Michigan Law Review

Volume 40 | Issue 6

1942

THE PRESENT STATUS OF MULTIPLE TAXATION OF INTANGIBLE PROPERTY

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THE decision by the Supreme Court in 1932 of the case of *First National Bank of Boston v. Maine*[1] represented the culmination of a fairly brief but apparently decisive effort by that Court substantially to do away with the taxation of intangible property by more than one state. Successive decisions[2] within the three years previous had sought to do away with such taxation of debts (no matter how evidenced) by more than one state; and *First National Bank v. Maine* laid down the same rule for corporate stock.[3]

However, developments since that time have substantially changed the situation with regard to this matter. We are now by no means so sure that such multiple taxation of intangibles is given up. In fact we are reasonably sure that it is not prohibited in some circumstances. It is the purpose of this paper to inquire what is the present situation with regard to the multiple taxation of intangibles, and perhaps to speculate as to how this matter is likely to develop in the immediate future.

THE SITUATION IN 1932

First National Bank v. Maine and its immediate predecessors[4] had not only disapproved the taxation of any intangible by more than one state, but had also laid down rules for determining which state was to have the right to tax. While, as will appear shortly, there was some variation in particular circumstances, the general rule was that the state of domicile of the creditor of a chose in action or the owner of any other form of intangible was the state which alone was entitled to impose a tax upon it.

The ruling that the state of domicile of the creditor or owner is

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[1] 284 U. S. 312, 52 S. Ct. 174 (1932).

[2] Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 S. Ct. 98 (1930); Baldwin v. Missouri, 281 U. S. 586, 50 S. Ct. 436 (1930); Beidler v. South Carolina Tax Commission, 282 U. S. 1, 51 S. Ct. 54 (1930).

[3] See Brown, "Multiple Taxation by the States—What is Left of It?" 48 HARV. L. REV. 407 (1935). Cf. Merrill, "Jurisdiction to Tax—Another Word," 44 YALE L. J. 582 (1935).

[4] See cases cited in notes 1 and 2, supra.

entitled to impose a tax upon the intangible represents no substantial departure from much older decisions of the Court; [5] but the ruling that that state alone had power to tax was not so well grounded in precedent.[6] To be sure, the Court had many years before this time determined that only one state ordinarily had the power to impose a tax upon tangible property.[7] That state, however, is not necessarily that of the domicile of the owner; it is rather that of the permanent and actual situs of the chattel. Where the chattel is a stock-in-trade of movable units, like railway cars passing through various states, each state may tax, but only on a proportionate basis,[8] so that at least theoretically the entire property is taxed but once.

The opinion in the first case[9] squarely laying down this rule as to tangible property expressly stated that its doctrine did not apply to intangible property. However, when, a quarter of a century later, the Court decided to apply this theory to intangibles, it was able to do so by using the same formula of taxing the property at its assumed situs. By employing the ancient maxim "*mobilia sequuntur personam*," the Court determined that the situs of intangibles is at the domicile of the owner. But of course this maxim is a pure fiction, and any real situs of intangibles (or at least most intangibles) is just as purely imaginative. The truth is that these decisions are mere reflections of the determination of the Court to restrict the taxation of intangibles to one state, and that one the state of the domicile of the owner, not as a matter of logic or physical reality, but solely as a matter of policy; and this was very frankly admitted and even urged by Justice Sutherland, speaking for the majority of the Court in *First National Bank v. Maine.*[10]

A word should be said at this point with respect to the difference

[5] Kirtland v. Hotchkiss, 100 U. S. 491 (1879) (debt may be taxed by state of domicile of the creditor); Hawley v. Malden, 232 U. S. 1, 34 S. Ct. 201 (1914) (stock of a foreign corporation may be taxed at the domicile of the stockholder).

[6] See, e.g., Corry v. Baltimore, 196 U. S. 466, 25 S. Ct. 297 (1905), holding that stock of a domestic corporation may be subjected to a property tax, even though the stockholder is a nonresident of the taxing state.

[7] Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 S. Ct. 36 (1905). See also Frick v. Pennsylvania, 268 U. S. 473, 45 S. Ct. 603 (1925).

[8] Johnson Oil Refining Co. v. Oklahoma ex rel. Mitchell, 290 U. S. 158, 54 S. Ct. 152 (1933). If the chattel has no permanent situs, the state of domicile of the owner is, as a matter of policy, permitted to tax it. New York ex rel. New York Central & H. R. R. v. Miller, 202 U. S. 584, 26 S. Ct. 714 (1906).

[9] Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 S. Ct. 36 (1905).

[10] 284 U. S. 312, 52 S. Ct. 174 (1932).

for this purpose between tangible and intangible property. If one looks at common understanding and ordinary business language—and there is good reason for doing so with respect to the very practical problem of taxation—it seems that instruments for the payment of money, and especially corporate bonds, might well be regarded as tangible property.[11] The same is true of bank accounts. But the Court seems definitely to have repudiated this view, taking the position that such documents are mere evidences of indebtedness, not the property itself, and that bank accounts are likewise mere debts rather than property.[12] The Court has thus insisted in this particular upon the purely legalistic rather than the practical point of view. However, money itself is to be treated as tangible property.[13]

The foregoing discussion has assumed that only the property tax is involved in this problem. However, the Court had already clearly indicated that the same principles govern jurisdiction for the imposition of state inheritance and other death taxes.[14] It is true that death taxes are not taxes upon property, but are rather excise taxes upon the transfer of property by death. But the position of the Court was that transfers of only such property as is within the taxing jurisdiction of the state may be subjected to death taxes by the same state. While this proposition has been subjected to criticism from a theoretical standpoint,[15] it seems rational and also quite reasonable in its actual operation. It is true that death taxes are not recurrent, as are property taxes; but they are imposed at very heavy rates, so that multiple death taxes may be ruinous when they are incurred. At any rate the Court expressly reiterated this proposition in the cases decided at this very period, which were avowedly intended to do away with multiple property taxes upon intangibles.[16] As a matter of fact, all of these cases actually involved state inheritance taxes.

Nevertheless, there were certain situations where, even in 1932,

[11] But cf. Lowndes, "Bases of Jurisdiction in State Taxation of Inheritances and Property," 29 MICH. L. REV. 850 (1931).

[12] Blodgett v. Silberman, 277 U. S. 1, 48 S. Ct. (1928). See also Buck v. Beach, 206 U. S. 392, 27 S. Ct. 712 (1907).

[13] Blodgett v. Silberman, 277 U. S. 1, 48 S. Ct. 410 (1928). Cf. Pearson v. McGraw, 308 U. S. 313, 60 S. Ct. 211 (1939).

[14] Frick v. Pennsylvania, 268 U. S. 473, 45 S. Ct. 603 (1925). The decision of Bullen v. Wisconsin, 240 U. S. 625, 36 S. Ct. 473 (1916), is a somewhat doubtful authority to the contrary, but if so must be deemed overruled on this point by the clear decision in the Frick case.

[15] See Lowndes, "Bases of Jurisdiction in State Taxation of Inheritances and Property," 29 MICH. L. REV. 850 (1931).

[16] See cases cited in notes 1 and 2, supra.

one could not be sure that multiple tax burdens with respect to intangibles had been entirely wiped out by these decisions. Most of these problems will require more complete discussion in the light of developments since that date; but they should be listed here to show the points which the Court has been able to seize upon to reverse its previous rulings in large part, without in most instances avowedly doing so.

The first of these is the separate taxation of a corporation and its stock. This is not multiple taxation, since it is, or may be, imposed by the same jurisdiction. Furthermore, the two taxes are not technically upon the same property; in the one case the tax is upon the corporate property and payable by the corporation, in the other it is upon the stock and payable by the stockholder. But since corporation taxes are ultimately a charge against the stockholders, there is an economic double burden.

But it was settled before 1932, and remains settled now, that this double burden is not unconstitutional, and the resident stockholders may be taxed upon their stock.[17] Indeed it may be forcibly argued that there is not even economic unfairness, because of the special privilege which the state gives to do business in the corporate form. And it follows that a state may not impose a tax upon or with respect to stock of a foreign corporation owned by a nonresident merely because the corporation itself owns property in the state.[18] The property may be taxed by the state to the corporation, but the stockholder does not own any interest in the corporate property.

On the other hand, the state may, if it chooses, remove partially or completely this double economic burden by exempting from taxation the stock owned by residents when the corporate property is taxable.[19] There is no improper classification in imposing the tax upon the stock of foreign corporations not having property in the state and exempting from taxation stock of foreign corporations which have such property in the state. All such arrangements—or the refusal to make any concession whatever—are solely within the power of the state, so long at least as the distinctions made have some rational basis.

Whether the principle, or supposed principle, prohibiting multiple taxation of intangibles as between the states, applies to the United

[17] Hawley v. Malden, 232 U. S. 1, 34 S. Ct. 201 (1914). Cf. Corry v. Baltimore, 196 U. S. 466, 25 S. Ct. 297 (1905), extending the same rule to stock of a domestic corporation owned by nonresidents.

[18] Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69, 46 S. Ct. 256 (1926).

[19] Kidd v. Alabama, 188 U. S. 730, 23 S. Ct. 401 (1903); Klein v. Board of Tax Supervisors of Jefferson County, Kentucky, 282 U. S. 19, 51 S. Ct. 15 (1903).

States in relation to foreign countries might perhaps have been doubtful even in 1932, since that principle was now avowedly a matter of policy rather than based upon any technical (but necessarily fictional) situs. At any rate, the Court decided only a year later in *Burnet v. Brooks*[20] that this principle did not bind the United States. Here a British subject, a resident of Cuba, kept securities in the United States at the time of his death. It was held that these securities were properly a part of his gross estate for purposes of the federal estate tax. The Court took the position that the prohibition of multiple taxation by the states was not applicable to the United States because the latter is an international sovereign, and therefore free from these policy limitations, except as such limitations might be self-imposed, by treaty or otherwise.

Other points where in 1932 there might be considered to be the possibility of multiple taxation, and where there have been since that date important developments which must be further considered are (1) taxation of trusts (though here the indications, such as they were, were unfavorable to multiple taxation);[21] (2) taxation of intangibles under circumstances where they had acquired a so-called business or commercial situs separate from the domicile of their owner; and (3) state income taxation. But for all that, the scope of multiple taxes with respect to intangibles was in 1932 apparently so small as to be practically negligible. There were older authorities squarely supporting such multiple taxation; but the most important one of these, *Blackstone v. Miller*,[22] had already been squarely overruled.[23] Another important case,[24] which had sustained rather stringent multiple taxes, had not yet encountered a like fate, but the rather airy statement in the opinion in that case that "the Fourteenth Amendment does not prohibit double taxation" certainly could not be regarded as good law, when the Court had so recently and so repeatedly held that the Fourteenth Amendment does at times prohibit the kind of "double" taxation there under consideration—that which involves taxation by more than one state of the same property. Other decisions[25] upholding such multiple taxation

[20] 288 U. S. 378, 53 S. Ct. 457 (1933). See also De Ganay v. Lederer, 250 U. S. 376, 39 S. Ct. 524 (1919).

[21] See Brown, "The Taxation of Trust Property," 23 Ky. L. J. 403 (1935).

[22] 188 U. S. 189, 23 S. Ct. 277 (1903).

[23] By Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 S. Ct. 98 (1930).

[24] Cream of Wheat Co. v. County of Grand Forks, North Dakota, 253 U. S. 325, 40 S. Ct. 558 (1920) (quotation from p. 330 of 253 U. S.).

[25] Notably Bullen v. Wisconsin, 240 U. S. 625, 36 S. Ct. 473 (1916), and Fidelity & Columbia Trust Co. v. Louisville, Kentucky, 245 U. S. 54, 38 S. Ct. 40 (1917).

were naturally deemed to be overruled or at least substantially modified, and in this particular to have only a "historic interest."[26]

It now seems proper to consider the more recent developments.

MULTIPLE INCOME TAXES

The problem of multiple income taxes has been to some extent mingled, and indeed confused, with the problem of the nature of the income tax. There has been much argument, even in the Supreme Court, that an income tax is a property tax.[27] It cannot be denied that there may be a property tax measured by income from the property.[28] Undoubtedly this raises some difficulty in the matter of identifying and distinguishing taxes on income from property from taxes on the property itself. But usually a tax upon the property and imposed at ordinary property tax rates is a property tax, even though the value of the property is determined by capitalizing income; whereas a tax directly upon the income at special rates dependent upon the income itself, especially if income not derived from property is likewise taxed, is an income tax. At any rate, the property tax and the income tax are sharply distinguishable in both theory and practice.[29]

This distinction was apparently overlooked or misapplied in *Senior v. Braden*,[30] where the Court invalidated an Ohio tax upon the income from beneficial interests (represented by transferable certificates) in land partly[31] outside the state, on the theory that this was an attempt to tax the out-of-state land. But this case was substantially overruled only two years later by *New York ex rel. Cohn v. Graves*,[32] where it was held that a state could properly impose an income tax upon rentals received by a resident from land outside the state. Justice Stone, the present chief justice, who had written the dissenting opinion in *Senior v. Braden*, wrote the prevailing opinion in the *Cohn* case. In meeting the argument that the state income tax was essentially a tax upon the property from which the income was derived and therefore amounted

[26] Justice Sutherland in First National Bank of Boston v. Maine, 284 U. S. 312 at 322, 52 S. Ct. 174 (1932).

[27] Maguire v. Trefry, 253 U. S. 12, 40 S. Ct. 417 (1920). It should be noted that this case came up from Massachusetts, and the Court merely accepted the settled view in that commonwealth that an income tax is a property tax.

[28] Baltimore v. Gibbs, 166 Md. 364, 171 A. 37 (1934); Commonwealth v. Stewart, 338 Pa. 9, 12 A. (2d) 444 (1940).

[29] See Brown, "The Nature of the Income Tax," 17 MINN. L. REV. 127 (1933).

[30] 295 U. S. 422, 55 S. Ct. 800 (1935).

[31] Part of the land represented by the certificates was situated in Ohio. There seems no reasonable argument for denying the states power to tax as respects such property.

[32] 300 U. S. 308, 57 S. Ct. 466 (1937).

to a prohibited tax on out-of-state realty, he said with reference to the relation of income and property taxes:

> "Neither analysis of the two types of taxes, nor consideration of the bases upon which the power to impose them rests, supports the contention that a tax on income is a tax on the land which produces it. The incidence of a tax on income differs from that of a tax on property. Neither tax is dependent upon the possession by the taxpayer of the subject of the other. His income may be taxed, although he owns no property, and his property may be taxed although it produces no income. The two taxes are measured by different standards, the one by the amount of income received over a period of time, the other by the value of the property at a particular date. Income is taxed but once; the same property may be taxed recurrently. The tax on each is predicated upon different governmental benefits; the protection offered to the property in one state does not extend to the receipt and enjoyment of income from it in another."[33]

From this aspect of the matter there is no real problem of multiple taxation. Assuming, as generally happens, that the state where the property is located imposes a tax upon it, and that the state of the domicile of the recipient of the income from the property imposes a tax upon that income as a part of his total income, yet the two states are taxing on different bases. Conceivably there is a double economic burden, but that is no more objectionable than the undisputed power and frequent practice of imposing a property tax on land within the state and also taxing the resident owner on his income from that land.

On the other hand, we do sometimes have multiple state income taxes in the strict sense, if a state imposes a tax upon income derived by a nonresident from property or other sources within the state, and then the state of his residence imposes a tax upon his entire income, including that derived from the outside state which has already taxed it. It seems clear that the federal government has this power; that is, it may tax nonresidents of the United States upon income derived from United States sources even though such income may be taxable in the country of residence,[34] and it may tax United States citizens upon their entire income, irrespective of the fact that such income is derived from sources outside the United States, where it is subject to taxation by the jurisdiction whence derived.[35]

[33] 300 U. S. at 314.

[34] De Ganay v. Lederer, 250 U. S. 376, 39 S. Ct. 524 (1919). Cf. Maguire v. Trefry, 253 U. S. 12, 40 S. Ct. 417 (1920).

[35] Cook v. Tait, 265 U. S. 47, 44 S. Ct. 444 (1924).

Of course, this does not necessarily prove that the states have this power. But that they do, seems to be definitely proved by the decision of *Lawrence v. State Tax Commission of Mississippi*,[36] decided in this very year of 1932. This case held that a state may tax an individual domiciled there upon his entire income, even though such income is derived entirely from property or activities outside the state, and therefore subject to tax by the state from which it was derived.[37] Nor need the domiciliary state give any credit or other allowance for the tax imposed by the state of the source of the income. The Court has more recently indicated its adherence to this doctrine.[38]

The result is the possible and frequently actual taxation of the same income by two states.[39] While state income taxes are usually not imposed at very high rates, the income tax is an annual levy and the burden of at least two taxes is fairly serious. To obviate in part this burden, many states provide for credits or other allowances with respect to income taxes of other states upon the same income.[40] However, it seems clear that no such allowances are required by the Federal Constitution, and that it is accordingly merely a matter of grace, or perhaps good business judgment, of the states themselves. At any rate, the potential multiple burdens on intangible property are no greater than on tangibles; and neither is greater than the burden on income not derived from property.

MULTIPLE TAXATION THROUGH THE BUSINESS SITUS DOCTRINE OR THE LIKE

The doctrine that a state may tax credits owed to or owned by nonresidents but having a business or commercial situs within the state was well settled long prior to 1932.[41] Closely analogous is the decision of the Court permitting a state to impose a tax upon the good will of a foreign corporation doing business in the state (the value of the good

[36] 286 U. S. 276, 52 S. Ct. 556 (1932).

[37] See Shaffer v. Carter, 252 U. S. 37, 40 S. Ct. 221 (1920).

[38] New York ex rel. Cohn v. Graves, 300 U. S. 308, 57 S. Ct. 466 (1937), on another point from that with respect to which the case has already been cited.

[39] Conceivably more than two, in case of dispute as to the source of the income; but this would rarely happen.

[40] See an acute discussion of this matter by Keesling, "The Problem of Residence in State Taxation of Income," 29 CAL. L. REV. 706 (1941).

[41] The earliest clear statement of this principle was in New Orleans v. Stempel, 175 U. S. 309, 20 S. Ct. 110 (1899). However, it was anticipated at least as early as Tappan v. Merchants' National Bank, 19 Wall. (86 U. S.) 490 (1874). See Brown, "Multiple Taxation by the States—What is Left of It?" 48 HARV. L. REV. 407 (1935).

will within the state being apportioned according to the business).[42]

Such a doctrine is of course an exception to the general rule that credits and other intangible property are to be taxed only at the domicile of the creditor. The cases decided in the early 30's, which laid down this principle with such apparent inflexibility,[43] might therefore be considered to throw some doubt upon the whole business situs doctrine. That doubt was increased by the language of the Court, which in each of these cases expressly declined to pass upon the validity of the business situs doctrine, on the theory that it was not involved, although in at least one of them[44] the facts would seem to have presented a proper case for its application. In the last[45] of this series of cases the Court referred to the doctrine in the following rather discouraging language, "That question heretofore has been reserved, and it still is reserved to be disposed of when, *if ever*, it properly shall be presented for our consideration."[46]

But if the Court ever really felt the doubt as to the continued propriety of the business situs doctrine which its own language engendered, it abandoned such feeling and clearly rehabilitated the doctrine only four years later. This was the decision of *Wheeling Steel Corporation v. Fox*.[47] Here the plaintiff was a Delaware corporation, having its principal operating office, where all contracts had to be approved, in West Virginia. However, its chief plants were in Ohio. The bulk of its bank accounts were kept in West Virginia, though there were small ones in cities in Ohio where its plants were located, for the purpose of meeting payrolls and other current plant expenses, these bank accounts being subject to the supervision of the main office in West Virginia. It was held that the "commercial domicile"[48] of the corporation was in West Virginia, and that all its bank accounts (even including those in Ohio banks) were taxable in West Virginia. It must be conceded that the propriety of the business situs doctrine does not seem

[42] Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 17 S. Ct. 305 (1897). Cf. Blodgett v. Silberman, 277 U. S. 1, 48 S. Ct. 410 (1928).

[43] See cases cited in notes 1 and 2, supra.

[44] Beidler v. South Carolina Tax Commission, 282 U. S. 1, 51 S. Ct. 54 (1930).

[45] First National Bank of Boston v. Maine, 284 U. S. 312, 52 S. Ct. 174 (1932).

[46] 284 U. S. at 331 (italics supplied). But cf. Merrill, "Jurisdiction to Tax—Another Word," 44 YALE L. J. 582 (1935).

[47] 298 U. S. 193, 56 S. Ct. 773 (1936). See also Smith v. Ajax Pipe Line Co., (C. C. A. 8th, 1937) 87 F. (2d) 567, cert. denied sub nom. Ajax Pipe Line Co. v. Smith, 300 U. S. 677, 57 S. Ct. 670 (1937).

[48] This is the usual phrase now frequently used as the equivalent of the older "business situs." See the excellent discussion by Ramsey, "A New Theory of Corporate Domicile for Tax Purposes," 23 A. B. A. J. 543 (1927).

to have been argued by counsel; the sole dispute was with respect to its application. However, the unanimous decision of the Court in this case certainly does away with any question as to the present standing of the business situs doctrine, though, of course, not with all problems as to its proper application.

The most important question which still remains is that of multiple taxation. That is, assuming that the state of business situs has the power to tax the credits owing to a nonresident owner on this theory, may his domicile also tax such credits, on the usual theory that choses in action owed to a resident have their situs for taxation at the domicile of the creditor? If so, we have a clear case of multiple taxation.

Here we must consider briefly a problem which frequently arises in this connection, though it has its bearing also in other problems of multiple taxation of intangible property. This is the question whether the imposition of a tax by one state can have any bearing whatever upon the taxing jurisdiction of another state. It is often said, or assumed, that this question must be answered in the negative; that it is axiomatic that one state cannot restrict the power of another, nor need one state conform its taxing laws to that of another.[49]

As thus stated, this proposition does seem clearly correct; but it is particularly susceptible of misapplication. It is obviously true that a state cannot by imposing a tax upon that which it has no jurisdiction to tax affect the power of a state which has such jurisdiction.[50] On the other hand, it would seem equally clear that a state which has no jurisdiction to impose a certain tax cannot be given such jurisdiction by reason of the failure, whether deliberate or otherwise, of the state actually having jurisdiction to impose the tax.[51] But if the Court does determine that only one state shall have jurisdiction to impose a tax upon or with respect to intangible property, and has determined which state that is, it is thereby necessarily restricting the power of one state to tax by awarding the sole power to another. This might not be so if the decision was a matter of formal logic or geographic limitation, as is at least arguably the case with respect to tangible property; but the Court has frankly admitted that these decisions as to intangibles are matters of policy rather than logic. It is submitted that, whatever the Court has said, it has often limited the taxing power of one state in relation to that of another.

[49] Kidd v. Alabama, 188 U. S. 730, 23 S. Ct. 401 (1903); Bullen v. Wisconsin, 240 U. S. 625, 36 S. Ct. 473 (1916).

[50] Coe v. Errol, 116 U. S. 517, 6 S. Ct. 475 (1881).

[51] Blodgett v. Silberman, 277 U. S. 1, 48 S. Ct. 410 (1928).

Since the problem again becomes one of policy, it is pertinent to inquire whether the taxation of the same credit by two states, one on the theory of business situs, and the other on the basis of the domicile of the creditor, represents sound policy. It has been urged [52] that this is justifiable, on the ground that the taxation on the business situs theory is in fact an excise rather than a property tax, so that the property is really taxed but once. However, the Court has squarely decided that taxation of credits on the basis of business situs is a property and not an excise tax.[53] It is believed that this is sound, since the tax is normally imposed on the same basis and at the same rates as that on other property. Granting, as one must, that this is close to the somewhat shadowy line between property and excise taxes, yet it seems to fall on the property side.

The only other argument in favor of the fairness of both taxes seems to rest upon the "benefit theory"; [54] it is contended that since both states are assumed to give some protection with respect to these credits, both should be able to tax them. This benefit theory has had more application in other connections, which will be referred to hereafter; here it is sufficient to say that there does not seem to be any more justification for two taxes on this sort of property than on any other property. It therefore seems that the tax by more than one state is prima facie unjustifiable. Indeed, a number of state courts have held improper a tax by their state upon credits belonging to a resident when such credits were subject to tax in another jurisdiction under the business situs theory.[55]

It must be admitted that there are several federal Supreme Court decisions which clearly sustain a tax upon credits by two states in this

[52] See Lowndes, "Bases of Jurisdiction in State Taxation of Inheritances and Property," 29 MICH. L. REV. 850 (1931).

[53] Virginia v. Imperial Coal Sales Co., 293 U. S. 15, 55 S. Ct. 12 (1934). The decision thus upheld the tax, although it was assumed that it would be invalid as an excise tax because on interestate commerce. While excise taxes on interstate commerce are now held valid [McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388 (1940)], yet the doctrine of the Virginia case as to the nature of the business situs tax seems unaffected.

[54] See Merrill, "Jurisdiction to Tax—Another Word," 44 YALE L. J. 582 (1935).

[55] Miami Coal Co. v. Fox, 203 Ind. 99, 176 N. E. 11 (1931), is perhaps the leading authority on this point. In an annotation to that case in 79 A. L. R. 333 at 344 (1931), written the same year, the opinion is expressed that the taxation of intangible property having a business situs elsewhere by the jurisdiction of the domicile of the creditor would be unconstitutional. See also Commonwealth v. Madden's Executor, 265 Ky. 684, 97 S. W. (2d) 561 (1936). This case was affirmed on another point in Madden v. Kentucky, 309 U. S. 83, 60 S. Ct. 406 (1940).

situation. In perhaps the leading case on this point,[56] the Court seemed to confuse the property with the personal tax. Speaking by Justice Holmes, it said:

> "So far as the present decision is concerned we may concede without going into argument that the Missouri deposits could have been taxed in that State, under the decisions of this court. ... But liability to taxation in one State does not necessarily exclude liability in another. ... The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the State so chooses, may be measured more or less by reference to the riches of the person taxed. Unless it is declared unlawful by authority, we see nothing to hinder the State from taking a man's credits into account. But so far from being declared unlawful, it has been decided by this court that whether a State shall measure the contribution by the value of such credits and choses in action, not exempted by superior authority, is the State's affair, not to be interfered with by the United States, and therefore that a State may tax a man for a debt due from a resident of another State."[57]

At any rate, most of these cases[58] came before 1930, and one would suppose that they had been overruled or substantially modified by the decisions in that year and immediately thereafter. Furthermore, even in this earlier period, there was authority which, impliedly at least, tended to restrict the tax to but one state—that of business situs.[59]

More important are the subsequent decisions, especially *Wheeling Steel Corporation v. Fox*,[60] which has already been stated. It seems clear that this case is at least an implied authority that the sole taxing jurisdiction in this situation is in the state of business situs. Here the only controversy was between West Virginia, the state of business situs, and Ohio, where the plants were, since Delaware, the state of domicile of the corporate owner, was such only technically, and furthermore did not attempt to impose any tax upon these credits. However, the ques-

[56] Fidelity & Columbia Trust Co. v. Louisville, Kentucky, 245 U. S. 54, 38 S. Ct. 40 (1917). See also Cream of Wheat Co. v. County of Grand Forks, North Dakota, 253 U. S. 325, 40 S. Ct. 558 (1920).

[57] 245 U. S. at 58.

[58] New York ex rel. Cohn v. Graves, 300 U. S. 308, 57 S. Ct. 466 (1937), is a later decision sustaining multiple taxation on somewhat similar theories; but this is an income tax case.

[59] Buck v. Beach, 206 U. S. 392, 27 S. Ct. 712 (1907).

[60] 298 U. S. 193, 56 S. Ct. 773 (1936).

tion would have been closely analogous if West Virginia had sought to impose a tax upon all the bank accounts without making any allowance for the Ohio taxes upon the accounts in that state. The Court intimated that this could not be done; but the precise question was not presented, since it appeared that West Virginia would give the corporation a credit for the taxes on the bank accounts in Ohio imposed by that state. There have been subsequent, and even slightly more direct, intimations to the effect that multiple taxation is not allowable in this situation.[61]

So far a good argument could be made on both sides with respect to how the Court will finally solve this problem. This is still true, since the Court failed to answer the question, even when the problem was apparently directly presented, in *Newark Fire Ins. Co. v. State Board of Tax Appeals.*

Here the plaintiff was a New Jersey corporation, but had its principal business office in New York. The proper municipality in New Jersey sought to impose a property tax upon all its intangible property, upon the ground that these intangibles had a situs in New Jersey by reason of the domicile of the corporation there. When the case was presented to the New Jersey court,[62] it was conceded by the taxing authorities that these intangibles had a business situs in New York, and were therefore taxable there, though in fact, as a matter of policy, New York does not tax such intangibles owned by foreign corporations. The state court sustained the tax, arguing that the older Supreme Court cases permitting multiple taxation in the business situs situation[63] have not been overruled, and further pointing out that there was no multiple taxation in fact since New York did not tax these intangibles—a consideration which has already been shown to be rather beside the point.

When the case came before the federal Supreme Court,[64] that Court sustained the New Jersey tax by an eight to one vote.[65] Unfortunately, however, in the reasons given the majority of the Court was

[61] Smith v. Ajax Pipe Line Co., (C. C. A. 8th, 1937) 87 F. (2d) 567, cert. denied sub nom. Ajax Pipe Line Co. v. Smith, 300 U. S. 677, 57 S. Ct. 670 (1937); First Bank Stock Corp. v. Minnesota, 301 U. S. 234 at 241, 57 S. Ct. 677 (1937), where the Court said, "The considerations support the taxation of intangibles at the place of domicile, *at least where they are not shown to have acquired a business situs elsewhere. . . .*" (Italics supplied.)

[62] 118 N. J. L. 525, 193 A. 912 (1937).

[63] See cases cited in note 56, supra.

[64] 307 U. S. 313, 59 S. Ct. 918 (1939).

[65] Justice McReynolds dissented without opinion.

equally divided. Four of the justices, in an opinion written by Justice Reed,[66] took the position that there was no proof that the intangibles subjected to New Jersey tax actually had any business situs in New York at all,[67] and expressly declined to pass upon the question whether, if this had been shown, it would have affected the validity of the New Jersey tax. The other four members of the Court, speaking through Justice Frankfurter,[68] assumed that there was business situs in New York, but squarely held that this in no way affected the power of New Jersey to tax on the domicile basis. These justices conceded that multiple taxation was perhaps unwise, but were clear that the Federal Constitution does not interfere with it.[69]

And in this rather unsatisfactory position we have to stop, since there seem to be no further decisions on the point. Giving due regard to recent changes in personnel of the Court would lead one to expect it to sustain multiple taxation in this situation, however unjustifiable it might seem to be; but the point is not foreclosed.

MULTIPLE TAXATION OF TRUST PROPERTY

Here too the only substantial problem is with respect to intangible property. Tangible property held in trust is taxable, normally at its permanent situs, exactly like property not in trust; and the equitable interest of the beneficiaries, if regarded as taxable property, is incorporated in the res itself and is not separately taxed.[70] Of course, trusts of tangible and also of intangible property may be subjected to an income tax, and a further tax may be imposed upon the income received by a nonresident beneficiary in the state of his residence; [71] but this multiple income taxation is no worse than other situations of multiple income taxation, which it has been seen are sustainable.

The fundamental problem relates to property and death taxation on or with respect to intangible property held in trust; though, as will appear, the test of jurisdiction to impose these taxes may not be the same. It is clear that property taxes may be imposed at the state of domicile or place of business of the trustee. It is also arguable, and indeed logically sustainable, that the beneficiary has an equitable prop-

[66] Chief Justice Hughes, and Justices Butler and Roberts, concurring.

[67] This was partially due to the fact that the tax was not formally upon the credits, but rather upon capital and surplus.

[68] Justices Stone, Black and Douglas, concurring.

[69] See the language from this opinion cited in note 113, infra.

[70] See Brown, "The Taxation of Trust Property," 23 KY. L. J. 403 (1935).

[71] Maguire v. Trefry, 253 U. S. 12, 40 S. Ct. 417 (1920).

erty interest, which being itself intangible, is subject to property and inheritance taxes at his domicile. Therefore if the beneficiary's residence is different from that of the trustee, there will be two taxes. But since, as already demonstrated, this problem of jurisdiction to tax intangibles is basically one of policy, the double burden cannot be justified unless it is to be regarded as good policy to impose a heavier burden upon trust property than upon property not held in trust; and it is submitted that this is unjustified, particularly as the beneficiary can be prevented from escaping his fair share of the burdens of his own state by the imposition of an income tax. As was pointed out by the California Court of Appeals in a fairly early case[72] holding that corporate stock held by an Illinois trustee for a California beneficiary was not subject to property taxation in California,

> ". . . It seems very clear to us that the stock in the hands of the trustees is within the jurisdiction of the taxing power of the state of Illinois. And to hold that it may be assessed in California also, would be to subject it to double taxation, which is never favored unless clearly required by the statute of the particular state which claims that right."

In *Bullen v. Wisconsin*,[73] decided in 1916, the federal Supreme Court sustained an inheritance tax by Wisconsin upon the death of one of its residents who had transferred securities in trust in Illinois, and retained a life estate and power of appointment. The Court commented that "Illinois also has taxed the fund, as it might," apparently referring to Illinois property taxes.

On the other hand, the Court held several years later, in *Wachovia Bank & Trust Co. v. Doughton*,[74] that North Carolina could not impose an inheritance tax on the passing of property under a power of appointment held by a life beneficiary of a trust, who was a resident of that state. The trust was created under the will of the decedent's father, who died a resident of Massachusetts, and the trustee was a Massachusetts trust company. The theory of the Court was that this was a Massachusetts trust and the appointees took from the father and not from the decedent who had made the appointment by her will. Justice Holmes filed a separate opinion, which was not exactly a dissent but expressed doubt whether the result could be reconciled with the *Bullen* case.[75]

[72] Lowry v. Los Angeles County, 38 Cal. App. 158 at 164, 175 P. 702 (1918).

[73] 240 U. S. 625, 36 S. Ct. 473 (1916) (quotation from p. 631 of 240 U. S.).

[74] 272 U. S. 567, 47 S. Ct. 202 (1926).

[75] Justices Brandeis and Stone concurred with Justice Holmes. Cf. note 102, infra.

Curiously enough, Justice Holmes himself wrote the opinion in *Brooke v. Norfolk*,[76] where a Virginia resident who was a life beneficiary of a Maryland trust was held not subject to Virginia property tax upon his beneficial interest. The principal reliance was on the *Wachovia Bank* case. The opinion is very brief, and by no means lucid.

However in 1929 the property tax problem was squarely presented in *Safe Deposit & Trust Co. of Baltimore v. Virginia*.[77] Here intangible property was held in trust by a Maryland trustee for the benefit of two minors residing in Virginia. The income was to be accumulated for them and paid over when they or the survivor reached the age of twenty-five. Virginia attempted to impose the tax upon the basis of the entire value of the property, exactly as if the minors had been the sole owners of the property, and disregarding the fact that they were then receiving no income and would lose everything if they failed to attain the age of twenty-five.

The Court, speaking by Justice McReynolds, invalidated the Virginia tax, mainly on the ground that the property was solely taxable to the trustee in Maryland. The opinion laid some stress, however, upon the limitations and deferments of the beneficiaries' rights, and admitted that conceivably their equitable interests could be taxed in Virginia if such interests were properly appraised. Justice Stone submitted a concurring opinion emphasizing this point.[78] Justice Holmes alone dissented, though the case seems hard to distinguish from *Brooke v. Norfolk*,[79] in which he had written the opinion.

The problem of separate taxation of the beneficiary's interest, which had thus been left undecided by the federal Supreme Court, was squarely presented to the Supreme Court of Maryland in *Baltimore v. Gibbs*.[80] Here the city of Baltimore, Maryland, claimed a tax upon the equitable interest of one of its residents in a trust of intangibles held by a Pennsylvania trustee. The Maryland court invalidated this tax, citing *First National Bank v. Maine*[81] and its predecessors[82] as laying down the rule that there is to be but one property tax on intangibles, and *Safe Deposit & Trust Co. of Baltimore v. Virginia*[83] as showing

[76] 277 U. S. 27, 48 S. Ct. 422 (1928).
[77] 280 U. S. 83, 50 S. Ct. 59 (1929).
[78] Justice Brandeis concurred with Justice Stone.
[79] 277 U. S. 27, 48 S. Ct. 422 (1928).
[80] 166 Md. 364, 171 A. 37 (1934).
[81] 284 U. S. 312, 52 S. Ct. 174 (1932).
[82] Cases cited in note 2, supra.
[83] 280 U. S. 83, 50 S. Ct. 59 (1929).

that that tax is to be imposed by the state of the trustee. On this latter point it 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." [84]

The federal Supreme Court denied certiorari in this case.[85]

There seems to be much basis for the position of the Maryland court. Granting that the *Safe Deposit & Trust Co.* case left open the question of a possible tax upon the equitable interest,[86] the logic of its position, especially in view of its later decisions frowning upon multiple taxation, would seem to require but one tax, at the domicile of the trustee.

But this whole line of thought seemed to come to an end with two companion cases decided in 1939, *Curry v. McCanless*[87] and *Graves v. Elliott.*[88] In the *Curry* case the decedent, a resident of Tennessee, had before her death transferred certain securities to an Alabama trust company as trustee. She reserved a life estate, a power of appointment and the power to revoke, the last two powers not having been exercised when she died. Of course, the reservation of the life estate and of these powers was the reason why anything passed with respect to this trust from the settlor, so that an inheritance tax was due on her death. The Tennessee court held that that state had the sole power to impose an inheritance tax with respect to this trust property. On appeal, the Supreme Court by a five to four decision held that both Tennessee and Alabama could impose an inheritance tax measured by the full value of the property.

[84] 166 Md. at 372.
[85] 293 U. S. 559, 55 S. Ct. 71 (1934).
[86] See 47 HARV. L. REV. 1209 at 1224 (1934).
[87] 307 U. S. 357, 59 S. Ct. 900 (1939).
[88] 307 U. S. 383, 59 S. Ct. 913 (1939).

The majority opinion was written by Justice Stone. His general idea is that the decedent had voluntarily subjected the property to the taxing power of both states—an apparent application of the "benefit" theory already referred to.[89] *First National Bank v. Maine* was cited, but was held to be limited by several other cases, some decided before it was. It may be noted in passing that this decision not only affects *Safe Deposit & Trust Co. of Baltimore v. Virginia*,[90] but not improbably overrules *First National Bank v. Maine* and its predecessor cases. Justice Stone further cites *Burnet v. Brooks*,[91] and holds that its doctrine is just as applicable to the states as to the federal government—a complete contradiction of the theory upon which that case was decided, but offering further evidence of the probable reversal of the doctrine of a single taxing jurisdiction for intangibles.

The dissenting opinion was written by Justice Butler.[92] His position was that the property was taxable only in Alabama, the state of the trustee, and that Alabama alone could tax the transfer by death.

Graves v. Elliott,[93] the companion case, involved practically the same question, except that other states were involved (New York was the state of domicile of the decedent, and Colorado the state of the trustee). Here the line-up of the Court was exactly the same. Justice Stone again wrote the prevailing opinion, but here Chief Justice Hughes wrote the dissenting opinion, which, however, took the same position that the tax should be imposed only by the state of the trustee.

The Supreme Court of Pennsylvania in *Commonwealth v. Stewart*[94] relied upon these decisions in holding that Pennsylvania was entitled to impose a property tax upon the equitable interest of a resident in a New York trust of intangibles. The *Safe Deposit & Trust Co.* case[95] was distinguished on the ground that there the attempt of the state of the beneficiary was to impose the tax upon the full value of the property rather than upon the value of his interest; and the *Gibbs* case[96] was criticized but distinguished on like grounds. The federal

[89] See Merrill, "Jurisdiction to Tax—Another Word," 44 YALE L. J. 582 (1935).

[90] 280 U. S. 83, 50 S. Ct. 59 (1929).

[91] 288 U. S. 378, 53 S. Ct. 457 (1933).

[92] Chief Justice Hughes, and Justices McReynolds and Roberts, concurred in this opinion.

[93] 307 U. S. 383, 59 S. Ct. 913 (1939).

[94] 338 Pa. 9, 12 A. (2d) 444 (1940).

[95] Safe Deposit & Trust Co. of Baltimore v. Virginia, 280 U. S. 83, 50 S. Ct. 59 (1929).

[96] Baltimore v. Gibbs, 166 Md. 364, 171 A. 37 (1934), cert. denied 293 U. S. 559, 55 S. Ct. 71 (1934).

Supreme Court denied certiorari,[97] merely citing the *Curry* and *Graves* cases. The justices who had dissented in these cases and who were still members of the Court noted their dissent in this case also. From this decision we may probably conclude that both states can impose property taxes, as both can impose inheritance taxes, in this situation, providing, of course, that the settlor has reserved a life interest or sufficient powers of control or modification to justify the imposition of any inheritance tax upon his death.

The situation would seem to be that the Court is unanimous in its conclusion that the jurisdiction to impose property and inheritance taxes with respect to property held in trust under these circumstances is the same, and that all likewise agree that the state of the trustee has jurisdiction to impose both taxes. The majority feel that the state of domicile of the settlor has a like power to impose both taxes; the minority feel that they should be imposed only by the state of the trustee. The Court personnel has further changed since these decisions, but there seems no likelihood that the new judges will have a different point of view.

Nevertheless it seems worthwhile to inquire as to the soundness of these results. On this point the most helpful decision appears to be that of the Supreme Court of Minnesota in *In re Frank's Estate.*[98] Here the decedent, a resident of North Dakota, had created a trust of intangibles with a Minnesota trustee. He had reserved the income during his life, and also a power of revocation, which he did not exercise. On his death the equitable estate passed to his wife and daughter. There was no serious dispute that this transfer was subject to death taxes, because of the reservation of the income and of the power of revocation by the settlor, but the question was where?

On the first hearing of the case the court decided that the transfer by death was taxable in Minnesota, relying particularly upon the fact that property taxes had been paid to Minnesota without objection, and saying that the rule for property and inheritance taxes should be the same. But on rehearing, this decision was reversed, the court still conceding that the property was taxable in Minnesota but further holding that "the transfer thereof took place under the laws of North Dakota."

It is submitted that the Minnesota court has in its second opinion seized upon the precise point of the problem. In this situation the rules for property and inheritance taxes should not be the same, since the

[97] Sub nom. Stewart v. Commonwealth of Pennsylvania, 312 U. S. 649, 61 S. Ct. 445 (1941).

[98] 192 Minn. 151, 257 N. W. 330 (1934) (quotation infra from 192 Minn. at 162). See also Hackett v. Bankers Trust Co., 122 Conn. 107, 187 A. 653 (1936).

subject of the tax is different. For the property tax it is the legal title of the property, which is intangible and must be considered to be with the trustee; for the inheritance tax it is the equitable interest, which is also intangible but is owned by the settlor (whose death results in inheritance tax liability by reason of his reservation of income or control), and must therefore be regarded as situated for tax purposes at his domicile. It is clear that there is no inheritance from the trustee. In most of these cases the trustee is a corporation and does not die; even if he is an individual, he obviously passes nothing of value. So far as known, no attempt has ever been made to impose an inheritance tax with respect to trust property upon the death of the trustee; all these inheritance or other death tax controversies arise upon the death of a person (usually the settlor) having some beneficial interest in the property. As already pointed out, such a person's interest must be considered to be located at his domicile, and at least for inheritance tax purposes to be taxable only there.[99] It must be conceded that there is no very logical reason why the jurisdiction of the domicile of any person having a beneficial interest is not also entitled to impose property taxes during his life time upon such interest, if it is correctly valued; but this seems to be bad policy.

It is therefore the writer's opinion that the minority of the federal Supreme Court has taken the preferable position with respect to property taxes on intangible property held in trust; that is, that such property is taxable solely at the domicile of the trustee, not of the beneficiary. He also agrees with the minority that only one inheritance tax should be imposed upon the death of the settlor, if the latter has reserved rights in the income or control of the trust; but he is not in accordance with the view of the minority as to which state this is. It is believed that the solution of the Minnesota court in the *Frank* case is the correct one, and that the jurisdiction to impose an inheritance or other death tax should be confined to that of the domicile of the decedent settlor, the termination of whose reserved powers by his death constitutes the taxable transfer.

The majority of the Court has relieved itself of the necessity of analyzing these questions by holding that both jurisdictions can impose both taxes. It is submitted that this solution is not merely illogical but highly undesirable. No doubt it is commendable to protect state taxing power, particularly in these days when federal activities are greatly restricting it. But unless and to the extent that the states themselves

[99] The same distinction was made in Lowry v. Los Angeles County, 38 Cal. App. 158, 175 P. 702 (1918).

give up this power by reciprocal arrangements, the only result would be to force the formation of trusts in the same state as the residence of the settlor, and thus create something of a trade barrier. In any event it seems clear that this doctrine will not in the long run greatly increase state revenues.

MISCELLANEOUS PROBLEMS

Somewhat analogous to the trust cases but involving slightly different problems was the decision of *Pearson v. McGraw*.[100] Here the decedent was originally a resident of Illinois and used an Illinois trust company as his agent to collect principal and interest on his securities and to reinvest when necessary. He continued this arrangement when he moved to Oregon, so that the securities were all kept in Illinois. Shortly before his death, he directed the trust company to sell most of the securities and invest the proceeds in federal reserve notes. These notes were transferred to the company in irrevocable trust for certain of his relatives; but there was no dispute that the transfer was in contemplation of death. The trust company, as provided in the new trust agreement, used the notes to purchase securities. It was held that these securities were subject to inheritance tax in Oregon, the domicile of the decedent at his death. The majority of the Court, speaking by Justice Douglas, conceded that the federal reserve notes were tangible property, but held that their acquisition was only a step toward the intended transfer of intangible property in contemplation of death. The Court held therefore that to deny the power of Oregon to tax would be unfair, and merely on the basis of form. Justice Stone wrote a separate opinion to the effect that federal reserve notes are intangibles and so a gift of them in contemplation of death may be directly taxed on an inheritance tax basis by the state of the domicile of the decedent.[101]

This decision seems clearly correct, but the opinion of Justice Douglas seems preferable to that of Justice Stone. The federal reserve notes are certainly money in any practical sense, and should be regarded as tangible property. However, the transfer of them was merely for the purpose of acquiring securities, and this pure subterfuge should not be permitted to defeat an inheritance tax at the domicile.[102]

More troublesome are two recent decisions with regard to bank

[100] 308 U. S. 313, 60 S. Ct. 211 (1939).

[101] Justice Frankfurter announced his agreement with this reasoning, but also concurred with Justice Douglas. Justice McReynolds dissented.

[102] Wachovia Bank & Trust Co. v. Doughton, 272 U. S. 567, 47 S. Ct. 202 (1926), is subject to criticism as being decided on a similar merely technical distinction. However, it is probably overruled by such cases as Curry v. McCanless, 307 U. S. 357, 59 S. Ct. 900 (1939).

stocks. The first of these is *First Bank Stock Corporation v. Minnesota.*[103] Here the plaintiff, a Delaware corporation, had its office in Minnesota, and did practically all its business there. Its principal business was to hold bank stocks, but it assisted and supervised banks whose stock it held. It was held that the commercial domicile of the plaintiff was in Minnesota and the stocks of the banks were taxable there, the business situs doctrine applying to stocks as well as credits. The Court criticized the maxim "*mobilia sequuntur personam*" as stating a rule without disclosing any reasons, apparently forgetting the frank statement of Justice Sutherland[104] that the maxim represents a rule of policy, not technical rationalization.

Nevertheless the decision offers no serious difficulties, except for the fact that two states (North Dakota and Montana) were shown to tax the stock of banks of those states owned by the plaintiff. The Court declined to pass on the validity of these out-of-state taxes. It appeared, however, that they were imposed so that the bank stock taxes of these states should be equal to their taxes on national bank stock, and thus comply with the condition imposed by the federal statutes for any tax to be imposed upon the national bank stocks.[105] Since the National Banking Act permits states where national banks are organized to tax all the stock of such banks even though owned by nonresidents, and does not permit any other states to tax such stocks, and since the tax on national bank stocks cannot be heavier than that imposed upon competing capital,[106] there is much justification for the North Dakota and Montana taxes indirectly involved in this case. On the other hand, it might be argued that under such circumstances it would be a wiser policy to have correspondingly reduced the Minnesota taxes, by a credit or otherwise.

But this justification for multiple taxation in the case just discussed, such as it is, was not present in *Schuylkill Trust Company v. Pennsylvania,*[107] decided a year later. Here it was held that a Pennsylvania tax upon a stock of trust companies could be collected[108] with respect to stock held by nonresident stockholders as well as that held

[103] 301 U. S. 234, 57 S. Ct. 677 (1937).

[104] In First National Bank v. Maine, 284 U. S. 312, 52 S. Ct. 174 (1932).

[105] Cf. Tappan v. Merchants' National Bank, 19 Wall. (86 U. S.) 490 (1874).

[106] The present statute, 44 Stat. L. 223 (1926), 12 U. S. C. (1934), § 548, gives other options for state taxation of national banks; but where the option of taxing the stock is used, the same requirement that the tax shall not exceed that on competing moneyed capital still applies.

[107] 302 U. S. 506, 58 S. Ct. 295 (1938).

[108] Though collected from the company, the tax was charged proportionately against the stockholders and was concededly a property tax upon the stock.

by residents. *Corry v. Baltimore*[109] was cited by Justice Roberts, in delivering the unanimous opinion of the Court, as decisive, as indeed it is, if we ignore the substantial overruling of that case by *First National Bank v. Maine*.[110] Curiously enough, the latter case was not even cited by the Court, though it was by counsel. Here is additional evidence that *First National Bank v. Maine* and the cases immediately preceding it[111] are substantially overruled.

CONCLUSION

This examination of the present situation leads anyone who is opposed to multiple taxation of or with respect to intangibles to be very pessimistic. The decisions in the early 30's which the Court itself believed would substantially do away with multiple taxation have not merely been limited; they have apparently been substantially overruled. Probably there is no serious danger of immediate subjection of tangible property to multiple taxation; but intangibles are to be subjected to such taxation, so long at least as there is any possible basis for claiming that two or more states have some relation to the intangible in question. The following language from Justice Frankfurter[112] represents what seems clearly to be the prevailing opinion in the Court at present:

> "Wise tax policy is one thing; constitutional prohibition quite another. The task of devising means for distributing the burdens of taxation equitably has always challenged the wisdom of the wisest financial statesmen. Never has this been more true than today when wealth has so largely become the capitalization of expectancies derived from a complicated network of human relations. The adjustment of such relationships, with due regard to the promotion of enterprise and to the fiscal needs of different governments with which these relations are entwined, is peculiarly a phase of empirical legislation. It belongs to that range of the experimental activities of government which should not be constrained by rigid and artificial legal concepts. Especially important is it to abstain from intervention within the autonomous area of the legislative taxing power where there is no claim of encroachment by the states upon powers granted to the National Government. It is not for us to sit in judgment on attempts by the states

[109] 196 U. S. 466, 25 S. Ct. 297 (1905).
[110] 284 U. S. 312, 52 S. Ct. 174 (1932).
[111] Cited in note 2, supra.
[112] Newark Fire Insurance Co. v. State Board of Tax Appeals, 307 U. S. 313, 59 S. Ct. 918 (1939).

to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the Constitution our task is ended."[113]

As already pointed out, this language seems to draw a distinction without a difference. To be sure, it is not judicial wisdom to invalidate every tax which may be considered unwise. But it is submitted likewise not to be judicial wisdom to sustain every tax imposed by any state without the slightest economic or practical justification, merely because the Constitution does not definitely say that the particular state cannot impose the particular type of tax. No doubt the Court does not intend to go as far as this; but if it does not, it has to draw the line somewhere. It is the writer's opinion that the Court drew the line about correctly in the early 30's, and that its failure to adhere to this line is unfortunate.

The taxpayer is now confronted with the problem whether this ruinous multiple taxation can be avoided. Obviously this cannot be done completely. But so far as possible, it behooves the taxpayer to avoid doing business outside the state of his residence (or, if a corporation, the state where it is incorporated), so as to avoid multiple taxation on the business situs theory, at least except in so far as he can confine himself to states like Delaware which as a matter of policy do not impose tax burdens on property outside the state. He must likewise avoid, so far as reasonably possible, keeping his investments outside the state, and particularly he must confine his stock investments either to the stocks of corporations of his own domicile or to those of states which do not impose property taxes upon or death taxes with respect to stocks of their domestic corporations held by nonresidents. Finally, he must form any desired trusts of intangible property in his own state, and so far as possible avoid beneficial interest in nonresidents of the state.

Obviously these goals can never be completely reached; but in so far as they are, the only possible result will be further and substantial trade barriers between the different states of our country. It is submitted that a policy which leads to such trade barriers is something which we are reasonably entitled to call upon the courts not merely to stigmatize as unwise but within reasonable limits to invalidate.

It must however be admitted that these unfortunate results are not likely actually to happen. Probably what will rather occur is a further development of the matter already referred to—namely the extension of voluntary exemptions from such taxation by the various states. Many

[113] 307 U. S. at 323-324.

of our larger commercial states have already as a matter of policy exempted the investment interest of nonresidents actually or constructively within the state from the burdens of property and death taxes; and this development is apt to spread, aided possibly by agreements for reciprocal exemptions, which had considerable development before the early 30's, but then diminished, because the Supreme Court decisions of that period were considered to make them unnecessary.

Economic pressure will probably force most of the states, even those not primarily commercial, to fall into line on this. A few may hold out, but they will have very little business, corporate or otherwise. This will, after considerable trouble, expense and injustice, substantially end multiple taxation. But the protection of the taxing power of the states, in which the Supreme Court seems so much interested at present, will have evaporated into nothingness. The Supreme Court decisions of the early 30's were pure policy decisions; but they represented sound policy. The present decisions are just as truly policy decisions; and it is submitted that the policy is very questionable. Multiple taxation is burdensome and unsound; and whatever the Court does or fails to do, a free economic system is bound substantially to eliminate it.