The Taxation of Trust Intangibles

THE recent United States Supreme Court decisions in *Curry v. McCanless*[1] and *Graves v. Elliott*,[2] with respect to death taxes, and the recent Pennsylvania decisions in *Dorrance's Will*[3] and in *Griscom's Will*,[4] regarding the effect of separate domiciles of co-trustees on property taxation, have placed in positions of first importance questions which relate to the taxation of trust intangibles. In respect to the *ad valorem* taxation of stocks and bonds held in trust, there has appeared the danger of taxation by an improper jurisdiction and the observations which follow will be confined as closely as possible to this particular type of property taxation. Obviously, the consideration of this subject will touch upon the field of death taxes in respect to trust intangibles to a very great degree due to the scope of the recent Supreme Court decisions.

In order to maintain a logical continuity in the discussion of any basic theory of taxation, brief references to certain elementary concepts and principles must be made. For the purpose of emphasizing the importance of the trust relationship, which is the essence of the discussion which follows, clear-cut contrasts result from the distinctions appearing in the decision of the Supreme Court in the well-known case of *Hemphill v. Orloff*.[5] The Court contemplated the corporation, the natural person, the ordinary trust, and the business trust in ruling that, as a prerequisite to doing business in Michigan, a business trust formed in accordance with the provisions of a Massachusetts statute must nevertheless comply with the Michigan statute regulating the admission of foreign corporations to that state. In order to reach this conclusion, it was necessary to differentiate the business trust from the ordinary trust—the former as similar to the corporate personality, and the latter sufficiently dissimilar to place it in an entirely separate category.[6]

A few years after the Supreme Court made the above distinctions it again considered this type of concept and, as in *Hemphill v. Orloff*, again passed upon the question of whether or not a certain state of facts disclosed a trust within the definition of an "association," which

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1 (May 29, 1939) 59 Sup. Ct. 900, 83 L. ed. Adv. Ops. 865.

2 (May 29, 1939) 59 Sup. Ct. 913, 83 L. ed. Adv. Ops. 880.

3 (Pa. Jan. 3, 1939) 3 Atl. (2d) 682.

4 (Pa. Jan. 3, 1939) 3 Atl. (2d) 693.

5 (1928) 277 U. S. 537.

6 See 2 BOGERT, TRUSTS AND TRUSTEES (1935) 1004.

would warrant a treatment similar to that accorded corporations under the Federal Income Tax Act. In *A. A. Lewis & Co. v. Commissioner*,[7] the characteristics of the business trust and the ordinary trust were thus commented upon, by quoting from an equally recent decision, as follows:

" 'It implies the entering into a joint enterprise, and, as the applicable [departmental] regulation imports, an enterprise for the transaction of business. This is not the characteristic of an ordinary trust—whether created by will, deed, or declaration—by which particular property is conveyed to a trustee or is to be held by the settlor, on specified trusts, for the benefit of named or described persons. Such beneficiaries do not ordinarily, and as mere *cestuis que trustent*, plan a common effort or enter into a combination for the conduct of a business enterprise.' "[8]

Thus, in the Supreme Court's own terminology, the "ordinary trust" connotes the identical relationship that equity and good conscience brought into being centuries ago. The importance of this contrast between "business trust" and "ordinary trust" will appear later when considering the propriety of the application of the maxim *mobilia sequuntur personam* to the concept of the ordinary trust.

I

Certain text writers and commentators in the course of their discussions have made the statement that the trust relationship is a type of status which has certain qualities and characteristics which cannot be avoided by the parties and to which those desiring the use of the trust device must submit.[9] Thus, in discussing the distinctions between "contract" and "status," Professor Bogert makes the observation: "The creation of a trust is not merely the making of one form of a contract. It is the creation of a status, accompanied by the conveyance of . . . a property interest to the trustee. Duties are fastened on the trustee by operation of law."[10] It is necessary, however, that the term "status," as a synonym for "relationship" in respect to the ordinary trust, should be carefully distinguished from a second and more familiar type of status which is personal in its character and in which the interest of the state is demonstrated by the care

[7] (1937) 301 U.S. 385.

[8] *Ibid.* at 388, quoting from Morrissey v. Commissioner (1935) 296 U.S. 344, 356-357.

[9] 1 BOGERT, *op. cit. supra* note 6, at 72-73.

[10] *Ibid.* at 73. See also MINOR, CONFLICT OF LAWS (1901) c. 9; SALMOND and WINFIELD, LAW OF CONTRACTS (1927) 8-9.

with which the relationships of marriage, adoption, guardianship, and the like are created and protected by provisions of law.[11] This first-mentioned kind of status is just as definitely a part of our law and, although conceptual in character, is necessary in the law's development.[12]

Circumstances frequently present themselves where it is necessary for courts to consider abstractions for the very purpose of arriving at material conclusions. It is, therefore, surprising to find a certain hesitancy in pursuing this interesting status connotation further. After all, is it not a phenomenon in the law worthy of attention that an individual by the simple expedient of entering into an agreement with a trustee and transferring property to him thereunder should be creative to the extent of assuring the aid and protection of a court of equity in the enforcement of his wishes? No premium is paid for this privilege which is accorded the settlor under the laws of all jurisdictions which derive their jurisprudence from Anglo-Saxon sources. As a part of a common heritage, there has come to the settlor the privilege of the use of this abstract trust concept to provide a status which definitely differentiates the res in trust from other similar property held outside that relationship. It is but a short step to consider this privilege as one of material value; and the retained power of revocation of this trust relationship and the repossession of the trust res, as well as the power to make testamentary disposition thereof, are likewise valuable rights.[13] A careful consideration of the trust status will disclose that its greatest effects are centered upon the res itself and the peculiar characteristics of the

[11] See RESTATEMENT OF THE CONFLICT OF LAWS (Am. L. Inst. 1934) § 119, comment (c).

[12] Regarding a broader definition, Professor Beale has this to say: "The definition of status given in the restatement is applicable to one kind of status only, that kind considered in the restatement. But for completeness it is necessary to consider another kind of status less practically important in the Conflict of Laws but none the less real. A complete definition of status is that it is a personal quality or relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third persons and the state are concerned. . . . Status is a real institution of our law, and in spite of its incorporeal and conceptual character is an item in the development of the law and in its application by the courts. It is a creature of the law, and in that sense unreal and artificial; but it rests upon a factual basis of character or relation. Like title, to which it has a close resemblance, it is created of necessity to enable us to deal with and attach rights to certain facts of social importance. It is not a pure abstraction, nor is it real in a physical sense; but it is an existent legal quality of factual situation." 2 BEALE, CONFLICT OF LAWS (1935) § 119.1.

[13] Curry v. McCanless, *supra* note 1; Graves v. Elliott, *supra* note 2.

tenure of the trustee in relation thereto. Nor is there a requirement that the trust res must be a unit. It may be a unit, or it may be many items physically located in one place, or these parts may be widely separated. Each is none the less of the same trust status. Conceivably, a unit of the res might be physically located in each of the states of the Union and still the trust status, which is impressed upon each alike, would not be changed in any manner. The settlor created this status at the same time that he gave instructions to the trustee regarding the limitations of the latter's use of the res or any part thereof. These admonitions must be respected by third parties and this is nevertheless true whether the res is physically in one place or parts thereof are widely dispersed. In other words, wherever the res is, there also is the trust status or relationship.

The great majority of ordinary trusts do not present questions of the conflict of laws in respect to the *ad valorem* taxation of trust intangibles, since both trustee and the physical evidences of the res are usually located at the trustee's domicile. Furthermore, the rise of the corporate fiduciary, with its greatly restricted power to act as trustee in other states, has tended to further minimize controversies which might utilize this trust status as a helpful factor. However, there are frequently presented facts and circumstances involving ordinary trusts which make necessary the consideration of the conflicting laws of different taxing jurisdictions. In such cases, the trust status or relationship as an inseparable feature of the trust res is entitled to a controlling significance.

II

In the consideration of the trust entity, an inordinate importance is often placed upon the relationship between the trustee and the beneficiary; whereas, a factor of at least equal, or even greater, importance is the relationship of trustee and res. The existence of the res is a *sine qua non* of the existence of the trust itself and, in addition, the res has a unique standing before the law in that its actual use by the trustee is determined by the directions given by the settlor. Viewed another way, this status or relationship contemplates an impossibility of legal voluntary separation of the title of the res from the trustee except in the manner which the settlor has indicated. It is seen, therefore, that the res, by becoming subject to a trust relationship, immediately gathers unto itself the entire concept, the complete status which has been hereinbefore considered. If we accord to

it the importance to which it is entitled, the rights of both the trustee and the beneficiary might even be looked upon as rights which emanate from the endowment of the res with the status of the trust rather than the endowment of the trustee and beneficiary with rights in the res.

More than a decade ago there appeared in a law journal a scholarly article from the pen of one whose legal attitude was admittedly influenced by the Continental civil law,[14] and whose subject was the relationship which is here under discussion. Such observations might be expected to draw one's casual curiosity towards an anticipated discussion of the trust concept as characteristically representative of the common law in its Anglo-Saxon development, and as equally foreign to the civil law in its development in Roman antiquity. However upon examination of the observations of Lepaulle[15] quite the opposite appears, and we of the common law are given the rare opportunity of observing a keen analysis of one of our own ancient legal concepts by an inquiring mind and the making of a vigorous, and most successful, attempt to grasp the significance thereof. The writer himself alluded to a unique advantage which was his as an outsider, thus: "As Paul Claudel once put it: 'It is sometimes dangerous to listen to poets, but remember that, being in the moon, they are the only ones to see the earth as a whole!'"[16] His theory of the nature of the trust relationship is thus presented:

"We may be led in the right direction by recalling: 1. That all that is necessary for the existence of a trust is a *res* and an appropriation of that *res* to some aim; 2. That a trustee is not necessary for the existence of the trust, but becomes indispensable for its normal functioning. The rights and obligations of the trustee will vary according to only one thing, his mission. Such mission always consists in insuring that the *res* be properly appropriated to the aim to which it has been devoted, either by the settlor, by the court, or by operation of law. The rights that the trustee will have in each particular case depend on his obligations; they are tools given to him for the fulfillment of his duties, and such duties are determined by the appropriation to which the *res* has been devoted. Hence, it is apparent that: trustee, *cestui*, rights and obligations of either of them are only means for reaching an end and that no one of these means is in itself essential to the existence of the trust; that the essence of such legal institution can only be found in the *res* and its appropriation to some aim. Trusts appear to us,

[14] Pierre Georges Lepaulle, avocat à la cour de Paris, Licencié ès Lettres, University of Paris, 1913; Docteur en droit, S.J.D., Harvard University, 1922.

[15] *An Outsider's Viewpoint of the Nature of Trusts* (1928) 14 CORN. L. Q. 52.

[16] *Ibid.* at 53.

then, as a segregation of assets from the *patrimonium* of individuals, and a devotion of such assets to a certain function, a certain end. When property is held in trust, one knows how it is going to be used; its purpose, its *raison d'être* are determined; while, on the contrary, when property is subjected to private ownership, no one knows what is going to become of it. We may then formulate this first conclusion that *a trust is an appropriation of assets*; that some one will be in charge of such appropriation and that the whole world must respect it." [17]

Quite obviously, the trust res has here attained an eminence not heretofore accorded it under any theory.[18] The simplicity of the above explanation is indicative of the clearness of the concept itself.

It will be observed that nowhere in the statement of this self-styled viewpoint does its proponent refer to the rights of the trustee and beneficiary as rights *in rem*. On the contrary, there seems to be a marked preference for the consideration of the source of such rights as the res itself which has been subjected to the force of the trust relationship. By so refraining from using these descriptive terms which have for so long a period been availed of by courts and commentators, emphasis is assured in that place where the proper analysis of the concept places it; namely, upon the res subjected to the trust status.

A visualization of this status or relationship, as hereinabove urged, appears from the distinctions drawn by the late Mr. Justice Cardozo in his opinion in *Anderson v. Wilson*.[19] A New York testator directed his executor to sell and convert into personalty his residuary estate, the proceeds of which were to be thereafter divided for ultimate distribution to his five children. This residuary corpus was to be held in trust and the income distributed to those entitled thereto until all of the assets of the residue were advantageously liquidated, subject, however, to the discretion of the executors as to the time of liquidation. One of these assets, a commercial building, was sold at a considerable loss from inventory value, and, before distribution of the

[17] *Ibid.* at 55.

[18] Although the consideration of the significance of the situs of the evidence of the intangible at the instant when the settlor bestows upon it the status of a trust asset is not within the purview of this article, it is gratifying to observe the prime importance attached thereto by the courts in determining the "seat of the trust." In the leading case of Hutchison v. Ross (1933) 262 N. Y. 381, 187 N. E. 65, (1934) 89 A. L. R. 1007, *aff'g* Ross v. Ross (1931) 233 App. Div. 626, 253 N. Y. Supp. 871, it was held that the legality of a trust of securities in New York, made in Quebec by one domiciled there, was determined by the law of New York. See 2 BEALE, *op. cit. supra* note 12, § 294.

[19] (1933) 289 U. S. 20.

proceeds thereof, one beneficiary sought to claim one-fifth of this loss in his individual federal income tax return. The Supreme Court held to the contrary, however, and allowed the loss as one which should properly be reflected in the return of the trust itself. The Court made these significant remarks: "In so ruling we do not forget that the trust is an abstraction, and that the economic pinch is felt by men of flesh and blood. Even so, the law has seen fit to deal with this abstraction for income tax purposes as a separate existence, making its own return under the hand of the fiduciary and claiming and receiving its own appropriate deductions." [20] Here, then, the testator, by invoking the trust concept, exerted a force upon the res which not only firmly attached to it attributes which could be removed only in the manner dictated by the testator, but also acted through the res in bestowing upon both trustee and beneficiary definite rights which pertained thereto. The trust status did not operate directly upon the trustee and beneficiary for if there was no res, here the residue, then there was no trust. As the opinion points out, the beneficiaries had no interest in the res, but they did possess rights which pertained to the commercial building which a court of equity would readily recognize and enforce should the trustee fail to make that use of it which the testator intended. Thereafter, when the trustees liquidated the res by sale according to the directions of the testator, the trust relationship, acting through an entirely different res, now the proceeds, bestowed other and different rights upon both trustees and beneficiaries, the rights pertaining to the building as aforesaid having disappeared with its conveyance. These new rights were, therefore, received without abatement, as the Court stated, and in accordance with the instructions of the testator that these proceeds, and these proceeds alone, would eventually belong to them.

It is again worthy of note that there is a total absence of the use of the expression *in rem* in respect to the rights of the trustees and those of the beneficiaries. It is definitely inferred that Mr. Justice Cardozo did not desire to apply these *"in rem"* terms to the respective rights of trustees and beneficiaries so clearly dissimilar before and after the sale, because emanating from different trust properties at different times. After observing the analysis of the so-called "trust abstraction" which appears in the opinion of *Anderson v. Wilson*, and again recalling Lepaulle's observations[21] concerning the essen-

[20] *Ibid.* at 27.

[21] See text preceding note 17, *supra.*

tial elements of the trust concept, a remarkable similarity appears. Expressive of this similarity is the definition of the trust proposed as the final conclusion of Lepaulle's article as follows: "... an appropropriation of assets realized by means of a legal 'person' who is subjected to the obligation of taking all reasonable steps to realize such appropriation, and who has all the rights necessary to fulfill such obligation." [22]

Here, then, are the true distinctions: that the existence of the res is the *sine qua non* of the existence of the trust; that a characteristic of the concept of the trust is an action exerted upon an existing res; that this action bestows rights upon both trustee and beneficiary which rights pertain to the res but should not be properly described as *in rem*; that these rights are so closely associated with the res as to become part and parcel thereof, and to the extent that they can never properly be dissociated therefrom except in the manner indicated by the settlor; that where the physical evidence of the trust res or any part thereof is geographically situated, be it tangible or intangible, in that place is likewise situated the trust status or relationship. This, then, is the writer's thesis: that the political subdivision in which the stock and bond certificates evidencing the intangible trust res, or any portion thereof, are found to have a definite and established physical location is that taxing sovereignty which is exclusively entitled to the privilege of levying thereon an *ad valorem* personal property tax.

III

Generally, there is far less appreciation than there should be of the actual physical operations of the ordinary trust. When a settlor places his personal property, both tangible and intangible, with his trustee, he contemplates that there shall be set up immediately bookkeeping records showing the inventory or other book values of all of the trust assets, upon which records may be indicated proper increases or decreases thereof as the administration of the trust progresses. He will likewise expect that an income cash account will be established to reflect the collection of dividends, interest, rentals and the like, as well as a principal cash account. Furthermore, ledger sheets or cards descriptive of each particular asset and necessary data for the proper identification thereof are necessary. These records constitute the bases for any accounting that is desired and are

[22] Lepaulle, *op. cit. supra* note 15, at 57.

ordinarily physically located either at the domicile of the trustee or at his place of business. Likewise, at one or the other of these locations may usually be found what is generally referred to as the "seat of administration of the trust," or in its more abbreviated form simply the "seat of the trust." [23] At such place, questions relating to the trustee's duties, to the investments he may make, to the person to whom he must pay income or principal, to the interpretation of the terms of the instrument, to the place of periodic accountings, to the assignability of the interest of the beneficiary, to the power of his creditors to reach the res or income, and other questions of a similar nature are properly considered.[24] There, also, may usually be found the trust res. This is not necessarily so, for it may be in another jurisdiction or its component parts may be scattered over many jurisdictions. The most significant feature of the trust relationship is the res itself. The trust status or relationship, inseparable from the res, is located wherever the certificates and documents evidencing the intangible trust res, or any portion thereof, are physically located, subjected at all times, of course, to the terms and conditions of the trust indenture. For the purposes of *ad valorem* property taxation, the "situs of the trust relationship" is at the physical location of the res.[25]

The *raison d'être* of "status" as a mechanical term is, for the most part, the very existence of private and public international law. Were there no states in the Union or other different taxing sovereignties and if a trust were confined to the geographic limits of the nation, there would be no occasion to consider the trust concept as a status. In fact, there is no occasion to consider it at all if the trustee and the res are together at the seat of the trust. It does become material, however, where the items which make up this aggregate res are in

[23] The recent case of Dorrance's Will, *supra* note 3, has introduced a new term, "trust domicile," which apparently is used as a synonym for "seat of the trust."

[24] 2 BEALE, *op. cit. supra* note 12, §§ 292.1, 297.2. See also RESTATEMENT OF THE CONFLICT OF LAWS (Am. L. Inst. 1934) §§ 297-299.

[25] Although the use of the term "situs" in connection with the term "the trust relationship" is admittedly unusual, nevertheless, the significance of situs has been stressed by at least one well-known text writer in the course of searches for a rationale in the field of the conflict of laws. "If from the tangled skein of decisions upon this subject it can be said that a single certain conclusion may be drawn, after a careful and laborious analysis of the cases, I should select as that conclusion the fact that the great foundation and basic principle of private international law is SITUS. Find the situs of the particular act, circumstance, or subject under injuiry and you will know the law which should properly regulate its validity and effect. This proposition, it is true, is subject to exceptions, but the exceptions are quite clearly defined, and may in general be applied without great difficulty." MINOR, *op. cit. supra* note 10, at vii.

either states or political subdivisions where a physical presence may subject them to the taxing prerogative of such sovereignties. When the trustee, in the course of his administration, deposits a bond or certificate of stock evidencing the trust intangible in a state other than that of the seat of the trust, its presence within the geographical limits of that state is *qua* trust property and not simply as owned by a natural person.[26] In respect to this particular trust intangible, therefore, it may be said that at such place there is likewise present all of those rights of both trustee and beneficiary which touch or concern the trust relationship. In short, in that location is a situs of the trust. Whether or not it constitutes the only situs of that trust would obviously depend on whether there were other trust assets and their respective locations.

IV

In the consideration of the *ad valorem* taxation of the intangible trust res, the evidence of which is physically held in a taxing jurisdiction other than that of the seat of the trust, there is at once encountered the maxim *mobilia sequuntur personam*. It states that movables follow the person of the owner. The courts have seen fit to look upon the domicile of the owner as the significant place of taxation when this maxim is invoked.[27] It is quite definitely a fiction and not a statement of fact, nor even a presumption thereof. The assertion that its use for the purpose of convenience is a sufficient excuse for its existence may well be doubted. However, due respect must be

[26] It has already been observed that the concept of the ordinary trust is not an entity similar to that of a foreign corporation which may not carry on local business within another state without the latter's permission, either express or implied. Hemphill v. Orloff, *supra* note 5. After all, the individual trustee is nevertheless a citizen. When he places the whole or any part of the trust res in one or more states other than that of the seat of the trust, the state in question has neither power to disturb him nor any power whatsoever arbitrarily to exclude him in the first place. To do so would violate the provisions of Article IV, Section 2 of the Federal Constitution that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States"; and the provision of the Fourteenth Amendment, Section 1 that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." See Scott, *Jurisdiction Over Nonresidents Doing Business Within a State* (1919) 32 HARV. L. REV. 871, 884. That a state may not prohibit the trustee of an ordinary trust from acting within its borders was established many years prior to the holding of Hemphill v. Orloff. See Farmers' Loan & Trust Co. v. Chicago & A. Ry. (C. C. D. Ind. 1886) 27 Fed. 146; Shirk v. Lafayette (C. C. D. Ind. 1892) 52 Fed. 857; Roby v. Smith (1892) 131 Ind. 342, 30 N. E. 1093.

[27] See HARDING, DOUBLE TAXATION OF PROPERTY AND INCOME (1933) 108.

paid to its pronouncement since its very antiquity seems to have earned for it a permanent place in our law.[28]

This idea of intangibles being located for *ad valorem* taxation purposes at the domicile of the trustee-owner should not be made a premise and thus a direct basis for legal reasoning; yet, the extent to which the rules of taxation cling to the maxim is remarkable. One who inquires is fairly overwhelmed with the number of court opinions which are content to quote *mobilia sequuntur personam* and *stare decisis* in the same breath.[29] The practical effects of the application of this maxim in respect to the taxation of trust intangibles should be observed. A trustee, for example, whose domicile is in Massachusetts, decides to establish himself in California for a reason which is quite foreign to the interests of his trust; for instance, a growing personal preference for a more moderate climate. The invoking of the *mobilia* maxim thereupon causes the intangibles in some imaginary spirit to make the long trek westward. But they are not called upon to make any tedious effort in being so transported to their new home, for as soon as the trustee-owner has established his home-domicile in California immediately they make it theirs.[30] Their presence in the spirit is amply sufficient under the maxim to subject them to an *ad valorem* personal property tax there. Thus, the taxing authority of California is given the exclusive privilege of considering these uninvited and invisible guests as definite subjects of tax exaction. All the while, these same intangibles may have been quietly reposing in a lock box in Maine with legends emblazoned across their respective faces to the effect that their restless owner held them in

[28] See Blodgett v. Silberman (1928) 277 U.S. 1, 9.

[29] See the numerous cases cited by the following textwriters, and note their statements as here quoted:

"It has accordingly been held that a trustee of intangible property is taxable on it at his domicil although the property consist of securities which are kept outside the state, and although the beneficiaries be non-resident." 1 BEALE, *op. cit. supra* note 12, at 600.

". . . such property may and ordinarily will be assessed for taxation in the state in which the trustee is domiciled." 2 BOGERT, *op. cit. supra* note 6, at 841.

"Where the trust res consists of intangibles, the tax is imposed upon the trustee at his domicile, according to the decisions. This is logical since the trustee is the owner of the legal title, and imposition of a tax at the owner's domicile is the rule usually followed in such cases." GOODRICH, CONFLICT OF LAWS (1938) 111.

"If intangible it was customary to tax it to the trustee at his domicil, on the ground that he was the legal owner, and that the *mobilia* presumption applied." HARDING, *op. cit. supra* note 27, at 106.

[30] See Texas v. Florida (March 13, 1939) 59 Sup. Ct. 563, 571, 83 L. ed. Adv. Ops. 549, 558, citing RESTATEMENT OF THE CONFLICT OF LAWS (Am. L. Inst. 1934) § 13.

trust for a certain beneficiary pursuant to the terms of a certain trust indenture made with the settlor on a date certain. Such is the case law to which the courts seem determined to give lip service at least.[31]

Generally, this maxim is referred to as one of convenience, which is quite understandable in contemplation of the above application. Often there is the added intimation that, as a practical matter, the general objects of the particular personal property tax statute under consideration have been attained by its use and the tax gatherer thus aided by a sort of harmless rule of thumb.[32] Those who are impressed by the situation thus presented may, upon reflection, feel that the following of this convenient short-cut, which is usually taken by the courts to reach a conclusion of taxability, has been occasioned by attaching an improper significance to this *mobilia* fiction and that the controlling significance of the trust concept itself has been overlooked. This definite concept is unique in the law and its very features present an anomalous situation for the application of a fiction whose tenor is that the intangible trust res follows the trustee. If anything, the interests of the trustee, as has been observed, are so identified with the res that they may be said to follow it! It is here affirmatively asserted that the *mobilia* fiction is improper of application to intangibles which have been brought within the trust status.

A full one-third of a century ago, there was handed down by the Sixth Circuit Court of Appeals the decision in *Goodsite v. Lane*,[33] the facts of which are tersely explained in the first short paragraph of the opinion: "The question involved is whether personal property, consisting of stocks, bonds, etc., held in New York, on deposit with a bank and trust company, by a trustee appointed by a court of Connecticut, under the will of a resident of Connecticut, for the benefit of an heir and legatee residing in Connecticut, and which had never been brought into or invested in Ohio, was taxable in the latter state for the sole reason that such trustee was a resident of Ohio." It was held that the intangible trust res was not taxable in Ohio, which was the domicile of the trustee. The opinion quoted the generalization of the law in respect to jurisdiction to tax which was stated by Justice Field in the case of *State Tax on Foreign-held Bonds*[34] thus: "The power of taxation, however vast in its character and searching in its

[31] Welch v. Boston (1915) 221 Mass. 155, 161, 109 N. E. 174, 176.

[32] "But in respect of intangible property, the rule is still convenient and useful, if not always necessary; and it has been adhered to as peculiarly applicable to that class of property." First Nat. Bank v. Maine (1932) 284 U. S. 312, 329.

[33] (C. C. A. 6th, 1905) 139 Fed. 593.

[34] (1872) 82 U. S. (15 Wall.) 300, 319.

extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business." The Court then proceeded to apply these broad principles to the Ohio personal property tax statute as interpreted by the supreme court of that state, to the effect that intangible property was embraced within its provisions in respect to persons residing in the state, regardless of where such property may be situated. It finally concluded that "neither the trust estate nor the beneficiary, nor the trustee, in any proper sense, was within the jurisdiction of the state of Ohio."[35] This holding is a proper one and by applying the simple features of the taxing theory herein propounded—that the situs of the trust relationship gives jurisdiction to tax—to its facts, it is readily perceived that here the seat of the trust was in Connecticut; however, the situs of the trust—that is, where the stocks and bonds, the evidences of the intangible trust res, were physically located—was in New York and the domicile of the trustee was in Ohio. The opinion speaks of other considerations, such as the domicile of the beneficiary and the administration of the trust; however, the clear facts of the case definitely narrow the decision to the proposition that the *mobilia* fiction was not recognized.

In 1929 there was handed down what appears to be the only decision of the Supreme Court bearing directly upon the *ad valorem* property taxation of trust intangibles. *Safe Deposit & Trust Co. v. Virginia*[36] is considered to have quite definitely weakened the fiction of the maxim *mobilia sequuntur personam* which was referred to in the opinion as "intended for convenience, and not to be controlling where jurisdiction does not demand it." The case did not involve, as is frequently thought, a question of double taxation[37] but the simple one of an attempted exercise of jurisdiction to tax by an improper sovereignty. The authority for the Court's conclusion might well have been the quotation from *State Tax on Foreign-held Bonds,* which appeared in the opinion of *Goodsite v. Lane,* since the only actual holding of the case was that the intangible trust res, consisting of stocks and bonds held and administered by the trustee in the state of its domicile, could not be subjected to a property tax at the domicile of the beneficiary in another state. However, this decision will

[35] Goodsite v. Lane, *supra* note 33, at 595.

[36] (1929) 280 U. S. 83, 93.

[37] The expression "double taxation," although one of general usage, should properly be confined to the tax exactions of a single state or taxing district. 2 COOLEY, TAXATION (4th ed. 1924) *passim.* The reason for this preference in terminology becomes apparent upon considering the mechanics of operation under the usual personal property taxing statute.

undoubtedly attain an added significance as the law in respect to trust taxation progresses for the reason that there is here a recognition, although unexpressed as such, of the trust concept as being sufficiently definite to warrant its position in the law as a status or relationship.[38] The simple facts of the case may be readily analyzed as showing a holding by a trustee at the seat of the trust of the evidences of the intangible trust res and, insofar as an *ad valorem* property tax is concerned, a separate consideration of the situs of the trust becomes unnecessary since it is identical with that of the seat of the trust.

For a decade prior to May 29, 1939, the Supreme Court had not informed us further in respect to the many problems of trust taxation. On that date, however, it handed down its decisions in *Curry v. McCanless*[39] and *Graves v. Elliott*,[40] both being death tax cases which did not directly contemplate the *ad valorem* taxation of trust intangibles. Strictly speaking, these decisions are not in point to the subject under discussion; however, both stressed the trust relationship and the observations of the Court on the general field of taxation of intangibles are so informative that they warrant a careful scrutiny. In *Curry v. McCanless* the decedent's retained power of testamentary disposition of the trust res in an otherwise irrevocable trust was held to be a proper subject of death transfer taxation at the domicile of the decedent,[41] following *Bullen v. Wisconsin*.[42] *Graves v. Elliott* recog-

[38] See the observations on Safe Deposit & Trust Co. v. Virginia, *supra* note 36, appearing in the dissenting opinion of Chief Justice Hughes in Graves v. Elliott, *supra* note 2, at 917, 83 L. ed. Adv. Ops. at 884.

[39] *Supra* note 1.

[40] *Supra* note 2.

[41] Here the decedent, a resident of and domiciled in Tennessee, placed in trust in an Alabama bank certain intangibles which she had inherited from her brother's estate in Alabama but which she had never physically possessed in Tennessee. She provided for payment of the trust income to herself during her lifetime and reserved the power to make final distribution of the trust property by her will. This she did by directing that those particular securities should remain with the same Alabama bank as trustee after her death for the benefit of those designated in her testamentary trust. The Tennessee bank was appointed executor for her property in that state, and the aforesaid Alabama bank was appointed executor of her Alabama property as well as all the property which she had the right to dispose of by her will in said state. The tax commissioners of the two states joined issue before a Tennessee chancellor, who held that his state could not constitutionally exact a death tax in respect to the securities in Alabama and that the latter state was so exclusively entitled. This holding, however, was reversed on appeal to the Tennessee Supreme Court, which assured the death taxing prerogative to Tennessee to the exclusion of Alabama. The United States Supreme Court reversed the latter court insofar as it denied the power of Alabama to exact a death tax in respect to the securities in Alabama and thus permitted taxation by both states.

[42] (1916) 240 U. S. 625.

nized the relinquishment at death, in consequence of the non-exercise in life, of a power to revoke a trust created by a decedent as an appropriate subject of death transfer taxation.[43]

The chancellor, before whom *Curry v. McCanless* was originally tried, had apparently seized upon the so-called "integration theory" of taxation[44] and proceeded to attack the *mobilia* fiction and had thus sought to stem the current of the undoubted weight of authority. In fact, so completely had he adopted this theory that he proceeded to the full limit of its application in asserting, in effect, that there is no difference between property and inheritance taxation of intangibles in the matter of jurisdiction.[45] In holding that the securities physically held by the Alabama bank on the date of the death of the decedent had a legal situs there analogus to the situs of tangible property in Alabama and were consequently subject to that state's death tax, he applied the principle of *Frick v. Pennsylvania*[46] which treated property taxation and death taxation of tangibles in an identical manner when it permitted New York to tax the Frick art collection located there in spite of the fact that the decedent's domicile was in Pennsylvania.

The chancellor's reversal by the Tennessee Supreme Court[47] was effected by an arbitrary use of the fictional *mobilia* theory which from

[43] Decedent, while domiciled in Colorado, transferred certain intangibles to a Colorado bank in trust to pay the income to her daughter for life and then to pay the income and eventually the principal to the daughter's children. She reserved the powers to change the beneficiaries without their consent, to revoke or modify the trust, and to remove the trustee and substitute a new one, but never exercised any of them. At the time of her death, decedent was a resident of New York. Colorado collected a tax upon the transfer of the trust fund, including the trust corpus in the decedent's gross estate for the purpose of New York transfer tax. This ruling was reversed on appeal, the court giving the reason that the trust had a fixed situs in Colorado. The United States Supreme Court reversed the latter court, holding that the relinquishment at death of the unexercised power to revoke warranted a death tax exaction by New York in a manner similar to a death tax on an intangible, thus permitting taxation by both states.

[44] Professor Harding's "integration theory" establishes the taxable situs of intangible personal property at that place where such property becomes "integrated" or sufficiently identified with a geographic location as to be looked upon as on a competitive basis with other property there held, and has a value there of real wealth. "This single place would seem to be most logically the place at which the wealth is made useful and productive, where the business is carried on, rather than some other place." HARDING, *op. cit. supra* note 27, at 43.

[45] Professor Harding concluded that there was no difference between the jurisdictional bases of inheritance and property taxation. *Ibid.* at 117. Professor Bogert is in accord on the authority of Frick v. Pennsylvania (1925) 268 U.S. 473. See 2 BOGERT, *op. cit. supra* note 6, at 839, n. 14.

[46] *Supra* note 45.

[47] Nashville Trust Co. v. Stokes (Tenn. 1938) 118 S.W. (2d) 228.

its very nature does not call logic to its support. That court referred to the title of the trustee as "legal title" and immediately followed this designation by the necessary qualifying words "only for the purposes of the trust."[48] Reference is thus made to the "appropriation of assets" to which Lepaulle has directed our attention as a most significant feature of the trust concept.[49] The title of the trustee is of such a unique nature and so definitely set apart from the "legal title" which is unencumbered by the trust status that it should be described in an entirely different manner. "Trust title," if this new term may be used, is far more expressive of its nature than the clause which is invariably hastily added by the usual definitions. This stated conviction that there should be an exclusive connotation for this type of "title" was recognized by Lepaulle: "We may therefore conclude on this point in saying that Anglo-Saxon countries have two different regimes for property: individual ownership and trusts."[50] Henceforth, the term "trust title" will be used as a synonym for "legal title" where the interest of the trustee is referred to, thereby making unnecessary any qualifying phrase.

This trust title is created when the res is appropriated under the trust indenture and, as heretofore urged, constitutes a component part of the status or relationship of the trust which is so closely identified with the res as to be incapable of separation therefrom, save in the manner indicated by the settlor. How then can the fiction of *mobilia sequuntur personam* attach the trust title to the person of the trustee at his domicile when it is not susceptible of being removed from the physical location of the res itself? One may conveniently and arbitrarily refer to the presence of an intangible at the domicile of the owner when speaking of the legal title of a natural person or corporation for there is no status involved which is inconsistent therewith. However, it is inaccurate to refer to the convenience of the use of a fiction in respect to the trust concept when its application is impossible of performance. The *mobilia* fiction contemplates a legal title which is dissociated from the res, whereas a trust title is not susceptible of separation from the trust res. If this distinction does not exist then the concept of the trust relationship itself has no significance, and trust title would become identical with the ownership of a natural person where no relationship or status whatsoever is involved.

[48] *Ibid.* at 230.

[49] Lepaulle, *op. cit. supra* note 15, at 57.

[50] *Ibid.* at 58.

The Supreme Court in evolving its theory by which the Alabama intangibles became subjected to Alabama's death taxes, first commented upon "the impossibility in the circumstances of this case of attributing a single location to that which has no physical characteristics and which is associated in numerous intimate ways with both states. . . ."[51] It then proceeded to comment upon the continuing potency of *mobilia sequuntur personam* as the substitution of a "rule for a reason," where the owner of the intangibles confines his activities to his own domicile. Immediately thereafter appears a brief reference to the widely recognized exception to the application of the *mobilia* fiction known as the "business situs" doctrine—"The taxpayer who is domiciled in one state but carries on business in another is subject to a tax there measured by the value of the intangibles used in his business."[52] As direct authority for the statement of this doctrine there appear the oft-cited *Stempel, Bristol, Comptoir National, Metropolitan,* and *Liverpool* cases[53] and the more recent *Wheeling Steel* case[54] wherein there appeared for the first time the term "business domicile." It should be here observed that the prevailing application of the *mobilia* maxim and the efficacy of its "business situs" exception have not been disturbed in any particular by the decision in the principal case.[55] To the contrary, the Court proceeded to expand this exception to the point where it entered upon a discussion of the only new case law established by the entire decision—the recognition of the principle of integration, being the identical principle which the Tennessee chancellor made the basis of his original decree.[56]

The facts of the case set the stage in every respect for the application of *mobilia sequuntur personam.* But this would have permitted Tennessee, as the domiciliary state, to tax directly the Alabama intangibles. On established doctrines, the only manner of awarding Alabama its taxing prerogative would be by invoking the "business situs"

[51] Curry v. McCanless, *supra* note 1, at 903, 83 L. ed. Adv. Ops. at 868.

[52] *Ibid.* at 906, 83 L. ed. Adv. Ops. at 872.

[53] New Orleans v. Stempel (1899) 175 U. S. 309; Bristol v. Washington County (1900) 177 U. S. 133; Board of Assessors v. Comptoir Nat. (1903) 191 U. S. 388; Metropolitan Life Ins. Co. v. New Orleans (1907) 205 U. S. 395; Liverpool etc. Ins. Co. v. Orleans Assessors (1911) 221 U. S. 346.

[54] Wheeling Steel Corp. v. Fox (1936) 298 U. S. 193.

[55] See the concurring opinion of Mr. Justice Reed in Curry v. McCanless, *supra* note 1, at 909, 83 L. ed. Adv. Ops. at 875, and the opinion of the same justice in Newark Fire Ins. Co. v. State Board of Tax Appeals (May 29, 1939) 59 Sup. Ct. 918, 921, 83 L. ed. Adv. Ops. 889, 892. See also Mr. Justice Frankfurter's opinion in the last mentioned case at 922, 83 L. ed. Adv. Ops. at 894.

[56] See note 44, *supra.*

exception to the *mobilia* fiction. However, this avenue was closed because no facts existed to invoke this exception—a distinguishing feature of which is that there shall exist a more or less continuous process of investment and reinvestment within the state to the point of becoming competitive with local interests usually through the instrumentality of a specific agent representing the non-resident owner as in *Catlin v. Hull*,[57] the progenitor of this exception.

An analysis of the facts relating to the Alabama securities disclosed that the *inter vivos* trust of the decedent had failed and the trust relationship had disappeared at the instant of death as completely as if it had never existed. Her ambulatory will was definitely cast at the same instant and immediately "spoke" and thereupon the Alabama intangibles, which had been heretofore impressed with the trust status and "appropriated" in that state by the trustee, pursuant to the terms of the trust indenture, had returned to the direct ownership of a natural person because of the decedent's exercise of her power of appointment by will. Thereupon, if the *mobilia* fiction had been invoked, the Alabama intangibles would have been attributed to Tennessee for death tax purposes. Again at the same instant, the decedent by will directed the establishment of a separate and independent testamentary trust of the same intangibles which continued to be held in Alabama by the same corporate entity, now acting, however, as executor. It will be observed that the events recited occurred in a single legal instant, in the "twinkling of the legal eye," but nevertheless in the above order. The physical delivery of the evidences of the intangibles by the Alabama executor to itself as trustee would,

[57] (1849) 21 Vt. 152. A resident of New York owning promissory notes of certain residents of a Vermont town placed same in the hands of a resident thereof as his agent to manage a business of collecting and reloaning interest collected, as well as principal, for the benefit of the New York owner. As a defense to the imposition of a direct *ad valorem* tax upon these notes, it was contended that these intangible debts had no situs in Vermont for taxation purposes and were technically located at the domicile of the owner in New York, an argument in the true *mobilia* tradition. The court held, however, that the taxing jurisdiction where these promissory notes were in fact located had the power to tax there. It is worthy of note that the court did not enter upon any discussion of an actual situs of these intangibles. It simply assumed that the physical presence of the evidences of these intangibles was sufficient to warrant the imposition of a tax. The court said that Vermont protected the non-residents' intangibles held there and that this should be paid for. ". . . if persons residing abroad bring their property and invest it in this state, for the purpose of deriving profit from its use and employment here, and thus avail themselves of the benefits and advantages of our laws for the protection of their property, their property should yield its due proportion towards the support of the government, which thus protects it." *Ibid.* at 161. The "business situs" doctrine of Catlin v. Hull a half century later became the foundation of the long line of Supreme Court cases headed by the Stempel case. See *supra* note 53.

of course, have to await the settling of the estate by the executor and its final accounting as such.

But the important feature is that these intangibles had clearly become "integrated" or sufficiently identified with the geographic location of the evidences thereof in Alabama to be looked upon as on a competitive basis with other property there and to have a value as real wealth at that place in Alabama. It is most significant that both opinions in *Curry v. McCanless* leave no doubt whatsoever that, insofar as jurisdiction to tax is concerned, there is no difference between *ad valorem* property taxation and death transfer taxation.[58] In thus commenting upon the soundness of the decisions in *Curry v. McCanless* and *Graves v. Elliott,* it should be observed that death taxation imposed upon the power of testamentary disposition in the former and the power of revocation in the latter by states other than those in which the intangibles had become integrated presents no inconsistency. Neither power was part of the trust relationship under either set of facts. Furthermore, the death taxation of these powers, which the Court contemplated as intangible assets of the respective decedents' estates, was not identical with the death taxation of the intangibles themselves. The fact that the value of the intangibles so integrated in other states constituted the measure of the death tax of each of the powers is merely the use of a mechanical yardstick which it is the privilege of a taxing state to establish.[59]

V

Although *Curry v. McCanless* and *Graves v. Elliott* extended the principles of *Frick v. Pennsylvania* to intangibles which were subject to powers held by natural persons at the time of death and thus permitted death taxation by the state where the evidences of the intangibles had become definitely integrated, there is nothing to give rise to an inference that trust intangibles could become integrated in a state other than the domicile of the trustee to assure an exclusive jurisdiction for *ad valorem* property taxation there. It has heretofore been observed that the *mobilia* fiction is logically inapplicable to the trust intangible. It has likewise been concluded that the integration theory is an enlargement of the "business situs" exception to the *mobilia*

[58] See also the statement of Chief Justice Hughes in his dissenting opinion in Graves v. Elliott, *supra* note 2, at 917, 83 L. ed. Adv. Ops. at 884: "But the power to impose an inheritance or transfer tax, as well as the power to impose an ad valorem property tax, depends upon the property being attributable to the domain of the taxing State." The case of Frick v. Pennsylvania, *supra* note 45, is cited.

[59] See note 37, *supra.*

fiction even to the extent of making unnecessary the recognition of the original fiction itself.[60] It becomes necessary, therefore, to consider whether the trust intangible may have a business situs and, if not, it would seem that the integration theory would, *a fortiori,* become inapplicable. Can every trustee "invest and re-invest" in a foreign jurisdiction and thus establish a "business situs" there? In order to acquire a freedom from taxation at his domicile for his foreign-held trust res, must each trustee be forced to enter the marts of trade? The answer is obvious. If every trustee could meet the mechanical requirements of "business situs" and "integration of intangibles" there would necessarily be no difference between the "legal title" of a natural person and the "trust title" of a trustee.

The ignoring of the marked difference between the legal title to the intangibles of the natural person outside the trust relationship and the trust title of the trustee within that relationship is in effect the disregarding of the appropriation of the res pursuant to the dictates of the settlor. A presence of the evidence of the trust intangible in a jurisdiction other than that of the domicile of the trustee is a presence there *qua* trust and not a presence there of an unfettered evidence of the intangible. Should the trust intangible in the course of administration of the trust become integrated at a place at which the wealth is made useful and productive, where the business is carried on, this would be purely incidental to its presence there pursuant to the dictates of the settlor. There are no degrees of the trust relationship; the status either exists or the title is an unfettered one. The numberless variations of the appropriation of the trust res which the settlor may direct, some of which might even specifically direct that the trust intangible be so used as to become integrated, are all entitled to the full benefits accorded the trust status, and thus any integration must be incidental and not of a controlling force in establishing a jurisdiction to tax. Unfortunately, therefore, the recently established Supreme Court principles cannot be applied to the trust intangibles, and the ordinary trust from the very nature of its status and the trust title of its trustee should be subjected to an entirely different theory to determine jurisdiction to tax.

VI

Frequent references have been made to what is the rule rather than the exception; that is, the identity of the physical situs of the

[60] See HARDING, *op. cit. supra* note 27, at 80.

evidences of the trust intangibles not only with that of the domicile of the trustee but also with that of the place of general administration of the trust. The question may then be reasonably asked: Why not adopt a rule of thumb that the trust intangible shall be taxed at the seat of the trust, since the domicile of the trustee, the physical location of the res and its administration are usually located at such place and, furthermore, any question which may arise after the trust has come into existence must there be determined?[61]

If an indispensable feature in the determination of the seat of the trust is the physical presence there of the evidence of the trust intangible, then the aforesaid question would have no particular significance, since the taxability of the res at the seat of the trust could be accounted for under the situs of the trust, seat of the trust, or *mobilia* theories. If the domicile of the trustee is not an indispensable feature of the seat of the trust, there would nevertheless remain the first two of the three theories last mentioned as applicable. But there are many instances in which the evidence of the trust intangible is physically located elsewhere, at a place quite definitely removed from either the seat of the trust or the domicile of the trustee. So far as is known, no contention has ever been made that the absent intangible trust res is looked upon in any fictional manner, reminiscent of the *mobilia* doctrine, as being drawn to the seat of the trust from a location such as that just described. What is the substance, therefore, of the contention that the seat of the trust should be the place for the taxation of the trust intangible? If both physical presence of the evidence of the intangible trust res and the domicile of the trustee coincide with the seat of the trust location, those who are loyal to the *mobilia* doctrine would overlook all other considerations save this feature in establishing taxability. On the other hand, in accordance with this "trust situs" theory, all considerations other than the presence of the evidence of the res will be considered unnecessary of recognition. A dilemma is therefore presented between these two theories, which dilemma must necessarily ignore the seat of the trust theory for the reason that it lacks substance. Why then is it necessary for a court to grope through a maze of controverted facts to determine this seat of the trust where the taxability of the intangible trust res is concerned? Unless other substantial features can be developed as determinative of the seat of the trust, it must be asserted that there is, in fact, not even a dilemma, for the *mobilia* fiction, as hereinabove demonstrated, is inapplicable,

[61] BEALE, *op. cit. supra* note 12, § 297.2.

leaving the situs of the trust at the situs of the res as the single controlling consideration.

Of course, there will always be varying incidents of trust administration appearing at one or many places. These incidents will exist because of the nature of the appropriation of the trust res, which appropriation has been made in accordance with the dictates of the settlor. Thus, the trustee may actually attend to the correspondence and other similar details of the trust at his business office at one place, his ledger sheets or cards descriptive of the assets held may be kept at another place, his entire document file, consisting of the original trust indenture, certified copies of the court orders and prior accountings may be at the office of the trust's counsel at a third place, the trustee may actually do his buying and selling in respect to the trust assets at the office of his broker at a fourth place, he may live at a fifth place and the securities may be kept in a safe deposit box at a sixth place, and so on. There is a way out of this confusion which, by contrast, is simplicity itself—locate the res which is the very life spring of the trust status. This is an apt expression because a spring of water may account for the existence of an oasis, and so likewise the res is the *sine qua non* of the trust. There may be visible evidences at the oasis of the existence of the spring just as there may be the above evidence of the existence of the trust. Of two things one can be positive: that the oasis will not exist without the spring, nor the trust without the res.

The thoughts hereinabove expressed are graphically illustrated in a line of very recent Pennsylvania cases of which *Dorrance's Will*[62] and *Griscom's Will*[63] are representative. In the former, the John S. Dorrance estate, after being subjected to enormous death tax exactions by both New Jersey and Pennsylvania,[64] continued its efforts to defend itself against another similar threat. This time, however, it was against a tax which might have become an annually recurring exaction, the Pennsylvania *ad valorem* personal property tax. New Jersey had already assessed, levied, and collected a similar tax in respect of the identical intangibles, the evidences of which were physically located there in the custody of a Camden corporate co-trustee,

[62] *Supra* note 3.

[63] *Supra* note 4.

[64] Dorrance's Estate (1932) 309 Pa. 151, 163 Atl. 303, *cert. den.*, (1932) 287 U.S. 660, (1933) 288 U.S. 617; *In re* Dorrance (1934) 115 N.J.Eq. 268, 170 Atl. 601, (1934) 116 N.J.Eq. 204, 172 Atl. 503, (1935) 13 N.J.Misc. 168, 176 Atl. 902, (1936) 116 N.J.L. 362, 184 Atl. 743, *cert. den.*, (1936) 298 U.S. 678.

the three remaining co-trustees, who were individuals, being domiciled in three separate counties in Pennsylvania. The supreme court of Pennsylvania held that New Jersey was the "trust domicile," the latter term being used hesitatingly, and that the intangibles there located should not, therefore, be taxed in Pennsylvania, even on an apportioned basis. It is worthy of note that the court concluded that this intangible trust property was located and exclusively administered at this "trust domicile," this new term apparently being used as synonymous with "seat of the trust"; however, with a necessary and most significant feature added, namely, the physical presence of the evidences of the intangible trust res. Although the case ostensibly was decided on the point of the existence of divided domiciles of co-trustees and the "appellants' view that the trust is a unit and will not be divided,"[65] the readily discernible undercurrent was a resentment against the application of this same *mobilia* fiction to the trust relationship similar to that appearing in the opinion in *Goodsite v. Lane*.[66] Of course, "trust domicile" in respect to the trust is an appealing term because it tends to convey the same visualization as does "commercial domicile" in respect to the corporation.[67] But the paths of reasoning must eventually separate in no uncertain manner, for the very term "commercial," although quite appropriate to the corporation, is by the same token foreign to the word "trust" as used in connection with "domicile" in *Dorrance's Will*. Again we are confronted with the compelling differences between trust title and legal title; appropriation of assets and the unfettered control of corporate ownership; a status or relationship and a total lack thereof—for how can the direct citation of *Goodsite v. Lane* be otherwise explained? The underlying, although unexpressed, theory of *Dorrance's Will* is that the indispensable feature or characteristic of the seat of the trust is the physical presence of the trust tangibles and the evidences of the trust intangibles clothed with the trust status; that other incidents of administration may, but not necessarily must, be found there; that the use of the term "trust domicile" is expressive of a willingness to depart from the necessity of forever looking to the domiciles of trustees to determine a jurisdiction to tax the trust intangible; and finally, contrary to the anticipated inference that "trust domicile" is a synonym for "seat of the trust," it should more properly be looked

[65] Dorrance's Will, *supra* note 3, at 687.

[66] *Supra* note 33.

[67] Wheeling Steel Corp. v. Fox, *supra* note 54.

upon as synonymous with "trust situs" as used herein, and as such determinative of jurisdiction to tax.

Griscom's Will accentuates the very distinctions to which reference has just been made. In this case, one individual co-trustee was domiciled in the state of Florida, another in Montgomery County, Pennsylvania, and the corporate trustee in Philadelphia County in the last mentioned state. After noting that the trust property assessed consisted of stocks and bonds held by the corporate co-trustee in Philadelphia, the court held that the statute conferred power "to tax such trust property on the county in which it is maintained and in which the trust is administered. . . ."[68] Said the court: ". . . the trustees keep and maintain the trust property and perform their duties as trustees in Philadelphia county, the domicile of the corporate trustee. The property is therefore taxable here and not in any other county where no part of it is maintained."[69] There is no reference whatsoever to the maxim *mobilia sequuntur personam* in the opinion in this case. No use is made of the recently coined term "trust domicile" referred to in the opinion of *Dorrance's Will,* handed down on the same day. There also appears the significant fact that even though there is an explanation in a footnote[70] to the effect that the trustees remain answerable to the orphans' court of Montgomery County by whose decree the testamentary trust assets were awarded to them, and even in spite of the additional fact that one of the individual co-trustees was there domiciled, nevertheless the trust intangibles were not taxable in Montgomery County because no part thereof was there maintained. Apparently Pennsylvania has thus removed from the list of required features for the determination of "trust domicile"—if there is still an insistence that said term is synonymous with "seat of the trust"—the place where court accountings are necessary. Finally, the outstanding characteristic common to the decisions in both *Dorrance's Will* and *Griscom's Will* is that the physical situs of the trust res was in the jurisdiction whose right to collect the *ad valorem* personal property was eventually upheld as exclusive. It would seem, therefore, that the "trust domicile" or "seat of the trust" theory, as advocated in these cases, has tended strongly towards, if it has not actually given way to, this "trust situs" theory.

[68] *Supra* note 4, at 695.

[69] *Ibid.*

[70] *Ibid.* at 694, n. 2.

VII

The Supreme Judicial Court of Massachusetts in *Welch v. Boston*[71] submitted a definite criticism of the principles established by *Goodsite v. Lane,* and further explained its action as follows: "The natural method of dealing with the taxation of invisible and intangible property is to treat with the owner where he lives, where he can be reached and where it is comparatively easy to administer the law with justice. Any other course seems to open wide the door to evasion of all taxation." After citing the usual long list of decisions which involve the *mobilia* fiction, all doubt as to the court's conviction was removed by the last sentence of the opinion: "It is contrary to *Goodsite v. Lane,* . . . which, for the reasons stated, we are constrained not to follow."[72] Thus diametrically opposed to the holding of *Goodsite v. Lane,* the *Welch* case upheld an exaction by Massachusetts of a tax levied in respect to trust intangibles, the physical evidence of which was permanently held in Maine where the testator died domiciled and where the testamentary co-trustees, domiciled in Massachusetts, received their appointment. The facts of the two cases are remarkably similar. The identical feature upon which the holding in the earlier case of *Goodsite v. Lane* turned in one direction was the same feature which caused the court in *Welch v. Boston* to turn in the opposite direction; namely, the domicile of the trustee being within the jurisdiction which asserted its right to tax.

The use of the word "evasion" was unfortunate since this word invariably gives rise to an inference that in some manner moral turpitude is involved. To illustrate the dangers of the use of this word, as well as the proper limits within which its meaning should be confined, reference may here be made to an interesting dialogue which occurred on the floor of the United States Senate on May 27, 1932, during a discussion of that portion of the Revenue Bill of 1932 which provided for a tax on bank checks. Senator David A. Reed of Pennsylvania had made reference to certain practices prevailing in farming communities of Ohio of giving an order drawn, not upon a bank, but upon the drawer company itself. Senator George W. Norris of Nebraska remarked: "Really, I think the object of it is to evade the tax, myself. It seems to me such a holding would not be a misconstruction." To this, Senator Reed replied, "It is doing a perfectly lawful act in a way that is not taxable. I do not think that even the Bureau of

[71] *Supra* note 31, at 160, 109 N. E. at 176.

[72] *Ibid.* at 161, 109 N. E. at 176.

Internal Revenue, or the Federal Courts, could hold that it was within this statute."[73] Later, in remarks addressed for the benefit of an individual whose company in Ohio had followed the aforesaid practice, and who had enquired as to whether such orders as were customarily given were taxable, Senator Reed put the following case: "Let me explain to Mr. Brownell what we mean by 'tax evasion.' It is just like a citizen who comes to a river. He finds two bridges, one a free bridge and the other a toll bridge. He goes over the free bridge. It cannot be said that he is evading the toll. He is taking that method which is not taxable and he is not resorting to the method that is taxable. Nobody can fairly charge him with evading the tax."[74]

There seems to be a readiness to rush to the same faulty conclusion as that just demonstrated wherever tax questions are involved. Yet, in other phases of administration of financial matters, both by natural persons and by fiduciaries, there is general commendation for economical practices. In respect to tax liabilities, therefore, it would seem the natural desire of the conscientious trustee so to conduct his administration that his trust estate would suffer the least. Certainly, the privilege extended to the natural person of "doing a perfectly lawful act in a way that is not taxable," *a fortiori* should not be denied to a trustee who is exerting his efforts in behalf of beneficiaries who may be burdened with incapabilities or incapacities, the existence of which may have been the very occasion for the trust's establishment. In urging this point no violation is done to a consistency since the difference between legal title and trust title does not connote a difference between desired prudence in respect to the natural person and a required prodigality where the trustee is involved. To the contrary, from its very nature the administration of the trust should be entitled to an even more lenient treatment than that of the natural person who very often acts in such a manner as to come within the colloquial expression of "taking businessmen's risks."

Returning to the consideration of the two cases above mentioned, there appear no facts in either case which disclose on the part of the trustee an intention to evade any tax in establishing the significant fact of their respective domiciles. Intention of the trustee plays a very minor part in the consideration of this problem and the use of the word "evasion," which intimates a positive and intentional action, again creates a wrong impression.

[73] (1932) 75 CONG. REC. 11421.

[74] *Ibid.* at 11422.

A later Massachusetts case from the same court, *Newcomb v. Paige,*[75] provides a rare opportunity of demonstrating that the position of the same court in the earlier case of *Welch v. Boston* is untenable. Here one trustee was resident in Massachusetts, another in California, and the third in New York, but all the evidences of the trust intangibles were in the custody of the New York trustee. Massachusetts assessed the trustee there domiciled for one-third of the intangibles and this assessment was held void because the ownership of that particular trustee was "not of such character as to bring the taxable domicil of the trust within the terms of our law."[76]

It will be observed that the basis of criticism of *Goodsite v. Lane* was that the Ohio trustee was relieved, by the court's holding, of the application of the *mobilia* fiction, which would have permitted Ohio to tax the trust intangibles, the evidences of which were held in New York; that there was thus bestowed upon him an uncontrolled discretion to select any jurisdiction which he desired wherein the trust intangibles might come to rest, and with the obvious further inference that he would select that jurisdiction which would minimize the personal property tax liability of his trust estate. However, in *Newcomb v. Paige,* the court, by the simple expedient of recognizing that the New York trustee had sufficient custody of the trust intangibles to warrant an exclusive taxing jurisdiction in that state, thereby approved what might well have been a selection of an exclusive taxing jurisdiction in a manner equally as effective as ever the Ohio trustee under *Goodsite v. Lane* could have done. Furthermore, this result follows without departing in any way from the court's announced recognition of the applicability of the *mobilia* fiction. What then is the significance of this word "evasion" when a court may apply it with its negative implications to the Ohio trustee yet, by the simple expedient of invoking the *mobilia* maxim in behalf of the New York trustee, there may be attained a similar objective of minimizing the trust's personal property tax liabilities? The answer is that this situation discloses that the doctrine of *mobilia sequuntur personam* falls far short of maintaining a consistency even within its own bounds. The confusing results reached by the application of the *mobilia* fiction to facts of divided domiciles thus becomes quite understandable. On the other hand, the difficulties of treatment of such facts disappear upon the application of the "trust situs" theory which, by hypothesis,

[75] (1916) 224 Mass. 516, 113 N. E. 458.

[76] *Ibid.* at 520, 113 N. E. at 459.

attaches no significance whatsoever to the number of trustees or where they are domiciled when considering the taxability of the trust intangible.

That unless property is clearly within a taxing state it is not taxable is so elementary as not to require citation of authority. The taxpayer has nothing to do with the drafting of the taxing statute and if he arranges his affairs in such a manner that they will be subject to the tax only if the statute had different provisions he is certainly doing no more than is his privilege. He can even absent himself, his property, and any taxable interest which he may possess, and locate in another jurisdiction more to his liking, and he has still not evaded any taxes. Said the Supreme Court in *Gregory v. Helvering:*[77] "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted."[78]

There is no tax evasion under either the theory of *Goodsite v. Lane* or that of *Welch v. Boston.* A minimizing of taxes, which may be described as tax avoidance, is permitted under the theory of both decisions, a contrast existing only in the method of so minimizing or avoiding the tax. Under the theory of the former case, the trustee simply moves the trust intangibles to the more favorable taxing jurisdiction, and under the theory of the latter the trustee simply betakes himself there. More impressive, however, is the contrast in theory. Under the former there is a recognition of the established trust relationship as impressed upon the physically present evidence of the intangible res, while in the latter there is an arbitrary use of the artificial *mobilia* fiction as a premise upon which to base a conclusion, which is admittedly inaccurate in fact, coupled with a total disregard of the trust relationship.

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[77] (1935) 293 U. S. 465, 469.

[78] That this is the proper and prevailing legal rule is unquestionable. Marsball v. Commissioner (C. C. A. 6th, 1932) 57 F. (2d) 633, 634; Helvering v. Gregory (C. C. A. 2d, 1934) 69 F. (2d) 809, 810, *aff'd,* Gregory v. Helvering, *supra* note 77; Commissioner v. Eldridge (C. C. A. 9th, 1935) 79 F. (2d) 629, 631; Sawtell v. Commissioner (C. C. A. 1st, 1936) 82 F. (2d) 221, 222. See also Angell, *Tax Evasion and Tax Avoidance* (1938) 38 COL. L. REV. 80, evidently inspired by remarks in a Presidential message to Congress in June, 1937 [(1937) 81 CONG. REC. 5124], in which instances of "avoidance and evasion of tax liability" were mentioned by the Secretary of the Treasury and were referred to by the President as "definitely contrary to the spirit of the law." *Ibid.* at 6705. As stated in this article, "The press of the country in most instances followed the language of the President and coupled avoidance and evasion in one phrase and gave to both words one implication." Angell, *loc. cit. supra.*

Welch v. Boston should not have struck down *Goodsite v. Lane* with the stigma of opening the door to tax evasion. Upon reflection, it must be concluded that the Ohio trustee in the latter case was doing nothing more than his duty required of him when he successfully defended against the attempt of his own state to exact $45,000 from a trust which did not touch or concern Ohio in any manner. Nor in *Dorrance's Will,* which closely resembles *Goodsite v. Lane,* was the action of the trustees in contesting Pennsylvania's attempt to tax property outside of its jurisdiction either a refusal to recognize the spirit of that state's tax laws or an effort to evade them. Dorrance's trustees were simply proceeding in a proper and conscientious manner to protect their trust from a determined taxing attitude which contended that, regardless of a one hundred per cent exaction by New Jersey, where all the evidences of the trust intangibles were physically located, the accident of domicile in Pennsylvania of certain cotrustees warranted the commonwealth in forcing the trust estate to turn the other cheek in true Memnonite fashion, not once, but annually thereafter.

VIII

The suggested use of new terms, a preference for changed attitudes towards ancient concepts and persuasive efforts towards new paths, should not necessarily be taken as solely iconoclastic. Likewise, no implication of disrespect for the law's traditions should be occasioned by the treatment of a legal subject in a manner admittedly unorthodox, doubtless even to the point of anathema in the minds of some. Perhaps the bringing of a traditional legal attitude to the contemplation of the realities of the business of trust administration may create a deeper appreciation for this abstraction known as a trust. Be that as it may, in urging the "trust situs" theory to the effect that the situs of the trust relationship, determined by the geographical location of the physical evidences of the intangible trust res, definitely indicates a constitutionally exclusive jurisdiction to tax, it will be observed that no new tools have been employed nor has any new concept been fashioned. To the contrary, only a closer scrutiny has been asked in respect of a centuries-old concept.

The recognition of the nature of this trust relationship will itself provide the means by which our trust estates may be relieved from improper tax exactions. But first it will be necessary to depart from the beaten paths heretofore followed by our courts, always urged on

to further inconsistencies by the *mobilia* fiction. The continuance of such arbitrary reasoning will never lead to the solution of the problem.

It may be recalled that almost within a twelvemonth the press carried reports of the conclusion reached by an owner of one of the country's greatest fortunes to appoint an individual as a trustee to reorganize his vast enterprises.[79] It is inconceivable that one jurisdiction, due to the coincidence of the trustee's residence therein, should gather unto itself the privilege of exercising the taxing prerogative in respect of all of the intangibles of this trust wherever their evidences may be located, and even though they may be distributed among all the states of the Union. In this connection there may be recalled the late Mr. Justice Cardozo's treatment in *Jessup v. Smith*[80] of the difficult predicament of an indigent trustee who sought to impress an attorney's lien directly on the trust res in the first instance to obtain a vital protection of his trust. In upholding these efforts, and thus cutting squarely across the grain of established case law, this learned justice, ever appreciative of the trust concept, referred thus to the court's justification of the means used in contemplation of the end desired: "There must, therefore, be some other remedy where such payment is impossible. If that were not so, there would be no safety either for an indigent trustee or for the estate committed to his care. *The law is too far-sighted to invite such consequences.*"[81]

Of special and encouraging significance also are the following remarks *obiter* which appeared in the dissenting opinion in the recent Supreme Court case of *Texas v. Florida:*[82]

"In view of the enormous extent to which intangibles now constitute wealth, and the increasing mobility of men, particularly men of substance, the necessity of a single headquarters for all legal purposes, particularly for purposes of taxation, tends to be a less and less useful fiction. In the

[79] In its issue of March 21, 1938, the *New York Times* carried this front-page headline, "Hearst Names Shearn as Trustee to Reorganize His Vast Properties." A recent amendment to the constitution of the State of New York [art. XVI, sec. 3, as amended in 1938] should be noted: "Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation, and if held in trust, shall not be deemed to be located in this state for purposes of taxation because of the trustee being domiciled in this state, provided that if no other state has jurisdiction to subject such property held in trust to death taxation, it may be deemed property having a taxable situs within this state for purposes of death taxation . . . . "

[80] (1918) 223 N.Y. 203, 119 N.E. 403.

[81] *Ibid.* at 208, 119 N.E. at 404. Italics added.

[82] *Supra* note 30, at 578, 83 L. ed. Adv. Ops. at 566.

setting of modern circumstances, the inflexible doctrine of domicile—one man, one home—is in danger of becoming a social anachronism. Recent applications and modifications of this rule to satisfy the vague contours of the due process clause have hardly mitigated its inadequacies for our day. . . ."

It is hoped that at a time in the not too distant future the above observations of Mr. Justice Frankfurter will be referred to as having had a prophetic ring.

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