1935

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THE TAXATION OF TRUST PROPERTY

By ROBERT C. BROWN*

The purpose of this paper is to examine the rules relating to the taxation of property held in trust. The problem relates only to property taxes in the correct sense of that term. Inheritance and income taxes, while undoubtedly burdening property to some extent, are not strictly taxes on the property, and will, therefore, be disregarded here except to the extent that they may throw light upon property taxes.

It would seem also that only intangible property offers any real problem in this connection. Real estate has always been subject to tax only by the taxing jurisdiction in which it is actually located. While tangible personal property has not always been treated in the same way, it now seems to be settled that such property actually and permanently situated within the boundaries of a particular taxing jurisdiction may be taxed by that jurisdiction alone and without regard to the residence of the owner. The same rule should be applied to trust property. Although the interest of the beneficiary of a trust has a certain similarity to a chose in action, yet such interest is a property right rather than a mere contract right, and under the maxim that equity follows the law, will be treated as real or personal property according to the nature of the trust res.

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3First National Bank of Boston v. Maine, 234 U. S. 312, 52 Sup. Ct. 174 (1932) and cases there cited.
4See People v. Gaus, 169 N. Y. 19, 6 N. E. 987 (1901).
5Brown v. Fletcher, 253 U. S. 589, 35 Sup. Ct. 154 (1915).
Where, however, the trust res consists of intangible property—as is perhaps more often than not the situation nowadays—the problem is somewhat more difficult. The interest of the beneficiary is no doubt still property, but the problem of the taxation of the trust property itself is a very troublesome one. The difficulty arises from the fact that choses in action and other intangible property have generally no actual location. To assign to such property a "situs" for taxation is, therefore, to indulge in a fiction. And the courts have shown a decreasing disinclination to apply this fiction. Such property must, therefore, be regarded as actually situated nowhere—which is indeed the fact.

But it would be even more absurd and improper to permit such property to escape taxation altogether. The obvious solution is to permit the jurisdiction of the domicile of the owner to tax intangible property. However, the problem still remains, who is the owner of the property held in trust?

**The Ordinary Rules as to Taxation of Trust Property**

Taxation is a matter of strict law rather than equity, as almost any taxpayer will cheerfully testify. The obvious solution, then, would be to determine whom a court of law regards as the owner of the property. And there is no real doubt as to the answer to this question—at law the property is of course owned by the trustee. It is, therefore, not surprising to find that, generally speaking, intangible property held in trust is regarded as subject to tax by the taxing jurisdiction where the trustee is domiciled and without regard to the domicile of the beneficiary. The Supreme Court of Mississippi has stated the rule succinctly as follows:

"The personal property covered by this assessment should have been assessed to the trustee in his character as trustee at his residence or domicile."

The authorities to this effect are numerous.

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*See cases cited in note 3, supra.


2. Board of Supervisors v. Dale, 40 Miss. 671, 70 So. 828 (1916). See also Adams County v. Dale, 110 Miss. 671, 70 So. 828 (1916).

This rule does not apply of course to property held by a person who is really an agent rather than a trustee, whether or not he is called a trustee. In that case the agent has no ownership of the property whatever, and it should normally be assessed to the principal at his residence. But the rule does apply to all sorts of fiduciaries having any legal interest in property held by them for the benefit of someone else, including guardians, trustees in bankruptcy, and receivers. The property is taxable to the trustee even though the validity of the trust has been attacked, so long as such attack has not yet been judicially determined to be justified. And the fact that the settlor of the trust has a power of revocation, which he has not yet exercised, should not affect the power to tax the intangible property to the trustee at his domicile. The power of revocation, whatever effect it may have on inheritance taxation, has evidently no effect upon the present legal ownership of the property in the trustee.

If there are two or more trustees residing in different jurisdictions, the usual policy is to apportion the property equally between the different trustees. It would certainly never do to tax the whole property wherever any one of several trustees had his domicile. As the Supreme Court of New Hampshire has said in McClellan v. Concord:

"Each trustee is not liable for the tax on the whole property, for such an assessment would result in taxing it as many times as there are trustees, in violation of the established doctrine of taxation."

This is also the prevailing rule in the authorities. A few


See Kimhart v. Howard, 90 Md. 1, 44 Atl. 1040 (1899).


Schmidt v. Failey, 148 Ind. 150, 47 N. E. 328 (1897).


Supra, note 9.

97 Atl. 553.

Appeal Tax Court v. Gill, 50 Md. 377 (1878); Mackay v. San
cases ignore the residences of the trustees where the property is in the form of documentary securities, but the explanation of this line of decisions is that the courts treat such documentary securities as tangible property and, therefore, tax it where the documents are actually situated.

Even more clearly accepted is the rule that intangible property is for taxation purposes to be divided equally between the trustees when they are all residents of the same state but live in different municipalities or other taxing districts. No case has been found which sanctions local taxation on the basis of the full value of the property by more than one taxing district in these circumstances. There are, however, cases which permit the taxation of the property at the domicile of the beneficiary rather than at that of the trustee or trustees within the same jurisdiction. This is allowable only as expressly provided by statute but seems legally unobjectionable. The same may be said of the scheme for taxing trustees on the share of the property held for them by nonresident beneficiaries. But when resident beneficiaries are taxed upon their interests as property, the trustees being non-residents of the state, there arises an immediate problem of multiple taxation.

Francisco, 128 Cal. 678, 61 Pac. 382 (1900); People v. Feitner, 168 N. Y. 360, 61 N. E. 280 (1901); Crocker v. Malden, 224 Mass. 313, 118 N. E. 527 (1918). 20 People v. Coleman, 119 N. Y. 137, 23 N. E. 483 (1890); People v. Tax Commissioners, 17 N. Y. Supp. 923 (1891). 21 The idea that documents representing choses in action and other intangible property are themselves tangible property, seems to have much practical sense; but it has been pretty definitely repudiated, at least for taxation purposes, by the Federal Supreme Court. Blodgett v. Silberman, 277 U. S. 1, 48 Sup. Ct. 410 (1928). See also Baldwin v. Missouri, 281 U. S. 586, 50 Sup. Ct. 436 (1930). It would appear, therefore, that the cases cited in note 20, supra, cannot now be sustained, at least on this basis.


since the trustees will presumably be subject to tax upon the trust property at their own domiciles. This problem will be considered hereafter.

As just suggested, there is some tendency to provide for the taxation of property held in trust to the beneficiary at his domicile rather than to the trustee. It has been urged that this is a more scientific and more desirable way to tax such property, on the ground that the beneficiary is the actual owner of the property as distinguished from the merely technical legal ownership resting in the trustee, whose domicile should therefore be disregarded. There is some direct judicial authority for this view though ordinarily only when expressly provided by statute. This ruling may indeed be justifiable in certain peculiar sorts of trusts, even without express statutory authority. An example of this is a voting trust, which, though a genuine and active trust, is nevertheless one for a very limited purpose, and one where the certificate holder is in most substantial particulars, the complete owner of the stock. Similarly, where the beneficiary is exempt from property taxation, it would seem improper to deny the exemption by assessing the property to the trustee.

But, as already pointed out, the distinct weight of authority favors the taxation of all trust property to its legal owner, the trustee. The truth is that there is more than a technical legal reason for this. If one or all of the beneficiaries are future, they might well be unable to pay the tax. And even if all the

27 See the cases cited in notes 23-26, supra.
28 See the note in (1926) 41 Harv. L. R. 511.
30 Matter of Ming, 39 N. J. Eq. 1 (1884).
32 Williston Seminary v. County Commissioners, 147 Mass. 427, 18 N. E. 210 (1888). But in Parkhurst v. Winchester, 234 Mass. 121, 125 N. E. 152 (1921) it was held that the primary purpose of the trust was to pay annuities rather than to accumulate for future beneficiaries, and that the property was therefore taxable to the trustees. The court remarked that it might be difficult to collect the tax from these future beneficiaries "who may be unable to pay it." In Ellsworth College v. Emmet County, 156 Ia. 52, 135 N. W. 594 (1912), the property was held taxable to the trustees, but the exempt status of the beneficiary was given effect to, by treating the property itself as exempt in the hands of the trustees.
33 See Parkhurst v. Winchester, supra, note 32.
beneficiaries are existing, they are possibly somewhat scattered, may be rather indigent, and are at any rate extremely unlikely to be acquainted with business practices. Certainty and convenience of collection seem, then, to dictate a continuance of the present scheme of collecting the tax from the trustee.

However, there may be more justification for some modification of this rule when a business trust is involved. Even here the same rules as to property taxation should probably be adhered to when there is a real trust, but such devices are often trusts only in name. If the so-called beneficiaries have any substantial control over the person acting as trustee, it is rather a partnership than a trust.

But even under those circumstances, the property is often taxed to the so-called trustee at his domicile. Of course, if the trust res consists in whole or in part of real property, it is taxable at its actual situs, irrespective of the residence of the trustee or beneficiaries. It is sometimes considered that where the so-called business trust is actually a partnership, the doctrine of equitable conversion will transform the real estate into personal property. However, it would seem that this should make no difference, as even if it is personal property, it still has a permanent situs where the land is situated, and is therefore taxable only in that jurisdiction.

The result seems to be that the property taxation problem of business trusts, in the correct sense of that term, is essentially the same as that of the more ordinary sort of trusts, where active business is not intended to be carried on. At any rate decisions with respect to these trusts do not show any very definite tendency to deviate from the ordinary rule that the property is taxable only at the domicile of the trustee and not to the beneficiaries.

Possibly a more tenable suggestion for varying the ordinary rule for taxation of trust property is to tax it in the juris-

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25 See Brown, Common Law Trusts as Business Enterprise, (1928) 3 Ind. L. J. 595.


dictation where it is intended that the trust shall be operated. This suggestion has an obvious application to trusts where it is intended that active business should be carried on, but is by no means necessarily confined to such trusts.

The first actual application of such an idea seems to have been in situations where there were several trustees, some of whom were inactive. In such cases it has sometimes been held that the jurisdiction of residence of the active trustee or trustees could properly tax the whole property without regard to the inactive trustee. At times this idea has been applied even by the domicile of the inactive trustees, thus resulting in a loss of revenue to the state thus applying it. On the other hand, the courts have sometimes been influenced—improperly, as it now appears—to tax intangible trust property at the location of the documents representing such property rather than at the place where the active trustees are domiciled. And there are, likewise, authorities which explicitly decline to give up any revenue on this theory, asserting that the inactive trustees are still trustees and that the state of their domicile is, therefore, entitled to its share of the tax of the trust property.

But if such an idea is accepted at all it is then only a short step to the conclusion that the jurisdiction where the trust is really managed is the one to tax the trust property. The Supreme Judicial Court of Massachusetts in *Newcomb v. Paige* has taken cognizance of these practical considerations in the following language (speaking of the resident trustee):

"Under these circumstances he alone as resident of this commonwealth does not hold the title as owner within the commonwealth in such sense as to bring him within the tax act. He cannot exercise ownership as a resident in this commonwealth, but only by conjoint action with his fellow trustees, none of whom are resident here, as to a fund in substance in the custody of the courts of another jurisdiction."

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28 Johnson v. Oregon City, 3 Ore. 13 (1863); Hawk v. Bonn, 6 Oh. C. C. 452 (1892). See also, People v. Barker, 8 Misc. 32, 23 N. Y. Supp. 651 (1894).
29 People v. Coleman, supra, note 20; People v. Tax Commissioners, supra, note 20; Hawk v. Bonn, supra, note 38.
30 See cases cited in note 21, supra.
31 People v. Coleman, supra, note 20; People v. Tax Commissioners, supra, note 20.
His ownership is not of such character as to bring the taxable domicile of the trust within the terms of our law."

And the same court has gone still farther in its application of this idea of the practical control of the trust as localizing the power of imposing a property tax, in *Hutchins v. Commissioner*. Here the residences of the trustees and beneficiaries of the trusts in question were entirely ignored and the Massachusetts tax was thus given up, on the ground that the trusts were created under the laws of foreign jurisdictions and were actually administered there. It must be admitted that this case involves an income tax rather than a property tax in the strict sense of that term. Nevertheless, it seems to be in point, since the Massachusetts court has the settled, though rather unfortunate, idea that an income tax is a form of property taxation.

But undoubtedly the clearest authority in favor of this theory of levying a tax upon trust property according to the place where the trust is to be administered, is the Minnesota case of *In re Thorne's Estate*. This case involves strictly a question of inheritance taxation, but is in point as to property taxation, since it is now quite clear that, as a general rule, property which is outside the jurisdiction of a state for property tax purposes can not constitutionally be used as a basis for imposing an inheritance tax.

In the *Thorne* case a resident of New York died, leaving an interest in a trust consisting mostly of corporate stocks. Two of the four trustees were residents of Minnesota, the other two were residents of New York. It appeared that the trust agreement was signed in New York and that most of the trustees' meetings were held there. However, it was entirely clear not only that most of the tangible assets represented by the stocks constituting the trust res were in Minnesota, but also that the trust was intended to be, and actually was, managed there. On these facts the Minnesota Court held that the state had jurisdic-

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*272 Mass. 422, 172 N. E. 605 (1930).*

*See comments on this case in (1930) 79 U. of Pa. L. R. 219, and (1931) 44 Harv. L. R. 475. These point out that the Massachusetts court has not been consistent on this point.*

*See Brown, op. cit. note 1, supra, at pp. 132 ff.

*145 Minn. 412, 177 N. W. 638 (1920).*

tion to impose an inheritance tax upon the passing of the estate, saying:

"The proposition that a trust has a situs so as to afford a basis for claiming an inheritance tax is not entirely novel, although courts in determining the location may not always stress the same factors. Varied importance is given to the residence of the trustees, the residence of the settler, the place of the administration of the trust, and the location of the trust property. Professor J. H. Beale, in an article in the Harvard Law Review for April, 1919, arrives at the conclusion that a succession tax is payable at the place of the administration or seat of the trust."  

It is believed that this general idea is theoretically sound though it is not quite so clear whether it is as easily workable as the prevailing somewhat wooden but certainly convenient rule that the intangible property of the trust is to be taxed at the domicile of the trustee. However this may be, the Thorne case failed to pass the scrutiny of the same court in the light of subsequent developments. It was explicitly overruled in Baker v. State, which involved precisely the same trust as that in the Thorne case. The court did not criticize its former theory that trust property may properly be subjected to tax where the trust is to be administered, but took the position that this trust, which was intended to enforce a consistent and harmonious policy in the management of several large mining corporations, was itself essentially a corporation (or at least should be governed by like rules), and being organized in New York its stock could not be subjected to taxation by Minnesota under the doctrine of the recent case of First National Bank of Boston v. Maine.

It is submitted that the Baker case does not invalidate the holding of the Thorne case in so far as that case is based upon the proposition that trust property is to be taxed at the place where the trust itself is managed—the "seat of the trust." The Baker case was based on the theory that the so-called trust was not really a trust at all. And there are still a number of cases, whose authority has not yet been attacked, which give

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51 177 N. W. 640.
52 See note by Professor J. H. Beale in (1920) 34 Harv. L. Rev. 52. He states that the Thorne case justifiably provides for property taxation "at the seat of the trust."
53 186 Minn. 160, 242 N. W. 697 (1932).
54 Supra, note 3.
55 Cf. note 51, supra.
support to this view that trust property is to be taxed where the trust is managed.\textsuperscript{55}

It is therefore fair to consider this problem on its merits. The theory of taxing trust property at the place where the trust is to be administered has undoubtedly much logical and scientific basis.\textsuperscript{56} Nevertheless, it may be criticized as somewhat unworkable. The problem of deciding as to what is really the place of administration of the trust will often be very difficult, and, furthermore, disagreements as to this between various courts might give rise to quite objectionable multiple taxation. And if this does not happen, it might well result in an unjustifiable loss of revenue to states which held that the property was to be managed in some other state, even though some or all of the trustees were residents of the state considering the problem. Therefore, it again seems wiser to adhere to the more easily workable theory that intangible trust property is to be taxed at the domicile of the trustee.

There is, however, still another and in some ways more serious diversity in this general subject, and that is with respect to testamentary trusts. Where property is held under such a trust, it has large practical similarity (though not legal identity) to the holding by a decedent estate. It is, therefore, not surprising that there is some tendency to reflect the rule as to the taxation of property held by decedent estates in taxing property held under testamentary trusts. And that rule is to tax the property of a decedent estate at the domicile of the decedent, irrespective of the residence of either his personal representative or the beneficiaries of the estate,\textsuperscript{57} though this right may, of course, be given up by the state of the decedent’s domicile.\textsuperscript{58}

Nevertheless, the general rule is still to treat testamentary trusts like other trusts and to hold, therefore, that property of such trusts is taxable at the domicile of the trustee.\textsuperscript{59} The rule

\textsuperscript{55} See cases cited in notes 33, 39, 43 and 45, supra.
\textsuperscript{56} Cf. note 51, supra.
\textsuperscript{57} Gallatin v. Alexander, 10 Lea 475 (Tenn., 1882).
\textsuperscript{58} In re Haight, supra, note 42.
\textsuperscript{59} Johnson v. Oregon City, supra, note 38; Dallinger v. Rapello, 14 Fed. 32 (1882), 15 Fed. 434 (1883) (C. C. D. Mass.); In re Dietman, supra, note 28; Augusta v. Kimball, supra, note 9; Hemenway v. Milton, supra, note 42; McClellan v. Concord, supra, note 9. Several of
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is not the same where there is a bequest of an annuity, as this is neither technically nor substantially a trust.

But with property held by an estate being taxed one way and property held by a testamentary trust being taxed another way, a difficulty arises in drawing the line between them. This is particularly the case where the same individual is named as executor and trustee. It will then obviously be somewhat difficult to determine when he passes from one capacity to the other, and, therefore, (if he happens to be a resident of another taxing jurisdiction from the decedent) when the proper situs of the property for taxation will change. There are several cases where this distinction between executors or administrators and trustees is not really recognized by the court. On the other hand a testamentary trust may be created in fact, even though that term is not used by the testator. In general, it would seem that where the same person is appointed executor and trustee and submits his accounts as executor, which accounts are approved, he thereafter holds the property as trustee. Still more plainly is this the case if he has been actually discharged as executor, or where he goes through the formality of transferring the property of himself as executor to himself as trustee. But such personal representatives, and even the courts themselves, are often so careless in drawing the line between activities as executor and activities as testamentary trustee that the property tax problem, as well as others depending upon this distinction, may become very troublesome.

The situation is further complicated in the case of decedent estates by the frequent appearance of an ancillary executor. There are not wanting authorities which hold that a state where an ancillary executor is appointed for the estate of these cases fail to distinguish between executors and testamentary trustees.


People v. Commissioners of Taxes, supra, note 42; Walla Walla v. Moore, 16 Wash. 339, 47 Pac. 753 (1897). And cf. note 59, supra.


Hardy v. Yarmouth, supra, note 22.

Mackay v. San Francisco, supra, note 19.

Milligan v. Jackson, 78 Miss. 537, 30 So. 756 (1901).

State v. Beardsley, 77 Fla. 803, 82 So. 794 (1919), holding that the mere payment of the debts of the decedent transforms his executor into a trustee.

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a non-resident decedent, is entitled to tax property held by such ancillary executor in the state of his appointment. However, other authorities decline to impose such a tax, leaving it to the jurisdiction where the decedent was a resident.

Conversely, where the decedent was a resident of the taxing state but the executor is a non-resident of that state and has been appointed ancillary executor in the state of which he is a resident, some authorities hold that property of the estate in the hands of the ancillary executor in the state of his residence is not taxable by the state in which the decedent was domiciled. This problem is frequently confused by the nature of the property. Though many courts, even at the present date, do not seem to fully recognize it, a state can not tax realty or intangible personal property permanently situated outside its borders, even though it belongs to a resident of the state or to a resident decedent estate. If, however, the property is intangible, the state where the decedent was a resident certainly has the power to tax it, irrespective of the residence of the main or ancillary executor.

It is evident, therefore, that there is a legal right, and in fact a strong tendency, to tax intangible property of a decedent estate at the domicile of the decedent, irrespective of the residence of his personal representative having charge of the estate. The theory is that the executor or administrator has an "official residence" in the jurisdiction where his decedent had his residence; and this irrespective of the actual residence of the personal representative. This theory is accepted quite generally with respect to executors, administrators, and other personal representatives. And there are a few authorities who

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67 Baldwin v. Shine, 84 Ky. 502, 2 S. W. 164 (1886); Dorris v. Miller, 105 Ia. 564, 75 N. W. 482 (1898).
68 State v. Lewis, 256 Mo. 93, 165 S. W. 319 (1914), substantially overruling on this point, State v. St. Louis County Court, 47 Mo. 594 (1871).
70 See authorities cited in notes 2 and 3, supra.
71 Gallatin v. Alexander, supra, note 57.
72 Att'y-Gen. v. Campbell, L. R. 5 H. L. 524 (1872); Gallup v. Schmidt, 154 Ind. 196, 55 N. E. 443 (1900), affirmed in 153 U. S. 300, 22 Sup. Ct. 162 (1902), on the ground that no federal question was presented; Rand v. Pittsfield, 70 N. H. 530, 49 Atl. 88 (1901); Commonwealth v. Williams, 102 Va. 778, 47 S. E. 867 (1904); Commonwealth v.
hold that the same rule of "official residence" at the domicile of the decedent is applicable to a testamentary trustee. It follows that, according to such cases, the property held in testamentary trust is to be taxed by the jurisdiction in which the testator had his home at the time of his death, irrespective of the actual residence of the trustee. Such decisions may be erroneous, but they are not difficult to understand, in view of the practical difficulty, which has already been pointed out, of distinguishing sharply between the functions of executor and testamentary trustee, when, as is often the case, the same person is appointed to both offices.

However, the theory of an "official residence" for a testamentary trustee as separate from his actual residence for this purpose, is denied by a number of authorities. The point is clearly brought out in the Mississippi case of Millsaps v. Jackson where the court held that property in the hands of executors should be taxed at the domicile of the decedent, but when transferred to themselves as testamentary trustees, the property should be taxed at their respective domiciles proportionately. There are many other authorities to the effect that the taxation of property held in a testamentary trust is not different from that of other trust property; that is, it is to be taxed at the residence of the trustee, or if there is more than one trustee, it is to be divided proportionately among them. In other words the concept of "official residence" is denied, at least for the present purpose, with respect to testamentary trustees. In one case the doctrine of "official residence" for a testamentary

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Peebles, 131 Ky. 121, 119 S. W. 774 (1909); McKennon v. Fall, 127 Tenn. 393, 155 S. W. 193 (1913); Yardley v. Essex County, supra, note 22.


5 Lewis v. Chestert, supra, note 73, which was distinguished on this ground.
trustee was accepted where the trustee was actually appointed by the court of the domicile of the decedent, but denied when that court merely supervised the execution of the trust. It is submitted that rules based upon such hair-splitting distinctions should not be followed, and that "official residence" should be given up for taxation purposes with respect to testamentary trusts.

Indeed, there is considerable authority which seems to deny the concept of official residence in toto even as respects executors and other personal representatives of the testator. According to this doctrine the taxability of intangible property in the hands of the representatives of an estate is to be determined according to the domicile of the representatives themselves and without regard to the domicile of the decedent. The Supreme Court of Washington has pointed out that any rule subjecting the property held by a decedent estate to tax at the residence of its former owner may result in its being taxed there forever if the estate is never technically settled; and this is obviously somewhat ridiculous. But whatever may be the justification for the application of the concept of "official residence" in the case of executors and administrators, it is apparent that such a concept is unrealistic, unjust and unworkable where the property is held by a testamentary trustee. Property of a testamentary trust should, therefore, be taxed like other trust property; namely, at the actual domicile of the trustee.

MULTIPLE TAXATION OF TRUST PROPERTY

But the most serious problem remains. Obviously the trustee has the legal title to the property of the trust, and upon such property he may be, and generally is, taxed. Just as truly the beneficiary has an interest in the trust property, which interest is more than a contract right; it is itself property. Can the trustee and the beneficiary both be taxed? They both have property, but if this is allowed, the same economic interest is


78 In Walla Walla v. Moore, supra, note 61.

79 Brown v. Fletcher, supra, note 5.
being subjected to more than one tax. While such economic
double taxation is being increasingly frowned on,\textsuperscript{80} it does not
yet appear to be fully done away with, and so it may be that
this sort of multiple taxation is legally justifiable. Morally justi-
ifiable it does not seem to be. The only reason that the intan-
gible property is subjected to such a heavy tax burden is that it
is held in trust, which seems no justification at all. Further-
more, the whole burden of such multiple taxation will fall upon
the beneficiary.\textsuperscript{81} He must pay the tax on his own interest, and
he must really bear the tax on the trustee's interest, since this is
obviously a proper charge in the execution of the trust, which
the trustee can and will make against the income otherwise pay-
able to the beneficiary. The trust device was, at least originally
and primarily, for the particular protection of the beneficiary;
the permitting of such multiple taxation would transform it
into an agency for burdening the helpless beneficiary more than
persons who are not beneficiaries of trusts and who, therefore,
supposedly do not need the same protection. Protection at the
price of multiple taxation obviously costs too much.

Yet it is hardly surprising that such multiple taxation
has been claimed and in many instances actually collected by a
number of our states, hard pressed, as all of them are, especially
in these times, for necessary revenue. The theoretical argument
is perfectly simple. The trustee has property and this property
is taxable at his domicile. The beneficiary also has property
(an equitable interest, it is true, but still property)\textsuperscript{82} which is
likewise taxable at his domicile. And finally the separate prop-
erty of the trustee and of the beneficiary are of equal value,
this value being the market value of the trust res. Nothing
could be simpler.

And until rather recently the power to impose such multi-
ple taxation, though no doubt recognized as somewhat unjust,
was not regarded as subject to serious attack. An outstanding
authority in this field wrote as recently as 1919:

\textsuperscript{80} See the cases cited in note 3, supra.
\textsuperscript{81} See note, State Power to Impose a Property Tax on the Interest
of a Beneficiary of a Trust, (1930) 30 Col. L. R. 539.
\textsuperscript{82} Brown v. Fletcher, supra, note 5.
"The power of the state of his residence to tax the beneficiary of a trust cannot be doubted."\(^8\)

This means multiple taxation, for there is not, and never was any doubt of the power of the state of his residence to tax the trustee. A similar statement appears in the latest edition of the leading text on taxation.\(^8\)

Perhaps something should be said, in the first place, as to the application to this problem of cases involving other than property taxation. They are frequently cited in cases involving the taxation of trust property, and we should, therefore, consider how far they are really entitled to be treated as authorities.

Probably inheritance tax cases are the most commonly cited in connection with property tax problems. There is a definite tendency, which has culminated in a number of recent decisions of the Federal Supreme Court,\(^8\) to wipe out multiple inheritance taxation. Nevertheless, there are a number of authorities, which are possibly still in good standing, to the effect that the beneficiaries of a non-resident trust must pay an inheritance tax even though the domicile of the settlor of the trust or of the trustee also collected such a tax.\(^8\) The Federal Supreme Court has also approved this doctrine,\(^8\) though it may perhaps be doubted whether the court would now adhere to this ruling, especially in view of the later case of *Wachovia Bank & Trust Co. v. Doughton*.\(^8\) In this last case a resident of Massachusetts gave property to a Massachusetts trustee for his daughter for life, then as she might appoint. The daughter lived in North Carolina and made the appointment by will in that state.

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\(^8\) See the cases cited in note 3, *supra*.

\(^8\) *In re Line's Estate*, *supra*, note 29; *In re Douglas County*, 84 Neb. 506, 121 N. W. 593 (1909); *In re Dillingham's Estate*, 196 Cal. 525, 238 Pac. 367 (1925). But see *Re Helena*, 236 Pa. 213, 84 Atl. 665 (1912), where this rule was approved, but a different result was reached, on the ground that the so-called trust was actually a mere agency.


\(^8\) 272 U. S. 507, 47 Sup. Ct. 202 (1926). Mr. Justice Holmes expressed a doubt whether this case could be distinguished from *Bullen v. Wisconsin*, *supra*, note 87.
It was held that North Carolina could not collect an inheritance tax on the passage of the trust property when the daughter died. The court, speaking by Mr. Justice McReynolds, said:

"We think the assets of the trust estate established by the will of Haynes had no situs, actual or constructive, in North Carolina. The exercise of the power of appointment was subject to the laws of Massachusetts and nothing relative thereto was done by permission of the State where Mrs. Taylor happened to have her domicile. No right exercised by the donee was conferred on her by North Carolina. A State may not subject to taxation things wholly beyond her jurisdiction or control."

However this problem may be finally decided, it is submitted that the authorities permitting a multiple inheritance tax in this situation do not necessarily justify a multiple property tax. For example, a settlor who creates a trust by conveying property to a non-resident trustee may still retain an interest which will justify the imposition of an inheritance tax by the state of his domicile upon his death, without justifying a multiple property tax during his life, and thereafter. This distinction is brought out in Lowry v. Los Angeles County, where a resident of California had, before his death, transferred securities to an Illinois trust company in trust for himself. On his death he bequeathed his interest in these securities partly to another resident of California, partly to residents of other states. It is held that the securities were subject to a California inheritance tax, but not to a property tax, as they were, of course, taxable in Illinois, and a double property tax, the court said, is not to be presumed.

Possibly, then, there is something still left of multiple inheritance taxation; but whatever this may be, it is not a decisive authority in favor of multiple property taxation, especially with regard to trust property; for the two kinds of taxation are distinctly different.

The somewhat dubious state of the validity of multiple inheritance taxation is not shared by similar income taxation. It is unquestionably valid for the state of residence of the beneficiary of a trust to compel that beneficiary to pay an income tax upon his receipts from the trust, irrespective of what sort of tax is or may be levied upon the trustee at his domicile. The

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*272 U. S. 575.*
*38 Cal. App. 153, 175 Pac. 702 (1918).*
*Harvard Trust Co. v. Commissioner, 187 N. E. 596 (Mass., 1933).*
Federal Supreme Court has so held in a decision which seems never to have been in any way departed from.

But income tax cases are in no sense authorities with regard to property tax problems. Income taxes, like inheritance taxes, are not property taxes (though they are often so referred to). They are not excise or personal taxes either; they are in fact sui generis. What can be done with an income tax, then, is hardly even an argument as to property taxes.

One state court, New Hampshire, has forbidden its executive authorities to levy a property tax upon a resident beneficiary of a non-resident trust, on the ground that this would be equivalent to imposing a property tax upon both a corporation and its stockholders. Such economic double taxation of a corporation and its stockholders may be illegal in New Hampshire, but it is, of course, legal practically everywhere else. But though this fails in most jurisdictions as an effective argument against multiple taxation of trust property, neither is it reasonably to be regarded as an argument in favor of it.

The result is that authorities as to these other forms of taxation have little, and in most cases, no bearing upon the precise problem here presented. Conceding that the inheritance tax cases permitting multiple taxation in this sort of situation are still in good standing (which is extremely doubtful) they have only a very indirect bearing upon the property tax problem; and the income tax cases and cases approving the taxation of both a corporation and its stockholders have no bearing whatsoever.

The Massachusetts case of Hunt v. Perry is probably the leading case directly in favor of the proposition that a state may validly impose a property tax upon the interest of a beneficiary in a trust, although the trustee is a resident of another

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93 Maguire v. Trefry, supra, note 92.
94 See Brown, op. cit., note 1, supra.
95 Berry v. Windham, 59 N. H. 288 (1879).
96 See Farrington v. Tennessee, 95 U. S. 679 (1877), where the court says at p. 687, "The capital stock and the shares [of a corporation] may both be taxed, and it is not double taxation."
97 165 Mass. 287, 43 N. E. 103 (1896). This case is followed in Harvard Trust Co. v. Commissioner, supra, note 91.
state and is taxed by the state of his residence upon the trust property. The court takes the position that the beneficiary has property where he is a resident, and the fact that it may be taxed elsewhere is wholly immaterial. The argument of the court is well summarized in the following excerpt from the opinion:

"The defendants contend that the statute, if such is its true construction, is unconstitutional. This argument rests on the ground that the property is situated out of the state; that the beneficial interests of a cestui que trust is nowhere else made taxable; and that this statute selects for taxation a kind of interest not otherwise taxable, and so imposes a tax which is disproportionate. This argument, however, is met by the suggestions already made that the cestui que trust is here, and his ownership or title is here, namely, the right to the income of the trust fund. The fact that the corpus of the trust fund is held by trustees who live elsewhere, and who hold under a will proved and allowed elsewhere, does not take away the power of the legislature to subject the interests of the cestuis que trustent to taxation here, if they live here. There is no more reason for holding this to be beyond the power of the legislature than there would be for holding the taxation of cattle and sheep, of manufactured goods, or of shares in corporations, untaxable here, because situated out of the state."\(^91\)

Another state which has even more clearly and emphatically asserted its power to tax the beneficiary of a trust on his interest is Virginia. The Supreme Court of this state has decided several cases on this point,\(^99\) and in all of them this position was clearly taken. The latest of these cases, Trust Co. of Norfolk v. Commonwealth,\(^100\) has an elaborate argument; but this case need not be here considered at length, since it was carried to the Federal Supreme Court; and the decision of that court\(^103\) will be summarized later.

Another elaborate and careful opinion to the same effect as to the power of the state of the beneficiary's residence is the Vermont case of St. Albans v. Avery.\(^102\) Here, too, the court considered the constitutional problem, but sustained the valid-
ity of such a tax under the Fourteenth Amendment of the Federal Constitution, relying particularly upon Hunt v. Perry. The following language of the court gives, perhaps, the gist of its argument:

"In the instant case the beneficiaries are the equitable owners, indeed, they are the substantial owners, of the trust fund. They have the power to control, absolutely, the character of the securities comprising the fund, and to terminate the trust at will. They actually owned these securities yesterday, so to speak, and may tomorrow, if they so elect; and the entire income, less the trustee's commission for executing the trust, belongs to them. To say that, possessed of the interest and rights which they have under this arrangement, they have no 'property', that they are not 'worth anything', is absurd."

The Federal Supreme Court declined to review this decision, when an attempt was made to attack it under the Fourteenth Amendment.

There are a number of decisions in other states claiming the same power. Thus such a tax has been sustained in Maryland, Maine, Kentucky, Ohio, Pennsylvania, New Hampshire, and Nebraska.

But as already intimated, such a holding involves a distinct constitutional question. It has been, and may at least be reasonably contended, that such taxation, which is multiple in substance though not in form, and is certainly economically undesirable, may constitute a deprivation of property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution. The mere fact that the Federal Supreme Court has declined to pass upon any particular case of this sort is not necessarily a binding authority; but there are

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29 Supra, note 97.
30 114 Atl. 34 (1921). It will be noted that this language indicates that the beneficiaries could put an end to the trust at their own discretion.
33 See Augusta v. Kimball, supra, note 9.
35 See Tafel v. Lewis, 76 Oh. St. 122, 78 N. E. 1003 (1906).
36 See Lewis v. Chester, supra, note 73.
37 Crosby v. Charlestown, supra, note 69.
38 In re Douglas County, supra, note 86.
39 The excerpts from Hunt v. Perry (supra, note 98) and from St. Albans v. Avery (supra, note 104) both show that the taxpayer relied in part on an argument of this sort.
unquestionably some decisions of that court which give affirmative support to the asserted power of a state to tax the beneficiary upon his interest in the trust property.

One of these is *Bullen v. Wisconsin*\(^{114}\) where a testator resident in Wisconsin made a transfer in trust of certain securities to an Illinois trustee. Upon his death this transfer was held subject to the Wisconsin inheritance tax (mainly because the testator had reserved the income from the property) although Illinois had taxed the fund, "as it might."\(^{115}\) While this is not strictly in point, yet it has close relation to the property tax problem and may certainly be regarded as at least an inferential approval by the court of the validity of such multiple taxation.\(^{116}\)

Another case, which is still less in point, but has, with some slight justification, been cited by various state courts in asserting this power to tax the beneficiary's interest,\(^{117}\) is *Fidelity & Columbia Trust Co. v. Louisville*.\(^{118}\) Here it is held that a resident of Kentucky might be taxed in Kentucky on bank accounts in Missouri, though these bank accounts had also been taxed in Missouri on the theory that they had a "business situs" there. The opinion by Mr. Justice Holmes is rather brief but clearly states that multiple taxation is unobjectionable. If it is really unobjectionable, it certainly seems that it would be held likewise unobjectionable in the situation here presented.

On the other hand the authorities against multiple taxation of this sort, while rather less numerous, are of increasing weight. There seems to be practically unanimous agreement among students of the subject that such taxation is economically undesirable and unfair.\(^{119}\) Furthermore, a few state courts have definitely declined to permit the taxation of a resident beneficiary where the trustee is a resident of another state.

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\(^{111}\) *Supra*, note 87.

\(^{112}\) 240 U. S. 625 (1915).

\(^{113}\) Cf. as to the present standing of this case what is said about it in *Wachovia-Bank & Trust Co. v. Doughton*, *supra*, note 88.

\(^{114}\) Especially in *Bingham v. Commonwealth*, *supra*, note 108.

\(^{115}\) 245 U. S. 54, 38 Sup. Ct. 40 (1917).

At least three states, Florida, California, and Arkansas have quite definitely taken the position that such a tax would be illegal, or at least so undesirable as to be practically outside the power of the state legislature. And several other state courts which have, under certain circumstances, sustained such a tax, have nevertheless declared it illegal under other circumstances. Such are Massachusetts, Maryland, New Hampshire, and Pennsylvania. In most of these latter instances this result was reached because of a particular statute, or at least because the court felt that the legislature had not clearly evidenced the desire to impose this sort of multiple taxation. Nevertheless, the fact that these courts are not ready to construe a general taxing statute so as to impose such a tax is at least an implied admission that it is undesirable and, therefore, of somewhat dubious validity.

Furthermore, the Federal Supreme Court has in recent years taken a position which is distinctly hostile to the taxation by a state of the interest of a beneficiary in a non-resident trust. The first of these cases is Brook v. Norfolk. Here the plaintiff was a Virginia resident and had a life estate in a trust fund created in Maryland and held by a trustee in that state. The trust res consisted of intangible property. Virginia assumed to tax the plaintiff on her interest in the property, computing such interest at the entire value of the property. This tax was held to be invalid.

The case is not, however, a very conclusive authority. In the first place the precise nature of the tax is not entirely clear. It was apparently a property tax, but it is also said that the plaintiff had paid a tax to Virginia on what she "received." Furthermore, as has already been indicated, the very brief opinion by Mr. Justice Holmes is by no means clear. And finally—though in view of what has been said this does not seem very

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120 State v. Beardsley, supra, note 66.  
121 Lowry v. Los Angeles County, supra, note 90.  
122 Greene County v. Smith, supra, note 34.  
124 See Kinhart v. Howard, supra, note 11.  
125 Berry v. Windham, supra, note 95.  
127 See especially, Dorr v. Boston, supra, note 123.  
128 277 U. S. 1, 48 Sup. Ct. 422 (1928).
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important—the testator who created the trust seems to have been a resident of Maryland rather than of Virginia.129

A far more important authority is the decision, a year later, of Safe Deposit & Trust Co. v. Virginia.130 Here a father living in Virginia conveyed securities to a Maryland trust company in trust to be accumulated for his infant sons living in Virginia, until they respectively reached the age of twenty-five, then to be distributed to them or their issue if they had died. While the property was thus held, it was taxed by Maryland. Virginia also attempted to tax the full value of the securities, on the ground that this was a tax on the equitable interests of the infant beneficiaries, who were, as already stated, residents of Virginia.

The Virginia tax was held to be invalid as beyond the jurisdiction of that state. The position of the court is made clear by the following excerpts from the opinion by Mr. Justice McReynolds:

"Ordinarily this Court recognizes that the fiction of mobilia sequuntur personam may be applied in order to determine the situs of intangible personal property for taxation. Blodgett v. Silberman, 277 U. S. 1. But the general rule must yield to established fact of legal ownership, actual presence and control elsewhere, and ought not to be applied if so to do would result in inescapable and patent injustice, whether through double taxation or otherwise. State Board of Assessors v. Comptoir National d'Escompte, 191 U. S. 388, 404; Buck v. Beach, 206 U. S. 392, 408. Liverpool & L. & G. Ins. Co. v. Orleans Assessors, 221 U. S. 346, 354; Maguire v. Trefry, 253 U. S. 12, 17. Here, where the possessor of the legal title holds the securities in Maryland, thus giving them a permanent situs for lawful taxation there, and no person in Virginia has present right to their enjoyment or power to remove them, the fiction must be disregarded. It plainly conflicts with fact; the securities did not and could not follow any person domiciled in Virginia. Their actual situs is in Maryland and can not be changed by the cestuis que trustent.

The power of Virginia to lay a tax upon the fair value of any interest in the securities actually owned by one of her resident citizens is not now presented for consideration. See Maguire v. Trefry, supra."

The court thus took the position that the property was actually situated with the trustee in Maryland and could not be taxed again on the theory or fiction of a beneficial interest in the same property in Virginia. Yet it will be noted that the court

129 Trust Co. of Norfolk v. Commonwealth, supra, note 100, relied on this point to distinguish the case.
130 Supra, note 101, reversing Trust Co. of Norfolk v. Commonwealth, supra, note 100.
131 280 U. S. 92 (1929).
did not explicitly deny the power of Virginia to levy a tax upon the interest of the beneficiaries if the value of that interest were properly computed. This suggestion perhaps resulted from, but is at any rate made more explicit by, a concession to that effect in the argument by the taxpayers' counsel. It is further emphasized by the concurring opinion of Mr. Justice Stone, who says in part:

“If the question were here I should not be prepared to go so far as to say that the equitable rights in personam of the beneficiaries of the trust might not have been taxed at the place of their domicile quite as much as a debt secured by a mortgage on land in another jurisdiction, notwithstanding the fact that the land is also taxed at its situs. See Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 205; Bristol v. Washington County, 177 U. S. 132; Kirtland v. Hotchkiss, 100 U. S. 491; Savings Society v. Multnomah County, 169 U. S. 421, 431. In neither case, if the threat of double taxation were controlling, which under the decisions it is not, Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54, 58; Cream of Wheat Co. v. Grand Forks Co., 253 U. S. 325, 330; Citizens National Bank v. Durr, 257 U. S. 99, 109; cf. Swiss Oil Corporation v. Shanks, 273 U. S. 407, 413, would it seem that in any real sense is there double taxation, since the legal interests protected and taxed by the two taxing jurisdictions are different.”

Mr. Justice Stone then reaches his conclusion because he considers that the beneficial interests of the boys in Virginia were taxable but were not worth the total value of the securities since their interests were limited by the possibility of their dying before reaching the age of twenty-five. Mr. Justice McReynolds, as already shown, partially concedes the correctness of this view, though laying more stress upon the theory that Virginia was assuming to tax property outside its jurisdiction. And it must be added that Mr. Justice Holmes dissented from the opinion of the court, taking the position squarely that such multiple taxation to the full value of the property is entirely justifiable.

Safe Deposit & Trust Co. v. Virginia, then, is not a definite authority that the property of a beneficiary can never be taxed apart from the trustee. Nevertheless, it goes a long way toward a declaration that such taxation contravenes the Fourteenth Amendment to the Federal Constitution. In fact, there

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128 280 U. S. 85 (1929). “We do not now contend that the State of Virginia could not constitutionally tax whatever may be the value of the cestui’s interest.”

129 280 U. S. 96 (1929). Mr. Justice Brandeis concurred in this opinion.

13 Supra, note 101.
is no other way to rationalize Mr. Justice McReynolds's opinion, in which a majority of the court concurred. And furthermore, such an interpretation of the decision is the only one which is consonant with the present strong tendency of the court to do away with economic double taxation as between the states. From the standpoint of principle and of the authorities from the same court then, this interpretation of the decision seems both proper and desirable.

And it has been fully accepted by the Maryland Supreme Court, which was formerly a leader in the attempt to support the power of the state where a beneficiary of a trust was domiciled to tax him on his beneficial interest. In the very recent case of Baltimore v. Gibbs that court held that such a tax upon the interest of a Maryland beneficiary in funds held in trust for her in Pennsylvania would contravene the Federal Constitution. The court discussed various recent decisions of the Federal Supreme Court, especially Safe Deposit & Trust Co. v. Virginia, and indicated its acceptance of the theory that such decisions indicate a determination to do away entirely with such burdensome multiple taxation as between the states, in the following language:

"The state tax commission, in a reasoned opinion quoted by counsel in this case, although conceding the jurisdiction of the state of the situs to levy such a tax, inferred that double taxation of corpus of intangibles had never been held to violate the Fourteenth Amendment, and concluded that it could not be so held because of some consequences that could not be accepted, such as prevention of the taxation of mortgages of bonds held within the state and secured by property outside the state, or of shares of stock held by residents in foreign corporations the property of which is out of the state. But it is the understanding of this court that the Supreme Court has now definitely deduced from the Fourteenth Amendment what it has described as a

135 See the cases cited in note 3, supra. It will be noted that the court in Hunt v. Perry, supra, note 97, in the excerpt from the opinion cited in note 98, takes the position that such multiple taxation is justified by the power of a state to tax tangible personal property of a resident, though such property is permanently situated outside the taxing state. Unfortunately for this argument, it is now well settled that a state has no such power. Union Refrigerator Co. v. Kentucky, 199 U. S. 194, 26 Sup. Ct. 36 (1905). The same may be said, of course, as to the supposed power of a state to levy a tax upon the stock of domestic corporations held by non-residents. First National Bank of Boston v. Maine, supra, note 3.

136McCeney v. County Commissioners, supra, note 106. See also, Humbird v. State Tax Commission, supra, note 26.

137 171 Atl. 37 (Md., 1934).

138 Supra, note 101.
'rule of immunity from taxation by more than one state,' for intangibles as well as for tangibles. 'The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds of property, is broader than the applications thus far made of it.' First National Bank v. Maine, 284 U. S. 312, 326."

With reference to Safe Deposit & Trust Co. v. Virginia, the court said:

"Taking the tax, then, to be one on the principal of the property, or on part of the total of rights which constitute the property, it seems to differ from the tax levied on the whole corpus which in Safe Deposit & Trust Co. v. Virginia was held unconstitutional only as a part differs from the whole. No legal distinction can be drawn, we think, between taxing the whole corpus because of the benefit received by the resident from it, and taxing so much of it as represents her share in it upon a capitalization of her income. The whole value, including every part of the rights in it, is taxed at the site, and taxation in Maryland on the basis of a share in the principal would seem to be double taxation. For these reasons the court is of opinion, as stated, that the present tax is unconstitutional."

For the reasons already stated at length, it is submitted that this interpretation of the Safe Deposit & Trust Co. case is the correct one. The Maryland court seems to be justified in its conclusion that the wavering suggestions of the Federal Supreme Court in that case as to a possible right to tax the beneficiary's interest were really merely put in out of abundant caution, and that the court must and will decide, when the question is squarely presented, that the states have no such power to any extent whatever. When the Supreme Court has gone so far to invalidate multiple taxation of other sorts, some of which is economically and otherwise much more easily defendable, it is certainly not to be expected that it will hesitate to do away with this more outrageous and indeed wholly indefensible form.

**Conclusion**

It appears then that the normal method of taxing intangible trust property—and there is, of course, little question with respect to tangible property—is to tax it to the trustee at his domicile. If there are two or more trustees residing in different jurisdictions, the value of the property should normally be apportioned between such trustees for this purpose. Various

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215 171 Atl. 38-9 (1934).
20 171 Atl. 40 (1934).
21 It is criticized, however, in (1934) 47 Harv. L. R. 1224.
other suggestions have been made, and are supported by some authority, for varying this rule in peculiar instances. However, an examination of these suggestions indicates that, whatever their theoretical validity, they are apt to be difficult to operate, and at any rate are not as convenient as the regular method of taxing the property to the trustee.

As to the suggestion that the beneficiary should also be taxed at his domicile on his interest in such trust property, it may be confidently asserted that such tax would be extremely burdensome and unjust. Furthermore, it is believed to be a necessary consequence of the decision of a number of recent Federal Supreme Court cases involving such multiple taxation between the states, and especially of *Safe Deposit & Trust Co. v. Virginia,*¹⁴ that such multiple taxation is in violation of the Fourteenth Amendment of the Federal Constitution, as depriving the beneficiary of his property without due process of law. Such a result is sound and desirable; for such a burden is unreasonable. It follows that the sound rule is that intangible property held in trust is to be taxed to the trustee at his domicile and is not to be taxed again to the beneficiary or otherwise.

¹⁴*Supra,* note 101.