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THE 'SITUS' OF STOCK*

ROBERT POMERANCE†

INTRODUCTORY

This paper proposes to examine critically the concept of 'situs' as applied to stock, with the purpose of determining whether that concept is sufficiently precise to be of any real utility. If the concept of 'situs' proves to be so variable and nebulous that it must be redefined every time it is used, it is simply a superfluous terminological intermediate which serves only to mislead. But if 'situs' emerges from the investigation as an exact and well-founded legal concept,¹ it ought to be retained and recognized as a valuable aid to legal thinking.

a. *What is stock?*

To the ordinary layman a stock certificate *is* the stock. Does he not buy and sell the stock certificate on the Stock Exchange? Will not his banker loan him money on it, and take it away if he fails to repay the loan? Has not a cashier of a bank who ran away with a pocketful of certificates been sentenced to prison as an embezzler?² It is hard to convince the layman, and perhaps equally hard to convince many a lawyer, that a certificate of stock is, after all, only a piece of paper. Respectable legal authorities have termed the certificate "the stock itself, practically, in business transactions. . . property in itself,"³ "a constituent of title",⁴ and "a concrete physical representation of [an] interest" in property.⁵

This identification of the certificate with the stock results from a psychological habit whereby a simple concrete object, usually a part

*The author is indebted to Professor Robert S. Stevens of the Cornell Law School for his criticism and aid. Thanks are due also to Professor Elliott E. Cheatham of Columbia Law School for his many pertinent suggestions.

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¹Cf. CARDOZO, PARADOXES OF LEGAL SCIENCE (1928) 61: "A fruitful parent of injustice is the tyranny of concepts. They are tyrants rather than servants when treated as real existences and developed with merciless disregard of consequences to the limit of their logic. For the most part we should deal with them as provisional hypotheses to be reformulated and restrained when they have an outcome in oppression or injustice."

²That the illegal sale of certificates received as collateral constitutes grand larceny, not merely petty larceny, see *People v. Katz*, 154 App. Div. 44, 139 N. Y. Supp. 137 (1st Dept. 1912).

³2 COOK, CORPORATIONS (8th ed. 1923) 1609.

⁴*Hatch v. Reardon*, 204 U. S. 152, 161, 27 Sup. Ct. 188, 191 (1906).

⁵*Klein v. Wilson & Co.*, 7 F. (2d) 769, 771 (D. N. J. 1924).

or attribute of the whole, is used to represent or symbolize something more complex and less easily objectified. Of this habit one court has said:

"It is a familiar experience that things which exist at first and are spoken of as theories or mere concepts soon become recognized facts, and are given in thought and words body and substance. Physical science abounds in illustrations of this, and in both business affairs and in the law we meet with them. It is really the same tendency as the disposition to personify things, and to reduce the abstract to the concrete."⁶

Upon examination, however, it becomes apparent that stock is something more than the paper certificate. In the old common law, a bond was a sealed specialty which was treated as if it were the obligation itself; if aught destroyed the paper on which the obligation was written, the obligation perished as well. But to-day it is well settled that, if a bond or stock certificate is destroyed, its owner may obtain a new one. The stock certificate is not identical with the obligation, but represents it in some manner.⁷ Thus, suppose that a newly organized corporation delays sending to a shareholder certificates representing stock that he has bought—the shareholder is none the less a shareholder, and has a right to a portion of the corporation's earnings.⁸ Though each certificate is earmarked by the number it bears, the corporate property is an undivided whole, and no shareholder could pick out the exact portion that corresponds to his certificate. Hence, although the certificate can be bought, sold, stolen, pledged, and sued for, stock is something more than the certificate; whatever stock may be, the certificate is not the share of stock. It is, if you like, a 'representation', or 'evidence' of the share. This distinction is fundamental. Its significance will appear as we progress.⁹

We are not to understand that the layman's identification of the certificate with the share has no legal significance. The courts always

⁶De Ganay v. Lederer, 239 Fed. 568, 572 (E. D. Pa. 1917).

⁷Blodgett v. Silberman, 277 U. S. 1, 15, 48 Sup. Ct. 410, 415 (1925); CHRISTY, THE TRANSFER OF STOCK (1929) §§ 4, 12.

⁸CHRISTY, *op. cit.* *supra* note 7; (1926) 11 CORNELL LAW QUARTERLY 237. And see Pacific National Bank v. Eaton, 141 U. S. 227, 11 Sup. Ct. 984 (1891); American, etc., Co. v. State Board, 56 N. J. L. 389, 29 Atl. 160 (1893).

⁹"'Shares' are the units into which the rights of members, to participate in the control of the corporation, in its profits or in the distribution of corporate assets, are divided. . . . A 'Certificate of Stock' is a written instrument sealed with the corporate seal, signed by the proper corporate officers, as required by this Act, and evidencing the fact that the person therein named is the registered owner of the share or shares therein described." UNIFORM BUSINESS CORPORATION ACT (1928) § 1.

are concerned with how the layman looks at things, and his point of view becomes important when the court is attempting to find out what he meant by the words he used in a contract, deed, or will. *In re Clark*¹⁰ presents an unusual, striking illustration of the importance which may be attached to the popular conception of stock. The testator owned shares in a mining company which was incorporated in South Africa, but which maintained transfer offices both in Africa and in London. The certificate was kept at the testator's London residence. By his will, the testator bequeathed his personal property in England to A, his personal property in Africa to B. It was held that, since the stock was represented by certificates located in England, the intention of the testator must have been to bequeath the property to A, and hence it passed under the bequest of property in England.¹¹

It is not easy to pin down the exact definition of the term 'stock'. It is bewilderingly elusive. Stock has been tagged, at one time or another, with many labels—it has been called quasi-property, a contract right, a chose in action, and a host of other names. Most of these terms are in themselves so ambiguous that they only heighten the confusion. Furthermore, they are true only by way of analogy, if at all. The use of these terms would be misleading, and an effort will be made to avoid them so far as possible in the course of this paper.

Since the corporate fiction is firmly embedded in our law, a shareholder in a corporation owns, in legal contemplation, only his shares, the corporation alone possesses the corporate property.¹² The veil of corporate fiction seldom is dropped unless necessary to prevent fraud.¹³ The shareholder has an interest in or right against the

¹⁰[1904] 1 Ch. 294.

¹¹*Cf.* Matter of McMullen, 114 Misc. 505, 187 N. Y. Supp. 248 (Surr. Ct. 1921) in which a New York transfer tax was held to apply to shares in a foreign corporation which had among its assets realty in New York, even though the certificates were owned by a non-resident and were kept outside the state. Aimed against the evasion of taxes through the use of the corporate device, this provision, in substance, treats shares as real property. The case was reversed in 199 App. Div. 393, 192 N. Y. Supp. 49 (1st Dept. 1922), in which the court held that the state lacked jurisdiction to tax shares of such corporations. See also Matter of Gates, 243 N. Y. 193, 153 N. E. 45 (1926) noted (1926) 12 CORNELL LAW QUARTERLY 108. Subsequently this portion of the tax statute was repealed. *Cf.* Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69, 46 Sup. Ct. 256 (1926); (1925) 38 HARV. L. REV. 809.

¹²"The title to corporate assets is not vested in the shareholders. The title is in the corporation,..." Cardozo, C. J., in *Marr v. Tumulty*, 256 N. Y. 15, 24, 175 N. E. 356, 358 (1931).

¹³WORMSER, DISREGARD OF THE CORPORATE FICTION (1928) 47 *et seq.*

corporation, which interest or right is his stock. The term stock defines and characterizes the relation between the corporation and the shareholder, a relation, in the words of Mr. Justice Holmes, "complex and abiding".¹⁴ In this sense stock is intangible, and "can have no spatial character except by virtue of the parties to the relation,"¹⁵ and it is *sui generis*, because it is characterized by a unique set of rights and duties. The sum of the rights and duties that inhere in the corporation-shareholder relationship defines a share of stock, the term labels that, and nothing more. Stock can be defined more exactly only by determining the rights and duties involved in the relationship.

b. *What is 'situs'?*

The word 'situs', in its dictionary usage, means physical location or situation. But the law has perverted and misused the word until it is scarcely possible to tell what it signifies. Like many other legal expressions, such as 'property', 'trust', and 'domicile', it has been expanded to include so many novel situations that it no longer has an exact meaning. The law has made the 'situs' of real estate equivalent, simply enough, to its actual physical location. But the 'situs' of personal property has been defined, for many purposes in the law, as its owner's domicile. The fiction *mobilia sequuntur personam* is at the root of this doctrine. Now it is apparent that, from the moment we speak of a 'situs' divorced from the physical location of a chattel, we have begun to use 'situs' in a sense different from the dictionary meaning. It has become the result of certain legal contacts or situations by virtue of which one jurisdiction or another assumes control over property. 'Situs' has ceased to express a physical fact from which to reason.

To-day, the fiction that movables follow the owner, as applied to tangible chattels, is not followed for most purposes.¹⁶ But the same problem of the perverted, expanded use of the term 'situs' is involved in discussions of the 'situs' of intangible personality such as stock. For, although courts still talk about the *actual* 'situs' of stock,¹⁷ it is utterly inconceivable that an abstract, intangible, right-duty relationship should have an actual physical location. The stock

¹⁴Modern Woodmen v. Mixer, 267 U. S. 544, 551, 45 Sup. Ct. 389 (1924).

¹⁵Direction der Disconto-Gesellschaft v. U. S. Steel Corp., 300 Fed. 741, 746 (S. D. N. Y. 1924), opinion by Judge Learned Hand. Cf. note 103 *infra*.

¹⁶Frick v. Pennsylvania, 268 U. S. 473, 45 Sup. Ct. 603 (1925). But see Old Dom. S. S. Co. v. Virginia, 198 U. S. 299, 25 Sup. Ct. 686 (1905).

¹⁷Lockwood v. U. S. Steel Corp., 209 N. Y. 375, 103 N. E. 697 (1913).

certificate has a physical location, but we have seen that the share is not identical with the stock certificate. To talk about the physical location of an abstract relationship is highly metaphysical and utterly futile.

There can be no *actual* 'situs' of a share of stock. If 'situs' is to be used in the sense of physical location it might better be abandoned entirely. What Professor Powell has said of the debt is equally applicable to the corporate share: "It isn't that kind of an animal. Any talk about its location is necessarily a medley of metaphor and analogy."¹⁸ 'Situs' simply means the place where shares "may effectually be dealt with."¹⁹ Or perhaps one should say places, because it is not impossible that several jurisdictions may deal effectually with the same shares of stock.²⁰ Nor need the place be the same for every purpose, for perhaps a jurisdiction which cannot deal effectually with shares for one purpose can for a different purpose. 'Situs' would seem to be pretty much what the courts make it.²¹ At different times, and for different purposes, they have made it the domicile of the owner, the place where the certificate is located, the state of incorporation, the place where the corporation owns property and does business. Because 'situs' is not necessarily single, and may turn out to be multiple, this paper will attempt to make separate analyses of the term in varying circumstances. If there be any correlation among the results, it should grow visible as we progress.²² But if there be no correlation, the concept of 'situs' as applied to stock will prove to be a useless intermediate.

TRANSFERS OF STOCK

The Uniform Negotiable Instruments Law defines a negotiable instrument as an unconditional promise or order to pay a sum certain

¹⁸Powell, *Business Situs of Credits* (1928) 28 W. VA. L. QUART. 89, 90.

¹⁹*Ibid.*

²⁰See *infra* pages 54, 60, 63, 68. For comments on the situs problem, see (1925) 38 HARV. L. REV. 809; (1926) 39 *ibid.* 485.

²¹*Cf.* the statement of Mr. Justice Holmes in *Safe Deposit and Trust Co. of Baltimore v. Virginia*, 280 U. S. 83, 97, 98, 50 Sup. Ct. 59, 62 (1929): "To say that a debt has a *situs* with the creditor is merely to clothe a foregone conclusion with a fiction."

²²The RESTATEMENT OF PROPERTY (Am. L. Inst. 1929) § 1, defines property as a person's rights against the world in a thing. If this definition be accepted, situs becomes the place or places which adjudicate these rights in things. The place where land is physically located adjudicates rights in land. Similarly, the place where chattels are physically located usually adjudicates rights in them. But property in stock, under the definitions in the RESTATEMENT, must mean *rights in intangible rights*, and hence it is much more difficult to fix upon a single forum which adjudicates rights in stock than in tangible property.

in money at a fixed or determinable future time.²³ The narrowness of this definition has prevented the classification of bills of lading, warehouse receipts, and stock as 'negotiable instruments'. But the Uniform Bills of Lading Act²⁴ substantially has endowed bills of lading with the quality of negotiability—i.e., a bona fide holder for value of a bill of lading endorsed in blank takes it free of equities between the maker and the previous holder. At common law, bills of lading were not negotiable, although the doctrine of estoppel might bar the claim of one who voluntarily parted with the indicia of ownership. The common law doctrine permitted the true owner to recover, however, in the situation where no estoppel could be raised against him—e.g., if the bill of lading had been stolen from him.

In a very similar manner, the Uniform Stock Transfer Act²⁵ makes stock certificates, when properly endorsed, negotiable, in the sense of cutting off equities. Section 5 of the Act provides:

"The delivery of a certificate to transfer title in accordance with the provisions of section 1 is effectual. . . though made by one having no right of possession and having no authority from the owner of the certificate or from the person purporting to transfer the title."

Although the Act is in derogation of the common law and does not mention specifically the rights of the bona fide purchaser of a stolen certificate,²⁶ it has been construed as changing the common law doctrine of estoppel or quasi-negotiability,²⁷ as it is sometimes called, to true negotiability.²⁸ Thus, a bona fide purchaser or pledgee for value of a certificate is protected against the owner even though the endorsement was obtained by fraud,²⁹ or the certificate was stolen from or lost by the owner.³⁰

As to negotiability, then, stock certificates are classifiable with

²³ U. L. A. (NEGOTIABLE INSTRUMENTS LAW) § 1.

²⁴ U. L. A. (BILLS OF LADING ACT) § 32 *et seq.*

²⁵ U. L. A. (STOCK TRANSFER ACT) § 5.

²⁶ See the vigorous dissenting opinion in *Jackson v. Portland Cement Co.*, 238 Mich. 476, 213 N. W. 863 (1927).

²⁷ *Baker v. Davie*, 211 Mass. 429, 97 N. E. 1094 (1912); 2 COOK, CORPORATIONS (8th ed. 1923) 1272.

²⁸ WILLISTON, SALES (2d ed. 1924) 717, n. 4; BALLANTINE, CORPORATIONS (1927) 473, n. 70.

²⁹ *Jenkins v. Continental Trust Co.*, 150 Md. 416, 133 Atl. 610 (1926).

³⁰ *Peckinpaugh v. Noble & Co.*, 238 Mich. 464, 213 N. W. 859 (1927); *Jackson v. Portland Cement Co.*, *supra* note 26; *Nicholson v. Morgan*, 119 Misc. 309, 196 N. Y. Supp. 147 (Mun. Ct. 1922); *Turnbull v. Longacre Bank*, 249 N. Y. 159, 163 N. E. 135 (1928); and see *Wilson v. Shear Co.*, 3 S. W. (2d) 849 (Tex. Civ. App. 1927). The cases are collected in (1928) 52 A. L. R. 947.

notes, bills of exchange, bills of lading, and warehouse receipts. Under Section One of the Uniform Stock Transfer Act, delivery of the certificate plus endorsement in blank or specifically, or delivery of the certificate plus a separate written power of attorney to transfer or a written assignment are the *only* means of transferring stock.³¹ Wherever the Act is in force,^{31a} the transferable value of the stock is bound up in the certificate. The chief change made by the Act is one of theory. True negotiability is substituted for so-called "negotiability by estoppel," the doctrine whereby one who had clothed another with the indicia of ownership was estopped to assert his ownership against a bona fide purchaser for value. A practical difference is that a bona fide purchaser of a stolen endorsed certificate now is protected against the true owner. A shareholder still may collect dividends before certificates have been issued, or may ask for replacement of certificates which have been destroyed. A number of writers³² and a few courts,³³ however, have pressed the analogy with bills and notes to the extent of asserting that the stock is identical with the certificate.

One discussion³⁴ says that under the Uniform Stock Transfer Act

"... the shares are so completely identified with the certificates that it seems inconsistent with this identification for [the state of incorporation] to exercise in any manner jurisdiction in rem over the shares except through and by means of the certificates."

Such statements are not strictly accurate. That the stock certificate merely has been endowed with the same degree of negotiability as commercial paper does not mean that the share has been made identical with the certificate. Power to transfer title to the obligation by doing specific acts has been given to the holder of the paper—a power not given to the casual possessor of tangible chattels, except coin. By endorsing and delivering the certificate, he transfers the

³¹*Quaere*, how would the courts treat an attempt to transfer shares of stock for which no certificates had been issued? By analogy with the attempted sale of goods not yet in existence, the attempted transfer might be treated as a contract to transfer when the certificates are issued. An actual transfer of the certificates to a bona fide purchaser for value then would cut off the right, which the buyer otherwise would have, to specific performance.

^{31a}In 1930 it had been adopted in twenty-one states. See 6 U. L. A. (1930 Supplement) 2.

³²GOODRICH, *CONFLICT OF LAWS* (1927) 407; (1927) 15 CALIF. L. REV. 145.

³³Blake v. Foreman Bros. & Co., 218 Fed. 264 (N. D. Ill. 1914); Newell v. Tremont Lumber Co., 161 La. 649, 109 So. 344 (1926); Lockwood v. U. S. Steel Corp., *supra* note 17.

³⁴(1927) 15 CALIF. L. REV. 145, 150, n. 28.

intangible rights which it evidences. The transferability of the share is governed solely by the transferability of the certificate. The other characteristics of stock, the rights and obligations which it involves, still constitute, however, the intangible relationship of which the certificate is only a representation. Even the Uniform Stock Transfer Act does not make the certificate the obligation. Stock still is intangible, hence it remains impossible, even under the Act, to give the share of stock a physical location.

a. *Applicability of the Uniform Stock Transfer Act*

The Act has been adopted in twenty-one states, including New York, New Jersey, Pennsylvania, and Illinois, but not including Delaware.³⁵ Because of the change to negotiability and of certain other changes hereinafter to be discussed which the Act introduces, it is necessary to discuss here the situations in which the Act applies. Does the Act apply a) if it is in force at the state of incorporation, but not at the place where the certificate is transferred? b) If it is in force at the place of transfer, but not at the state of incorporation?

The question which law governs the transfer of commercial paper presents an analogous problem. The weight of authority, distinguishing between rights against the maker and rights as between transferor and transferee, makes the law of the place of issue govern the former, but holds that the law of the place where the present holder acquired the instrument governs the validity of his title.³⁶ This holding recognizes business needs—the maker of the note or bill naturally is familiar with the law of the place where he makes it, rather than of some foreign state or country, and in a sense relies upon local law governing the instrument which he makes. But those who accept or transfer a note or bill in a foreign state or country are familiar only with the law of that state or country, and expect the laws of that place to govern their transfers. It is hardly practical, for example, to expect a transferee in Belgium of a check made by a New York citizen to know whether the New York law permits a corporate

³⁵See *supra* note 31a.

³⁶2 WHARTON, CONFLICT OF LAWS (3d ed. 1905) § 447b; *Roland M. Baker Co. v. Brown*, 214 Mass. 196, 202, 100 N. E. 1025, 1028 (1913) (bill of lading); *Weissman v. Banque de Bruxelles*, 254 N. Y. 488, 494, 173 N. E. 835, 837 (1930) (check); *Embricos v. Anglo-Austrian Bank*, [1905] 1 K. B. 677 (bill of exchange). See (1928) 37 YALE L. J. 803. The RESTATEMENT OF CONFLICT OF LAWS (Am. L. Inst. 1930) §§ 200, comment (a), 282, comment (a), seems to recognize the same rule as to stock. Cf. the rule in England, *infra* note 38.

officer to endorse checks payable to the corporation.³⁷ The New York law creates the contract and makes it transferable; if New York should make notes written in New York non-transferable, a transferee would, under the rule of comity, have no rights no matter where the transfer was made. But so long as New York permits the transfer, it seems proper that the validity of an attempt to transfer should be governed by the law of the place where the attempt is made.

Although, as has been pointed out, the analogy between notes and stock certificates is imperfect, the same arguments as to the law which should govern transfer are applicable to both. Today shares of stock are bought and sold in enormous quantities, and a distinct policy in favor of ease of transfer has grown up. When a state passes a statute making certificates negotiable, it seems natural that the state should make that statute apply to all transfers within the state, so that inhabitants may determine by local law the validity of transfers made within the state. That is the rule in England.³⁸ The Uniform Stock Transfer Act, as interpreted by the courts, adopts a different rule. Section 22 of the Act, a compendium of definitions, contains the following:

“(1) In this act, unless the context or subject matter otherwise requires—‘Certificate’ means a certificate of stock in a corporation organized under the laws of this state or of another state whose laws are consistent with this act.”

To this section the following commentary is appended:

“As to the definition of a certificate. . . , it should be said that it seems impossible for a state to make effectual enactment as to the nature and effect of certificates for shares, issued by corporations chartered in other states, unless such states have a similar act.”^{38a}

The policy here expressed against extra-territorial operation of the Act has been interpreted by the courts, in conjunction with the definition of a certificate under the Act, to mean that the Act does not apply to stock in corporations incorporated in states which have not adopted the Act.³⁹ Practically every court confronted with the ques-

³⁷Weissman v. Banque de Bruxelles, *supra* note 36.

³⁸Williams v. Colonial Bank, [1888] L. R. 38 Ch. Div. 388.

^{38a}6 U. L. A. (1922) 25, 26.

³⁹Paterson v. Fitzpatrick McElroy Co., 247 Ill. App. 81 (1927); Barstow v. City Trust Co., 216 Mass. 330, 103 N. E. 911 (1914); Boston Safe Deposit Co. v. Adams, 224 Mass. 442, 113 N. E. 277 (1916); Casto v. Wrenn, 255 Mass. 72, 150 N. E. 898 (1926); Rand v. Hercules Powder Co., 129 Misc. 891, 223 N. Y. Supp. 383 (Sup. Ct. 1927). See also Seymour, *The Proposed Uniform Stock Transfer Act*, (1921) 9 CALIF. L. REV. 186, 205.

tion has so held, and their holdings seem to carry out the intention of the Commissioners on Uniform Laws. The interpretation which has been given is not, however, absolutely necessary, because the phrase, 'unless the context or subject matter otherwise requires' seems to allow sufficient latitude to permit of a contrary interpretation.

It is submitted that the approach taken by the Act is inconsistent with the requirements of modern business. In a single day, a broker may buy or sell on the New York Stock Exchange stock in corporations incorporated in a dozen or two dozen different states. It is utterly impractical to require that in each transaction the broker look to the law of the state of incorporation in order to discover whether the transfer he has made is effective. The Act might easily be amended to bring the rule as to stock into conformity with the rule as to bills and notes; and in the interests of present-day business, it ought so to be amended.

If the Act is in force in the state of incorporation, but not at the place of transfer, the Act ought not, under the English rule above, govern the transfer. The policy against extra-territorial application of the Act would seem to have no bearing upon this situation. A recent writer on stock transfer argues that it follows conversely from the policy against extra-territoriality that "if the Act is in force at the domicile of the corporation, the certificates of stock of the corporation are entitled to the benefits of the Act regardless of where they are negotiated."⁴⁰ Nothing in the Act itself lends support to this holding, and no cases on the point have been found. The doctrine of negotiability would be extended by such a holding, and therefore it possibly may find favor with the courts. It does not accord with the English rule, nor with the majority rule in the United States as to the law governing the transfer of commercial paper; and it does not seem a desirable rule.⁴¹ If the rule is to be uniform, the place of transferring

In *Turnbull v. Longacre Bank*, *supra* note 30, the parties assumed at trial that the Uniform Act governed. On appeal, the contention was made that the law of the state of incorporation should have been proved, but the court held that the contention was raised too late. *Cf. Iowa Securities Corp. v. Ridgwood Natl. Bk.*, 106 Misc. 335, 175 N. Y. Supp. 776 (Sup. Ct. 1919), in which, although the corporation apparently was incorporated in Iowa, wherein the Uniform Act was not in force at the time, the parties assumed that the Uniform Act in New York, the state of transfer, governed.

⁴⁰CHRISTY, *op. cit. supra* note 7, at 118.

⁴¹The RESTATEMENT OF CONFLICT OF LAWS (Am. L. Inst. 1930) takes a contrary view. See *supra* note 36. *Cf. Bridgeport Bank v. N. Y. etc., Co.*, 30 Conn. 231, 275 (1861), an early case in which the question of the validity of a transfer of stock under a blank power of attorney was held to be governed by the law of the place where the power was executed.

the certificate, and not the place of issue, always should govern the validity of transfers of shares.

THE TAXATION MUDDLE

The writer does not intend to discuss the subject of multiple taxation of intangibles in its entirety, for many of the ramifications of the subject are beyond the scope of this paper.⁴² The taxation muddle will be examined here only in so far as it bears, or may bear, upon the problem of the 'situs' of stock.

First, a distinction between inheritance taxes and property taxes should be noted. Inheritance taxes are indirect and upon the privilege of inheriting, whereas property taxes are direct and the emphasis is rather upon the property itself. Both, however, ordinarily are measured by the amount of property within the control of the jurisdiction, and, as a matter of practice, are levied only when property exists within such control. When a state seeks to tax stock, the property is intangible and incapable of physical location. Hence the question becomes: Which jurisdiction has sufficient contact with or control over these intangible rights to treat them as property within its control? The discussion which follows is with reference to inheritance taxes in the main, but, in so far as our problem is concerned, it seems equally applicable to property taxes and income taxes based upon property within the control of the jurisdiction.

In 1896, Judge Vann of the New York Court of Appeals, with extraordinary and refreshing frankness, wrote:⁴³

"When the design of the legislature is to tax the transfer of everything that it has power to tax, there is no inconsistency in taxing in one form, if another is not available. Indeed, perfect consistency is not always practicable in a scheme of taxation that is intended to let nothing escape that can be owned or transferred. Thus, the legislature intended, as I think, to repeal the maxim *mobilia personam sequuntur*, so far as it was an obstacle, and to leave it unchanged, so far as it was an aid, to the imposition of a transfer tax upon all property in any respect subject to the laws of this state. . . That dominant purpose is the key to the construction of the act, and it should not be thwarted by the conservatism of the courts, even if, in order to embrace all kinds of property, it is necessary to make it so pliable in application as to conform to all methods of doing business and all ways of holding property."

⁴²For an excellent historical resume of the subject, see (1930) 15 CORNELL LAW QUARTERLY 457.

⁴³*In re Whiting's Estate*, 150 N. Y. 27, 30, 31, 44 N. E. 715, 716 (1896).

Although in this case Judge Vann was with the minority,⁴⁴ the attitude towards taxation which he expressed has been characteristic of state legislatures and courts until recent years.⁴⁵ Legislatures were gunning for every species of bird, courts were abetting them by refraining from 'conservative' interpretations of tax statutes. As a consequence, at least four types of inheritance taxation were tried. Taxes were imposed not only at both ends of the stock relationship, but also in states where the certificate was located, and in those where the corporation owned property and did business.

The tax by the state of incorporation was justified because its laws kept alive the corporation's obligation to the shareholder. The tax by the state of the owner's domicile was based upon *mobilis sequuntur personam*, a fiction later rejected in the taxation of tangible chattels. Taxation by the state in which the certificate was kept was based on the analogy with tangible chattels, and justified further on the theory that its law sanctioned transfers of the certificate. Taxation by the state in which the corporation owned property and did business was accomplished by disregard of the corporate fiction, whereby the shareholder became partial owner of a business within the state. The validity of this last tax is a problem in the corporate fiction, not included in our discussion. Suffice it to mention that, in 1926, the United States Supreme Court, in *Rhode Island Hospital Trust Co. v. Doughton*,⁴⁶ found the tax unconstitutional. The veil of corporate fiction evidently was diaphanous enough to permit states of penetrating vision to tax shareholders as owners of corporate businesses and property.

It is still possible that three states may tax—the state of incorporation, the state of the domicile of the stock owner, and the state where the certificate is located. Each of these finds some logical justification for taxing. Might goes a long way towards making right, and so long as a state has something to seize upon, however slippery, it has an excuse for taxing. The domicile of the owner is the historic

⁴⁴The opinions in this case are curious. Judge Vann wrote the prevailing opinion, but stated that he did so by "direction" of "a majority of my associates," and decided the case contrary to his own expressed views. One judge concurred, three concurred in result, two dissented on the ground that the multiple taxation was unsound public policy.

⁴⁵For statistics on the number of states taxing each 'situs' of shares, see Bradford, *Death Duty Legislation* (1925) 11 VA. L. REV. 585; (1930) 15 CORNELL LAW QUARTERLY 457.

⁴⁶*Supra* note 11. *Accord*: *Matter of Gates*, *supra* note 11. *Cf. In re Bronson's Estate*, 150 N. Y. 1, 44 N. E. 707 (1896).

tax-place of intangibles;⁴⁷ even abstract waifs must have a tax home at some place; so, like obedient shadows, they trail their owners. The state in which the owner was domiciled seizes upon his end of the stock relationship, and surprisedly discovers that it has jurisdiction to tax. In much the same way, the state of incorporation takes hold of the other end of the relationship, which is anchored to the corporation. Finally, the certificate being the only tangible evidence of the stock, the state in which the certificate is located inevitably discovers that it has jurisdiction to tax.

The imposition of this tax by the state in which the certificate is located is hard to defend. Tangible chattels may be taxed wherever found, but, as we have seen, stock is intangible property of which the certificate is merely transferable evidence. Some justification for the tax may be found in the protection which the state law gives (if it does) to the transfer *inter vivos* of the certificate within the state. But a certificate is not property, not the thing in itself; hence, although the state may tax its transfer as a certificate, and although it is the sole means of transferring the stock, it seems harsh that the state should be allowed to tax its transfer as if it were the property itself, and to collect a heavy inheritance tax merely because the certificate happens to have been left within the state. When the tax sought to be imposed is levied, not upon the full value of the relationship, but merely upon the formal transfer of the certificate, rather than the property represented by the certificate, it is a different matter. The validity of such a stock-transfer tax when imposed on the transfer of a non-resident's certificates representing shares in a foreign corporation, was upheld in *People ex rel. Hatch v. Reardon*.⁴⁸ The New York court properly emphasized that the tax was imposed upon the privilege of formally transferring the certificate under New York law, not upon the property evidenced by the certificate. It was, in fact, merely a stamp tax.

The Uniform Stock Transfer Act, as has been pointed out, did not identify the stock with the certificate, although it did make the transfer of the certificate the sole means of transferring the stock. An interesting, but wholly unsupported case in Louisiana, *Newell v. Tremont Lumber Co.*,⁴⁹ adopts the opposite view. The Louisiana inheritance tax law imposed a tax on property of non-residents which was physically within the state. The court held that stock in a

⁴⁷Estate of Hodges, 170 Cal. 492, 150 Pac. 344 (1915); Matter of Estate of Romaine, 127 N. Y. 80, 27 N. E. 759 (1891).

⁴⁸184 N. Y. 431, 77 N. E. 970 (1906).

⁴⁹*Supra* note 33.

Louisiana corporation, the certificates evidencing which were located in Illinois, was not taxable under the Louisiana statute. The effect of the Uniform Stock Transfer Act the court expressed thus:

"The *transferable value* of the stock lies. . . wholly in the *certificates*; and thus the certificates are by law made the corporeal or physical representatives of the stock itself, so that, where the said certificates are, there also the stock itself is physically located."^{49a}

This argument assumes that the Uniform Act makes stock tangible; for otherwise it would be absurd to speak of its physical location. The decision seems to exaggerate the effect of the Act, and courts in other states have shown no inclination to agree with the Louisiana court.⁵⁰

Recent attempts of the United States Supreme Court to curb multiple taxation raise more interesting problems. Several times in the last few years the Court has expressed a definite aversion to multiple taxation,⁵¹ and in the recent case of *Farmers' Loan & Trust Co. v. Minnesota*⁵² reiterates that aversion. The case decided expressly, Mr. Justice Holmes dissenting, that Minnesota, the state of the debtor, lacked power to impose an inheritance tax on negotiable bonds issued by itself and its municipalities, the owner being domiciled and the instruments located in New York. It has already been pointed out that bonds have had a history quite different from that of stock. Only three years ago did the Supreme Court decide, in *Blodgett v. Silberman*,⁵³ that bonds were intangibles, and could be taxed at the domicile of their owner despite the *Union Refrigerator*⁵⁴ and the *Frick*⁵⁵ cases. But memories of the time when the bond was the obligation still linger. The stock certificate comes of baser lineage, and only with the advent of the Uniform Stock Transfer Act has it risen to the status of a negotiable instrument.

Both are intangibles, both belong in the mysterious class of 'choses in action'; and Judge Learned Hand⁵⁶ has intimated that negotiable bonds "are now to be considered in the same class" as shares of stock.

^{49a}*Ibid.* at 652, 109 So. at 345.

⁵⁰*Bellows Falls Power Co. v. Commonwealth*, 222 Mass. 51, 109 N. E. 891 (1915); *Re Pantlind Hotel Co.*, 232 Mich. 330, 205 N. W. 99 (1925); *Callery's Appeal*, 272 Pa. 255, 116 Atl. 222 (1922); *cf. De Ganay v. Lederer*, *supra* note 6.

⁵¹*Frick v. Pennsylvania*, *supra* note 16; *Blodgett v. Silberman*, *supra* note 7; *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83, 50 Sup. Ct. 59 (1929).

⁵²280 U. S. 204, 50 Sup. Ct. 98 (1930).

⁵³*Supra* note 7.

⁵⁴*Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 Sup. Ct. 36 (1905).

⁵⁵*Supra* note 16.

⁵⁶*Moore v. Mitchell*, 30 F. (2d) 600, 603 (C. C. A. 2d, 1929).

Whether the Supreme Court would so consider them is a matter of conjecture, however. In the light of recent agitation against multiple taxation,⁵⁷ the enactment of reciprocal tax statutes,⁵⁸ and the Court's known antipathy toward multiple taxation, it is quite possible that the Court might forbid Minnesota to tax stock as well as bonds in the situation presented in the *Minnesota* case. Should the Court make that decision, it would represent a most interesting shift of theory; for in *Frick v. Pennsylvania*,⁵⁹ decided only five years ago, the Court treated the state of incorporation as the *primary* taxing power, saying:

"The decedent owned many stocks in corporations of States, other than Pennsylvania, which subjected their transfer on death to a tax and prescribed means of enforcement which practically gave those States the status of lienors in possession. As those States had created the corporations issuing the stocks, they had power to impose the tax and to enforce it by such means, irrespective of the decedent's domicile, and the actual situs of the stock certificates. Pennsylvania's jurisdiction over the stocks necessarily was subordinate to that power. . . We think it plain that such value as the stocks had in excess of the tax is all that could be regarded as within the range of Pennsylvania's taxing power."

To-day the state which creates the corporation has no power to tax its bonds when the instruments and holders are outside the state; and logically no greater justification exists for taxing the corporation's outstanding stock. The state creates the corporation and sanctions its obligations as much in one case as in the other. The abruptness with which the Supreme Court overturned *Blackstone v. Miller*⁶⁰ in deciding the *Minnesota* case indicates that policy rather than history guided its decision. If policy is the guiding consideration—and in this instance it should be—the rule of the *Minnesota* case ought to apply to stock as well as bonds. Whether the Court actually will desert the position it took in the *Frick* decision is not easy to prognosticate. A case squarely presenting the question should make history.

Does the *Minnesota* case bar an inheritance tax by the state where the stock certificate is located? In that case, both the bond-paper and the owner's domicile were located in New York. In remarking that New York had power to tax, the Court laid stress on the doctrine

⁵⁷Bradford, *loc. cit. supra* note 45.

⁵⁸CHRISTY, *op. cit. supra* note 7, c. X, *passim*.

⁵⁹*Supra* note 16, at 497, 45 Sup. Ct. at 607.

⁶⁰188 U. S. 189, 23 Sup. Ct. 277 (1903).

mobilia sequuntur personam, and made clear that its statement was based upon the fact that New York was the domicile of the owner. The manner in which the Court enumerated every possible tax-situs, animadverted upon multiple taxation, and expressly approved of only one tax-situs, the domicile of the owner, might lead to the inference that the court disapproved of taxation by the state in which the certificate was located. But the Court did not expressly disapprove; in fact, it did not discuss the question at all, and even if it had, the discussion would have been dictum. Taxation by the state where a bond instrument is located still is possible, although perhaps its doom is near.⁶¹ Hence, however indefensible it may seem, the place where a stock certificate is located still has power to tax.⁶²

Perhaps this is only a restatement of the issue between policy and history; but the longer one puzzles over the taxation muddle, the more one wonders why it has been regarded as a question of power or jurisdiction at all. State courts desirous of upholding state taxes never found any difficulty in locating shares, and discovering jurisdiction to tax, wherever expediency required. Now, when the Supreme Court discovers that multiple taxation is malodorous, presto! the state of incorporation has lost its power to tax. Does jurisdiction vary, or does the definition of due process pulsate, contracting and expanding with the needs of the time? In *De Ganay v.*

⁶¹Subsequent to the writing of this paper, the writer's attention was called to the recent case of *Baldwin v. Missouri*, 281 U. S. 586, 50 Sup. Ct. 436 (1930), which holds unconstitutional a transfer tax by the State of Missouri on bonds and notes, the certificates for which were located in Missouri at the time of the death of the testatrix domiciled in Illinois. The Court, at 593, 50 Sup. Ct. at 438, finds that the bonds and notes had a "situs at the domicile of the creditor", and hence "were not within Missouri for taxation purposes." This case and the Minnesota case seem effectually to limit the taxation of bonds, at least, to the state in which the owner is domiciled.

Mr. Justice Holmes dissents in a typically candid opinion. He concludes, at 596, 50 Sup. Ct. at 439: "Very probably it might be good policy to restrict taxation to a single place, and perhaps the technical conception of domicile may be the best determinant. But it seems to me that if that result is to be reached it should be reached through understanding among the States, by uniform legislation or otherwise, not by evoking a constitutional prohibition from the void of 'due process of law,' when logic, tradition and authority have united to declare the right of the State to lay the now prohibited tax."

⁶²*In re Sack's Estate*, 232 App. Div. 433, 250 N. Y. Supp. 113 (2d Dept. 1931), The New York Appellate Division, 2nd Department, on the authority of *In re Bronson's Estate*, *supra* note 46, upheld a transfer tax on shares of stock in a domestic corporation, although the certificates were in the possession of a non-resident decedent. The court recognized the reasoning of the Minnesota case, but refused to upset the settled law of New York "without direct authority to the contrary."

Lederer,⁶³ a Federal income tax upon a non-resident alien who owned and kept in Europe certificates of stock in a United States corporation was upheld. If the *Minnesota* case (supposing, for the moment, that it applies to stock) expounded a doctrine of absolute lack of jurisdiction, the Federal income tax, based upon presence of the alien's property within the United States, should not apply, and the *De Ganay* case ought to be decided differently today.⁶⁴ But Mrs. De Ganay probably would have to pay her tax now, just as she did in 1917; for limitations upon multiple taxation appear to be based rather upon policy—lack of due process, the Supreme Court calls it—than upon lack of jurisdiction. “[T]he jurisdiction of the taxing power over the rem as a practical fact”⁶⁵ exists wherever the share is, and without logical inconsistency the share may be in at least three different places at the same time. The impossibility of treating the problem as one of jurisdiction is apparent the moment one tries to decide logically which of the three jurisdictions should emerge from the fray the sole survivor. As a matter of due process it really makes very little difference, so long as the other two die on the field of honor.

That does not, however, dispose of the matter; for the battle will be long and bitterly fought, and each of the three candidates will claim the right to be sole survivor. But policy, not jurisdiction, is the nub of the matter; intangible rights have no physical location from which jurisdiction may be deduced. Hence convenience should determine which state or states ought to tax. If multiple taxes are millstones about the public neck, they are contrary to “due process of law”. In that phrase the Supreme Court may discover the means of straightening out the taxation inuddle.

ADMINISTRATION

Upon the death of a person, testate or intestate, administration of his estate ordinarily is had in the state of his last domicile.⁶⁶ Under the principle of comity, the right of succession to personalty which he leaves outside his domicile is governed by the law of the domicile.⁶⁷ For this outside personalty ancillary administration frequently is necessary, however. The ancillary administrator acts in cooperation with the domiciliary administrator, and usually pays over to him

⁶³*Supra* note 6.

⁶⁴Old Dom. S. S. Co. v. Virginia, *supra* note 16.

⁶⁵De Ganay v. Lederer, *supra* note 6, at 574.

⁶⁶4 SCHOULER, WILLS (6th ed. 1923) § 3520.

⁶⁷*Ibid.* § 3516. Illinois and Mississippi are contra. See *Ewing v. Warren*, 144 Miss. 233, 109 So. 601 (1926).

whatever surplus remains after the property in the state of ancillary administration has been settled up.⁶⁸ The need for ancillary administration results from the fact that the state of principal administration has no jurisdiction over property in another state.

For purposes of administration, a simple debt is treated as though it were located at the debtor's domicile—the place where he can be found most easily.⁶⁹ Actually the debt has no physical location, but control over the debtor furnishes a basis for jurisdiction to administer.⁷⁰ Promissory notes have been treated, in some decisions, in the same manner as simple debts.⁷¹ Negotiable bonds, on the other hand, have been regarded as tangible chattels,—as assets wherever the instruments are found.⁷²

Where is stock to be administered? The usual view, in accordance with the holdings as to debts and notes, makes the state of incorporation the place at which stock is administered, on the theory that it is the proper place for the enforcement of obligations against the corporation.⁷³ It is argued further that administration at the state of incorporation protects local creditors of and claimants against the shareholder by keeping property in the state until all claims against it have been satisfied.⁷⁴ The view taken by a few recent cases,⁷⁵ and championed by Professor Goodrich,⁷⁶ treats a share of stock, like a negotiable bond, as tangible property wherever the certificate is

⁶⁸SCHOULER, *op. cit. supra* note 66, § 3526. This is purely a matter of comity, discretionary with the courts of the state of ancillary administration. Transmission sometimes has been refused. *State of Iowa v. Slimmer*, 248 U. S. 115, 39 Sup. Ct. 33 (1918); *Estate of Bliss*, 121 Misc. 773, 202 N. Y. Supp. 185 (Surr. Ct. 1923); *In re Lorillard*, 127 L. T. Rep. 613 (1922).

⁶⁹2 WHARTON, *op. cit. supra* note 36, § 612a. *Cf. Colorado v. Harbeck*, 232 N. Y. 71, 133 N. E. 357 (1921).

⁷⁰"It is evident that the law for purposes of jurisdiction is not interested in the spatial quality of property, that is, the fact that the property has extension, or occupies space, except in so far as that quality affords the state a power of control over it. . . . It is power of control and not location that is the basis of jurisdiction." Carpenter, *Jurisdiction over Debts for Purpose of Administration, Garnishment, and Taxation* (1918) 31 HARV. L. REV. 905, 907.

⁷¹*Wyman v. Halstead*, 109 U. S. 654, 3 Sup. Ct. 417 (1884).

⁷²Goodrich, *Problems of Foreign Administration* (1926) 39 HARV. L. REV. 796, 802. *Quere*, is this rule affected by the Supreme Court's decision that, at least for tax purposes, bonds are intangibles?

⁷³2 WHARTON, *op. cit. supra* note 36, § 612a; *Grayson v. Robertson*, 122 Ala. 330, 25 So. 229 (1898); *Murphy v. Crouse*, 135 Cal. 14, 66 Pac. 971 (1901).

⁷⁴*Murphy v. Crouse*, *supra* note 73.

⁷⁵*Norrie v. Lohman*, 16 F. (2d) 355 (C. C. A. 2d, 1926); *Lockwood v. U. S. Steel Co.*, *supra* note 17; (1925) 25 COL. L. REV. 232.

⁷⁶Goodrich, *op. cit. supra* note 72, at 805.

found. A third view, based upon the maxim *mobilia sequuntur personam*, hits upon the domicile of the owner as the proper place for administration.⁷⁷

Against each of these views something may be said. The necessity for protecting creditors seems somewhat exaggerated. Certainly it has not influenced the development of the rule as to bonds. Moreover, under the Uniform Stock Transfer Act,⁷⁸ shares may be attached at the state of incorporation, if the owner is enjoined from transferring the certificates, or the certificates are impounded. The majority rule at common law is the same except that the impounding or injunction is not necessary.⁷⁹ If the creditor can attach shares in the state of incorporation, that should protect his interest sufficiently, and administration in that state should be unnecessary. The possibility of having to sue the corporation must be reckoned with, but it seems exceptional rather than usual. It must be remembered that the shareholder-corporation relationship differs vastly from a simple debtor-creditor relationship; with stock negotiable and freely negotiated, the administrator in the ordinary case simply sells the certificates, and has no need to bring suit against the corporation. Finally, if these are the only grounds for administration in the state of incorporation, administration there should be unnecessary when there is no need of suit and no creditors are claiming. This was the interpretation given a Missouri statute which made stock in Missouri corporations "personal estate" for the purpose of administration in Missouri.⁸⁰ Creditors and distributees having consented to forego administration in Missouri, the court suggested that the domicile of the owner would administer the stock.

The treatment of a stock certificate as a tangible for purposes of administration is objectionable, first, because the share is an abstract relationship, not identical with the certificate, and second, because no special convenience favors so treating it. Analogies with the place for taxation and the place for attachment prove little; control for taxation involves different considerations from control for administration, hence control for one purpose does not necessarily predicate control for the other. We have seen that the certificate is not identical with the share of stock, and should not be taxed as if it were. Why should the certificate be administered as if it were the stock itself?

⁷⁷Estate of Miller, 90 Kan. 819, 136 Pac. 255 (1913).

⁷⁸U. L. A. (STOCK TRANSFER ACT) § 13.

⁷⁹*Infra* note 85.

⁸⁰Fairchild v. Lohman, 13 F. (2d) 252 (W. D. Mo. 1926).

Mobilia sequuntur personam has been condemned as a fiction—Professor Goodrich dismisses it summarily as a criterion for administration because it is “not true either as a matter of fact or legal doctrine.”⁸¹ It might be answered that the taxation analogy is as valid here (if not more valid, in the light of the possible implications of the *Minnesota* case) as when it is used in support of the place where the certificate is located. But there is a better answer. No matter where shares are administered, if jurisdiction to administer be based upon physical location, we must resort to a fiction, for shares have no physical location. If the problem thus resolves itself into a choice of fictions, should not the one that works best be selected? If we admit that administration is based upon control over property rather than upon physical location of property, ultimately we are led to the same conclusion; control being essentially a practical term, control for administration should rest with the state that can administer most efficiently. That state, it is submitted, is the domicile of the owner. Ancillary administration is cumbersome, slow, expensive—so much red tape. A testator may leave stock in corporations incorporated in six or eight different states, or in one corporation incorporated in a number of states. To what purpose six or eight ancillary administrations when, in the ordinary case, the entire estate might be settled under a single administration issued at the owner’s domicile?

Of course, these statements need qualification. If an administrator wants to contest an inheritance or transfer tax, he still may find it necessary to secure the appointment of an ancillary administrator. Perhaps the solution lies in statutes allowing foreign administrators to sue or to secure local administration without the usual elaborate proceedings.⁸² But as the law of ancillary administration exists to-day, there is ample justification for following the maxim *mobilia sequuntur personam* in fixing the place where shares of stock should be administered.

ATTACHMENT AND EXECUTION

The problem of the attachment of stock really is two-fold: mingled with the problem of attachment and execution as a means of enforcing personal judgments is the problem of attachment for the purpose of acquiring jurisdiction in rem and quasi-in-rem. But the two problems lend themselves to treatment as one, because jurisdiction over property is acquired only when it is within the control of the state,

⁸¹Goodrich, *op. cit. supra* note 72, at 806.

⁸²Gray v. Franks, 86 Mich. 382, 49 N. W. 130 (1891); 1 WOERNER, ADMINISTRATION (3d ed. 1923) § 163.

and is subject to seizure.⁸³ If stock may be attached in a state, it should follow both that that state may acquire jurisdiction quasi-in-rem by virtue of the attachment and that an execution against the stock may there be enforced. The two problems therefore will be treated as one.

The traditional place for the attachment of stock, like that of the simple debt, has been the state of incorporation.⁸⁴ In 1913, Professor Beale wrote:⁸⁵

“The courts. . . almost unanimously hold that the presence of a certificate of stock within the jurisdiction gives no power to take the right evidenced by the certificate; existing only on the books of the corporation, it can be attached only in that place where the corporate books legally exist, that is, at the domicile of the corporation.”

In 1900, however, the New York Court of Appeals had driven an entering wedge of dissent in *Simpson v. Jersey City Contracting Company*.⁸⁶ Certificates of stock in a foreign corporation, owned by a non-resident, had been pledged to a resident of New York. A creditor of the pledgor sought to levy upon the pledgor's interest under a warrant of attachment. The court, recognizing that for many business purposes stock certificates were regarded as property, held that for the purpose of attachment they might be considered property within New York. The case has been cited frequently, and has been followed in New York⁸⁷ and in a few other states.⁸⁸ The Supreme Court of the United States, in the *Yazoo* case,⁸⁹ upheld a Mississippi statute which permitted execution on stock certificates within the state. Mr. Cook, in his work on corporations, approves the doctrine:

“. . . in view of the fact that certificates of stock have gradually grown to be more than mere receipts or evidence of stock, and have come to be the stock itself, practically, in business transactions, especially in America, and, like a promissory note,

⁸³*Pennoyer v. Neff*, 95 U. S. 714, 727 (1877); *Martin v. Bryant*, 108 Me. 253, 80 Atl. 702 (1911).

⁸⁴*Gundry v. Reakirt*, 173 Fed. 167 (E. D. Pa. 1909).

⁸⁵Beale, *Exercise of Jurisdiction in Rem to Compel Payment of a Debt* (1913) 27 HARV. L. REV. 107, 111.

⁸⁶165 N. Y. 193, 58 N. E. 896 (1900).

⁸⁷*General Motors Corporation v. Ver Linden*, 199 App. Div. 375, 192 N. Y. Supp. 28 (1st Dept. 1922).

⁸⁸*Merritt v. American Barge Co.*, 79 Fed. 228 (C. C. A. 8th, 1897); *Mitchell v. Leland Co.*, 246 Fed. 103 (C. C. A. 9th, 1917); *Puget Sound Bank v. Mather*, 60 Minn. 362, 62 N. W. 396 (1895); *Griswold v. Kelly-Springfield Tire Co.*, 94 N. J. Eq. 308, 120 Atl. 324 (1916).

⁸⁹*Yazoo & Miss. Valley R. R. v. Clarksdale*, 257 U. S. 10, 42 Sup. Ct. 27 (1921).

a certificate of stock is property in itself and carries title, irrespective of the corporate books and of transfer on the corporate books."⁹⁰

The weight of authority, however, has clung to the common law view expressed by Professor Beale. By statutes in Delaware and New Jersey, stock in Delaware and New Jersey corporations is in contemplation of law located in those states (except for purposes of taxation), and is subject to attachment there.⁹¹

In one respect the traditional view proved impractical. The owner of the certificate, as soon as he heard that the share had been attached at the domicile of the corporation, was likely to attempt to sell the stock by endorsing and delivering the certificate. Since at common law certificates were not negotiable, the question of priorities between the attaching creditor and the bona fide transferee of the certificate without notice was an annoying one, with the trend of decisions in favor of the latter.⁹² The necessity of protecting the transferee probably explains why a promissory note may be attached only where the note itself is found,⁹³ although a simple debt may be attached at the domicile of the debtor. The drafters of the Uniform Sales Act and Uniform Warehouse Receipts Act were confronted with the somewhat similar problem of the attachment of merchandise represented by an outstanding negotiable bill of lading or warehouse receipt. Their solution was a provision that the goods could be attached only if the outstanding instrument which represented them was impounded or its negotiation enjoined.⁹⁴ This makes difficult the attachment of goods for which a bill of lading or warehouse receipt is outstanding, since an attachment sufficient against a bona fide purchaser of the document of title can be perfected only when both the goods and either the document of title or the holder thereof are in the state. But it seems a reasonable way out of the difficulty which inevitably arises when attachment of tangible property represented by a negotiable instrument is attempted.

The Uniform Stock Transfer Act, since it made certificates negotiable had to provide some method of attachment which could not be

⁹⁰2 COOK, *op. cit. supra* note 3, § 485.

⁹¹Bouree v. Trust Francais, 14 Del. Ch. 332, 127 Atl. 56 (1924); Skinner v. Educational Pictures Corporation, 14 Del. Ch. 417, 129 Atl. 857 (1925); Andrews v. Guayaquil Co., 69 N. J. Eq. 211, 60 Atl. 568 (1905); Amparo Mining Co. v. Fidelity Trust Co., 75 N. J. Eq. 555, 73 Atl. 249 (1909).

⁹²2 COOK, *op. cit. supra* note 3, § 486 *et seq.*

⁹³Oakdale Mfg. Co. v. Clark, 29 R. I. 192, 69 Atl. 681 (1908).

⁹⁴1 U. L. A. (SALES ACT) § 39; 3 U. L. A. (WAREHOUSE RECEIPTS ACT) § 25. See especially the comments of the Commissioners, 1 U. L. A. (1931) § 39.

defeated by negotiation of the certificate to a bona fide purchaser. Influenced by a desire for uniformity,⁹⁵ the framers of the Act followed the rule of the Sales Act and Warehouse Receipts Act in Section 13 of the Uniform Stock Transfer Act:

"Sec. 13.—No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined. Except where a certificate is lost or destroyed, such corporation shall not be compelled to issue a new certificate for the stock until the old certificate is surrendered to it."

In accordance with the intention of the framers, this section has been interpreted as re-enacting the common law rule that the state of incorporation has power to attach, but adding, as a condition precedent to attachment, the seizure of the certificate or an injunction against its transfer. Thus, a Federal court sitting in Wisconsin has jurisdiction under Section 57 of the Judicial Code⁹⁶ to clear the title to shares of stock in a Wisconsin corporation, even though both the certificates and the adverse claimants thereto are in Ohio.⁹⁷ Curiously enough, *Holmes v. Camp*,⁹⁸ one of the few cases discussing Section 13, was a New York case. The New York Court of Appeals thought it not inconsistent with the *Simpson* case⁹⁹ to hold that shares of stock in a New York corporation could be attached in New York, and viewed Section 13 merely as a preventive against the rendition of futile judgments.¹⁰⁰

What, in the light of these decisions, does Section 13 accomplish? A court has jurisdiction to enjoin the transfer of the certificate only

⁹⁵See 6 U. L. A. (STOCK TRANSFER ACT) § 13, commentary.

⁹⁶36 STAT. 1102, 28 U. S. C. (1926) § 118.

⁹⁷*Harvey v. Harvey*, 290 Fed. 653 (C. C. A. 7th, 1923).

⁹⁸219 N. Y. 359, 114 N. E. 841 (1916).

⁹⁹*Supra* note 86.

¹⁰⁰Although this case arose subsequently to the enactment of the UNIFORM STOCK TRANSFER ACT into law in New York, the Act was not applicable, since the certificates involved were issued before the Act took effect. See N. Y. CONS. LAWS C. 42 (PERS. PROP. LAW) § 184.

The Court did, however, discuss the effect of Section 13 of the Act: "The possibility of our courts being engaged in rendering futile judgments in such an action as this where there are outstanding certificates not within its jurisdiction or control is now and for the future limited by our adoption of the Uniform Stock Transfer Law with its various provisions relating to proceedings against the interest of a stockholder represented by such outstanding certificates."

Quaere, whether N. Y. Civ. Prac. Act § 915 is not inconsistent with § 13 of the Uniform Act?

when the defendant is within the state, hence the injunction cannot be resorted to in commencing a quasi-in-rem action. The injunction can be used in an in personam action wherein the property is attachable as security, provided the holder of the certificate is within the state. But, despite the issuance of the injunction, the defendant still has the power to defy the court and transfer his certificates, and thus to render the attachment futile. The doctrine of *lis pendens* had no application to stock at common law,¹⁰¹ and *a fortiori* does not apply now that stock certificates have become negotiable. As to seizure of the certificate: if the analogy with the Uniform Warehouse Receipts Act and the Uniform Sales Act is carried out to its logical extremity, it would seem that the certificate must be seized in the state of incorporation in order that attachment be valid. The language of Section 13 is equivocal, and no cases on the point have been found; but the necessity of seizing the certificates in the state of incorporation seems to be the logical outcome of the adoption of the common law rule and the addition of a condition precedent thereto.

It is submitted that Section 13 is based upon a false analogy. Bills of lading and stock certificates are both, under the Uniform Acts, negotiable, and both represent something else. But there the parallel ceases. Behind the bill of lading lie, in addition to legal relationships, actual tangible chattels having form, shape, and substance. Behind the stock certificate hovers only a shadowy, intangible relationship which the certificate evidences. The share of stock is separate from the certificate, yet the two are more intimately related, the one being the sole manifestation of the other, than are the merchandise and the bill of lading. Stock certificates, indeed, are much more analogous to promissory notes than to bills of lading, since the note, like the stock certificate, represents an intangible obligation. The rule of the *Simpson* case, which follows the rule as to promissory notes, is a more practical thing than the rule of Section 13. In this situation, the business man's point of view properly may be urged; for if the whole transferable value of stock is bound up in the certificate, ought not a creditor, as a practical matter, be able to reach that value wherever the certificate is found? Attachment made only at the place where the tangible evidence is found appears to be practicable as applied to promissory notes, and there is no reason why it should not be equally practicable as applied to stock certificates. The rule of the *Simpson* case, that the presence of the certificate alone, is a basis for attachment, removes the possible objection that under Section 13 only the state of incorporation can attach, and

¹⁰¹Holbrook v. N. J. Zinc Co., 57 N. Y. 616 (1874).

its general adoption would eliminate much confusion. The state of the law at present is anything but clear. New York, for example, followed the Uniform Act in *Holmes v. Camp*, where the attachment was of shares in a New York corporation, disregarding the certificate; but will New York cling to the rule of the *Simpson* case? If so, suppose that New Jersey, acting under the Uniform Act and having personal jurisdiction over the shareowner, enjoins the transfer of certificates located in New York, but representing stock in a New Jersey corporation. Suppose now that attachments are levied in both New York and New Jersey; may there not be a conflict between the rule of the *Simpson* case and the Uniform Act?

The attachment of stock is not limited, as a matter of jurisdiction, to any single place; we have seen that to-day several competing jurisdictions may attach. But practical convenience urges the adoption of a workable rule which will fix upon a single place of attachment. The frequency with which certificates are negotiated and the fact that they represent the sole means by which, under the Uniform Act, stock may be transferred, combine to indicate that the rule of the *Simpson* case would best conform to the needs of modern business. Though by no means a universal panacea, the adoption of that rule would introduce certainty into a field of commercial law that sadly needs it. Because it is most convenient, the state where the certificate is located should have the sole right to attach stock which the certificate represents.

SEIZURE BY THE SOVEREIGN

As an aftermath of the World War, some interesting and rather unusual cases concerning seizure of shares owned by non-resident alien enemies have come up. A parallel between seizure by the state and attachment by a court in favor of a private individual readily suggests itself. In both instances, the state must have control over the property sought to be seized, or its acts will not receive legal recognition elsewhere. And somewhat the same confusion exists in both instances, although perhaps it is easier to reconcile the cases on seizure.

A number of cases decided within a few years after the World War (and perhaps influenced a bit by wartime psychology) held that the United States Alien Property Custodian could confiscate German-owned shares in United States corporations regardless of the location of the certificates.¹⁰² These holdings apparently were based upon the

¹⁰²*Garvan v. Certain Shares, etc.*, 276 Fed. 206 (S. D. N. Y. 1921); *Columbia Brewing Co. v. Miller*, 281 Fed. 289 (C. C. A. 5th, 1922); *Miller v. Kaliwerke*,

common law rule that a share is attachable in the state of incorporation. They emphasize the distinction between the share and the certificate, dismissing the certificate as mere evidence of the share. In marked contrast with these cases is the *Disconto* case,¹⁰³ in which the Supreme Court was confronted with the problem of the validity of the seizure by the English Public Trustee of German-owned stock certificates representing shares in the United States Steel Corporation, which were in England, pledged with London bankers. The Supreme Court held that the law of the place where the certificates were located governed their transfer;¹⁰⁴ and since by the law of England the seizure was proper, the Supreme Court held that it would be recognized in the state of incorporation, and that the corporation should register the British rather than the German owner. The *Disconto* case has been much discussed,¹⁰⁵ and has been followed in later cases.¹⁰⁶ Yet at the same time the federal courts have continued to uphold seizure by the state of incorporation.¹⁰⁷

This prima facie inconsistency in the principle behind these later holdings is fairly easily explained. We have seen that the certificate represents and is the transferable evidence of the share; the share represents an interest in the corporation; and the corporation is the creature of the state of incorporation. Under the doctrine of comity, the law of the place of transfer ordinarily governs transfers, *provided* that the law of the state of incorporation permits the certificates to represent the shares and to be transferred. So long as that law sanctions the embodiment of the transferable value of the share in the certificate, the certificate may be seized where found, or the holder of it may be compelled to surrender it to the state. The state of incorporation, however, may seize the stock because, as the state which creates and sanctions the existence of the corporation, it has the power to divorce the share from the certificate.¹⁰⁸ Wartime

283 Fed. 746 (C. C. A. 2d, 1922). Cf. *Gt. Northern Ry. v. Sutherland*, 273 U. S. 182, 47 Sup. Ct. 315 (1927).

¹⁰³*Direction der Disconto Gesellschaft v. U. S. Steel Corp.*, 267 U. S. 22, 45 Sup. Ct. 207 (1925), affirming 300 Fed. 741 (S. D. N. Y. 1924).

¹⁰⁴Cf. cases *supra* note 36.

¹⁰⁵(1927) 15 CALIF. L. REV. 145; (1927) 9 MINN. L. REV. 661. Cf. (1925) 25 COL. L. REV. 366 (1925). The RESTATEMENT OF CONFLICT OF LAWS (Am. L. Inst. 1930) § 57 adopts the rule of the *Disconto* case.

¹⁰⁶*Pilger v. U. S. Steel Co.*, 102 N. J. Eq. 506, 141 Atl. 737 (1928).

¹⁰⁷*United Cigarette Machine Co. v. Canadian Pac. Ry.*, 12 F. (2d) 634 (C. C. A. 2d, 1926).

¹⁰⁸"New Jersey having authorized this corporation like others to issue certificates that so far represent the stock that ordinarily at least no one can get the benefits of ownership except through and by means of the paper, it recognizes as

seizure of the shares of domestic corporations by reason of the Alien Property Act can be explained by saying that the Act impliedly repeals or overrides the significance of the certificate, and, despite the Uniform Stock Transfer Act, makes the share transferable without the certificate.¹⁰⁹ Having severed the relationship between the share and the certificate, the state proceeds to seize the share. The alien certificate-holder is left with a worthless piece of paper, and a bona fide transferee, even though not an alien enemy, fares no better unless the state is willing to reunite the severed ties between the share and the certificate.¹¹⁰

The Supreme Court's acceptance in the *Disconto* case of the rule that the law of the state of transfer governs the transfer of stock certificates forms an interesting commentary upon the limited applicability of the Uniform Stock Transfer Act. The decision appears to support the writer's contention that the scope of the Act is needlessly limited, and that it should apply to all transfers made in states in which it is in force whether the certificates are the issue of domestic or of foreign corporations.

This whole group of cases is illustrative of the difference between control and 'situs'—the one a practical question of power to act, the other a technical question of imaginary location. More clearly than in any of the fields previously discussed, 'situs' here proves itself to be only a name signifying the result of the exercise of power to control, and not a basis for or justification of power to control. In this field, control strikes the keynote. In war, if not in peace, might makes right.

owner anyone to whom the person declared by the paper to be the owner has transferred it by the endorsement provided for, wherever it takes place. It allows an endorsement in blank, and by its law as well as by the law of England an endorsement in blank authorizes anyone who is the lawful owner of the paper to write in a name, and thereby entitle the person so named to demand registration as owner in his turn upon the corporation's books. But the question who is the owner of the paper depends upon the law of the place where the paper is... upon the things done being sufficient by the law of the place to transfer title." Mr. Justice Holmes in the *Disconto* case, *supra* note 103, at 28, 45 Sup. Ct. at 208. See also the instructive opinion of Judge Learned Hand in the Circuit Court of Appeals, *supra* note 15.

¹⁰⁹Miller v. Kaliwerke, *supra* note 102.

¹¹⁰The apparent conflict between the *Disconto* holding and the policy of the Trading With the Enemy Act, under which the Alien Property Custodian was empowered to proceed as stated in the text, is explained by a remark in the course of Holmes, J.'s opinion. He says, at 29, 45 Sup. Ct. at 208: "If the United States had taken steps to assert its paramount power... a different question would arise... The United States has taken no such steps."

CONCLUSION

This paper, it is hoped, has demonstrated that the problem of 'situs' is too complex successfully to be attacked with sweeping generalizations. Because we have been inclined to think of 'situs' in terms of physical location, we have been too apt to conclude that a share of stock must have a single, definite location for all purposes. A contemporary school of thought champions the theory that the 'situs' of a share is changing from the state of incorporation to a "more realistic" 'situs' at the place where the certificate is located. This theory is based largely upon the *Simpson* and *Disconto* cases and upon cases allowing ancillary administration at the place where the certificate is located. Since New York holds that the state of incorporation may attach the share without doing violence to the principle of the *Simpson* case, and since, in the *Disconto* case, the Supreme Court of the United States expressly admits that the law of the state where the certificate is transferred governs its transfer only insofar as the state of incorporation permits transfer, neither of those cases seems to the writer to prove any tendency towards "realism". The cases on ancillary administration represent a decidedly minority view.

Although it certainly is possible to decide every case on the theory that the share is where the certificate is, that arbitrary solution is too seductive. It is not practical, and in many circumstances it is not the desirable rule. In the preceding discussion it has been suggested that:

- 1) Taxation should be limited to one state. Which state should tax is not nearly so important as that taxation should be single.
- 2) The jurisdiction in which the certificate is located, alone, should be allowed to attach shares of stock.
- 3) The domicile of the deceased ordinarily should be the place where his shares of stock are administered.
- 4) The state where the certificate is located may seize it, but the state of incorporation may seize shares of stock, regardless of the location of the certificate which represents them.

On almost all of these points the law is unsettled. The idea of a single, fixed 'situs' of stock has proved a source of great confusion; results indicate that there is no such thing. 'Situs' is a term applied to a number of juristic results, which differ from one another quite properly, since they involve different considerations and are based upon varying policies. It is a legal as well as a psychological error to lump them together under a single concept, 'situs'.

If any tendency has been visible in the decisions, perhaps it is to give more weight to considerations of expediency and less to stubborn legal theory, to treat the latter as raw material from which expediency

is to refine the ultimate law. No certain truth lights the way to a solution of the problem of 'situs' of stock. Any theory is necessarily either a fiction or an assumption, and hence policy properly is given considerable weight. The suggestions in this paper as to the desirable rule in each situation are largely opinionative, and the reader is at liberty to disagree with them. A lack of uniformity among different fields such as taxation and attachment, or even a lack of uniformity within each field, is not to be deplored, so long as it results from differences in opinion as to the policy which should govern. What is important is that artificial theories of 'situs' should cease to rule and should be abandoned as misleading and worse than useless, that control over stock always should be justifiable as a matter of policy and convenience.