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CONFLICT OF LAWS-JURISDICTION IN REM OF DOCUMENTED CLAIMS

COMMENTS

CONFLICT OF LAWS — JURISDICTION IN REM OF DOCUMENTED CLAIMS — A court has jurisdiction *in rem* over any *res* of which it has physical control.[1] But does physical control of a document carry with it the control of the chose in action which it represents? This involves an inquiry as to what extent the chose in action is embodied in the document, to what extent the certificate is itself the *res* or property. Answers to this question have varied with the type of document and even with the type of suit in which the problem has arisen.

It seems clear that at first the courts regarded a document representing a claim not as a chattel, but as merely evidence of a chose in action.[2] However, faced with the tendency of merchants to deal with a document, at least where it was negotiable, as itself the property for which it could be so readily exchanged, the courts began to treat the

[1] Beale, "The Exercise of Jurisdiction in Rem to Compel Payment of a Debt," 27 HARV. L. REV. 107 (1913).

[2] 2 AMES, CASES ON BILLS AND NOTES 689 (1894).

document as an ordinary chattel for many purposes. A negotiable instrument is the subject of larceny, trover, and replevin.[3] Title passes by manual delivery.[4] And statutes have made the negotiable instrument the subject of attachment.[5] However, courts have not been ready to treat all documents representing claims, or even all negotiable instruments, as property for all purposes. They have inclined to distinguish between the more and the less negotiable.[6] This seems reasonable, as the more negotiable an instrument the more likely that the average business man will regard it as an ordinary chattel.

1. *Types of Documents*

New York seems to have gone as far as any jurisdiction in identifying property with the document, by holding that land contracts held by an agent in the State are subject to a property tax by that State.[7] On the other hand, the Supreme Court of Minnesota, which has gone almost as far as New York, decided that it could not proceed *in rem* against letters-patent within the jurisdiction.[8] It seems to be the general view that stock certificates are not property for the purposes of foreign attachments[9] or for the purpose of adjudicating ownership.[10]

[3] 2 AMES, CASES ON BILLS AND NOTES 689-707 (1894); Von Hesse v. Mackaye, 55 Hun. (N. Y.) 365 at 367, 8 N. Y. S. 894 at 895 (1890).

[4] 2 AMES, CASES ON BILLS AND NOTES 689-707 (1894).

[5] Yazoo & Mississippi Valley R. R. v. Clarksdale, 257 U. S. 10, 42 Sup. Ct. 27 (1921).

[6] Case of the State Tax on Foreign-Held Bonds, 15 Wall. (82 U. S.) 300 (1872), distinguishing municipal bonds from ordinary bonds; In re Clark, L. R. [1904] 1 Ch. Div. 294, distinguishing stocks from bonds; Re Bronson's Estate, 150 N. Y. 1, 44 N. E. 707 (1896), distinguishing stocks from bonds; Commissioner of Stamps v. Hope, L. R. [1891] A. C. 476, distinguishing between debt by simple contract and debt by specialty.

[7] People v. Board of Trustees, 48 N. Y. 390 (1872).

[8] Roots Co. v. Decker, 111 Minn. 458, 127 N. W. 417 (1910).

[9] Maertens v. Scott, 33 R. I. 356, 80 Atl. 369 (1911); Pinney v. Nevills, (C. C. Mass. 1898) 86 Fed. 97; Armour Bros. Banking Co. v. St. Louis Nat. Bank, 113 Mo. 12, 20 S. W. 690 (1892); 55 L. R. A. 796 n. (1902); Beale, "The Exercise of Jurisdiction In Rem to Compel Payment of a Debt," 27 HARV. L. REV. 107 at 111 (1913). But see *contra*, Puget Sound Nat. Bank v. Mather, 60 Minn. 362, 62 N. W. 396 (1895); Simpson v. Jersey City Contracting Co., 165 N. Y. 193, 58 N. E. 896 (1900); Beal v. Carpenter, (C. C. A. 8th, 1916) 235 Fed. 273.

See 25 HARV. L. REV. 74 (1911) rather unsuccessfully attempting to distinguish between the attachment of pledged and bailed stock.

[10] Hook v. Hoffman, 16 Ariz. 540, 147 Pac. 722 (1915); Clark v. O'Donnell, 68 Colo. 279, 187 Pac. 534 (1920); Mich. Trust Co. v. Probasco, 29 Ind. App. 109, 63 N. E. 255 (1902); Gamble v. Dawson, 67 Wash. 72, 120 Pac. 1060 (1912); Harris v. Chicago Title and Trust Co., 338 Ill. 245, 170 N. E. 285 (1930), decided after the adoption of the Uniform Stock Transfer Act; Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 20 Sup. Ct. 559 (1900); Baker v. Baker, Eccles & Co., 242 U. S. 394, 37 Sup. Ct. 152 (1916); Hudson Navigation Co. v. Murray, (D. C. N.

With respect to negotiable corporate bonds and notes, this problem has presented itself surprisingly few times. The stock certificate cases do not necessarily control since the stock certificate not only evidences a chose in action but also a right to participate in the management of the corporation and to share in its assets.[11] Moreover, a share of stock is only quasi-negotiable.[12] Consequently, the Minnesota court in the recent case of *First Trust Co. of St. Paul v. Matheson*[13] had practically no direct authority to which to look. In that case it was held that the mere physical presence in Minnesota of the certificates of bonds of a foreign corporation gave the Minnesota court power to adjudicate the ownership of the bonds as against non-resident defendants served by publication. The court based its decision largely on practical grounds and, it is believed, reached the desirable result.

2. *Types of Cases*

The question as to the potency to be given to a negotiable document arises most frequently in foreign attachment cases and in taxation cases.[14] As for attachment cases, those deciding whether or not a bond or

J. 1916) 236 Fed. 419; 25 HARV. L. REV. 719 (1912); *contra*, Franz v. Buder, (C. C. A. 8th, 1926) 11 F. (2d) 854. See notes 24, 26, and 28, infra.

[11] BALLANTINE, PRIVATE CORPORATIONS, sec. 130 (1927).

[12] BALLANTINE, PRIVATE CORPORATIONS, sec. 149 at p. 474 (1927).

[13] 187 Minn. 468, 246 N. W. 1 (1932).

[14] Taxation cases are really *sui generis*. On one side a tax may be imposed for protecting or transferring the document, State ex rel. Smith v. Probate Court, 124 Minn. 508, 145 N. W. 390 (1914), while on the other the tax may be held to be unconstitutional without regard to the question of jurisdiction. Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 Sup. Ct. 98 (1930). The Minnesota court in First Trust Co. of St. Paul v. Matheson, 187 Minn. 468, 246 N. W. 1 (1932), cited the Supreme Court as supporting its position in several recent tax cases. On closer examination, however, it will be seen that the cases cited, Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 Sup. Ct. 98 (1930); First Nat. Bank v. Maine, 284 U. S. 312, 52 Sup. Ct. 174 (1932), do not hold that the "death succession is taxable by the state where the papers have actual or 'business situs' and not by that of the owner's domicil," First Trust Co. of St. Paul v. Matheson, Advance Sheet to 246 N. W. 1 at 4 (1932) (this quotation was omitted in the final report), but they do hold that such taxes may be imposed by the State of the owner's domicil. In both of these cases the certificates were also held at the owner's domicil, and in each the court expressly reserved decision as to whether bonds or stocks might be given a "business situs" for some purposes. "We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property. . . . That question heretofore has been reserved, and it still is reserved. . . . " First Nat. Bank v. Maine, 284 U. S. 312 at 331, 52 Sup. Ct. 174 at 178 (1932). In a case decided in the short interval between these two cases the Supreme Court actually refused to do this for the purposes of taxation. Baldwin v. Missouri, 281 U. S. 586, 50 Sup. Ct. 436 (1930). Therefore, it is quite possible that they had the present problem in mind in making this reservation.

note is subject to attachment wherever it may be held seem to be about equally divided.[15] In *De Bearn v. Safe Deposit & Trust Co.*[16] the Supreme Court held, by denying an appeal for want of jurisdiction, that for the purpose of attachment even registered bonds are property within the jurisdiction of a state court. But foreign attachments are *quasi in rem*,[17] and may be distinguished from suits strictly *in rem*, in which the issue is the ownership of the stocks or bonds. It would hardly be possible to hold, as is done in many attachment cases, that a bond is property at the domicil of the legal owner, when the legal ownership is the very point in controversy. Courts in ownership cases are apt to refer to attachment cases as controlling. They are confused by the fact that in the case of the attachment of a simple debt the chose in action is given a fictional situs at the domicil or whereabouts of the debtor;[18] they continue to apply the fiction in the *in rem* action where the fiction does not fit. Furthermore, in a foreign attachment case it is possible to hold that the certificate itself is of sufficient value to permit of attachment, without identifying it with the claim and giving the claim a situs where the certificate is.[19]

Proceedings *in rem* against documented claims have not been numerous. Most of these have been attempts to adjudicate the ownership of stock. In these cases the state courts have quite universally *said* that the stock is not property in the jurisdiction where the certificates may be found.[20] Practically all of these cases, however, have been decisions actually holding that the court at the domicil of the corporation has jurisdiction *in rem* of the stock held in a foreign jurisdiction by a non-resident.[21] Yet at least one New York case refuses to use the stock

[15] Tweedy v. Bogart, 56 Conn. 419, 15 Atl. 374 (1888), bearer-bonds not attachable; Mower v. Stickney, 5 Minn. 397 (1861), promissory notes attachable: De Bearn v. De Bearn, 115 Md. 668, 81 Atl. 223 (1911), 233 U. S. 24, 34 Sup. Ct. 584 (1913), registered bonds attachable; 36 L. R. A. (N. S.) 421 n. (1912).

[16] 233 U. S. 24, 34 Sup. Ct. 584 (1913).

[17] Beale's classification is here adopted. A suit is strictly *in rem* if there is an existing claim against the *res* itself; it is *quasi in rem* if the *res* is attached merely in order to satisfy a separate claim. Beale, "The Exercise of Jurisdiction in Rem to Compel the Payment of a Debt," 27 HARV. L. REV. 107 at 109 (1913).

[18] Harris v. Balk, 198 U. S. 215, 25 Sup. Ct. 625 (1905).

[19] This seems to be what the English courts would have to hold if faced with this problem. See Attorney-General v. Bouwens, 4 M. & W. 171, 150 Eng. Repr. 1390 (1838); Stern v. Queen, L. R. [1896] 1 Q. B. Div. 211. See 9 MINN. L. REV. 661 (1925), advocating the "English Rule."

[20] See n. 10, supra.

[21] It is often assumed that the courts of two different States cannot have jurisdiction *in rem* of the same *res* at the same time. Yet courts frequently have concurrent jurisdiction *in personam* of the same subject matter. There seem to be no insuperable difficulties, either logical or practical, which would prevent a court which so desired from holding that the court with jurisdiction of the document and the court with jurisdiction over the corporation have concurrent "jurisdiction *in rem*" over the stock. See 39 HARV. L. REV. 485 (1926).

certificate cases as an analogy and holds that a suit is not maintainable *in rem* against a corporation to determine the ownership of coupon bonds held in another State.[22] This court even carries the conflict with the stock cases into the dictum by saying that the bonds themselves are the property proceeded against.

The federal and Supreme Court cases on this whole problem are in almost hopeless confusion. In one of the earliest and most cited cases touching this point the Supreme Court said that bonds, mortgages, and debts generally have "no *situs* independent of the domicile of the owner," while state and municipal bonds "have acquired the character of, and are treated as, property in the place where they are found."[23]

In the earlier federal cases it was held that a state court had jurisdiction to proceed *in rem* against a non-resident even as to stock in a foreign corporation because of the physical control over the certificates.[24] At the same time it was held that stock in a foreign corporation was not subject to attachment.[25] Shortly after these cases the Supreme Court decided *Jellenik v. Huron Copper Mining Co.*[26] It was there held, in a suit *in rem* to determine who was the real owner of stock, brought in the State in which the corporation was organized, that property represented by stock certificates was in the State which created the corporation. Without discussing the problem the Supreme Court carried this proposition to the converse case in *Baker v. Baker, Eccles & Co.*,[27] and held that the foreign State in which stock certificates were held had no jurisdiction to proceed *in rem* to adjudicate ownership. Yet strangely enough the lower federal courts have almost invariably failed to follow these decisions even as to shares of stock.[28] Some of these cases are distinguishable on the ground that the foreign corporation also did business in the State in which the certificates were found.[29]

[22] Von Hesse v. MacKaye, 55 Hun. (N. Y.) 365, 8 N. Y. S. 894 (1890), aff'd 121 N. Y. 694, 24 N. E. 1099 (1890).

[23] Case of the State Tax on Foreign-Held Bonds, 15 Wall. (82 U. S.) 300 at 324 (1872).

[24] Merritt v. American Steel-Barge Co., (C. C. A. 8th, 1897) 79 Fed. 228.

[25] Pinney v. Nevills, (C. C. Mass. 1898) 86 Fed. 97.

[26] 177 U. S. 1, 20 Sup. Ct. 559 (1900).

[27] 242 U. S. 394, 37 Sup. Ct. 152 (1916).

[28] Blake v. Foreman Bros. Banking Co., (D. C. N. D. Ill. 1914) 218 Fed. 264; Beal v. Carpenter, (C. C. A. 8th, 1916) 235 Fed. 273; Franz v. Buder (C. C. A. 8th, 1926) 11 F. (2d) 854; Norrie v. Lohman, (C. C. A. 2d, 1926) 16 F. (2d) 355; Guaranty Trust Co. of New York v. Fentress, (C. C. A. 7th, 1932) 61 F. (2d) 329. But see Hudson Navigation Co. v. Murray, (D. C. N. J. 1916) 236 Fed. 419; United Cigarette Machine Co. v. Canadian Pacific Ry., (C. C. A. 2d, 1926) 12 F. (2d) 634.

[29] Vidal v. South American Securities Co., (C. C. A. 2d, 1921) 276 Fed. 855.

In the later case of *Critchton v. Wingfield* [30] the Court held that even the physical presence of bearer bonds in the New York district did not give the federal court jurisdiction *in rem* to adjudicate the ownership of the bonds. In this case the Court emphasized the fact that the bonds were only temporarily held in New York and that they were removed from Mississippi in violation of a Mississippi statute.[31] However, it is hard to see how these considerations would affect the question of jurisdiction.

The Supreme Court case of *Direction Der Disconto-Gesellschaft v. United States Steel Corporation*[32] decided that the law of the place where the document is held determines who is owner of the document. This was all that the case actually decided, yet because of some of the language of Judge Hand in the district court [33] this case has already been cited by several federal courts as supporting their decisions that stock is personal property where the certificates are held.[34]

We have already noticed that the Supreme Court held that registered bonds within a State were sufficient property on which to base a foreign attachment.[35] In view of the conflict of opinion here, the confu-

[30] 258 U. S. 66, 42 Sup. Ct. 229 (1922).

[31] Followed in Seligman v. Mills, (C. C. 8th, 1928) 25 F. (2d) 807, as to non-negotiable notes only temporarily in the jurisdiction.

[32] 267 U. S. 22, 45 Sup. Ct. 207 (1925).

[33] "It is scarcely necessary to say that, if the shares are identified with the certificates, they pass as chattels, and the law of the place of transfer controls. . . . There are many cases which do so identify them, and perhaps these should serve, without more. . . .

"Yet the same result follows by an analysis which I must own seems to me more accurate. . . .

". . . under this view I have only to find, just as before, whether the title to the certificates passed to the public trustee." Direction der Disconto-Gesellschaft v. U. S. Steel Corporation, (D. C. S. D. N. Y. 1924) 300 Fed. 741 at 745-6.

[34] Franz v. Buder, (C. C. A. 8th, 1926) 11 F. (2d) 854; Norrie v. Lohman, (C. C. A. 2d, 1926) 16 F. (2d) 355; Guaranty Trust Co. of New York v. Fentress, (C. C. A. 7th, 1932) 61 F. (2d) 329. For a similar analysis see 39 HARV. L. REV. 485 (1926). But for proper interpretation of the case see United Cigarette Machine Co. v. Canadian Pacific Ry., (C. C. A. 2d, 1926) 12 F. (2d) 634; 9 MINN. L. REV. 661 (1925); 15 CAL. L. REV. 145 (1927).

[35] De Bearne v. Safe Deposit & Trust Co., 233 U. S. 24, 34 Sup. Ct. 584 (1913).

There is language in the taxation cases for almost any proposition that one wishes to assert.

"Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it. . . . " Mr. Justice Holmes in Blackstone v. Miller, 188 U. S. 189 at 206, 23 Sup. Ct. 277 at 279 (1903).

"We think bonds are not thus distinguishable from other choses in action. . . . They are . . . in their essence only evidences of debt. . . . They are representative and not the thing itself." Blodgett v. Silberman, 277 U. S. 1 at 14-15, 48 Sup. Ct. 410 at 415 (1928).

See also New Orleans v. Stempel, 175 U. S. 309, 20 Sup. Ct. 110 (1899); De

sion of the lower federal courts as to just where the Supreme Court stands even as to shares of stock, and the Court's recent hesitancy in the taxation cases to commit itself even in dicta, it would be interesting to see how that body would deal with the recent Minnesota case of *First Trust Co. of St. Paul v. Matheson,*[36] mentioned above, which, as we have seen, held that the mere physical presence in Minnesota of bonds of a foreign corporation gave the Minnesota court power to adjudicate the ownership of the bonds as against non-resident defendants served by publication. On practical grounds there seems to be no reason for denying jurisdiction in the Minnesota case. A court with jurisdiction over the document is frequently able to accomplish indirectly a transfer of the chose in action.[37] There would be no more hardship on the non-resident claimant than in the case of an ordinary chattel, where jurisdiction *in rem* is commonly recognized. True, a third-party debtor is also involved in these cases, yet in all of them the question is not whether the debt is owed, but merely to whom it should be paid.[38] Such a decision would do away with all the futile discussion of a fictional situs. The Minnesota decision seems to be in accord with the modern trend, and it finds support from the American Law Institute Restatement.[39]

It is even submitted that those decisions in the lower federal courts extending this doctrine to shares of stock, though not so easy to support on authority, have also reached the desirable result. If the trend continues and stocks are eventually considered to be negotiable instruments, it would certainly be quite logical to hold that a court with jurisdiction over a stock certificate has jurisdiction *in rem* to adjudicate the ownership of the stock.

C. S. R.

Ganay v. Lederer, 250 U. S. 376, 39 Sup. Ct. 524 (1919); Buck v. Beach, 206 U. S. 392, 27 Sup. Ct. 712 (1907).

[36] 187 Minn. 468, 246 N. W. 1 (1932).

[37] This would seem to be the correct interpretation of Direction der Disconto-Gesellschaft v. U. S. Steel Corporation, 267 U. S. 22, 45 Sup. Ct. 207 (1925). See n. 34, supra; also 30 HARV. L. REV. 486 (1917).

[38] Von Hesse v. MacKay, 55 Hun. (N. Y.) 365, 8 N. Y. S. 894 (1890), aff'd 121 N. Y. 694, 24 N. E. 1099 (1890), suggests a possible distinction between cases in which the corporate obligation is involved and those in which it is not. It would at least be the exceptional case in which the corporate obligation was also at issue.

[39] AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF CONFLICT OF LAWS, Proposed Final Draft, secs. 56, 57, 109 (1930).