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SITUS AND TRANSFER OF INTANGIBLES IN THE CONFLICT OF LAWS

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In an article on Administration and Succession in the Conflict of Laws, published in the CANADIAN BAR REVIEW,[1] I attempted to state in outline the rules of conflict of laws relating to the administration of the estates of deceased persons and relating to the succession to property on death. In that article stress was laid on the predominant importance of the situs of property as the criterion of jurisdiction and as the connecting factor for the purpose of the selection of the proper law, but it was outside of the scope of the article to discuss the difficulties which may arise in the attribution of a situs to various kinds of intangible movables.

The object of the present article is to discuss the situs of intangible movables and to discuss their transfer *inter vivos* in the conflict of laws.[2]

I. SITUS OF PROPERTY

The question what is the situs of a thing is important for various purposes, as, for example, (a) in order to decide whether

[1] Vol. 12, pp. 67-79, 125-141 (1934).

[2] This article is part of a new chapter 2, Legislative Power and the Conflict of Laws, in the forthcoming fifth edition of the present writer's Banking and Bills of Exchange.

the thing is part of the property of a deceased person which belongs to the local administration within a given country or province;[3] (b) in order to decide whether the thing is the subject of taxation within the terms of a taxing statute which imposes a tax upon property situated within a given country or province[4]; and (c) in order to decide whether the thing has been validly transferred *inter vivos* in accordance with the *lex rei sitae*, so far as that law is the governing law.

As regards the transfer *inter vivos* of tangible property[5], whether movable or immovable, it is clear that the domicile of the owner is immaterial and that the governing law is the *lex rei sitae*.[6] As regards the transfer *inter vivos* of intangible movables the applicability of the *lex rei sitae* is complicated by various considerations applicable to different kinds of intangible movables, and the subject has therefore been reserved for separate discussion below, but in any event the domicile of the owner is immaterial. Similarly for the purposes of provincial taxation upon property within the province, and for the purpose of the administration of the estate of a deceased person,[7] the situs of the property and not the domicile of the deceased owner is the dominant element, and the domicile of the owner has no bearing on the question of the situs of the property.

If the property is tangible, the situs is actual in the literal sense. If the property is intangible, the word "actual" in the literal sense cannot properly be used as to its situs, but any situs that may be attributed to it by the law is certainly not based upon the fiction that the property is situated where the owner is or was domiciled[8]; and the situs is actual in the sense that it is based upon substantial considerations[9] or upon some

[3] See 12 Can. Bar Rev. 67, at pp. 70, 125 ff.

[4] See 12 Can. Bar Rev. 67, at pp. 71 ff.

[5] The transfer of ships is probably governed by special rules. See, e.g., Dicey, Conflict of Laws, appendix, note 29.

[6] Apart from the exceptional cases of ships and of goods in transit at the time of the making of a contract of sale or pursuant to a contract of sale, various problems in connection with the transfer *inter vivos* of tangible movables are discussed in the present writer's Contract and Conveyance in the Conflict of Laws, 81 U. of Penn. L.R. 662-683, 817-846 (1933), [1934] 2 D.L.R. 1-44. As to contracts relating to immovables and as to the transfer *inter vivos* of immovables, see the present writer's Law of Mortgages, 2nd ed. 1931, chapter 40, sections 421-423.

[7] The statement in the text is also accurate with regard to the succession to the property, notwithstanding that the rules of conflict of the forum may in the case of movables make applicable the *lex domicilii* of the *de cujus* for the purpose of the distribution of the beneficial interest in the surplus: see 12 Can. Bar Rev. 67, at pp. 76, 131-132 (1934).

[8] See, especially, 12 Can. Bar Rev. 67, at p. 69.

[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. As to this case, see section III, Shares and Share Certificates, *infra*.

principle or coherent system of principles[10]. Inasmuch as different kinds of intangible movables have to be separately discussed so far as their transfer *inter vivos* is concerned, and they must be classified for that purpose, it seems better to discuss the question of the situs[11] to be attributed to each class of intangible movables as that class comes up for discussion in the following divisions of the present article.

II. Obligations to Pay Money

(a) *General Rules*

The most commonly cited general rules are that although a debt has no absolute local existence, yet it possesses an attribute of locality, and that a simple contract is regarded as being situated within the area of the local jurisdiction within which the debtor for the time being resides, where the assets to satisfy the debt presumably are[12], whereas a specialty debt has a species of corporeal existence by which its locality may be reduced to a certainty, and is regarded as being situated where the specialty is found at the material time[13]. These general rules require some amplification and modification. A judgment debt is said to be situated where the judgment is recorded[14]. A specialty within the general rule includes not only an instrument under seal, but also a statutory government obligation evidenced by a bond authenticated by the legislature and charged by statute on the consolidated revenue fund[15]. An exception to the general rule as to a simple contract debt exists in the case of a debt embodied in a negotiable instrument, though not a specialty. Such a debt is regarded as being situated where the instrument is found at the material time, the instrument being regarded as analogous either to a specialty or to a tangible movable[16]. While either the specialty character or the negotiable character

[10] *The King* v. *National Trust Co.*, [1933] S.C.R. 670, 4 D.L.R. 465.

[11] For a general discussion of the situs of intangible movables, see Dicey, Conflict of Laws, notes to his rule 76; Goodrich, Conflict of Laws (1927), pp. 83-113 (taxation), 361-366 (transfer *inter vivos*), 401-408 (administration).

[12] See, further, under heading (e), *infra*.

[13] *Commissioner of Stamps* v. *Hope*, [1891] A.C. 476. As to a debt secured by mortgage of land, see further under heading (d), *infra*.

[14] *Attorney-General* v. *Bouwens*, 1838, 8 M. & W. 171, at p. 191.

[15] *Royal Trust Co.* v. *Attorney-General for Alberta*, [1930] A.C. 144, 1 D.L.R. 868, [1929] 3 W.W.R. 633; applied in special circumstances to the bonds in question in *The King* v. *National Trust Co.*, [1933] S.C.R. 670, 4 D.L.R. 670.

[16] *Attorney-General* v. *Bouwens*, *supra*; *Crosby* v. *Prescott*, [1923] S.C.R. 446, 2 D.L.R. 937, 2 W.W.R. 569; *The King* v. *National Trust Co.*, *supra*.

of an instrument is sufficient justification for the attribution to the debt of a situs identical with that of the actual situs of the instrument, the negotiable character of the instrument is more important than its specialty character for the purpose of its transfer *inter vivos*.

(b) *Negotiable Instruments*

The simplest case is that of a debt which is represented or evidenced by a negotiable instrument, whether a specialty or not, as, for example, a bill, cheque or note, or a bearer bond, or a bearer interest coupon attached to a registered bond, or a bond payable to the order of a named person and not containing any provision making registration necessary on transfer. In this case the debt is in effect merged in the instrument which represents or evidences it[17], and the situs of the debt is the same as that of the instrument. There is consequently no difficulty in attributing a situs to the intangible debt for any purpose for which the attribution of a situs is important, as, for example, for the purpose of the administration of the estate of a deceased person or for the purpose of provincial taxation; and furthermore there is no difficulty in applying the *lex situs* of the instrument as the law governing the transfer *inter vivos* of the instrument and the debt[18]. The question whether an instrument has the quality of negotiability is governed by the *lex rei sitae* at the time of transfer[19].

(c) *Quasi-negotiable Instruments*

A more complicated case is that of a debt represented or evidenced by an instrument which for convenience may be called a quasi-negotiable instrument, namely, an instrument which is customarily transferable by endorsement or endorsed transfer and delivery, but which must be surrendered and the transfer of which must be registered in order to effect a complete transfer of the debt. Bonds registered in the name of a specified person frequently contain terms which bring them into this class of instruments[20]. Even if an instrument of this class is

[17] La créance fait corps avec le titre et sa nature incorporelle, ainsi matérialisée, cesse de créer un obstacle à une livraison de main à main. *Pesant* v. *Pesant*, [1934] S.C.R. 249, at p. 265.

[18] As to the transfer of negotiable instruments in the conflict of laws, see chapter 52, s. 4, of the present writer's Banking and Bills of Exchange.

[19] *Picker* v. *London and County Banking Co.*, 1887, 18 Q.B.D. 515; *Colonial Bank* v. *Cady*, 1890, 15 App. Cas. 267; *Garey* v. *Dominion Manufacturers*, 1924, 56 O.L.R. 159, [1925] 1 D.L.R. 99.

[20] Cf. Steffen and Russell, The Negotiability of Corporate Bonds, 41 Yale L.J. 799 (1932), and Registered Bonds and Negotiability, 47 Harv. L.R. 741 (1934).

a specialty, as it usually is, so as to justify the attribution to the debt of a situs at the place where the instrument is found, the debt is not merged in the instrument so as to justify us in saying that the transfer of the instrument is exactly equivalent to the transfer of the debt The transfer *inter vivos* of the instrument is of course governed by the *lex rei sitae* at the time of the transfer, while the transfer of the debt is governed by the law of the place of registration. In practice, however, the requirements of the law of the place of registration would usually be purely routine or ministerial, so that in effect the purchaser of the instrument, who acquires the property in the instrument by its transfer to him, usually acquires also the right to procure the registration of the transfer and the consequent registration of himself as holder of the instrument. This right is nearly though not exactly equivalent to the legal title to the debt which he acquires when the transfer is registered. Technically, until the transfer is registered, he has, as regards the debt, a *jus ad rem* rather than a *jus in re*[21].

(d) *Specialties*

If a debt is represented or evidenced by a specialty, it has a situs where the specialty is found at the material time[22], and this situs is an essential element for the purpose of the administration of the estate of the deceased owner and for the purpose of making the debt the subject of taxation under provincial legislation[23]. It does not follow, however, that the situs thus attributed to a specialty debt is the connecting factor in the conflict of laws with regard to the transfer *inter vivos* of the debt. If the instrument is strictly speaking negotiable, it falls under heading (b) above, and the transfer of the instrument and of the debt is governed by the *lex situs* of the instrument at the time of the transfer. If the instrument is quasi-negotiable in the sense explained under heading (c), above, the transfer of the instrument and the transfer of the debt are governed by the principles there stated. If, on the other hand, the instrument is not negotiable even in the limited sense just mentioned, then the situs attributed to the debt by reason of the specialty character of the instrument has no significance for the purpose

[21] As to the similar situation with regard to the transfer of a share certificate, see section III, *infra*, and *Colonial Bank* v. *Cady*, 1890, 15 App. Cas. 267, at p. 277, Lord Watson.

[22] As to the general rule, and as to what "specialty" includes, see heading (a), *supra*.

[23] *Toronto General Trusts Corporation* v. *The King*, [1919] A.C. 679, 46 D.L.R. 318, [1919] 2 W.W.R. 354.

of the transfer *inter vivos* of the debt. A mortgage of land is the commonest example of an instrument of this class. It is usually under seal, and even if, as in the case of a charge or mortgage under the land titles system, it need not be under seal, it may, by virtue of the governing statute, have the same effect as if it were under seal. A mortgage is, however, usually made in duplicate, one counterpart being registered in the registration district in which the land is situated, and the other counterpart being held by the mortgagee; and if the mortgagee's counterpart is found at the material time in a country different from that in which the land is situated, it is impossible to apply the general rule as to the situs of a specialty debt. Consequently recourse must be had to some other criterion of situs, and practical considerations point to the situs of the land as the locality of the debt[24]. In any event the mortgage security, although regarded as personal property in English local law, is characterized as immovable property in English conflict of laws[25], and therefore its transfer is governed by the *lex situs* of the mortgaged land. Furthermore, as the mortgagee must reconvey the land or discharge the mortgage when the mortgage debt is paid, the debt cannot be effectually transferred apart from the transfer of the security, so that the transfer of the debt is also governed by the *lex situs* of the land[26].

(e) *Other Choses in Action*

There remain for discussion questions as to the situs and transfer of a debt or obligation to pay money not falling within any of the above mentioned classes. Such a debt may conveniently, though not accurately, be designated in the subsequent discussion as a chose in action[27] or a simple contract debt[28]. While the general rule, already mentioned, is that a simple contract debt is situated in the country in which the debtor resides at the material time, because it is there that the assets to satisfy the debt presumably are and that the debt can be

[24] *Toronto General Trusts Corporation* v. *The King, supra;* cf. *Royal Trust Company* v. *Provincial Secretary-Treasurer of New Brunswick*, [1925] S.C.R. 94, 2 D.L.R. 49.

[25] *In re Hoyes, Row* v. *Jagg*, [1911] 1 Ch. 173.

[26] Generally as to the transfer of immovables in the conflict of laws, see the present writer's Law of Mortgages, 2nd ed. 1931, chapter 40, pp. 733 ff.

[27] The expression in itself is of course wide enough to include the various kinds of intangible property already discussed.

[28] The expression in itself includes of course the case of a negotiable instrument, not a specialty, already discussed, and may not be wide enough to cover every kind of obligation to pay money included in the subsequent discussion.

recovered[29], the application of the general rule is sometimes complicated by the fact that the debtor resides in effect in two or more countries. A corporation, for example, may carry on business and have offices in several countries, and in order to decide which of the several residences of the debtor is the criterion of locality of a particular debt, it is necessary to look at the contract which creates the debt. If under that contract the debt is payable or recoverable at the office of the company in a particular country, the debt is to be considered as being situated in that country[30]. It has been held a bank may be served and a deposit account attached in the province in which the money is deposited as a debt due to the depositor[31] and that the bank is protected by payment into court in pursuance of an order of court made in that province[32].

In *The King* v. *Lovitt*[33] the question was whether the province of New Brunswick was entitled to succession duty upon money on deposit in a branch at St. John, New Brunswick, of a bank having its head office at London, England, the domicile of the deceased depositor having been in Nova Scotia. It was argued that the situs of this simple contract debt was either at the residence of the debtor, that is, in England, or that of the creditor, that is, in Nova Scotia, and that the property was therefore situate outside of the province of New Brunswick. The Privy Council held that the debt was primarily payable at St. John, and that it had a situs within the province of New Brunswick. The statute in question purported to make all property situate within the province liable to succession duty, whether the deceased owner was domiciled there or not, such duty being assimilated by other provisions of the statute to a probate duty[34] payable for local administration. The money on deposit was therefore held to be liable to the duty.

[29] *Attorney-General* v. *Bouwens*, 1838, 4 M. & W. 171; *Commissioner of Stamps* v. *Hope*, [1891] A.C. 476; *Sutherland* v. *Administrator of German Property*, [1934] 1 K.B. 423.

[30] *New York Life Insurance Co.* v. *Public Trustee*, [1924] 2 Ch. 101, and cases there cited; *In re Russian Bank for Foreign Trade*, [1933] Ch. 745; *In re Russo-Asiatic Bank*, [1934] Ch. 745.

[31] *County of Wentworth* v. Smith, 1893, 15 O.P.R. 372. Now, by s. 96 of the Bank Act, the operation of an attaching order is limited to the branch, agency or office where the order or a notice thereof is served.

[32] *Harris* v. *Cordingly*, 1899, Q.R. 16 S.C. 501; cf. *Swiss Bank Corporation* v. *Industrial Bank*, [1923] 1 K.B. 673; *Richardson* v. *Richardson*, [1927] P. 228.

[33] [1912] A.C. 212, reversing *Lovitt* v. *The King*, 1910, 43 Can. S.C.R. 106, and restoring *Rex* v. *Lovitt*, 1906, 37 N.B.R. 558; cf. *Attorney-General* v. *Newman*, 1901, 1 O.L.R. 511; *In re Succession Duty Act*, 1902, 9 B.C.R. 174.

[34] As to "probate duty," see 12 Can. Bar Rev. 67, at p. 72 (1934).

From a later case[35] it would appear that the situs of the bank's debt or obligation to its customer is not necessarily the same as the situs of the asset consisting of the money deposited. The fact being that a certain branch bank retained out of the deposits there made only sufficient money for its local business and transmitted the surplus to the head office or to another branch, the court was divided on the question whether the municipality within which the first mentioned branch was situated was entitled to tax the bank on the basis of the gross amount deposited at that branch, as being personal property within the municipality.

The King v. *Lovitt* was distinguished in *Royal Bank* v. *The King*[36]. In the latter case the bank received on deposit at its branch in New York the proceeds realized in London of a mortgage bond issue of the Alberta and Great Waterways Company guaranteed by the province of Alberta. Under instructions from the bank's head office in Montreal a special railway account in the name of the treasurer of the province was opened at a branch in Alberta (no money being sent there in specie and the account remaining under the control of the head office) for purposes connected with railway construction wholly within the province as provided by certain provincial statutes of 1909, and subsequent orders in council and contracts. A provincial statute of 1911 recited that the railway had made default in payment of the interest on the bonds and in construction of the line, ratified the guarantee of the bonds, and enacted that the whole of the proceeds of the bonds, including the amount deposited with the bank, should form part of the general revenue of the province, free from all claim of the railway company or its assigns, and should be paid over to the treasurer of the province. Action was thereafter brought on behalf of the crown and the provincial treasurer to recover the amount of the deposit. It was held that the bond-holders, having subscribed their money for a purpose which had failed, were entitled to recover their money from the bank at its head office in Montreal, that this was a civil right existing and enforceable outside the province, and that the provincial legislation in derogation of that right was *ultra vires*. It was also argued that the provincial legislation was really banking legislation because its effect was to convert a special deposit which was conditionally payable to the depositor, or to be invested for his benefit, into an unconditional deposit payable on demand to a person other than the

[35] *The King* v. *Assessors of Rates and Taxes for Woodstock*, [1924] S.C.R. 457, 4 D.L.R. 169.

[36] [1913] A.C. 283, 9 D.L.R. 337, 3 W.W.R. 994.

depositor. This argument was answered in the negative in the provincial courts, and on appeal it was not considered necessary to decide it.

The situs of a simple contract debt or chose in action, ascertained on the principles just stated, is the governing element for the purpose of the administration of the estate of a deceased person[37] and for the purpose of provincial taxation on property[38], but the question of the transfer *inter vivos* of the debt or chose in action is in a state of doubt or confusion in English conflict of laws[39]. The nature of the problem may be clarified if we begin by distinguishing clearly between (a) the transaction which gives rise to the debt and (b) the transaction by which the debt is transferred from the creditor to a third person. The validity of the creditor's claim against the debtor and generally the rights and obligations of creditor and debtor *inter se* are governed by the ordinary principles of conflict of laws applicable to transaction (a), that is, in the case of a contract, by the proper law of the contract[40]. The selection of the proper law relating to transaction (b), that is, the transferring transaction, is more difficult, and depends on the way in which transaction (b) is characterized in its relation to transaction (a). Three possible modes of characterization suggest themselves, and in connection with the outline which follows here the consequences of each mode of characterization are indicated.

(1) The debt arising out of transaction (a) might be characterized as a movable thing having a situs of its own, and transaction (b) might be characterized as being sufficiently analogous to the transfer of a tangible movable to justify the application of the ordinary rule that the *lex rei sitae* governs the transfer of the thing; and the proper law of transaction (a) would be immaterial.

(2) Transaction (b) might be characterized as being merely incidental or ancillary to transaction (a), with the result that the transfer of the debt would be governed by whatever is the proper law of the transaction which gives rise to the debt; and

[37] See 12 Can. Bar Rev. 67, at pp. 70, 125 ff.

[38] See 12 Can. Bar Rev. 67, at pp. 71 ff., and *The King* v. *Lovitt, supra.*

[39] See the various judgments in *Republica de Guatemala* v. *Nunez*, [1927] 1 K.B. 699, affirming, in the result, Greer J., (1926), 95 L.J.K.B. 955, 42 T.L.R. 625.

[40] Cf. the present writer's Banking and Bills of Exchange, chapter 52, section 5, and Contract and Conveyance in the Conflict fo Laws, 81 U. of Penn. L.R. 661, at pp. 666 ff. (1933), [1934] 2 D.L.R. 1, at pp. 4 ff.

the situs of the debt, so far as it has a situs at all, would be immaterial.

(3) Transaction (b) might be characterized as being analogous to a contract, or at least as having a proper law of its own ascertained in a way similar to that in which the proper law of a contract is ascertained, without regard to the situs, if any, of the debt and without regard to the proper law of transaction (a).

The first mode of characterizing the transfer and the thing transferred is attractively simple, and its substantial advantages should commend it as the preferable characterization. This mode results in the application of a single law (the *lex situs* of the debt) to the validity of one transfer or several transfers, no matter where or by whom it or they may be made, and in particular avoids any problem of priorities as between transfers made in different countries. If it should happen that the debtor's obligation under transaction (a) is governed by some law other than the *lex situs* of the debt, he is of course still entitled to avail himself of the proper law of transaction (a) as regards the nature of the obligation, and in any action against him to recover the debt he is of course entitled to avail himself of the rules of procedure of the forum[41]. As a general rule the place of action would be the same as the situs of the debt.

The second mode of characterizing transaction (b) in its relation to transaction (a) is peculiarly appropriate to some cases in which transaction (b) is in effect the exercise of a power conferred by transaction (a), as, for example, a power conferred by an insurance policy or by its proper law to nominate a new beneficiary[42], or a power of appointment[43]. Even as applied to the simple case of the transfer of a debt, the second mode of characterization has some advantages.[44] Like the first mode of characterization, it avoids any problem of priorities as between two or more transfers because, as in the case of the first characterization, both or all the transfers are governed by a single law.

[41] Generally, as to the first mode of characterization, see Dicey, Conflict of Laws, rule 153; Westlake, Private International Law, s. 152 (analogy of the forum for the recovery of a debt with the situs of a corporeal movable); *In re Maudslay, Sons & Field, Maudslay* v. *Maudslay*, [1900] 1 Ch. 602, at p. 610; *Republica de Guatemala* v. *Nunez*, [1927] 1 K.B. 699, Lawrence L.J., approved by F.P., 43 L.Q.R. 296 (1927); cf. note, 40 Harv. L.R. 989 (1927); *Re Sawtell, Ex parte Bank of Montreal*, [1933] O.R. 295, 2 D.L.R. 392, 14 C.B.R. 320.

[42] Cf. *Re Baeder and Canadian Order of Chosen Friends*, 1916, 36 O.L.R. 30, 28 D.L.R. 424.

[43] The case of *In re Anziani, Herbert* v. *Christopherson*, [1930] 1 Ch. 407, might well have been, but was not, decided on this ground.

[44] It is approved by G. C. Cheshire, 51 L.Q.R. 76, at p. 85 (1935); cf. Cheshire, Private International Law, Oxford, 1935, pp. 352-354.

Unlike the first mode of characterization, the second mode of characterization avoids any possible conflict between the rights and obligations of the creditor and debtor *inter se* on the one hand, and the rights of the transferee or transferees on the other hand, because they are both governed by the proper law of the transaction which gives rise to the debt.

The third mode of characterizing transaction (b), namely, attributing to the transfer of a debt a proper law of its own, would seem to be the least satisfactory, although it appears to be the mode preferred by some judges.[45] Like the first mode of characterization, but unlike the second, it may make applicable to the transfer of a debt a law different from the proper law of the transaction which gives rise to the debt, and it involves all the usual problems which arise in connection with contract, such as those relating to capacity, formal validity and intrinsic validity. It raises also a difficulty which is absent in the case of either the first or the second mode of characterization, namely, that there may be two or more transfers of the same debt made in different countries, and that each transfer may be valid by its own proper law, and may be entitled to priority by that law. In a case like this it is obvious that resort must be had to some one law to decide the question of priorities. If, for example, the debtor resides in country X, and the debt is transferred by the creditor, in country Y to one person and in country Z to another person, the only practicable solution would seem to be to apply either the *lex situs* of the debt or the *lex fori*. As an action to recover the debt will usually be brought in country X, it will usually happen that the *lex fori* is the same as the *lex rei sitae*.[46] In that event the same result is reached as would be reached more simply by the first mode of characterization. If both transfers happen to be made in one country other than that of the situs or the forum, the law common to the two transfers might be applied.[47]

III. Shares and Share Certificates.

On the principle that intangible property is considered as being situated where it can be effectively dealt with, it has been

[45] *Lee* v. *Abdy*, (1886), 17 Q.B.D. 309; *Republica de Guatemala*, v. *Nunez*, 1926, 95 L.J.K.B. 955, 42 T.L.R. 625, Greer J., and [1927] 1 K.B. 699, Scrutton L.J.; *In re Anziani, supra*, Maugham J.

[46] Cf. *Kelly* v. *Selwyn*, [1905] 2 Ch. 117.

[47] *In Republica de Guatemala* v. *Nunez, supra*, the two transfers were made in Guatemala and the parties to both transfers were domiciled there, and the law of Guatemala was applied. Bankes L. J. held that the question was one of priorities, but this view seems hardly tenable, inasmuch as both transfers were held to be invalid; cf. F.P., 43 L.Q.R. 296 (1927).

held that so far as shares can have a situs, that situs is the place where the share registry office is. Thus, in *Brassard* v. *Smith*[48] certain shares of the Royal Bank of Canada were in question, the bank having its head office in the province of Quebec, and the shares being part of the estate of a person who was domiciled in the province of Nova Scotia and being registered at the share registry office maintained by the bank in Nova Scotia pursuant to the provisions of the Bank Act.[49] An action having been brought by the collector of succession duty under the Quebec Succession Duty Act for payment of duty in respect of the shares, as being property "actually situate within the province", and it being assumed that shares can have a local situation, it was held that the shares were not property situate in Quebec, as the ownership of the shares could be dealt with effectively only in Nova Scotia.[50] Similarly, if a bank maintains a share registry office in New York, or elsewhere outside of Canada, shares belonging to shareholders resident outside of Canada and registered at such share registry office are considered as having a situs at the place where the registry office is.[51] The principle that shares have a situs where the registry office is applies not only to book stock, but also to shares represented by certificates the surrender of which is required as a condition precedent to the transfer of the shares at the registry office.[52]

Under the principle just stated the situs of the certificate as distinguished from the situs of the shares is immaterial for the purpose of provincial taxation on property. Nevertheless the certificate, being a tangible thing, has of course a situs where it is in fact, and for some other purposes the situs of the certificate may be material. In particular the situs of the certificate may be important in connection with the transfer *inter vivos* of the shares as well as that of the certificate. As regards transfer *inter vivos* we must distinguish book stock from other shares.

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[48] [1925] A.C. 371, 1 D.L.R. 528, affirming *Smith* v. *Levesque*, [1923] S.C.R. 578, 3 D.L.R. 1057.

[49] Section 43, corresponding with s. 42 of the present Bank Act.

[50] It had already been decided, in *Smith* v. *Provincial Treasurer of Nova Scotia*, 1919, 58 Can. S.C.R. 570, 47 D.L.R. 108, that the same shares were the subject of taxation under the Nova Scotia Succession Duties Act. While the result is in accord with *Brassard* v. *Smith*, the view expressed in the judgments that the situs depends on the domicile of the deceased owner would seem to be no longer tenable; cf. 12 Can. Bar Rev. 67, at p. 69; *Untermyer Estate* v. *Attorney-General for British Columbia*, [1929] S.C.R. 84, 1 D.L.R. 315.

[51] *The King* v. *Cutting*, [1932] S.C.R. 410, 3 D.L.R. 273; cf *Re Macfarlane*, [1933] O.R. 44, 1 D.L.R. 345.

[52] *Erie Beach Co.* v. *Attorney-General for Ontario*, [1930] A.C. 161, 1 D.L.R. 859, affirming, 1929, 63 O.L.R. 469, [1929] 2 D.L.R. 754.

In the case of book stock the situation is simple in the conflict of laws. The transfer *inter vivos* of the shares is governed by the law of the place of registry, the *lex situs* of the shares, and there can be no question of any effective transfer of the shares by the transfer of the certificate, if any, elsewhere and by virtue of the law of some other place.

In the case of shares which are represented by a certificate which must be surrendered in order that the transfer of the shares may be registered on the books of the company, it may be necessary to distinguish between the situs of the certificate and that of the shares. On principle the transfer of the certificate is governed by the *lex situs* of the certificate at the material time, and the transfer of the shares is governed by the *lex situs* of the shares, and consequently, if the certificate is transferred in country X, and the share registry office is situated in country Y, the law of X may give to the transferee of the certificate the property in the certificate (*jus in re*) and a right to registration as shareholder (*jus ad rem*), but the enforcement of his right to registration as shareholder and the vesting in him of the title to the shares (*jus in re*) are subject to the law of Y. It may happen that the certificate is of a kind which is customarily sold and bought in the markets of both X and Y, and that the purchaser in X gets not only a title to the certificate, but also, by reason of the fact that the registration requirements of the law of Y are ministerial or routine in character, gets a right to registration as shareholder by the law of Y, so that for practical purposes, by the transfer of the certificate in X he acquires something which is substantially, though not exactly, equivalent to the title to the shares. Whether this is the result of the transfer of the certificate may, however, depend in particular circumstances upon special considerations relating to the nature of share certificates.

A share certificate of the kind now under discussion[53] is not, strictly speaking, a negotiable instrument,[54] that is, it is not negotiable in the same sense that a bill, cheque, note or bearer bond may be negotiable, and the shares are not merged in the certificate in the same way that a debt may be merged in a negotiable instrument,[55] even though the certificate may be

[53] A share warrant in favour of bearer may for the present purpose be considered a negotiable instrument.

[54] See, especially, *Colonial Bank* v. *Cady*, 1890, 15 App. Cas. 267.

[55] See heading (b), *supra;* cf. Transfer of Stock Certificates Endorsed in Blank, 32 Columbia L.R. 370 (1932); Jurisdiction in Rem of Documented Claims, 32 Michigan L.R. 506 (1934).

customarily sold and bought in the market. It may therefore happen that the transferee of a negotiable instrument would acquire a good title, although the transferee of a share certificate would not in similar circumstances acquire a good title, as against the former holder who did not intend to transfer the title or did not authorize its transfer[56]. The share certificate which must be surrendered in order that the transfer of the shares may be registered is substantially in the same position as a registered bond[57]. The transfer of the title to the certificate is governed by the *lex situs* of the certificate at the time of transfer, and under the proper law of the contract between him and the transferor (which would usually be the same as the *lex rei sitae*) he may, as to the shares, acquire some "property, right or interest," but the title to or ownership of the shares, strictly speaking, can be vested in him only in accordance with the *lex situs* of the shares[58]. If the certificate is in fact in country X, and the share registry office is in country Y, it is obvious that the certificate is a document of value and of some operative effect, although not completely operative to transfer the title to the shares, and therefore it may be the subject of taxation in X,[59] if the legislation of X is not subject to territorial limitations similar to those which are applicable to provincial legislation in Canada, and at the same time, the shares themselves may be the subject of taxation in Y. Again, the legislation of Y relating to companies falling within its scope may be so expressed as to reduce to a minimum the importance of the registration requirements of Y as against a transferee of the certificate who has bought the certificate in a recognized market[60].

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[56] *Colonial Bank* v. *Cady*, *supra*.

[57] See heading (c), *supra*.

[58] *Cf. Secretary of State of Canada* v. *Alien Property Custodian for the United States of America* [1931] S.C.R. 169, 1 D.L.R. 890; *The King* v. *Cutting*, [1932] S.C.R. 410, 3 D.L.R. 273.

[59] *Cf. Stern* v. *The Queen*, [1896] 1 Q.B. 211; see also Dicey, Conflict of Laws, notes to rule 76, for other examples of anomalous situations created by taxing legislation.

[60] Cf. the Dominion Companies Act, 1934, s. 36, superseding R.S.C. 1927, c. 27, s. 77.