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DOMICILE VERSUS SITUS AS THE BASIS OF TAX JURISDICTION

By ROBERT C. BROWN*

The very title of this paper shows a confused situation with regard to tax jurisdiction—a conflict between two basic concepts, which are mutually exclusive. But the actual difficulties are much more serious than at first appears. To begin with, we have a considerable disagreement as to the meaning and application of the concept of domicile—a difficulty which has had a recent and emphatic illustration in the now rather notorious *Dorrance*[1] case. The problem of identifying the situs of property, at least intangible property, is often just as troublesome, especially because from any realistic standpoint, intangibles have no situs at all. This problem will reappear in our discussion.

But even after these difficulties have been solved, the application of the two concepts to the problem of tax jurisdiction is confusion worse confounded. To be sure a well-known economist[2] has recently accused lawyers and courts of over-simplyfyir the problem, in a foolish attempt to do away with multi; taxation. To accuse the legal profession of over-simplifying any problem has somewhat the merit of novelty; but the

* Address by Robert C. Brown, Professor of Law at Indiana University School of Law, delivered at the National Tax Conference, Indianapolis, Indiana, October, 1936.

1 In re Dorrance's Estate, 115 N. J. Eq. 268, 170 Atl. 601 (1934). See the same case in 116 N. J. Eq. 204, 172 Atl. 503, 184 Atl. 743 (1934-6), cert. denied 56 Sup. Ct. 949 (1936). See also, Hill v. Martin, 296 U. S. 393 (1935).

2 Leland, "Harding on Double Taxation" (1936), 24 Calif. L. R. 379.

accusation is buttressed by recitals of the complexity of actual economic fact which seem to prove that it has much basis. Indeed, Mr. Justice Holmes in his dissenting opinion in *Safe Deposit & Trust Co. v. Virginia*[3] has pointed out something of the existing legal confusion in the application of domicile and situs to tax jurisdiction problems.

We pass then to a consideration of the actual results which have been reached with regard to this problem. It will appear, however, that if the simplicity of these court decisions is economically unrealistic, it is certainly not itself unreasonable; for tremendous complication even in judicial rules is still distinctly the order of the day.

The first step in analyzing the problem is to differentiate the different kinds of taxes. No doubt this is an unfortunate necessity, for this very distinction is always difficult and often very doubtful in application. In other words, it is often extremely difficult to decide what kind of a tax actually is involved. But in spite of some suggestion to the contrary,[4] it seems impossible to avoid an attempt to make such a distinction. This is because the rules, where there are any, and even more important, the whole method of attack by the courts on the problem discussed in this paper, depend very largely upon the kind of tax in issue.

The logical and convenient place to start is with personal taxes—those taxes imposed upon an individual simply because he is a person. A poll tax is a simple, though of course not the only, example.

Here domicile seems clearly the controlling consideration—that is, the state of domicile can impose a personal tax and no other state can. It was even said in *Dewey v. Des Moines*[5] that a non-resident owning property in the tax jurisdiction could not be subjected to personal liability for a deficiency on the sale of his property to collect a special assessment, on the ground that this would be imposing a personal tax upon

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[3] 280 U. S. 83 (1929), at 280 U. S. 97.

[4] See Rottschaefer, "State Jurisdiction of Income for Tax Purposes" (1931), 44 Harv. L. R. 1075.

[5] 173 U. S. 193 (1898).

a non-resident. It is perhaps true that the statement of the Supreme Court to this effect is somewhat broader than it would presently adhere to[6] and that by other methods, such a deficiency might possibly be collected; but if so, the reason is that this is still a property tax. If it is a personal tax, it is not collectible against a non-resident.

The federal Supreme Court has likewise held that the Territory of Alaska could collect a lump sum against a non-resident fisherman fishing in Alaskan waters, no matter how short a time such activity continued.[7] This decision seems hard to rationalize, at least if such a tax is to be regarded as a personal tax. Perhaps it can be justified as an excise tax—a problem which will be considered hereafter—though the Court did not thus analyze it. At any rate, this doctrine must now be regarded as applying only to taxes inconsequential in amount.[8]

It is true that a personal tax may apparently be imposed upon the basis of citizenship rather than domicile. Thus the federal government was held entitled to impose an income tax upon a United States citizen domiciled in Mexico and having all his property there.[9] While, as will presently appear, an income tax is not the same as a personal tax, similar principles would seem to apply for this purpose. However, the problem need not be considered here, not only because it is outside the scope of this paper, but also since it will rarely arise as between the states of the United States, as to which, with very rare exceptions, citizenship and domicile are synonymous.

Far more complicated is the problem with respect to property taxes. Right here the economic realist is likely to attack the distinction as one not reflecting any actual difference, since he will urge that all taxes are really personal taxes because all must ultimately be paid by human beings. But the dis-

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[6] See comment by Traynor in (1935), 24 Cal. L. R. 98, at pp. 104-5.

[7] Haawik v. Alaska Packers' Association, 293 U. S. 510 (1923).

[8] See Freeman v. Smith, 44 F. (2d) 703 (C. C. A. 9th, 1930), 62 F. (2d) 291 (id., 1932).

[9] Cook v. Tait, 265 U. S. 47 (1923).

tinction, as a legal concept anyway, is very clear. A property tax is a tax which is theoretically imposed upon the property and collectible only out of it or its earnings.

With respect to property taxes, the courts have been especially influenced by their repugnance to multiple taxation—a feeling which is comparatively recent, but no less emphatic.[10] Perhaps multiple taxation is not such a bad thing after all, but the fact that the courts think it is has had much to do with the results.

In considering property taxes we shall have to make a further subdivision according to the kind of property. And of these the first and the simplest is real property, which consists roughly of land and its physical or legal appurtenances.

Here the courts have never had any difficulty as to the results. The jurisdiction to tax land depends upon the situs of the land and without any regard whatsoever to the domicile of the owner. Even so-called incorporeal hereditaments appurtenant to real estate are taxable where the land to which they are appurtenant is situated even though the owner is not domiciled in that jurisdiction.[11] Furthermore, the attempt of a few courts to transport real estate bodily across state lines by the purely legal fiction of equitable conversion[12] is now quite universally and properly done away with so far as taxes are concerned. The federal Supreme Court has recently decided in *Senior v. Braden*[13] that equitable interests in land, even though represented by beneficial certificates readily transferable, are still interests in land and taxable only at the situs of the land. So here situs governs.

Passing to personal property, a distinction must be made between tangible and intangible property. The distinction may seem a rather artificial one, even as respects real estate; for the actual relationship of the owner to all property is in

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10 See Brown, "Multiple Taxation by the States—What is Left of It?" (1935), 48 Harv. L. R. 407.

11 Louisville, etc., Ferry Co. v. Kentucky, 188 U. S. 385 (1903).

12 See e. g. Land Title and Trust Co. v. Tax Commission, 131 S. C. 192, 126 S. E. 189 (1925).

13 295 U. S. 422 (1935).

fact one merely of intangible rights. Nevertheless, the distinction is made between personal property like furniture and automobiles, which is perceivable by the senses, and other property, like claims for money owed or goodwill, which is valuable but exists only because legally enforceable.

As to tangible personal property, the rule for a long time was that jurisdiction to tax depended upon the domicile of the owner. It was not until the present century that this idea was definitely repudiated by the federal Supreme Court;[14] but the repudiation now seems conclusive. It is now well settled law that tangible personal property permanently situated in one jurisdiction is taxable there and there only, even though the owner is domiciled elsewhere.[15]

But suppose the tangible personal property is not permanently situated in a single jurisdiction? Here again the domicile concept reasserts itself. It may be that property is constantly passing through a jurisdiction so that the owner may be regarded as having a stock-in-trade permanently there. If this is true, the stock-in-trade may be taxed by the jurisdiction in which it is, even though the component parts of that stock-in-trade are never in the jurisdiction for any considerable time.[16] But it has been held that where an owner of movable property—in this case railway cars—is unable to show that such property is permanently located in any other jurisdiction, the property is taxable at the domicile of the owner.[17] There is obviously no logic in this; it is merely a matter of policy. Clearly the property ought to be taxed somewhere, and since the owner can not show that it has been taxed in some other jurisdiction, the courts simply fall back on his domicile, in order to avoid its escaping taxation altogether. It may conceivably even lead to multiple taxation, since the units might be taxed collectively as constituting a stock-in-trade in another state, and singly at the domicile

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[14] Union Ref. Transit Co. v. Kentucky, 199 U. S. 194 (1905).

[15] Frick v. Pennsylvania, 268 U. S. 473 (1925); City Bank v. Schnader, 293 U. S. 112 (1934).

[16] Pullman's Car Co. v. Pennsylvania, 141 U. S. 18 (1891).

[17] New York v. Miller, 202 U. S. 584 (1906).

of the owner. Furthermore, the jurisdiction of the domicile of the owner may tax such wandering property even though it never actually comes or can come into such domicilary jurisdiction.[18] It appears, therefore, that while situs seems to have mostly won the battle with respect to tangible personalty, domicile is far from ousted.

And so we pass to intangible personalty. Here the battle between domicile and situs was, for a long time, compromised by the courts by allowing taxation by the jurisdiction of the domicile of its owner and also by the jurisdiction where it was conceived to be situated.[19] This idea, however, is not now in good standing. For one thing, the courts have come to realize that to talk about the situs of an intangible is to use the word "situs" in a truly Pickwickian sense, since realistically an intangible ordinarily has no situs. Perhaps it might well have been held that an intangible evidenced by an instrument—such as a promissory note or a bond—is to be treated for taxation according to the popular conception as tangible property, situated where the instrument is. However, the idea that such an instrument was itself tangible property has been definitely repudiated by the federal Supreme Court[20] which insists that the actual taxable property is the obligation, which is merely evidenced, not embodied, by the instrument.

But what then are the courts to do? Here we have immensely valuable property which should certainly not escape taxation, and it has no situs.

The solution, of course, was to fall back on the domicile of the owner and permit that jurisdiction, and that jurisdiction alone, to tax the intangible. It was not until 1930 that the federal Supreme Court definitely announced this solution, which was intended primarily to do away with multiple taxation,[21] but the rule is now well settled.[22] Originally, the

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18 Tacoma Oriental S. S. Co. v. Tallant, 51 F. (2d) 359 (D. C. W. D. Wash. S. D., 1931).

19 Fidelity, etc., Co. v. Louisville, 245 U. S. 54 (1917). See, also, Cream of Wheat Co. v. Grand Forks, 253 U. S. 325 (1920).

20 Blodgett v. Silberman, 277 U. S. 1 (1928).

21 Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930).

22 See First Nat. Bk. v. Maine, 284 U. S. 312 (1932), and cases there cited.

Court somewhat shamefacedly attempted to put some logical justification upon resort to the domicile by citing the hoary but imbecilic maxim of "mobilia sequuntur personam." However, in the culminating case[23] on this point, Mr. Justice Sutherland, who ought by this to win some ecomiums as a legal realist, stated distinctly that the maxim was a mere reflection of policy and that the decision of the Court was on the same basis; that is, that such property should be taxed but taxed only once, and that in the absence of anything better, the jurisdiction of domicile was the most reasonable and just, if not the logical, choice to make.

With respect to intangible property held in trust, the same rules seem to apply, though in some of these cases the courts talk about situs.[24] The property is taxable at the domicile of the trustee, who is the legal owner.[25] The suggestion has also been made that the equitable interests of the beneficiaries of the trust also constitute property and should likewise be taxable to them at their respective domiciles. Logically this argument seems unanswerable; but it runs contrary to the present strong repugnance of the courts to multiple taxation of the same economic interest and it will probably, therefore, not be followed.[26] Intangible property held in trust, therefore, will probably be taxable at the domicile of the trustee and not elsewhere.

But to all this there remains one rather curious exception, applicable to all sorts of intangible property, and evidenced in the recent case of *Burnet v. Brooks*.[27] Here a decedent, a resident of Cuba and a British subject, kept certain securities in the United States, which were here at the time of his death. The question was whether the transfer of such securities was subject to the federal Estate Tax. It would appear that the securities, or rather the intangible property of which they

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23 First Nat. Bank v. Maine, supra, note 22.

24 See e. g. Wachovia Bank & Trust Co. v. Doughton, 272 U. S. 567 (1926).

25 Safe Deposit & Trust Co. v. Virginia, supra, note 3. See also, Brown, "The Taxation of Trust Property" (1935), 23 Ky. L. J. 403.

26 See Brown, ob. cit., note 25. See also, Senior v. Braden, supra, note 13.

27 288 U. S. 378 (1933).

were evidences, were situated for tax purposes either in Cuba, the jurisdiction of domicile, or possibly in Great Britain, the jurisdiction of citizenship. But Mr. Chief Justice Hughes, in a necessarily somewhat labored opinion, reached the conclusion that they were situated for tax purposes in the United States. When the cases, which have been referred to, where the Court has taken the position that the state of domicile is to be the sole taxing jurisdiction, were cited, the Court answered that they were not in point, for the simple reason that they were decided purely on the basis of policy, the policy being to avoid multiple taxation between states, and therefore not applying to the United States, a sovereign in the international sense. If the United States wants to bring about multiple taxation, the Court, it appears, is simply not interested. So, as between the states, domicile governs. But when the federal government is concerned, situs may govern, that situs being apparently the actual situation of the securities evidencing the intangible property. This may all be sensible enough; but as a lawyer, I am compelled to admit that the only possible answer to the allegation of the economists that our boasted logic is in this respect somewhat lacking, is a blush, as becoming as possible.

Nor is this all. The courts have insisted, and still insist, that some intangibles do have an actual situs and can be taxed there. For example, goodwill of an express company, doing business throughout the United States, is obviously situated wherever business is done and each state may tax its share, the value of which will have to be computed by some method of apportionment.[28] This sounds like good common sense. Whether, however, the state of domicile of the company can also tax this entire goodwill is not made entirely clear; but the Supreme Court's present dislike of multiple taxation makes it now rather improbable.

Likewise, it has been held that a state may tax one of its residents upon his membership in a stock exchange situated in another state, on the ground that it is an asset of his local

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28 Adams Express Co. v. Ohio, 165 U. S. 194, 166 U. S. 185 (1897).

business.[29] Perhaps the exact test here is the place of business rather than of the domicile of its owner; though in most cases, of course, these will coincide. However, there is one Supreme Court decision to the effect that the state where the exchange is situated may tax the entire value of its memberships even though they are held by non-residents of that state.[30] But this case was decided before the Court had developed its present objection to multiple taxation, and the opinion being avowedly buttressed upon the assumed unobjectionability of that practice, is now of rather doubtful standing.

More important is the doctrine that credits may have a "business situs" apart from the domicile of their owner and may be taxed by the jurisdiction of such business situs. This business situs exists if the credits are the subject, or at least a necessary incident, of a continuous business actually carried on in the state. The doctrine seems abundantly sensible since otherwise the non-resident is at an advantage in competition with local people carrying on a similar business.

However, the writer was rash enough nearly two years ago to predict the abandonment of the business situs doctrine.[31] His reason was that he believed it inconsistent with the Supreme Court's present horror of multiple taxation.[32] Such rashness has been properly rebuked by the Court, which has in the last few months emphatically approved the taxation of credits at their business situs.[33] Whether this means that the state of domicile will also be permitted to tax such credits is not entirely clear; but one would guess both from the language of the Court and from general considerations that it does not.

As to intangibles then, we have the general rule that they are taxable at the domicile of the owner and only there. But that rule does not apply if the United States is involved, and

29 Anderson v. Durr, 257 U. S. 99 (1921).

30 Rogers v. Hennepin County, 240 U. S. 184 (1916).

31 See Brown, ob. cit., note 10.

32 Cf. Fidelity, etc., Co. v. Louisville, supra, note 19.

33 Wheeling Steel Corp. v. Fox, 56 Sup. Ct. 773 (1936).

here international multiple taxation is perfectly possible. It does not apply either if the intangibles are considered to have an actual situs in some jurisdiction other than the domicile of their owner through the doctrine of business situs or some similar idea. In such situations, the state where the intangibles are considered to be situated can tax them, but probably the jurisdiction of domicile of their owner can not do so.

It may be noted that certain cases involving inheritance or estate taxes have been cited in connection with the discussion of property tax jurisdiction. Theoretically this is unjustified, since estate and inheritance taxes are not taxes upon property but are rather excise taxes levied upon the privilege to transmit property after death or the privilege of receiving property from a decendent estate. However, such taxes are measured by the amount of property thus distributed or received. Furthermore, it is a well settled rule that only property which is within the taxing jurisdiction of the state in question may be used by it as a measure of an inheritance or estate tax to be imposed by it with respect thereto.[34] The jurisdiction to tax is, therefore, essentially the same.

As with respect to property taxes, there was for a long time an idea that multiple taxation on the basis of domicile and also situs was proper, at least with respect to intangible property.[35] However, this now seems to be entirely given up[36] except where it would be still permissible for property tax purposes—as in the case of federal taxation with respect to the estate of a citizen of another country.[37] It seems probable that the states also may be permitted to impose such a tax with respect to securities belonging to the estate of a decedent not a citizen of the United States but kept in the state imposing the tax, as here too there is no interstate multiple taxation.[38] Except for this, the jurisdiction of the domicile of the decedent has the sole taxing power of this

[34] Frick v. Pennsylvania, supra, note 15.
[35] Bullen v. Wisconsin, 240 U. S. 625 (1916).
[36] First Nat. Bank v. Maine, supra, note 22.
[37] Burnet v. Brooks, supra, note 27.
[38] In re Lloyd's Estate, 52 P. (2d) 1269 (Wash., 1936).

nature with respect to intangible property; though the *Dorrance*[39] litigation already referred to, where two states have thus far successfully maintained the proposition that the decedent was domiciled in each of them, shown that practically, if not legally, there is still some danger of multiple taxation.

Passing to excise taxes of the more conventional sort, the test seems to be largely that of situs. But since an excise tax is not a tax on property, what we must look for is not property but rather the situs of the exercise of the privilege or the act which is taxed. It has already been shown that it is often difficult to define or even identify excise taxes; but the best tests seem to be that they are non-recurrent, that they are based upon the exercise of a privilege or at least an act, and that they are, therefore, at least theoretically possible to avoid by avoiding that act.

It is true that franchise taxes may be imposed upon domestic corporations, apparently almost without limit, except special provisions of the Federal Constitution such as the Commerce Clause and the Due Process Clause.[40] This sounds like an excise tax imposed on the basis of domicile. However, it can just as well be rationalized as a tax upon the privilege of organizing in the state and using its laws for that purpose, an act which obviously must be considered to take place within the state. Just as clearly, a foreign corporation may be taxed by a state for the privilege of doing business within its borders,[41] though such tax must be at least roughly measured by the business done in the state.[42] This is obviously taking the situs test.

The same rule applies to other sorts of excise taxes. A leading case on this point is *Graniteville Co. v. Query*.[43] Here a corporation executed notes in South Carolina payable to

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39 In re Dorrance's Estate, supra, note 1.

40 Matson Nav. Co. v. State Board of Equalization, 56 Sup. Ct. 553 (1936). See, also, Cream of Wheat Co. v. Grand Forks, supra, note 19.

41 General American Co. v. Day, 270 U. S. 367 (1925).

42 Bass, etc., Ltd. v. State Tax Commission, 266 U. S. 271 (1924).

43 283 U. S. 376 (1931).

banks outside the state. These notes were of no legal effect until sent to these outside banks and discounted by them. The federal Supreme Court held, nevertheless, that South Carolina had jurisdiction to impose a stamp tax upon these notes, since they were actually executed in South Carolina. The fact that such execution had no legal effect was held immaterial, since the act taxed took place in the state. The test again is that of situs, although it goes without saying that locating the situs of the act taxed is often a troublesome problem.

And last but not least we come to income taxes. Here we have many troublesome problems and not a few of these are still very far from solution. Part of the difficulty is due to the attempt of some courts to catalog the income tax under some older category of taxes, such as property taxes. The truth is that an income tax does not fit into any of the older categories, and it must be regarded as a separate kind of tax.[44]

So regarding it, the first question is whether the tax may be imposed upon the basis of domicile, thereby enabling a jurisdiction to tax the entire income of persons domiciled within it, no matter from what source such income is derived. Certainly the United States can do that very thing,[45] though this doctrine perhaps rests upon the precise basis of citizenship rather than domicile. But there is at least one authority that the states have precisely the same power. This is *Lawrence v. State Tax Commission*[46] where the federal Supreme Court held that the state of Mississippi had authority to tax the entire income of a resident even though such income was almost entirely derived from sources outside that state. If this decision means what it says, the basis, or at least *a* basis, for jurisdiction to impose income taxes is domicile.

Unquestionably there is a good deal to be said for such a doctrine. It permits a state to tax its residents upon their entire economic increment of wealth during the year, the value and protection of which is at least partly due to the

44 See Brown "The Nature of the Income Tax" (1933), 17 Minn. L. R. 127.
45 Cook v. Tait, supra, note 9.
46 286 U. S. 276 (1932).

state of their domicile even though such income was derived from activities elsewhere.[47] But the doctrine contravenes the Court's present strong, if legalistic, dislike of multiple taxation; for, as will presently appear, there is no question of the right of a state to tax non-residents upon income derived from sources within the state. Indeed, the very standing of the *Lawrence* case is weakened by the fact that in the opinion the Court relied very largely upon older and now clearly discredited authorities permitting multiple taxation. It seems, therefore, to be the opinion of most legal theorists[48]—including even the so-called realists[49]—that the doctrine of the *Lawrence* case will not stand to its full extent; that the state of domicile will be permitted to tax the income only to the extent that such income is not within the taxing jurisdiction of some other state.

Some state courts have denied to their administrative authorities the power to levy taxes upon residents to this extent. Thus in the New York case of *Pierson v. Lynch*[50] it was held that New York could not tax a resident on income from rentals on out-of-state real estate, though it could upon the profits realized by him through the sale of such realty. The opinion is short and not very lucid, but the apparent basis is that this would amount to a tax upon the out-of-state realty from which the income is derived; and, of course, such a tax would clearly be outside of New York's jurisdiction. But this case was substantially overruled by the still more recent decision of the Court of Appeals in *Cohn v. Graves*,[51] holding a resident of New York taxable on rentals and mortgage interest from New Jersey realty. Here also the majority opinion is too short to be very helpful, but the elaborate dissenting opinion of Judge Hubbs is a strong argument against the

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[47] See Leland, ob. cit., note 2.

[48] See, Rottschaefer, ob. cit., note 4; Nossaman, "State Taxation of Income" (1936), 24 Calif. L. R. 524.

[49] See (1934) 43 Yale L. J. 851.

[50] 247 App. Div. 763, 263 N. Y. Supp. 259 (1933), affd., 263 N. Y. 533, 189 N. E. 684 (1933), app. dism., 293 U. S. 52 (1934).

[51] 271 N. Y. 353, 3 N. E. (2d) 508 (1936).

multiple taxation necessarily incident to the result of the prevailing opinion.

The Supreme Court of Wisconsin took a position even more unfavorable to the state in *Appeal of Siesel*[52] where it was held that where a resident of Pennsylvania, who owned corporate stock which had appreciated in her hands, gave it to a resident of Wisconsin, who in turn promptly sold it, the profit thus derived could not be taxed by Wisconsin, on the ground that it was a capital asset which had appreciated in value in Pennsylvania. So the answer to this particular problem is still quite uncertain.

On the other hand, as has already been pointed out, it is entirely certain that a state may impose a tax on the income of a non-resident derived from sources within the state.[53] Here we have the test of situs very definitely applied, the only problem being the ever-present one of deciding what actually is the situs of the source of income.

In this connection a very recent New York case is of interest. This is *Whitney v. Graves*.[54] It held that a resident of Massachusetts who owned a New York Stock Exchange seat would be liable for New York income tax on the profit made by selling the seat. The *Whitney* case resembles *Pierson v. Lynch*,[55] already cited, in being a short and non-lucid opinion; but in actual results as to jurisdiction to tax, it fits better with the more recent Court of Appeals decision in the *Cohn*[56] case.

Before leaving this subject, a word must be said with respect to trust income. The federal Supreme Court has held a non-resident and non-citizen of the United States taxable from the income of securities kept in the United States and alleged (though not very conclusively on the facts) to have

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[52] 259 N. W. 839 (Wis., 1935).

[53] Shaffer v. Carter, 252 U. S. 37 (1920); Travis v. Yale, etc., Co., 252 U. S. 60 (1920); Bass, etc., Ltd. v. State Tax Commission, supra, note 42.

[54] 283 N. Y. Supp. 219 (App. Div. 3rd Dept., 1935), affd. 3 N. E. (2d) 201 and 213 (1936).

[55] Supra, note 50.

[56] Supra, note 51.

a business situs here.[57] This doctrine is likely to stand, especially in view of the unwillingness of the Court to restrict the federal tax jurisdiction in the same way that it does the states.[58] But in the older case of *Maguire v. Trefry*,[59] the Court had taken the position that a beneficiary of a trust living in Massachusetts, could be taxed by that state on income received from securities held by a Pennsylvania trustee in that state. The result is unquestionably sensible, but seems to rest very heavily upon the domicile concept, especially as it would clearly give rise to multiple taxation if Pennsylvania should tax such income to the trustee, as it unquestionably could. It is, therefore, not surprising that the case just cited has been discredited by the Supreme Court itself in *Senior v. Braden*[60] where Mr. Justice McReynolds, speaking for the majority, pointed out that the *Maguire* case rests largely upon a tolerance for multiple taxation then felt by the Court but which has now wholly disappeared. Nevertheless, the economic soundness of the result in that case is cogent argument that it should and very possibly will survive.

With regard to income taxes then, we have some authorities now in good standing, though perhaps under attack, that it is primarily upon the basis of domicile; that is that the state of domicile of the recipient of income may tax the entire income though part or all of it was derived from sources outside that state. On the other hand, it seems entirely certain that an income tax may be imposed upon non-residents, on the basis of the situs of the source of the income; that is to say that income derived by a non-resident from property or activities within the state may be taxed by that state. Obviously these two doctrines, taken together, result in the possibility of multiple taxation, and it is, therefore, possible that the ultimate result will be that the domiciliary state can tax income of its residents only to the extent derived from within the state or at least to the extent not taxable by some other

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57 De Ganay v. Lederer, 250 U. S. 376 (1919).

58 Cf. Burnet v. Brooks, supra, note 27.

59 253 U. S. 12 (1920).

60 Supra, note 13.

state on the situs basis. On the other hand, multiple income taxation may possibly be regarded as economically less undesirable than other sorts of multiple taxation. This argument is especially cogent in connection with trust income, though it may be attacked on the theory that multiple income taxation, being annually recurring, is as burdensome as multiple property taxation and more so than multiple inheritance or estate taxation. The solution is not clear. It is in the hands of the gods, who are the federal Supreme Court.

It is believed that it has been demonstrated that if lawyers and courts have over-simplified this problem of jurisdiction to tax, they have still not made it precisely childish in its simplicity. We have personal tax jurisdiction usually on the basis of domicile but sometimes influenced by situs. Regarding real property taxation—here we have approximated actual simplicity—jurisdiction to tax is on the basis of situs. Tangible personal property is also to be taxed on the basis of situs, unless it appears that it does not have any permanent situs, when we fall back on domicile—for lack of anything better. Intangibles usually have no situs, and the courts have largely given up as a bad job an attempt to conjure up one for taxation purposes. Therefore, they again fall back on domicile. But some intangibles do have a situs of a sort, and in such cases the jurisdiction of such situs is still permitted to impose a property tax upon them, with the probable though not certain result that the jurisdiction of domicile of the owner is precluded from taxing the same intangible property.

As to excise taxes, we have the jurisdictional test of situs of the act which is the subject of the tax. This is confusing in fact, though not in legal theory. The only exception is with regard to inheritance and estate taxes, where the concepts of property tax jurisdiction have apparently been taken over bodily.

And for income taxes, we have both bases now in good standing. That is, we have good authority that the state of domicile has power to tax the entire income from whatever source derived; we also have the clear rule that the state of situs of the property or activities from which income is de-

rived by non-residents, can tax the income so derived. There is nothing necessarily inconsistent or even demonstrably undesirable in these two doctrines; but since they do unquestionably lead to multiple taxation, it is possible that the broad power of the domiciliary state will be somewhat reduced.

Everyone knows that the whole subject of taxation is moving rapidly in these days. The subject of jurisdiction to tax is certainly moving as fast as any part of it. Many of the rather tenuous conclusions here stated would have probably been regarded as utterly absurd less than a decade ago. During that period, the battle has been raging. On some parts of the front, domicile has won a reasonably clear victory and on others situs has prevailed. Both, therefore, seem likely to continue to govern as to certain sorts of taxes under certain conditions. But there are many segments where the battle is still undecided and where, therefore, only a proper caution will save one from being severely wounded. It is hoped, though without much confidence, that such caution has been evidenced in this paper.

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