



Volume 38 | Issue 3

Article 5

April 1932

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Recommended Citation

John E. Wood, *Reaching Shares of Stock*, 38 W. Va. L. Rev. (1932).

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REACHING SHARES OF STOCK

JOHN E. F. WOOD*

For want of a definition, a share of corporate stock has sometimes been described as being "in the nature of a chose in action";¹ but it is recognized to have a complexity peculiar to itself. The Commissioners on Uniform Laws have recently given us this proposed statutory definition: "Shares are the units into which the shareholder's rights to participate in the control of the corporation, in its surplus or profits, or in the distribution of corporate assets, are divided."² It is, of course, clear that the shareholder owns no part of the corporate assets, and his rights are purely *in personam*,³ but his right to be a shareholder and to stand in that personal relation to the corporation is a right in which he desires protection as against the world, and is accordingly a right *in rem*, subject, like other property rights, to the demands of creditors and adverse claimants and to the exactions of the tax gatherer.

In declaring what courts and what legislatures have the power to put their hands upon shares of stock, considered as property apart from the owner, courts have made use of the concept of situs. Now the word "situs" means something when applied to an acre of land or a horse or any other thing which occupies a position in space; to a lawyer it *must* mean something when applied by the courts to shares of stock.

*Jurisdiction in Rem*⁴

The assignment of jurisdiction as among various possible courts is essentially a practical problem: What court can most effectively and fairly deal with the subject matter? After that question is answered the law can be rationalized accordingly, and the theory made to fit the facts. An action *in personam* ought generally to be brought in a court which can seize the obligor because that court alone can guarantee to him a hearing and can

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¹ 3 BOUVIER, LAW DICTIONARY (3d Rawles, 1914) 3139.

² UNIFORM BUSINESS CORPORATION ACT, § 1.

³ Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 46 S. Ct. 256 (1926).

⁴ The phrase "jurisdiction *in rem*" is here used rather loosely to describe not only power to make adjudications which will bind all persons indifferently (Tyler v. Court of Registration, 175 Mass. 71, 55 N. E. 812 (1900)), but also power to render judgment with respect to rights in or claims upon property as against particular absent defendants (Arndt v. Griggs, 134 U. S. 316, 10 S. Ct. 556 (1890); Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565 (1877)).

enforce performance or punish non-performance of the obligation.⁵ An action *in rem* with respect to land or a tangible chattel ought to be brought in a court which can seize the property, because that court alone can give possession to the winner.⁶

When it was asked what court had power to proceed *in rem* with respect to shares of stock, minds trained to think in terms of physical location carried the process over into this new and foreign field. There were at least four possibilities. First, it might be said that the share was present with the record owner, upon the maxim *mobilia sequuntur personam*; but that was only a maxim, not a statement of fact, and the record owner constituted only one end of the obligation, and so far as remedies were concerned, the less important end. Again, the share could be said to be present where the certificate could be found, since there was something tangible which the court could seize; but the certificate was not a negotiable instrument,⁷ and in early law was only a muniment of title, not always effective, and never necessary for the establishment of rights as against the corporation.⁸ Third, a location might be assigned to the share in a place where the issuing corporation owned property and transacted business; but the shareholder did not own any part of that property. The last possibility was to locate the share at the permanent and official abiding place of the corporation which issued it. Since the final proof of stock ownership was upon books kept by the corporation, and since the ultimate benefit of stock ownership had to be derived from the corporation, the court having personal jurisdiction over it was the only one which could effectively compel it to make good its obligations to the shareholder.

This practical superiority enjoyed by the court of the corporate domicile in dealing with ownership of and claims upon shares of stock gave to that court jurisdiction of such proceedings, and this conclusion was embodied in the statement that the situs of corporate shares was at the corporation's official place of ex-

⁵ *Pennoyer v. Neff*, *supra* n. 4; *Arndt v. Griggs*, *supra* n. 4. This broad statement, used only for purposes of illustration, overlooks the possibility of personal jurisdiction based upon allegiance or domicile.

⁶ *The Belgenland*, 114 U. S. 355, 29 L. ed. 152 (1885).

⁷ 6 FLETCHER, *CYCLOPEDIA CORPORATIONS* (1917) § 3779, and cases cited.

⁸ *Pacific National Bank v. Eaton*, 141 U. S. 227, 11 S. Ct. 984 (1891); *Jefferson County Savings Bank v. Compton*, 192 Ala. 16, 68 So. 261 (1915). In *Lipscomb v. Condon*, 56 W. Va. 416, 49 S. E. 392 (1904) the court said, in the 5th and 6th headnotes: "A certificate of stock is not the stock itself, but is evidence of its existence and ownership. Though, when issued, such certificate is a muniment of title, it is not essential to the existence of the property represented by it."

istence. This was not a statement of fact, nor was it the reason for the rule. It was simply a method of stating the conclusion at which the law had arrived.⁹

It was accordingly settled that under statutes authorizing suits to quiet title to such personal property, or to enforce liens or claims upon it in the absence of the owner or adverse claimant, the suit might be brought in the court of the state which created the issuing corporation.¹⁰ When attachments and executions were permitted to be levied upon intangible property, the proper place for the levy upon shares of stock was in the state which chartered the corporation, although both the owner and the certificate were elsewhere.¹¹ Likewise administration upon shares of stock was properly obtainable in the state of incorporation,¹² although the course of descent of the property was determined by the law of the domicile of the decedent.¹³

Because these conclusions were expressed in terms of physical location, which had been borrowed from a more appropriate sphere, it was deemed inconceivable that a thing could be in two places at the same time, and the consequence was to deny to all courts, except those of the corporate domicile, any jurisdiction *in rem* with respect to corporate shares.¹⁴ Power to seize the certificate was immaterial.¹⁵ Indeed even the court of a state in which the issuing cor-

⁹ See the remarks of Mr. Justice Holmes in dissenting in *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83, 96, 50 S. Ct. 59, 62 (1929).

¹⁰ *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1, 20 S. Ct. 559 (1900); *Hamil v. Flowers*, 133 Ga. 216, 65 S. E. 961 (1909); *Michigan Trust Co. v. Probasco*, 29 Ind. App. 109, 63 N. E. 255 (1902); *Amparo Mining Co. v. Fidelity Trust Co.*, 75 N. J. Eq. 555, 73 Atl. 249 (1909); *Gamble v. Dawson*, 67 Wash. 72, 120 Pac. 1060 (1912).

¹¹ *Ashley v. Quintard*, 90 Fed. 84 (C. C., N. D. Ohio, 1898); *Winslow v. Fletcher*, 53 Conn. 390, 4 Atl. 250 (1885); *Cord v. Newlin*, 71 N. J. L. 438, 59 Atl. 22 (1904); *Plimpton v. Bigelow*, 93 N. Y. 592 (1883); *Christmas v. Biddle*, 13 Pa. St. 223 (1850).

¹² *Murphy v. Crouse*, 135 Cal. 14, 66 Pac. 971 (1901); *Richardson v. Busch*, 198 Mo. 175, 95 S. W. 894 (1906); *In re Fitch's Estate*, 160 N. Y. 87, 54 N. E. 701 (1899).

¹³ *Lowndes v. Cooch*, 87 Md. 478, 39 Atl. 1045 (1898).

¹⁴ 5 FLETCHER, *op. cit. supra* n. 7, § 3141; 7 THOMPSON CORPORATIONS (3d ed. 1927) § 5818.

¹⁵ *Pinney v. Nevills*, 86 Fed. 97 (C. C. Mass. 1898); *Warrior Coal & Coke Co. v. National Bank of Augusta*, 169 Ala. 646, 53 So. 997 (1910); *Armour Bros. Banking Co. v. Smith*, 113 Mo. 12, 20 S. W. 690 (1892); *Richardson supra* n. 12; *Christmas v. Biddle, supra* n. 11.

In *Christmas v. Biddle*, where it was sought to attach shares of stock of a foreign corporation by levying upon certificates which had been deposited with a broker for sale in the state of the forum, the court said, "This stock is held and transferable according to the law of its creation, the statute of Mississippi, on the books of the bank only, either in person by the holder, or by his attorney duly appointed. It will hardly be contended that lands in Mis-

poration was doing business, had no jurisdiction *in rem* as to its shares, although its power to coerce the corporation was ample.¹⁶

These rules became established in a period when corporations were few, when they did business for the most part as local enterprises, and when shares of stock formed a relatively small part of the national wealth. With the tremendous growth of corporations, both in numbers and in the territorial extent of their activities, two traditional views about corporations came to be revised. In the first place the old notion that a corporation could only exist in one place, gave way to the view that a corporation could be present in many places at the same time by virtue of its activities which are described as "doing business." In the second place, after the transfer of shares had become a common business transaction the layman attached more significance to a stock certificate than the law allowed. The certificate came to be a thing of value, representing for all practical purposes the share itself.¹⁷ It was inevitable that the law should adapt itself to these developments.

So courts began to reverse themselves in order to hold that proceedings *in rem* with respect to shares of stock could properly be brought in a state in which the issuing corporation owned property and did business, although its corporate domicile was foreign.¹⁸ Such decisions are generally put on the ground that trans-

mississippi could be attached, because the owner had sent on to this city his title deed with power to a broker to sell the same and raise money. Yet there is, in fact, no difference. It is the stock of the bank which is attached in this case, and the individual to whom the certificate of stock was sent with power to sell, is made the garnishee. Bank stock is made subject to levy and attachment, recently by our statutes; but, then, it is bank stock of our own State, subject to our own laws, and transferable by judicial sale under them; and not British, or French bank stock, or the bank stock of any other State, which, in this respect, is to be considered as a different sovereignty, and the property created by its laws must be considered subject to those laws, because its banks can exist in no other mode, nor in any other place than prescribed by its laws."

¹⁶ Ashley v. Quintard, *supra* n. 11; N. J. Sheep & Wool Co. v. Traders Deposit Bank, 104 Ky. 90, 46 S. W. 677 (1898); U. S. Express Co. v. Hurlock, 120 Md. 107, 87 Atl. 334 (1913); Plimpton v. Bigelow, *supra* n. 11; Ireland v. Globe Milling & Reduction Co., 19 R. I. 180, 32 Atl. 921 (1895).

¹⁷ A case which seems to have had considerable influence in this country is *In re Clark*, (1904) 1 Ch. 294. *T*, domiciled in England, owned shares of stock of a company organized under the laws of South Africa. The company maintained transfer offices both in South Africa and in England. The certificates were kept among *T*'s effects in England. *T* left a will bequeathing his personal property situated in England to his "Home Trustee," and all his personal property situated abroad to his "Foreign Trustee." Looking to the facts that the certificates were kept in England, and that the shares were transferable in England as well as in South Africa, the court held that these shares passed to the "Home Trustee," although the technical situs of the shares was in South Africa.

¹⁸ Vidal v. So. Am. Securities Co., 276 Fed. 855 (C. C. A. 2d, 1922); London, Paris & Am. Bank, Ltd. v. Aronstein, 117 Fed. 601 (C. C. A. 9th, 1902),

fer books are kept in the place where the corporation is doing business. Again, the conclusion is stated in terms of situs.

A more important development has taken place in recognition of the commercial importance of a stock certificate. Perhaps the leading case along this line is *Simpson v. Jersey City Contracting Company*.¹⁹ There a New York creditor sought to attach shares of stock of a foreign corporation belonging to a non-resident defendant by seizing the certificates, which had been endorsed in blank by the owner and pledged with a resident of New York as collateral security. The Court held that the attachment was valid. Answering the argument that the certificate was not the share and could not give it a location in New York, Gray, J., said:

“The distinctions sought to be drawn are largely artificial. The truth is that it (the stockholder) did have property here, in the common acceptance of the term, as well as in the eye of the law. Certificates of stock are treated by business men as property for all practical purposes. They are sold in the market, and they are transferred as collateral security for loans, and they are used in various ways as property. They pass by delivery from hand to hand, and they are the subject of larceny.”

Upon the authority of this decision lower New York Courts have held that shares of stock in a foreign corporation belonging to a non-resident defendant, may be attached in New York when the certificate for the stock has been endorsed in blank and placed in the hands of an agent in New York for sale,²⁰ and even when it has not been endorsed at all.²¹ There are observations to a similar

cert. den., 187 U. S. 641, 23 S. Ct. 841; *Wait v. Kern River, etc. Co.*, 157 Cal. 16, 106 Pac. 98 (1909); *Parke-Cramer Co. v. So. Express Co.*, 185 N. C. 428, 117 S. E. 505 (1923), cert. den. 263 U. S. 717, 44 S. Ct. 180.

¹⁹ 165 N. Y. 193, 58 N. E. 896 (1900). Commenting on this case, it is said, in 2 COOK, CORPORATIONS (6th ed. 1908) 1272: “It must be admitted that this decision, although apparently a wide departure from the common law, is a correct decision, in view of the fact that the certificates of stock have gradually grown to be more than mere receipts or evidence of stock, and have come to be the stock itself, practically, in business transactions, especially in America, and, like a promissory note, a certificate of stock is property in itself and carries title, irrespective of the corporate books and of transfer on the corporate books. The decisions on this subject may perhaps be reconciled on the ground that where the words of the statute are broad enough to allow an attachment to be levied on *certificates* of stock, such a levy is effective, inasmuch as certificates of stock now represent value in themselves, in very much the same way as promissory notes.”

²⁰ *People ex rel. Wynn v. Grifenhagen*, 167 App. Div. 572, 152 N. Y. Supp. 679 (1915).

²¹ *General Motors Corp. v. Ver Linden*, 199 App. Div. 375, 192 N. Y. Supp. 28 (1922).

effect from other courts.²² The question has not recently arisen in many states because attachment and execution statutes have, for the most part, been framed with reference to the earlier law and contain no provision for levies upon shares of stock, except by service of process upon the issuing corporation.²³

A similar development has taken place in cases arising under Section 57 of the Federal Judicial Code,²⁴ and in suits in state courts to establish liens or claims upon shares of stock, or to quiet title to such property. There are several decisions to the effect that such proceedings may be maintained against absent defendants in a court which has within its power stock certificates upon which to act, although the property involved is the stock of a foreign corporation.²⁵ Likewise in the field of administration there is

²² Mitchell v. Leland Co., 246 Fed. 103 (C. C. A. 9th, 1917); Baar v. Smith, 275 Pac. 861 (Cal. App. 1929).

²³ Bouree v. Trust Francais, etc., 14 Del. Ch. 332, 127 Atl. 56 (1924); Andrews v. Guyaquil & Quito R. Co., 69 N. J. Eq. 211, 60 Atl. 568 (1905), aff'd. 71 N. J. Eq. 768, 71 Atl. 1133; Harris v. Mid-Continent Life Ins. Co., 75 Okla. 105, 182 Pac. 85 (1919).

²⁴ 28 U. S. C. (1926) § 118.

²⁵ Norrie v. Loham, 16 F. (2d) 355 (C. C. A. 2d, 1926); Franz v. Buder, 11 F. (2d) 854 (C. C. A. 8th, 1926); Beale v. Carpenter, 235 Fed. 273 (C. C. A. 8th, 1916).

In *Direction der Disconto Gesellschaft v. U. S. Steel Corp.*, 300 Fed. 741 (D. C., S. D. N. Y., 1924), a case which involved the effect to be given to a seizure of endorsed certificates of stock of a foreign corporation, Learned Hand, J., said: "The plaintiffs' cases do not look to another conclusion. The case of *Jellenik v. Huron Copper Co.*, 177 U. S. 1, 20, Sup. Ct. 559, 44 L. Ed. 647, is often cited to show that corporate shares can have no situs except at the domicile of the corporation. It holds nothing of the sort; only that they do have a situs there, which is a very different matter. In truth, corporate shares have a situs in both places, so long as we insist upon applying to them a word drawn from the law of land and chattels, which must be in a single place at a time. Because a share, if we do not wish to call it a chose in action, is at least a legal relation, and can have no spatial character except by virtue of the parties to the relation. Wherever either party is, there is the property as respects such parts of the relation as touch that party. Where the corporation is, there dividends must be paid and all other duties performed to which the shareholder is entitled. There also may the sovereign declare who shall be the shareholder. Acts required of the corporation as performance of those duties will be normally treated as performance elsewhere. Similarly, where the shareholder is, there the share may be transferred by compulsion, and perhaps, since he is subject to compulsion, by decree in rem, even when he does not obey. There is no inconsistency in all this until one presupposes that, because the share is one place, it cannot be in any other. *Jellenik v. Huron Copper Co.*, *supra*, does not intimate anything of the sort."

This passage seems to assert a jurisdiction to deal with shares of stock either at the place of charter or at the place where the owner may be found. In that case, however, the seizure was effected in the absence of both the corporation and the owner. The explanation probably is that, by endorsing the certificates and depositing them in England, the foreign owner subjected them to English law, and in so doing subjected himself to that law to the extent of his interest in the stock.

modern authority to the effect that ancillary administration upon the stock of a foreign corporation is unnecessary, if the certificate for the stock may be found within the territory of the principal administrator.²⁵

This tendency to give to a stock certificate a legal significance commensurate with its commercial importance is evidenced, and is given further impetus, by the provisions of the Uniform Stock Transfer Act. Sections 1 and 5 of the Act make the certificate virtually a negotiable instrument.²⁷ Section 13 provides that, "No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined." This Act in so far as it has become applicable gives a new practical importance to the power to reach a stock certificate.

Although a stock certificate has in many states been elevated from a mere muniment of title to the rank of negotiable instruments, and although a new situs of corporate stock has been found at the place where the certificate is, it by no means follows that the jurisdiction of the court of the corporate domicile, or of the court of the state where the corporation owns property and does business, has been done away with.²⁸ Jurisdiction *in rem* still remains to those courts even in the view of the New York Court of Appeals, which has gone further than any other court in giving legal significance to the presence of the stock certificate.²⁹ The

²⁵ *Norrie v. Lohman*, *supra* n. 25; *Griswold v. Kelly Springfield Tire Co.*, 94 N. J. Eq. 308, 120 Atl. 324 (1916); *Lockwood v. U. S. Steel Corp.*, 209 N. Y. 375, 103 N. E. 697 (1913).

²⁷ *Jenkins v. Continental Trust Co.*, 150 Md. 416, 133 Atl. 610 (1926); *Jackson v. Portland Cement Co.*, 233 Mich. 476, 213 N. W. 863 (1927); *Stoltz v. Carroll*, 99 Ohio St. 289, 124 N. E. 226 (1919).

²⁸ *United Cigarette Machine Co. v. Canadian Pac. Ry. Co.*, 12 F. (2d) 634 (C. C. A. 2d, 1926); *Martel v. Block*, 154 La. 863, 98 So. 398 (1923); *Moys v. Union Trust Co.*, 276 Pa. 58, 119 Atl. 738 (1923); *LeRoy Sargent & Co. v. McHarg*, 42 S. D. 307, 174 N. W. 742 (1919).

²⁹ "We have not overlooked the case of *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 58 N. E. 896, 55 L. R. A. 796, where it was held by a divided court that certificates of stock of a foreign corporation belonging to a nonresident in the possession of a resident of this state as security for a debt and the interest of the owner or pledger therein was a property right within the state which might be levied upon under warrant of attachment. While that decision perhaps is in conflict with some of the cases cited which hold that certificates of stock are not property and subject to proceedings in the state wherein they are located, I do not see that in any manner conflicts with the proposition established by so many decisions that the interest of a stockholder in a domestic corporation is property which may be regarded as having its situs in this state." *Holmes v. Camp*, 219 N. Y. 359, 114 N. E. 841, 844 (1916).

situation, therefore, is that for purposes of proceedings *in rem*, corporate shares may be reached in three places. The old view has prevailed in some jurisdictions to the extent of holding that the presumptions are against giving to shares a situs at the place where the certificate may be found and that express statutory warrant for such procedure must be found;³⁰ but even this concession is apparently not made by the Supreme Court of Appeals of this state.³¹

The question then arises, what will happen in case of a conflict between two or more of these possible jurisdictions? Suppose two courts, one having the issuing corporation before it and the other having the certificate before it, proceed to pass judgments *in rem* with respect to the shares. The rule for the solution of such conflicts as between state and federal courts, has been that the one which first assumes the jurisdiction in point of time will be allowed to retain it until the matter is finally disposed of.³² There is one case holding that this is the rule as to the type of conflict which we are now considering,³³ but there is plausible reason for believing that the court sitting at the domicile of the corporation still enjoys the practical superiority of having the last word.

In 1917, when the tendency to identify the share with the certificate was not unknown, there arose the case of *Baker v Baker, Eccles & Company*,³⁴ in which it appeared that a Tennessee court, having before it a certificate of stock of a foreign corporation, which had been left in Tennessee by the owner when he died there, undertook to make an adjudication *in rem* as to the ownership of the shares. The winner in this proceeding took her decree and the certificates to Kentucky, where the corporation was domiciled, and brought a suit there to compel the corporation to recognize her as the stockholder. The Kentucky court proceeded to ignore the Tennessee decree, and to judge anew the property rights in the shares. The case went to the Supreme Court on the question whether full faith and credit was required to be given to the Tennessee decree, and the Court answered in the negative, saying:

“We have no concern with the effect of the Tennessee judgments upon the distribution of so much of decedent’s

³⁰ *Moys v. Union Trust Co.*, 276 Pa. 58, 119 Atl. 738 (1923).

³¹ *Union Bank & Trust Co. v. Hutchinson Lumber Co.*, 161 S. E. 559 (W. Va. 1932).

³² *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294, 28 L. ed. 729 (1884).

³³ *Norrie v. Lohman*, *supra* n. 25.

³⁴ 242 U. S. 394, 37 S. Ct. 152 (1917).

personalty as was situate within that State. The present action affects only the ownership of shares of stock in a Kentucky corporation, having no *situs* outside of its own State so far as appears. . . . No State need allow property of a decedent to be taken without its border until debts due to its own citizens have been satisfied; and there is nothing in the Constitution of the United States aside from the full faith and credit clause to prevent a State from giving a like protection to its own citizens or residents who are interested in the surplus after payments of debts. All of which goes to show, what plaintiff in error in effect acknowledged when she brought her present action in a Kentucky Court, that the Tennessee judgments had no effect *in rem* upon the Kentucky assets now in controversy.^{712a}

In *Miller v. Kaliwerke Aschersleben, A. G.*,⁶⁵ the Alien Property Custodian brought a suit to compel a New York corporation to issue to him certificates for shares of its stock which had been seized by the Custodian as property of an alien enemy. The seizure had been made by serving notice on the corporation.⁶⁵ The British Public Trustee (the counterpart of our Alien Property Custodian) intervened and alleged that he had seized these same shares by taking possession of the certificates, which had been endorsed by the alien owner and deposited in England, and, since his seizure antedated that of the Custodian, he demanded that he be recognized as owner of the shares. The court, professing not to pass on ownership but merely "possession" of the shares, held that the Custodian should prevail because his seizure was valid under the local law,

^{64a} The case of *Black Eagle Mining Company v. Conroy*, 94 Okla. 199, 221 Pac. 425 (1923) goes even further. That suit involved title to certain shares of stock in the Mining Company, an Oklahoma corporation. A stockholder of the corporation died domiciled in Kansas, and possessed of the stock certificates in that state. Administration was had in Kansas, and the stock was distributed to the next of kin, who were the plaintiffs in this suit. Thereafter certain creditors of the deceased procured administration in Oklahoma, the domicile of the corporation, and under an Oklahoma decree the deceased's shares of stock were sold to pay his debts. The next of kin from Kansas brought this suit to compel the corporation to recognize them as the owners of the stock. The court held that the primary jurisdiction to deal with ownership of the stock was in the State of Oklahoma, and that the plaintiffs took nothing by the decree of the Kansas court. It will be noted that here there was no dispute as to where the deceased was domiciled, as there was in the Baker case. The State of Oklahoma merely protected local creditors, because it had the last word in determining the ownership of and claim upon the shares of stock.

⁶⁵ 283 Fed. 746 (C. C. A. 2d, 1922).

⁶⁶ This was a mode of seizure commonly used on the theory that the shares had a *situs* at the place of incorporation. *Garvan v. Certain Shares, etc.*, 276 Fed. 206 (D. C., S. D. N. Y., 1921); *Columbia Brewing Co. v. Miller*, 281 Fed. 289 (C. C. A., 5th, 1922).

and that "it is quite immaterial, so far as the mere fact of seizure is concerned, whether the certificates were or were not in the possession of the British Public Trustee."

Consider next the case of *Direction Der Disconto-Gesellschaft v. U. S. Steel Corporation*,⁵⁷ where a German corporation sought to be declared the owner of certain shares of stock of the defendant corporation. The British Public Trustee intervened and set up the fact that the certificates for these shares of stock, while owned by the German company, had been endorsed in blank and left in England, and that the Trustee had seized the certificates under the provisions of English law. The Trustee demanded to be recognized as the owner of the shares. The Supreme Court, per Mr. Justice Holmes, held that the title to the certificates depended on the law of the place where they were seized, and that the United States, desiring "to consider itself civilized," would recognize the validity of the transfer as against the corporation. Then followed this interesting passage:

"If the United States had taken steps to assert its paramount power, as in *Miller v. Kaliwerke Aschersleben, A. G.*, 283 Fed. 746, a different question would arise that we have no occasion to deal with. The United States has taken no such steps. It therefore stands in its usual attitude of indifference when title to the certificate is lawfully obtained. There is no conflict in matter of fact or matter of law between the United States and England and therefore *Baker v. Baker, Eccles & Co.*, 242 U. S. 394, does not apply."

It seems from this language, and from the cases which it distinguishes, that seizure of certificates and seizure of shares are vitally different things. Of course, nobody would litigate about a piece of paper as such, and the purpose of both seizures is to reach the beneficial interest in the shares of stock. But the fact remains that one who has got the certificate by decree or by judicial sale must then repair to a place where the corporation is, to find out what he has got. If the state whose laws govern the relations between the corporation and its members "stands in its usual position of indifference," or if it has by legislation merged the share in the certificate, then the holder of the certificate may also become the owner of the share; otherwise the paramount power of the state of incorporation may cut him off.⁵⁸

⁵⁷ 267 U. S. 22, 45 S. Ct. 207 (1925).

⁵⁸ CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1930) § 57 states the relation between the two jurisdictions as follows:

"(1) Shares in a corporation are subject to the jurisdiction of the

We may, therefore, conclude that ultimate jurisdiction *in rem* with respect to shares of corporate stock rests in the state of incorporation; that this power may also be exercised in a place where the issuing corporation owns property and does business, provided transfer records are kept there; and that it may be exercised in a state where the certificate may be found, subject to the law of the state of incorporation. If these conclusions must be stated in language of location, it perhaps ought to be said that the certificates have a situs of their own and that the shares have a situs of their own, unless the law of the charter has merged the share in the certificate.

Taxation

Although we talk about taxes upon property, and taxes upon transfers of property, the fact is that all taxation is upon individuals. An individual may be taxed because he owns property or because he has made or received a transfer of property, but the tax falls none the less upon the individual.⁵⁹ The traditional justification of taxation is that persons who are subject to the protection of civilized government, must pay the expense of maintaining such a government.⁶⁰ "The public revenues are a portion that

state in which the corporation was incorporated.

"(2) The share certificate is subject to the jurisdiction of the state within whose territory it is.

"(3) To the extent to which the state in which the corporation was incorporated embodies the share in the certificate, the share is exclusively subject to the jurisdiction of the state which has jurisdiction over the certificate."

This mode of stating the law raises the question whether a state which has adopted the Uniform Stock Transfer Act has merged the share in the certificate. In *Harvey v. Harvey*, 290 Fed. 653 (C. C. A. 7th, 1923) it was held that, notwithstanding the provisions of the Uniform Stock Transfer Act, shares of stock retain their situs in the state of charter for purposes of a suit to try title to the shares. The seemingly contrary decision in *Klein v. Wilson & Co.*, 7 F. (2d) 769, 772, 777, (C. C. A. 3d, 1925) may be explained on the ground that the complaint sought a general receivership of a foreign corporation whose only property in the forum consisted of shares of stock of another corporation chartered there, and that general receivership was more practical in the place where the defendant was organized and did business. The Uniform Act does not give any special efficacy to the certificate until it is endorsed or assigned by the record owner; if this has not been done, there seems to be no merger under the Act, and an adjudication upon the certificate would be perilous.

⁵⁹ "Taxes generally are imposed upon persons . . . not upon property, although generally measured more or less by reference to the riches of the person taxed, on grounds not of fiction but of fact." Mr. Justice Holmes, dissenting, in *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83, 97, 50 S. Ct. 59, 62 (1929).

⁶⁰ 1 COOLEY, TAXATION (3d ed. 1903) 1.

each subject gives of his property, in order to secure or enjoy the remainder."⁴¹ Upon this theory it is proper that an individual's taxes should be proportioned to the amount of benefit which he receives, which in many cases will depend upon the amount of property which he owns, but of course no state is entitled to collect something for nothing.

The state of which the person is a subject renders to him more personal benefits than any other state. It provides for him safety in which to enjoy whatever property or income he may have. A personal tax upon him is, therefore, clearly justified, but when the tax is levied with respect to particular property, and so is in a manner of speaking, a tax upon that property, it was early recognized that the state of which he was a subject ought not to lay the tax unless it had rendered some service in connection with that very property. When it was found that the relation between the state and the property or transfer was sufficient to justify a tax, it was said that the property had a situs in the state for purposes of taxation.⁴²

Because of the rather involved relationships which constitute corporate stock, there frequently are several different states which contribute something to the creation or enjoyment or transfer of the property. Until recently it followed that there were often several states which were entitled to demand a *quid pro quo* by way of property or transfer taxes. The state in which the stockholder was domiciled could tax because the conflict of laws referred to that state some questions concerning ownership and descent of the property.⁴³ The state which chartered the corporation could tax because it created the body of rights and offered the means of enforcing them.⁴⁴ The state where the stock certificates were kept could lay a tax because it protected the possession of these important *indicia* of ownership.⁴⁵ It was also argued that the state in which the issuing corporation owned property and did business

⁴¹ MONTESQUIEU, *De L'Esprit Des Lois*, Liv. XIII, c. 1.

⁴² 1 COOLEY, *op. cit. supra* n. 40, 84 *et seq.*

⁴³ *Bullen v. Wisconsin*, 240 U. S. 625, 36 S. Ct. 473 (1916); *Hawley v. Malden*, 232 U. S. 1, 34 S. Ct. 201 (1914); *People v. Union Trust Co.*, 255 Ill. 168, 99 N. E. 377 (1912); *Welch v. Treasurer*, 223 Mass. 87, 111 N. E. 774 (1916).

⁴⁴ "So, too, it is well established that the state in which a corporation is organized may provide, in creating it, for the taxation in that state of all its shares, whether owned by residents or nonresidents." *Rhode Island Hospital Trust Co. v. Doughton*, 270 U. S. 69, 81, 46 S. Ct. 256, 258 (1926).

⁴⁵ *Stern v. The Queen* (1896) 1 Q. B. 211. It may be that in this country this jurisdiction was limited to states where the certificates had a "business situs." *New Orleans v. Stemple*, 175 U. S. 309, 20 S. Ct. 110 (1899).

could tax because it protected the corporation in the possession and exploitation of the substance which made the stock worth having.⁴⁶

Such multiple taxation of the same property was admittedly undesirable, but it was quite generally believed that jurisdiction to tax (either on general principles of the conflict of laws or under a due process clause) was to be determined by reference to tradition and logic rather than as a matter of expediency. So double taxation was not in itself a denial of due process of law.⁴⁷

The complete reversal of doctrine in this respect which has recently been brought about by our Supreme Court is one of the most striking developments in our law. The course of the revolution, beginning with *Frick v. Pennsylvania*,⁴⁸ and culminating, for the present at least, in *First National Bank of Boston v. Maine*,⁴⁹ is so familiar that it would be unprofitable to trace it. It is enough to note the three cases bearing most directly on the taxation of shares of stock.

In *Rhode Island Hospital Trust Company v. Doughton*,⁵⁰ the Court considered a North Carolina statute which sought to impose a tax with respect to the devolution from one non-resident to another of shares of stock of a foreign corporation in cases where the corporation was doing business in North Carolina and where fifty per cent or more of its property was located there, the tax being computed on the proportion of the value of the shares which the property owned by the company in North Carolina bore to all its property. The statute was held unconstitutional on the ground that the shareholder had no legal interest in the property of the corporation, so that there was nothing of his in North Carolina to be taxed.⁵¹

⁴⁶ Note (1925) 38 HARV. L. REV. 809, 815.

⁴⁷ "No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far." Holmes, J., in *Kidd v. Alabama*, 188 U. S. 730, 23 S. Ct. 402 (1903).

⁴⁸ 268 U. S. 473, 45 S. Ct. 603 (1925).

⁴⁹ 52 Ct. 174 (1932).

⁵⁰ *Supra* n. 3.

⁵¹ If we are to look through all fiction and ignore impractical distinctions, then the tax sought to be imposed by North Carolina seems to be more nearly justifiable than a similar tax at the domicile of the decedent. The property of the corporation situated in North Carolina gave to the decedent's shares just the proportion of their value which was used as the basis of the tax; and North Carolina, which protected the corporation in its business, contributed more to the value of the shares than did the state of the decedent's domicile, which merely enabled him to live and die in peace. Of course this sort of argument might lead to the proposition that no state could tax shares

In 1930 the movement against double taxation was advanced in the decision of *Baldwin v. Missouri*.⁵² There it was held that the presence in a state of negotiable bonds and notes did not give that state power to lay a tax with respect to the transfer of that property by will from one non-resident to another. The decision did not relate to certificates of stock, but there was no valid distinction. Any doubt was resolved with the decision of *First National Bank of Boston v. Maine*,⁵³ in January last. In that case the Court declared unconstitutional a Maine statute imposing so-called death duties with respect to shares of stock owned by a non-resident in a corporation chartered in Maine and owning most of its property there. Whatever else will be said of the decision it leaves the law clear: with trifling exceptions,⁵⁴ the sole power to tax corporate stock is in the state of the domicile of its owner.

The dissenting opinions in the *Maine* and *Missouri* cases, and in the other recent cases of similar trend,⁵⁵ have stated so authoritatively the arguments in opposition to the conclusions of the Court that it would be a work of presumption to undertake to add to them.⁵⁶ It may be permissible to regret that the majority of the

of stock if the corporation's assets were taxed at their location. This would not be a long step beyond *Safe Deposit & Trust Co. v. Virginia*, *supra* n. 9.

⁵² 281 U. S. 586, 50 S. Ct. 436 (1930).

⁵³ *Supra* n. 49.

⁵⁴ There seem to remain two possibilities of taxation in states other than the domicile of the owner or decedent: (1) In *Farmers' Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 213 (1930), McReynolds, J., seemed to recognize an extant jurisdiction to tax choses in action in a place where they have a "business situs," leaving open the question whether such taxation would exclude the right to tax at the domicile of the owner. (2) In *First Nat. Bank of Boston v. Maine*, *supra* n. 49, at 178, Sutherland, J., while denying the power of the state of incorporation to tax upon the devolution of shores of stock, said: "Undoubtedly the state of incorporation may tax the transfer of the stock of a nonresident decedent and the issue of a new certificate to take the place of the old, under the power generally to impose taxes of that character. But plainly such a tax is not a death duty which flows from the power to control the succession; it is a stock transfer tax which flows from the power of the state to control and condition the operations of the corporation which it creates." This seems to make due process depend upon the size of the tax; for how else than by looking to the size can it be determined whether the state of incorporation is making pretensions to having a hand in the succession or is merely exacting a fee for the minor function of transferring one end of the obligation?

⁵⁵ *First National Bank of Boston v. Maine*, *supra* n. 49, Stone, Holmes and Brandeis, JJ., dissenting; *Baldwin v. Missouri*, *supra* n. 52, Holmes, Brandeis and Stone dissenting; *Farmers' Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 50 S. Ct. 98 (1930), Holmes and Brandeis, JJ., dissenting; *Safe Deposit & Trust Co. v. Virginia*, *supra* n. 9, Holmes, J., dissenting.

⁵⁶ The burden of the dissent from the tendency of the Court is summed up in these words from *Baldwin v. Missouri*, 281 U. S. 586, 596, 50 S. Ct. 436, 439 (1930). "And what are the grounds? Simply so far as I can see that it is disagreeable to a bondowner to be taxed in two places. Very probably

Court, after having put most of these revolutionary decisions on the plain ground that double taxation is a bad thing,⁸⁷ should have fallen back on an argument about situs in the *Maine* case. There the Court said:

“The rule of immunity from taxation by more than one state is broader than the applications thus far made of it. In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there. . . .”

Of course an intangible thing, consisting of a congeries of rights and duties, cannot have a local situs in two places at the same time; neither can it have a local situs in any one place. The transfer to the First National Bank of Boston undoubtedly occurred in Massachusetts; but unless it also occurred in Maine the Bank got nothing but a piece of paper.

CONCLUSION

If, as an ancient philosopher is reported to have said, the world cannot be made perfect until we call things by their right names, we had perhaps as well begin on the word “situs.” If we were to ask a man of no legal training to state in the abstract where a thing is, he would probably reply that a thing is in the place where

it might be good policy to restrict taxation to a single place, and perhaps the technical conception of domicile may be the best determinant. But it seems to me that if that result is to be reached it should be reached through understanding among the States, by uniform legislation or otherwise, not by evoking a constitutional prohibition from the void of ‘due process of law,’ when logic, tradition and authority have united to declare the right of the State to lay the now prohibited tax.”

⁸⁷ So, in *Farmers’ Loan & Trust Co. v. Minnesota*, *supra* n. 55 the Court said: “Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country’s wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is a matter of the greatest moment.”

And in *Safe Deposit & Trust Co. v. Virginia*, *supra* n. 9, the Court said: “The adoption of a contrary rule would ‘involve possibilities of an extremely serious character’ by permitting double taxation, both unjust and oppressive.”

In these cases the Court seemed to treat “situs” as merely a word to use in describing the conclusion reached, and not as a representation of the reason for the conclusion,

you have to go to get it. So it is in law. In seeking to reach corporate stock with legislative or judicial process we must look to the various legal materials to determine how and where it can be reached for our particular purpose. Nobody would criticize us for calling that place a situs, but we put the cart before the horse when we think that the use of the word helped us to find the place.⁵³

⁵³This subject has been treated in a slightly different connection in an article by Powell, *The Business Situs of Credits* (1922) 28 W. VA. L. Q. 89.