THE CANADIAN BAR REVIEW

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☛ **Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 1, Ontario.**

CASE AND COMMENT

TAXATION—SUCCESSION DUTY—SITUS OF SHARES.—Recent cases bearing on the determination of the situs of shares for taxation purposes indicate that the courts have been driven into a cul-de-sac as a result of their literal adherence to the test of *Brassard* v. *Smith*.[1] As has been pointed out in previous notes in this REVIEW,[2] the test of *Brassard* v. *Smith*, reinforced by the judicially declared constitutional prohibition against legislative change of the "common law" rules respecting situs,[3] has created an impossible situation in respect of the situs of shares in a company having multiple share transfer registries in two or more jurisdictions.

The Privy Council's opinion in *The King* v. *Williams*[4] merely postponed the facing of an issue which now confronts the courts; for in that case the share certificates were physically located in the jurisdiction where the company in question maintained a share transfer registry, and that fact[5] was decisive for the Privy Council in assigning a situs to the shares. This basis of decision runs counter to the basis suggested by the Ontario Court of Appeal in *Treasurer of Ontario* v. *Blonde*,[6] where Robertson C.J.O., stated that it was the deceased's domicile in the jurisdiction where a share transfer registry was located that

[1] [1925] A.C. 371.
[2] (1942), 20 Can. Bar Rev. 471; (1942), 20 Can. Bar Rev. 640.
[3] *The King* v. *National Trust Co.*, [1933] S.C.R. 670.
[4] [1942] 3 D.L.R. 1, [1942] 2 All E.R. 95.
[5] The Privy Council placed particular reliance on the fact that the share certificates had been endorsed in blank. As to this, see (1942), 20 Can. Bar Rev. 640 and *The King* v. *Globe Indemnity Co. of Can.*, [1944] 3 D.L.R. 84 (Ont.).
[6] [1941] O.R. 227.

persuaded the Ontario courts, when the *Williams* case was before them, to assign the situs to that jurisdiction.[7] It is not likely that the Privy Council, when it decides the *Blonde* case, now on appeal to it, will be disposed to give some new direction to the matter of assigning a situs to shares, because in that case there was no share transfer registry in Ontario, the taxing jurisdiction, and hence the case can be disposed of on the ground that wherever the situs is it cannot be in Ontario.

The King v. *Globe Indemnity Co.*,[8] *Maxwell* v. *The King*[9] and *Re Aberdein*[10] are three recent decisions in Ontario which point up the unsatisfactory character of the test in *Brassard* v. *Smith* as elaborated in *The King* v. *Williams*. In all three cases, the shares which were sought to be taxed were those in companies having their head offices in Ontario and share transfer offices both in Ontario and elsewhere. In all three cases, too, the deceased owner died domiciled outside of the jurisdictions in which there were share transfer registries, and in each case the share certificates were in the place of domicile. In all three cases, the decision was that Ontario could not tax because, irrespective of where the shares were situated, they had no situs in Ontario. On the basis of *The King* v. *Williams* the decisions could hardly have been otherwise. What the result would have been if the deceased owner had been domiciled in Ontario (but the share certificates were elsewhere) can only be surmised. Since in *The King* v. *Williams* the deceased owner was domiciled in the place where a share transfer registry was kept, it would seem that domicile is not significant as a subsidiary controlling factor reinforcing the fact of location of a share transfer registry, although this may not be so where (contrary to the situation in *The King* v. *Williams*) the domicile is elsewhere than at the location of the share certificates.

Under the law as judicially declared at present, shares of a deceased owner in a company with multiple share transfer registries will escape succession duty taxation on the basis of situs if, regardless of the fact that there is a transfer registry in the taxing province, the deceased owner sees to it that the share certificates are kept outside that province. This may create an intolerable situation on equitable considerations of liability to tax, although it may redound to the advantage of shareholders. Conceivably, a provincial legislature might then purport to pro-

[7] *Ibid.*, at p. 243.
[8] [1944] 3 D.L.R. 84 (Ont.).
[9] [1944] 3 D.L.R. 88 (Ont.).
[10] [1944] 3 D.L.R. 90 (Ont.).

hibit the taking of share certificates out of the province or might provide for duplicate certificates, in order to maintain some ground for taxing shares of its companies on the basis of situs; or, it might seek to assign a predominance to the share transfer registry maintained in the province of incorporation, or (although this is unlikely) prevent the opening of further share transfer registries. Any of such legislative devices might, however, be caught by the constitutional restriction against changing the common law rules as to situs.

If there were any doubt whether the common law rules as to situs were fixed, there should be none in view of the Exchequer Court decision in *Bitter* v. *Secretary of State for Canada*[11] which indicates the difficulty of assigning a situs even to a simple contract debt where the debt is payable at any of several places or where the debtor is a corporation carrying on business in several places. The Court in that case was forced to the conclusion that the country of incorporation could by its legislation localize the debt but since the case concerned, not taxation but a question of ownership, it is doubtful how far it would be applied, if at all, to a tax question. In fact, both the *Bitter* case and *Braun* v. *The Custodian*,[12] which also involved a determination of the situs of shares as bearing on the question of ownership, show the artificiality of the tests applied in ascertaining situs for taxation purposes. Those cases held simply that the situs for the purpose of determining ownership was in the territory of incorporation, a test which, if applied to the tax situation, would avoid all the complexities which now beset both taxpayer and taxing authority.

B. L.

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SCHOOLS AND CIVIL LIBERTIES—PUPILS REFUSING TO SALUTE FLAG OR SING NATIONAL ANTHEM—STATUTORY EXEMPTION OF COMPULSORY RELIGIOUS EXERCISES.—*Donald* v *Hamilton Board of Education*,[1] a judgement of Hope J. in the Ontario High Court, gives Canada a "flag salute" case similar to those which have evoked so much constitutional emotion and heart-searching in the courts of the United States. In those courts the issues were cast in a constitutional frame of reference, and involved a consideration of the question whether state legislative power could, consistently with constitutional guarantees of freedom of speech

[11] [1944] 3 D.L.R. 482.
[12] [1944] 4 D.L.R. 209, affirming [1944] 3 D.L.R. 412.
[1] [1944] 4 D.L.R. 227.

and freedom of worship, be exercised to require school children to salue the American flag on pain of expulsion. With no constitutional guarantee of civil liberties in Canada, the similar question in the *Donald* case arose in relation to a statutory exemption of school children from compulsory religious exercises objected to by their parents or guardians.

The statutory power of a provincial legislature to direct or authorize a school board to require, as part of school exercises, a salute to the flag and the singing of the national anthem is unquestioned; on this point the recent Alberta decision of *Ruman* v. *Lethbridge School District Board of Trustees*[2] is clear. In that case it is significant that the flag salute was specifically mentioned as within the definition of "patriotic exercise" contained in the Alberta School Act, and that the Court was satisfied that the refusal to engage in the exercise was because of a conflict with the pupils' religious beliefs. The Court was not, however, confronted, as in the *Donald* case, with any provision for statutory exemption from religious exercises if objection was taken thereto.

The Court in the *Donald* case found that a duty rested upon teachers by virtue of statute and regulations, to inculcate patriotism, and that they could properly prescribe the flag to this end and punish disobedience by suspension. The main point in the case appeared to be then whether such a requirement conflicted with the statutory exemption from compulsory religious exercises. This was briefly considered and dismissed on the ground that the flag salute was a patriotic exercise, and hence not covered by the exemption.

The same result was, in effect reached by the Supreme Court of the United States in *Minersville School District* v. *Gobitis*[3] in holding that a flag salute requirement in the case of school children did not contravene constitutional guarantees of freedom of speech and worship. But the Court changed its mind in *West Virginia State Board of Education* v. *Barnette*[4] and held that such a requirement offended the named constitutional guarantees. In so far as the *Barnette* case takes its stand on freedom of speech, it is easily squared with the *Donald* case for in the latter case the only statutory protection was against compulsory religious exercises. In any event, it may be that an exemption under a statute may be more narrowly construed than a similar guarantee in a fundamental constitution. That is to say, what authorities designate

[2] [1944] 1 D.L.R. 360.
[3] (1940), 310 U.S. 586.
[4] (1943), 319 U.S. 624. The change was foreshadowed in *Jones* v. *Opelika* (1942), 62 Sup. Ct. 1231.

as a "patriotic" exercise may be held to fall outside a statutory exemption from religious exercises although it offends a person's religious beliefs; while in the case of a constitutional guarantee of freedom of worship, Courts may be more inclined to invalidate compulsory exercises which, although called patriotic, are incompatible with particular religious creeds.

Of particular interest in connection with the *Donald* case, however, is the amendment to the Alberta School Act made following the *Ruman* case. The amendment,[5] after providing for the "flag salute" introduces an exemptive proviso in favour of "any pupil whose parent or guardian presents to the principal of the school a written statement setting forth that he or she is a member of a religious organization whose tenets forbid or are opposed to its members individually saluting the flag." Such pupil is required then only "to come to attention and to remain standing silently and at attention "during the flag salute ceremony. However this provision may affect the interrelations of pupils of various religious beliefs, it is at least indicative that a so-called "patriotic" exercise may have a religious significance. It would not have been surprising therefore had the Court in the *Donald* case found that the flag salute came within the "religious" exemption.

[5] 1944 (Alta.), c. 46, s. 9.