State Jurisdiction to Tax Dividends and Stock Profits to Natural Persons

(Continued from the January issue†)

The preceding portion of this paper is devoted to defining and localizing the source of income derived from property; and to developing from decided cases and available analogies the proposition that income derived from property is taxable only in the state in which the source itself is subject to taxation. This concluding portion continues the discussion of this doctrine of exclusive jurisdiction in light of both theoretical objections and the decisions of the United States Supreme Court.

THE CASE FOR THE OPPOSITION

Several objections have been raised to this thesis. They are collected and set forth in an able and exhaustive criticism of my own work by Professor Simeon Leland. For convenience, his criticisms will be referred to here. Summarized, they run about like this:

(1) The courts are in fundamental error in applying to personal taxes the doctrines of jurisdiction devised to apply to taxes in rem. This objection strikes at the Union Transit case and the entire structure built thereon, and even at the cases which would prevent a so-called personal tax from being measured by the value of foreign lands. The argument here advanced to support the domiciliary taxation of income from foreign sources was quite commonly advanced in support of domiciliary taxation with respect to foreign-situated property prior to the Union Transit case. It was argued, as here, that the state with jurisdiction over the person could tax that person and could measure the tax with reference to foreign situated property as an index to ability to pay. "Were a State to enact that residents should be taxed in proportion to the value of their property, wherever situated, and though consisting of lands in another jurisdiction, the law might be impolitic and unjust, but seemingly would not be against any constitutional prohibition, or invalid. Such taxes are not so much personal, as a charge on property through the exercise of jurisdiction over the person." Hare, American Constitutional Law (1889) 318.

† Harding, State Jurisdiction to Tax Dividends and Stock Profits to Natural Persons (1937) 25 Calif. L. Rev. 139.

129 See Book Review (1934) 34 Col. L. Rev. 794.

130 Leland, Harding on Double Taxation (1936) 24 Calif. L. Rev. 379.

131 The argument here advanced to support the domiciliary taxation of income from foreign sources was quite commonly advanced in support of domiciliary taxation with respect to foreign-situated property prior to the Union Transit case. It was argued, as here, that the state with jurisdiction over the person could tax that person and could measure the tax with reference to foreign situated property as an index to ability to pay. "Were a State to enact that residents should be taxed in proportion to the value of their property, wherever situated, and though consisting of lands in another jurisdiction, the law might be impolitic and unjust, but seemingly would not be against any constitutional prohibition, or invalid. Such taxes are not so much personal, as a charge on property through the exercise of jurisdiction over the person." Hare, American Constitutional Law (1889) 318.

132 That so-called personal taxes measured by the value of foreign lands would not get by was made clear in Louisville & Jeffersonville Ferry Co. v. Kentucky, supra note 3. Any contrary implications in Citizens National Bank v. Durr (1921) 257 U. S. 99, must be rested upon the emphatic but highly questionable finding, that no interest in real property was involved. The feudal heritage of the common law has been such that few have seriously contended that taxes could be measured by foreign lands. Cf. (1918) 31 Ops. Atty. G. 287. While almost any lawyer would concede the correctness of this proposition, Mr. Leland and certain other nonlegal writers are still disposed to deny it. However, it must be conceded that the real
then leads to the proposition that the courts are in error in assigning to any one place an exclusive jurisdiction to tax particular property or particular income. The next step is to deny the deleterious effect of duplicate taxation.\footnote{33}{Why is double taxation objectionable? This is undoubtedly the most difficult question of all. Of course if all persons and all property were subjected to such duplicate taxation, there would be no basis for complaint. The difficulty lies in duplicate taxation of one person and single taxation of another. In the case of business taxes the idea seems to be that this element of inequality should not be permitted to unbalance normal competitive conditions. This is the basic thought underlying such things as the establishment of a business situs for credits employed within the state in competition with locally owned credits. See the original case of Catlin v. Hull (1849) 21 Vt. 152. The same idea appears in the hundreds of cases invalidating tax exemptions which would unbalance a competitive situation, to give one faction an advantage. See Petroleum Nav. Co. v. Henneford (Wash. 1936) 55 P. (2d) 1056. On the other hand, the cases upholding the discriminatory chain store taxes have done so on the theory that such taxes restored a normal competitive condition in which all the factions concerned would have an equal opportunity. State Board of Tax Commissioners v. Jackson (1931) 283 U. S. 527, 73 A. L. R. 1464. This consideration of policy would dictate that one competitor should not be subjected to a duplicate tax burden merely because its operations extend over state lines. That this policy is reflected in legislation is made clear by the fact that however unfairly the statutes may treat individual taxpayers, they usually provide for the taxation of domestic corporations on local property and local income in much the same manner as foreign corporations are taxed. The franchise and capital stock taxes, measured by total capitalization and thus reflecting foreign assets are usually nominal in amount. The considerations against duplicate taxation of business enterprise of course do not readily apply to inheritance taxes or to taxes upon individuals. However, there is another factor of public policy which seems to enter. It was clear at the time the United States government was created that there must necessarily be a relatively free flow of trade and commerce across state lines if the nation was to prosper. It became established quite early that the various states could subject such commerce to taxation which made the commerce contribute its fair share of local fiscal revenue, but that the state could not use its taxing power in such a way as to discriminate against such commerce in favor of purely local business. By a gradual enlargement of the definition of interstate commerce this protection against state-erected tax-tariff walls was extended to numerous types of business. During the same period the privileges and immunities clause of the Constitution was employed to protect an individual resident in one state in a claim of right to enter other states and there to engage in ordinary business enterprise on terms the same as those accorded local residents. The idea most apparent in the 1930 tax cases is that this freedom from discrimination while crossing state lines, already afforded ordinary business operations and individuals going from place to place to make their livelihood, should be accorded moneyed capital going from place to place for purposes of investment. There is, however, an important distinction between the case of capital going from place to place, and the case of individuals or tangible property so traveling. In the interstate commerce cases the Court has had to combat state efforts to keep the foreign goods from entering. In the privileges and immunities...}
against almost every decision limiting the taxing jurisdiction of the several states. Obviously it presents an irreconcilable conflict of fundamental philosophies. The argument is that the state confers upon the individual resident therein many benefits other than those conferred in relation to property or income, and may tax the individual in return for those benefits regardless of where his property may be situated or whence his income may be derived. This may be conceded. Governments more and more take from those with property to confer benefits on those without. However, does this of itself support a claim of jurisdiction to levy additional taxes upon the property or income? Will the benefit theory here adduced support a tax upon property in return for social benefits which by hypothesis have nothing to do with the ownership of property or the receipt of income? The argument justifies sales and use taxes, without doubt, but is not believed to justify duplicate property taxes.

Whether or not this argument be sound, we must deal with facts. It is a fact that *in rem* theories have been used to prevent what appeared to be duplicate property taxation in the guise of some sort of personal tax. Professor Leland and others believe that the Supreme Court will in the near future perceive and acknowledge the mistake, and will overrule this entire body of cases. I believe just as firmly that these cases represent cases it has had to combat state efforts to keep the nonresident business man or laborer out. In the case of intangibles, the situation is that the nondomiciliary state is usually glad to see the foreign capital come in. The foreign investor in local securities is usually treated fairly and is often given special exemptions and concessions. At the domicil of the investor, however, there seems to be a tendency to resist the exportation of capital; to feel that the duplicate taxation on the foreign investment is no more than proper. A domiciliary tax upon goods or credits situate elsewhere and already taxed at the situs puts a financial burden on the taxpayer merely because he has invested abroad. The same result flows from domiciliary income taxation of income already taxed at its foreign source. The question then is whether this indirect type of discrimination against the foreign investments of the local resident is to be tolerated. The cases answer negatively. The recent decision in Colgate v. Harvey, *supra* note 119, holds that an express income tax discrimination against foreign investments is unconstitutional. While the case attracted great attention because resting upon the privileges and immunities clause of the Fourteenth Amendment, it appears to be entirely sound. I view it as confirmatory of the arguments here advanced against duplicate domiciliary taxation. The interstate commerce parallel is suggested in Notes (1936) 49 Harv. L. Rev. 935; (1936) 20 Minn. L. Rev. 549. See Notes (1936) 30 Ill. L. Rev. 953; (1936) 36 Col. L. Rev. 669; (1936) 34 Mich. L. Rev. 1034.

In my own mind it is quite clear that the desirability of affording freedom of investment from state to state, as well as freedom of travel and trade, as the basis underlying the decisions against double taxation by the states, sufficiently differentiates the cases from those holding that the United States is not bound by the same constitutional limitations. The doctrine of economic integration is evolved to solve a problem arising in our own federated government, and has nothing to do with questions involving international investments. It is quite consistent with the reasoning and decision in Burnet v. Brooks (1933) 288 U.S. 378, 86 A. L. R. 747.
an evolutionary process which has yet to run its course. Here is an honest and reasonable difference of opinion. We professors may argue this indefinitely. The lawyer and the tax administrator, however, must deal in probabilities, particularly in immediate probabilities. It is difficult to see how, in view of the present state of affairs, a lawyer dealing with a controversy involving sufficient money to support the necessary litigation can conscientiously advise his client that he must stand by helplessly and submit to duplicate domiciliary taxation of income previously taxed at its source in another state. Nor is it clear that a state tax administrator can with the maximum of assurance advise the governor or legislature that in preparing the 1938 budget he or they may safely assume that the domiciliary power to tax income from extra-state sources will remain unimpaired.

(2) The second argument is that the decisions are at variance with the doctrine of taxation in proportion to ability to pay; that the person's ability to pay is properly measured by the total amount of his property and income and is not concerned with where the property is situated or the income earned. This seems to answer itself. A taxpayer in state X,

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134 Here we appear to run into a most common error; the assumption that benefit and ability to pay state a single test as applied to the theoretical justification of a tax. As a matter of fact they are mutually inconsistent. The benefit theory so warmly espoused by the legal writers of the Nineteenth Century is part and parcel of the individualistic philosophy of that period: the taxpayer was thought of as buying government much as he bought any other service which he deemed of value to him. The ability-to-pay theory advances the idea that one with considerable property or income should pay not only for the benefits of government which he receives but for the benefits flowing to others with little or no property. It is also clear that this difference has been accentuated by the changing notion of the function of government. Government which once concerned itself largely with protecting the individual from antisocial forces is now definitely committed to the task of affording affirmative aid and assistance to those with no important tax-paying ability. Under this concept of government, the benefits received by the individual taxpayer have very little direct relationship to the amount of property owned or the ability of the taxpayer to contribute. This disparity is magnified many times by the use of progressive rates, and today we find the progressive rate justified on still another ground; that the individual is not to be allowed to become too able to contribute. As is said in a recent acute discussion: "Translated into terms of social philosophy rather than fiscal expediency, the ability theory is pretty obviously socialistic. Wealth is accumulated at the expense of society and it is just and fitting to use the taxing power to return it to society. A mildly progressive tax might possibly be rationalized along lines of benefit, but the radical progression of the current bounty, death, and income taxes is totally insane from anything except a completely collectivistic point of view." Lowndes, Rate and Measure in Jurisdiction to Tax (1936) 49 Harv. L. Rev. 756, 760. It should be pointed out that the philosophic basis of the jurisdiction-to-tax cases is essentially the individualistic benefit theory. Ability to pay is, so far, negligible as a jurisdictional factor.
owning $100,000 in property in state Y, where it has already been taxed, is not as able to pay a tax on this amount to state X, as is another taxpayer with the same amount of property situated in state X and not previously taxed. The taxpayer in state X who has received an income of $50,000 from sources in State Y and who has paid state Y a tax of 8% thereon, is not as able to pay an additional income tax in state X, as is another taxpayer who has received from sources in state X an income of $50,000 not previously taxed. This ability to pay argument to support taxation at the domicil would be much more palatable if the domicil would allow the taxpayer credit against the domiciliary tax in the amount of the tax previously paid at the foreign situs or source. This has been done in rare instances, but the most we have been able to expect generally is that the tax at the situs or source is allowed as a deduction from assessed value or gross income. Even this isn't always available, although there is a possibility that it may become mandatory.

(3) The third objection is that to break up an inheritance and to tax each part at its respective situs, or to break up the income of an individual and to tax each part at its respective source, instead of taxing the entire estate or income at the domicil, is to eliminate the principle of progressive rates from inheritance and income taxation. There is some difference of opinion as to the ultimate desirability of progressive rates, but even assuming that they are to be retained, it is not clear that taxation at the situs or source prevents their application. Maxwell v. Bugbee is authority for applying the progressive rate principle, taking into account the size of the entire estate, even though only a portion thereof is within the taxing jurisdiction. The present stand-
ing of this decision was thrown into some doubt by language in Frick v. Pennsylvania,\textsuperscript{138} but a recent New York case indicates that it is by no means defunct.\textsuperscript{139} Maxwell v. Bugbee is not inconsistent with the doctrine which would give exclusive taxing jurisdiction to the situs or source.\textsuperscript{140} It seems likely that this question is to be answered in the very near future.\textsuperscript{141}

(4) The fourth objection, with particular reference to income taxes, is that the courts have been concerned with immediate source ("superficial origin") rather than with the ultimate source or economic origin of the income. This is true. This hardly argues for taxation at the domicil of the owner. If we were to disregard superficial legal categories and look only to actual wealth, we would tax the property of the debtor at its situs and would permit the debt to go tax-free.\textsuperscript{142} We would tax the corporate

\begin{footnotes}
\item[138] "That case is on the border line as is evidenced by the dissent of four members of the court." \textit{Supra} note 14, at 495.
\item[139] \textit{In re} Rueff's Estate (1935) 157 Misc. 680, 284 N. Y. Supp. 426, involving a scheme substantially similar to that in Maxwell v. Bugbee. The surrogate denied the right to tax and stated his opinion that Maxwell v. Bugbee had been overruled by the 1930 cases. See the interesting notes in (1936) 49 \textit{Harv. L. Rev.} 1377, and (1936) 45 \textit{Yale L. J.} 930.
\item[140] Undeniably Maxwell v. Bugbee was a most unfortunate decision when decided. It involved an inheritance tax on shares in domestic corporations owned by nonresident decedents at a time when such shares were taxable at both the domicil and the state of incorporation. The result of the decision was a gross discrimination against the nonresident investor, who would not only pay taxes on the shares in two places, but would also pay progressive rates at the highest possible rates in two places. However, the cases beginning in 1930 operate to remove this discrimination in any case where the right to tax a particular item is limited to a single place. While the case in 1919 operated as a discrimination against the multistate investor, the rule there enunciated would operate today to prevent a discrimination in favor of this same investor. Instead of increasing the total tax load of the person with property in many states, it operates only to prevent his escaping proper taxation by diversifying and spreading out his investments. While the surrogate in Rueff's Estate, \textit{supra} note 139, was of the opinion that the subsequent cases overrule Maxwell v. Bugbee, it appears more likely that their effect has been to rehabilitate what was once a most doubtful decision.

If the real basis of the principle against multiple taxation is to protect the multistate investor from discrimination (\textit{supra} note 133) then the rule of Maxwell v. Bugbee, which merely operates to keep the rule of "one thing—one person—one tax" from working a discrimination the other way, may stand. While many argue for duplicate taxation at the domicil as a means of preserving the progressive rate principle, it seems that the proper solution is, not to abolish the idea of exclusive jurisdiction, but rather to allow each place with exclusive jurisdiction over a part of the estate or income to apply the progressive rate principle to that part. Cf. Kessler, \textit{op. cit. supra} note 52, at 866.
\item[142] See the valuable discussion in Lowndes, \textit{op. cit. supra} note 134.
\item[142] Or perhaps where the creditor also has an interest in locally situated property of the debtor, as in the case of a debt secured by a mortgage of the local property, we might tax the value of the mortgage interest to the creditor and tax
\end{footnotes}
property to the corporation, and would ignore the possibility of taxing the corporate stock to the shareholder, either in the state of incorporation, or at his domicil. If we were to disregard immediate or superficial sources of income and look only to economic origin, we would tax the income of the debtor and permit the interest money to escape taxation altogether. We would tax the income to the corporation, and exempt the dividend to the shareholder. The adoption of such an approach would carry the doctrine of in rem taxation, the doctrine of taxation at situs or source, much further than I have dared advocate. I fancy, however, that I would be much more willing to espouse such a doctrine than would the advocates of duplicate "personal" taxes.

(5) Still another objection to the idea of exclusive taxing jurisdiction at the situs or source is the difficulty of administration. It is trite that economic activity transgresses state lines. In such cases the state of situs or source is required to resort to some sort of apportionment formula in order to estimate what part of the property or income is to be subject to local taxation. It is true that these formulae do not operate with mathematical exactness. It is difficult to see how this objection supports a claim of right to tax the entire income at the domicil. It seems to lead, instead, to the proposal advocated by Professor Leland and others to the effect that these taxes should be collected by the United States and the return therefrom apportioned in part among the several states. Such a plan would appear to have some advantages over a continuation of the old system of duplicate taxation. It is not so clear that it is preferable only the net worth of the property to the debtor. This would be constitutional, so long as the total amount taxed did not exceed the fair taxable value of the entire property. Savings & Loan Soc. v. Multnomah County, supra note 3; City of Davenport v. M. & M. R. Co. (1861) 12 Iowa 539; Myers v. Seaberger, supra note 3.

143 I believe it is also entirely within the power of the state to abolish the corporate entity for all purposes, and to tax the shareholders on the corporate property and corporate income as tenants in common. This would eliminate the claim of the domicil of the member to duplicate taxation. There are contrary implications in Blodgett v. Silberman (1928) 277 U.S. 1, but these rest squarely upon an interpretation of the Uniform Limited Partnership Act as making the commercial partnership a separate entity for the purpose of holding title to property. See also In re Deutz's Estate (1930) 105 N. J. Eq. 678, 149 Atl. 257. Rhode Island Hospital Trust Co. v. Doughton, supra note 44, is no authority on this point, since the state had not abolished the corporate entity save for this one purpose of duplicate taxation, and the court properly held that such an artifice would not be permitted. The recent case of Senior v. Braden, infra note 163, indicates that this practice of duplicate taxation on the basis of multiple legal interests is no longer in the best standing.

144 Supra notes 74-78.

to a plan which would permit each state to tax, to the extent that its own 
fiscal needs and financial policy dictate, those things and sources located 
within its own borders, and would prevent duplication elsewhere. Such 
proposals would virtually destroy the state's control over its own fiscal 
affairs and over its local industrial policy so bound up with fiscal legisla-
tion. 146 We have seen the device of allowing the 80% credit against 
federal estate taxes on the basis of state taxes paid, deliberately designed 
and used for that purpose. 147 It is not clear that the administrative prob-
lem of dividing the "take" among the states on a fair basis is much 
simpler than the application of apportionment formulae to individual 
businesses. 148 Even in the simpler proposal of a federally-collected state-
shared sales tax, it has been found impossible to devise an acceptable 
scheme for parceling out the proceeds. 149 In connection with the income 
tax proposal we should be prepared to accept some arbitrary scheme 
based upon factors such as assessed valuation or population, or some 
combination of these factors. 150

146 HARDING, op. cit. supra note 1, at 273. Any study of this proposal should be 
prefaced by a reading of the report of the Committee on Fiscal Relationships of 
Federal and State Governments (1934) PROCEEDINGS OF NATIONAL TAX ASSOCIATION 
161, and the heated discussion following the submission of this statement. Ibid, at 
171-187. Almost every conceivable argument pro and con was brought out.

147 Florida v. Mellon (1927) 273 U. S. 12, sustaining the device of allowing 
as a credit against Federal Estate Taxes, the amount of estate taxes paid the several 
states upon the same property in an amount not to exceed 80% of the federal tax. 
One of the purposes in the enactment of this bill, as disclosed by contemporary 
Sources, was to put a crimp in the hopes of retired capitalists who were removing 
to Florida in reliance upon the state constitutional provisions prohibiting taxation 
of inheritances. "If the act interferes with the exercise by the state of its full powers 
of taxation or has the effect of removing property from its reach which otherwise 
would be within it, that is a contingency which affords no ground for judicial relief."
Sutherland, J., ibid at 17. The effect of course was that Florida enacted an estate tax 
law equal to 80% of the federal tax, and lost most of this competitive advantage.

While many arguments are put forward for the state-shared federally-collected 
tax, and while some of these arguments are valid, it appears that a considerable part 
of the impetus behind it comes from states having burdensome income taxes and 
sales taxes. The legislator and tax official in these states are apt to consider a state 
without such taxes a sort of unfair competitor for the location of business and of 
residences for the rich.

148 The proposed plans of allocation are of course simpler than the use of 
apportionment formulae for individual businesses. This, however, gives us no 
insight as to the ultimate fairness of the scheme.

149 As a member of the committee referred to in note 146, I had the privilege 
of examining various proposals for the division of the tax revenue, as well as 
statistical tables showing the approximate results of each. None of the proposals 
seemed acceptable.

150 Leaving aside all of the so-called "relief" expenditures of the present era, 
we find the federal distributions being made frankly on the basis of the "needs" 
of the state. The ultimate political questions, not here decided, is whether the ability-
to-pay doctrine by which one person is taxed out of all proportion to benefit to 
himself, but for the benefit of others, is to be extended to the states.
(6) Other objections have been urged on the basis of the statutes and decisions relating to the United States income tax.\(^{151}\) These seem beside the board for the reason that the Supreme Court has held, and properly so, that the United States is not subject to the limitations previously imposed upon the states.\(^{152}\) The problem is distinctly one pertaining to the smooth operation of a federated government, and will have to be worked out as its unique character requires.\(^{153}\)

RIGHT OF THE DOMICIL TO TAX INCOME—THE CASES

It is high time now to look at decided cases. We have already noted a small group of state decisions which support the claim of the domicil to tax income from all sources.\(^{154}\) We need not examine them further at this time. There is an opposing group of state cases which should be mentioned. *Pierson v. Lynch*\(^{155}\) holds that the state of New York cannot

\(^{151}\) Any relief from oppressive duplicate taxation as between the United States and other nations must come by way of treaty. One interested in these matters should examine *Hernion, Relief from International Income Taxation* (1932) and the League of Nations materials collected and cited therein. The plans adopted in the various treaties of course rest to considerable extent upon expediency and the relative bargaining powers of the parties thereto. They seem to be of little use in the present discussion, although they are of interest in connection with proposals for interstate reciprocity statutes or interstate compacts for the prevention of duplicate taxation. Cf. Goldstein, *Residence and Domicil of Corporations with Special Reference to Income Tax* (1935) 51 L. Q. Rev. 684, dealing with the situation in the British Dominions.

\(^{152}\) *Burnet v. Brooks*, *supra* note 133. This case was decided after the 1930 series of state tax cases and in no way diminishes their authority.

\(^{153}\) As set out in note 133, the present principle against multiple state taxation seems to rest upon the desirability of free trade and commerce, including investment, among the states of the United States, and is the means by which the individual state is prevented from interfering unduly with this freedom. While the Supreme Court has properly undertaken the duty of maintaining a minimum of friction in interstate relations, it has undertaken no such burden in the case of the international relations of the United States. See the interesting comment in (1933) 47 *Harv. L. Rev.* 307; *Lowndes, Spurious Conceptions in the Constitutional Law of Taxation* (1934) 47 *Harv. L. Rev.* 628, 634-6.

\(^{154}\) *Supra* note 125.

\(^{155}\) (1933) 237 App. Div. 763, 263 N. Y. Supp. 259. The court in this case reasons that a tax on the annual income from the land is no different in kind from an annual property tax payable out of income; that the domicil was without jurisdiction to tax the foreign land; that, therefore, the state could not tax the income in question. Sole reliance was upon the United States Supreme Court cases. The case was affirmed upon memorandum opinion *sub nom.* People *ex rel.* Pierson *v. Lynch* (1933) 263 N. Y. 533, 189 N. E. 684. Writ of certiorari was dismissed in the United States Supreme Court on the technical ground that the opinion of the Court of Appeals did not state affirmatively that the ruling upon the federal question was necessary to the result reached. *Lynch v. People ex rel.* Pierson (1934) 293 U. S. 52, The recent case of *People ex rel.* Cohn *v. Graves* (1936) 246 App. Div.
constitutionally tax a resident of that state upon rentals received from foreign-situated land. It was also held that it could tax capital gains received from the sale of such land.\textsuperscript{156} The court gives no sound reason for the distinction, although it may be due to the idea that the sale involved the exercise of personal skill in New York and that this in some way gave the income a New York source.\textsuperscript{157} \textit{Opinion of the Jus-

335, 286 N. Y. Supp. 485, states that the Pierson case was decided solely on the Fourteenth Amendment.

Since the above text was written this latter case has been reversed (4 to 3) without opinion but with a statement by Crane, C. J., designed to compel the United States Supreme Court to decide the issue on its merits. (1936) 271 N. Y. 353, 3 N. E. (2d) 508. The reported case contains a dissenting opinion by Hubbs, J., arguing against the power of New York to tax a resident recipient of rents from New Jersey lands, and relying largely on the argument here advanced. Probable jurisdiction was noted in the United States Supreme Court on October 19, 1936 (57 S. Ct. 49). The issue is thus squarely before the Court and may be decided before this paper is published. This case also included the power of New York to tax interest received from debts secured by New Jersey land \textit{via} an estate in course of administration in New Jersey. As to this see note 159, \textit{infra}.

\textsuperscript{156} The decision on this point must be compared with People \textit{ex rel.} Whitney v. Graves (App. Div. 1935) 283 N. Y. Supp. 219, holding that New York might tax the capital gain realized by a Massachusetts resident upon the sale of a membership in a New York Stock Exchange. The owner had not used the membership in order to trade upon the floor of the exchange, but merely to obtain a discount from the usual brokerage commission charges. The decision appears to be inconsistent with Citizens National Bank v. Durr, \textit{supra} note 132, which on somewhat similar facts held that an exchange membership was intangible personality and subject to property taxation at the domicil of the member. This latter case, however, must be read with two reservations in mind; first, whether the Court was correct in finding this to be intangible personality; and second, that the Court in accord with the rule prevailing at that time wholly disregarded the problem of double taxation of intangible personality. The Court had previously upheld the taxation of an exchange membership at the seat of the exchange. Rogers v. Hennepin County (1916) 240 U. S. 184. Three possible reasons were advanced: first, that this was in part at least an interest in land; second, that even considered as intangible personality it had acquired a business situs at the seat of the exchange; and third, that the exchange was incorporated and the shares of the nonresident shareholder were taxable at the state of incorporation. This latter factor was not present in Citizens National Bank v. Durr, and is no longer valid since First National Bank v. Maine. The other two reasons seem valid. If the membership is considered as a license to enter and trade on certain premises (and Mr. Justice Holmes so considered it in his dissent to Citizens National Bank v. Durr) then the situs for taxation is clearly at the seat of the exchange and not elsewhere. \textit{Supra} note 132. If the membership is to be classed as intangible personality it would seem that it has acquired a business situs at the seat of the exchange. It would thus be taxable at the seat of the exchange, and, if our reasoning is correct, would not be again taxable at the domicil of the member. Even if the exchange be incorporated, the peculiar nature of the organization should take the case out of First National Bank v. Maine, and give the stock a business situs at the exchange. It appears that the decision in People \textit{ex rel.} Whitney v. Graves is entirely correct. The doubtful case at the present time is Citizens National Bank v. Durr. See \textit{Beale, op. cit. supra} note 1, § 118C.38.

\textsuperscript{157} The only case cited on this point was Willcuts v. Bunn, which however merely held that a federal tax upon profits derived from the resale of state bonds was not
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**tices** is an advisory opinion to the effect that the state of New Hampshire is without constitutional authority to tax a resident upon income received from land or chattels situated outside the state. **Hutchins v. Commissioner** rejects as probably unconstitutional a statutory interpretation which would permit Massachusetts to tax a resident trustee upon income from a foreign-created and foreign-administered trust. These are isolated cases, but they loom large when we consider the extremely small number of cases in which the issue of domiciliary vs. source taxation has been presented. These cases support our present thesis completely.

The battle is to be fought, however, in the Supreme Court of the United States. Here we find three pertinent decisions: **Maguire v.**

an unconstitutional burden upon or interference with the financing operations of the state. **Supra** note 66. While "some measure of sagacity" enters into any sale of capital assets, it is extremely difficult to see that this confers upon the domicil a right to tax the entire gain resulting from such sale. The decision in Hans Rees' Sons v. North Carolina, **supra** note 74, indicates that, where an income accruing in one place is shown to have been due measurably to the exercise of personal skill in another place, the proper procedure is an apportionment of the net taxable income between the two places.

**158** (1930) 84 N. H. 559, 149 Atl. 321. "We are of opinion that a state cannot tax income received as compensation for the use of either real estate or tangible personal property which has a situs outside the state. To avoid misapprehension, we add that this limitation does not apply to the taxation of intangibles owned by residents." The reasoning adopted appears to be about the same as that urged herein. The qualifying statement must be read in connection with the fact that the opinion antedates the 1930 intangible cases.

**159** (1930) 272 Mass. 422, 172 N.E. 605, 71 A. L. R. 677. The court found that the trust in this case had acquired a taxable situs in New York, and stated that therefore "the principle that the situs of intangible property held in trust, which in the absence of other controlling factors follows the person of the trustee, becomes inapplicable because by dominating law its situs is fixed in the place where the testamentary trust was created and established and is being administered under direction of its court. . . . . In our opinion there was no jurisdiction to levy the taxes on the gains of the two New York trusts." The reasoning in this case was the same as that here advanced.

This conclusion is contrary to that of the New York Court of Appeals in **People ex rel. Cohn v. Graves**, **supra** note 155. There is no majority opinion on this point. The three-judge dissent adopts the argument, here pressed, that income from intangibles with a business situs elsewhere is not taxable at the domicil. It may be possible to sustain the majority holding on this phase of the case by finding no business situs in fact. This latter is a doubtful issue.

**160** It should be noted that some of the state cases upholding the complete taxing power of the domicil actually involve taxation of domestic corporations. It does not necessarily follow from the fact that the state has successfully taxed the entire income of a domestic corporation from foreign sources, that it could levy the same tax on a resident individual. **HARDONG, op. cit. supra** note 1, § 45.
Treijry; the Lawrence v. State Tax Commission, and Senior v. Braden. Writing in 1932, it appeared to me that the standing of Maguire v. Trefry, decided in 1920, was open to considerable doubt. Today, I feel quite certain that if the same facts were presented, the former decision would be squarely overruled. The reasons are to be found in Senior v. Braden, presently to be discussed.

In the Lawrence case it was held that the state of Mississippi might tax to a resident taxpayer the profits derived from the performance of a road-building contract in Tennessee. The opinion was by Mr. Justice Stone, who had already set out in concurring and dissenting opinions his disagreement with the principles of the 1930 cases. His reasoning was about as follows: (1) Domicil within the state, with the accompanying right to invoke the protection of the state, constitutes a basis of taxation, and that the state is unrestricted in its taxation of domiciliaries "so long as the tax imposed is upon property within the state or on privileges enjoyed there." (Note the quoted qualification.); (2) "Taxation at the place of domicile of tangibles located elsewhere has been thought to be beyond the jurisdiction of the state; but considerations applicable to ownership of physical objects located outside the taxing jurisdiction, which have led to that conclusion, are obviously inapplicable to the taxation of intangibles at the place of domicile or of privileges which may be enjoyed there;" (3) whether the state calls the exaction an excise or

161 (1920) 253 U. S. 12.
162 (1932) 286 U. S. 276, 87 A. L. R. 374; (1932) 32 Col. L. Rev. 534; (1932) 42 Yale L. J. 283.
164 Cf. "There is reason to infer that a majority of the Supreme Court as it is presently constituted believe the Maguire case to have been wrongly decided." Nossuman, op. cit. supra note 52, at 537.
165 In addition to the Maguire case, the learned Justice relies principally upon three cases: Kirtland v. Hotchkiss (1879) 100 U. S. 491, corollary to State Tax on Foreign-held Bonds, and establishing that the domicil of the creditor could tax a debt owing by a nonresident and secured by foreign land; Fidelity & Columbia Trust Co. v. Louisville, supra note 17, sustaining a domiciliary tax upon a bank account maintained in another place where it had possibly acquired a business situs; and Blodgett v. Silberman, supra note 143, upholding a domiciliary inheritance tax upon a savings account located in another state, bonds kept in a vault in another state, and an interest in a partnership business conducted in another state and which by the laws of that state (the Uniform Limited Partnership Act) was declared to be intangible personality, and to represent no ownership in specific partnership assets.
property tax is immaterial in determining whether the property or privilege is within the jurisdiction of the taxing state; (4) the tax "is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state and to them the economic interest realized by the recipient of the income or represented by the power to control it bears a direct legal relationship;" (5) "It would be anomalous to say that although Mississippi may tax the obligation to pay appellant for his services rendered in Tennessee, still, it could not tax the receipt of the income upon the payment of that same obligation."

We may concede that domicil is a basis of taxing jurisdiction, but with the learned Justice will insist that the tax be "upon property within the state or on privileges enjoyed there." We may also concede, even insist, that the legislative label on the tax is not conclusive on issues of jurisdiction. The other arguments are open to question.

The statement that the cases relating to taxation of chattels have nothing to do with domiciliary taxation of intangibles, we must challenge. The principle of those cases appears to be this: Where an object of wealth is found to have a situs in fact in a single place, it is not subject to taxation at another place, not even at the domicile of the owner, on the basis of legal fictions which have no relation to, or are opposed to, fact. The 1930 cases make it clear that this same principle applies to intangibles. In the 1930 cases this single taxable situs was found to be at the domicile, but the court expressly refused to rule that this was always the case. In Wheeling Steel Corporation v. Fox the Court found quite definitely that the intangibles in question had acquired a situs in fact in the nondomiciliary state and were there taxable. Against the contention that the 1930 cases required the taxation of these intangibles at the domicile (state of incorporation) and not elsewhere, the Court stated that to reach such a conclusion would be "to make a 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

The Kirtland case is still in good standing. The Maguire case, however, has been virtually overruled in Senior v. Braden, discussed infra, and the opinion in this same case indicates that the Louisville case occupies about the same position as does Blackstone v. Miller. It must also be remembered that the loose language of the Silberman case sustaining duplicate inheritance taxation of intangibles had been repudiated in 1930. That portion of the opinion relating to the partnership interest and resting upon the uniform act is hardly tenable in view of Senior v. Braden.

Citing Maguire v. Trefry.

Supra note 39.
regard to their actual location." The only conclusion possible is that *situs in fact* is to prevail over situs by fiction in all cases, tangible and intangible alike. In fact, the argument that the rules as to situs of tangible property had nothing to do with the power of the state to tax privileges exercised by its domiciliaries was qualified as early as 1903.\(^{109}\)

It is noted that the learned Justice also relies upon the protection argument: protection to the person, protection to the right (or privilege) to receive the income, and the protection to the right (or privilege) of its enjoyment. It is clear that the protection afforded the person of the owner bears no particular relation to the amount of his foreign property. It is clear that the cases do not tolerate so-called personal taxes actually measured by the out-of-state property. This conclusion is confirmed by the bitterness of those who rail at the Court for confounding personal taxes with taxes *in rem*.\(^{170}\) Under the heading of protection of the person, there is no reason to distinguish between out-of-state property and out-of-state income. The second heading of protection set forth is the protection given the privilege (it is usually so called) of receiving the income. This, too, is doubtful. The protection would appear to be given more at the source of the income. The domicil would seem to be like any other state, merely standing ready to vindicate the "privilege" by action if the dispute should be brought to litigation in its courts. The 1930 inheritance tax cases establish that a state cannot tax the "privilege" of inheritance merely because that privilege is protected by its laws.\(^{171}\) This point of protection of the privilege of receiving the income, which is the one most relied upon by the proponents of complete domiciliary taxation, appears to be no different in kind from the theory of taxation so ardently espoused by Mr. Justice Holmes in *Blackstone v. Miller*,\(^{172}\) and so definitely and completely rejected by the Court in 1930. The third heading of protection, that of protecting the use and enjoyment of the

\(^{109}\) *Louisville & Jeffersonville Ferry Co. v. Kentucky*, supra note 3.

\(^{170}\) For example: "The very least that can be said is that left to themselves the courts would probably prevent either the conversion of present *in rem* property taxes into taxes on persons measured by wealth, or the development of individual taxes on wealth (*in personam*) as a supplement to them. . . . . Can a state tax a resident (*in personam*) on his total wealth regardless of where situated? Or can it measure total capacity by his total wealth (or property) irrespective of the *locus* of the wealth? The decisions apparently prevent this. They are based upon an *in rem* concept; if applied to a *personal tax* measured by wealth they would effectively prevent the total capacity of the individual from being taxed on a capacity basis." Leland, *op. cit. supra* note 130, at 385.

\(^{171}\) The taxing state was able to make the strongest kind of protection argument along these lines in *First National Bank v. Maine*, but the argument was given little credence.

\(^{172}\) *Supra* note 19.
income, seems to point in the direction of a consumption, use, or sales
tax, rather than an income tax. Even if sustaining an income tax it would
indicate the nontaxability of income never brought into the domicil. Such
a conception of the income tax would also make it extremely difficult to
remove it from the state constitutional limitations on ad valorem taxes.
Apparently the tax would have failed in the state court under the state
constitution had it been rested on this ground.\textsuperscript{173}

The final step in the argument attempts to base the decision upon a
theory of a source at the domicil: that the source of the income is the
debt created by the construction contract; that this debt is taxable at
the domicil; that the income is therefore taxable as from a domiciliary
source. We may concede that if the source is at the domicil, the domicil
may tax. However, the first two steps must be challenged. In the first
place, the "debt" is not the source of the income. The source, rather,
is in the actual work and labor performed in Tennessee.\textsuperscript{174} That the
source of the income does not change merely because the obligation to
pay it is transmuted into a common law debt at some time between the
time the income is first earned by the act of the recipient, and the time
it is finally realized, would seem to be established in the \textit{Wheeling Steel}
case.\textsuperscript{175} Furthermore, even if the debt is assumed to be the source of the
income, it is not clear that the debt in this case is taxable in Mississippi.
Rather, it would appear that this debt would have to be said to have
acquired a taxable situs in Tennessee.\textsuperscript{176} We have already seen the rea-
sons which would preclude duplicate taxation thereof in the Mississippi
domicil.

\textit{Maguire v. Trefry}\textsuperscript{177} held that the state of Massachusetts could tax

\textsuperscript{173} See, Hattiesburg Groc. Co. v. Robertson (1921) 126 Miss. 34, 88 So. 4,
25 A. L. R. 748. The difficulties of administration under such a doctrine are sug-
gested in Lowndes, \textit{op. cit. supra} note 52, at 490-1.
\textsuperscript{174} See Travis v. Yale & Towne Mfg. Co., \textit{supra} note 67.
\textsuperscript{175} \textit{Wheeling Steel Corp. v. Fox}, \textit{supra} note 39. In this case the taxpayer
had argued that since the state containing the main office of the corporation could
not tax the entire net income, but would be required to apportion the income between
itself and the states containing the corporation's factories, it would have to make
similar apportionment of the accounts receivable arising out of the business opera-
tions and representing unrealized income. This argument was rejected. "Here the tax
is a property tax on the accounts receivable, as separate items of property, and these
are not to be regarded as parts of the manufacturing plants where the goods sold
are produced."
\textsuperscript{176} The case is thus to be distinguished from Commonweal\textit{th v. Imperial Coal
Sales Co.}, \textit{supra} note 38, and from \textit{Wheeling Steel Corp v. Fox}, \textit{supra} note 39, in
which cases the sales contracts were actually made at the main office and collections
were made there. In the Lawrence case it appears that the Tennessee contract was
not merely a single item in an extensive business centralized in Mississippi, but was a
relatively isolated transaction centered in Tennessee.
\textsuperscript{177} \textit{Supra} note 161.
a resident \textit{cestui} upon the income received from a trust of intangibles situated in and administered in Pennsylvania. This decision rested largely upon the now-exploded idea that the rules of the \textit{Union Transit} case did not apply to intangibles and that double taxation of intangibles was not violative of the United States Constitution. It also set forth the same protection idea noted in the \textit{Lawrence} case. As already seen, this argument was open to serious objections even when made. \textit{Senior v. Braden} has not helped it. The basis of the decision, however, was that the source of the income was the interest of the \textit{cestui} in the trust corpus, and that this corpus was intangible personality, with a taxable situs at the domicil of the \textit{cestui}. This was perhaps true in 1920, but is not true now.\footnote{So long as duplicate taxation of intangible values and the income therefrom was considered entirely unobjectionable, it was unnecessary to determine the exact nature of the \textit{cestui}'s interest in a trust of intangibles. Today, however, this has become most important. It is discussed in connection with \textit{Senior v. Braden}.} In view of \textit{Safe Deposit & Trust Co. v. Virginia},\footnote{\textit{Supra} note 40. In this case the statute at the \textit{cestui}'s domicil actually referred to the corpus of the trust as the basis of the tax and not to the interest of the \textit{cestui}. This distinction was made in both majority and concurring opinions and would support the contention that the case decides nothing as to taxation of the \textit{cestui}. It seemed in 1932 that the Court was ready to hold that the domicil of the \textit{cestui} had no power to tax. While most commentators disagreed with this position, we now have considerable judicial authority for this same interpretation. See especially \textit{Baltimore v. Gibbs}, and the other trust cases cited \textit{supra} note 40. It will be seen hereafter that the majority opinion in \textit{Senior v. Braden} refers to the \textit{Maguire} case as inconsistent with the \textit{Safe Deposit & Trust} case.} we must state that the \textit{cestui}'s interest in a foreign-administered trust, even if considered as intangible personality, has its taxable situs by integration (by analogy to the business situs cases) at the seat of administration of the trust. This effectively eliminates the argument that the source of the income is somehow at the domicil of the \textit{cestui}. I am impelled to the belief that the \textit{Maguire} case is no longer in good standing.\footnote{\textit{Supra} note 164.}

This brings us to \textit{Senior v. Braden}.\footnote{\textit{Supra} note 163.} The Ohio statute in question provided for the assessment of ordinary personal property, bank deposits and money on an \textit{ad valorem} basis. On the same return the taxpayer was to list investments together with the income accruing therefrom. These investments were assessed for a tax of 5\% of that income. Plaintiff owned shares in seven real estate trusts, of the conventional type. The assessor at the plaintiff's Ohio domicil sought to assess him on these trust certificates and plaintiff sued to enjoin. The granting of the injunction by the trial court was ultimately affirmed in the United States Supreme Court. The argument of the state was that plaintiff's interests in the trusts con-
stituted intangible personality, and were therefore taxable at his domicil in Ohio, even though the trust lands were in part situate in other states. This the Court rejected, holding that the interest of the cestui was an interest in the property constituting the trust. Like any other equitable interest in foreign land, it is to be taxed at the situs and not at the domicil. However, it cannot be said that the effect of the case is limited to this. The state certainly did not argue that this was merely a property tax on land. In fact the Attorney-General felt compelled to concede that such an interpretation of the statute would involve it in difficulties under the Ohio constitution, as well as under that of the United States. The

182 The court did not go into this troublesome problem in the law of trusts in detail, being content to refer to the opposing arguments set forth in the well known articles by Professor Austin Scott (17 Col. L. Rev. 269) and Dean, now Mr. Justice, Stone (17 Col. L. Rev. 467) both entitled "The Nature of the Rights of the Cestui que Trust." The majority opinion adopts substantially the argument made by Scott. Referring to Stone's argument, as presented by the taxing state, the Court was content to say: "Apparently no opinion of any court definitely accepts the theory now advanced by appellees, but some writers do give it approval because of supposed consonance with general legal principles."

183 Irrespective of the conflicting cases dealing with personality, it had been generally agreed that equitable interests in land were to be taxed at the situs of the land and not at the domicil of the owner. Beale, op. cit. supra note 1, §§118C.4–118C.6. The difficulty in the trust cases, and particularly in the business trust cases was in determining whether the interest of the cestui actually was an equitable interest in the trust property. The difficulties are nicely brought out in Bates v. Decree of Judge of Probate (1932) 131 Me. 176, 160 Atl. 22.

184 Because of the enigmatic nature of the majority opinion, and the arguments in the dissent centering upon the "Delphic" admission of the counsel for the state, the critics of Senior v. Braden have tended to explain it away entirely upon the alleged blunder in the argument. Notes (1935) 21 Corn. L. Q. 151; (1936) 24 Cal. L. Rev. 200. It is asserted that the case decides nothing as to taxation, but merely that the cestui of a business trust is to be considered as having an ownership in the trust corpus. This admission was in the following language: "It may be candidly admitted that under the Fourteenth Amendment to the Constitution of the United States, the state of Ohio has no power to tax land or interests in land situated beyond its borders; nor has it power to tax land or interests in land situate within the state in any other manner than by uniform rule according to value. . . ." Both Ohio and United States cases indicate that this concession was necessary, not gratuitous. The brief continues: "From this it follows as a matter of course that if the property of the appellant which the appellees seek to tax in this case is land or an interest in land, situate within or without the state, their action is unconstitutional and should be enjoined." This statement necessarily follows from the first. However, note that the brief is not conceding the real issue. It says: If this tax be a tax on an interest in land, then the result follows. The brief-writer then proceeds to argue to the best of his ability that this tax has nothing to do with land; but that the interest of the cestui is intangible personality situate at and taxable at his domicil. It is then asserted that the facts bring it squarely within Maguire v. Trefry, and that the tax is sustainable on the same grounds. It was precisely this argument which was adopted in the Ohio Supreme Court in both the Senior case and Rowe v. Braden (1933) 126 Ohio St. 533, 186 N. E. 392, sustaining the same tax as applied to a trust of intangibles.
decision seems to be that: (1) the cestui is an owner of the corpus of the trust; (2) when the corpus of the trust consists of land, the interest of the cestui therein is not taxable at his domicil; (3) a tax upon the income from land is in effect a tax upon the land itself;\(^{185}\) therefore, (4) a resident cestui is not taxable upon the income from a trust of foreign lands. Of course, every step in this reasoning applies equally well to income from foreign lands accruing to a resident owner of any type other than cestui que trust; and to income from chattels permanently situated elsewhere, as defined in the *Union Transit* and *Frick* cases.

The full import of the opinion may be discovered by examining the dissenting opinion of Mr. Justice Stone, who, it will be remembered, dissented in *First National Bank v. Maine* and then wrote the majority opinion in the *Lawrence* case. His propositions are: (1) The Constitution does not prohibit taxation by different states of several legal interests resting upon a single economic interest, citing the corporate stock and mortgage cases; (2) "I do not doubt that a state may tax the income of

\(^{185}\) There is the focal point of the entire dispute. It may be objected immediately that no issue of income tax was here involved; that the statute in question treated this as a property tax. See Notes (1936) 14 Tex. L. Rev. 242; (1936) 24 Calif. L. Rev. 200. However, both majority and dissenting judges start with the proposition that nomenclature is immaterial: "Our concern is with realities." My reading of this case convinces me that there is in it, and in every other Supreme Court case relating to state jurisdiction to tax multistate income, the basic assumption that a tax upon income is directly related to the taxing of the source of the income. This was the decision in Pollock v. Farmers Loan & Trust Co., *supra* note 60, a case which has haunted the waking hours of every income tax advocate since the day of its pronouncement. Where the tax is by a nondomiciliary state the Court not only insists that the source of the income be within the state, but also that where only a part of the source is within the state the tax on the income must be proportionate to the local source. Turning to domiciliary income taxation, we find only two cases upholding the tax and in both of these, the Court found a source at the domicil. The basis of the Maguire case was that the tax was on the equitable ownership of the cestui in the trust corpus, which, by the rules then in force, had a taxing situs at the domicil. The Maguire case has been cited far and wide as upholding a general income tax jurisdiction at the domicil. However, if the tax in Senior v. Braden was not an income tax, the tax in the Maguire case wasn't either. A reading of the lower court opinions in the two cases indicates that the property tax angle was really stronger in the case of Maguire. Certainly the Ohio court was justified in believing that its decision was within the reasoning of the Maguire case.

Again in the *Lawrence* case, which didn't involve income from property in the ordinary sense, the majority opinion dragged in an argument that this income was derived from property with a taxable situs at the domicil. The alleged source was fallacious, but the significance of the argument remains. *Supra*, notes 175 and 176. An opportunity to proclaim the independence of domiciliary income taxation from concepts of situs or source was lost. As noticed below, this same argument of independent taxing power was urged by the minority in Senior v. Braden, and the opportunity again ignored.
its citizens derived from land in another state. The right to impose the
tax is founded upon the power to exact it, coupled with the protection
which the state affords to the taxpayer in the receipt and enjoyment
of his income," citing the Lawrence and Maguire cases; (3) the cestui
of a trust does not have any ownership in the corpus of the trust, but
rather a group of personal rights against the trustee, here relying on the
reasoning contained in his well-known article to this effect, an article
expressly disregarded by the majority; (4) all rights are incorporeal and
that technical differences between corporeal and incorporeal rights should
not be the basis of constitutional decisions.

The rejection of Mr. Justice Stone's first point means nothing other
than that the Court cannot be expected in the near future to sanction
any new categories of multiplication of taxation by the multiplication of
legal interests out of single wealth.\(^{186}\)

The second unavailing point constitutes the keystone of the argument
for domiciliary income taxation; that the tax is based upon the protection
afforded the recipient and the privilege of receiving and enjoying the
income. Had the court desired to accept this argument it could have
sustained the tax without bothering over the nature of the cestui's interest
in the corpus. The failure to do so must mean that the broad language of
the Lawrence case cannot be relied upon; that its effect is to be considered
as probably limited to income from services and other non-property
sources.

The third argument, that the cestui's rights are personal only has been
the subject of contention since the days of Coke. So far as the language
of the cases is concerned, it indicates that there is some sort of ownership
as usually defined.\(^{187}\) However, even if the majority be deemed mistaken
on this point, it detracts not one whit from the real significance of the

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\(^{186}\) The argument based upon the close parallel between an interest in a business
trust and a share of stock in a corporation is an appealing one and has prevaled in many connections. See Notes (1935) 24 Ill. B. J. 98; (1935) 14 N. Car. L. Rev. 106; (1935) 49 Harv. L. Rev. 159. It had been adopted by several state courts in tax cases. Its unqualified rejection by the Court may indicate that at some future time we may be relieved of duplicate taxation in even the corporation-shareholder cases. Supra note 143.

\(^{187}\) In last analysis, the exact nature of the cestui's interest in a trust consisting
of Illinois lands would not be determined by the law of Ohio or by any general rule prevailing in the federal courts, but by the law of Illinois, the situs of the land. Bates v. Decree of Judge of Probate, supra note 183; Conflict of Laws, Restatement (Am. L. Inst. 1931) § 239. The Court's conduct in brushing aside the Ohio determination and substituting the general rule as enunciated in its own cases probably indicates a further decision to prevent duplicate taxation on the basis of departures from orthodox categories of property rights and ownership. See note 143, supra.
case; that income from foreign-situated lands is not taxable at the owner's domicil. Furthermore, even if we concede the dissenter's argument that these are purely personal rights, it is arguable that they have acquired a business situs at the seat of administration of the trust. 188

The fourth point, that all rights are incorporeal, seems to defeat the second and third arguments. If this be true, there is absolutely no reason to distinguish between legal and equitable ownership for tax purposes, and the situs will prevail in all cases.

This analysis of Senior v. Braden leads to this conclusion: The United States Supreme Court held in the Union Transit case that lands and chattels permanently situated elsewhere are not subject to ad valorem taxation at the domicil. It held in the Frick case that such lands and chattels are not subject to inheritance taxation at the domicil. It now appears to be prepared to hold that the income accruing to the owner from these same properties is not to be taxed at the domicil. 189 All this,

188 Mr. Justice Stone stresses supposed analogies to debts and to corporate stock. However, these may be found to have acquired a situs by integration at another place when the wealth represented thereby is continuously employed in economic activity in that place. DeGanay v. Lederer (1919) 250 U. S. 376, comes close, although no trust was involved. It may be going a little beyond the present idea of business situs to argue that purely personal rights of the cestui against the trustee have a business situs at the place of administration of the trust.

189 This statement isn't as startling as it may appear to be. It is not meant that an income tax on the yield of property is for all purposes a tax on the property itself, any more than an inheritance tax is a tax on the property inherited. The many state cases have properly held that an income tax is not to be subjected to the same restrictions under the state constitutions as is an ad valorem tax. What is meant is that, just as taxing jurisdiction over the property inherited is necessary to an inheritance tax, tax jurisdiction over the property yielding the income is necessary to an income tax. This proposition is squarely supported by Hutchins v. Commissioner, supra note 159; and In re Opinion of the Justices, supra note 158. It is supported in respect of annual income by Flarson v. Lynch, supra note 155. Considerable research has disclosed no state case actually upholding a tax upon a resident individual on annual income from tangible property outside the state. Longyear v. Commissioner (1929) 265 Mass. 585, 164 N. E. 459, comes nearest such a result. See Beale, op. cit. supra note 1, § 118C.19. The cases usually cited for such a proposition will be found to be of one of several types: (a) a test case of some sort raising the issue of the validity of the income tax statute as an entirety, usually on the basis of some constitutional restriction upon ad valorem taxes, and actually involving no vital issue of income from foreign property; (b) a case involving income from foreign sources other than tangible property, such as income from personal services, and even these are scarce; (c) a case involving income from intangibles with a taxable situs at the domicil, such as income from ordinary investments, or income from an equitable interest which the court first finds to be intangible personally situate at the domicil, as in the Maguire case; or (d) a case involving the taxation of income of domestic corporations as distinguished from resident individuals. The corporation cases are not strictly in point on matters of
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moreover, is quite without reference to language of "privilege" and "protection."

But how about intangibles? Suppose the foreign-administered trust consists of intangible property? It is clear that both the corpus and the trust income would be taxable at the situs, in this case at the place of administration if it be sufficiently localized to acquire a business situs, otherwise they would be taxable to the trustee as legal owner at his domicil. But, may further taxes be laid by the domicil of the cestui?

The right of this state to tax the cestui's interest in the corpus must rest on the proposition that his interest consists of intangible personalty, located at his domicil for tax purposes. However, the decision in the Braden case prevents classing his interest as merely an equitable chose in action, taxable in about the same way as a debt. Rather, we must consider his interest as an ownership in the intangibles constituting the res. The question, then, is whether the domicil of the equitable owner may tax any part of intangibles which are localized in the hands of a legal owner elsewhere. The problem does not differ from any other case of domiciliary taxation of intangibles which have acquired a foreign situs by integration. This situation we have canvassed in detail, concluding that the domicil cannot levy such a tax. The domicil of the cestui therefore appears to be cut off from any ad valorem or inheritance taxation of foreign-administered trusts of intangibles, as in the case of a trust of foreign lands or chattels.

...
May the domicil of the *cestui* tax him upon the income derived by him from the trust? Three arguments could be advanced to support this tax: (1) that the domicil of the recipient may tax him upon all income, including that from foreign sources; (2) that the source of the income is the *cestui's* equitable ownership in the intangible trust *res* and that the *mobilia* maxim gives this ownership a taxable situs at his domicil, so that the source of the income may be said to be at his domicil; (3) that the interest of the *cestui* is an equitable chose in action, assigned to his domicil for tax purposes as would be a debt, so that the income from this source is income from a source at the domicil. The third argument seems entirely eliminated by the decision in the *Braden* case. The decision in the *Maguire* case, upholding the domiciliary tax, was rested upon the second ground. But the *Maguire* case was decided at a time when duplicate taxation of such intangibles was freely permitted. Today we can't assume that interests in foreign-administered intangibles are always taxable at the domicil. We must also remember that the *Maguire* case was the basis of the state court opinions in the *Braden* case, and was much relied on in the state's argument on the appeal. Mr. Justice McReynolds in the *Braden* case referred to the *Maguire* case as being based upon *Blackstone v. Miller*, which he said had been disapproved and was not in harmony with *Safe Deposit & Trust Co. v. Virginia*, and "the views now accepted here in respect of double taxation." This seemingly confirms that which appeared at first to be the correct interpretation of the *Safe Deposit & Trust* case: that, while disclaiming such an actual holding, the majority were really agreed upon the idea that the *cestui's* interest in a foreign trust of intangibles had no taxable situs at his domicil. Further doubt on the present good standing of the *Maguire* case is confirmed by Mr. Justice Stone's statement in his dissent that "it is now thought by the court to be necessary to discredit or overrule it." These happenings seem to confirm the statement made in 1933 that the *Maguire* case could no longer be considered good authority; that the *cestui's*

*trust consisted of intangibles. Professor Kent, writing in *Bogert, op. cit. supra* note 190, § 263, collects and reviews these cases and concludes that there is little hope for immediate relief from duplicate taxation at the *cestui's* domicil. Professor Brown, *op. cit. supra* note 190, at 416-429, reviews the same cases and concludes that *Safe Deposit & Trust Co. v. Virginia* marks the beginning of such a limitation as that set out in *Harding, op. cit. supra* note 1, § 20, and here repeated. Both of these discussions antedate Senior v. *Braden*. The decision in that case, as pointed out, sustains Mr. Brown's argument. Mr. Kent's argument closely parallels that of Mr. Justice Stone's dissent, and of course was there rejected. See *Baltimore v. Gibbs* and other trust cases cited *supra* note 40.
domicil had not only lost the right to tax his interest in the trust corpus, but also was about to lose the right to tax the income therefrom.\textsuperscript{192}

The domiciliary taxation of the \textit{cestui's} income will therefore have to rest on the first ground mentioned; that the domicil may tax income irrespective of source. It has been seen that the rejection by the majority of Mr. Justice Stone's dissenting argument built upon this theory as enunciated in the \textit{Lawrence} case would appear to indicate that this broad proposition is no longer tenable, and that the \textit{Lawrence} case, if it has any standing at all, must be restricted so far as concerns income from foreign sources, to sources other than property. However, its standing even here may be doubted. The \textit{Lawrence} case and the \textit{Travis} case present a clear case of duplicate taxation on the same thing: income from personal services in a nondomiciliary state. The \textit{Travis} case supports the right to tax at the source, and its reasoning appears still to be sound. The \textit{Lawrence} case supports the domiciliary taxation of the same income. Its reasoning is thrown into serious doubt by the subsequent opinions, and even Mr. Justice Stone's make-weight local source argument must be discarded. The court's apparent present purpose to restrict taxation of income from property in the same manner as the taxation of the property itself is restricted, may well augur the application of the same doctrine to income from non-property sources, and the overruling of one or the other of these cases.\textsuperscript{193} Admittedly, however, there is considerable room to speculate as to which is to go.\textsuperscript{194}

\textsuperscript{192}There are, however, certain state cases which have followed the \textit{Maguire} case as good authority, even since 1930. \textit{Ross v. McCabe}, supra note 125; \textit{First Nat. Bank v. Commissioner} (1932) 279 Mass. 168, 181 N. E. 205.

\textsuperscript{193}The obvious practical difficulties in separating income from local property from other income with a local source are suggested in \textit{Lowndes}, \textit{op. cit. supra} note 52, at 491-493.

\textsuperscript{194}It is not believed that this problem is affected in any way by the decision in \textit{Matson Navigation Co. v. State Board of Equalization} (1936) 297 U. S. 441, \textit{reh'g denied} Mar. 30, 1936. Here California sought to tax a domestic corporation upon net income accruing from the rendering of transportation service. Some of the service was rendered locally, but the principal business of the corporation was interstate and foreign carriage. The state apportioned the income on the basis of business originating in California, a formula which the corporation did not contest. The tax was attacked as not authorized by statute; that it constituted an unconstitutional burden on interstate and foreign commerce; that the assessment was void under the uniformity provision of the state constitution; that the tax was void as a discrimination in favor of foreign corporations. The state court found against the corporation on each point. \textit{Matson Navigation Co. v. State Board of Equalization} (1935) 3 Cal. (2d) 1, 43 P. (2d) 805. It was added gratuitously that the state had the power to tax the corporation on its entire net income if it desired, citing the \textit{Lawrence} case, but noting \textit{Pierson v. Lynch} as an exception. The decision of the state court was affirmed, the Supreme Court pointing out that the appor-
We have wandered through an intricate maze of reasoning, and have encountered many varied and difficult problems. Looking to the cases actually decided, and taking into account the basic theory of these now overruled, we may observe the development of a present trend of decision. Taking into account this line of cases in perspective, and interpreting it in light of what appears to be the underlying social philosophy of the judges writing the opinions, and in the light of the basic assumptions of those judges who lost their arguments but carried them into dissenting opinions, we are in a position to draw certain conclusions. While some of these conclusions are not as yet supported by actual decision, they present a well-rounded approach, and indicate the likely course of evolution of the newly revived and extended principle against multistate duplicate taxation of the multistate investor and business man. They are, however, not advanced as ultimate solutions. Only a fool would essay such a course. They are rather a working hypothesis to be tested by events which should occur within the immediate future. It is believed that they present the best solution of the problems which even now are coming on for solution. They are:

(1) The legal owner of corporate stock is not subject to ad valorem or inheritance taxes in a nondomiciliary state, merely because that state happens to be the state of incorporation or the state where the corporation conducts all or part of its business.

(2) The legal owner of corporate stock is subject to ad valorem and inheritance taxes in a nondomiciliary state, upon a showing that the stock has acquired a business situs therein.

(3) The legal owner of corporate stock is subject to ad valorem and inheritance taxes at his domicil, except where the facts show the acquisition by the stock of a business situs elsewhere.

(4) The single factor of the location of the physical evidences of the stock is insufficient to fix tax jurisdiction.

(5) Annual income or other profit derived by the legal owner from his stock is not taxable in a nondomiciliary state because that state happens to be the state of incorporation, the state where the corporation formula had not been attacked and was not intrinsically arbitrary, and that profits from interstate commerce were not exempt from nondiscriminatory income taxation. The court then pointed out the broad power of the state of incorporation to levy a franchise tax valued upon the entire worth of the corporate privileges, even though represented in part by foreign property and earnings. As has been pointed out above in several connections, state franchise taxation on domestic corporations may extend to include the value of property, income, or gross receipts which would normally be beyond the taxing power as applied to natural persons. See Note (1936) 34 Mich. L. Rev. 1229.
tion does all or part of its business, or the place where the share certi-

(6) Annual income or other profit derived by the legal owner from his stock is subject to taxation in a nondomiciliary state upon a showing that the stock has acquired a business situs therein.

(7) Annual income or other profit derived by the legal owner from his stock may be taxed to him at his domicil in all cases, except where it appears that the stock has acquired a business situs in another state.

(8) Income derived from a trust res consisting of corporate stock is taxable to the trustee as to any other legal owner; that is, it is taxable at such place or places where particular stock may have acquired a business situs, and in default of such a business situs, is taxable at the place of administration of the trust, as this is itself a business situs. If neither of these factors should be present, it is taxable to the trustee at his domicil.

(9) Income accruing to the cestui from a trust consisting of corporate stock is taxable at his domicil only in those circumstances which would bring the stock itself within the taxing jurisdiction; that the stock had acquired a business situs therein, or that the trust was being administered therein, or that the trustee was also domiciled therein, as the case may be.

Arthur Leon Harding.

UNIVERSITY OF IDAHO,
MOSCOW, IDAHO.