TAXATION — TRUSTS — DOUBLE TAXATION — CERTIFICATES OF BENEFICIAL OWNERSHIP.—An Ohio statute classified as incorporeal, equitable interests in land evidenced by transferable certificates and placed a 5 per centum tax on the income from them.[1] The appellant challenged this classification as incorrect. His contention was denied by the Ohio Supreme Court which upheld the taxing authorities in their view that such certificates were incorporeal interests which were a property in themselves which could be taxed at the domicile of the owner regardless of the character of the corpus of the trust or its location.[2]

On appeal from the state decision the United States Supreme Court in *Senior v. Braden*[3] held that for taxation purposes, at least, the *cestui que trust* has a property interest in the trust *res* and that if the *res* consists of land,[4] a trust certificate covering a proportionate share of the land may not be taxed under the Ohio statue,[5] as an intangible.

The growing antipathy of the Supreme Court toward double taxation[6] has made necessary a choice from among the various theories advanced as to just what interest the *cestui que trust* has in the property held by the trustee. One school of thought, exemplified by Austin W. Scott,[7] holds that today it is correct to say that the *cestui que trust* has two classes of rights; a number of rights, positive and negative, against the trustee alone, and in addition as equitable owner of the trust *res*, a right *in rem* against the

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67 L. Ed. 731, 43 S. Ct. 445; Ex parte Williams (1928) 277 U. S. 267, 72 L. Ed. 877, 48 S. Ct. 523.

[1] Ohio General Code (1931) section 5328 provided that all investments and other intangible property of persons residing in the state should be subject to taxation. Section 5323 so defined "investment" as to include incorporeal rights of a pecuniary nature from which income is or may be derived, including equitable interests in land and rents and royalties divided into shares evidenced by transferable certificates. Section 2638 imposed upon productive investments a tax of 5 per centum of their income yield. This statute upheld by the Ohio Supreme Court in Rowe v. Braden (1933) 128 Ohio St. 597, 186 N. E. 392.

[2] Senior v. Braden (1934) 128 Ohio St. 597, 193 N. E. 614.

[3] (1935) 295 U. S. 422.

[4] Real property has always been subject to tax only by the taxing jurisdiction in which it is actually located. Cooley on Taxation (4th ed. 1924), section 1066.

[5] Supra, note 1.

[6] Baldwin v. Missouri (1930) 281 U. S. 586; Beidler v. South Carolina Tax Commission (1930) 282 U. S. 1; First National Bank v. Maine (1932) 284 U. S. 312; Blodgett v. Silberman (1928) 277 U. S. 1; Safe Deposit & Trust Co. v. Virginia (1929) 280 U. S. 83.

[7] 17 Columbia Law Review 269; Pomeroy, *Equity Jurisprudance* (4th ed. 1928), section 972; Bogert, *Handbook of the Law of Trusts* 430; Bates v. Decree of Judge of Probate (1932) 131 Maine 176, 160 Atl. 22; Narragansett Mutual Fire Insurance Co. v. Burnham (1931) 51 R. I. 371, 154 Atl. 909. R. C. Brown expresses the view that although the interest of the beneficiary of a trust has a certain similarity to a chose in action, yet such interest is a property right rather than a mere contract right and under the maxim that equity follows the law, will be treated as a real or personal property according to the nature of the trust *res*, 23 Ky. Law Journal 403.

world at large to insist that it respect his ownership and to insist that it refrain from using the property for any purpose inconsistent with the trust. The other classical view, set out by Harlan F. Stone in 17 Columbia Law Review 467, and adhered to in his dissent to *Senior v. Braden*,[8] is that the right of the *cestui* is a right *in personam* against the trustee, specifically enforcible with reference to the trust *res* and that the *cestui* acquires such rights *in personam* against third persons not because he is the equitable owner of the trust *res*, but through equity imposing on third persons the duty of not aiding in a breach of the trust or preventing the *cestui* from having the benefit of the trustee's obligation. A third, unorthodox, view is presented by Pierre Lepaule. His theory[9] is that a trust is a social institution; an appropriation of assets with someone in charge, which the whole world must respect. All questions of whether the *cestui que trust* has rights *in personam* against only the trustee or *in rem* as equitable owner of the trust *res* are put aside as irrelevant.[10]

Faced with a trust which seems to fall in Pomeroy's fourth class of trusts,[11] one of which the primary object is to hold the corpus of the property, receive its rents, profits and income and apply them to some prescribed use, the Supreme Court followed the choice it had previously made in *Brown v. Fletcher*[12] and held that the beneficiary had an "interest in and to the property that was more than a bare right and much more than a chose in action." This, in spite of the fact that under the terms of the land trust certificates the holder had no other rights than a proportionate share of the income and a like share of the proceeds from the final sale of the property without any right to possession or to defend possession, to partition or to management. The holders are restricted to an equitable action for an accounting, to compel the performance of the trust and to restrain breaches of it.[13]

Since the holder of the trust certificate[14] had a property interest in the land itself, the Supreme Court held unconstitutional the Ohio statute which

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[8] Supra, note 3.

[9] (1917) 17 Columbia Law Review 467; Archer-Shee v. Garland, House of Lords, Appeal Cases 1931. The House of Lords was persuaded that according to American law, the appellant's wife had no property interest in the income arising from the securities, stocks and shares constituting the trust for her benefit in New York, but had only a chose in action against the trustees, hence she had no property taxable by the British government.

[10] (1928) 14 Cornell Law Quarterly 52.

[11] Pomeroy, *Equity Jurisprudence* (4th ed. 1928) section 992.

[12] (1915) 235 U. S. 589.

[13] Supra, note 3.

[14] (1928) 2 U. of Cincinnati Law Review 255. Goldman and Clyde explain that an Ohio land trust certificate merely represents a split up for the convenience of the ordinary investor of the ancient form of investment known as ground rent. The interests of the beneficial owners are equitable interests in the real estate. The land is taxed to the trustee or lessee and the certificate holder is not subject to any real or personal tax and is subject only to the Federal income tax.

sought to tax the income from such certificates, regardless of the location or character[15] of the trust property.

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[15] Union Refrigerator Transit Co. v. Kentucky (1905) 199 U. S. 194 holds that tangible personality permanently located beyond the owner's domicile may not be taxed at the latter place under the Fourteenth Amendment. Buck v. Beach (1907) 206 U. S. 392; Frick v. Pennsylvania (1925) 268 U. S. 473; Wachovia Bank and Trust Co. v. Daughton (1926) 272 U. S. 567. And intangible personal property may acquire a taxable situs where permanently located and employed and protected. New Orleans v. Stemple (1898) 175 U. S. 309; Bristol v. Washington County (1900) 177 U. S. 133; State Board of Assessors v. Comptoir National d'Escompte (1903) 191 U. S. 388.