NOTES

The Pennsylvania State Authority Act

The scope of this note is confined to a discussion of the opinion of the Pennsylvania Supreme Court, given on a rehearing of *Kelly v. Earle*,[1] determining the validity of the Pennsylvania State Authority Act.[2] Under the facts in the original petition, the legislature created a public corporation known as the General State Authority, empowered the Authority to purchase land from the state, to construct improvements thereon, and to receive loans and grants.[3] The Authority planned to make improvements with money advanced by the federal government. The improved land was then to be leased to the state for an amount sufficient to pay operating expenses and liquidate the Authority's obligation to the bondholders. At the end of thirty years, upon compliance with the contract, the Authority was to deed the improved property to the state. The property was subject to execution by the bondholders upon default in payment of rents. In a four-to-three decision, the court held the State Authority Act unconstitutional, on the ground that, since the land of the Authority was subject to execution, there was a pledge of the general faith and credit of the state, so that the obligation conclusively was a debt.[4] And since the land was deeded back to the state, the arrangement constituted a purchase of capital assets by installments,[5] the aggregate of which exceeded the current revenue plus $1,000,000., and was therefore a debt within the constitutional prohibition.[6]

The petition for rehearing contained new and additional facts, including a stipulation exempting the land of the state or the Authority from execution, and a provision that title to the lands remain in the Authority at the expiration of the leases. The petition emphasized that the expected current revenues would be ample to pay the annual rentals. Further, it appeared here that the state was to pay the rentals from a fund made up almost entirely of compensation paid by the several counties for their proportionate use of the new projects.[7]

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1. 320 Pa. 449, 182 Atl. 501 (1936). Opinion on rehearing not yet reported. Pa. Sup. Ct., Jan. 30, 1937.

2. PA. STAT. ANN. (Purdon, Supp. 1936) tit. 71, § 1707.

3. The projects would be financed under the W. P. A., whereby forty-five per cent of the total cost is paid as a gift by the federal administration, and the balance is advanced as a loan. The Authority planned to solicit $60,000,000.

4. When a state pledges property as security for a loan it is considered a debt of the state, in the constitutional sense, because on default and execution the general assets of the state are diminished, and thus, there is a burden on the people generally. Lesser v. Warren Borough, 237 Pa. 501, 85 Atl. 839 (1912); Schuldice v. Pittsburgh, 251 Pa. 28, 95 Atl. 938 (1915); see Tranter v. Allegheny County Authority, 316 Pa. 65, 85, 173 Atl. 289, 298 (1934).

5. It is well settled in Pennsylvania that debt limitations cannot be avoided by purchasing capital assets on installments, each of which would be within future current revenue, rather than by paying a lump sum. Appeal of City of Erie, 91 Pa. 398 (1879); Brown v. City of Corry, 175 Pa. 528, 34 Atl. 854 (1896); McKinnon v. Mertz, 225 Pa. 85, 73 Atl. 1011 (1909).

6. PA. CONST. art. IX, § 4: "No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasions, suppress insurrection, defend the State in War, or to pay existing debt; and the debt created to supply deficiencies in revenue shall never exceed in the aggregate at any one time, one million dollars." It is settled in Pennsylvania that this provision prohibits indebtedness in excess of revenue collectible within the biennial period, it being considered current revenue, plus one million dollars.

7. New facts were admitted on the rehearing because the Supreme Court had taken original jurisdiction.

Upon rehearing, the court was unanimous in holding the obligations legal on the amended record.[8] It reasoned that the obligations were no longer a debt within the constitutional prohibition because the new facts made the transaction a lease for recurrent needs,[9] rather than the purchase of a capital asset; and secondly, that it was not a debt in the constitutional sense, because the obligation was self-liquidating.[10]

The creation and use by the states of separate legal entities known as "authorities" to finance public improvements have grown rapidly in the last few years.[11] Thus, authorities have been created to finance low-rent housing projects,[12] and their utilization has been upheld in programs of electrification and water conservation,[13] flood control programs,[14] toll bridges[15] and other projects.[16] In most of the "authority" cases the bonds have been secured solely by a pledge of revenues from fees in the nature of service charges, and thus have been self-liquidating.[17] But it should be noted that under this arrangement, except where prohibited by peculiar constitutional provisions, the states could have created the same obligations directly, for when an obligation is self-liquidating, it is not a debt at all in the constitutional sense, and is therefore unaffected by limitations, making the creation of an authority unnecessary. Thus the authority has not occupied an important position, except for management purposes. However, the Pennsylvania court in the instant decision has gone farther in enabling the state to accomplish through the instrument of an authority what it clearly could not accomplish directly. To liquidate its obligation, the Authority depended, not on the service charges imposed on those receiving direct benefit from the improved property, but on compensation in the form of rentals from the state, almost all of which was acquired through increasing the tax burden.

Prior to this decision, the "lease for recurrent needs" doctrine had only been used in Pennsylvania by municipalities, and never by the state. But the court extended the doctrine to apply to leases of the state, pointing out that the purpose

8. It is interesting to note that one of the dissenting justices on the first hearing had become the Chief Justice in the interim between the hearings, and wrote the opinion of the court upon the second hearing.

9. It is not disputed that in Pennsylvania a municipality may enter a lease for recurring needs, provided the annual rentals do not exceed the debt limitation, despite the fact that the aggregate of the rentals would exceed the limitation. Wheeler v. Philadelphia, 77 Pa. 338 (1875); Bailey v. Philadelphia, 184 Pa. 594, 39 Atl. 494 (1898); Georges Township v. Union Trust Co., 293 Pa. 364, 143 Atl. 10 (1928). *Cf.* cases cited *supra* note 5. Thus a municipality could lease a fire alarm system for ten years at $1,000. per year, where the $1,000. would not exceed the limitation, although the aggregate of the rentals or the present sale value would exceed it. But if the same municipality entered into a contract of purchase for the fire alarm system, to be paid for in installments of $1,000. each, then it would be considered a capital acquisition and the installments would be considered in their aggregate. Thus it would exceed the limitation.

10. Tranter v. Allegheny County Authority, 316 Pa. 65, 173 Atl. 289 (1934); California Toll Bridge Authority v. Kelly, 218 Cal. 7, 21 P. (2d) 425 (1933); Bates v. State Bridge Commission, 109 W. Va. 186, 153 S. E. 305 (1930).

11. See Foley, *Low-Rent Housing and State Financing* (1937) 85 U. OF PA. L. REV. 239, 253.

12. N. Y. CONS. LAWS (Cahill, Supp. 1931-35) c. 67, §§ 60-78.

13. Lower Colorado River Authority v. McCraw, 125 Tex. 268, 83 S. W. (2d) 629 (1935).

14. Clarke v. South Carolina Pub. Serv. Authority, 177 S. C. 427, 181 S. E. 481 (1935).

15. California Toll Bridge Authority v. Kelly, 218 Cal. 7, 21 P. (2d) 425 (1933).

16. For a collection of laws creating authorities, see Foley, *Revenue Financing of Public Enterprises* (1936) 35 MICH. L. REV. 1, 6.

17. Board of Regents v. Sullivan, 42 P. (2d) 619 (Ariz. 1935); California Toll Bridge Authority v. Kelly, 218 Cal. 7, 21 P. (2d) 425 (1933); State *ex rel.* Miller v. State Bd. of Educ., 56 Idaho 210, 52 P. (2d) 141 (1935); Caldwell Bros. v. Bd. of Supervisors, 176 La. 825, 147 So. 5 (1933); State *ex rel.* Normile v. Cooney, 100 Mont. 391, 47 P. (2d) 637 (1935).

of the Pennsylvania debt limitation was to keep expenditures within current revenues, and that this purpose applied to state debts, as well as to municipal debts. The court was unequivocal in holding the obligations legal on the rehearing, but it is submitted that other avenues of logic could have been as readily followed.

The court could certainly have pierced the corporate veil and have held that there is no real difference between the state and the Authority,[18] and since the state could not lease to itself, and pay rents to itself, the arrangement would be void. No stock was issued by the Authority, so that the interest would lie in its creator, the state, thus emphasizing the identity of the two interests.

As indicated above, the only practical reason for declaring the Act unconstitutional on the first hearing was that the arrangement, whereby the land would eventually be deeded back to the state, would, in reality, constitute a sale.[19] Under the new facts, the title was to remain in the Authority, and therefore it was held a lease for recurring needs, and consequently a valid obligation.[20] But it is of note that "although title was to remain in the Authority, the Authority was to have existence as a corporation for just thirty-two years";[21] thirty years to liquidate the bonds, and two years to clean up its affairs. When the Authority goes out of existence, the lands and improvements must escheat to the state, so that in either event title passes to the state. And in this case, where title passed by deed, the obligation was forbidden; but where, by the device of not executing a deed, it passed by escheat, the obligation was valid. This, again, serves to emphasize the extent to which the court went to ignore reality.

It is further submitted that the court is inconsistent in giving to the Authority all the attributes of a separate and distinct legal entity, completely insulated from its creator, in order that it could be a lessor to the state, but in refusing at the same time, to completely insulate the Authority from the state for the purpose of giving it plenary control over the land which it holds. Considering the purpose of the Authority, there would seem to be no legal basis for giving it complete insulation in one case, and not in the other. And if it is considered a separate and distinct legal entity in both cases, it would follow logically that the Authority could pledge such property if it chose to do so. The property would no longer be that of the state; it would cease being state property when deeded to the Authority. Yet the court was strong in its contention that the property must not be subject to execution.[22]

18. *Cf.* Schuldice v. City of Pittsburgh, 251 Pa. 28, 32, 95 Atl. 938, 940 (1915), where it was held that the device of having bonds issued by a bridge company, the stock of which was owned by the city, did not avoid the charge that thereby the city's debt was increased. The court said: "While it is true that the bridge company continued to exist as a corporate entity . . . yet the indebtedness of the bridge company became in effect the indebtedness of the city, its real owner, even though there was no direct liability for the debt on the part of the city." Accord: Point Bridge Co. v. Pittsburgh Rys., 240 Pa. 105, 87 Atl. 614 (1913). The principal distinguishing feature is that in the instant case no stock was issued, but this seems relatively unimportant in view of the creation by the state of the Authority, and in view of the constituency of the Authority. The Act provides that the Governor, the state treasurer, the auditor general, the secretary of internal affairs, the secretary of property and supplies, the president pro tempore of the senate and their respective successors in office, and two citizens of the state are "hereby created a body corporate constituting a public corporation and government instrumentality by the name of 'The General State Authority'." PA. STAT. ANN. (Purdon, Supp. 1935) tit. 71, § 1707-3.

19. Appeal of Erie, 91 Pa. 398 (1879); Brown v. Corry, 175 Pa. 528, 34 Atl. 854 (1896); McKinnon v. Mertz, 225 Pa. 85, 73 Atl. 1011 (1909).

20. Wheeler v. Philadelphia, 77 Pa. 338 (1875); Bailey v. Philadelphia, 184 Pa. 594, 39 Atl. 494 (1898); Georges Township v. Union Trust Co., 293 Pa. 364, 143 Atl. 10 (1928).

21. PA. STAT. ANN. (Purdon, Supp. 1936) tit. 71, § 1707-4a.

22. See Foley, *Low-Rent Housing and State Financing* (1937) 85 U. OF PA. L. REV. 239, 256.

As a second ground for the decision, the court stated that the projects constructed with the borrowed money were self-liquidating, and that therefore the obligations were not debts in the constitutional sense.[23] From the very inception of constitutional debt limitations, it has been held that obligations incurred for the construction of such projects as canals,[24] toll-bridges,[25] lighting plants,[26] and water systems [27] were not debts in the constitutional sense if payable from a special fund, made up solely of revenues of the created project. Such obligations were not debts because the money used for repayment was not otherwise available for general state purposes, and the obligation could never increase the tax burden of the people generally.

The court was ambiguous by failing to state in what respect the obligations were self-liquidating. There are three possibilities. The court might have used "self-liquidating" in the sense adopted at the first hearing, that the obligations were payable solely from the revenue of fees or service charges imposed for the use of the facility created, thus imposing no tax burden on the people generally. In other words, it would be the obligation of the state, payable solely from service charges for the use of the thing created with the borrowed money, such as the financing of toll bridges by pledging the tolls. If it is assumed that the court had this view in mind, then the objections made by the court on the original hearing may be repeated here, namely, that "In so far as such projects are permitted by the *Tranter* [28] case [permits self-liquidating obligations], no valid objection to them could be founded upon section 4 of article IX [limitation provision]. But it must be obvious that the nature of most of the projects envisaged excludes the possibility of self-liquidation. So far as those projects are concerned, the *Tranter* case offers no support." [29]

As a second possibility, the court might have meant that the state's contractual obligation to pay annual rentals to the Authority for the leased improvements was self-liquidating, in that these rentals were to be payable solely from a special fund made up of compensation paid by the several counties to the extent that they use the improvements, plus the slight contributions made by patients or relatives directly, in the case of state hospitals, who are financially able to pay. There was apparently no stipulation restricting the state, in paying the rentals, to compensation from counties or patients, but the court takes for granted that this restriction exists. The existence of such an agreement would seem to be a requisite to the validity of the debt in the arrangement under consideration, for it is of the essence of the special fund doctrine that payments be made only from the special fund. But a stronger objection can be made. Under the true "self-liquidation" or "special fund" doctrine, the revenues making up the fund were always in the nature of service charges, such as tolls, or water and electricity rents; the very basis of the doctrine was that the people generally

23. Tranter v. Allegheny County Authority, 316 Pa. 65, 173 Atl. 289 (1934); California Toll Bridge Authority v. Kelly, 218 Cal. 7, 21 P. (2d) 425 (1933); Evans v. Holman, 244 Ill. 596, 91 N. E. 723 (1910); Klein v. Louisville, 224 Ky. 624, 6 S. W. (2d) 1104 (1928).

24. *In re* Canal Certificates, 19 Colo. 63, 34 Pac. 274 (1893).

25. Klein v. Louisville, 224 Ky. 624, 6 S. W. (2d) 1104 (1928).

26. Evans v. Holman, 244 Ill. 596, 91 N. E. 723 (1910).

27. Winston v. Spokane, 12 Wash. 524, 41 Pac. 888 (1895).

28. Tranter v. Allegheny County Authority, 316 Pa. 65, 85, 173 Atl. 289, 298 (1934). (A statute authorizing a public corporation to take over highway tubes for the purpose of making self-liquidating improvements with federal aid and authorizing the corporation to pledge the revenue, in the form of tolls, of the highway tubes, was held valid as not creating a debt of the county in the constitutional sense. The court stated: "The bondholders cannot call on the public treasuries to contribute; no county or municipal property can be taken for the debt, because the bondholders have agreed to look to a special fund for payment, to be raised in the manner provided.")

29. Kelley v. Earle, 320 Pa. 449, 461, 182 Atl. 501, 506 (1936).

would not be subjected to an increased tax burden, and that funds otherwise available for general purposes would not be used.[30] But through the agency of the county the very foundation of the "self-liquidation" doctrine is contravened; in saying that the source of the receipt of revenue is immaterial, the court would seem to be disregarding reality.

A third possibility, is that the obligation of the Authority to pay bondholders was considered self-liquidating because payable from a special fund made up solely of rentals paid by the state. The court cited the *Tranter* [31] case as its precedent, and in that case it was the obligation of the Authority, and not the county, which was self-liquidating. Therefore, it is a fair inference that in the instant case the court was considering the obligation of the Authority, and not of the state. If this is true, then the court's discussion of "self-liquidating" obligations was superfluous. If it was the obligation of the separate legal entity, it should make no difference how it was liquidated. The fact that the Authority's debt was self-liquidating simply described its method of financing, and logically had no effect upon the validity of the state's obligation.

In refusing to look behind the entity, known as the Authority, and in giving it the effect of a corporate body separate and distinct from the state, the court was enabled to bring the case within the "lease for recurring needs" doctrine. To attain this result, it was necessary to ignore the precedent whereby Pennsylvania courts have refused to give similar effect to public corporations organized for substantially the same purpose, i. e., of avoiding debt limitations. It was necessary to overlook the identity and effect between deeding land to the state, and revesting title in the state by escheat. Further, the court was compelled to disregard the identity of interest between the state and the Authority. It is apparent that the most forceful argument of the court was the economic justification for taking advantage of the very favorable contracts offered under the W. P. A. to meet unemployment problems and to share proportionately with other states the bounties of the federal government. Although the result was, perhaps, desirable under the circumstances, the precedent opens wide the doors to extravagance and waste, the very effect which the limitations were designed to prevent.

R. L. T.

The Situs of Stock for the Purpose of Attachment

Although this field of law has been ably dealt with several times in the past,[1] the confusion which continues unabated, and the increase in the number of

30. Thus in the *Tranter* case the court sustained the self-liquidating obligations because: "The bondholders cannot call upon the public treasuries to contribute." And in *In re* Senate Resolution No. 2, 94 Colo. 101, 31 P. (2d) 325 (1933), where the special fund was to be made up of excise revenues, designated by the legislature to make up the fund, the court said that a debt in the constitutional sense would be created, since the statute allocated to the payment of the debt neither anticipated revenues from an improvement or industry created by the act, nor even revenue from a source first tapped by the statute, but revenue already provided in past years and at present flowing into the state treasury. But *cf.* Johnson v. McDonald, 97 Colo, 324, 49 P. (2d) 1017 (1935). In the absence of peculiar constitutional provisions, it appears that the real test is whether the state generally, in the broad sense of placing any tax burden on its people, is obligated to pay, or whether the repayments are to be made out of a self-liquidating project without aid from taxation. If the funds for repayment are to come from the people through any sort of burden that will burden the people generally, there arises a general obligation to repay.

31. See *supra* note 28.

1. Pomerance, *The Situs of Stock* (1931) 17 CORN. L. Q. 43, 62; Notes (1926) 15 CALIF. L. REV. 145, (1925) 9 MINN. L. REV. 661.

states which have adopted the Uniform Stock Transfer Act, make it not unwise to attempt once more an analysis of an apparently obscure subject.

The recent efforts of Mr. Coty's creditors to subject his shares in Coty, Inc., a Delaware corporation, to the satisfaction of their claims is an excellent illustration of the problem involved. One Cotnareanu commenced an action against Coty in New York and levied an attachment against certain of his certificates of stock in Coty, Inc., by serving the warrant with notice of levy on New York banks which had possession of the certificates. A few months thereafter Woods, another creditor of Coty, commenced an action at law against Coty in Delaware and levied an attachment against the same shares of stock represented by the certificates by serving notice of the attachment on the resident agent of the corporation in Delaware, the domicile of the corporation. Each of these attachments was sufficient under the law of the particular forum to subject at least some part of Coty's interest in the corporation to the jurisdiction of that forum.[2] It is within the scope of this note to determine what interest was subject to the power of each court, and, as between the two, which court actually had jurisdiction to determine and control the ownership of the shares.

The decisions concerning the situs of shares for the purpose of attachment may readily be classified into three views: (1) That the share is located only at the domicile of the corporation, the state of incorporation, and consequently that state alone has jurisdiction over the share, the certificate being merely evidence of the fact of ownership of shares and not attachable property; (2) That the share is located at the domicile of the corporation, but for the purpose of attachment the corporation is domiciled in the state in which it has its principal place of business; as under the first view, the certificate is not such property that it may be attached; (3) That although the share exists at the domicile of the corporation, still the stock certificate, by virtue of its commercial value, is property and may be attached wherever found.

The first view has been adopted by the majority of states.[3] It is based on the reasoning that a share is an interest in the general enterprise undertaken by the association, and that therefore it is so intimately connected with the association that it exists only where the association is legally domiciled. Inasmuch as a share is merely an aggregate of rights and duties, it is almost a misuse of terms to say that it has a situs at any one place.[4] However, courts have given the share a location at various places for different purposes,[5] and for the particular purpose of attachment they have designated its situs to be at the state of incorporation. The corollary to this first theory is that the share certificate is merely a convenient form of evidence of the ownership of a certain number of shares and as such is not "property", nor even an "interest in property", which may be attached under the usual attachment statute.[6]

The second rule is merely a practical extension of the first. The courts applying this rule refuse to permit the concept of corporate domicile at the place of incorporation to take precedence over the reality of corporate domicile at the

2. Woods v. Spoturno, 183 Atl. 319 (Del. 1936); Cotnareanu v. Woods, 155 Misc. 95, 278 N. Y. Supp. 589 (Sup. Ct. 1935).

3. Gundry v. Reakirt, 173 Fed. 167 (C. C. E. D. Pa. 1909); Pinney v. Nevills, 86 Fed. 97 (C. C. D. Mass. 1898); Dupont v. Moore, 86 N. H. 254, 166 Atl. 417 (1933); Christmas v. Biddle, 13 Pa. 223 (1850); B. & A. Drilling Co. v. Norton, 20 S. W. (2d) 413 (Tex. Civ. App. 1929). At common law not even a share in a domestic corporation could be reached by attachment process because of the peculiar nature of a share. Denton v. Livingston, 9 Johns. 96 (N. Y. 1812); Trust Co. v. Weaver, 102 Tenn. 66, 50 S. W. 763 (1899).

4. See Pomerance, *supra* note 1, at 45, 46.

5. See *infra* note 21.

6. Pinney v. Nevills, 86 Fed. 97 (C. C. D. Mass. 1898); Dupont v. Moore, 86 N. H. 254, 166 Atl. 417 (1933); Christmas v. Biddle, 13 Pa. 223 (1850).

principal place of business.[7] This view has much to recommend it, since it is the merest fiction to say that a corporation is domiciled in state *X* merely because it was incorporated there (for reasons best known to the promoters) although it carries on all its business, internal and external, in state *Y*. However, the mere fact that a corporation is licensed to do business within the state is uniformly held not to be sufficient to bring the corporate shares within the jurisdiction of the licensing state.[8]

The third view is inconsistent with the others primarily in attributing intrinsic value to the certificate itself, for the principal reason that business men treat certificates of stock as property for all practical purposes.[9] Therefore, some courts have concluded that stock certificates are embraced within the terms of statutes providing for the attachment or garnishment of property belonging to the defendant and in his or a third person's possession.[10] An adoption of this rule necessarily implies that the law of the state in which the certificate is present governs the transfer of the certificate, and this has been so held by the United States Supreme Court in the leading case of *Direction der Disconto-Gesellschaft v. United States Steel Corporation.*[11] However, even though that case enunciates the law as to the transfer of the certificate, the transfer of the share itself is necessarily governed by the law of the corporate domicile, since it has been held by the same courts that apply the above rule that the share is within the jurisdiction of that state alone.[12]

Inasmuch as some states have made stock certificates negotiable to the extent that a delivery of a properly endorsed certificate constitutes the transferee the owner of the shares, it may be said that in some cases the effect of an exercise of jurisdiction over the certificate is equivalent to the exercise of jurisdiction over the actual shares.[13] It is probably this fact which has lead the American Law Institute to formulate the following rule:

> "To the extent to which the law of the state in which the corporation was incorporated embodies the share in the certificate, the share is subject to the jurisdiction of the state which has jurisdiction over the certificate." [14]

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7. Wait v. Kern River Mining & Milling Co., 157 Cal. 16, 106 Pac. 98 (1909); Dean Rapid Tel. Co. v. Howell, 162 Mo. App. 100, 144 S. W. 135 (1909).

8. Daniel v. Gold Hill Mining Co., 28 Wash. 411, 68 Pac. 884 (1902). However, if the corporation has become domesticated by force of a local statute, the shares are within the jurisdiction of the local courts. Bowman v. Breyfogle, 145 Ky. 443, 140 S. W. 694 (1911); Young v. South Tredegar Iron Co., 85 Tenn. 189, 2 S. W. 202 (1886).

9. Simpson v. Jersey City Contracting Co., 165 N. Y. 193, 58 N. E. 896 (1900) (certificates are sold in open market, transferred as collateral security for loans, *etc.*).

10. Mitchell v. Leland Co., 246 Fed. 103 (C. C. A. 9th, 1917); Baar v. Smith, 97 Cal. App. 400, 275 Pac. 861 (1929); Puget Sound Nat'l Bank v. Mather, 60 Minn. 362, 62 N. W. 396 (1895); People *ex rel.* Wynn v. Grifenhagen, 167 App. Div. 572, 152 N. Y. Supp. 679 (1st Dep't, 1915); General Motors Corp. v. Ver Linden, 199 App. Div. 375, 192 N. Y. Supp. 28 (1st Dep't, 1922); see 2 COOK, CORPORATIONS (8th ed. 1923) 1609. For the general proposition that a stock certificate is property see 11 FLETCHER, CYCLOPEDIA CORPORATIONS (Perm. ed. 1932) § 5093.

11. 267 U. S. 22 (1925), *aff'g*, 300 Fed. 741 (S. D. N. Y. 1924); Pilger v. U. S. Steel Corp., 102 N. J. Eq. 506, 141 Atl. 737 (1928); RESTATEMENT, CONFLICT OF LAWS (1934) § 53, comment *b;* see Notes (1926) 15 CALIF. L. REV. 145, (1925) 9 MINN. L. REV. 661. *Contra:* Hunt v. Drug, Inc., 35 Del. 332, 156 Atl. 384 (1931).

12. Black v. Zacharie, 44 U. S. 483 (1845); United Cigarette Machine Co. v. Canadian Pac. Ry. Co., 12 F. (2d) 634 (C. C. A. 2d, 1926); 12 FLETCHER, *op. cit. supra* note 10, § 5473; see Henley v. Myers, 215 U. S. 373, 383 (1910).

13. Direction der Disconto-Gesellschaft, 267 U. S. 22 (1925) is an example of this. The New Jersey law was that an indorsement in blank and delivery of the certificate transferred title to the shares. Therefore, a lawful seizure of a certificate, indorsed in blank, in England had the effect of making the holder the owner of the shares evidenced by the certificate.

14. RESTATEMENT, CONFLICT OF LAWS (1934) § 53 (3). See Note (1926) 15 CALIF. L. REV. 145, in which the writer adopted this view.

Under a reasonable interpretation of this rule the state which has jurisdiction of the certificate has jurisdiction of the share to the extent to which the state of incorporation has made a transfer of the certificate equivalent to a transfer of the share. Construing the rule in this fashion, it is submitted that it goes too far and is not justified by the decisions of the courts. If the rule were to be applied, a certificate to which the state of incorporation has imparted the utmost negotiability would carry with it the share itself, and the situs of the share would be coexistent with the physical location of the certificate; yet this is not so. In *Direction der Disconto-Gesellschaft v. United States Steel Corporation* the court, although admitting that the transfer of the certificate was governed by the law of England, spoke of the "paramount power" [15] of the United States and apparently approved of the decision in *Miller v. Kahwirke Aschersleben Aktien-Gesellschaft* where it was said:

> "A seizure of the certificate, which may be in one state or county, is not a seizure of the stock, the situs of which may be in another. That the situs of stock is at the domicile of the corporation, and that it makes no difference that the certificate of the stock may physically be elsewhere, is the rule in federal courts." [16]

Likewise, the New York Court of Appeals held in *Holmes v. Camp* [17] that, despite the importance which is attributed to the certificate, the share itself is located at the domicile of the corporation and is property belonging to the shareholder within the state. In the face of this and other authority,[18] it is impossible to conclude that the physical presence of a "negotiable" certificate confers jurisdiction of the share itself, unless it be said that a share in a corporation is so unique an interest that it may have a situs in two places at one and the same time for the same purpose,[19] and such an extreme result is neither desirable nor necessary. Undoubtedly, the rule appearing in the *Restatement* is a good practical solution of the problem, and, if universally adopted, would have the effect of doing away with all conflict. However, since the general conception is that the share actually exists only at the corporation's domicile, it is highly improbable that the *Restatement* rule will be adopted. Thus it would only be stultification to sponsor the rule, especially since the same satisfactory result may be obtained

15. Although this reference to the paramount power of the United States in the opinion by Justice Holmes is somewhat ambiguous, he was no doubt referring to the situation presented by Judge Hand in these words: "Again I have nothing to do with the power of the United States to capture these shares, notwithstanding a prior capture in England; that is, I need not say whether, if the local sovereign lays his hand upon the corporation, he should prevail over similar action taken elsewhere against the shareholder." Direction der Disconto-Gesellschaft v. U. S. Steel Corp., 300 Fed. 741, 743 (S. D. N. Y. 1924), *aff'd*, 267 U. S. 22 (1925).

16. 283 Fed. 746, 755 (C. C. A. 2d, 1922).

17. 219 N. Y. 359, 114 N. E. 841 (1916). This case concerned the right to serve a nonresident defendant by publication in a suit involving the title to shares in a domestic corporation; the defendant being the owner of the shares and the certificate being outside of the state. The court determined that the shares were property within the state, and therefore service by publication was proper under a statute permitting such service in actions *quasi in rem*. No distinction was made between situs for this purpose and situs for the purpose of attachment. See also Jellineck v. Huron Copper Mining Co., 177 U. S. 1 (1900).

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

19. Of course, for a different purpose stock may have a different situs. Thus, the situs of stock for the purpose of taxation is at the domicile of the owner. First Nat. Bank of Boston v. Maine, 284 U. S. 312 (1932). In the field of administration of a decedent's estate the same confusion as to the situs of stock forming a part of the estate exists as in the field under discussion with the majority treating the stock as assets at the place of incorporation. See Goodrich, *Problems of Foreign Administration* (1926) 39 HARV. L. REV. 797, 805; and see cases collected in 72 A. L. R. 179 (1931).

in the great majority of cases by maintaining the share's situs at the corporation's domicile and permitting the state in which the certificate is located to adjudge the ownership of the certificate.

In the light of the foregoing principles the apparent conflict between the Delaware and New York attachments of Coty's interest in Coty, Inc., is necessarily resolved in favor of the Delaware attachment, for that proceeding subjected the shares themselves to the jurisdiction of the court, whereas the New York attachment conferred upon the court jurisdiction of the certificate only, the exercise of which jurisdiction could affect the share merely by indirection. The New York court recognized the inferiority of its position and made it one of the grounds for enjoining the plaintiff in the Delaware action from continuing the proceedings.[20] Nor would the result in this particular conflict be altered by an adoption of the *Restatement* rule, since Delaware has declared that for the purpose of attachment and for all other purposes except taxation, the situs of shares in a Delaware corporation is in Delaware.[21]

The Effect of the Uniform Stock Transfer Act

This act, at present part of the statute law of twenty-five states,[22] has for its avowed purpose the making of the certificate, to the fullest extent possible, the representative of the shares.[23] With regard to the attachment of shares this purpose has been effectuated by providing that no attachment of shares for which there is an outstanding certificate shall be valid unless either (a) the certificate is actually seized, or (b) it is surrendered to the corporation, or (c) its transfer by the holder is enjoined.[24] Further, the corporation cannot be compelled to issue a new certificate until the old one is surrendered to it.[25]

Before entering into an examination of the significance of these provisions it is necessary to point out that the word "certificate" as used in the act means only certificates issued by corporations incorporated in states where the act is in force [26] and issued after the act has taken effect.[27] Thus, in *Cherkasky v. Pride* a Pennsylvania court refused to sustain an attachment of certificates of stock in a Delaware corporation on the ground that, although the act was in force in Pennsylvania, Delaware had not adopted it.[28]

A situation, the converse of that presented in the above case, has not yet arisen; that is, an attempt to attach in a state in which the Act is not in force a certificate which has been issued in a state which had adopted the act. Of course, if the state in which the attachment took place was one which had previously attributed sufficient value to the certificate to treat it as attachable property, there is no problem. Moreover, even if the state were one which, prior to the consideration of such a situation, had not looked upon stock certificates in so realistic an attitude, the result might well be in favor of the validity of the attachment on either one of two grounds: (a) that the certificate has become of

20. Cotnareanu v. Woods, 155 Misc. 95, 97, 278 N. Y. Supp. 589, 592 (Sup. Ct. 1935). The injunction was based on the theory that the defendant was seeking to attain an inequitable advantage under the laws of another state. See Pound, *The Progress of the Law-Equity* (1920) 33 HARV. L. REV. 420, 425, for a discussion of this ground as a basis for an injunction.

21. REV. CODE DEL. (1935), c. 65, § 2048.

22. 6 U. L. A. (Supp. 1935) 5.

23. UNIFORM STOCK TRANSFER ACT, § 1, Commissioners' Note.

24. *Id.* at § 13.

25. *Ibid.*

26. *Id.* at § 22; Casto v. Wrenn, 255 Mass. 72, 150 N. E. 898 (1925); Rand v. Hercules Powder Co., 129 Misc. 891, 223 N. Y. Supp. 383 (Sup. Ct. 1927).

27. UNIFORM STOCK TRANSFER ACT § 23; Direction der Disconto-Gesellschaft v. U. S. Steel Corp., 300 Fed. 741 (S. D. N. Y. 1924), *aff'd*, 267 U. S. 22 (1925).

28. 10 D. & C. 133 (Pa. 1928).

such increased value by virtue of the qualities imparted to it by the act that it has ceased to be merely evidence of title and has become property; or (b) that the act has caused the situs of the share to be transferred from the domicile of the corporation to whatever place the certificate happens to be. The weakness of the second ground has already been indicated, and there is, in addition, the objection that substantial authority has held that the Act does not effect the situs of shares issued under it.[29] Thus, in *Harvey v. Harvey*[30] it was necessary, in order to sustain the jurisdiction of the lower court, to determine the situs of certain shares in a Wisconsin corporation.[31] It was argued that the Uniform Stock Transfer Act, which was in force in Wisconsin, had the effect of fixing the situs of shares at the residence of their owner. In rejecting this argument the court stated:

> "It may be true that the statute mentioned tends to give to shares of stock qualities partaking of those of commercial paper, but we do not agree that the effect of the statute is to change the situs of the shares, or to deprive the courts of Wisconsin from exercising jurisdiction over stock in a Wisconsin corporation owned by nonresidents." [32]

On the other hand the first possible ground upon which an attachment could be supported, has the strength of sound common sense behind it. A certificate which, if properly indorsed and delivered, carries with it complete ownership of a share is property in both a legal and non-legal sense of the word. Certainly, anything which the public considers as having considerable value by itself should be looked upon as property by a court, especially if it is capable of seizure and sale as a certificate is. Undoubtedly, any court desirous of changing its concept of the nature of stock certificates so as to permit their attachment will find useful material in the terms of the Act.

When the circumstances are such that the certificate cannot be seized, the Act has provided that the holder of the certificate may be enjoined from transferring it, and such an injunction will have the force of an attachment.[33] That this remedy may be even more certain, section 14 provides that a creditor whose debtor is the owner of a certificate shall be entitled to all possible aid from courts of appropriate jurisdiction. However, since the act specifies that it is the holder who is to be enjoined from transferring the certificate, an injunction restraining the corporation from permitting a transfer of the shares on its books does not operate as an attachment.[34] This conclusion is a necessary one not only from

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29. Harvey v. Harvey, 290 Fed. 653 (C. C. A. 7th, 1923); McQuillen v. National Cash Register Co., 13 F. Supp. 53 (D. C. Md. 1935); Warren v. New Jersey Zinc Co., 116 N. J. Eq. 315, 173 Atl. 128 (1934); *cf.* Newell v. Tremont Lumber Co., 161 La. 649, 109 So. 344 (1926) (for the purpose of taxation).

30. 290 Fed. 653 (C. C. A. 7th, 1923).

31. This case arose under section 57 of the Judicial Code [18 STAT. 472 (1875), 28 U. S. C. A. § 118 (1927)] which provides that when any action is brought in any district court to determine the title to property within the district, absent defendants may be joined by publication. This action involved rights in stock in a corporation domiciled in the district. The certificate was outside of the district and so were several of the defendants. The principal contention of the defendants was that there was no property within the district. Thus, the same problem is involved as in attachment proceedings—both being *quasi in rem*. The courts have recognized this and cite the cases interchangeably.

32. 290 Fed. 653, 659 (C. C. A. 7th, 1923).

33. UNIFORM STOCK TRANSFER ACT § 13.

34. Bloch-Daneman Co. v. Mandelker & Son, 205 Wis. 641, 238 N. W. 831 (1931). *A fortiori* mere service of notice on the corporation is not an attachment when the holder of the certificate has not been enjoined. American Surety Co. of N. Y. v. Kasco Mills, 262 N. Y. 585, 188 N. E. 75 (1933).

the terms of the act but also for the purpose of insuring the negotiable value of the certificate.[35]

In this respect *Warren v. New Jersey Zinc Company*[36] is highly relevant. In that case the New Jersey Chancellor sustained the validity of an injunction restraining a nonresident from transferring the certificate of shares in a domestic corporation on the ground that the *res* was within the jurisdiction of the court, and that the injunction was effective because the person enjoined knew of the injunction. Although there is some authority for the effectiveness of a decree issued against a nonresident but affecting property within the jurisdiction of the court,[37] such a principle is not applicable herein, since the *res* is not the shares which were held to be in New Jersey, but the certificate which was in New York.[38] The decision is to be deplored since the act necessarily contemplated only an effective injunction as an attachment.[39] Otherwise, the value of a certificate as a commercial instrument might be impaired, and thus the purpose of the act defeated.

Conclusion

For the purpose of attachment the situs of a share is in the state of incorporation, the legal domicile of the corporation. The weight of authority behind this rule is so great that to seek to supplant it at this late date would be of little, if any, effect. On the other hand the growing acceptance of the certificate as paper of considerable commercial value should, and probably will, lead more courts to look upon the certificate as property which may be attached. Ordinarily an attachment and sale of a certificate will constitute the transferee the owner of the share, since under the law of the state in which the attachment took place he is the lawful owner of the certificate, and this is usually sufficient to make him the owner of the share. However, any conflict resulting from simultaneous attachments at the corporate domicile and at the place where the certificate is present must be resolved in favor of the attachment at the domicile, since in that proceeding the court has jurisdiction of the shares themselves. The Uniform Stock Transfer Act has not changed the actual situs of the share, but it has imparted such added value to the certificate, by increasing its negotiability, that it is property within the meaning of attachment statutes.

E. R. von S.

35. An injunction restraining the corporation from transferring the shares on its books would not prevent the transfer of the certificate to an innocent person, nor, in fact, would enjoining the holder from transferring the certificate necessarily have that effect, but, at least, it is more likely to restrain the transfer.

36. 116 N. J. Eq. 315, 173 Atl. 128 (1934).

37. See 5 POMEROY, EQUITY JURISPRUDENCE (3d ed. 1905) § 15.

38. The bad effect of this decision was ameliorated by the fact that before the proceedings were culminated all the parties in interest, including the nonresident holder of the certificate, appeared before the court.

39. See Amm v. Amm, 117 N. J. Eq. 185, 175 Atl. 186 (1934), where the court went out of its way to say that an injunction restraining a nonresident from transferring his certificate was not within the contemplation of the act.