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ESCHEAT OF CORPORATE INTANGIBLES: WILL THE STATE OF THE STOCKHOLDER'S LAST KNOWN ADDRESS BE ABLE TO ENFORCE ITS RIGHT?

The purpose of this note is to determine how far the right granted to the states in *Texas v. New Jersey*¹ extends and whether such right is practically enforceable. In that case the Supreme Court announced the rule that the state of the last known address of a missing owner of corporate intangibles has the right to escheat such intangibles, *viz.*, unclaimed corporate stocks and dividends.² However, whether the state with the right to escheat also has the power to compel the corporations to make reports to it concerning this right — reports in which the corporation would list its stockholders whose last known addresses were in the state requiring the report — is doubtful. Without the right to compel the filing of these reports, the right to escheat may be worthless. Further, if the state has the power to compel such reports, the question remains as to where the state can bring suit to enforce its right to escheat. Should the state sue in the state courts of the corporation's state, the Supreme Court of the United States, a federal district court, or its own state courts? Before exploring these matters, the concept of escheat should be briefly examined.

I. The Concept of Escheat

A. *At Common Law*

The ancient principle of escheat dates back to about the twelfth century.³ In the early common law the feudal notion of tenure was the basis for escheat. When the fee owner of land died without heirs capable of performing the services of the tenure, the land reverted to the lord of the fee. If the mesne lord(s) were unknown or if the land was held directly from the Crown, it went immediately to the Crown.⁴ Escheat would also occur by corruption of blood — as when the tenant was guilty of attainder of felony.⁵ To be distinguished from escheat, though closely related, is forfeiture. In forfeiture the Crown acquired the land through its exercise of the royal prerogative when the owner committed treason, a felony, or when an alien acquired land other than by descent.⁶ In these cases the land reverted directly to the Crown even if the mesne lord was known.

Although escheat at common law was applicable only to realty,⁷ it is important to note that the Crown could also take abandoned personal property

1 379 U.S. 674 (1965). A final decree was entered by the Court on April 26, 1965, 380 U.S. 518.

2 Although various other unclaimed debts were involved and subject to the rule in *Texas v. New Jersey*, such as refunds of payroll deductions to former employees and checks to suppliers, this note is concerned with abandoned stocks and dividends. However, much of the discussion is applicable to other unclaimed property as well.

3 1 SIMES, *THE LAW OF FUTURE INTERESTS* §9 (1936).

4 For a thorough treatment of the principle of escheat, see Note, *Origins and Development of Modern Escheat*, 61 COLUM. L. REV. 1319 (1961). After the Statute of Quia Emptores, 18 Edw. 1, c. 1 (1290), which abolished subinfeudation, the Crown was more often the beneficiary of escheat.

5 TIFFANY, *OUTLINES OF REAL PROPERTY* §409 (1929).

6 *Id.* §410; Note, 61 COLUM. L. REV. 1319, 1323-24 (1961).

7 Note, 61 COLUM. L. REV. 1319, 1320 (1961).

under the doctrine of *bona vacantia*.⁸ This doctrine is distinguishable from escheat because, under it, the Crown took the property for the sole reason that there was no other owner. The Crown was thought to have a better right to the property than a stranger. In escheat, on the other hand, the sovereign took property as the ultimate successor. Although the escheat of corporate intangibles stems from the common law doctrine of *bona vacantia*, in the United States the common law distinction between escheat and *bona vacantia* does not exist.⁹ Both realty and personalty are taken by escheat.

B. *Modern Notions*

Today, every state has an escheat statute of one form or another.¹⁰ Although the statutes vary as to what unclaimed or abandoned property is subject to escheat, they are of two basic types. One is the true escheat statute under which title to the property vests in the state after the running of the statute of limitations. Under this type of statute the true owner cannot recover the property once title has vested in the state. However, the most prevalent type is the custodial statute whereby the state acquires possession of the property but the true owner, his heirs, or his assigns can claim it at any time.¹¹

In the last twenty years, with the notable exception of Pennsylvania,¹² the states have enacted more comprehensive escheat statutes.¹³ These statutes render many specific types of property escheatable.¹⁴ This flood of abandoned or unclaimed property legislation, subjecting intangible as well as tangible property to escheat, has been motivated by a desire for revenue without the odious aspects of taxation. Escheat has enabled the states to add millions of dollars to their coffers.¹⁵ A significant portion of the revenue that is gleaned from escheating intangibles may be yielded by corporate stocks and dividends.

C. *Corporate Stocks and Dividends*

As of 1964, twenty-three states had statutes providing for the escheat of unclaimed corporate stocks and dividends after the lapse of the specified period

8 19 AM. JUR. *Escheat* §2 (1939). When the English Law of Property Act of 1922, 12 & 13 Geo. V, c. 16, §§128-44, abolished escheat, all property including land went to the Crown under the doctrine of *bona vacantia*.

9 Note 61 COLUM. L. REV. 1319, 1327 (1961).

10 Note, *A Survey of State Abandoned or Unclaimed Property Statutes*, 9 ST. LOUIS U. L.J. 85 (1964). For an enlightening discourse on the rationale of modern escheat, see Note, *Modern Rationales of Escheat*, 112 U. PA. L. REV. 95 (1963).

11 McBride, *Unclaimed Dividends, Escheat Statutes and the Corporation Lawyer*, 14 BUS. LAW. 1062, 1064 (1959).

12 Pennsylvania was the first state to provide for escheat of unclaimed stock and dividends in 1915. For its current escheat statute, see PA. STAT. ANN. tit. 27, §§241-301 (1958).

13 For a survey of escheat statutes in general, see Note, *A Survey of State Abandoned or Unclaimed Property Statutes*, 9 ST. LOUIS U.L.J. 85 (1964).

14 The list includes: various deposits with banks, fiduciaries, courts, public agencies, and utility companies; insurance proceeds; bond interest and principal; tax refunds; witness and juror fees; wages; pari-mutuel race tickets; money orders and travelers' checks; lost, embezzled or stolen property; things received in the course of sundry businesses, such as cleaners, express companies, and pawnbrokers; vacant cemetery lots and graves; and even trading stamps. Lake, *Escheat, Federalism and State Boundaries*, 24 OHIO STATE L.J. 322, 326 (1963); Note, 61 COLUM. L. REV. 1319, 1332-36 (1961).

15 McBride, *supra* note 11, at 1065-68. However, this general optimism regarding the efficacy of escheat as a revenue producer is not shared by all. See Garrison, *Escheats, Abandoned Property Acts and Their Revenue Aspects*, 35 KY. L.J. 302, 314-17 (1947); Note, 65 HARV. L. REV. 1408, 1416 n.48 (1952).

of time.¹⁶ The general power of the states to escheat these as well as other abandoned property is unquestioned.¹⁷ However, many particular problems have arisen in this area. Some have been solved by statutory revision or by court decision. Nonetheless, certain perplexing problems, which have received little or no attention from the legislators, the courts or the commentators, still remain. Before examining the lingering problems, a brief summary of those problems which have already been remedied is in order.

The escheat statutes were repeatedly attacked as unconstitutional. The grounds for attack were impairment of contract and violation of due process. However, in *Security Sav. Bank v. California*,¹⁸ the Supreme Court held that the escheat of unclaimed bank deposits did not violate the contracts clause if the procedure was appropriate because the obligation of the bank to the depositor was discharged when the bank turned the funds over to the state. In *Standard Oil Co. v. New Jersey*,¹⁹ the escheat of unclaimed corporate stocks and dividends was upheld in the face of a contracts clause challenge on the grounds that, because it is a function of the state to dispose of abandoned property, no implied contract arises between the obligor and obligee as to the disposition of such property. In these cases, however, the Court was not faced with a situation where the parties had provided by express contract for the disposition of the property if it went unclaimed. This problem was touched on in *State v. Jefferson Lake Sulphur Co.*,²⁰ where the Supreme Court of New Jersey held that the corporate charter must yield to state law when the two are inconsistent as to the disposition of abandoned intangibles. In that case, about five months after New Jersey adopted an escheat statute, the stockholders amended the charter in an attempt to circumvent the operation of the statute. The amendment provided that dividends unclaimed for a certain period of time would revert to the corporation. In denying efficacy to this corporate action the court reasoned that the corporation is a mere stakeholder with no claim to the dividends once they are declared. Therefore, it cannot "escheat" the dividends itself if the state has an applicable escheat statute. However, it is not certain whether this case stands for the proposition that the state can escheat abandoned property if a contract exists providing for its disposition. Since the charter amendment was not unanimously consented to by all stockholders, it cannot properly be said that there was a contract for the disposition of the property. The court implied, however, that the decision would have been the same had there been an individual contract with each shareholder:

[The law of the state] is not only a continuing constituent part of the contract between the sovereign and the corporation, but stockholders pur-

16 Legislation, 17 VAND. L. REV. 1354, 1355 n.7 (1964). In addition it should be noted that Vermont adopted the Uniform Disposition of Unclaimed Property Act in 1965. VT. STAT. ANN. tit. 27 §§1208-36 (Supp. 1965).

17 "The right of appropriation by the state of abandoned property has existed for centuries in the common law." Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541, 547 (1948). Except in limited instances, not important here, the federal government has no power to escheat. Thus, the states are alone in tapping this source of revenue. Note, 61 COLUM. L. REV. 1319, 1336-39 (1961).

18 263 U.S. 282 (1923).

19 341 U.S. 428 (1951).

20 36 N.J. 577, 178 A.2d 329 (1962), appeal dismissed, 370 U.S. 158 (1962).

chase their stock subject to it, and it becomes an integral part of their contract with the corporation and with each other.²¹

Thus, it does not appear that the contracts clause will bar escheat in the future even if a contract does provide for the disposition of the property.²² The public policy argument favors escheat.

As the escheat statutes have not been invalidated by the contracts clause, similarly, they have not run afoul of the demands of due process. It is necessary to realize that due process has a dual requirement: the court must have jurisdiction to render judgment and adequate notice must be given.²³ Considering the latter initially, the notice requirement demands that interested parties be given notice reasonably calculated under all the circumstances to apprise them of the action and give them an adequate opportunity to appear and be heard.²⁴ Notice by personal service or registered mail should always be sufficient.²⁵ Difficulties have arisen in this area when only notice by publication is given. In *Security Sav. Bank v. California*,²⁶ involving the escheat of unclaimed bank deposits, the Court held that personal service on the bank was the equivalent of a seizure of the deposits which subjected the *res* to the jurisdiction of the court. Thus, classified as an *in rem* or a *quasi in rem* proceeding, notice by monthly publication in a newspaper was sufficient for the depositors.²⁷ Then in the *Standard Oil* case,²⁸ the Court held that publication in a newspaper of general circulation throughout New Jersey was sufficient notice to the non-resident stockholders that New Jersey was initiating escheat proceedings against the unclaimed stocks and dividends.²⁹ Coupling these cases it could be inferred that due process will be satisfied if personal notice is given to the holder and notice by publication is given to the owner. At any rate, as far as proper notice is concerned, the due process requirements have not hindered the operation of the escheat statutes.

Perhaps a more difficult problem than that of adequate notice has been the question of jurisdiction. This is due to the intangible nature of stocks and dividends. Whereas tangible property has a definite situs, intangible property

21 *Id.* at 586, 178 A.2d at 335. As of yet there have been no cases utilizing this decision as authority.

22 See generally Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512, 621, 852 (1944).

23 For an excellent treatment of this distinction, see Perry, *The Mullane Doctrine—A Reappraisal of Statutory Notice Requirements*, 1952 CURRENT TRENDS IN STATE LEGISLATION 32, 39-43.

24 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

25 *Ibid.* However, substituted service, such as by registered mail, may only be accomplished pursuant to a statute so providing.

26 263 U.S. 282 (1923).

27 The last known residences of the depositors were not indicated. This case followed *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714 (1877), which formulated our modern doctrine of jurisdiction. Pennoyer led to the principle that notice by publication was sufficient to a non-resident only when he had property in the state which was the subject of an *in rem* proceeding. In *Anderson Nat'l Bank v. Lockett*, 321 U.S. 233 (1944), the Court held that notice posted on the courthouse door was sufficient to resident and nonresident depositors. The *Security Sav. Bank* case also illustrates the intermeshing of jurisdiction with the due process requirements.

28 341 U.S. 428 (1951).

29 However, this has been criticized in Note, *Requirements of Notice in In Rem Proceedings*, 70 HARV. L. REV. 1257, 1268 (1957) and *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 990 (1960).

does not. Thus, while tangible property in subject to escheat only in the state where it is located,³⁰ the escheat of intangible property has been the subject of controversy among states which claim the right to escheat the same property. A brief synopsis of the leading cases will bring this point to focus. In *Security Sav. Bank v. California*,³¹ the Supreme Court considered the jurisdictional aspects of escheat for the first time. As indicated above, it held that California, the locale of the bank, could escheat the unclaimed deposits. In 1948, the Supreme Court held that New York could escheat unclaimed insurance funds on policies issued to residents of that state for delivery there by an insurance company chartered in another state.³² Specifically excluding from its holding the situation in which either the insured or the beneficiary were no longer residents of the state, the Court based its decision on the "contacts" theory: "The question is whether the State of New York has sufficient contacts with the transactions here in question to justify the exertion of the power to seize abandoned moneys due to its residents."³³ This case, by virtue of the fact that more than one state could conceivably have sufficient "contacts" with such funds, was the breeding ground for the multiple escheat enigma. This embryonic threat was fully spawned in the Supreme Court's next escheat-jurisdiction decision. The Court held, in the *Standard Oil* case,³⁴ that New Jersey could escheat unclaimed stocks and dividends of Standard Oil although the company did not transact business there, and even though the stockholders were not residents of that state. However, Standard Oil was chartered under the laws of New Jersey and did maintain a statutory registered office in the state, together with its stock and transfer books. Thus, because the corporation was amenable to service of process in New Jersey, the Court found that New Jersey could escheat the property. Control over the parties was the determinative factor.

Since choses in action have no spatial or tangible existence, control over them can "only arise from control or power over the persons whose relationships are the source of the rights and obligations." . . . Situs of an intangible is fictional but control over parties whose judicially coerced action can make effective rights created by the chose in action enables the court with such control to dispose of the rights of the parties to the intangible.³⁵

Recognizing the possibility of multiple escheat, although the claim of no other state was before the Court, it was said that the full faith and credit clause would bar multiple escheat.³⁶ This decision prompted the term "race of diligence."³⁷

30 "With respect to tangible property, real or personal, it has always been the unquestioned rule in all jurisdictions that only the State in which the property is located may escheat." *Texas v. New Jersey*, 379 U.S. 674, 677 (1965).

31 263 U.S. 282 (1923). *Accord*, *Anderson Nat'l Bank v. Lueckett*, 321 U.S. 233 (1944).

32 *Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S. 541 (1948).

33 *Id.* at 548. In answering this question the Supreme Court quoted from the opinion of the lower court:

"For the core of the debtor obligations of the plaintiff companies was created through acts done in this State under the protection of its laws, and the ties thereby established between the companies and the State were without more sufficient to validate the jurisdiction here asserted by the Legislature." *Id.* at 551.

34 341 U.S. 428 (1951).

35 *Id.* at 439-40.

36 *Id.* at 443.

That is, the first of the several states with jurisdiction that initiated escheat proceedings would escheat all because the other states would be forced to recognize its decision.

It was not until *Western Union Tel. Co. v. Pennsylvania*³⁸ that the problem of multiple escheat was decisively adjudicated. In that case, Pennsylvania initiated escheat proceedings against the telegraph company for unclaimed funds wired from its Pennsylvania offices. However, New York, the state of the principal office and of incorporation, had already escheated some of the funds that Pennsylvania sought to escheat. The Supreme Court held that if Pennsylvania were also allowed to escheat these funds, the telegraph company would be deprived of due process. Therefore, Pennsylvania's claim was rejected. Recognizing that full faith and credit would not effectively bar multiple escheat the Court finally quieted the threat of multiple escheat on the grounds of due process. Nevertheless, it did not terminate the race of diligence. However, the recent decision of *Texas v. New Jersey*³⁹ has resolved this problem. Invoking the original jurisdiction of the Supreme Court, Texas brought an action against New Jersey, Pennsylvania, and the Sun Oil Company. It sought an injunction and declaratory relief to determine which state had the right to escheat certain abandoned property, including stocks and dividends, held by the Sun Oil Company.⁴⁰ Florida was permitted to intervene since it also claimed the right to escheat a certain portion of the property. Sun Oil did not deny liability; it only sought to avoid double liability. In rejecting the tests of "contacts," of the domicile of the debtor corporation, and of the state of the corporation's principal place of business, advanced by Texas, New Jersey, and Pennsylvania, respectively, the Court held, as contended by Florida, that the state of the last known address of the stockholder, as shown on the debtor's books and records, has the right to escheat.⁴¹ This ". . . rule recognizes that the debt was an asset of the creditor . . . [and] will tend to distribute escheats among the States in the proportion of the commercial activities of their residents."⁴² It was further held that, in the event of no recorded address of a stockholder or if the state of last known address does not provide for escheat, the state of corporate domicile

37 *Id.* at 444 (Frankfurter, J., dissenting). It also prompted the proposal of the UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, 9A U.L.A. 412 (1965). Section 5 of this act provides for escheat of stocks and dividends of a business association when the owner has not claimed them or corresponded in writing with the association for seven years following the date prescribed for payment or delivery. Either the state of incorporation or the state in which the corporation does business and which is the state of the last known residence of the stockholder, as indicated by the corporation's books, may escheat. However, multiple escheat is prevented under this dual test by §10 which provides that if two states can escheat under §5 then the state of the last known address has priority. But if multiple escheat is to be effectively prevented both states would have to adopt §10. The act also terminates the race of diligence. Since its promulgation in 1955, the uniform act has been adopted, with modifications, by 12 states.

38 368 U.S. 71 (1961).

39 379 U.S. 674 (1965).

40 As noted in note 2, *supra*, other unclaimed debts were escheated in addition to stocks and dividends. This case purportedly decided which state had the right to escheat all abandoned corporate intangibles.

41 379 U.S. at 681-82. Consequently, it will be necessary for states whose escheat statutes concentrate on the debtor to revise their statutes in accordance with this rule. Another effect of the case should be the prompting of states which have no escheat statute at present to enact one.

42 *Id.* at 681.

could escheat the property subject to the right of another state to show that the stockholder had his last known address in that state or subject to the right of the state of the last known address to enact an appropriate escheat statute. Thus, this case has unequivocally terminated the race of diligence and the menace of multiple escheat which had permeated the field of escheat of corporate stocks and dividends. However, the case may have created problems just as perplexing as those which it resolved.

II. The Problem

Since *Texas v. New Jersey* announced the authoritative rule as to which state has the right to escheat abandoned corporate intangibles, one might naturally question whether any problems remain in this area. However, that decision did leave certain questions unanswered. Essentially, the problem is one of jurisdiction. An attempt to analyze this problem will be made in the remainder of this discussion. Two questions are involved. Does the rule in *Texas v. New Jersey* include the right to compel corporations to file reports by means of which the state may learn the addresses of the corporate stockholders residing within its boundaries? This implicitly includes the maintenance of detailed records for a number of years.⁴³ Secondly, will the state of the stockholder's last known address have jurisdiction, in both a legal and a practical sense, to enforce this right?

Initially, the precise factual situation involved should be delineated. We are primarily concerned with the case where the only contact which a corporation has with the escheating state is the fact that one or more of its stockholders are listed on the corporate books as having their last known address in that state; the corporation is incorporated, is doing business and has its principal place of business in another state; the stockholders disappear for the required length of time so that their stocks and dividends are presumed abandoned and therefore escheatable by the state.

Considering first the question of the filing of reports, it may be safely assumed that the corporation will do no more than the law requires in this regard. Thus, it will not file reports with the states, pursuant to state statutes,⁴⁴ listing the stockholders who reside in that state and whose corporate holdings are subject to escheat unless the state has the right to compel such reports. Further, even if the state has the right to compel such reports the corporations will not file the reports unless they are vulnerable to suit by the states. Thus, if a state cannot sue within its own borders or will not sue elsewhere for obvious practical reasons, the corporations will keep the funds. If the state has an effective means of redress which it is willing to assert, then it is highly probable that the corporations will comply.

The assumption that the corporations will not do more than the law requires

⁴³ Since such records must be kept before any reports can be filed, this fact will inhere in all references to corporate reports hereafter.

⁴⁴ The statutes commonly provide for the filing of such reports, e.g., UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT §11.

is not made merely to present an academic question; it appears to be a reality.⁴⁵ It is only natural to expect that a corporation will be reluctant to part with abandoned intangibles which it possesses. This is so even though it may recognize the right of the state to escheat, for in many instances the corporation would be forced to surrender a considerable sum of money to say nothing of the expenses involved in filing reports and in keeping records. It would be much easier to regard this situation as a loophole in the law rather than to consider its action as a dishonest practice. That is, unless the states have a right to such reports and the ability and willingness to enforce such right, a corporation would only be performing an expensive gratuity. Even if it realizes that the funds must be surrendered eventually, postponement is a natural tendency since the corporation may thereby acquire the use of interest free funds. In addition, as noted above, the filing of such reports would entail, on the part of the corporation, the task of familiarizing itself with the varying escheat laws of possibly fifty jurisdictions and reporting to each in accord therewith. This is indeed an onerous burden.⁴⁶

The holding in *Texas v. New Jersey* furthers the natural impetus to balk as regards reporting. Apparently, that case held that the *only* state which can escheat is the state of the last known address of the stockholder. If that is so, and the state cannot acquire the necessary reports⁴⁷ or obtain jurisdiction, then the corporation can escape escheat altogether. This is quite the reversal of the former situation where the threat of multiple escheat prevailed. However, it is not certain whether the decision stands for this proposition. A plausible argument could be made that the rule that the *only* state which can escheat is the state of the last known address of the stockholder applies only when competing states are before the court. Support for this contention can be found in various statements of the Court.⁴⁸ However, in view of the background of the problem

45 Letter from John W. Beatty, practicing attorney, to NOTRE DAME LAWYER, Dec. 2, 1965, on file in the office of the NOTRE DAME LAWYER.

46 It should be noted that whether the maintenance of detailed records regarding dividends will impose a burden on the corporations will depend on the jurisdiction's view of the statute of limitations. Two divergent views exist on declared dividends. One is that the statute of limitations is not tolled unless the corporation clearly repudiates the stockholder's right to the dividends and he has knowledge of it, such as a demand and refusal to pay. The other is that the statute runs at the time the dividend is declared. In some jurisdictions the applicable rule will depend on whether the dividend is payable on demand or on a specified date. FLETCHER, CYCLOPEDIA CORPORATIONS §5370 (rev. perm. ed. 1958). In cases in which the first view applies it will be no greater burden on the corporation to maintain the records for the state because it would have to keep them for the stockholder at any rate, assuming that the corporation did not repudiate the shareholder's right to the dividends. Since the state merely succeeds to the right of the owner in escheat the further problem of whether the statutory bar constitutes a vested right must be considered. If it is vested then the prohibition cannot be removed for escheat. The obvious solution is to designate a longer period of time for the statute of limitations than for escheat. Commissioners' Note, UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, 9A U.L.A. 436-38 (1965).

47 The reports are necessary if the state is to be apprised of its right to escheat. Since such information cannot be obtained from the missing shareholder, the corporations are the only source of such data. Even if a state was at one time aware of its citizens' stockholdings through information supplied by such individuals, the inherent nature of the problem requires the state to discover the existence of funds subject to escheat from a different source. Only the companies possess this information.

48 "We therefore hold that each item of property in question in *this case* is subject to escheat only by the State of the last known address of the creditor, as shown by the debtor's books and records." 379 U.S. at 681-82. (Emphasis added.) "[N]one of this Court's cases

it seems improbable that this was the Court's intention or that this interpretation will be placed upon its decision. Rather, it appears that the case was intended to formulate an immutable rule to govern all cases of this type whether there are one, or fifty, states before the bench. Indeed, this would be the only sensible holding to be ascribed to the case. Consequently, with only one state possessing the right to escheat, the possibility of entirely avoiding escheat exists if the corporation can thwart that state's attempt, and, as stated at the outset of this discussion, this should make the corporations even more reluctant to file such reports. Therefore, the right granted in *Texas v. New Jersey* must be examined to determine how far it extends.⁴⁹ Unless it includes the right to compel corporations to file reports, such reports will probably not be made to the states and this situation may make it impossible for the states to effectuate their rights to escheat.

III. How Far Does the Right Granted in *Texas v. New Jersey* Extend?

Is the right to corporate reports concomitant with the right of the state of the stockholder's last known address to escheat abandoned corporate stocks and dividends?⁵⁰ The Supreme Court was silent on this issue. In fact, it appears that the court consciously avoided deciding this problem. Mr. Justice Black revealed the reluctance of the Court to pass on this matter when he stated:

The issue before us is not whether a defendant has had sufficient contact with a State to make him or his property rights subject to the jurisdiction of its courts. . . . [W]e are faced here with the very different problem of deciding which State's claim to escheat is superior to all others.⁵¹

While the above quoted statement is directed principally to the reluctance of the Court to consider the jurisdictional issue, a footnote to it has application to the question of reports: "Nor, since we are dealing only with escheat, are we concerned with the power of a state legislature to regulate activities affecting the State. . . ."⁵² Assuming that the filing of reports was what Mr. Justice Black was referring to, it would appear that the case leaves undecided the question of whether the state which has the right to escheat can compel reporting by a foreign corporation, situated in the factual position on which this discussion has been predicated.

It may still be argued by some that the right to compel reports is necessarily

allowing States to escheat intangible property decided the possible effect of conflicting claims of other States." *Id.* at 682 n.13. "[W]e are faced here with the very different problem of deciding which State's claim to escheat is superior to all others." *Id.* at 679.

49 While we are not concerned with the wisdom of the Court's decision, it may be interesting to note that the case has received criticism as well as commendation from the student writers. Criticisms appear in 65 COLUM. L. REV. 1101 (1965); 33 GEO. WASH. L. REV. 979 (1965); 60 NW. U. L. REV. 550 (1965). Commendations appear in 39 ST. JOHN'S L. REV. 368 (1965); 18 VAND. L. REV. 1581 (1965).

50 It is common for escheat statutes to provide for corporate reports concerning escheatable property. See, e.g., UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT §11. There will be no problem as to whether the right to compel reports inheres in the right to escheat if the state has power to regulate the corporation. This is examined *infra*.

51 379 U.S. at 678-79.

52 *Id.* at 678 n.8.

inherent in the holding of *Texas v. New Jersey*. Such an argument would be based on the fact that the state's right to escheat would be meaningless without the right to compel reports and that surely the Court did not intend to confer the right of escheat on a particular state without at the same time conferring the means of enforcing the right. Thus, it may well be true, although seemingly the opinion of the Court gives no clue in this regard, that the Court did intend to give to the escheating state the right to compel reports. However, if this was the Court's intent, it certainly should have been expressed because, as will appear from the discussion of jurisdiction to regulate which appears immediately below, such a holding would be a somewhat revolutionary one in the field of state regulation of foreign corporations. It cannot be assumed that the Court would propound so revolutionary a ruling by implication.

IV. Jurisdiction to Enforce the Right to Escheat

The principal questions raised by the holding in *Texas v. New Jersey* involve the jurisdiction of the state to enforce its right to escheat granted therein. The question of jurisdiction involved naturally lends itself to a two-fold division: (1) jurisdiction to regulate, *i.e.*, to compel reports; (2) jurisdiction to sue, *i.e.*, in what forum may the escheating state assert its right to abandoned intangibles? These two concepts will be examined separately at this point.

A. Reports

Assuming *arguendo* that *Texas v. New Jersey* does not reach the issue of the right of the escheating state to compel reports concerning the addresses of shareholders, the question remains as to whether a state could, acting through either its legislature or its courts, compel foreign corporations to file such reports. Under the basic fact situation with which this note is concerned, *i.e.*, when the only contact of the foreign corporation with the escheating state is the fact that the last known address of one of its shareholders was in the state, it seems improbable, under any theory of regulatory power based on "doing business" or "contacts," that the state could compel the corporation to furnish such information.

It is necessary to realize that "doing business" has different meanings depending on the issues involved.⁵³ It varies according to whether the jurisdictional issue concerned is regulation, taxation, or service of process. The same degree of "doing business" that is required for one purpose is not necessarily the same degree that is needed for another.⁵⁴ Another distinction must be brought into focus. The applicability of various constitutional safeguards also depends on the issues involved. "Doing business" for purposes of judicial jurisdiction is ordinarily limited only by the due process clause of the fourteenth amendment; on the other hand, for jurisdiction to regulate foreign corporations, the states must adhere to the safeguards provided by the commerce clause, the equal protection clause (after qualifying to do business in the state), and the

⁵³ FLETCHER, *op. cit. supra* note 46, §8712.

⁵⁴ *Ibid.*

impairment of contract clause, after having first satisfied the due process clause.⁵⁵ Thus, it is evident that jurisdiction to regulate requires a higher degree of "doing business" or "contacts" than that necessary for jurisdiction for purposes of service of process.

The question of whether the state can compel corporate reports must be considered in terms of whether the state has jurisdiction to regulate the corporation. It would be rather absurd to postulate that, in light of existing law, a state could regulate a corporation when the only contact which it has with the state is the fact that one of its stockholders lived there.⁵⁶ It was stated as early as 1889 that "in no legal sense can the business of a corporation be said to be that of its individual stockholders."⁵⁷ Perhaps, the fact that this is insufficient to confer regulatory jurisdiction on the state can be more forcefully illustrated by analogy to tax cases: "[T]axes are not regulations in any sense of that term."⁵⁸ Thus, for purposes of state taxation of foreign corporations, less stringent "contacts" are required than those necessary for regulation. Still, for taxation there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."⁵⁹ Or as stated in another decision, there must be a sufficient "nexus between such a tax and transactions within a state for which the tax is an exaction."⁶⁰ Such a "nexus" or "definite connection" is lacking in the situation at hand. Indeed, not even the recent Supreme Court decision dealing with state jurisdiction to tax—*General Motors Corp. v. Washington*⁶¹—far-reaching though it may be, would support the contention that jurisdiction to regulate exists in the present situation. Consequently, the futility of trying to subject a foreign corporation to a state's report requirements merely because one of its stockholders lived there is, without additional contacts, obvious.

But if it is assumed that the stockholder bought the stock in the state, and such an assumption appears not only reasonable but also probable, then an additional factor is present. However, it has generally been held that the mere sale of stock by a corporation in a state, or the solicitation of stock subscriptions in the state, does not subject a foreign corporation to the regulatory jurisdiction of the state,⁶² the reason being that such transactions are not in the ordinary or usual course of business. However, a minority view holds if a corporation does sell its stock in the state, it is subject to the state's regulatory power.⁶³ How-

55 *Id.* at §§8389-8401. In addition to the constitutional limits on jurisdiction over foreign corporations the intangible factor of comity may also impose restrictions.

56 For a discussion of what constitutes doing business for purpose of state regulation of foreign corporations, see generally FLETCHER, *op. cit. supra* note 46, §§8464-8502.

57 *People v. American Bell Tel. Co.*, 117 N.Y. 241, 255, 22 N.E. 1057, 1062 (1889).

58 *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 461 (1959).

59 *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954).

60 *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 445 (1940). This test was reiterated by *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 464 (1959).

61 377 U.S. 436 (1964). For a thorough discussion of the constitutionality of state taxation of foreign corporations, see *annot.*, 67 A.L.R.2d 1322 (1959).

62 *Payson v. Withers*, 5 Biss. 269, Fed. Cas. No. 10,864 (1873); FLETCHER, *op. cit. supra* note 46, §8489.

63 See *Friedlander Bros. v. Deal*, 218 Ala. 245, 118 So. 508 (1928); *Langston v. Phillips*, 206 Ala. 174, 89 So. 523 (1921); *Southern Bldg. & Loan Ass'n v. Weaver*, 151 So. 882 (Ala. App. 1933); *Jones v. Martin*, 15 Ala. App. 675, 74 So. 761 (1917); *Commercial Nat'l*

ever, in the usual situation the stockholder will buy the securities through a brokerage firm in the state. This alone is insufficient to confer jurisdiction on the state for any purpose, much less jurisdiction to regulate.⁶⁴ Thus, under the traditional notions of doing business for purposes of regulating foreign corporations, the mere fact that a citizen of the state owns stock in the foreign corporation is insufficient to confer such jurisdiction.⁶⁵

B. *Ability to Bring Suit*

It must be noted at the outset of the discussion of the ability of a state to bring suit to enforce its escheat rights that if the state has no right to reports, the question of suit is probably moot. The reason for this is of course that, without the information furnished by the reports, the state will be unaware of its rights to the abandoned intangibles. It would be foolish for the state to even attempt to litigate in such a situation. Such suits would be based on unreliable information or suspicion and would involve a wasteful shotgun approach.

The corporate debtor alone has the information necessary to insure a *bona fide* exercise of the judicial process by the State where it seeks custody of wage claims. Without this knowledge the excursion is a junket, a hit-or-miss proposition, an annoyance to both suitor and defendant.⁶⁶

Conversely, if the state for some reason does have the right to require reports, the question of the right to sue in its own courts (the most convenient forum from its point of view) will be mooted because, as noted above, the right to regulate inherently includes the right to sue. Therefore, for the sake of the discussion of the right to sue, it must be assumed that the state has no right to reports but that it has somehow acquired the necessary information and has decided to bring suit. The question then becomes one of the available forum.

It is obvious that the state could sue at the corporation's locale. Similarly, it should also be obvious that this is somewhat impractical due to the expense of maintaining suit in the courts of another state. A state is not apt to undergo this expense especially when the sum which it might escheat is small. In addition, if the state's own attorneys were to plead the case in another state they would possibly be handicapped by lack of familiarity with rules of procedure there. Further, a local bias may exist against allowing another state to obtain abandoned property. These factors compel states to avoid out-of-state litigation. So, pragmatically, it seems that a state must litigate in its own courts if the expected escheat revenues are to be realized. In order to accomplish this, the state will have to show that it has jurisdiction to sue. This may be either

Bank v. Jordan, 71 Fla. 566, 71 So. 760 (1916); Ulmer v. First Nat'l Bank, 61 Fla. 460, 55 So. 405 (1911); American Timber Holding v. Christensen, 206 Wis. 25, 238 N.W. 897 (1931); Southwestern Slate Co. v. Stephens, 139 Wis. 616, 120 N.W. 408 (1909).

64 "Moreover, the fact that securities of a foreign corporation are traded on a stock exchange within the state does not constitute 'doing business' within the state for the purpose of conferring jurisdiction [to serve process]." Grossman v. Sapphire Petroleums, Ltd., 195 N.Y.S.2d 851, 853 (Sup. Ct. 1959).

65 It might be well to recall at this point that the factual situation on which the discussion of the question of jurisdiction in this note is based in this very situation—where the only contact of the corporation with the state is that a stockholder resided in the state.

66 State v. United States Steel Corp., 22 N.J. 341, 355, 126 A.2d 168, 176 (1956).

in *personam* or in *rem* jurisdiction.⁶⁷ In *personam* jurisdiction will be considered initially.

Prior to the revolutionary decision in *International Shoe Co. v. Washington*⁶⁸ the law of *in personam* jurisdiction over corporations developed from "presence," express consent to "doing business" and implied consent.⁶⁹ Then, in *International Shoe*, the Court discarded the old tests in favor of a new one:

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."⁷⁰

This has generally come to be known as the "minimum contacts" test. However, as illustrated above, the fact that the corporation has a stockholder living in the state is most probably not sufficient contact to justify judicial jurisdiction.⁷¹ Perhaps additional facts exist which would confer jurisdiction.

Certainly, the corporation would have used the mail to communicate with its stockholders. By use of the mails the corporation would notify the stockholder of meetings, solicit proxies, distribute dividends, and supply annual reports. In *McGee v. International Life Ins. Co.*,⁷² the Court held that California had judicial jurisdiction over a Texas corporation which issued a reinsurance agreement to a California resident.⁷³ The only contact the defendant corporation had with California was by mail. The insured signed the policy in California and mailed it to the defendant. Also, the premiums were mailed to the defendant corporation by the insured. The corporation never had an agent in California for any purpose. In holding that there were sufficient minimum contacts for California to assert judicial jurisdiction over the foreign insurer, the Court stated that:

67 The essential difference between an *in personam* action and an *in rem* action is that the former binds the parties involved while the latter is a determination of rights in property which runs against the whole world. Also to be distinguished is a *quasi in rem* action in which only the rights of certain persons in property are determined. CHADBURN & LEVIN, CASES ON CIVIL PROCEDURE 21-22 (1961).

68 326 U.S. 310 (1945).

69 See generally HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918); Hazard, *General Theory of State-Court Jurisdiction*, SUP. CT. REV. 241 (1965); Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

70 326 U.S. 310, 316 (1945).

71 See *Gold v. Pioneer Fund, Inc.*, 107 Ga. App. 855, 132 S.E.2d 144 (1963); *Grossman v. Sapphire Petroleum, Ltd.*, 195 N.Y.S.2d 851 (Sup. Ct. 1959). In these cases it was held that sale of a corporation's stock in a state does not alone constitute doing business in that state. Their reasoning seems to extend to minimum contact jurisdiction.

72 355 U.S. 220 (1957).

73 For discussions of this case, see Ehrenzweig, *Pennoyer Is Dead—Long Live Pennoyer*, 30 ROCKY MOUNT. L. REV. 285 (1958); Freeman, *McGee v. International Life Insurance Co. and the Amenability of Foreign Corporations to Suit*, 13 BUS. LAW. 515 (1958); Hoffman, *The Plastic Frontiers of State Judicial Power over Non-residents: McGee v. International Life Insurance Company*, 24 BROOKLYN L. REV. 291 (1958); Reese, *Judicial Jurisdiction over Non-residents; The Impact of McGee v. International Life Insurance Co.*, 13 N.Y.C.B.A. RECORD 139 (1958); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

[A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. . . . With this increasing nationalization of commerce has come a great increase in the *amount of business* conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in *economic activity*. . . . It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. . . . These *residents* would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum — thus in effect making the company judgment proof. Often the crucial witnesses — as here on the company's defense of suicide — will be found in the insured's locality.⁷⁴ (Emphasis added.)

Assuming that this decision is the law today there are two characteristics which distinguish it from the present situation. First, the Court justified its holding, which clearly extended beyond anything it had previously held, on the ground that residents could not afford to bring suit in an out-of-state forum. The state had to provide effective redress for its residents when nonresident insurers failed to pay claims of the state's citizens. However, in escheat the state is suing; it can certainly afford to do so and hence is able to protect its rights.⁷⁵ Secondly, in *McGee* the mails were used in conjunction with the business activity of the corporation — selling insurance. This was the purpose for which the corporation was formed. In the present situation it cannot properly be said that the payment of dividends or notification of meetings is the purpose for which the corporation was formed. Thus, such activity, though conducted through the mails as in *McGee*, is not to be considered as conducting "economic activity" through the mails in the limited sense that the Court was using that term in *McGee*.

Even if these two distinctions were not recognized, it is doubtful that *McGee* could be used in support of the state's position in the escheat situation in light of *Hanson v. Denckla*.⁷⁶ In that case the Court reversed the Florida Supreme Court's decision which was necessarily based on the finding that it had personal jurisdiction over the parties to the suit. The Supreme Court held that *in personam* jurisdiction was lacking. The relevant facts were that the settlor had set up a trust in Delaware and then became domiciled in Florida. From time to time she communicated with the trustee via mail concerning the trust. The settlor executed a power of appointment in Florida. Commenting on the *McGee* case, the Court said: "[I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."⁷⁷

⁷⁴ 355 U.S. 220 at 222-23. For a district court case which goes even further than *McGee* see *Pugh v. Oklahoma Farm Bureau Mut. Life Ins. Co.*, 159 F. Supp. (E.D. La. 1958).

⁷⁵ It is recognized that the expense of maintaining the suit, might in many instances, make the suit unattractive. See text accompanying notes 66-67 *supra*. This is not to say that the state is financially unable to bring suit.

⁷⁶ 357 U.S. 235 (1958).

⁷⁷ *Id.* at 251.

In rejecting the contention that the communication by mail constituted sufficient contacts the Court stated:

From Florida Mrs. Donner carried on several bits of trust administration that may be compared to the mailing of premiums in *McGee*. But the record discloses no instance in which the trustee performed any acts in Florida that bear the same relationship to the agreement as the solicitation in *McGee*. Consequently, this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida.⁷⁸

Although the Court based its holding on the fact that the defendant-trustee did no act in Florida, and did not consummate any transaction in that state, this case has generally been regarded as a retreat from *McGee*.⁷⁹ Thus it would appear that the use of the mails in communicating with its stockholders will not subject a foreign corporation to the *in personam* judicial jurisdiction of the stockholder's state.

This may be an apt juncture to discuss the efficacy of a state long-arm statute. If a state were to enact such a statute to cover this situation, would it withstand the assault that would surely follow? The doctrine of "minimum contacts" immediately suggests an answer in the negative. A state can enact such a statute but it must satisfy the "minimum contacts" test of *International Shoe* in order to be constitutional. In the present situation there is no contact with the state.⁸⁰

Briefly, the essential element in acquiring personal jurisdiction over foreign corporations, whether the basis be the use of the mails or the adoption of a state long-arm statute, is that the corporation must have "minimum contacts" with the state. Further, these contacts must be in connection with the corporation's business. If either of these factors are lacking, due process will render the foreign corporations immune. Thus, if the corporation president is vacationing in Florida, that state cannot acquire personal jurisdiction over the foreign corporation by virtue of that fact alone. But if the corporation president visits Florida in an attempt to sell its product, then the state has more adequate grounds for asserting jurisdiction over the corporation.⁸¹ The escheat situation is analogous to the former.

⁷⁸ *Id.* at 252.

⁷⁹ See generally Kurland, *supra* note 69; Leflar, Cleary, Cowen, Schlesinger & Ehrenzweig, *Transient Jurisdiction—Remnant of Pennoyer v. Neff: A Round Table*, 9 J. PUB. L. 281 (1960); Reese & Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249 (1959).

⁸⁰ In the leading cases upholding such statutes, *Hess v. Pawloski*, 274 U.S. 352 (1927) and *Tardiff v. Bank Line*, 127 F. Supp. 945 (E.D. La. 1954), the defendants had been present in the jurisdiction prior to the suit. Interesting language appeared in the *Tardiff* case: "Having provided the right [wrongful death action], the state should not be powerless to provide the remedy," 127 F. Supp. at 948. This was not the basis for the holding but only further justification for the decision. It cannot be supposed that such language would be appropriate in the absence of sufficient contacts with the state.

⁸¹ Indeed, this was recognized by the Court in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958):

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State thus invoking the benefits and protections of its laws.

Having concluded that the state cannot acquire *in personam* jurisdiction in its own courts, the possibility of obtaining *in rem* jurisdiction remains to be examined. Physical power over the *res* is the basis of *in rem* jurisdiction.

The basis of the [*in rem*] jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State. . . . Tangible property poses no problem for the application of this rule, but the situs of intangibles is often a matter of controversy.⁸²

Thus, the first requirement of *in rem* jurisdiction is the presence of the *res* within the state. This poses an interesting question in escheat: What is the *res*?

If the *res* is the stock certificate itself it may support *in rem* jurisdiction depending on the law of the jurisdiction:

[T]o the extent to which a stock certificate is, under the law of the state of incorporation, an embodiment of the shareholder's interest, the presence of the certificate will also support jurisdiction *in rem* or quasi *in rem*.⁸³

But even if this is the applicable rule it will be of no avail in the present situation because the stockholder is lost and, presumably, the stock certificate also. Further, even if the stock certificate were located and subjected to the court's jurisdiction the only action which the state could take would be to sell the stock. Mere possession of the stock by the state would not confer jurisdiction over the corporation. Thus, in the situations when the state did acquire possession of the stock certificate it would be getting only half of what it should ideally obtain because it could not compel the corporation to pay the abandoned dividends to it. However, if the state did acquire the stock and obtained a court decree declaring it to be the owner thereof, the corporation, as a practical matter, to insure friendly relations with its stockholders, would probably pay the dividends. If the corporation did pay, however, it would be a voluntary act and not due to any power the state possessed over the corporation.

On the other hand, if the funds themselves are the *res*, the problem is that they are not actually located in the state of the stockholder's last known address. The funds are with the corporation. Thus, they are not within the court's jurisdiction, and cannot be brought under the physical control of the tribunal. Nor would *in rem* jurisdiction be obtained if the funds were declared to be constructively within the jurisdiction of the court. The *res* must be subjected to the jurisdiction of the court by a seizure,⁸⁴ in order that the *in rem* judgment may be executed against the property since it is not personally binding on the corporation. However, the funds cannot be seized because they are located in another state and the corporation is not subject to

82 *Hanson v. Denckla*, 357 U.S. 235, 246-47 (1958). Physical power is the basis of *in rem* jurisdiction. *McDonald v. Mabey*, 243 U.S. 90, 91 (1917). *But cf.* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 *YALE L. J.* 289 (1956).

83 *Developments in the Law — State-Court Jurisdiction*, 73 *HARV. L. REV.* 909, 952 (1960), citing *Merritt v. American Steel Barge Co.*, 79 Fed. 228 (8th Cir. 1897), and *RESTATEMENT, CONFLICT OF LAWS* §53(3) (1934).

84 *RESTATEMENT, JUDGEMENTS* §§32, comment e, 34, comment b (1942).

the personal jurisdiction of the court. Thus it would not be feasible to say that the funds may be constructively seized.

The final possibility is that the *res* is the stockholder's claim to which the state succeeds. Again, this interpretation fails to provide *in rem* jurisdiction over the corporation, for two reasons. First, there must be a seizure of the *res* or its equivalent. While tangible property is subjected to the court's jurisdiction by attachment or sequestration, intangibles cause difficulty since they cannot be reduced to physical possession. Thus, the question arises as to what constitutes a seizure of the *res*. Here, an examination of past decisions may prove helpful. In *Security Sav. Bank v. California*⁸⁵ seizure of the *res*, the bank deposits, was accomplished by personal service on the bank. This was possible because the bank was located in California, the escheating state. In *Anderson Nat'l Bank v. Lockett*⁸⁶ the bank deposits themselves, located in the escheating state, were seized. In *Connecticut Mut. Life Ins. Co. v. Moore*⁸⁷ the insurance companies, holding abandoned funds, sought to enjoin the enforcement of New York's abandoned property act. Thus, they subjected themselves to the court's jurisdiction. At any rate, as foreign insurance companies, they were subject to New York's insurance regulations and were amenable to process in New York. In *Standard Oil Co. v. New Jersey*,⁸⁸ again seizure was accomplished by service of process on the corporation. The Court emphasized the fact that it was power over the parties which enabled the state to assert control over the abandoned stocks and dividends. Thus, seizure in these prior escheat cases was based on control over the debtor corporation. In the present situation, the *res* cannot be seized because the state lacks personal jurisdiction over the corporation. Moreover, it would not seem that mere notice to the debtor corporation is sufficient to bring the property within the court's jurisdiction. Nor would it be tenable to suggest that the *res* could be seized by service on the stockholder. Necessarily, the shareholder would have to be apprised of the action by publication. But in the preceding cases seizure was accomplished by personal service. Even if the intangible claim could be effectively seized to yield *in rem* jurisdiction, such a judgment would be binding only on the shareholders. It could not bind the corporation because there would be nothing on which the judgment could be executed. Thus, an *in rem* action against the corporation is impossible.

In determining that an *in rem* proceeding against the corporation would not be efficacious, a distinction must be made between situs of an intangible and the *res*. As stated by Mr. Justice, then Judge, Cardozo:

The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the creditor; for others, the domicile or place of business of the debtor, the place, that is to say, where the obligation was created or was meant to be discharged; for others, any place where the debtor can be found. . . . At the root of the selection

85 263 U.S. 282 (1923).

86 321 U.S. 233 (1944).

87 333 U.S. 541 (1948).

88 341 U.S. 428 (1951).

is generally a common sense appraisal of the requirements of justice and convenience in particular conditions.⁸⁹

It thus becomes apparent that any determination of the situs of an intangible must necessarily be fictional. Therefore, the determination may properly be based on considerations of justice and convenience. However, in ascribing situs to an intangible the court is merely determining which state has the right to escheat. The situs of the intangible is not the location of the *res*. Thus situs cannot confer *in rem* jurisdiction. In establishing the situs of abandoned corporate intangibles at the state of the creditor's last known address, the Court, in *Texas v. New Jersey*, relied on the doctrine of *mobilia sequuntur personam*, according to which "movables follow the law of the person,"⁹⁰ and stated that the rule proposed would be in accord with another line of decisions concerning the situs of intangibles for other purposes. With reference to this latter statement, three cases were cited in which the situs of certain intangible property was fixed at the owner's domicile, thus permitting that state to levy transfer and inheritance taxes on that property at the owner's death.⁹¹ However, two features distinguish those cases from the situation at hand. First, the tax was on the transfer of the property rather than on the property itself. Secondly, the state of the intangibles' situs had probate jurisdiction in the cases cited. Thus there were independent grounds of jurisdiction in the cases. This is the important point to note. Ascribing a situs to corporate intangibles does not confer jurisdiction upon the situs state. It merely determines which state has the right to escheat. To establish *in rem* jurisdiction, the *res* must be subjected to the court's jurisdiction. This cannot be done under the circumstances of the present problem. Further, it should be pointed out that fixing the situs in the state of the last known address will not confer *in personam* jurisdiction either; determination of the situs does not render the corporation amenable to process.

Consequently, under the traditional notions of jurisdiction, as founded in *Pennoyer*, the state would be unable to assert its jurisdiction to escheat in such a case. Admittedly the *Pennoyer* system has come under attack. Its rigidity has melted due to the increased mobility of our society.⁹² Various reforms have been suggested. Perhaps the most recent commentary criticizing its remaining vestiges is in an article by Professor Hazard.⁹³ If his views are adopted, then jurisdiction to escheat will exist in the state of the stockholder's last known address. In essence, after a study of the history of jurisdiction, he suggests:

The presence of a *res*—a tract of land, a fund—is of no peculiar jurisdictional significance but is rather the transactional event that provides a legitimate basis for plenary jurisdiction pursuant to the minimum-contacts rule. The process is issued to nonresidents in such cases in order to comply with *Mullane's* notice requirement. That process, because it

89 *Severnoe Corp. v. London & Lancashire Ins. Co.*, 255 N.Y. 120, 123, 174 N.E. 299, 300 (1931).

90 BLACK, LAW DICTIONARY 1154 (4th ed. 1951).

91 *Baldwin v. Missouri*, 281 U.S. 586 (1930); *Farmer's Loan & Trust Co. v. Minnesota*, 280 U.S. 204 (1930); *Blodgett v. Silberman*, 277 U.S. 1 (1928).

92 *E.g.*, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

93 Hazard, *General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241.

issues from a state having minimum contacts with the litigated transaction, has potency in virtue of *International Shoe* to permit entry of whatever judgment is necessary to determine the controversy, without regard to limitations formerly associated with in rem proceedings.⁹⁴

Thus, under this view, the presence of the *res*, alone, within the territory should be sufficient to confer jurisdiction because its mere presence yields the required minimum contacts.⁹⁵ However, it is evident that present notions of jurisdiction have not advanced to this stage.

Before concluding, it is necessary to review some tangential points. It is true that the state could bring an original action in the United States Supreme Court to escheat these funds.⁹⁶ Indeed, this was done in *Texas v. New Jersey*. However, it is fairly safe to state that the Supreme Court would refuse to exercise its jurisdiction. In the first place, the statute conferring original jurisdiction on the Supreme Court in such cases is not exclusive.⁹⁷ Thus, the state courts have concurrent jurisdiction and redress could be sought in such a forum. Further, the Supreme Court has permitted its original jurisdiction to be invoked only 123 times from 1789 to 1959.⁹⁸ This illustrates the inherent tendency of the Court to evade such actions. In addition, even if the Court would hear such cases it would be, similar to suits at the corporation's locale, an inconvenient forum for the states, as well as more expensive. As suggested in *Western Union Tel. Co. v. Pennsylvania*,⁹⁹ the Court might refer such actions to the federal district courts. However, in the *Western Union* case the Court was referring to actions between two or more states. But such a proposal would be just as efficacious in this instance. This would be true especially if the states were not accorded fair treatment in the courts of the corporation's state.

Perhaps the most practical way for the states to avoid any jurisdictional problems in enforcing their rights to escheat would be for them to make reciprocal arrangements among themselves. Thus, if State *A*, as the state of the last known address of the owner of abandoned corporate intangibles, has the right to escheat, and State *B* has jurisdiction over the corporation, *e.g.*, as the state of incorporation, State *B* could obtain the necessary reports, collect the funds, and transfer them to State *A*. In turn, State *A* would provide the same service for State *B*. If the corporations balked at such an arrangement on the grounds that only the situs state has the right to escheat and that the procedure circumvents this scheme, a defense could be attempted under principles of agency or the like.

V. Conclusion

The principal question which is bound to arise in the wake of *Texas v. New Jersey* is whether the right granted to the escheating state is enforceable.

94 *Id.* at 282.

95 *Id.* at 283-84.

96 "(b) The Supreme Court shall have original but not exclusive jurisdiction of . . . (3) All actions or proceedings by a State against the citizens of another State or against aliens." 28 U.S.C. §1251(b)(3) (1964).

97 *Ibid.*

98 Note, 11 STAN. L. REV. 665 (1959).

99 368 U.S. 71, 79 (1961).

This question in turn revolves principally around the right of the state to compel reporting by the affected corporations. As indicated in the discussion thus far, apparently the Court did not pass on the reporting question in reaching its decision. Moreover, it seems highly doubtful that the right to receive reports could be constitutionally granted, in accordance with traditional notions of jurisdiction to regulate, under many factual situations which are likely to give rise to escheat proceedings. Yet, without the right to compel reporting, the right to escheat may be largely academic. Thus, the jurisdictional aspects of the enforcement of the right to escheat granted in *Texas v. New Jersey* urgently require definitive clarification.

It further appears that the principal case may have the undesirable effect of limiting the right to escheat, which right, from time immemorial has been an unquestioned prerogative of the states. It is said that the decision may limit the right to escheat because of its rule that *only* (with the two exceptions mentioned) the state of the last known address of the owner of the abandoned intangibles may escheat such property. Does the Court mean "only" in a literal sense? If so, and if the escheating state is precluded from enforcing its right because of jurisdictional limitations, there will be no state which can escheat the property unless the limited exceptions apply. Perhaps the Court should have added a third exception to the general rule, *viz.*, that the right to escheat belongs to the state of incorporation when the state of the last known address lacks regulatory power over the corporation. At any rate, this problem, like the question of the right to compel reports, requires urgent attention. Until these problems are clarified, *Texas v. New Jersey* may not fulfill its promise of stabilizing the law of escheat.

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