Cornell Law Review

Volume 23
Issue 1 *December 1937*

Article 9

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Recommended Citation
Edward S. Stimson, *Jurisdiction to Tax Intangibles* , 23 Cornell L. Rev. 142 (1937)
Available at: http://scholarship.law.cornell.edu/clr/vol23/iss1/9

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JURISDICTION TO TAX INTANGIBLES[1]

EDWARD S. STIMSON

Inability to think realistically about so-called intangible property has resulted in a decision which seems unfortunate. A necromantic use of terms has resulted in an opinion which defies understanding. *First Bank Stock Corporation v. State of Minnesota,*[2] recently decided by the United States Supreme Court, involves the question of what state or states may tax corporate stock. The problem presented by the facts is a complicated one. Stock in Montana and North Dakota state banks was owned by a Delaware corporation which did business in Minnesota. Its headquarters were there and the certificates of stock in the subsidiary banks were kept there. Montana had taxed the stock of its banks and so had North Dakota. Minnesota taxed the same stock. The District Court of Hennepin County, Minnesota, held that the due process clause of the Fourteenth Amendment prohibited the imposition of the tax by Minnesota. The Minnesota Supreme Court and the United States Supreme Court reached the opposite conclusion. It is submitted that the District Court was right.

The word "property" is peculiarly ambiguous. When used to refer to ownership of a tangible object or person such as an automobile or a slave, it is thought of as designating the object or person. When used to indicate the ownership of a debt owed by an individual, it is thought of as meaning the legal relation. In these relationships the debtor is as tangible as the slave or automobile and the legal relation between slave and owner or automobile and owner is as intangible as the legal relation between a debtor and his creditor. For jurisdictional purposes there is no difference between tangible property and intangible property and courts and writers ought not to allow themselves to be carried away by this popular classification.

If a tangible object or person like an automobile or slave is in one state's territory and its or his owner is in the territory of another, the state in whose territory the object or person is can compel payment of a tax because it can seize the object or person and either hold it or him until the tax is paid or sell it or him thereby cutting off the rights of the foreign owner. Likewise if a debtor is in the territory of one state and his creditor is in another's territory the state, having power over the debtor, can compel payment of a tax because it can compel the debtor to pay a portion of the debt to it; and since the debtor is subject to its law it can give him a pro tanto discharge from his duty to the foreign creditor.[3] The extent of the debtor's duty

[1]For convenience, the name STIMSON is used in the footnotes to designate the writer's JURISDICTION AND POWER OF TAXATION published in 1933.
[2]57 Sup. Ct. 677 (April 26, 1937).
[3]See *infra* note 25.

depends on the law to which he is subject and it necessarily determines the extent of the foreign creditor's right. The property right is wholly within the control of the state having power over the debtor. That is why a debt may be attached, garnisheed, or subjected to trustee process in the state in which the debtor is served with process, for that state, having power over the debtor, can discharge him from the duty to his foreign creditor on payment of the money into court, even though subsequently the court orders the money paid to plaintiff, the creditor's creditor.[4]

If the debtor is a corporation, it is a legal entity which is intangible and has no location in space. Nevertheless, it has always been recognized that the corporation is subject to the power of the state in which it is incorporated.[5] It follows that the state which has power over the corporation can compel it to pay a tax on the debt because it can compel payment of a portion of the debt to it and can discharge the corporation pro tanto from its duty to the foreign creditor.

Corporate stock is a legal relation between a corporation and a stockholder in which the corporation is the obligor and the stockholder is the obligee. As with debt, the state which has power over the corporate obligor can compel it to pay a tax on the stock because it can compel payment of a part of the value of the stock to it thereby diminishing the value of the shares including those owned by foreign stockholders. Also it can compel the foreign owner to pay the tax by prohibiting the corporation from transferring shares on its books until the tax is paid.

Realistically, a state having power over a debtor or issuing corporation is as able to exact a tax as a state having power over a tangible object or a slave. Jurisdiction to tax is the same for "tangible" and "intangible" property. The state having power over the property can tax it.[6] So, too, can the state which has power over the owner, creditor, or stockholder.[7] By physical sua-

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[4]Chicago, Rock Island & Pacific Railway Co. v. Sturm, 174 U. S. 710 (1899); Harris v. Balk, 198 U. S. 215 (1904); Louisville & Nashville R. R. Co. v. Deer, 200 U. S. 176 (1906). For state court decisions, see STIMSON, p. 25, n. 53.

[5]STIMSON, pp. 11-12.

[6]*Credits:* New Orleans v. Stempel, 175 U. S. 309 (1899); Bristol v. Washington County, 177 U. S. 133 (1900); State Board of Assessors of Parish of Orleans v. Comptoir National D'Escompte, 191 U. S. 388 (1903); Blackstone v. Miller, 188 U. S. 189 (1903) (overruled; see *infra* note 21); Scottish Union & National Insurance Co. v. Bowland, 196 U. S. 611 (1905); Metropolitan Life Insurance Co. v. New Orleans, 205 U. S. 395 (1907); Liverpool & London & Globe Insurance Co. v. Orleans Assessors, 221 U. S. 346 (1911). For state court decisions see STIMSON, p. 25, n. 54.
Stock: Tappan v. Merchants' National Bank, 19 Wall. 490 (1873); Corry v. Baltimore, 196 U. S. 466 (1905). For state court decisions see STIMSON, p. 24, n. 52.

[7]Kirtland v. Hotchkiss, 100 U. S. 491 (1879); Bonaparte v. Appeal Tax Court, 104 U. S. 592 (1881); Hawley v. Malden, 232 U. S. 1 (1913); Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54 (1917); Cream of Wheat Co. v. Grand Forks County, N. D., 253 U. S. 325 (1920); Citizen's National Bank v. Durr, 257 U. S. 99 (1921); Schwab v. Richardson, 263 U. S. 88 (1923). For state court decisions see STIMSON p. 10, n. 20.

sion or other pressures it can compel him to pay a tax measured by the value of his property wherever situated. In the absence of constitutional limitations, when an owner is subject to the power of one state and the object he owns, his debtor, or issuing corporation is subject to the power of another, both states can tax.

In a long line of cases beginning with *Louisville and Jeffersonville Ferry Co. v. Kentucky*, the Supreme Court has held that double taxation resulting from taxes imposed by two states of the United States, both of which had power to tax was so unfair, that it was a violation of the due process clause of the Fourteenth Amendment.[8] This compelled it to decide which of the two states able to exact a tax might still continue to do so. In the case of "tangible" personal property it decided that the state where the object was could continue to tax it and the state in whose territory the owner was could no longer continue to do so.[9] It recognized that the old maxim, *mobilia sequuntur personam*, was a fiction which did not express a reason for the result reached. In the matter of taxing "intangible" property it has changed its mind several times and now seems to be relying upon the discredited maxim.

In *Louisville and Jeffersonville Ferry Co. v. Kentucky*,[10] it held that Kentucky could not tax ferry franchises granted by Indiana to a Kentucky corporation. This is a decision in favor of the state having power over the obligor and against the state having power over the owner. After this case there is a period during which the Supreme Court refused to apply the due process limitation of the Fourteenth Amendment to "intangible" property.[11]

In *Farmer's Loan and Trust Co. v. Minnesota*,[12] decided in 1930, the Supreme Court held that the due process clause of the Fourteenth Amendment prohibited more than one state of the United States from taxing "intangible" property. The principle was applied four months later in *Bald-*

[8]Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U. S. 385 (1903); Delaware, Lackawanna & Western R. R. v. Pennsylvania, 198 U. S. 341 (1905); Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 (1905); Ludwig v. Western Union Telegraph Co., 216 U. S. 146 (1910); Pullman Co. v. Kansas, 216 U. S. 56 (1910); Western Union Telegraph Co. v. Kansas, 216 U. S. 1 (1910); Looney v. Crane Co., 245 U. S. 178 (1917); Locomobile Co. of America v. Massachusetts, 246 U. S. 146 (1918); International Paper Co. v. Massachusetts, 246 U. S. 135 (1918); Frick v. Pennsylvania, 268 U. S. 473 (1925); Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83 (1929); Farmer's Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930); Baldwin v. Missouri, 281 U. S. 586 (1930); Beidler v. South Carolina Tax Commission, 282 U. S. 1 (1930); Hans Rees' Sons, Inc. v. North Carolina, 283 U. S. 123 (1931); First National Bank of Boston v. Maine, 284 U. S. 312 (1932).

[9]Delaware, Lackawanna & Western Railroad Co. v. Pennsylvania, 198 U. S. 341 (1905); Union Transit Co. v. Kentucky, 199 U. S. 194 (1905).

[10]188 U. S. 385 (1903).

[11]Hawley v. Malden, 232 U. S. 1 (1914); Fidelity & Columbia Trust Co. v. Louisville, Ky., 245 U. S. 54 (1917); Cream of Wheat Co. v. Grand Forks County, N. D., 253 U. S. 325 (1920); Frick v. Pennsylvania, 268 U. S. 473 (1923) (inheritance tax); Blodgett v. Silberman, 277 U. S. 1 (1928) (inheritance tax).

[12]280 U. S. 204 (1930).

win v. Missouri,[13] and later in the same year in *Beidler v. South Carolina Tax Commission.*[14] In these three cases the property consisted of credits. In *First National Bank of Boston v. Maine,*[15] the principle was applied to corporate stock. The application of the due process principle to so-called intangible property is sound but it is submitted that the Court in deciding which of the two states might continue to tax chose the wrong state. It decided in favor of the state having power over the owner, relying on the *mobilia sequuntur personam* maxim which it had repudiated in cases where the property taxed was "tangible."

In all four of these cases the tax imposed was an inheritance tax. Apart from the constitutional limitation only one state is actually able to exact an inheritance tax, for, after the death of the owner, the state which had power over him can no longer force him to pay. This is shown by *Colorado v. Harbeck.*[16] The facts in this case were as follows: The deceased died domiciled in Colorado owning credits and stock valued at $3,000,000. Debtors and issuing corporations were not subject to Colorado law and there was no other property in Colorado. Colorado attempted to collect an inheritance tax but found itself unable to do so because neither the property nor the legatees were within its power. It sued the New York executrix and the legatees in New York, which apparently had power over some or all of the property. The New York Court of Appeals held that Colorado did not have jurisdiction to tax because neither the property nor any person having a claim to it was within its power.

In the situation prescribed by the facts in the case above, it is clear that no personal obligation can be imposed on the deceased and that as between the state which had power over the deceased owner and the state having power over the res, obligor, or issuing corporation only, the latter is able to collect a tax. Of course, the state which had power over the deceased owner could subject local property to the payment of a tax on foreign property, but this could be justified only on the untenable ground that the tax was a personal obligation of the decedent. The domicile theory of jurisdiction does not represent reality and it has been shown to be unsound.[17] The domiciliary state has no real power over a person beyond its borders, and *Colorado v. Harbeck* shows that the magic word "domicile" cannot give it power over a deceased person.

Judge Gray saw this, and his dissenting opinion in *Matter of Swift,*[18] which was the first case on the point in this country, is still one of the best

[13] 281 U. S. 586 (1930).
[14] 282 U. S. 1 (1930).
[15] 284 U. S. 312 (1932).
[16] 232 N. Y. 71, 133 N. E. 357 (1921).
[17] See Sec. II of the writer's article "What Law Governs" to appear soon.
[18] 137 N. Y. 77, 32 N. E. 1096 (1893).

expositions of the problem. In this case the New York Court of Appeals upheld an inheritance tax assessed by New York on chattels situated outside of the state on the ground that the decedent was domiciled in the state. The disposition of judges to prefer authority to reason caused it to be followed until the United States Supreme Court decision in *Frick v. Pennsylvania.*[19] Unfortunately, the supposed difference between "tangible" and "intangible" property has caused the latter decision to be limited to so-called tangible property. So, until *Farmer's Loan and Trust Co. v. Minnesota,*[20] it was assumed that inheritance taxes could be imposed by both the decedent's domiciliary state and the state having power over the debtor or issuing corporation. In this case the selection of the decedent's domiciliary state as the only state which would be permitted to continue to impose the tax was, in the first place, the choice of a state which never had actual power to impose a personal obligation for the tax because control over the owner ceased when he died, and, in the second place, the choice was inconsistent with that made in the decisions on the constitutional limitation on the power to tax so-called tangible property. In order to make this unsatisfactory choice, the Supreme Court had to overrule its own decision in *Blackstone v. Miller*[21] and ignore its decision in *Louisville and Jeffersonville Ferry Co. v. Kentucky.*[22] It is submitted that these two decisions must eventually be followed.

In *Farmer's Loan and Trust Co. v. Minnesota*[23] and *First National Bank of Boston v. Maine,*[24] the Supreme Court relied upon *State Tax on Foreign Held Bonds.*[25] Up to the time of these decisions it was the only Supreme Court decision holding that credits could not be taxed by the state having power over the debtor. There were a number of Supreme Court decisions to the contrary besides *Blackstone v. Miller.*[26] The Supreme Court in its opinion in one of these cases, *Bristol v. Washington County,*[27] quoted from an opinion of the Minnesota Supreme Court[28] in which it was said that Minnesota, where the debtors were, had jurisdiction to tax the credits because the credits had a *business situs* in Minnesota. In another and later case, *Liverpool and London and Globe Insurance Co. v. Orleans Assessors,*[29] in which *State Tax on Foreign Held Bonds*[30] was in effect overruled, the

[19]268 U. S. 473 (1925).
[20]280 U. S. 204 (1930), cited *supra* note 12.
[21]188 U. S. 189 (1903).
[22]188 U. S. 385 (1903).
[23]280 U. S. 204 (1930), cited *supra* notes 12 and 20.
[24]284 U. S. 312 (1932), cited *supra* note 15.
[25]15 Wall. 300 (1872).
[26]The cases are listed in note 6 *supra* under the subheading, *Credits.*
[27]177 U. S. 133 (1900).
[28]In re Jefferson, 35 Minn. 215 (1886).
[29]221 U. S. 346 (1911).
[30]15 Wall. 300 (1872), cited *supra* note 25.

United States Supreme Court repudiated the idea that the jurisdiction of the state having power over the debtor was based on the *business situs* phantasm. Chief Justice Hughes said:

> "When it is said that intangible property, such as credits on open account, have their situs at the creditor's domicile the metaphor does not aid. Being incorporeal they have no actual situs. But they constitute property; as such they must be regarded as taxable, and the question is one of jurisdiction.
>
> "The legal fiction, expressed in the maxim, *mobilia sequuntur personam*, yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicile. The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor and is of value to the creditor because he may be compelled to pay; and power over the debtor at his domicile is control of the ordinary means of enforcement."[31]

Unable to ignore these cases entirely, the Supreme Court in *Farmer's Loan and Trust Co. v. Minnesota*[32] and *First National Bank of Boston v. Maine*[33] said that intangibles might acquire a situs for taxation other than at the domicile of their owner "if they have become integral parts of some local business."[34] Apparently the Supreme Court meant that if a *business situs* could be established, the state of the *situs* could tax and not the domiciliary state. The term *business situs* never had a definite meaning. The presence of an agent of the creditor in the state where the debtors were is not always sufficient to establish it.[35] In the opinions in which it appears, the term is used as a device to get around the unfortunate decision in *State Tax on Foreign Held Bonds.*[36]

The Court applied the choice made in the inheritance tax cases to an annual property tax in *Virginia v. Imperial Coal Sales Co., Inc.*,[37] decided in 1934. Here Virginia had imposed the disputed tax on accounts receivable arising out of business done in Ohio owned by a corporation incorporated and having its principal place of business in Virginia. What state or states had power over the debtors does not appear. The Supreme Court sustained the tax on the ground that Virginia was the "domicile" of the corporation. There are at least three difficulties with this argument. (1) Domicile never was a basis of jurisdiction for the imposition of taxes other than inheritance

[31] 221 U. S. 346 at 354 (1911).
[32] 280 U. S. 204 (1930), cited *supra* notes 12, 20 and 23.
[33] 284 U. S. 312 (1932), cited *supra* notes 15 and 24.
[34] 280 U. S. 204, 213 (1930); 284 U. S. 312, 331 (1934).
[35] Reat v. People, 201 Ill. 469, 66 N. E. 242 (1903); Hillman Land & Iron Co. v. Commonwealth, 148 Ky. 331, 338, 146 S. W. 776, 780 (1912); Adams v. Mortgage Co., 82 Miss. 263, 392, 34 So. 482, 528 (1903); Herron v. Keeran, 59 Ind. 472 (1872).
[36] 15 Wall. 300 (1872). See STIMSON, p. 24 *et seq.*
[37] 293 U. S. 15 (1934).

taxes.[38] (2) Domicile never was a basis of jurisdiction over corporations[39] and it is inapplicable because of the rule that there can be only one legal domicile,[40] while a corporation is subject to the jurisdiction of all states or countries in which it has agents or servants acting or "doing business" for it,[41] in addition to the state or country in which it is incorporated. (3) No corporation has a "home"[42] in the sense that the word is used in connection with individuals. Therefore, the word "domicile" is used figuratively to designate something else, which leads to the question: What else? In the Virginia case it seems to mean state of incorporation.

In *Wheeling Steel Corp. v. Fox*[43] the facts were similar to those in *Virginia v. Imperial Coal Sales Co.*,[44] except that the corporation was incorporated in one state, Delaware, and the office from which its affairs were managed was in another, West Virginia. As in the Virginia case, the "intangible" property consisted of credits or claims against debtors but to what law the debtors were subject does not appear. The bank deposits were apparently in banks whose banking houses were in other states, and if these banks were corporations incorporated in those states they might be considered to be foreign corporations doing business in West Virginia by reason of the deposits and withdrawals made by the Wheeling Steel Corporation from Wheeling, and subject to West Virginia law. The Supreme Court sustained an *ad valorem* property tax imposed on this property by West Virginia. Chief Justice Hughes said:

> "To attribute to Delaware, merely as the chartering state, the credits arising in the course of the 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."[45]

This statement should be applauded.

What are the "realities"? It was said that West Virginia was the *commercial domicile*[46] of the corporation. Since it is unreal to attribute a domicile to a corporation it is difficult to see how the addition of the word

[38] STIMSON, p. 6, n. 11.
[39] STIMSON, *Jurisdiction Over Foreign Corporations* (1933) 18 ST. LOUIS L. REV. 195.
[40] GOODRICH, CONFLICT OF LAWS (1927) § 14.
[41] *Supra* note 39.
[42] *Supra* note 40.
[43] 298 U. S. 193 (1936). See also Smith v. Ajax Pipe Line Co., 87 F. (2d) 567 (C. C. A. 8th 1936), *cert. denied* 57 Sup. Ct. 670 (1937). In this case a tax imposed by Missouri on a Delaware corporation's bank deposit in a New York bank was sustained. The corporation was doing business in Missouri and its principal office was there.
[44] *Supra* note 37.
[45] 298 U. S. 193 at 211 (1936).
[46] See Ramsey, *A New Theory of Corporate Domicile for Tax Purposes* (1937) 23 A. B. A. J. 543.

"commercial" is a recognition of reality. The accounts receivable were said to have a *situs* in West Virginia because: (1) the books were kept there; (2) the accounts were payable there; and (3) the contracts out of which they arose were made there. The contracts originated with orders taken in sales offices in other states for goods manufactured and shipped from other states but as the orders were subject to acceptance or rejection at the office in West Virginia the contracts were said to be "made" in West Virginia. Similar reasoning in the case of "tangible" personal property would be to say that it was taxable where the contract of purchase was completed although the object was in another state on tax day. The bank deposits in banks whose banking houses were in other states were said to have a *situs* in West Virginia because "From the Wheeling office proceed the items deposited and there the withdrawals are directed and controlled."

The meaning of the case is obscure. The Court may have intended to put the decision on the ground that the credits had a *situs* in West Virginia because the "domicile" of the corporation was there, "domicile" being interpreted to mean the place from which the corporation is managed. On the other hand it may have wanted to base the decision on the ground that the credits had a *business situs* in West Virginia, although the debtors were not subject to West Virginia law. Whatever was meant neither precedent nor reason supports it.

The principal case, *First Bank Stock Corporation v. State of Minnesota,*[47] is an application of the doctrines of *Wheeling Steel Corporation v. Fox*[48] to corporate stock. The Minnesota tax was sustained on both grounds, to wit: that Minnesota was the *commercial domicile* of the owning corporation and that the stock of the Montana and North Dakota corporations had a *business situs* in Minnesota. The criticism of these beautiful word combinations is equally applicable here. In addition this is the first application of the *business situs* phantasm to corporate stock. The presence of the stock certificates in Minnesota did not give it power over the property because the certificates like bonds and notes are merely evidence of the legal relation, and the state in whose territory they are located does not because of them have power over the legal relation so as to be able to exact a tax.[49]

Would not the following be a sound solution of the problem presented by the facts in *First Bank Stock Corporation v. Minnesota?* The due process clause of the Fourteenth Amendment prohibits more than one state of the United States from taxing "intangibles" as well as "tangibles." Of the several states having actual power only the state having power over the

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[47]*Supra* note 2.
[48]*Supra* note 43.
[49]Farmer's Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930) and cases cited in STIMSON, p. 33, n. 77.

debtor or issuing corporation may continue to tax. Stock of the corporations incorporated and doing business in Montana may be taxed there only. Stock of the corporations incorporated and doing business in North Dakota may be taxed by it only. The Minnesota tax was invalid because prohibited by the due process clause of the Fourteenth Amendment.

If the obligor or issuing corporation was one over which several states had power, the best solution would seem to be to permit each state to tax a proportionate part of the debt or stock based on the ratio of the value of the corporation's real and tangible personal property situated within the state to the total value of its real and tangible personal property.[50]

[50]See the following inheritance tax cases: Matter of Cooley, 186 N. Y. 220, 78 N. E. 939 (1906); Matter of Thayer, 193 N. Y. 430, 86 N. E. 462 (1908); Kingsbury v. Chapin, 196 Mass. 533, 82 N. E. 700 (1907); Gardiner v. Carter, 74 N. H. 507, 69 Atl. 939 (1908). See also, STIMSON, p. 48.