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ADMINISTRATION AND SUCCESSION IN THE CONFLICT OF LAWS.

I. CONCERNING MAXIMS.

II. ADMINISTRATION OF ESTATES.
1. *Legislative Power and the Conflict of Laws.*
2. *Jurisdiction and the Situs of Property.*
3. *Appointment of an Administrator.*
4. *The Stages of Administration.*
(1) Getting in the Property.
(2) Payment of Creditors' Claims.
(3) Distribution of the Surplus.

III. SUCCESSION TO PROPERTY.
1. *Selection of the Proper Law.*
2. *Proof and Application of Foreign Law.*

I. CONCERNING MAXIMS.

A maxim has been defined as "a summary statement of an established or accepted principle" or "a pithy expression of a general rule of conduct or action."[1]

The chief defect of a maxim is that it is usually so summary or so pithy that it gives a quite misleading impression of the principle or rule of which it is supposed to be the statement or expression; and it would therefore appear to be a mistake, due to confusion of thought or likely to induce confusion of thought, to dignify a maxim with the name of principle or rule.

[1] Century Dictionary. The use of *maxim* in the sense of *axiom* is obsolete, according to the Oxford English Dictionary, which gives, as a second definition of maxim, "a proposition (esp. in aphoristic or sententious form) ostensibly expressing some general truth of science or experience."

The maxim *mobilia ossibus inhaerent* is not so bad, because no one would think of taking the words literally, and obviously the maxim is merely a somewhat quaint mode of referring to some principle or rule of which it is not itself an intelligible statement or expression. When, however, the same thing is put in the words *mobilia sequuntur personam,* more harm is done, because the absurdity resulting from a literal translation of the words is not quite so obvious—though, on second thought, the vision of all Mary's movable goods taking their cue from her little lamb and following her wherever she goes is not much less grotesque than that of their all adhering to her bones.

Kent,[2] writing over one hundred years ago, uses the fuller form *mobilia personam sequuntur, immobilia situm,* but he does an injustice to Ulrich Huber, who wrote over one hundred years earlier, in attributing the maxim to him.[3] In the first passage from Huber cited by Kent, Huber states simply and clearly the principle that intestate succession is governed, in the case of movables by the law of the domicile of the deceased owner, and in the case of immovables by the law of their situs. He happens, in accordance with a fashion of his time, to write in Latin, but he does not obscure his statement of the principle by stating the maxim. The same is true of the second passage from Huber cited by Kent, in which Huber states various rules of conflict of laws, in the course of what the index at the end of the third volume calls a *digressio,* under the title De Conflictu Legum Diversarum in Diversis Imperiis.[4] In neither passage does Huber say that movables follow the person or adhere to his bones.

Story[5] gathers together, however, a formidable collection of quotations from various continental writers, in Latin and in French, abounding in figures of speech. Occasionally these writers come down to *terra firma,* as, for example, when they say that movables have no *certus ac fixus situs,* no *assiette fixe,* in the place where they are situated in fact (which is no more than saying that they are movable); but they are more apt to say that movables have no local situation, and by a sort of fiction follow the person of their owner.

[2] Commentaries on American Law (1826-1830), 6th ed., 1848, vol. 2, p. 67.

[3] Kent's reference is to vol. I, p. 278, and vol. 2, p. 542, of Ulrici Huberi Praelectionum Juris Civilis Tomi III (according to the title page of the 4th edition, Frankfort and Leipsic, 1749, which I have consulted, and which appears to have the same pagination as the edition used by Kent).

[4] This excursus is appended, in volume 2 of the Praelectiones, to Lib. I, Tit. III, De Legibus, SCtis, & Longa Consuetudine, and is reprinted separately in Appendix IV to Guthrie's translation of Savigny's Conflict of Laws, 2nd ed., Edinburgh and London, 1880.

[5] Conflict of Laws, §§ 377 ff.

The danger of the use of maxims based upon fiction and figure of speech is that those who use them are inclined to reason from them as if they were principles. Thus the doctrine prevailed widely at one time that the transfer of movables *inter vivos* is governed by the *lex domicilii* of the owner[6]—a doctrine which has now been generally abandoned in favour of the application of the *lex situs* at the time of the transfer.

At the risk of seeming to be platitudinous, I preface the discussion of the main subject by pointing out that the principle which is supposed to be stated in the maxim *mobilia sequuntur personam* is in reality of very limited scope, as illustrated by the following propositions.

(*a*) The principle applies to movable property, not to all personal property, and therefore does not apply to any interest in land, even though that interest is characterized in English law as personal property.[7]

(*b*) The principle has no bearing on the question what is the situs of any movable thing.[8] If the thing is tangible, its situs is actual in the literal sense, and the domicile of its owner is immaterial. If the thing is intangible, the word "actual" in the literal sense cannot properly be predicated of its situs; but any situs which may be attributed to it by the law is certainly not based upon the fiction that the thing is situated where the owner is domiciled, and the situs may be called actual in the sense that it is based upon substantial considerations,[9] or upon some principle or coherent system of principles.[10]

(*c*) The principle has no bearing on the question whether the courts of a country have jurisdiction, that is, on the question of *forum* as distinguished from *lex*, or on the question whether the

[6] Story, § 379, adopts the same doctrine, but he prefers to base it on the "transitory nature" of movables and "the general convenience of nations."

[7] Therefore "mobilia" must be translated "movables" and not "personal property". *Freke* v. *Carbery*, 1873, L.R. Eq. 461. Some of the confusion which results from the confusing of "movable" with "personal" is pointed out in my annotation to *Re Colville*, [1932] 1 D.L.R. 53, and in my article on Contract and Conveyance in the Conflict of Laws, 81 University of Pennsylvania Law Review 661, at pp. 663-666 (April, 1933), [1934] 2 D.L.R. 1.

[8] This is clearly stated, after argument specifically directed to the matter, by Lord Thankerton in *Provincial Treasurer of Alberta* v. *Kerr*, [1933] A.C. 710, at pp. 721-722, 4 D.L.R. 81, at p. 87. The point was already fairly plain, and I had ventured to lay some stress on it in my Banking and Bills of Exchange, 4th ed., 1929, pp. 87-88; cf. 10 C.E.D. (Ontario) 411.

[9] As, e.g., when an intangible thing is said to be situated where it can be effectively dealt with. *Brassard* v. *Smith*, [1925] A.C. 371, 1 D.L.R. 528.

[10] Cf. *The King* v. *National Trust Co.*, [1933] S.C.R. 670, at p. 673, 4 D.L.R. 465, at p. 467, Duff, C.J.C.

legislature of a province has jurisdiction by reason of the situs of a thing.[11]

(*d*) Even as applied to the choice of law, the question of *lex* as distinguished from *forum*, the principle is limited to succession in the narrow sense and does not apply to administration of estates generally.[12]

II. Administration of Estates.

1. *Legislative Power and the Conflict of Laws.*

Broadly speaking, the subject of the administration of the estates of deceased persons falls within the exclusive legislative power of the legislature of each province, and in every province legislation has been enacted upon various aspects of the subject.

Apart from such limitations on provincial legislative power as may be necessary in order that due effect may be given to all provisions of the British North America Act, 1867, that legislative power is territorially limited by the wording of most of the clauses of sec. 92 of the statute, as, for example, "direct taxation within the province in order to the raising of a revenue for provincial purposes," "property and civil rights in the province" and "generally all matters of a merely local or private nature in the province."

Furthermore, even within this territorial limitation, a province does not attempt or desire to apply only its own local law, whether statutory or not, to every case which comes before its courts. This local law is the ordinary law of the province,[13] applicable to cases in which no foreign (that is, extraprovincial) element appears. The law of each province also includes certain rules of conflict of laws or private international law, applicable to cases in which some foreign element appears; and these rules constitute a body of law which is as much a part of the law of the province as its local law, and which in certain circumstances may require the courts of the province to apply to a given case the rules of law of some foreign country[14] instead of the local law of the province. If, for example, it appears that the transaction in question took place in a foreign country, or that the

[11] This limitation of the principle follows from limitation (b), and is involved in the decisions in *Brassard* v. *Smith, Provincial Treasurer of Alberta* v. *Kerr*, and *The King* v. *National Trust Co., supra.*

[12] The discussion of the main subject which follows has as its chief object the elaboration and more exact statement of this limitation.

[13] Including of course rules of law which are in force in the province by virtue of Dominion legislation passed within the scope of the legislative power of the Dominion, or by virtue of statutes of the British Parliament not repealed as to the province by competent legislative authority.

[14] For this purpose each province is a separate country; and any other province is a "foreign" country, and its law is a "foreign" law. *Attorney-General for Alberta* v. *Cook*, [1926] A.C. 444, 2 D.L.R. 762.

thing in question is or was situated in a foreign country, or that the parties to the controversy are, or one of them is, domiciled in a foreign country, a court may have to consider whether it ought to apply the rules of law of that country instead of the local law of the province. In particular if the administration of the estate of a deceased person is in question, various matters of conflict of laws may have to be considered, depending chiefly on the situs of the assets and the domicile of the person whose estate is in question.

2. *Jurisdiction and Situs of Property.*

Jurisdiction over things as such[15] is essentially dependent upon their situs. As a general rule every country [16] has exclusive jurisdiction over all things situated within its territory and no jurisdiction over any thing situated elsewhere.

It follows that when a person dies leaving property in different countries, each country has, as a general rule, and without regard to the domicile or nationality of the *de cujus,* the exclusive right to dictate what disposition is to be made of the property situated within its territory, including the questions whether that property or any part of it passes directly to the persons beneficially entitled or devolves upon some other person for the purpose of administration; and the exclusive right to appoint or authorize a person to administer the property situated within the territory and to control that person in all the stages of the administration of that property; and the exclusive right to decide who are entitled as beneficiaries as regards that property, and in what manner and subject to what duties or liabilities, if any, they shall take the property.

Inasmuch as the administration of the estate of a deceased person in a given country is normally limited to the property there situated, it is obviously important to determine exactly what is the situs of every kind of property. As regards tangible property there is usually no difficulty in ascertaining the situs, but in the case of intangible property difficulties may arise in the attribution to it of a situs. On principle, whatever is the situs of property for the purpose of its local administration should also be its situs for the purpose of taxation, so far as the statute imposing a tax makes liability to pay

[15] Jurisdiction over persons, the exercise of which may indirectly involve some control of the disposition of things, is not in question here.

[16] Meaning, as applied to Canada for the present purpose, a particular province.

dependent upon the situation of the property within the territory;[17] but it would be unduly optimistic to expect that taxing statutes should always observe a nice distinction in this respect, or that the reported decisions upon these statutes should be uniform.

In the case of a province of Canada, however, the legislative power is territorially limited. The provincial legislature may impose a tax upon a person within the province or upon property within the province; it cannot validly impose a tax upon property situated outside the province; and, by reason of the further limitation that provincial taxation must be "direct," it cannot validly impose a tax upon a person within the province in respect of property situated within or outside the province in the expectation and with the intention that he shall indemnify himself at the expense of another person.[18]

Taxes which may be generically called death duties are in the statutes of the provinces of Canada usually called succession duties without regard to differences of nature or incidence. For the purpose of the more exact definition of the limitations imposed on provincial legislative power, it is, however, useful to bear in mind the distinction made in the United Kingdom between two main classes of death duties.[19] Broadly speaking, probate duty or estate duty (so far as this duty was by the Finance Act, 1894, substituted for probate duty) may be considered as the price of the protection afforded by the government to the property included in the local administration, and therefore is payable only upon or in respect of property

[17] Cf. Duff, C.J.C., in *The King* v. *National Trust Co.*, [1933] S.C.R. 670, at pp. 673-674, 4 D.L.R. 465, at p. 467, with reference to the situs of debts, or obligations to pay money: "As is well known, rules for the determination of such situs for various purposes have been drawn from those which defined the jurisdiction of the ecclesiastical tribunals respecting probate."

[18] The general principles governing the distinction between direct and indirect taxation are summarized in *Attorney-General for Manitoba* v. *Attorney-General for Canada*, [1925] A.C. 561, 2 D.L.R. 691, and *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.*, [1927] A.C. 34, 4 D.L.R. 113. The latest cases in the Privy Council are *Lower Mainland etc., Committee* v. *Crystal Beach*, [1933] A.C. 168, 1 D.L.R. 82; *Provincial Treasurer of Alberta* v. *Kerr*, [1933] A.C. 710, 4 D.L.R. 81; *Attorney-General for British Columbia* v. *Kingcome Navigation Co.*, [1934] A.C. , 1 D.L.R. 31. The application of the distinction to taxation in respect of administration or succession will be illustrated by some other cases cited in the course of the subsequent discussion.

[19] Cf. *Winans* v. *Attorney-General*, [1910] A.C. 27; *Smith* v. *Provincial Treasurer for Nova Scotia*, 1919, 58 Can. S.C.R. 570, 47 D.L.R. 108. In my Banking and Bills of Exchange, 4th ed., 1929, pp. 84 ff, I attempted to state more fully the distinction mentioned in the text and indicate its applicability to provincial legislation in Canada: but I do not warrant that all that I said there is consistent with all the observations contained in the present article; still less do I attempt to reconcile with each other all the dicta contained in the judgments of even the highest courts.

situated within the country, regardless of the domicile of the *de cujus* or of the beneficiaries; whereas legacy duty or succession duty may be considered as a toll taken by the government on the transmission of property from the *de cujus* to the beneficiaries, and therefore, in the absence of apt and clear words to the contrary in the taxing statute, is payable only upon or in respect of property which passes under or by virtue of the law of the country. We may for convenience call a duty of the former class a tax upon administration, and a duty of the latter class as a tax upon transmission (or succession) or upon property transmitted on death.

In the light of the foregoing preliminary observations and of some recent cases, taxes which may be validly imposed by a provincial legislature in connection with the administration of the estate of a deceased person or with the succession to that estate may conveniently be divided into three classes, distinguished below by the letters (a), (b) and (c).

(a) A provincial legislature may, without regard to the domicile or residence of the beneficiaries, impose a tax upon administration, payable by the executor or administrator out of the corpus of the property situated within the province as a condition of the grant of probate or administration and without regard to the mode of distribution of the beneficial interest in the surplus. This is a tax analogous to the British probate duty and by its nature is limited to the property situated within the province, because only that property is included in the local administration, and the tax is a charge made by the province for the local administration,[20]—a charge made for services rendered or to be rendered by the government in connection with the local administration as distinguished from pure taxation[21] of person or property.

The foregoing statement applies not only to movable property situated within the province, but also to immovable property situated within the province so far as it is included in the local administration. Formerly, in a province in which the principles of English law prevail, not all the immovable property situated within the province would have been included in the local administration. Real property would have been excluded, and only such interests in land as are characterized in English law as personal property (as, for example,

[20] *Blackwood* v. *The Queen*, 1882, 8 App. Cas. 82; *Attorney-General of Ontario* v. *Newman*, 1901, 1 O.L.R. 511; *The King* v. *Lovitt*, [1912] A.C. 212; *Provincial Treasurer of Alberta* v. *Kerr*, [1933] A.C. 710, at pp. 719-720, 725-726, 4 D.L.R. 81, at pp. 85, 91.

[21] *Cotton* v. *The King*, [1914] A.C. 176, at p. 195, 15 D.L.R. 283, at p. 293; *Provincial Treasurer of Alberta* v. *Kerr*, *supra*.

leasehold estates in land) would have devolved, along with movable property, upon the executor or administrator. The tendency of modern legislation is, however, to make all property, real and personal, devolve upon the executor or administrator for the purpose of administration.

A tax upon administration is a direct tax. It is not a tax imposed on the executor or administrator personally in the expectation or with the intention that he will reimburse himself at the expense of the beneficiaries, but it is a tax which the executor or administrator must pay out of the property in his hands, as he must pay any other item of the expenses of administration, before the surplus available for distribution among the beneficiaries is ascertained.

(b) A provincial legislature may impose a direct tax—by way of pure taxation, as distinguished from a charge made in connection with its local administration as stated in paragraph (a)—upon the property, movable or immovable, of the decedent, situated within the province and transmitted in consequence of its owner's death. It is now well settled that the subject of the taxation must be within the province, and that the situs of every kind of property must be determined on principle and in accordance with fact, without regard to the domicile of the decedent and without regard to any declaration of a provincial legislature by which for taxation purposes a situs within the province is attributed to property which on principle or in fact is situated elsewhere.[22] The fact that the beneficiary is domiciled or resident within the province does not enable the provincial legislature to impose a tax upon property situated outside the province; and it has been said in effect that the legislature cannot do indirectly what is cannot do directly.[23] The identification of the subject-matter of the tax is naturally to be found in the charging section of the statute, and it will only be in the case of some ambiguity in the terms of the charging section that recourse to other sections is proper or necessary.[24] If it appears that the tax is really a tax upon property, the fact that the burden of the tax falls on a

[22] *Provincial Treasurer of Alberta* v. *Kerr, supra; The King* v. *National Trust Co.,* [1933] S.C.R. 670, 4 D.L.R. 465. These two cases have already been cited in Section I, Concerning Maxims, *supra,* on the question of situs.

[23] *Woodruff* v. *Attorney-General for Ontario,* [1908] A.C. 508, at p. 513: "Directly or indirectly, the contention of the Attorney-General involves the very thing which the legislature has forbidden to the province—taxation of property not within the province." This case was somewhat discredited, because the circumstances were so special and there was so much doubt as to the reasoning on which the decision was based, in *Cotton* v. *The King,* [1914] A.C. 176, 15 D.L.R. 283; but its credit would seem to be restored at least partially by its citation, with apparent approval, in *Provincial Treasurer of Alberta* v. *Kerr, supra.*

[24] *Provincial Treasurer of Alberta* v. *Kerr, supra.*

person found within the province[25] will not render the tax valid if the property is situated outside the province, and, assuming the validity of the principle that the legislature cannot do indirectly that which it cannot do directly, a tax upon a person in the province in respect of property situated outside the province is likewise invalid.[26]

Even if the property is situated within the province, the tax, in order to be valid, must also be direct, in the sense that it is made payable by the very person by whom it is intended or desired by the legislature that it should be paid; so that, if the executor or administrator is made personally liable, with the obvious intention that he shall pay the tax and reimburse himself out of the beneficiaries' interest, the tax is indirect, and therefore invalid.[27] If the tax is direct and the property is situated within the province, there can be no doubt as to the power of the province to charge the property with the payment of a tax and to make the payment of the tax a condition of the registration of a beneficiary's title or of the recognition as *jus in re* of the title held in trust for the beneficiary.[28] The tax may be made fully effective and enforceable when the beneficiary seeks to vest in himself by transfer the title which has been transmitted by the death of the former owner.[29]

(c) A provincial legislature may, either under the guise of a tax upon succession or transmission or by way of taxation imposed in terms upon successors, impose a direct tax upon persons domiciled or ordinarily resident within the province in respect of the transmis-

[25] *Bank of Toronto* v. *Lambe*, 1887, 12 App. Cas. 575, at p. 584.

[26] In *Madden* v. *Nelson and Fort Sheppard Ry. Co.*, [1899] A.C. 626 (not a taxation case), at pp. 627-628, it was said "it is a very familiar principle that you cannot do that indirectly which you are prohibited from doing directly." It is another question whether my application of the principle to the taxation cases is justified by the authorities: see paragraph (d), *infra*.

[27] *Provincial Treasurer of Alberta* v. *Kerr, supra; cf. Alleyn* v. *Barthe*, [1922] 1 A.C. 215, 62 D.L.R. 515, in which it was held that if a statute provides that the executor or administrator shall not be personally liable, but may be required to pay the tax out of the property or money in his possession belonging or owing to the beneficiaries, the tax is direct. See paragraph (c), *infra*.

[28] *Boyd* v. *Attorney-General for British Columbia*, 1917, 54 Can. S.C.R. 532, especially at p. 554, Duff, J., 36 D.L.R. 266, at p. 281. The particular property in question was a deceased partner's interest in land situated in British Columbia, and, as the subject-matter was immovable property having an actual situs in the province, it is difficult to understand why Anglin, J., dissenting, should have made any difficulty on the ground that the partner's interest was to be regarded for some purposes as personal property or as being situated in Ontario or should have thought that the decision of the majority involved saying that a provincial legislature may for the purpose of taxation declare property to be situated within the province when it is not in fact so situated.

[29] *Cf.* "transmission," the legal result which follows on death, and the subsequent "transfer" necessary to invest the new owner, as the words are used in the Bank Act, sec. 51, with reference to bank shares: *Brassard* v. *Smith*, [1925] A.C. 371, 1 D.L.R. 528.

sion to them of property under or by virtue of the law of the province.

If the property is immovable, it passes under or by virtue of the law of the province only if it is situated within the province.[30] If immovable property is situated outside the province, the provincial legislature cannot impose a tax upon it or upon any person with respect to it; if it is situated within the province, it is obvious that the legislature may impose a direct tax upon it (without regard to the domicile of the decedent or the domicile or residence of the beneficiary), or upon a person in the province with respect to it, and it would not be arguable that the statute would be less valid if it purported to tax the succession or transmission instead of the property or the successor.

If the property is movable, however, other considerations arise. The succession to movable property, that is, the transmission of movable property on death, takes place under or by virtue of the law of the province if the decedent was domiciled in the province, whether the property is situated within or is situated outside the province.[31] It sometimes happens that a provincial legislature purports to impose a tax on the succession or transmission, and there would be a deceptive plausibility in the suggestion that the tax is valid because the succession or transmission is within the province. The fallacy of such a suggestion lies of course in the fact that a succession or transmission is neither person nor property, whereas, when it is said that the subject of the taxation must be within the province, it is clear that what is meant is that the person upon whom, or the property upon which, the tax is imposed must be within the province. A succession or transmission is merely a transaction or act of the law by which property is transmitted from the decedent to the beneficiaries, and cannot itself be the subject of taxation. Therefore if the property is movable and is situated within the province, the legislature may impose a tax upon the property or in respect of the property or its administration, as stated in paragraphs (a) and (b). If the legislature purports merely to impose a tax upon succession or transmission. the natural construction of the statute is that the tax is limited to property which passes under or by virtue of the law of the province

[30] The *lex situs* governs the succession to immovables: see Section III, Succession to Property, *infra.*

[31] See Section III, Succession to Property, *infra.* The expression "under or by virtue" of the law of the province is taken from *Lambe* v. *Manuel,* [1903] A.C. 68. Strictly speaking, the transmission takes place under or by virtue of the *lex situs*; it is only under or by virtue of its rules of conflict of laws that in a secondary sense, the transmission takes place under or by virtue of the *lex domicilii.*

and therefore does not apply at all to movable property, even though situated within the province, if the decedent was domiciled outside the province.[32] In the case of a less simple statute, however, its construction may lead to the conclusion that it also imposes a tax upon the movable property situated within the province without regard to the domicile of the decedent.

If the property is movable, and is situated outside the province, and the legislature purports to impose a tax on succession or transmission, the taxation obviously cannot be justified as a tax on property, and therefore it is essential to its validity that the beneficiary be domiciled or resident within the province: there being no property to be taxed there, there must be a person to be taxed there. So, it has been held that a provincial legislature may impose a tax upon "all transmissions within the province, owing to the death of a person domiciled therein, of movable property locally situate outside the province at the time of such death,"[33] the condition that the transmission is to be "within the province" being satisfied if the person to whom the transmission takes place is domiciled or ordinarily resident in the province.[34] There being a person in the province upon whom the tax is imposed,[35] the case does not offend against the rule that the subject of the taxation must be within the province.

The tax must also be direct, and this condition is satisfied by provisions of the statute that the persons to whom property situated outside the province is transmitted are personally liable for the duties in respect of such property and no more, and that "No notary, executors, trustee or administrator shall be personally liable for the duties imposed by this section. Nevertheless the executor, the trustee or the administrator may be required to pay such duties out of the property or money in his possession belonging or owing to the beneficiaries, and if he fails so to do may be sued for the amount thereof, but only in his representative capacity, and any judgment rendered against him in such capacity shall be executed against such property or money only." [36]

The result of the recognition of the validity in these circumstances of taxation in the province in which the decedent was domiciled is

[32] *Lambe* v. *Manuel,* [1903] A.C. 68.
[33] *Alleyn* v. *Barthe,* [1922] 1 A.C. 215, 62 D.L.R. 515; *cf. Attorney-General for Ontario* v. *Baby,* 1926, 60 O.L.R. 1, [1927] 1 D.L.R. 1105.
[34] As the universal legatee in *Alleyn* v. *Barthe* was.
[35] *Provincial Treasurer of Alberta* v. *Kerr,* [1933] A.C. 710, 4 D.L.R. 81.
[36] *Alleyn* v. *Barthe,* distinguishing *Burland* v. *The King,* argued and reported at the same time as *Alleyn* v. *Barthe,* and *Cotton* v. *The King,* [1914] A.C. 176, 15 D.L.R. 283. *Alleyn* v. *Barthe* was in turn distinguished on this point in *Provincial Treasurer of Alberta* v. *The King, supra.*

of course to open the way to double taxation, because obviously the movable property may also be validly taxed in the province in which it is situated either by way of a tax upon administration or by way of pure taxation upon property. At least it may be said, however, that the opportunities for double taxation are appreciably less frequent than is the case as between countries in which the legislative power is not territorially limited by constitution or statute.

(d) As contrasted with the restricted view of the scope of the legislative power of a provincial legislature stated especially in connection with paragraph (b), there is discernible in the cases a current of authority which tends towards the recognition of a considerably wider scope of that legislative power. Even in the case of a tax of the kind stated in paragraph (b) it has been held that if a person dies leaving property situated outside the province as well as property situated within the province, the rate of taxation on the property situated within the province may be based on the total value of the property whether situated within or outside the province, with the result that the gradation of the tax upon the property situated within the province is accelerated by reason of the existence of the property outside the province.[37] The effect would seem to be to enable a provincial legislature to impose what is in substance a tax upon property situated outside the province, or to impose a tax upon a person within the province in respect of property situated outside the province, under the guise of an increased tax upon property or person within the province, upon the ground that the rate of valid taxation is a matter entirely for the province to decide. So, the decision that the tax of the kind stated in paragraph (c) is valid would seem to involve the proposition that a provincial legislature may tax a person in the province in respect of property situated outside the province under the guise of a tax upon the transmission of the property to him under or by virtue of the law of the province. It is not quite clear where the line can logically be drawn. If the basis of taxation may wholly or partially be property situated outside the province, it is difficult to escape the logical conclusion that a direct tax may be imposed upon any person in the province on any basis of taxation whatsoever, subject of course to the practical limitation that the tax can be enforced only against the person or his property in the province; on this theory a person in the province can be directly taxed in respect of property situated outside the province.

[37] *Minister of Finance of British Columbia* v. *Royal Trust Co.*, 1920, 61 Can. S.C.R. 127, 56 D.L.R. 226, reversed, merely on the construction of the statute, *sub nom. Royal Trust Co.* v. *Minister of Finance of British Columbia*, [1922] 1 A.C. 87, 61 D.L.R. 194.

It appears from the foregoing discussion that for the purpose of provincial taxation, the situs of every kind of property must be determined on principle or in accordance with fact. It is not, however, within the scope of this article to discuss the difficulties which may arise in the attribution of a situs to particular kinds of intangible movables.[38]

(To be Continued.)

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[38] For example, as to shares in companies, it appears to have been assumed for the purposes of the argument in *Provincial Treasurer of Alberta* v. *Kerr* (although not so stated in the report of the case in the Privy Council), that all the "personal" (meaning "movable") property there in question was actually situated outside of the province, including certain shares the certificates of which were actually situated within the province: see the report of the case in the Supreme Court of Alberta, *sub nom. Kerr* v. *Provincial Treasurer of Alberta,* [1932] 2 W.W.R. 705, [1933] 1 D.L.R. 88. It still remains for some court to effect a complete reconciliation of *Brassard* v. *Smith,* [1925] A.C. 371, 1 D.L.R. 528, with such cases as *Colonial Bank* v. *Cady,* 1890, 15 App. Cas. 267; *Stern* v. *The Queen,* [1896] 1 Q.B. 211; *Secretary of State for Canada* v. *Alien Property Custodian for the United States,* [1931] S.C.R. 169, 1 D.L.R. 890. See also *Erie Beach Co.* v. *Attorney-General for Ontario,* [1930] A.C. 161, 1 D.L.R. 859; *The King* v. *Cutting,* [1932] S.C.R. 410, 3 D.L.R. 273.