The Personal Tax Planning Review

THE SITUS OF REGISTERED SHARES

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1 Scope of Article

In this article, I consider the situs, for inheritance tax purposes, [2] of shares in a United Kingdom incorporated and resident company which are registered on a branch register kept out of the United Kingdom, and a transfer of legal title to which can be transferred only by entry on that register. I consider in particular the impact of the "rogue" decision of the Court of Appeal *Macmillan Inc v Bishopsgate Trust (No 3)* 1996 1 WLR 387 ("*Bishopsgate*"). But for that decision, there would be no doubt but that the shares are situate in the jurisdiction where the register is kept.

The nature of the problem is best illustrated by a quotation from James Kessler's *Taxation of Foreign Domiciliaries*, at 26.2:

> "It is necessary for completeness to mention *Macmillan v Bishopsgate Trust (No 3)* [1996] 1 WLR 387. This concerned a company incorporated and

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2 No question arises as respects capital gains tax as the matter is dealt with expressly by Taxation of Chargeable Gains Act 1992, section 275 (Location of assets) (e), which provides: "For the purposes of this Act - ... (e) subject to paragraph (d) above, [which applies only to 'shares or securities issued by any municipal or governmental authority, or by any body created by such an authority'] registered shares or securities are situated where they are registered and, if registered in more than one register, where the principal register is situated".

> with a share register in New York. Auld LJ adopted the view set out above: see p.411e. Alarmingly, Aldous LJ states without discussion that the situs is the place of incorporation: see p.423f. Staughton LJ inclines to the same view but expresses himself more cautiously. See p.405e.
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> "... It is a pity that the majority of the Court of Appeal did not express themselves more carefully or more cautiously; they have introduced into the law if not an uncertainty at least an inconsistency which needs to be explained away. But there it is."

The purpose of this article is to review the "traditional" learning, and to "explain away" *Bishopsgate*.

2 The Companies Act 1985

2.1 Section 362 and Schedule 14

The shares will normally be registered on an Overseas Register maintained pursuant to Companies Act 1985, section 362 and Schedule 14. Section 362, so far as material, provides:

> "362.—(1) A company having a share capital whose objects comprise the transaction of business in any of the countries or territories specified in Part I of Schedule 14 to this Act may cause to be kept in any such country or territory in which it transacts business a branch register of members resident in that country or territory.
>
> (2) Such a branch register is to be known as an "overseas branch register" ...
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> (3) Part II of Schedule 14 has effect with respect to overseas branch registers kept under this section .."

Part II of Schedule 14 (General Provisions With Respect to Overseas Branch Registers) provides:

> "1 ...
>
> "2.—(1) An overseas branch register is deemed to be part of the company's register of members ('the principal register').

"(2) It shall be kept in the same manner in which the principal register is by this Act required to be kept ...

"3.—(1) A competent court in a country or territory where an overseas branch register is kept may exercise the same jurisdiction of rectifying the register as is under this Act exercisable by the court in Great Britain; and the offences of refusing inspection or copies of the register, and of authorising or permitting the refusal, may be prosecuted summarily before any tribunal having summary criminal jurisdiction.

"(2) This paragraph extends only to those countries and territories where, immediately before the coming into force of this Act, provision to the same effect made by section 120(2) of the Companies Act 1948 had effect as part of the local law.

"4.—(1) The company shall—

(a) transmit to its registered office a copy of every entry in its overseas branch register as soon as may be after the entry is made, and

(b) cause to be kept at the place where the company's principal register is kept a duplicate of its overseas branch register duly entered up from time to time.

Every such duplicate is deemed for all purposes of this Act to be part of the principal register.

...

"5 . Subject to the above provisions with respect to the duplicate register, the shares registered in an overseas branch register shall be distinguished from those registered in the principal register; and no transaction with respect to any shares registered in an overseas branch register shall, during the continuance of that registration, be registered in any other register.

"6. ...

"7. Subject to the provisions of this Act, any company may, by its articles, make such provisions as it thinks fit respecting the keeping

of overseas branch registers.

> "8. An instrument of transfer of a share registered in an overseas branch register (other than such a register kept in Northern Ireland) is deemed a transfer of property situated outside the United Kingdom and, unless executed in a part of the United Kingdom, is exempt from stamp duty chargeable in Great Britain."

A key feature is that the overseas branch register is the only register in respect of the shares registered on it. Copies kept with the main register are no more than that. Although the Act does not say so in terms, the implication is that title to shares registered on the overseas branch register can be transferred only by entry on that register. One would expect the company's articles also to make that clear. Thus, simply on the basis of the traditional learning, referred to below, shares registered on the overseas branch register would be situate in the jurisdiction where the register was kept.

2.2 Schedule 14 Part II Paragraph 8

Schedule 14, Part II, paragraph 8 probably does nothing to challenge the traditional learning. On one view, while it does not go so far as codifying it, it at least recognises it. It is, however, somewhat oddly worded. It does not say that the shares registered on the overseas branch register are themselves property situated outside the United Kingdom. Instead, it says that "an instrument of transfer" of such a share is deemed to be a transfer of property situated outside the United Kingdom. At first blush, this looks very odd, because the instrument of transfer does not itself transfer the legal title. That can be done only by entry on the register.

One explanation of the function of paragraph 8 is that it is concerned with the passing of title in Equity. We now know that the execution of an instrument of transfer and its delivery to the transferee is a good equitable assignment of the shares, even if the transferee is a volunteer. Yet paragraph 8 is of some antiquity and I very much doubt that it was drafted with this situation in mind.

A much more likely explanation is that the draftsman had in mind Stamp Act 1891, section 14(4) which provides:

> "(4) Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be

> available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was executed."

The House of Lords in *Commissioners of Inland Revenue v Maple Co. (Paris), Limited* [1908] A.C. 22 had decided that this subsection determined the territorial scope of stamp duty. There are three limbs. First, if an instrument is executed in the United Kingdom, it is stampable, even though there is otherwise no connecting factor with the United Kingdom. Paragraph 8 does nothing to alter this rule. Second, if the instrument relates to property situate in the United Kingdom, it is stampable on that account. Paragraph 8 overrides that rule, in so far as it would otherwise be applicable. Thirdly, an instrument which relates to "any matter or thing done or to be done, in any part of the United Kingdom" is also stampable. Paragraph 8 overrides this rule too.

In my view, the reason paragraph 8 deems the instrument of transfer of a share to be a transfer of property situated outside the United Kingdom is that it is that instrument which is stampable *ad valorem* if the transfer is a conveyance on sale.[3] Moreover, paragraph 8 bites only if the transfer is actually registered, i.e. effect is given to it by entries on the register. In deeming the transfer to be of property situate outside the United Kingdom, the paragraph prevents a charge to stamp duty under the second limb of section 14(4). There remains, however, the possibility of a charge under the third limb, on the grounds that the instrument relates to something which is to be done in the United Kingdom, namely the transmission to the registered office of the company in the United Kingdom of a copy of the entry made in the overseas branch register relating to the transfer: see paragraph 4(1)(a) of Part II of Schedule 14. It is to avoid a charge under this third limb that paragraph 8 needs to state that a transfer of shares executed outside the United Kingdom is exempt from stamp duty.

It is arguable that paragraph 8 applies to deem for, *inter alia,* inheritance tax purposes the shares to be situate outside of the United Kingdom. If so, it would not matter if the Court of Appeal had in *Bishopsgate* changed the "common" law.[4]

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3 Similarly, if the instrument was a voluntary conveyance in the days when there was an *ad valorem* voluntary disposition duty.

4 I use the term "common" law in contradistinction to statute law. I appreciate that the rule was originally one of ecclesiastical law, adopted by the probate court.

3 Case Law Before Bishopsgate

3.1 *New York Life Insurance Company v Public Trustee*

The history of the development of the law relating to the situs of *choses in action* was set out by Atkin LJ in *New York Life Insurance Company v Public Trustee* [1924] 2 Ch 101 at page 120:

> "The question as to the locality, the situation of a debt, or a *chose in action* is obviously difficult, because it involves consideration of what must be considered to be legal fictions. A debt, or a *chose in action*, as a matter of fact, is not a matter of which you can predicate position; nevertheless, for a great many purposes it has to be ascertained where a debt or *chose in action* is situated, and certain rules have been laid down in this country which have been derived from the practice of the ecclesiastical authorities in granting administration [of the estates of deceased persons to personal representatives and administrators], because the jurisdiction of the ecclesiastical authorities was limited territorially. The ordinary had only a jurisdiction within a particular territory, and the question whether he should issue letters of administration depended upon whether or not assets were to be found within his jurisdiction ..."[5]

3.2 *Attorney-General v Higgins*

The decision of the Court of Exchequer in *Attorney-General v Higgins* (1857) 2 H and N 339, that shares are situate where title to them can be transferred, namely where the register is situate, is normally regarded as the classic decision. Yet on a closer examination of the decision, it is clear that that is not the ratio and it is really later cases which established the rule definitively by "explaining" *Higgins*.
The deceased William Higgins had resided until his death in the (ecclesiastical) province of York. He owned shares in certain railway companies in Scotland which had been incorporated under the Companies Clauses Consolidation (Scotland) Act 1845 ("the 1845 Act"). Probate of his will was granted by the Prerogative Court of the Province of York. The case concerned the liability of the executors for a form of stamp duty referred to as "probat e duty" which was payable according to the situs of the property and not the domicile of the testator. [6] It was admitted by the

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5 The jurisdiction of the ecclesiastical courts over the estates of deceased persons was transferred to the Probate Court which was in turn absorbed into the High Court by the Judicature Acts 1973-75.

6 Per Pollock, CB, arguendo, at page 347.

executors that, section 20 of the 1845 Act apart, the executors would have had to obtain in the Scottish courts "confirmation" of the will, "confirmation" being the Scottish equivalent of obtaining probate, and to pay probate duty accordingly. The ratio of the decision was that, if probate had been obtained in England, while section 20 allowed the shares to be transferred on the books of the company without any need for "confirmation" in Scotland, it did not take away the need to exhibit a stamped inventory of Scottish property. As Watson B put it, at page 353: "The Act does not provide that these shares are to have their situs in Canterbury, [7] although the railway is in Scotland".

One's initial reaction on reading the case is that the question of situs (section 20 apart) was hardly in dispute. Manisty for the defendants began his speech by admitting that before the passing of the 1845 Act, confirmation (in Scotland) would have been necessary. It is difficult so see how that could be on any basis other than the shares being situate there. The question of situs was raised, by Pollock CB, only during his argument. Manisty's reply was that the shares were locally situate where the certificates were, i.e. in this case in the Province of York. He drew an analogy with the case where a man died owning a bond, situate in England, for a debt owed by a foreigner. The argument became bogged down when it appeared that it was far from plain that the bond/debt would have an English situs. The Attorney-General in reply argued that the shares were situate in Scotland because "the chief offices of these railways are in Scotland".

Pollock CB simply assumed that the shares were situate in Scotland, without giving any reasons. Similarly, Watson B assumed that the shares were "in Scotland" without giving reasons. It was only Martin B who dealt expressly with the point and held that the shares were not "*bona notabilia* here", i.e. were not situate in England. He gave the reason that was to be adopted in later cases: "It is clear that by the 19th section of [the 1845 Act], the evidence of title to these shares is the register of shareholders, and that being Scotland this property is located in Scotland". He refers to that proposition as "acknowledged law".

3.3 *Brassard v Smith*

Attorney-General v Higgins was approved by the Privy Council[8] in *Brassard v Smith* [1925] A.C. 371. In that case, a banking company, the head office of which was at Montreal in the Province of Quebec, had power by statute to maintain in any

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7 Canterbury and York are the two provinces of the Church of England.

8 Viscount Haldane, Lord Dunedin, Lord Atkinson, Lord Wrenbury and Lord Salvesen.

province a registry office at which alone shares held by residents in that province were to be registered and could validly be transferred. A person who was resident and domiciled at Halifax in the Province of Nova Scotia died there owning shares in the bank, the shares being registered at an office maintained by the company at Halifax under the above statutory power. Succession duty in respect of the shares was claimed under the Quebec Succession Duty Act, by article 1376 of which the duty was imposed upon "property actually situate within the Province .... whether the transmission takes place within or without the Province". It was held that, as the ownership of the shares could be effectively dealt with only in Nova Scotia, they were not property situate in Quebec.

It is interesting to note that de Lorimier J in the Supreme Court of Montreal and a minority of judges on the appeal side of the Court of King's Bench held that shares could have a local habitation and that that local habitation was the head office of the company. That view the Privy Council rejected.

One argument unsuccessfully put forward for the appellant collector of succession duty was that, admitting that, for the purposes of transference, the shares could only be dealt with in Nova Scotia, there were many things in connection with shares other than transference which could only be done in Quebec, as for instance the declaration of a dividend, the claim put forward in the event of liquidation, the voting at a general meeting, etc.

Their Lordships unequivocally explained *Higgins* in the way in which it has been understood ever since (if not previously). As Lord Dunedin said, delivering the Opinion of the Committee at page 377:

> "It is clear from this that 'transmission' [in the Ontario statute] is used to express the legal result which follows on death, but not to express the actual step which is necessary to invest the new holder. That is done by transfer, and that transfer in such a case is effectuated by a change in the register where the shares are registered, that is in this case in Nova Scotia. Their Lordships consider that the question was really settled by *Attorney-General v Higgins.* (1) Baron Martin in that case says in so many words: 'It is clear that the evidence of title to these shares is the register of shareholders and, that being in Scotland, this property is located in Scotland'.
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> "It is quite true that in that case the head office as well as the register was in Scotland, but in their Lordships' view it is impossible to hold that in that case the position of the head office was the dominant factor merely on the strength of a phrase used by the reporter of the Attorney-General's argument, and a casual reference made to the case by Lord Esher in a

> subsequent case of *Attorney-General v Lord Sudeley.* (2) In the present case Duff J, dealing no doubt with the 'no local situation' argument, said as follows: 'And the Chief Baron's judgment, I think, points to the essential element in determining situs in the case of intangible chattels for the purpose of probate jurisdiction as "the circumstance that the subjects in question could be effectively dealt with within the jurisdiction' ' . This is, in their Lordships' opinion, the true test. Where could the shares be effectively dealt with? The answer in the case of these shares is in Nova Scotia only, and that answer solves the question."

The statement that "transfer in such a case is effectuated by a change in the register where the shares are registered" was explained by Viscount Maugham, delivering the opinion of the Privy Council in *Rex v Williams* [1942] A.C. 541,[9] at the bottom of page 558:

> "It may be useful here to make some general remarks on the meaning and effect of the principle laid down in *Brassard v Smith* and in the *Erie Beach* case. The first observation is that the phrase used in laying down the principle clearly means "where the shares can be effectively dealt with as between the shareholder and the company, so that the transferee will become legally entitled to all the rights of a member", e.g., the right of attending meetings and voting and of receiving dividends. If the phrase only meant "effectively dealt with as between transferor and transferee of shares", the test would obviously be almost completely useless, since the rights of a shareholder as between himself and a transferee can, speaking generally, effectively be transferred in any part of the world. The second observation is that the test, where applicable, is concerned merely with the place where the shares are to be taken to be situate. The late owner in the normal case was absolutely entitled to the shares as the registered owner of them in the books of the company, and, if resident in a country or province different from that in which the shares can be effectively dealt with, could nevertheless have sold the shares and completed the transaction by an attorney or otherwise. That, however, does not touch the question of situs."

3.4 *Erie Beach Company Limited v Attorney-General for Ontario*

Brassard v Smith was followed by the Privy Council in *Erie Beach Company Limited v Attorney-General for Ontario* [1930] A.C. 161. The Ontario Succession Duty Act, section 7 imposed succession duty on "all property situate in Ontario ...

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9 See below 3.5.

passing on the death of any person". A dispute arose as to whether certain shares comprised in an estate in the Appellant company were assets situate in Ontario. The company was incorporated under the law of Ontario. The deceased "and his associates in the organisation of the company and the conduct of its affairs appear to have been all of them people of the State of New York. Every meeting of the company, whether of shareholders or of directors, took place in the City of Buffalo; the management of the company's business was conducted from its office in Buffalo; its books, records and documents were kept there; the common shares actually issued were issued there, and such transfers as took place were made and recorded there".[10]

The appellants contended that "shares in a joint stock company have no local situation, that, like debts and other *choses in action* and rights arising ex-contractu,[11] they constitute property of which the value - applying the maxim "Mobilia sequuntur personam" [12] - is taxable at the place of domicil [sic] of the deceased possessor".[13]

The Judicial Committee rejected this argument in no uncertain terms. "A series of judicial decisions extending from *Attorney-General v Higgins* (1), in the Court of Exchequer in 1857, to *Brassard v Smith* (2), before this Board in 1924, have ascertained **beyond possible doubt**[14] the test which must be applied to determine the local situation of the shares of a joint stock company when that fact has to be determined in order to decide as to liability to or immunity from local taxation. *Cotton v The King* (1) and *Burland v The King* (2), which were much discussed in the argument here, show the working of the rule, but do not qualify it as previously laid down.[15]

> "In *Attorney-General v Higgins*, as in *Brassard v Smith*, duty upon shares was in question. In *Attorney-General v Higgins* Baron Martin held that when transfer of shares in a company must be effected by a change in the register,

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10 See the Opinion of the Committee, delivered by Lord Merrivale, at page 168.

11 RV's footnote: "i.e., out of a contract".

12 RV's footnote: "i.e., movable property follows the person".

13 Page 168 after the penultimate divide.

14 Emboldening supplied.

15 RV's footnote: "These cases relate respectively to the scope and constitutionality of Quebec statutes and to not discuss the rules for determining the situs of shares."

> the place where the register is required by law to be kept determines the locality of the shares. Lord Dunedin, in delivering the judgment of this Board in *Brassard v Smith*, epitomized the crucial inquiry in a sentence - "Where could the shares be effectually dealt with?" The circumstances relied upon by the appellants which show the predilection of the members of the plaintiff company for transacting its business in Buffalo - so far as they might - have, in their Lordships' opinion, no material weight. The shares in question can be effectually dealt with in Ontario only. They are therefore property situate in Ontario and subject to succession duty there."[16]

Three points arise from the decision. First, it is established "beyond possible doubt" that shares in a company are situate in the place where they can be effectively dealt with in and, in a case where a transfer of legal title can be perfected only by entry on the company's register, that is in the ordinary case where the company's register of shareholders is kept.

Secondly, if the company's register of shareholders is not kept in the jurisdiction where it ought to be kept, the shares are still situate in that jurisdiction. Although their Lordships did not expressly advert to this point, it follows from the facts that they recorded, namely that "the common shares actually issued were issued [in the state of New York], and such transfers as took place were made and recorded there".

Thirdly, a point which I find highly illuminating in considering *Bishopsgate*, their Lordships stressed that the question of the nature of the shares which, it would appear, includes their situs, is to be determined by the law of the jurisdiction which created the company.[17]

> "The nature of the property in the shares in question depends in the main - if not wholly - upon the terms of the enactment under which the plaintiff company subsists: the Ontario Companies Act ... This statute of the Provincial Legislature provides for the grant of incorporation by the Lieutenant-Governor in Council, for purposes whereto the authority of the Legislature extends, to be set forth in the petition for incorporation. One of the antecedent requirements for incorporation is a statement by the petitioner or petitioners of a place in Ontario where the head office of the company is to be situate. The shares are by section 56 to be deemed to be

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16 See page 168 last divide.

17 That, of course, does not mean that the situs of the shares is necessarily in that jurisdiction.

> personal estate transferable on the books of the company. Under section 60 no transfer is valid or effectual save as exhibiting the rights of the parties thereto toward each other until entry thereof is made in the books of the company. Bye-law 22 of the company provides, further, that the shares shall be transferable only by the recording of the transfer on the stock-book of the company at their head office or the office of their transfer agents, if any, and the company's authorised form of certificate states that the shares are transferable only on the books of corporation by the holder in person or his attorney upon surrender of the certificate properly indorsed. By section 118 of the statute the company's register of shares and shareholders is required to be kept at its head office 'within Ontario', and (by section 119) available for inspection. There is provision in the statute – see sections 52 and 119 – for relaxation of the stringency of some relevant provisions by special Act, or letters patent, or bye-laws, or leave of the Lieutenant-Governor, but no such special sanction exists in this case. By section 121 of the statute jurisdiction is given to the Supreme Court of Ontario to order rectification of the books, and to determine questions of title in relation to the shares."[18]

Applying this to the shares in a United Kingdom incorporated company registered on the overseas branch register, those shares are, in accordance with the law of the jurisdiction of incorporation namely England, and in accordance with, I assume, the articles of association (the "bye-laws") of the company, transferable only in the foreign jurisdiction where the register is kept and hence are situate there.

There is only one small blip in the *Erie Beach* decision. Lord Merivale said, at page 167 first divide:

> "On the face of the statutory conditions above enumerated, it must be seen that if the corporation has a local habitation Ontario is its locality. For the appellants, however, facts are relied upon such as in the case of an individual might well have warranted an argument, that the person in question had chosen as his place of domicile the State of New York and had followed up his choice by action effectual to secure domicile there."

This is a little unfortunate as the question was not where the company had its local habitation or was domiciled but where shares in it were situate. Nor, as our understanding of the law has developed, would we nowadays equate "local habitation" with domicile. The domicile of a corporation is normally regarded as being in the jurisdiction under whose laws it comes into being whereas its local

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[18] Passing beginning page 166 after the second break.

habitation or residence is where its business (usually at board level) is conducted.

What is absolutely clear from reading the decision, however, is that their Lordships:

> (a) decisively rejected the test of the place where the management of the business and affairs of the company were carried on as being the situs of the shares
>
> (b) unequivocally followed and endorsed the rule laid down in *Brassard v Smith*
>
> (c) did not even consider the test of the situs of the shares to be the jurisdiction of incorporation.

3.5 *Rex v Williams*

Brassard v Smith and *Erie Beach* were also followed in *Rex v Williams* [1942] A.C. 541, which concerned shares in an Ontario company, title to which the Privy Council held could be lawfully transferred on either of two registers, one in Ontario and the other in New York.[19]

Their Lordships rejected an argument that, as the share certificates were issued under the seal of the company, they were "specialties" and thus the situs of the certificates was also the situs of the shares. They rightly pointed out, at page 557 before the second break: "The rule laid down in *Brassard v Smith* would in practice be useless if the place where the certificates for shares were found at the time of the death should be taken to be necessarily the situs of the shares. Their Lordships have no hesitation in holding that the situs of the certificates is not, taken alone, sufficient to afford a solution to the present problem."

Although their Lordships clearly had to lay down a special rule to deal with the case where shares could be transferred on two registers, they refused to accede to the argument that "in a case where shares can be effectively dealt with in registries existing in different fiscal areas ... *Brassard v Smith* and following decisions ... have no application, and that a completely different test or tests of situs should be applied, e.g., that of head office or principal place of business, or domicile, leaving out of account the principle laid down in *Brassard v Smith*". Rather, their Lordships took the view that the " principle seems to them not to have lost all weight even if in certain cases a choice has to be made as between more than one place where the

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[19] The actual ratio, that the shares were situate in New York because the certificates were there and had been endorsed in blank by the deceased, is not relevant to the present question.

shares can effectively be transferred".[20]

3.6. Effect of Privy Council Jurisprudence

Thus, the case law of the Privy Council is absolutely settled. Given that any rule for ascertaining the situs of a *chose in action* must be a little artificial and to some extent arbitrary and that it is more important to lay down a rule which is clear and workable (without being unreasonable or productive of injustice) than to hit on precisely the "right" rule, it is to my mind inconceivable that, *Macmillan v Bishopsgate* apart, the Privy Council would refuse to follow its previous rulings. Moreover, the Privy Council has shown that the rules relating to specialties (which are situate where the deed is) or to other debt claims (which are normally situate where the debtor is resident or, if resident in more than one place, where the debt is recoverable[21]) are not in point.

3.7 *Baelz v Public Trustee*

The twentieth century English cases are entirely consistent with the Privy Council's approach. In *Baelz v Public Trustee* [1926] Ch 863, the question arose whether the interest of a German national in shares in Arnold J. Van den Bergh Ltd., a company registered in England under the Companies Acts as a limited liability company, was "a property, right, or interest situate within His Majesty's dominions" so as to be subject to the charge imposed by the Treaty of Peace Orders, 1919-1921, made pursuant to the Treaty of Peace Act 1919. The plaintiff contended that it was not, as the business was carried on in Holland, that by the articles of association of the company, it was provided that all meetings of the company, whether of members or directors, should be held in Holland, and all such meetings had been in fact so held; since 1909 the whole of the administrative business of the company had been conducted in Holland by the managing director or directors domiciled and resident in Holland, and at no time since 1909 had the company sold any goods or done any business in the United Kingdom; the company had not been assessed for income tax in England on its profits or earnings. The register of shareholders was kept in England and a banking account was kept in London in order to pay dividends to members in England.

Eve J rejected that Plaintiff's argument that "a change of residence by the company will operate to transplant the interest of the individual as a shareholder to the locality of the new residence. For the contributory's title to his shares, his status as a

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20 Page 560, after the last break.

21 See *New York Life Insurance Company v Public Trustee* [1924] 2 Ch 101.

shareholder and the enforcement of his rights, recourse must be had to the statutory register, which remains localised at the registered office, and to the Court, with which alone, under section 32 of the Companies (Consolidation) Act 1908, abides the power to rectify the register".[22] He decided, rightly in my view, that the case was covered by the decisions in *Attorney-General v Higgins* and *Brassard v Smith*.

The Plaintiff had argued that the only relevant factor was the residence of the company, as determined for income tax purposes, which was clearly in Holland. It had been determined by the House of Lords in *Bradbury v English Sewing Cotton Co* 1923] A. C. 744 that a dividend paid by a company was from a source situate for income tax purposes in the country of residence of the company. The Lord Cave, Lord Chancellor had made, at page 753, an incautious remark:

> "And the question, therefore, arises, whether the locality of the shares or stock of a company is to be determined by its place of incorporation and registration or by its place of residence and trading. After some doubt, I have come to the conclusion that the latter is the true view. 'Shares in a company', said Sir James Hannen in In the Goods of Ewing,[23] 'are locally situate where the head office is'; and I think this means that they are locally situate where the company's principal place of business is to be found. A share or a parcel of stock is an incorporeal thing, carrying the right to a share in the profits of a company; and where the company is, there the share is also, and there is the source of any dividend paid upon it."

That remark was, however, "explained" by Lord Cave in *Swedish Central Ry. Co v Thompson* [1925] A. C. 495, 501:

> "my own observations, to which Atkin LJ refers, were not directed to any question of residence but to the position of the shares as a source of income for income tax purposes."

That there should be a separate rule for income tax is not surprising. The question is not where the shares are situate but what is the territorial source of a dividend paid in respect of those shares. Given that English tax law has a rule that the undistributed profits of a company resident in the United Kingdom are taxable in the United Kingdom, it is not so absurd to hold that those profits should, once

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22 See Companies Act 1985, Schedule 14, paragraph 3, cited above, which, subject to one condition, confers the power to rectify an overseas branch register on the local court.

23 (1881) 6 P. D. 19, at page 23. This remark was *obiter dicta* and was simply an inaccurate summary of what *Attorney-General v Higgins* decided.

distributed, have their source in the same territory as the paying company is resident.

3.8 *In Re Aschrott*

Eve J also decided *In Re Aschrott* [1927] 1 Ch. 313, which concerned a claim for estate duty. The certificates for shares in certain US and South African companies were situate in the United Kingdom and the shares themselves were transferable in London at the date of the death of the testator, who was domiciled in Germany, and which occurred in 1915 when the United Kingdom was at war with Germany. It was argued by the defendant that no duty was exigible. It was conceded on his behalf: "It is true that the existence in England of branch registers to record transfers of these shares would, in normal times, have made these shares, if found within the jurisdiction at the death, subject to estate duty: *Stern v The Queen* ".[24] The argument was rather that, "since the testator had appointed alien enemies to be his executors, representation of him by them or their nominees in England became impossible during the period of the war".

Eve J stated unequivocally at the bottom of page 331: "The evidence of title is the register, and according to the case of *Attorney-General v Higgins*, that determines the locality of the shares.". He went on to state, correctly, that "the fact that the testator's power of disposing of the shares and effecting any transfer of them had been temporarily suspended could not operate to change the location of the particular shares held by alien enemies, leaving unchanged the locality of shares held by those shareholders whose power of disposition was not affected ... The shares remained throughout locally situate in this country".

There are arguably two points on which there is a discrepancy between the law as laid down by the Privy Council and that to be found in the English authorities. It particularly touches and concerns the case where there are two registers and shares can be registered on either.

It is clear from the Privy Council authorities that there can be only one location of an asset for probate purposes and that in the case of registered shares which are not negotiable, that is the place where the register is kept. The place where the shares can be dealt with as between vendor and purchaser is irrelevant.

3.9 *Stern v The Queen*

Stern v The Queen [1896] 1 Q.B.211 was a decision of the Divisional Court of the

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24 [1896] 1 Q.B.211. See 3.9 below.

Queen's Bench Division that probate duty was properly payable in respect of shares in certain railway companies constituted under the laws of divers of the States included in the United States of America, or under the laws of the United States. At the time of the death of Baron de Stern, such shares were marketable in England. The certificates for the whole of the shares in question were in England at the date of Baron de Stern's death, and were in his possession or in that of his agents or trustees. So far as appears from the report, the shares were neither registered nor capable of registration on any share register kept in England.

Wright J, with whom Kennedy J agreed "for the same reasons" said, at page 219:

> "There is in this country within the jurisdiction of the Ordinary (now the Probate Court) a document the existence of which vouches and is necessary for vouching the title of someone to the foreign share, so that in the absence of that document no one at all could establish a title to the share. It is found by the case that the certificates are currently marketable here as securities for that share and the dividends payable on that share; it is found, in fact, that the delivery of the certificate in this country *ipso facto* affects the title in a sense that it entitles the transferee to all the transferor's rights. It follows that the certificate itself has some operative power here, and it seems to me not to be within the ancient rule that a simple contract debt or mere evidences of a simple contract debt are supposed to exist only at the place of the debtor's residence. It being a marketable security operative, though not completely operative, to pass the title, and having a marketable value here, I think that it is itself a document which is a document of value in the hands of the executors within the jurisdiction of the Ordinary."

Hence, according to the Divisional Court, shares in a company are situate in the jurisdiction where the certificates for them are kept, provided that the shares are "marketable" there. This decision is completely contrary to the Privy Council authorities and is wrong in principle. First, it ignores *Attorney-General v Higgins*.[25] Secondly, it simply is not true that "in the absence of [the shares certificate] no one at all could establish a title to the share." Duplicate certificates could always be obtained. Nor was it " found by the case ... the delivery of the certificate in this country *ipso facto* affects the title in a sense that it entitles the transferee to all the

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[25] That may be partly explained by the executors having argued, at page 217 that "Shares in a company are locally situate where the head office is: *Attorney-General v Higgins; In the Goods of Ewing* (1881) 6 P.D. 19". In the latter case, Sir James Hannen, the President of the Probate, Divorce and Admiralty Division, had indeed made that statement, at the bottom of page 24, but merely as an illustration of a *chose in action* having a local situation. The case turned on the local situation of the right to have administered the estate of one who died domiciled in Scotland.

transferor's rights". Quite the contrary. It was agreed that in the special case

> "... where the indorsed transfer has been duly executed by the registered owners of the shares, the name of the transferee being left blank, delivery of the certificate in that condition by him or by his authority, with intent to transfer, transmits his title to the shares both legal and equitable.
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> "The delivery of the certificate, with the transfer executed in blank, 'passes the property' of the shares, but that statement must be qualified. The right of the holder is in the nature of a *jus ad rem*, and not of a *jus in re*. Delivery does not invest him with the ownership of the shares in the sense that no further act is required in order to perfect his right. Notwithstanding his having parted with the certificate and transfer, *the original transferor who is entered as owner in the certificate and register continues to be the only shareholder entitled to vote and draw dividends in respect of the shares* until the transferee or holder for the time being obtains registration in his own name. Such delivery, therefore, passes, not the property of the shares, but a title legal and equitable, which will enable the holder to have the shares vested in himself by registration in the books of the company without risk of his right being defeated by any other person deriving title from the registered owner.
>
> "...
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> "As between the parties to the transaction, the transfer is entirely completed by the delivery of the certificates as aforesaid, and the deliveree of the certificates can effectually transfer his interest by handing his certificates to another. *But the company, for the purposes of the right to vote, the receipt of dividends, and the other rights of shareholders, is entitled to have regard only to the registered shareholder*, and where a registered shareholder is indebted to the company the company can (if the debt from the shareholder became due to the company before the company had notice of the transfer of the share) refuse to register a transfer of the shares until the obligations of the shareholder have been satisfied."[26]

The Divisional Court missed the very point emphasised by the Privy Council in *R v Williams*, discussed at 3.5 above. It is irrelevant where the shares can be effectively dealt with as between the transferor and transferee of them. What matters is where the shares can be effectively dealt with as between the holder and the company.

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26 Italics supplied.

Thirdly, the decision proves too much. The ecclesiastical rules were intended to prevent clashes between different jurisdictions. Those rules make sense only if an item of property can be situate only in one jurisdiction at a time. The Divisional Court overlooked the fact that the shares were situate in the USA (whether because that was where the registers were kept or because, as was erroneously supposed by counsel for the suppliants to be the case, because the head offices were there) and therefore could not also be situate in England. As Cohen QC said in reply: "The certificates were not saleable in this country, and it was only the certificates which were here. It was the property in the shares that was saleable, and that is situate out of the country. The executors would be liable in America to pay probate duty in respect of that property".

One point which seems to have been largely ignored was that " none of the certificates of proprietorship of the shares were in the name of Baron de Stern, but all were in the names either of the firm of Stern Brothers or of other persons or firms. If all the bare trustees were resident in England and the trusts governed by English law, it was at least arguable that what Baron de Stern was entitled to at his death was an equitable interest in the shares and that that was situate in England. Provided that the executors obtained probate in England, they would then be in a position to compel the trustees to transfer the shares on the registers of the companies. That would not involve the executors obtaining probate in any state of the USA.

The nearest that the argument approached this point was where the Attorney-General said: ... " the testator was possessed of certificates which, as is found by the case, were transferable by delivery. The transfers of all the certificates had either been executed or could be executed by the persons in whose names the shares stood. It was not a case where his executors would have to do anything before transferring the shares".

While my own view is that, in the case of a trust governed by English law, an equitable interest in trust property has the same situs as the underlying trust property, especially where the beneficiary is absolutely entitled,[27] that is not entirely beyond argument.

At the date of the death of Baron de Stern, the forms of transfer and powers of attorney (which were indorsed on all the shares) had in regard to a large number of the shares been signed by the firms or persons in whose names the certificates of proprietorship were made out; but with regard to some of the shares of which the certificates were in the name of Stern Brothers the forms of transfer and powers of

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27 See *Re Clore Deceased* [1982] STC 25.

attorney indorsed upon them had not been signed by Stern Brothers at the date of Baron de Stern's death. No distinction was made in the judgments between the two categories of shares, so that the decision cannot be explained on the basis of endorsement *inter vivos*.

3.10 *In re Clark, Mckecknie v Clark*

Stern v The Queen was cited without disapproval in *In re Clark, Mckecknie v Clark* [1904] 1 Ch 294, although that was a case where shares in foreign companies could be registered either in England or overseas and the certificates were kept in England. The actual decision was consonant with *R v Williams*.

3.11 Conflict between Privy Council and English Authorities

Although *Stern v The Queen* has never been formally overruled, it is clear that it has long since ceased to be regarded as good law. It was cited in *R v Williams* but ignored by the Judicial Committee. In my view, the earlier English authorities would now be regarded even in England as plainly wrong in so far as they conflict with the Privy Council authorities. This, however, cannot be absolutely guaranteed. It might therefore be sensible for share certificates to be kept in the jurisdiction where the register is kept.

It might also be advisable to ensure that shares are registered in the name of the beneficial owner or, if the shares are held on the trusts of a settlement, in the names of one or more of the trustees. If legal title to the shares is to be vested in a nominee/ bare trustee shareholder, the nominee should not be a person resident, present or having a place of business in the United Kingdom and the bare trust should not be governed by the law of England or of any other part of the United Kingdom.

4 *Macmillan Inc v Bishopsgate Trust (No 3)*

4.1 The Background

Thus, the law as laid down in *Attorney-General v Higgins* could be regarded as conclusively established, having been so consistently followed since by courts of the highest authority. The view has been put forward, however, that the decision of the Court of Appeal in *Macmillan Inc v Bishopsgate Trust (No 3)*1996 1 WLR 387 has cast doubt on the traditional learning. Macmillan Inc ("Macmillan") had been legally and equitably entitled to shares in Berlitz International Inc, a company incorporated in the state of New York. The share register was maintained in that

state and legal title to the shares in question were apparently transferable only on that register. 106,000,000 of the shares had been transferred to Bishopsgate Investment Trust Plc ("Bishopsgate"), the first defendant, as nominee for Macmillan. While one gathers that Bishopsgate was a United Kingdom incorporated company, the trust agreement was governed by the law of New York. In breach of that trust agreement, Bishopsgate pledged the shares to the defendant banks in consideration of loans. Although the mechanics were different in each case, the shares were registered in the names of, or nominees for, the defendant banks so that they were purchasers for value of the legal title and the only question was whether they took subject to the equitable ownership of Macmillan. That depended on whether they had notice of Macmillan's rights. The defendants contended that the question of whether they had notice should be determined according to New York law, the reason being that under New York law the test is actual knowledge or suspicion and deliberate abstention from inquiry lest the truth be discovered; whereas under English law it is sufficient if the purchaser had reason to know or cause to suspect. The appeal concerned an agreed preliminary issue as to whether the claim was governed by New York law or English law.

Aldous LJ explained the rival claims, at page 417: "Macmillan submitted that their claim was based upon a restitutory obligation and that the law to be applied was English law as that was the law of the place where the benefit was received", That submission was unanimously, and rightly, rejected. The claim to "restitution" was no more than a claim to a continued beneficial ownership and the real question was who had beneficial title to the shares and/or what the priorities were as between them.

Aldous LJ further stated, at page 418: "The defendants submitted that the dispute between the parties concerned the title to the shares and in particular it was a dispute as to whether the plaintiffs or the defendants had the better title. That being so, New York law applied. However, the defendants did not agree as to the reason why New York law applied. Counsel for Shearson Lehman and Crédit Suisse[28] submitted that New York law applied because the appropriate law was the law of incorporation of Berlitz, the *lex situs*. Swiss Volksbank[29] on the other hand submitted that the appropriate law was that of *lex loci actus*,[30] being the law of the place where the transaction on which the assignee relied for priority over the claim of the original owner took place. That submission was accepted by the judge, who held that the

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28 The second and third defendants respectively.

29 The fifth defendant.

30 The law of the place of the transaction.

place where the transaction took place was the place of actual delivery of possession or transfer of title which created the security interest on which the particular defendant relied. Thus, as the shares claimed by Shearson Lehman and Swiss Volksbank were transferred in New York, New York law applied".

4.2 The Decision of the Court of appeal

The Court of Appeal disagreed with Millet J but held that in any case the relevant transaction was the transfer of legal title to the defendants, which occurred in New York, the law of which would thus still be the relevant law to apply if the matter was indeed governed by the place of the transaction.

No judicial decision is authority for a proposition which was not in dispute before it. No question arose, at least directly, in this case as to where the shares were situate in the sense of where legal title to them could be transferred, as between the shareholder and the company. It appears to have been common ground that legal title had been transferred and had been transferred in New York. The question was whether the transferees of the legal title took subject to the equitable rights of Macmillan.[31]

The way in which the judges recorded the contention of the defendants is very interesting. Aldous LJ, in the passage cited above, said that contention was that "New York law applied because the appropriate law was the law of incorporation of Berlitz, the *lex situs*". Hence, he was drawing no distinction between the two. Staughton LJ said, at page 397B-C: "The defendants are content with the judge's conclusions as they stand. But the preferred view of Shearson Lehman and Crédit Suisse is that the applicable law is the *lex situs* of the shares, or (if there is any difference) the law of the place of incorporation or where the register is kept. All these tests point to New York in this case. Swiss Volksbank on the other hand adopts the judge's solution as its primary case, but is content with the *lex situs* or the law of the place of incorporation as alternatives".

Given that the place of incorporation was also the place where the register was kept, the difference between the defendants was not vital in that case. The situs of the shares was on either view undoubtedly New York.

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31 Somewhat surprisingly, no one argued that the applicable law was that of New York because those rights arose under a trust agreement governed by New York law and no one argued that, as Equity acts in *personam*, it was the English rules which should apply to determine whether the conscience of the defendants was bound and the English court should therefore order them to transfer the shares to Macmillan.

The judges were unanimous in their decision to dismiss the Plaintiff's appeal but not in their reasoning.

4.3 Staughton LJ

Staughton LJ noted that the general rule, which is subject to exceptions, "appears to me to be that issues as to rights of property are determined by the law of the place where the property is". 399 F-G. He points out that that applies to land and chattels. The third category he considered was negotiable instruments, but decided it was not in point in the circumstances. He then considered *choses in action* in general and noted that the *lex loci actus* test was not applicable. Nor was the proper law of the assignment, (except as between assignor and assignee). He stated: "The law governing the right to which the assignment relates ... in the case of a debt points to the proper law of the contract or other obligation by which the debt was created". The reasoning is: "Since the law governing the creation of the right assigned determines the rights and obligations of the debtor that result from the assignment, it must also decide questions of priorities between competing assignments". He noted that "Situs is now replaced by the proper law of the contract by which the debt was created.[32] But with other monetary obligations the choice of "the law governing the creation of the thing approximates closely, in my opinion, to the *lex situs*".

Staughton LJ then went on to consider the special case of shares in a company. He said, at the bottom of page 404:

> "We were referred to a number of transatlantic cases. In some of them the question was decided by the law of the place where the certificates were, apparently on the ground that by the law of the place of incorporation the company was given power to issue certificates having that effect. Subject to that, the preponderance of authority is that the ownership of shares is to be determined by the law of the situs, which for this purpose is the place of incorporation. ... I conclude that an issue as to who has title to shares in a company should be decided by the law of the place where the shares are situated (*lex situs*). In the ordinary way, unless they are negotiable instruments by English law, and in this case that is the law of the place where the company is incorporated. There may be cases where it is arguably the law of the place where the share register is kept, but that problem does not arise today."

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32 Because the situs of a debt changes with the residence of the debtor, the *lex situs* "is thus rejected, because it is uncertain".

Staughton LJ was thus considering opposing arguments supporting (a) the *lex loci actus* and (b) the *lex situs*/of incorporation respectively. It did not matter in the case whether the *lex situs* was always the same as the law of incorporation, as the two were clearly the same. As Staughton LJ said: "Whether it be situs, place of incorporation or place of share register, the answer is the law of and prevailing in the State of New York". Staughton LJ expressly left open the possibility that the *lex situs* might not be that of the jurisdiction of incorporation if the share register were kept elsewhere. The following statement of his should be read in that light: "It seems to me that situs and incorporation have the advantage of pointing to one system of law which is very unlikely to be transient, and cannot be manipulated by a purchaser of shares in order to gain priority". This does not mean that the situs is always the jurisdiction of incorporation.

Hence, no doubt at all is thrown by the judgment of Staughton LJ on the traditional learning on registered, non-negotiable shares. In any case, just as in determining the law applicable to priorities where there has been an assignment of a simple debt, the situs of the debt has been rejected in favour of the law governing the creation of the debt, so too, there is something to be said that in the case of assignments of shares the law governing creation, i.e. the law of incorporation, should prevail over the law of situs. Yet this does not affect the question of situs.

4.4 Auld LJ

Auld LJ at page 411 said: "In my view, there is authority and much to be said for treating issues of priority of ownership of shares in a corporation according to the *lex situs* of those shares. That will normally be the country where the register is kept, usually but not always the country of incorporation. If the shares are negotiable, the *lex situs* will be where the pieces of paper constituting the negotiable instruments are at the time of transfer".

This could not be clearer and is perfectly consistent with the traditional learning.

4.5 Aldous LJ

It is only the judgment of Aldous LJ which might be thought to cast any doubt on the traditional learning. In setting out the issues he stated: "Counsel for Shearson Lehman and Crédit Suisse submitted that New York law applied because the appropriate law was the law of incorporation of Berlitz, the *lex situs*". It appears from the other judgments that they were not arguing that the *lex situs* was *ipso facto* the law of incorporation. Their principal argument was that the law of incorporation prevailed as being the law governing the creation of the shares. But *lex situs* was just

as helpful to them given that, as it happened, it was the same as the law of incorporation.

Aldous LJ, like the rest of the court, rejected the *lex loci actus* test and concluded: " The issue being one of priority, the law having the closest and most real connection must be New York law. That is the law which governs the right in dispute, namely the right to be placed on the register". That points to a place of incorporation test.

Aldous LJ said, quite correctly: "I have no doubt that the transferability of shares in a corporation, the formalities necessary to transfer them and the right of the transferee to be registered on the books of the corporation as the owner of the shares are all governed by the law of incorporation". After discussing the judgment of Millet J, he concluded: "I am of the view that the authorities indicate, rather than decide, that the appropriate law to apply when deciding whether one party has a better title to shares is the *lex situs,* that being the law of incorporation".

It is clear from the rest of his judgment that Aldous LJ was adopting a "jurisdiction of incorporation" test. Confusion arises because he refers to that as the *lex situs*. There are two explanations for this. The first is that, as there was no distinction between the *lex situs* and the law of incorporation on the facts of the case, and as the *lex situs* will normally be the law of incorporation, he was not considering those cases where the two are different. In this already complex appeal, there would have been no point at all in counsel raising the distinction.

The second explanation is that he was using *lex situs* in a different sense from that used in the line of authority stemming from the ecclesiastical and probate courts. Evidence for this is his citation from *Braun v The Custodian* [1944] 3 D.L.R. in which Thorson J said: "It is, I think, a sound rule of law that the situs of shares of a company *for the purpose of determining a dispute as to their ownership* is in the territory of incorporation of the company, for that is where the court has jurisdiction over the company in accordance with the law of its domicile and power to order a rectification of its register, where such rectification may be necessary, and to enforce such order by a personal decree against it".[33]

To similar effect is his citation from *Jellenik v Huron Copper Mining Co* (1900) 177 U.S. 1, a case decided in the US Supreme Court: "As the habitation or domicile of the company is and must be in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, *whenever it is sought by suit to determine who is its real*

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33 Italics supplied

owner".[34]

What Aldous LJ derived from these judgments was that "shares are property which is situated in the country of incorporation and it is the law of that country which should be applied when determining questions of ownership." By "situated in" he means no more than "created and having their being under the laws of". He is not asking the question which the probate lawyers asked: "Where could the shares be effectively dealt with?".

4.6 Author's View

Now the reasoning of Aldous LJ is perfectly respectable. The case was concerned with which system of law was to apply to the issue of transfer of equitable title to shares in a company created under the law of a certain state. A corporation is an artificial legal entity, having no parallel in the natural world, and exists only under the laws of a particular state, being recognised by the laws of other states, such as the jurisdictions of the United Kingdom, out of international comity. The same is true of shares in it. It is quite unlike tangible property which has an existence in the natural world independently of any legal system. One would*prima facie* expect the question of transmission of title to the shares to be governed by the law of the state of incorporation as the shares, being rights in and over the fictional entity, themselves depend for their existence on the law of that state.

Shares, although *choses in action*, are different in some respects from other types of *choses in action*, such as debt claims. While a debt claim must, of course, be recognised under at least one system of law for it to constitute a legal right, such claims are recognised by all legal systems and, one imagines, were recognised by even primitive systems. The same is also true by and large of contractual rights. Nearer to the case of a share in a corporation is intellectual property, which does not exist – "naturally" and which depends for its existence on the law of a state which decides to create it. Of course, intellectual property is superficially unlike a share in that it can subsist in many jurisdictions; yet, on a true analysis, one finds that there are as many intellectual property rights as there are jurisdictions, e.g. my right that no one should breach my copyright by printing my book in France is a different right from my right that no one should print my book in England.

What is perhaps not so obvious is whether one extinction of equitable title should be governed by the law of the place of incorporation. It is well established that, as Equity acts in *personam*, the English courts can apply the English law of trusts to foreign situate property. There was no real discussion of this point in the

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[34] Italics supplied.

judgments. One reason might be that the proper law of the nominee agreement, and therefore of the trust, was expressed to be that of New York. On one view, that was determinative of what constituted notice and the argument before the English courts was misconceived. None of his, however, affects the question on which I am asked to advise.

This approach, under which the law of incorporation determines the situs of the shares in the company because it determines the nature of those shares, is one endorsed by the Privy Council in *Brassard v Smith*. While one can readily agree with Aldous LJ that the law of incorporation governs both priorities on transfer of shares and their situs, it does not follow that in every case and for every purpose the situs is the jurisdiction of incorporation.

To my mind, one cannot seriously consider that *Macmillan v Bishopsgate* throws any doubt on the traditional learning on the situs of shares, at least for the purpose of probate and capital taxes. The correctness of the classic test simply did not arise in the case and was not argued. *Attorney-General v Higgins*, *Brassard v Smith* and *Erie Beach Co*, *Rex v Williams* and *Stern v The Queen* were neither referred to in the judgments nor cited in argument, although they were referred to in the skeleton arguments. None of the other cases I have referred to above was even so referred to.

Auld LJ expressly endorsed the classic "place where the register is kept" test. Staughton LJ carefully state that "in the ordinary way", the *lex situs* is the law of the place where the company is incorporated and noted "There may be cases where it is arguably the law of the place where the share register is kept, but that problem does not arise today". And while Aldous LJ did not express himself so carefully, the most that he decided was that for the purpose of determining priorities on a transfer of shares, it is the law of incorporation which is to be applied and that the law of the place where the shares can be effectively dealt with is immaterial.

The traditional learning has been laid down on several occasions by the Privy Council and followed by English courts from the 1920's. It is to my mind inconceivable that the English courts of today would regard it as having all been overturned by incautiously worded *dicta* of Aldous LJ in relation to quite another issue.

5 View of Capital Taxes Office

I note that the Capital Taxes Office appears to take the same view, in its Advanced Instruction Manual, Chapter S:

> "S.16. Inscribed and registered securities
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> "S.16.1. General rule
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> "The locality, for Inheritance Tax purposes, of inscribed and registered securities is governed by the situation of the register, entry upon which is necessary to complete the title of the owner of the security: see *Att Gen v Higgins* [1857] 2 H and N 339. ...
>
> "It is immaterial, for this purpose, that the business of the company may be wholly administered outside the country in which the register is kept: see *Baelz v Public Trustee* [1926] Ch 863.
>
> "S.16.2. Branch registers
>
> "When a company has more than one register, any stocks and shares registered on a branch register and transferable only by a change therein, are situate in the place where that register is required by law to be kept – not in the place of the head office of the company – see *Brassard v Smith* [1925] AC 371. 'The true test', per Lord Dunedin, at p 376, is 'where could the shares be effectively dealt with?': the last three words were explained by Viscount Maughan in *R v Williams* [1942] AC 541 at p 558 as meaning 'effectively dealt with as between the shareholder and the company, so that the transferee will be legally entitled to all the rights of a member'."

As James Kessler says: "The Revenue Manual tactfully ignores [*Bishopsgate*]".