IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 13 Original

STATE OF TEXAS,

Plaintiff,

vs.

STATE OF NEW JERSEY, *et al.,*

Defendants.

EXCEPTIONS OF THE STATE OF NEW JERSEY TO THE MASTER'S REPORT AND SUPPORTING BRIEF

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EXCEPTIONS TO THE MASTER'S REPORT

Defendant, State of New Jersey, by Arthur J. Sills, Attorney General of the State of New Jersey, respectfully excepts as follows to the report of the Special Master:

I.

As to the Master's Recommended Conclusions of Law

1. The Master erred in recommending conclusion #10 (p. 20), that the "last known address of the creditor as appearing on the books of the debtor corporation is adequate and sufficient to establish the residence of the owner of the intangible property for escheat purposes." The Master should have recommended the conclusion that the last known address of the creditor, placed on the records

of Sun from 7 to 40 years ago, cannot be equated with either the domicile or residence of the creditor, especially in view of the fact that Sun's attempts to make payment to the creditor at that address have been unsuccessful.

2. The Master erred in recommending conclusion #2 (p. 18) as a general proposition of law, that "only one state has power to escheat" both tangible and intangible property. However, we contend that in the case at hand only the State of New Jersey, the domicile of Sun, has the prior or superior right to escheat the property held by Sun, and the Master erred in not so concluding.

3. The Master erred in recommending conclusion of law #9 (p. 20), which is as follows:

> "9. Justice and equity would seem to require that intangible property, sought to be escheated by a state, be located in the state of last known address of the owner thereof, rather than at the residence of the debtor who has no interest in such property."

The Master erred in not finding that established principles of law and the equities and convenience in the administration of justice require the finding in this case that only New Jersey, Sun's domicile, has the power to take possession of the unclaimed intangibles held by Sun. Under the New Jersey Custodial Statute the property is first taken into custody and is later escheated unless the person entitled to the property or another state establishes a superior right thereto.

4. The Master's recommended conclusion #13 (p. 20) is as follows:

> "13. No party to this action has power or jurisdiction to escheat the property in the action owned by persons who left no last known residence or address. Only

> New Jersey, the domiciliary residence of the debtor corporation, has power and jurisdiction to require payment of the debts representing such property under its custodial statute."

We respectfully submit that the Master erred in the first sentence of the above recommended conclusion by holding that no state in this action has power or jurisdiction to escheat the property which was owned by persons who left no known residence or address. We agree with the second sentence of recommended conclusion #13, namely, that only New Jersey, under its custodial statute, has the power and jurisdiction to require payment of the debts representing such property. However, we also contend that New Jersey has the power not only to take custody of such property but to escheat same, that is, to perfect title thereto and retain the same permanently.

5. The Master erred in recommending conclusion #4 (p. 19) by saying that, "All intangible property results from a debtor-creditor relationship" and that the "debtor has no proprietary interest in the intangible property." This led to other erroneous recommended conclusions of the Master, numbered 7, 8, 11, 12 and 13. In the main these conclusions result from the Master's view that only the state where the creditor once had an address is the present situs of the intangible property and, therefore, the only state that has legal power and jurisdiction to escheat that asset. The Master erred in not recognizing that the property in question is now ownerless property, that the residence and domicile of the persons who were once entitled to the property are now unknown and that the only certain fact of today's whereabouts of the property is that the property has been commingled with the general assets of Sun. Those assets can surely be reached in New Jersey, the only permanent location of that corporation. Unless custody is taken by a state, Sun could acquire a proprietary

interest in the property since it has possession thereof and, by passage of time, such possession may ripen into ownership.

II.

As to New Jersey's Offer of Exhibits

The Master erred in rejecting the offer in evidence by New Jersey of certain exhibits to be made part of the record. See Findings of Fact, #XIX, pp. 17-18. These exhibits were numbered one to five for identification.

Exhibit number five was a copy of the report of unclaimed property made by Sun Oil Company to the State of Texas on which the within action is predicated. No objection by any party in this action was made to the offer of these exhibits. The Master did not say this report was irrelevant or immaterial; he rejected it on the ground that it "served no useful purpose and would only confuse what was clearly set out in the agreed Stipulation of Facts."

Exhibits one to four were certified copies of judgments entered against Sun Oil Company some years ago in separate cases in the Superior Court of New Jersey in which certain intangibles not involved in this action were awarded to the State of New Jersey. Three judgments provided for custody and one judgment provided for escheat of the intangibles there involved. The Master considered these exhibits immaterial.

New Jersey contends that since the Master and this Court are sitting without a jury, there could be no prejudice in the admission of these exhibits. Moreover, the judgments were offered to show that New Jersey courts had adjudged property of the nature here involved to be subject to the New Jersey Custodial and Escheat Laws and the judgments furnished details for the general statement of fact to which all parties had stipulated. See Paragraph XVIII, p. 16 of Findings of Fact.

BRIEF

Statement of the Case

This is an original action commenced by the State of Texas (Texas) against the State of New Jersey (New Jersey), the State of Pennsylvania (Pennsylvania), and Sun Oil Company (Sun), a corporation organized and existing under the laws of the State of New Jersey and authorized to do business in every state of the United States and in foreign countries. By leave granted, the State of Florida (Florida) has intervened as a party defendant.

On September 21, 1961, New Jersey commenced an action against Sun under the New Jersey Custodial Escheat Statute, N.J.S. 2A:37-29, *et seq.*, by which New Jersey sought a judgment directing Sun to pay to the State Treasurer for safekeeping certain unclaimed wages, dividends, interest and other general cash obligations. (Prior to this date, New Jersey had obtained three judgments under this custodial Statute against Sun with respect to other unclaimed intangible obligations of Sun.)

Thereafter, on November 7, 1961, the State of Texas enacted an escheat law, Article 3272(a), Title 53, Vernon's Civil Statutes of Texas. On or about April 28, 1962, the State of Texas commenced the within original action by the filing of a motion in this Court for leave to file a complaint. Texas alleged that it had an exclusive right to escheat certain unclaimed intangibles in the possession of Sun Oil Company and sought to enjoin the prosecution of the custodial action then pending in the State of New Jersey. By agreement between New Jersey and Sun, and without prejudice, the State of New Jersey, for the sole purpose of expediting the disposition of the complaint of Texas, volun-

tarily obtained an order in the New Jersey Superior Court staying further proceedings therein until the disposition of the within matter.

The intangible personal property alleged to be involved in this action, more particularly described in the stipulation of counsel filed in this cause, consists of cash claims for:

(a) Wages for services performed in Texas, Louisiana, and Arkansas by employees of Sun whose last known addresses on the books of Sun were either in (a) Texas, (b) states other than Texas or (c) unknown. Said last known addresses were placed on Sun's books before December 31, 1954, and Sun has been unable to pay these claims since said date.

(b) Supplies purchased and services rendered in Texas, Louisiana, Arkansas, California, and Mississippi by persons whose last known addresses on the books of Sun were either in (a) Texas, (b) states other than Texas or (c) unknown. Said last known addresses were placed on Sun's books before December 31, 1954, and Sun has been unable to pay these claims since said date.

(c) Employees' expenses and other miscellaneous minor fees and charges incurred in Texas and 20 other states by employees of Sun whose last known addresses on the books of Sun were either in (a) Texas, (b) states other than Texas or (c) unknown. Said last known addresses were placed on Sun's books before December 31, 1954, and Sun has been unable to pay these claims since said date.

(d) Royalties on gas and oil production from lands in and rental on leases on lands in Texas, Louisiana, New Mexico and Mississippi, payable to various persons whose last known addresses on the books of Sun were either in (a) Texas, (b) states other than Texas or (c) unknown. Said last known addresses were placed on Sun's books before December 31, 1954, and Sun has been unable to pay these claims since said date.

(e) Mineral proceeds on production from land and leases in Texas, Louisiana, New Mexico and Mississippi payable to various persons whose last known addresses on the books of Sun were either in (a) Texas, (b) states other than Texas or (c) unknown. Said last known addresses were placed on Sun's books before December 31, 1954, and Sun has been unable to pay these claims since said date.

(f) Dividends on the common stock of Sun payable to persons whose last known addresses on the books of Sun were in Texas. Said last known addresses were placed on Sun's books before December 31, 1954, and Sun has been unable to pay these claims since said date.

(g) Deductions from wages for the purchase of war bonds payable to employees hired in Pennsylvania whose last known addresses were in Texas. Said last known addresses were placed on Sun's books before December 31, 1954, and Sun has been unable to pay these claims since said date.

(h) Cash, the exact nature of the claim being unknown, payable by Sun through its mid-continent division office in Tulsa, Oklahoma to persons whose last

known addresses on the books of Sun were in Texas. Said last known addresses were placed on Sun's books before December 31, 1954, and Sun has been unable to pay these claims since said date.

(i) Stock dividends for which stock script certificates for fractional shares of capital stock of Sun were issued in the name of stockholders whose last known addresses on the books of Sun were in Texas. Said last known addresses were placed on Sun's books before December 31, 1954, and Sun has been unable to pay these claims since said date.

Sun attempted to make payment of the foregoing claims as follows:

1. In the cases of (a) wages and (b) employees' expenses, fees, and charges, by hand delivery of checks, if possible, or by mailing a check to the last known address. The checks were either (a) not delivered, (b) returned to the company or (c) never presented for payment.

2. In the case of (a) supplies purchased and services rendered, (b) royalties on gas and oil production and (c) cash dividends on common stock, by mailing checks to the last known address of the person entitled, if an address was known. The checks were either (a) not delivered, (b) returned to the company or (c) never presented for payment.

3. In the case of unclaimed payments for deductions from wages and uncashed checks issued by the Company in Tulsa, Oklahoma, the nature of the underlying transaction being unknown, Sun's records do not now reflect what efforts were made to attempt payment of these claims.

4. In the case of unclaimed stock dividends, for which stock script certificates for fractional shares were issued,

by mailing the stock script certificates to the last known address of the shareholder, all of which certificates were returned undelivered and are now in the possession of Sun and are held at their principal executive office in Philadelphia, Pennsylvania.

Follow-up efforts by Sun, particularly in the case of cash dividends and stock script certificates, were unsuccessful in locating the person entitled.

New Jersey resists the claim of Texas on the ground that in the face of these conflicting claims by several states the unclaimed property held by Sun which is subject to the New Jersey law can have its situs as unclaimed personal property for escheat or custodial purposes only in the fixed and permanent location of the corporation, which in this case is its domicile in New Jersey. New Jersey contends that neither Texas, Pennsylvania nor Florida has a superior claim to escheat or take custody of the funds in the light of the factual situation presented.

New Jersey's claim is based upon Articles 2 and 3 of Chapter 37, Title 2A, New Jersey Statutes (N.J.S. 2A:37-11 *et seq.*). Article 2 provides that where the owner of any personal property within the State has been unknown for 14 years or when his whereabouts has been unknown for 14 years or when the property has been unclaimed for 14 years, the property shall escheat to the State. Article 3 provides for the custody of moneys payable as dividends, interest, wages and other general cash obligations to unknown persons or persons whose whereabouts have been unknown for 5 successive years or which have remained unclaimed for said period. Notice of the taking for custody is mailed to the last known address of the owner and the Attorney General of another state if the address is in another state. If the property is not claimed within two years after notice, it is escheated, but may be reclaimed

with interest at 2% within 7 years after date of entry of escheat judgment by a claimant entitled thereto who did not have actual knowledge of the action for escheat.

Texas claims the property is subject to escheat only in Texas on the grounds that it is personal property held within Texas or held without Texas for a person or beneficiary whose last known residence was in Texas and because of the business operations conducted by Sun in the State of Texas.

Pennsylvania claims on the grounds that the property is within or subject to the control of Pennsylvania because Sun presently has its principal executive office in Pennsylvania and conducts extensive business operations in Pennsylvania.

Florida claims a small number of the items of unclaimed property involved on the grounds the claims were payable to some persons whose last known address was in the State of Florida.

By order of this Court, dated February 25, 1963, the Honorable WALTER A. HUXMAN was appointed Special Master.

After a preliminary conference with the Master on April 18, 1963 at Topeka, Kansas the parties stipulated in writing so much of the facts as was possible to expedite the proceedings. The parties submitted briefs, and oral argument was presented to the Master in Topeka, Kansas on October 10, 1963. No testimony was taken. At the oral argument New Jersey offered in evidence, for the record, a copy of the report by Sun to Texas on which this action is predicated and certified copies of four judgments of the Superior Court of New Jersey in favor of New Jersey against Sun for custody and escheat of intangibles not involved in this action. The offer of this

evidence was not objected to by any of the other parties in the action. Nevertheless, the Master rejected the offer by New Jersey.

The Master has submitted his report and it has been ordered filed by the Court.

Summary of Argument

Sun Oil Company (Sun), incorporated in New Jersey, does business in New Jersey and in other states and foreign countries. In September, 1961, New Jersey commenced an action under its Custodial Escheat Statute to take for safekeeping various unclaimed wages, dividends and other general cash obligations held by Sun for more than five years. Thereafter, in November, 1961, the State of Texas (Texas) enacted an escheat law calling for a report of all unclaimed property held for 7 or more years which may be subject to escheat by that state. Pursuant thereto Sun filed its report with Texas of unclaimed intangible obligations which became the subject of this action.

The report shows nearly two thousand separate intangible obligations between 7 and 40 years of age owed by Sun to persons whose last known address was in Texas, whose last known address was in states other than Texas and whose last known address was unknown on the books of Sun. The obligations included unclaimed cash dividends on common stock of Sun, unclaimed wages, stock dividends and various other general obligations of the corporation.

This action was commenced by the State of Texas to claim a prior right to the intangibles over the conflicting claims of New Jersey, the domicile of Sun, as well as Pennsylvania, the state where Sun presently maintains its principal executive offices. The State of Florida intervened claiming the right to escheat certain obligations to persons who, seven or more years ago, had a last known address in Florida.

At common law property which had become ownerless was taken by the sovereign by the doctrine of *bona vacantia.* The escheat by the state of ownerless property is an outgrowth of this doctrine. This doctrine applies to intangible as well as tangible personal property which is taken by the state when such property has remained unclaimed for a sufficient period of time as to become presumptively without an owner. Note, *Origins and Development of Modern Escheat,* 61 Col. L. Rev. 1319, 1332 (1961).

The issue in this case is to determine which state of those claiming the property in this action has the prior or superior right to claim such property. In recommending an answer to this question the Master applied the common law doctrine of *mobilia sequuntur personam* in order to find the situs of the property. Under this doctrine the situs of personal property is deemed to be at the domicile of the owner. The Master then erroneously confused residence with domicile and then equated "last known address" on the books of Sun with residence of the creditor. Thus the Master recommended several erroneous propositions of law, namely, that Texas has exclusive jurisdiction to escheat intangible property "owned by persons whose last known residence or *address* was in Texas" (emphasis added) and that no state has power to escheat the property held by Sun for persons "who left no last known residence or address." See p. 20, Report of the Special Master. These conclusions followed the reasoning that situs of the property is in Texas or some other state where the creditor had his last known address, and that the situs of the obligation is not where the corporate debtor is located.

But, the doctrine of *mobilia sequuntur personam* is inapplicable here because there is no evidence in this case to establish the domicile of the persons to whom Sun owes these intangible obligations. To establish domicile,

residence in fact must be shown coupled with the purpose to make the place of residence one's permanent home. *Texas* v. *Florida,* 306 U. S. 398 (1939).

Sun's report to Texas establishes clearly that in many cases the last known address could not have been a place of residence. For example, the report filed by Sun shows that the last known address of many creditors was a post office box or a mailing address in care of a bank or some company. There was no proof introduced of any kind to show that any one last known address was actually a home or residence, and there was no stipulation of fact describing the nature of any place whose address was shown on the books of Sun.

Assuming that personal property follows the domicile of the creditor, the fact that Sun was unable to make payment of the obligation to the creditor at that last known address tends to prove that such address is not the present domicile of the creditor, that is, is not the permanent dwelling place of the creditor. There is, in fact, no proof that the creditor is alive today; nor is there any proof that, if he died, he left heirs or who his heirs may be or where they may live. For this reason we say the property is ownerless; the property may be escheated because it has no owner; and until an owner appears or is found, we cannot know his domicile.

Thus, the taking here must be from the obligor, the holder of ownerless property, and the last known address must be rejected as a basis for the primary exercise of jurisdiction to take custody or to escheat ownerless property. *See: State* v. *American Sugar Refining Co.,* 20 N. J. 286, 119 A. 2d 767 (1956); *In re Menschefrend's Estate,* 283 App. Div. 463, 128 N. Y. S. 2d 738 (App. Div. 1954), *aff'd,* 8 N. Y. 2d 1093, 170 N. E. 2d 902 (Ct. of App. 1960), *cert. denied,* 365 U. S. 842 (1961); *In re Rapoport's Estate,*

317 Mich. 291, 26 N. W. 2d 777, 782 (Sup. Ct. 1947), *cert. denied sub nom, California v. Michigan Bd. of Escheats,* 332 U. S. 764 (1947); *In re Hull Copper Co.,* 46 Ariz. 270, 50 P. 2d 560, 563, 101 A. L. R. 664 (Sup. Ct. 1935).

In taking ownerless property from a corporation not entitled to keep said property, the state that should have the prior or superior right to the taking is the state of incorporation. That state is the domicile of the corporation. The general obligations of the corporation always have their permanent situs in the state of incorporation. This rule provides certainty and simplicity in the application of escheat laws where there are conflicting claims among states. The corporation can always be sued in its state of incorporation. This is the most convenient rule for the corporation, involving a minimum of expense in filing a report of escheatable funds in one state and in not being subject to multifold actions for the escheat of small but numerous obligations owed to persons whose addresses may be located in many states. We respectfully submit that these contentions are supported by the report filed in this case showing approximately two thousand separate obligations totalling less than $40,000, averaging less than $20.00 per item. See p. 8, par. XVII, Report of the Special Master.

Moreover, it is noted that under the Escheat Statute of Texas upon which this action is based Texas is not entitled to any of the funds. The Texas Statute by its very terms applies to personal property held within the State of Texas and to personal property which is held "without the State for a person or beneficiary whose last known *residence* was in this State." Article 3272a, Section 1(b), Title 53, Vernon's Civil Statutes of Texas (emphasis added).

The Attorney General of Texas has recognized that the Texas statute lays claim to personal property held outside of the State of Texas only for persons "whose last known residence" was in Texas. See Brief on Motion of Texas for Leave to File Bill of Complaint, p. 11.

The stipulation of facts indicate that the property in question is outside of Texas. Where obligations are unclaimed for a period of four years, they are no longer treated on Sun's books as obligations but are taken into income, and the corporation exercises dominion of ownership over the property. See pages 13 and 14, Report of the Special Master. Under the rule that the situs of property is at its owner's place of domicile, the property in question is in New Jersey, the corporation's domicile. The property has now become part of Sun's mass of intangible assets.

It is immaterial that some checks had been issued at one time on a bank in Texas in attempted payment of the original obligations. A check that is unpaid is not considered payment of an obligation. Therefore, the original obligation remains unpaid and is the intangible here involved which is held by Sun as part of its mass of property.

ARGUMENT

POINT I

As the state of incorporation of Sun, New Jersey has the superior right to take ownerless intangible property held by Sun, and no other state can establish that it is the domicile of the persons, if any, who may be entitled to the property.

A. Neither Texas nor any other state has proved that it is the place of domicile or residence of the persons to whom Sun's obligations were originally payable.

In his recommended conclusions of law, the Master stated:

> "Inherent in the power to escheat is the location of property within the borders of the jurisdiction seeking to exercise such power." P. 18.

In trying to locate the property subject to this action the Master considered that the property followed the creditor and that:

> "The last known address of the creditor as appearing on the books of the debtor corporation is adequate and sufficient to establish the residence of the owner of the intangible property for escheat purposes." P. 20.

It is both factually and legally incorrect to equate the last known address shown on the books of Sun with the domicile or residence of a creditor, both as to the present as well as at the time when the last known address was placed on Sun's books.

A detailed report has been filed with the Treasurer of Texas, "on which this action is predicated and from which the Stipulation of Facts was prepared." *Report of Special Master,* p. 18. Nothing in this report shows that the address of any creditor therein was the actual residence or domicile of any creditor. The addresses have been referred to in the Stipulation of Facts merely as the "last known address," not as a residence or domicile. The report conclusively shows many instances where the address could not have been a residence or domicile as illustrated by the following items shown on said report:

Item No. This Report	*Name of Owner, Insured Beneficiary or Annuitant or Person Entitled to Property, and Identification Number or Reference If Available*	*Last Known Address of Owner*	*Date Property Became Payable, Demandable or Returnable*	*Date of Last Transaction with Owner*	*Value or Amount due Owner*
		UNCASHED CHECKS			
78.	Guidry, Chas. L.	P.O. Box 42 Carenco, La.	11/22/50	11/22/50	4.50
81.	Hite, George E. 3rd & Chas. S. Mallory Trustee under will of Robt. Mallory 417669	120 Broadway* New York 5, N. Y.	11/15/51	11/15/51	318.14
87.	Miller, Lillie 618303	Box 453 Seaside, Calif.	8/ 8/51	8/ 8/51	4.78
112.	Whitney, Lydia et al	c/o Philip Grossman—1st Wisc. Trust Co. Milwaukee, Wisc.	3/10/54	3/10/54	66.50
		GULF COAST PRODUCTION DIVISION— UNCLAIMED LEASE RENTAL CHECKS			
3.	Jacobsen, Erik Holgen	Bank of America, Portola Branch, San Francisco, Cal.	11/ 6/41	11/ 6/41	10.00

4.	Jacobsen, Mrs. Marian R., Jacobsen, Josephine I., Jacobsen, Carl E., & Jacobsen, Dorothy L.	Bank of America, Portola Branch, San Francisco, Cal.	11/11/42 11/19/42	11/19/42	20.00
5.	Walker, Inez M. & Husband, Walker, Warburton W.	Midway National Bank of St. Paul, St. Paul, Minn.	5/16/40	5/16/40	21.20
		GULF COAST PRODUCTION DIVISION— UNCLAIMED OIL AND GAS PURCHASE ROYALTY CHECKS			
59.	House, Wilson & House	604 Dallas Bank & Trust Co. Bldg., Dallas, Texas	12/2/39	12/ 2/39	8.91
		UNCLAIMED CASH DIVIDENDS ON COMMON STOCK			
85.	Baker, B. B.	P.O. Box 352, Greggton, Tex.	9/10/54 12/10/54	12/10/54	.50
86.	Hamilton, Mrs. Clara B.	c/o Sun Oil Co., Box 2880 Dallas, Texas	12/10/54	12/10/54	3.25
88.	Huckabee, John Jr.	Box 131, Selman City, Texas	6/10/54	6/10/54	.25

* This is a well-known office building near Wall Street, in New York City.

Domicile has been defined as follows:

> "Domicile is a word used to express the legal relation existing between a person and a particular place or territory. Such relation arises by residence in the place or territory accompanied by intention to remain for an unlimited time, or it is created by operation of law as in case of birth, minority or marriage." *Keenan, A Treatise on Residence and Domicile,* p. 60 §26 (1934)

Domicile is a question of fact and intent. Residence in fact, coupled with the purpose to make the place of residence one's permanent home, are the essential elements of domicile. *Texas* v. *Florida,* 306 U. S. 398, 424 (1939).

As shown above, many of the last known addresses on the books of Sun could not have been a residence, much less a domicile, at the time the obligations accrued from 7 to 40 years ago. Nor is there any proof in the record of the present whereabouts of the persons whose names are listed on Sun's report to Texas. The fact that Sun has been unable to make payment of these obligations at the last known address strongly indicates that the persons are no longer at that address. A permanent removal from any such address, or a removal from an established domicile without a showing that the removal is temporary, would establish a change of domicile. *Burr's Adm'r.* v. *Hatter,* 240 Ky. 721, 43 S.W. 2d 26, 28 (Ct. Appeals Ky. 1931). In any case it is sufficient to say that the record is absolutely barren of any proof that the addresses were ever or are now the residence or domicile of the persons involved.

A comparable situation was presented in *State* v. *American Sugar Refining Company,* 20 N. J. 286, 119 A. 2d 767 (1956). There New Jersey sought to escheat unclaimed

dividends payable to stockholders of American Sugar Refining Company, a New Jersey corporation, with extensive business operations in the State of Massachusetts. Massachusetts intervened and asserted that under its escheat statute it had a superior right to those unclaimed dividends which were payable to persons whose last known address on the books of American was in Massachusetts. The Supreme Court of New Jersey denied the claim of Massachusetts. In its opinion the Court cited Judge TAFT's Opinion in *Conner* v. *Miller,* 154 Ohio St. 313, 96 N. E. 2d 13 (Sup. Ct. 1950) for the proposition that a last known address may or may not have been a place of residence, let alone a place of domicile. Massachusetts contended that stockholders whose last known address was in Massachusetts "were and are domiciled there and that Massachusetts as the domiciliary state has 'a superior right over that of New Jersey to final escheat.' " 20 N. J. at 294 *et seq.,* 119 A. 2d 771 *et seq.* The New Jersey Supreme Court then said in language appropriate to the case at hand:

> "The burden of establishing the Massachusetts domicile rests with Massachusetts as the intervening claimant; on the record before us we believe that it has not carried its burden. See *State* v. *Otis Elevator Co.,* 10 N. J. 504, 510 (1952); *State* v. *Otis Elevator Co.,* 12 N. J. 1, 20 (1953). *Cf. In re Seddon's Estate,* 110 Colo. 528, 136 P. 2d 285 (Sup. Ct. 1943); 28 *Notre Dame Law,* 416 (1953). The last known addresses which were recorded on the books of the corporation had little relation to domicile; as Judge Taft aptly remarked in *Conner* v. *Miller,* 154 Ohio St. 313, 96 N. E. 2d 13 (Sup. Ct. 1950), a last known address may or may not have been a place of residence, let alone a place of domicile. See *State* v. *Garford Trucking, Inc.,* 4 N. J. 346, 353 (1950); *State* v. *Benny,* 20 N. J.

238 (1955). In the instant matter many of the last known addresses were obviously places other than residences and the remainder may or may not have been residences. Decades have elapsed since the dividends were declared in 1935 or prior thereto (some were declared as early as 1891) without any claims by their owners or any information whatever as to their owners' whereabouts. It seems more than likely that those who may originally have had Massachusetts domiciles terminated them long ago (*cf. State* v. *Western Union Telegraph Co.*, 17 N. J. 149, 158 (1954)); in any event it can hardly be said that there was any realistic showing that the interested stockholders were and are domiciled in Massachusetts. Compare *Note, Escheat of Corporate Dividends,* 65 Harv. L. Rev. 1408, 1414 (1952):

> " 'The first objection to escheat to the state where the shareholder lives is that by hypothesis it is unknown. Usually there is no way to tell whether the last known shareholder has died or sold his shares. Moreover, the current residence of even the last recorded owner may be unknown. Since a man who has remained in or near the same community can be more easily located than one who has moved a substantial distance, it is likely that the shareholder no longer resides in his old state. Thus there certainly seems no reason to assume that the state of the last known residence of the last known owner has any connection with the present shareholder. Indeed, it is even doubtful whether over a large number of cases the amounts escheated to the various states would be related to the number of shareholders residing in each state.'

"In furtherance of its contention that it has a superior right, Massachusetts asserts that it and not

New Jersey has 'an *in personam* jurisdiction over the owners of the dividends.' Its assertion assumes that the dividend owners were originally domiciled in Massachusetts and that a presumption may be indulged in as to the continuance of their domiciles in Massachusetts. But, as has already been indicated, the acknowledged circumstances support neither the basic assumption of domicile nor the presumption of continuance. The incontrovertible fact is that the only established connection between Massachusetts and the last known owners of the unclaimed dividends is that their last known mailing addresses, recorded many years ago on the books of the company, were somewhere in Massachusetts. Realistically viewed, that connection is hardly as significant as that of New Jersey, which as the state of incorporation, always has had the comprehensive power to deal in New Jersey with the relations between the corporation and its stockholders, both resident and non-resident. See *Merola* v. *Fair Lawn Newspaper Printing Corp.*, 135 N. J. eq. 152, 156 (E. & A. 1944); *Andrews* v. *Guayaquil & Quinto Railway Co.*, 69 N. J. Eq. 211 (Ch. 1905), affirmed 71 N. J. Eq. 768 (E. & A. 1906). *Cf. Standard Oil Co.* v. *State of New Jersey, supra.*''

B. The rule of *mobilia sequunter personam* cannot be applied to place situs of the property in the state of last known address of the person to whom the property was payable.

The rule of *mobilia sequunter personam* is that personal property has its situs at the domicile of the owner. *Blodgett* v. *Silberman*, 277 U. S. 1 (1928); *Baldwin* v. *Missouri*, 281 U. S. 586 (1930). The Master seems to have applied this rule as well as equitable principles to reach the conclusion (p. 33) that, ''Justice would seem to require'' that the situs of intangible property for escheat purposes ''be

fixed at the residence of the creditor of such property. It is his property; it belongs to him. Ordinarily, he has in his possession evidence of such property."

But the rule cannot apply in the case at hand. It has been clearly demonstrated in Point A above that there is no proof in the record of either domicile or residence.

Following the conclusion that the situs of intangible property is fixed for escheat purposes at the residence or last known address of the creditor of such property, the Master was forced to conclude that where a last address is unknown no state could escheat the property held by Sun. The Master stated, at p. 34:

> "The adoption of this rule would, of course, mean that no state could escheat property of creditors whose last address was unknown."

In the case at hand, many obligations of Sun are payable to persons whose addresses are unknown and are not shown on the books of Sun nor in the Report to Texas. Under the Master's concept this property could not be escheated by any state. Moreover, since we have established that last known address cannot be equated with residence or domicile, the whereabouts of all the claimants are now unknown and unproved in this action, and, by the Master's reasoning, none of the subject property could be escheated by any state.

The Master did recognize that although the property could not be escheated from Sun in any state, a state such as New Jersey could take custody of the property and hold same subject to the claim of a rightful owner. See p. 34. However, the Master's conclusion that the state does not have power to escheat for all time property held by a corporation and persons whose address or existence is unknown is contrary to established law. *Christianson* v. *King County,* 239 U. S. 356 (1915); *Hamilton* v. *Brown,*

161 U. S. 256 (1896); *Standard Oil Co.* v. *New Jersey,* 341 U. S. 428 (1951); *Security Savings Bank* v. *California,* 263 U. S. 282 (1923); *United States* v. *Klein,* 303 U. S. 276 (1938).

As stated by this Court in the *Standard Oil* case, *supra,* 341 U. S. at 438:

> "Escheat is permitted against the persons whose addresses or existence is unknown * * *."

C. Where property is ownerless and where the residence or domicile of the persons last entitled thereto are unknown, the domicile state of the debtor has the superior right to escheat the unclaimed intangible obligations.

Ownerless personal property is subject to the sovereign power of appropriation. Property of this nature has been classified historically as *bona vacantia.*

Originally the doctrine of *bona vacantia* applied in the main to tangible personal property. By reason of changing economic conditions there has been a shift of emphasis in the application of this doctrine to items of intangible personal property which today tend to have a more important value than stray animals and shipwrecked cargoes. Note, *Origins and Development of Modern Escheat,* 61 *Col. L. Rev.* 1319, 1332 (1961).

No matter what place the historical development of the doctrine of *bona vacantia* may play in supporting the sovereign power of a state to dispose of unclaimed personal property, the underlying principle is that the property does not have an owner. In *Standard Oil Co.* v. *New Jersey,* 341 U. S. 428, 435, (1951) this Court stated:

> "* * * We need not consider whether a state possesses inherent power for such legislation as to personalty as the successor to a prerogative of royal sovereignty.

> "As a broad principle of jurisprudence rather than as a result of the evolution of legal rules, it is clear that a state, subject to constitutional limitations, may use its legislative power to dispose of property within its reach, *belonging to unknown persons.*" (Emphasis added).

Since the unclaimed intangibles involved in this action are deemed ownerless property, it is a mistake to consider such property as belonging only to the original creditor.

The Master recommended the conclusion (p. 19) that the debtor "has no proprietary interest in the intangible property." But the debtor does have possession of the property, and, by reason of the passage of time and statutes of limitation that may be applicable to escheat claims against the debtor, such possession may ripen into ownership. Although not subject to specific identification, the intangible obligations do exist as part of the mass of property owned by the debtor. See: *Anderson Nat. Bank* v. *Luckett,* 321 U. S. 233, 248 (1944). It is from amongst these intangibles that the claim must be paid, and it is in that mass where situs of the intangible can be found. As the court said in *Anderson National Bank, supra,* 321 U. S. at 248:

> "As we have seen, a bank account is a chose in action of the depositors against the bank, which the latter is obligated to pay in accordance with the terms of the deposit. It is part of the mass of property within the state whose transfer and devolution is subject to state control."

The Master recognized that intangibles do not have a fixed physical presence in a given place. They are legal obligations, choses in action. The Master also recognized and recommended the conclusion of law that where prop-

erty was owned by persons who left no last known residence or address (p. 20), "Only New Jersey, the domiciliary residence of the debtor corporation has power and jurisdiction to require payment of the debts representing such property under its custodial statute."

We agree, to some extent, with this recommended conclusion of the Master with respect to property originally owned by persons who left no last known residence or address. We go further and say that New Jersey has the power not only to take custody of the property, but to escheat same. We contend that the same rule should apply to property owned by persons who left a last known address, where there is no proof that the address was the residence or domicile of the person, and it must therefore be concluded as a matter of fact that the residence and domicile of that person are unknown.

This rule is not unfair. The statutory procedure in New Jersey is such that the rights of all claimants are adequately protected. The action against Sun pending in the Superior Court of New Jersey was commenced under the Custodial Escheat Statute, N.J.S. 2A:37-29, *et seq.* Under this statute New Jersey takes custody of unclaimed intangibles held by the corporation consisting of dividends, interest, wages and other general cash obligations. *State* v. *Sperry & Hutchinson Co.*, 23 N. J. 38, 127 A. 2d 169 (1956).

After the funds are delivered to the State Treasurer for safekeeping, the Treasurer sends a notice by mail to the last known address of the person entitled and to the Attorney General of the state of such last known address. N.J.S. 2A:37-32. If the property is not claimed within two years after such notice is sent, it becomes subject to escheat. N.J.S. 2A:37-34. Thereupon, a further proceeding is commenced in the Superior Court of New Jersey to es-

cheat the property. N.J.S. 2A:37-36. Notice is again given by mail to the person entitled at his last known address and to the Attorney General of such state. N.J.S. 2A:37-37. Notice is also given by publication. N.J.S. 2A:37-37. After judgment of escheat is entered, a person entitled may, for a period of seven years thereafter, obtain repayment of the escheated funds plus 2% interest. N.J.S. 2A:37-40.

This reasonable and practical approach gives ample protection to all persons and states who may have a claim against the property. This rule supports a judgment herein in favor of New Jersey.

D. Convenience, economy and certainty compel the rule that the state of incorporation of the holder of owner-less property has the superior right to take such property.

As shown above there are legal obstacles in reaching the conclusion that the state where a creditor had an address many years ago as shown on the books of a debtor corporation is the present situs of the property. Treating such state as the situs requires a finding that last known address constitutes domicile, or at least residence. That finding cannot be made as a matter of fact or logic.

Using last known address as the test is disadvantageous in a practical as well as legal sense. In the case at hand the property subject to escheat consists of 1,730 separate claims against Sun totalling $26,461.65. Par. XVII, p. 8. The average claim is for approximately $16.00. These claims are payable to persons whose last known address is in Texas, in many states other than Texas, or unknown. This means that under a last known address rule Sun would be required to file a report in each state that has an abandoned property law where any of Sun's creditors once had an address, and each of those states would have the right

to claim the property from Sun and subject Sun to a separate action for the escheat of same.

Added to this is the uncertainty of the last known address rule which would have to yield readily to the claims of several states where the creditor once actually resided, since actual residence would always be superior to last known address. Moreover, the state of domicile would be superior to the states of residence or last known address.

The advantages of a rule giving priority to the state of incorporation for escheat purposes are evident. The state of incorporation always has jurisdiction over the debtor. There need be only one report and one action for taking the property.

Most large corporations, like Sun, conduct business operations in many states in the United States. If every state should adopt a law providing for the disposition of unclaimed personal property, corporations will be required to keep extensive records and make annual reports to all states even though the state laws may have application to only an insignificant amount of property. The expense of keeping such records may be greatly out of proportion to the amount of unclaimed funds involved. With the increased activity in this field by many states the amount of unclaimed property that may be taken by any one state will be greatly diminished. The expense of taking will be greatly increased in proportion to the amount received in any one action.

The defects and disadvantages in a last known address rule are recognized in Note, *Escheat of Corporate Dividends,* 65 Harv. L. Rev. 1408, 1414:

> "The first objection to escheat to the state where the shareholder lives is that by hypothesis it is unknown. Usually there is no way to tell whether the last known

shareholder has died or sold his shares. Moreover, the current residence of even the last recorded owner may be unknown. Since a man who has remained in or near the same community can be more easily located than one who has moved a substantial distance, it is likely that the shareholder no longer resides in his old state. Thus there certainly seems no reason to assume that the state of the last known residence of the last known owner has any connection with the present shareholder. Indeed, it is even doubtful whether over a large number of cases the amounts escheated to the various states would be related to the number of shareholders residing in each state."

Considering possible alternates to a rule preferring the state of incorporation, the aforesaid Note in the Harvard Law Review concludes as follows (Vol. 65 at 1419):

"The rationale for the escheat of abandoned property supports payment to the state of the holder rather than to the state of the last known owner. In cases in which more than one state may make a claim through the holder, the choice between them should be designed to minimize uncertainty and expense in the collection process, since the value of the dividends held by each party is so small. It should also be designed to eliminate the possibility of multiple escheat, since the injustice of this is far clearer than the equities of the rival governments. On this basis, funds held by corporations should escheat to the state of incorporation rather than to the state of the business situs."

The Master suggested that the equities do not favor the rule which gives priority to the state of incorporation. On page 37 of his report the Master said:

> "Not much equity or fairness can be urged in favor of a rule fixing the situs of an absent owner's intangible property at the domiciliary residence of the debtor corporation for escheat purposes. Sun Oil Company has no property in New Jersey, no bank accounts or property of any kind. All its assets are at its principal office in Pennsylvania and at its division headquarters in Texas and other states where divisions are maintained. It would thus seem to be a rather farfetched and harsh fiction of law to say that all intangible property in this case is located at the domiciliary residence of the debtor corporation in New Jersey."

Here again the Master has erred, we respectfully submit. Not only is his reasoning unsound as a general proposition of law but it is contrary to the facts of this case.

Finding of Fact VIII on page 6 of the Master's report states:

> "The Company operates or leases 688 service stations in the State of New Jersey, maintains 4 district offices and storage facilities there, and has a marine terminal and pipeline terminal at Newark, New Jersey."

This finding was taken from the stipulation of facts by the parties. It shows that Sun has substantial property and business operations in New Jersey. These business operations were stated in very general terms in the stipulation. And as indicated above, the state of incorporation is the place where the corporation is deemed to possess all of its mass of intangible assets. Certainly there is no question that the corporation is subject to suit in New Jersey. But all corporations are not subject to suit in all states of the union where creditors may have had their last known address.

E. Obligations for corporate stock and dividends have a situs only in the state of incorporation for escheat purposes.

No argument of any substance can be made against a determination that unclaimed shares of corporate stock and dividends payable on corporate stock have their situs only in the state of incorporation.

It is settled law that, absent a permissive statute in the state of incorporation, shares of stock have their situs only in that state for seizure in execution, attachment and garnishment. See: Note: *Corporations—Situs of Corporate Stock,* 19 Va. L. Rev. 386 (1933); Note: *Situs of Shares of Stock,* 33 Harv. L. Rev. 485 (1925); Pomerance, *The Situs of Stock,* 17 Cornell L. Q. 43 (1931).

> "The fundamental rule stated in an earlier section that the situs of shares of stock of a corporation is at the domicile of the corporation was likewise, prior to the Uniform Stock Transfer Act, the majority rule in execution, attachment and garnishment; and it was usually held that the situs of shares for the purposes of those proceedings was in the state under whose laws the corporation was created, and in that state alone, in the absence of some statutory provision or other controlling circumstance which operated to give an additional or secondary situs. In accordance with the general rule, statutes permitting the attachment or garnishment of, or the levy of execution upon, shares of stock, though general in their terms, are usually held to apply to domestic corporations only, at least in the absence of anything showing a contrary intention on the part of the legislature." Vol. 11, *Fletcher, Cyclopedia Corporations,* (Perm. Ed.), p. 155, §5106.

It is generally recognized that the stock of a corporation has a situs only in the state in which the corporation was

created for the purpose of jurisdiction to adjudicate rights of ownership or claims of title in respect thereto. *Nixon* v. *Nixon,* 348 S. W. 2d 434, 436 (Texas Ct. Civ. App. 1961).

In *Jellenik* v. *Huron Copper Mining Co.,* 177 U. S. 1 (1900) the Court stated at page 13 of 177 U. S.:

> "* * * But we are of opinion that it is within Michigan for the purposes of a suit brought there against the Company—such shareholders being made parties to the suit—to determine whether the stock is rightfully held by them. The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the Company for the benefit of the true owner."

Under the facts of the case at bar where the corporation has been unable to make delivery of certificates for fractional shares of stock to the stockholder entitled at his last known address or at any address by follow-up procedures, it must be concluded that the whereabouts of the stockholder is unknown. Under these circumstances, unclaimed shares of stock in a corporation and dividends payable thereon can have a situs only in the state of incorporation.

Although there are only fractional shares of stock resulting from stock dividends involved in this action, the general rule of situs of shares of stock is applicable to these fractional interests.

F. The intangibles involved are not claims on checks and do not have a situs at the bank on which the check was drawn.

The intangibles involved in this action are not claims on checks, that is to say, they are not claims against the bank upon whom the checks were drawn. Nor are these obliga-

tions claims against Sun on the checks themselves; the claims are on the underlying obligations for which the checks were drawn.

This point is made because on page 21 of his report the Master referred to the "intangibles" as:

> "* * * (a) Checks sent to persons whose last known address was in Texas; (b) checks to persons whose last known address was in states other than Texas; and (c) checks to persons whose last known address is unknown * * *."

As stipulated by the parties, the property here involved consists of claims for wages, amounts payable for supplies purchased and services rendered, amounts payable for employees' expenses and other minor fees and charges, amounts payable as royalties on gas and oil production from lands and rental on leases on lands, fractional mineral interests, cash dividends on common stock, deductions from wages for purchase of war bonds, cash claims for which checks were issued in Oklahoma the exact nature of which are unknown, and stock dividends for which scrip certificates for fractional shares of stock were issued. In an attempt to make payment of the claims for cash, Sun issued checks in the name of the person entitled. These checks were either undelivered, mailed and returned undelivered or never presented for payment.

The unilateral action of issuing checks as well as the bookkeeping and banking transactions by Sun are of no consequence in determining Sun's liability for the unclaimed intangibles here involved. *Standard Oil Co.* v. *New Jersey,* 341 U. S. 428, 437 (1951).

The issuance of a check which may or may not have been delivered to the person entitled did not convert the cash

claim for wages, dividends and other obligations into a claim for cash on a check.

It is an established principle of law that a check of a debtor, received for a debt, is not payment if not itself paid except in those cases where it is positively agreed to be received as payment. 70 C. J. S., *Payment,* §24, p. 233; *State* v. *United States Steel Corp.,* 12 N. J. 38, 45, 95 A. 2d 734, 737 (1953). Here there is no proof at all that the creditor agreed to treat the mere issuance of a check as payment of the underlying obligation.

Thus, the fact that a check was drawn on a bank in Texas does not mean that the obligation is in Texas. The debtor corporation may no longer be doing business in Texas and the creditor may no longer reside there. It is, therefore, unwarranted to establish a rule that fixes the situs of property for escheat purposes in the state where a bank is located on which a check was once drawn many years ago.

POINT II

The complaint of Texas should be dismissed because the personal property claimed is outside of Texas and the Texas Escheat Law applies only to such property if held for a person "whose last known residence" was in Texas.

Texas claims a superior right to escheat the unclaimed property here involved under Articles 3272 and 3272a, Title 53, Vernon's Civil Statutes of Texas wherein it is provided *inter alia*:

> "Article 3272. When estates shall escheat.—If any person die seized of any real estate or possessed of any personal estates, without any devise thereof, and

having no heirs, or where the owner of any real or personal estates shall be absent for the term of seven years, and is not known to exist, leaving no heirs, or devisee of his estates, such estate shall escheat to and vest in the State. Where no will is recorded or probated in the county where such property is situated within seven years after the death of the owner it shall be prima facie evidence that there was no will, and where no lawful claim is asserted to, or lawful acts of ownership exercised in, such property for the period of seven years, and this has been proved to the satisfaction of the court, it shall be prima facie evidence of the death of the owner without heirs. * * *.

"Article 3272a, Personal Property Subject to Escheat

Report by holder of personal property.

'Section 1. Every person holding personal property subject to escheat under Article 3272 of Title 53, Revised Civil Statutes of Texas, 1925, at the time of the effective date of this Act, shall, within sixty (60) days thereafter, file a report thereof with the State Treasurer, as specified in section 2 of this Article. Every person who holds personal property which becomes subject to escheat under Article 3272 after the effective date of this Act, shall, within sixty (60) days thereafter, file a report thereof with the State Treasurer, as specified in Section 2 of this Article; provided that after one report has been made under this Article by any person, subsequent reports by such person may be made on an annual basis on or before May 1st of each year.

* * *

'(b) *The term "personal property" includes,* but is not limited to, money, stocks, bonds and other securities, bills of exchange, claims for money or indebtedness and other written evidences of indebtedness, dividends, deposits, accrued interest, purchase payments, sums payable on certified checks, certificates of membership in a corporation or association, amounts due and payable under the terms of any insurance policy, security deposits, unclaimed refunds and deposits for utility or other services, funds to redeem stocks, and bonds, undistributed profit, dividends, or other interests, production and proceeds from oil, gas and other mineral estates, and *all other personal property* and increments thereto, *whether tangible or intangible, and whether held within this State, or without the State for a person or beneficiary whose last known residence was in this State.* (Emphasis added.)

'(c) The Term "subject to escheat" shall include personal property presumed to be subject to escheat by the prima facie conclusions contained in Article 3272, including all personal property (1) of which the existence and whereabouts of the owner are unknown and have been unknown to the holder for more than seven (7) years and (2) on which, from the knowledge and records of the holder it appears that no claim or act of ownership has been asserted or exercised during the past seven (7) years and (3) on which no will of the last known owner has been recorded or probated in the county where the property is situated within the past seven (7) years.' "

Not only is Texas unable to assert a superior right to the claims, but it cannot assert any right unless it proves that the persons entitled are residents of Texas. The

Texas statute by its very terms is applicable only to property outside the state when owned by *residents* of Texas who actually or presumptively died without heirs or devisees. Note: "Conflicting Claims Under Modern Escheat Statutes", 16 Sw. L. J. 660, 664.

Texas commenced this action by filing a Motion for Leave to File Bill of Complaint. In the Brief in support of said motion, at page 11, it is stated that the courts of Texas have not yet construed the statute in question but that the Attorney General of Texas has rendered an opinion interpreting the statute, Attorney General's Opinion No. WW —1180 (1961). The Attorney General is quoted as saying:

> "The Legislature, in our opinion, intended by this definition of personal property to include all personal property subject to escheat which is held in this state, regardless of the last known residence of the beneficiary or person for whom the property is held, and that held outside the state for a person or beneficiary whose last known residence was in this state."

Thus the Attorney General of Texas has recognized that where property is held outside of Texas the Texas Escheat Law is applicable to that property only on a showing that it is held for a person or beneficiary "whose last known residence" was in Texas. As we have shown above, the property in question has been incorporated into the general mass of intangibles held by Sun which are present at Sun's place of domicile, its state of incorporation.

The wording of the Texas Statute brings the claim of Texas within the construction placed on a similar Arizona statute in *In Re Hull Copper Co.*, 46 Ariz. 270, 50 P. 2d 560, 101 A. L. R. 664 (1935). There Arizona claimed that the distributive share of the assets of a dissolved Arizona corporation payable to persons who were unknown or whose

whereabouts were unknown had escheated to the State of Arizona under a provision of the Arizona law which is as follows:

> "* * * §4304. *When property escheats.* If any person die, seized or possessed of any property without any devise or bequest thereof, and having no heirs, or where the owner of any property, without any devise or bequest thereof, and having no heirs, shall be absent for the term of seven years, and is not known to exist, such estate shall escheat to and vest in the state."

Although the property was declared escheatable under a provision of Arizona's Constitution, it was held not subject to escheat under the statute because the persons entitled to the distributive shares were not Arizona residents. On page 563 of 50 P. 2d the Court held that property would escheat only if the owners had been residents of Arizona before dying without heirs or becoming absent from the state for 7 years saying:

> "We consider then the claim of the state. This, as we have stated, was based on the theory that the owners of the stock in question were persons falling within the class described in section 4304, supra. If the claim of the appellees cannot be sustained, still less, we think, can that of the state, as set forth in its pleadings, be upheld. In the first place, the only evidence as to the residence of these stockholders is that they were nonresidents of the state of Arizona. In such case, since the property in question was personal in its character, it would ordinarily follow the residence of the owner, and an escheat proceeding in this state would not lie. This is apparently recognized by the statute, for it refers to the owner being 'absent for

> the term of seven years,' which certainly implies absence from the state of Arizona, and therefore residence in this state. In the second place, there is no showing whatever as to whether the missing stockholders have any heirs. While this, of course, may be established by circumstantial evidence, we think that some showing on this point is required. 10 R. C. L. 614. We are of the opinion that the state has failed to show the money in question has escheated to it under the provisions of sections 4304-4310, supra."

Before the Texas Statute can be held to have any application to the property here involved, it must be established that the persons entitled thereto were in fact residents of the State of Texas. This has not been proved in the case at bar. Thus, under Texas law, the complaint should be dismissed.

POINT III

Procedural Exception and Argument

The copy of the report of Sun to Texas on which this action is predicated and the certified copies of the judgments entered in the New Jersey courts should have been admitted in evidence by the Master and made a part of the record.

At the hearing before the Master New Jersey offered in evidence five exhibits. The exhibits were numbered one to five for identification.

Exhibit #1 was a certified copy of a judgment dated July 19, 1954, obtained by the State of New Jersey against Sun Oil Company. The judgment provided for the custody for safekeeping of unclaimed wages aggregating $4,667.01 and unclaimed dividends on capital stock aggregating $1,644.71.

Exhibit #2 was a certified copy of a judgment dated February 28, 1955, providing for the escheat of unclaimed dividends on preferred and common stock aggregating $866.20 and unclaimed stock dividends, represented by script certificates for fractional shares, aggregating 1.37 shares of capital stock.

Exhibit #3 was a certified copy of a judgment dated June 12, 1955, providing for the custody for safekeeping of unclaimed wages aggregating $3,816.01 and unclaimed dividends on capital stock aggregating $3,332.10.

Exhibit #4 was a certified copy of a judgment dated July 28, 1959, providing for the custody for safekeeping of unclaimed wages aggregating $3,115.08 and unclaimed dividends on capital stock aggregating $378.86.

These exhibits were offered to show that New Jersey's Courts had adjudged property of the nature involved in this action to be subject to New Jersey's custodial and escheat laws.

Exhibit #5 was a copy of the report of Sun to Texas upon which this action is predicated. The report contained the names of between 1,800 and 2,000 people, the amounts payable to them, the date said amounts became payable, and their last known addresses if known.

This exhibit was offered to complete the record by presenting the full picture of the information available relative to these claims. The report shows that many of the addresses could not support a conclusion that they represent the named person's domicile. There were many business addresses, post office box addresses and addresses in care of another person. The report further shows that the claims became payable from at least 7 to more than 40 years ago.

No objection was made to the offer of these exhibits to be made part of the record. Nevertheless, the Master rejected the offer. At page 18 of his Report the Master states that the judgments were rejected, "because such exhibits were deemed immaterial." His rejection of the Report filed with Texas was stated as follows:

> "Exhibit 5 was a full copy of the detailed report filed with the Treasurer of Texas on which this action is predicated and from which the Stipulation of Facts was prepared. This offer was rejected on the ground that the numerous individual items making up the voluminous report served no useful purpose and would only confuse what was clearly set out in the agreed Stipulation of Facts. Exceptions were allowed to the Master's ruling."

The attitude of our federal courts sitting without a jury on the admissibility of evidence appears in *Builders Steel Co.* v. *Commissioner of Internal Rev.*, 179 F. 2d 377 (8 Cir. 1950). There the Circuit Court vacated a decision of the Tax Court and granted petitioner a new trial because the Tax Court erroneously excluded competent and material evidence. The Circuit Court, holding that at a non-jury trial or hearing evidence of even doubtful admissibility should be admitted to permit the Court on review to make an end to the case, stated at page 379 of 179 F. 2d.

> "In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evi-

dence induced the court to make an essential finding which would not otherwise have been made. *Thompson* v. *Carley,* 8 Cir., 140 F. 2d 656, 660; *Doering* v. *Buechler,* 8 Cir., 146 F. 2d 784, 786; *Grandin Grain & Seed Co.* v. *United States,* 8 Cir., 170 F. 2d 425, 427. On the other hand, a trial judge who, in the trial of a nonjury case, attempts to make strict rulings on the admissibility of evidence, can easily get his decision reversed by excluding evidence which is objected to, but which, on review, the appellate court believes should have been admitted. In the case of *Donnelly Garment Co.* v. *National Labor Relations Board,* 8 Cir., 123 F. 2d 215, 224, we stated our views upon this subject as follows: '* * * We think that experience has demonstrated that in a trial or hearing where no jury is present, more time is ordinarily lost in listening to arguments as to the admissibility of evidence and in considering offers of proof than would be consumed in taking the evidence proffered, and that, even if the trier of facts, by making close rulings upon the admissibility of evidence, does save himself some time, that saving will be more than offset by the time consumed by the reviewing court in considering the propriety of his rulings and by the consequent delay in the final determination of the controversy. One who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it accurately after it has been received, and, since he will base his findings upon the evidence which he regards as competent, material and convincing, he cannot be injured by the presence in the record of testimony which he does not consider competent or material. Lawyers and judges frequently differ as to the admissibility of evidence, and it occasionally happens that a reviewing court regards as admissible evidence which was re-

jected by the judge, special master, or trial examiner. If the record on review contains not only all evidence which was clearly admissible, but also all evidence of doubtful admissibility, the court which is called upon to review the case can usually make an end of it, whereas if evidence was excluded which that court regards as having been admissible, a new trial or rehearing cannot be avoided. We say this in the hope of preventing a repetition of what occurred in the case now before us, and to obviate any misunderstanding as to what the attitude of this Court is with respect to the taking of evidence in a hearing before a special master or a trial examiner.' "

The judgments were offered herein to prove that New Jersey Courts had previously adjudicated New Jersey's right to claim property similar to that in question. Reference was made in the Stipulation of Facts (par. xviii, p. 16) to payments made by Sun to various states in previous years for unclaimed property, including New Jersey. The judgments in question merely detailed the basis for such payments which had been referred to in said Stipulation of Facts.

We respectfully submit also that the Report of Sun to Texas should have been admitted in evidence. The Report was described by the Master as the "detailed report filed with the Treasurer of Texas on which this action is predicated and from which the Stipulation of Facts was prepared." This Report was not rejected on the grounds of irrelevancy or immateriality, but simply because the Master felt that the Report "served no useful purpose and would only confuse what was clearly set out in the agreed Stipulation of Facts" (p. 18).

As stated above, no party to the action objected to any of the exhibits offered by New Jersey.

We respectfully submit that the detailed report in question will help this Court understand certain parts of the Stipulation of Facts which were expressed in general terms.

We are submitting with this brief copies of the aforementioned judgments and of the report of Sun to Texas, and we respectfully urge that this Court consider same as part of the record. We respectfully submit that Sun's report to Texas will assist the court in evaluating the practical consequences of its decision in this case, which is one of the considerations urged by New Jersey for the rule exposed herein.

CONCLUSION

For the foregoing reasons we respectfully urge that this Court should enter judgment determining that the ownerless, intangible obligations held by Sun are subject to the superior right of New Jersey, as the state of incorporation, to take such property under its Custody and Escheat Laws and that neither Texas, Pennsylvania nor Florida has established a superior right to such intangibles.

Respectfully submitted,

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PROOF OF SERVICE

I, CHARLES J. KEHOE, Deputy Attorney General of the State of New Jersey, one of the attorneys for defendant, State of New Jersey, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of February, 1964, I served copies of the Exceptions by the State of New Jersey to the Report of the Master and Supporting Brief on each of the other parties to this action by depositing copies in a United States post office or mail box, with first class postage or air mail postage prepaid, and addressed to:

(1) Honorable Waggoner Carr,
Attorney General of Texas
Box R, Capitol Station,
Austin, Texas 78711.

(2) Honorable Walter E. Alessandroni,
Attorney General of the Commonwealth of Pennsylvania,
State Capitol,
Harrisburg, Pennsylvania.

(3) Honorable Richard W. Ervin,
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