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## THE SITUS OF THINGS

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The *situs* of a thing, as the term will be used in this article, means a settled relation of the thing to a particular locality. This relation is very similar to that relation between a person and a locality which we call domicil. Used in this sense, *situs* does not include the mere temporary location of a thing, but refers solely to a location which has such a degree of permanence that the thing may fairly be described as *settled* within the place and as forming a *part of the mass of property* in that place. For most purposes, if the location of a thing is in question, it is immaterial whether that location is temporary or permanent; but in several legal relations, permanent *situs* is in question.

The similarity between the conception of domicil and that of *situs* of property has often been noticed. Thus in *New York Central Railroad v. Miller*<sup>1</sup> Mr. Justice Holmes said: "Using the language of domicil, which now so frequently is applied to inanimate things, the state of origin remains the permanent *situs* of the property, notwithstanding its occasional excursions to foreign parts." And in *Selliger v. Kentucky*<sup>2</sup> the same judge spoke of the goods in question as "still domiciled in Kentucky."

It is a general principle that the property actually within the territory of a sovereign is fully subject to his jurisdiction. In an exceptional case only is it of any importance whether the thing is temporarily or permanently situated within the territory. The existence of a

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<sup>1</sup> (1906) 202 U. S. 584, 26 Sup. Ct. 714.

<sup>2</sup> (1909) 213 U. S. 200, 207, 29 Sup. Ct. 449.

permanent situs is usually required only in two classes of cases: taxation of property, and the administration of it by courts.

It will be noticed that the parallelism to domicile exists in this point also. Mere presence of a person within the territory of a sovereign gives the sovereign jurisdiction for ordinary purposes; and it is usually only for purposes of taxation and of inheritance that the domicile, as distinguished from the personal presence, is of consequence where the question is that of the application of the territorial law.

## I

### LAND AND THINGS CONNECTED WITH LAND

The situs of land can offer no serious difficulty. Land has by nature a permanent situs; and that situs must necessarily be within the state in whose boundaries it lies. It cannot change its location. Its sovereignty may indeed be changed; it may lie now within the territory of one sovereign, now within that of another.<sup>3</sup> But even in such a case its situs remains constant.

Where however the land has annexed to it other things, whether tangible or intangible, an interesting question of situs may arise. A thing legally annexed to the land must have a situs with it. Thus the branches of a tree, though spreading over adjoining land, would have a situs where the trunk is growing.

The same principle would seem to prevail where the thing is annexed to land not in fact but by operation of law. According to the English law an heirloom, the deed of land, or the key of a house, is regarded as in some sense annexed to the land. It seems reasonably clear that all these things would be regarded as having a situs on the land. Suppose, for instance, the owner of land carried an heirloom or his house key into another state; would it be regarded as having a situs in that state so that it could be taxed or administered there? It is pretty clear that it would not. This result may, to be sure, be reached by other lines of reasoning. It might truly be said, for instance, that both the heirloom and the key are situated permanently on the land and that when the owner carries them into another place they are necessarily in transit until they are returned to their proper position again. Or it may be urged that since they pass with the land to the heir, no administrator can have a right to take them; and since they form by law a part of the real estate, their value is included in the taxation of the real estate and therefore cannot properly form the basis of other taxation. But the reason first given, that they are by law annexed to the land, seems after all the most potent.

While slavery existed it was the law of some states that the slave

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<sup>3</sup> *Chappell v. Jardine* (1884) 51 Conn. 64.

was annexed to the soil. This was, for instance, the law of Louisiana.<sup>4</sup> In the case of such a status a slave must be regarded as having a situs on the land. Here again there are two reasons for reaching this conclusion: first that so long as he belongs on a particular plantation, he cannot be regarded as being permanently fixed in any other place to which he may be temporarily carried; and second, that since he is by law annexed to the soil, he should be regarded as situated on the land.

Where a franchise is granted to be used in connection with land such franchise is regarded as real estate and its situs is the same as that of the land with which it is connected. Thus a ferry<sup>5</sup> or bridge<sup>6</sup> franchise has a location at the bank or shore to which it is attached.

Water-power is an incorporeal right, exercisable only in connection with land, but quite distinct from the water itself, or from the land under water. "It is a capacity of land for a certain mode of improvement, which cannot be taxed independently of the land."<sup>7</sup> "Its potential power becomes actual, by operating upon real property, and thereby giving it a value."<sup>8</sup> In Massachusetts and Maine the water-power is regarded as situated at the place where the power is exercised,<sup>9</sup> but the Connecticut and New Hampshire rule, that it is situated at the dam,<sup>10</sup> seems upon the whole sounder, since the power is operative and valuable at that point.

The legal situs of gas or water mains laid in a public highway is a matter of considerable difference of opinion.<sup>11</sup> According to one opinion, the pipes are appurtenant to the works of the corporation; and in that case the situs of the pipes is to be regarded as at the works.<sup>12</sup> If the pipes are regarded either as personal property or as annexed to the realty their situs is of course the place where they lie.

<sup>4</sup> *McCullum v. Smith* (1838, Tenn.) Meigs, 342.

<sup>5</sup> *Conway v. Taylor* (1861, U. S.) 1 Black, 603; *Louisville & J. F. Co. v. Kentucky* (1903) 188 U. S. 385, 23 Sup. Ct. 463.

<sup>6</sup> *Henderson Bridge Co. v. Kentucky* (1897) 166 U. S. 150, 17 Sup. Ct. 532.

<sup>7</sup> Shaw, C. J. in *Boston Mfg. Co. v. Newton* (1839, Mass.) 22 Pick. 22.

<sup>8</sup> Haskell, J. in *Union W. P. Co. v. Auburn* (1897) 90 Me. 60, 37 Atl. 331, 37 L. R. A. 651, 60 Am. St. Rep. 240.

<sup>9</sup> *Union W. P. Co. v. Auburn*, *supra*; *Boston Mfg. Co. v. Newton*, *supra*; *Lowell v. County Comrs.* (1890) 152 Mass. 372, 383, 25 N. E. 469.

<sup>10</sup> *Quinebaug Reservoir Co. v. Union* (1900) 73 Conn. 294, 47 Atl. 328; *Cocheco Mfg. Co. v. Strafford* (1871) 51 N. H. 455; *Winnipiseogee L. C. & W. M. Co. v. Gilford* (1887) 64 N. H. 337, 10 Atl. 849.

<sup>11</sup> *Taxation of Pipes in Public Streets* (1890) 4 HARV. L. REV. 83.

<sup>12</sup> *Appeal of Des Moines Water Co.* (1878) 48 Ia. 324.

## II

## CHATTELS

An artificial theory that chattels are situated at the domicile of the owner ("*mobilia sequuntur personam*") was adopted by Story from the European writers on the Conflict of Laws; he however cautiously limited it by an often quoted passage: "It yields, whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined."<sup>13</sup> So far as it might be sought to apply this doctrine to the location of chattels, it has been entirely abandoned both in taxation cases<sup>14</sup> and in other questions of jurisdiction.<sup>15</sup> Where jurisdiction is concerned, it may confidently be affirmed that, except in the case of intangible property, the doctrine to-day is not even recognized as a fiction to be followed; and even in the case of intangible property it is only a fictitious form of stating a proposition of a very different sort.

The general principle of situs is that the situs of a chattel is based upon a natural fact, its actual position in space. Its actual position is *prima facie* its situs, just as a man's actual residence is *prima facie* his domicile. Further consideration of the subject resolves itself into a study of the exceptions to this general principle; and these exceptions will next be considered.

## A. PROPERTY IN TRANSIT

Property merely in transit through a state has no settled location or situs there and is not subject to the exercise of the local jurisdiction in any matter which requires a settled location.

The leading case on this subject is *Hays v. Pacific Mail Steamship Co.*<sup>16</sup> This was a suit to recover back money paid under protest for taxes assessed upon a vessel. The vessel was registered at the domicile of the owner in New York. The vessel plied between San Francisco and Panama, having a regular route and remaining at San Francisco no longer than necessary to land the passengers, mails, and freight; which was ordinarily accomplished in one day. The taxes in question were assessed by the city of San Francisco for the year 1851-52. The court held that the state of California had no jurisdiction over the vessels for the purpose of taxation, Nelson, J., saying, "they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the state; they were there but temporarily."

<sup>13</sup> Story, *Conf. L.* (8th ed., 1883) sec. 550.

<sup>14</sup> *Hoyt v. Commissioners of Taxes* (1861) 23 N. Y. 224; *Pullman's P. C. Co. v. Pennsylvania* (1891) 141 U. S. 18, 11 Sup. Ct. 876.

<sup>15</sup> *Green v. Van Buskirk* (1868, U. S.) 7 Wall. 139.

<sup>16</sup> (1854, U. S.) 17 How. 596.

Many similar decisions have been made. Thus, where a travelling circus came into a state to exhibit at one or two points within the state and then to proceed to another state, it was held that the circus was merely in transit and was not taxable.<sup>17</sup> In another case a county in Illinois levied a tax upon crude oil which was passing through a pipe line from Kansas to a point in Indiana. There was an almost constant flow of oil through the pipes. The court held that since the property was in transit it was not subject to taxation within the state.<sup>18</sup>

An interesting example of the application of the same principle to the question of administering the assets of a deceased owner is *Wells v. Miller*.<sup>19</sup> In that case certain lumber was passing down the Mississippi river on a steamboat at the moment of the owner's death. At the very moment of death it was claimed that the lumber was within the limits of Missouri. The lumber having been converted by the defendant, the plaintiff, who was the domiciliary administrator in Illinois, brought suit for the conversion and it was objected that the Missouri administrator should bring the suit. The court, however, overruled this objection, and held (citing Story, *Conflict of Laws*, sec. 520) that there was no situs for purposes of administration in the state where the property happened to be in transit at the moment of death.

In the case of *Commonwealth v. Buffalo & Lake Erie Transportation Co.*,<sup>20</sup> bonds belonging to an owner in Pennsylvania were held in New York as pledge for a debt. It was held that they were in New York for a merely temporary purpose, and that they were taxable in Pennsylvania. In another case,<sup>21</sup> money deposited in a bank by an agent in charge of a branch office, forwarded weekly by means of the agent's check to the home office in another state, was held not to have a situs at the bank.

In *Semple v. Commonwealth*,<sup>22</sup> the owner of property taxed in Louisville, who was domiciled in Texas, was in the habit of making rather frequent and prolonged visits to Louisville, where he had relatives and business interests. He hired an apartment in Louisville, to which he sent furniture from outside the state, living there during his visits; he opened in Louisville a bank account for his personal expenses while in the city; he brought with him an automobile; this he afterwards sold in Louisville and bought another there. The court held that none of this property could be taxed in Louisville. Thomas, J., said: "Under such circumstances, personal property even though it be tan-

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<sup>17</sup> *Robinson v. Longley* (1883) 18 Nev. 71.

<sup>18</sup> *Prairie Oil & Gas Co. v. Ehrhardt* (1910) 244 Ill. 634, 91 N. E. 680.

<sup>19</sup> (1867) 45 Ill. 382.

<sup>20</sup> (1911) 233 Pa. 79, 81 Atl. 932.

<sup>21</sup> *Metropolitan Life Ins. Co. v. Newark* (1898, Sup. Ct.) 62 N. J. L. 74, 40 Atl. 572.

<sup>22</sup> (1918, Ky.) 205 S. W. 789.

gible, does not have a situs for taxation at the place where it is thus temporarily located."

### 1. *Dealings in Transit*

When goods in transit through a state are temporarily halted for transshipment, this does not put an end to the transit, nor give the goods a situs within the state.<sup>23</sup> Even if the transshipment is accompanied by a separation and assortment of the goods this does not give the goods a local situs.<sup>24</sup> In a similar case, where oil was passing through a state in a pipe-line, the temporary retention of a portion of the oil in a tank for the purpose of equalizing the work of the pumps by which the mass of oil was forced through the pipes did not give any of the oil a situs within the state.<sup>25</sup> It seems also that goods held in a bonded warehouse to secure the import duty are still in transit.<sup>26</sup>

If, however, while the goods are within the state any use is made of them, or any process of manufacture or of preparation for market is applied to them, which is of such a nature as seriously to interrupt the transit, the goods while being so used or while undergoing such a process are usually regarded as having a fixed situs. So where grain while in transit through a state was removed from the cars to an elevator for inspection, weighing, cleaning, drying, sacking, grading, and mixing and then reloaded, it was held to have a fixed situs within the state.<sup>27</sup> Where property while in transit is stopped in order to go through a final process of manufacture and then to be forwarded, it has a situs at the place of stoppage; as where barrel staves were bought in a rough condition and brought to a certain place, there to be finally finished and forwarded: they were held to have a situs at that place;<sup>28</sup> where live hogs were brought into Indiana, there to be killed and packed, and then shipped further, the hogs were situated in Indiana.<sup>29</sup> And where oil was stopped during the transit to be barrelled and forwarded, it was held to have a situs at the place of barrelling.<sup>30</sup>

The principle is well illustrated by the case of *McCutcheon v. Board of Equalization*.<sup>31</sup> In that case flour shipped from the West to New York on a through bill of lading, was held during transit on a pier in Jersey City for the purpose of repacking and blending. It was held to have a situs in New Jersey. In the Supreme Court Swayze, J., said:

<sup>23</sup> *Berwind & White Coal Co. v. Jersey City* (1907, Sup. Ct.) 75 N. J. L. 76, 67 Atl. 181.

<sup>24</sup> *State v. Engle* (1871, Sup. Ct.) 34 N. J. L. 425.

<sup>25</sup> *Prairie O. & G. Co. v. Ehrhardt* (1910) 244 Ill. 634, 91 N. E. 680.

<sup>26</sup> *Farr Alpaca Co. v. Commonwealth* (1912) 212 Mass. 156, 98 N. E. 1078.

<sup>27</sup> *People v. Bacon* (1910) 243 Ill. 313, 90 N. E. 686.

<sup>28</sup> *Standard Oil Co. v. Combs* (1884) 96 Ind. 179, 49 Am. Rep. 156; *Brown County v. Standard Oil Co.* (1885) 103 Ind. 302, 2 N. E. 758.

<sup>29</sup> *Rieman v. Shepard* (1866) 27 Ind. 288.

<sup>30</sup> *General Oil Co. v. Crain* (1908) 209 U. S. 211, 28 Sup. Ct. 475.

<sup>31</sup> (1915, Sup. Ct.) 87 N. J. L. 370, 94 Atl. 310, 96 Atl. 292.

"If the goods are actually in the course of a continuous journey, they are not subject to taxation. The difficulty is to decide what breaks the continuity of the journey. In this case it was broken by repacking and blending the flour upon the pier. Whether mere repacking would suffice may perhaps be arguable, although the packages that go on to destination are not the same packages that are landed on the pier; but surely the flour after blending is a different commodity. It is blended for the very purpose of making something different, a quality that is or is supposed to be more salable. The process of blending is no doubt different from the process of grinding grain into flour, but in each case a different commodity is produced."

A case in a lower court in New York appears to be opposed to this general principle.<sup>32</sup> Goods produced in New York were sent out of the state to be dyed. The court held they were outside the state only temporarily, and that they were taxable in New York. If the case is sound, they cannot be taxable in the place to which they were sent. The soundness of the decision may be questioned.

## 2. Live Stock

Where live stock is placed on a ranch for grazing, its location is fixed there with sufficient permanence to be regarded as a real situs.<sup>33</sup> If, on the other hand, the cattle are simply placed temporarily in a pasture for grazing, soon to be shifted into another pasture, they are held not to have a situs in the pasture.<sup>34</sup>

A difficult question may arise where sheep are being driven through a state, grazing as they pass through. If the sheep are really being driven for the purpose of grazing them, it is clear that their situs is within the state. The fact that the lands of the state are being occupied by the cattle for grazing purposes is sufficient to give them a situs in the state.<sup>35</sup> The rapidity with which the stock are driven through the state must determine the good faith of the claim that the principal object of driving them through is in fact transportation.<sup>36</sup> Where, however, it is clear that the stock are really being driven for transportation and that the feeding of them by grazing is incidental to that, the stock are to be regarded as in transit and as not having a situs in the state.<sup>37</sup>

<sup>32</sup> *People v. Feitner* (1900, N. Y. Sup. Ct.) 32 Misc. 84, 66 N. Y. Supp. 91.

<sup>33</sup> *Fennell v. Pauley* (1900) 112 Ia. 94, 83 N. W. 799; *Morse v. Stanley County* (1910) 26 S. D. 313, 128 N. W. 153.

<sup>34</sup> *Hill v. Caldwell* (1909) 134 Ky. 99, 119 S. W. 749.

<sup>35</sup> *Half v. Green* (1900) 10 Okl. 338, 62 Pac. 816; *Waggoner v. Whaley* (1899) 21 Tex. Civ. App. 1, 50 S. W. 153.

<sup>36</sup> *Carton v. Uinta County* (1902) 10 Wyo. 416, 69 Pac. 1013.

<sup>37</sup> *Kelley v. Rhoads* (1903) 188 U. S. 1, 23 Sup. Ct. 259, reversing s. c. (1898) 7 Wyo. 237, 51 Pac. 593, 39 L. R. A. 594. See also *Murdock v. Murdock* (1911) 38 Ut. 373, 113 Pac. 330.

3. *Vessels*

A vessel has no situs at a mere port of call, even though the vessel is making regular trips between that port and another.<sup>38</sup> The reason for this doctrine has been neatly expressed by several judges. Thus in *Hays v. Pacific Mail Steamship Co.*,<sup>39</sup> Mr. Justice Nelson said that the purpose for which the vessel was in the port of call wholly excluded the idea of permanently abiding in the state. In *St. Louis v. Ferry Co.*<sup>40</sup> Mr. Justice Swayne said that a ferry boat plying between St. Louis and the opposite bank of the river "did not so abide within the city as to become incorporated with and form a part of its personal property."

If however the vessel is employed exclusively within the waters of a single state, she has a fixed situs in that state, though she may be owned and registered elsewhere.<sup>41</sup> On this ground a yacht kept in a harbor by a non-resident, and used for pleasure within the waters of the state, is held to have a situs there.<sup>42</sup> It seems however that if a vessel is laid up between its regular trips at a certain point on the shore, she may be regarded as permanently situated there.<sup>43</sup>

A vessel which has no actual situs would under the ordinary doctrine be taxable only at the owner's domicile; and this is the rule usually laid down.<sup>44</sup> A few cases, following a *dictum* in the leading case, speak of the "home port," or port of registration, as the place of taxation; usually where that is also the domicile of the owner,<sup>45</sup> but in at least one case where the owner was domiciled elsewhere.<sup>46</sup> A vessel that

<sup>38</sup> *Hays v. Pacific Mail S. S. Co.* (1854, U. S.) 17 How. 596, 15 L. Ed. 254; *St. Louis v. Ferry Co.* (1870, U. S.) 11 Wall. 423, 20 L. Ed. 192; *Morgan v. Parham* (1872, U. S.) 16 Wall. 471, 21 L. Ed. 303; *Ayer & Lord Tie Company v. Kentucky* (1906) 202 U. S. 409, 26 Sup. Ct. 679, 50 L. Ed. 1082; *Yost v. Lake Erie Transp. Co.* (1901, C. C. A. 6th) 112 Fed. 746; *San Francisco v. Talbot* (1883) 63 Cal. 485; *Johnson v. DeBary-Baya Merchants' Line* (1896) 37 Fla. 499, 19 So. 640, 37 L. R. A. 518; *State v. Haight* (1863, Sup. Ct.) 30 N. J. L. 428; *Callender Navigation Co. v. Pomeroy* (1912) 61 Or. 343, 122 Pac. 758.

<sup>39</sup> (1854, U. S.) 17 How. 596, 15 L. Ed. 254.

<sup>40</sup> (1870, U. S.) 11 Wall. 423, 20 L. Ed. 192.

<sup>41</sup> *Old Dominion Steamship Company v. Virginia* (1905) 198 U. S. 299, 25 Sup. Ct. 686, 49 L. Ed. 1059, 3 Ann. Cas. 1100; *Northwestern Lumber Co. v. Chehalis County* (1901) 24 Wash. 626, 64 Pac. 909, 87 Am. St. Rep. 747, 54 L. R. A. 212.

<sup>42</sup> *Tobey v. Kip* (1913) 214 Mass. 477, 101 N. E. 998.

<sup>43</sup> *Irvin v. New Orleans S. L. & C. R. R.* (1879) 94 Ill. 105, 34 Am. Rep. 208.

<sup>44</sup> *Southern Pacific Co. v. Kentucky* (1911) 222 U. S. 63, 32 Sup. Ct. 13; *Olson v. San Francisco* (1905) 148 Cal. 80, 82 Pac. 850, 113 Am. St. Rep. 191, 2 L. R. A. (N. S.) 197; *California Shipping Co. v. San Francisco* (1907) 150 Cal. 145, 88 Pac. 704; *Com. v. Southern Pacific Co.* (1909) 134 Ky. 417, 120 S. W. 311; *Howell v. State* (1845, Md.) 3 Gill, 14; *Com. v. American Dredging Co.* (1888) 122 Pa. 386, 15 Atl. 443, 1 L. R. A. 237, 9 Am. St. Rep. 116; *Norfolk & Western Ry. v. Board of Public Works* (1899) 97 Va. 23, 32 S. E. 779.

<sup>45</sup> *Johnson v. DeBary-Baya Merchants' Line* (1896) 37 Fla. 499, 19 So. 640, 37 L. R. A. 518 (*semble*); *People v. Commissioners* (1874) 58 N. Y. 242.

<sup>46</sup> *Commonwealth v. Ayer Lord & Tie Co.* (1903) 117 Ky. 161, 77 S. W. 686.



has an actual situs elsewhere, being tangible property, cannot be taxed at the owner's domicil.<sup>47</sup>

Where there were several owners and the vessel was registered at the domicil of the majority, it was held not taxable at the different domicil of a single owner.<sup>48</sup>

#### 4. *Rolling-Stock*

The rolling-stock of a railroad, since, like a vessel, it is by its nature and use constantly moving from place to place, cannot ordinarily be regarded as having an actual situs anywhere,<sup>49</sup> and is therefore taxable at the domicil of the railroad, that is, in the state of charter.<sup>50</sup> If indeed there is a regular course of distribution of the rolling-stock, so that a given average number of cars may be found constantly within a state, that average number may be taxed as a stock-in-trade,<sup>51</sup> but this is not a taxation of the specific cars.

#### 5. *Machinery*

An application of the doctrine of property merely in transit is often attempted in the case of portable, heavy machinery which is moved from place to place for the purpose of use there. An example of such machinery is a portable saw-mill which is moved to a particular timber lot, used there for a year or two, and then, having sawed all the lumber there available, is moved to another lot. Can such a saw-mill be said to have fixed situs in the place where it happens to be sawing for the time being, or is it to be regarded as in slow transit from place to place? It might with good reason be regarded as permanently fixed for the purpose of taxation, at least in cases where the employment in the particular locality is likely to last another year. In fact, however, the authorities in this case have taken the opposite view and held that such a saw-mill with its appliances and with the lumber sawed by it, is not located on the timber lot with sufficient permanency to have a situs there.<sup>52</sup>

<sup>47</sup> *American M. S. S. Co. v. Crowell* (1908, Sup. Ct.) 76 N. J. L. 54, 68 Atl. 752.

<sup>48</sup> *Wilkey v. Pekin* (1857) 19 Ill. 160.

<sup>49</sup> *State v. Union Tank Line* (1905) 94 Minn. 320, 102 N. W. 721; *Pacific R. R. v. Cass County* (1873) 53 Mo. 17; *State ex rel. v. Severance* (1874) 55 Mo. 378; *State ex rel. Armour Co. v. Stephens* (1898) 146 Mo. 662, 48 S. W. 929; *Bain v. Richmond, etc. R. R.* (1890) 105 N. E. 363, 11 S. E. 312, 8 L. R. A. 301 n., 18 Am. St. Rep. 916.

<sup>50</sup> *New York Central R. R. v. Miller* (1906) 202 U. S. 584, 26 Sup. Ct. 714; *Morrell R. R. v. Com.* (1908) 128 Ky. 447, 108 S. W. 926.

<sup>51</sup> *Pullman's Palace Car Co. v. Pennsylvania* (1891) 141 U. S. 18, 11 Sup. Ct. 876.

<sup>52</sup> *Joiner v. Pennington* (1915) 143 Ga. 438, 85 S. E. 318; *Ingram v. Cowles* (1889) 150 Mass. 155, 23 N. E. 48.

In several cases, however, property which is not easily distinguishable from saw-mills with regard to the permanency of location, has been held to have a local situs. Thus, dredges with the scows used with them and the tugs for the purpose of moving them about, have been held to have a situs within the state where they are working upon a job, even though by their nature they are moved about from place to place in order to seek new employment when the old job has been finished.<sup>53</sup> In one such case, however, the property has been held to be in transit.<sup>54</sup>

In the same way, by the great weight of authority the tools and appliances used in construction work are regarded as having a fixed situs, although as soon as the work is finished they will be moved to another place. In *Grisby Construction Company v. Freeman*,<sup>55</sup> blacksmith tools used in construction were held not to be in transit. They were "here for use and for a use likely to be of some duration, possibly a full year, and for the time being . . . incorporated in the bulk of the property of the state." It was therefore held that the property had a situs. In *Eoff v. Kennefick-Hammond Company*,<sup>56</sup> horses, wagons, light machinery and blacksmith tools were assessed at a place where they were being used in the construction of a road bed for a railroad. It was held that the property was in the state for use and profit and not for transit and was therefore taxable.

It would seem that these cases are sound and that the correctness of the decision in the saw-mill cases may be questioned.

#### 6. Logs and other Products of the Soil

Logs floating down a river through a state, from one outside state to another, have no situs within the state; they do not constitute part of the wealth of the state.<sup>57</sup> Nor does a temporary or seasonal interruption of transit change the situs. Thus where logs were drawn from Vermont and placed on the ice in the Connecticut River in New Hampshire, and were there left to be carried out of the state when the ice melted in the spring, it was held that the logs had no situs in New Hampshire; neither the delay nor the change of vehicle terminated the transit.<sup>58</sup> If however the logs are stopped at a boom in the river, to remain until needed for use, which may not be for several years, the

<sup>53</sup> *McRae v. Bowers Dredging Co.* (1898, W. D. Wash.) 90 Fed. 360; *National Dredging Co. v. State* (1893) 99 Ala. 462, 12 So. 720.

<sup>54</sup> *Commonwealth v. American Dredging Co.* (1888) 122 Pa. 386, 15 Atl. 443, 9 Am. St. Rep. 116, 1 L. R. A. 237.

<sup>55</sup> (1901) 108 La. 435, 32 So. 399, 58 L. R. A. 349.

<sup>56</sup> (1906) 80 Ark. 138, 96 S. W. 986, 7 L. R. A. (N. S.) 704.

<sup>57</sup> *Conley v. Chedic* (1872) 7 Nev. 336.

<sup>58</sup> *Connecticut R. L. Co. v. Columbia* (1882) 62 N. H. 286; *Coe v. Errol* (1886) 116 U. S. 517, 6 Sup. Ct. 475.

transit is not temporarily interrupted; it has for the time being ceased, and the logs have a situs within the state.<sup>59</sup>

The case of *Burlington Lumber Co. v. Willetts*<sup>60</sup> illustrates this principle. In that case it appeared that an Iowa lumber company leased land and employed an agent on the Illinois side of the Mississippi River and there, in a bay of the river, stored each winter, to be kept in storage until they were needed at the company's mill, a large number of logs which had been floated down the river on the way to the mill, which was opposite the storage place and below it. The logs so stored during the winter were taxed in Illinois, and the tax was held valid.

The line of reasoning adopted by Mr. Justice Craig in delivering the opinion of the court is as follows: It is claimed that the logs were *in transitu*, and therefore not taxable. If property while in the course of transportation over a navigable river were detained by low water or ice, or other cause, it would not be taxable; but this property seems not to have been *in transitu* while being stored. The transit ended at the bay. When the logs reached that point, they were located there for an indefinite time. The bay therefore became the destination of the property "and so remained until such time as the corporation saw proper again to place the property in transit."

Where the logs have not been brought in from outside the state, but have been felled within the state and drawn upon the ice to wait the melting of the ice, the case is different. The logs under such circumstances have a situs within the state.<sup>61</sup>

In the case of *Coe v. Errol*<sup>62</sup> Mr. Justice Bradley stated the discrimination to be made in these cases in the clearest language:

"There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage

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<sup>59</sup> *Diamond Match Co. v. Ontonagon* (1903) 188 U. S. 82, 23 Sup. Ct. 266; *State v. Burlington Lumber Co.* (1912) 118 Minn. 329, 136 N. W. 1033.

<sup>60</sup> (1886) 118 Ill. 559, 9 N. E. 254.

<sup>61</sup> *Coe v. Errol* (1886) 116 U. S. 516, 6 Sup. Ct. 475; *Nelson Lumber Co. v. Loraine* (1884, W. D. Wis.) 22 Fed. 54; *State v. Tabor Lumber Co.* (1907) 101 Minn. 186, 112 N. W. 214; *Carrier v. Gordon* (1871) 21 Oh. St. 605.

<sup>62</sup> (1886) 116 U. S. 516, 6 Sup. Ct. 475.

to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State. . . . Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State? It is true, it was said in the case of *The Daniel Ball*,<sup>63</sup> 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing."

The final delivery to the exporting carrier is regarded by the court as important in determining the moment of beginning the transit; and any act of unconditional delivery of logs felled within a state to a carrier for carriage outside the state is therefore the beginning of transit, and removes the situs of the logs from the state. Such delivery may by custom be made beside the track, or in some other way designated by custom. Thus where staves were bought for shipment to a point outside the state, and were piled beside the carrier's track, according to custom, that the carrier might load them, it was held that they had ceased to have a local situs.<sup>64</sup> Where corn was purchased for export, moved to the railroad, and put in railroad cribs awaiting transit, it is to be regarded as already in transit.<sup>65</sup> And where timber,

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<sup>63</sup> (1871, U. S.) 10 Wall. 557, 565.

<sup>64</sup> *Standard Oil Co. v. Bachelor* (1883) 89 Ind. 1.

<sup>65</sup> *Ogilvie v. Crawford County* (1881, D. Iowa) 7 Fed. 745.

purchased for shipment in a vessel, was to be rafted to the vessel, according to custom, the vessel thus accepting shipment, the transit was held to begin when the timber was brought to the port of shipment and gathered into rafts, though the vessel had not yet arrived.<sup>66</sup>

Placing the logs beside the track, however, or even in the depot of the carrier, does not place them in transit unless the act constitutes an acceptance of the goods by the carrier, thus placing them in the carrier's possession for immediate carriage.<sup>67</sup> So where railroad ties were piled beside the track waiting orders for sales and shipments, they could not be started until sold, and they were therefore not yet in transit.<sup>68</sup>

#### 7. Exports or Imports

The principle already discussed in the case of *Coe v. Errol*<sup>69</sup> would apply to any goods waiting export. In any such case it is possible for the owner, though he now intends to export goods, to change his mind up to the moment when the carrier actually receives them. The fact, therefore, that the goods are intended for export does not affect their situs or the right of a state where they are situated to control them.<sup>70</sup> Thus where grain owned by a non-resident is stored in an elevator pending shipping orders, it is situated within the state;<sup>71</sup> and where ice is cut on a lake and stored in an adjoining ice-house, to be shipped to the non-resident owner, a retail dealer in ice, as he needed it to sell, the ice is situated in the ice-house.<sup>72</sup>

Where an attempt is made to tax property lately brought into the state, the question to be solved is whether the goods in question have "become incorporated with the other personal property of the state."<sup>73</sup> The question is similar to, but not the same as, the question when an interstate carriage has ceased;<sup>74</sup> since it has been held in that case that there must be "a change in the ownership or in the condition of the merchandise."<sup>75</sup> This is not necessary in order to justify the state in

<sup>66</sup> *Blount v. Munroe* (1878) 60 Ga. 61.

<sup>67</sup> *Ayer & Lord Tie Co. v. Keown* (1906) 122 Ky. 580, 93 S. W. 588; *Maurer v. Cliff* (1892) 94 Mich. 194, 53 N. W. 1055; *Colebrook v. Berlin Mills Co.* (1915, N. H.) 96 Atl. 301.

<sup>68</sup> *Rees-Scott Co. v. New Orleans* (1909) 124 La. 155, 49 So. 1012; *Colebrook v. Berlin Mills Co.*, *supra*.

<sup>69</sup> *Supra*, p. 535.

<sup>70</sup> *Turpin v. Burgess* (1886) 117 U. S. 504, 6 Sup. Ct. 835; *Carrier v. Gordon* (1871) 21 Oh. St. 605.

<sup>71</sup> *Walton v. Westwood* (1874) 73 Ill. 125.

<sup>72</sup> *Winkley v. Newton* (1891) 67 N. H. 80, 36 Atl. 610, 35 L. R. A. 756; *John Hancock Ice Co. v. Rose* (1901, Sup. Ct.) 67 N. J. L. 86, 50 Atl. 364.

<sup>73</sup> *Hayes v. Pacific M. S. S. Co.* (1854, U. S.) 17 How. 506.

<sup>74</sup> *American S. & W. Co. v. Speed* (1904) 192 U. S. 500, 24 Sup. Ct. 365.

<sup>75</sup> *State v. Kennedy* (1867) 19 La. Ann. 397; *Leisy v. Hardin* (1889) 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; *Lyng v. Michigan* (1889) 135 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 150.

levying a tax; for that purpose it is only necessary that the property should "come to its place of rest."<sup>76</sup>

It would seem clear, therefore, that where goods are brought into a state and are there held for sale they have a taxable situs there; and it has so been held. Thus where automobiles were shipped to a retailer from outside the state and were held by him for sale, it was held that they were taxable in his hands.<sup>77</sup> And a similar decision was reached in a case where fertilizer had been imported for sale,<sup>78</sup> and where coal had been brought into a state, deposited in a general mass, and held subject to sale orders.<sup>79</sup> So where goods were shipped to retailers enclosed in boxes, the contents of the boxes were situated where the retailers held them as soon as they had been taken from the boxes and were ready for sale.<sup>80</sup>

The view held in New York, however, is different. In *People ex rel. Parker Mills v. Commissioners of Taxes*<sup>81</sup> it appeared that nails manufactured by the relators were sent into New York for sale at their office in that city; and the court held that they had no fixed situs in New York and could not be taxed there. Nothing seems to have turned, in the mind of the court, on the fact that the goods cannot have remained long unsold; since it appeared that the annual sales were \$300,000, while the average stock on hand was valued at \$10,000. The decision is followed in New York.<sup>82</sup>

#### B. MERGER OF CHATTEL IN A DOCUMENT

A situation sometimes arises where tangible property is deposited in bailment and a receipt for the property is issued which is thereafter dealt with as a symbol of the property, a dealing with the certificate being legally regarded as a dealing with the property. This situation has long been accepted as the legal result of the shipment of goods, taking back a bill of lading. As the court said in *Meyerstein v. Barber*:<sup>83</sup> "While the goods are afloat it is common knowledge, and I would not think of citing authorities to prove it, that the bill of lading

<sup>76</sup> *Brown v. Houston* (1885) 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257.

<sup>77</sup> *Commonwealth v. Banker Bros. Co.* (1909) 38 Pa. Super. 101 (cotton imported from another state and waiting sale); *Colbert v. Board of Supervisors* (1882) 60 Miss. 142.

<sup>78</sup> *Pocomoke Guano Co. v. Biddle* (1912) 158 N. C. 212, 73 S. E. 996.

<sup>79</sup> *Lehigh & W. B. C. Co. v. Junction* (1908, Ct. Err.) 75 N. J. L. 922, 66 Atl. 923, 68 Atl. 806; *Susquehanna Coal Co. v. South Amboy* (1908, Sup. Ct.) 76 N. J. L. 412, 69 Atl. 454; *Brown v. Houston* (1885) 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257 (coal still in barges); *Pittsburg & S. C. Co. v. Bates* (1895) 156 U. S. 577, 15 Sup. Ct. 415, 39 L. Ed. 538.

<sup>80</sup> *Park Bros. & Co. v. Nez Percé County* (1907) 13 Ida. 298, 89 Pac. 949.

<sup>81</sup> (1861) 23 N. Y. 242.

<sup>82</sup> *People v. Barker* (1896, N. Y.) 5 App. Div. 246, 39 N. Y. Supp. 151, affirmed 149 N. Y. 623, 44 N. E. 1128.

<sup>83</sup> (1866) L. R. 2 C. P. 38, 45.

represents them: and this endorsement and delivery of the bill of lading, while the ship is at sea, operates exactly the same as the delivery of the goods themselves to the assignee after the ship's arrival would do."

Whether this doctrine is applicable to other instruments than the bill of lading is a matter of some doubt. If the goods are in this way merged into the receipt so that the situs of the goods is thereafter to be regarded as in the place where the receipt is, this must be done by the law of the place where the goods are at the time when the receipt is issued for them.<sup>84</sup> In the case just cited it was held that the goods were not so merged in the warehouse receipt in question by the law of Massachusetts; but the warehouse receipt did not in that case run to order but to a single named person.

In *Shakespeare v. Fidelity Insurance, Trust and Safe Deposit Company*,<sup>85</sup> the question was raised with regard to a certificate of deposit for coupon bonds. The owner of the bonds, which were deposited in Pennsylvania, took the certificate to his domicil in New Jersey and it was found there at the time of his death. An administrator appointed in Pennsylvania demanded possession of the bonds, and upon refusal brought action. In this action judgment was given for the defendant on the ground that the bonds had been merged in the certificate of deposit. In the course of his opinion Chief Justice Sharswood said: "We do not consider that the United States coupon bonds which are the subjects of this controversy were, at the time of the death of the decedent, any part of his estate in this Commonwealth. The defendants were the mere depositaries of the bonds for safe-keeping. They were, therefore, in the possession of the decedent. He held the certificate of their deposit. The defendants were bound to restore the bonds at any time to the lawful holder of the certificate. It was as if the bonds had been placed in a fire-proof safe of the defendants, of which the decedent possessed the key. In point of fact, the certificate was in the actual possession of the widow of the decedent in New Jersey. She surrendered it as she was bound to do, to the foreign executor. She could not have withheld it. The New Jersey executor could have sued her, and compelled its delivery to him. The Pennsylvania administrator certainly could not. By the terms of the certificate it might be transferred by assignment indorsed thereon and approved by the company. The foreign executor could have so assigned it, and his assignee could have sued for the delivery of the bonds, in his own name. The assignment would have been a sale of the bonds, which were payable to bearer, and passed by delivery. Whoever showed a legal title to the certificate had a right to the possession of the bonds."

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<sup>84</sup> *Hallgarten v. Oldham* (1883) 135 Mass. 1, 46 Am. Rep. 433.

<sup>85</sup> (1881) 97 Pa. 173.

*Crosby v. Charlestown*<sup>86</sup> was a very similar case. Stocks and bonds were deposited in a safety deposit vault in Minnesota, the owner being domiciled in New Hampshire. A tax was assessed in New Hampshire and payment was denied on the ground that a tax on the securities had already been paid in Minnesota. The court held that the tax was not rightly levied in Minnesota and that it could be levied in New Hampshire. This was put, however, upon the ground that the securities, being intangible, had no situs of their own for the purposes of taxation. It did not appear in the case that a certificate of deposit was issued for the securities and no claim was made that they had been merged in such a certificate.

In *Selliger v. Kentucky*<sup>87</sup> certain whiskey owned by an inhabitant of Kentucky had been sent to Germany and there deposited in a warehouse and a receipt taken for it. The right was claimed in Kentucky to tax the whiskey, and this right was denied by the Supreme Court. One claim that was made was that the whiskey had been merged in the warehouse receipt and as that was held in Kentucky the situs of the whiskey might be regarded as in that state. Mr. Justice Holmes said, "We are dealing with German receipts, and therefore we are not called upon to consider the effect of statutes purporting to make such instruments negotiable . . . . The receipt might be made the representative of the goods in a practical sense. A statute might ordain that a sale and delivery of the goods to a purchaser without notice should be invalid as against a subsequent bona-fide purchaser of the receipt. We need not to speculate as to how the law would deal with it in that event, as we have no warrant for assuming that the German law gives it such effect."

The net result of these cases would seem to be that a negotiable warehouse receipt, like a negotiable bill of lading, might well be treated, by the law of the place where the goods were at the time of its issue, as a symbol into which the goods were merged, and in such a case the situs of the goods would be regarded as at the place where the receipt happened at the moment to be.

#### C. PROPERTY IN GREMIO LEGIS

Property which is within the control of a court has a situs and is taxable at the place where the court is. Thus, property in the hands of a receiver is taxable in the state which has appointed the receiver,<sup>88</sup> and this includes money paid into the court by an ancillary receiver.<sup>89</sup> In the same way if a guardian has been appointed by a court, the prop-

<sup>86</sup> (1915, N. H.) 95 Atl. 1043.

<sup>87</sup> (1908) 213 U. S. 200, 29 Sup. Ct. 449.

<sup>88</sup> *Stevens v. New York & O. M. R. R.* (1875, S. D. N. Y.) 13 Blatch. 104.

<sup>89</sup> *Schmidt v. Failey* (1897) 148 Ind. 150, 47 N. E. 326, 37 L. R. A. 442.



erty in his hands under such appointment has a situs in the court, though both the guardian and the ward are domiciled outside the state, and the property itself is held by the guardian at his domicil.<sup>90</sup> And property in the hands of an executor or administrator, even though it is actually held in another state, is taxable where the probate court is.<sup>91</sup>

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<sup>90</sup> *Baldwin v. State* (1899) 89 Md. 587, 43 Atl. 857, following *Baldwin v. Commissioners* (1897) 85 Md. 145, 36 Atl. 764.

<sup>91</sup> *Thurot's Estate* (1918, Utah) 172 Pac. 697.