DEATH TAXES IN MANITOBA.

PART I.

INHERITANCE AND INHERITANCE TAXES.

The Institution of Inheritance.

The right of one person to succeed on the death of another to the ownership and possession of that other's property, by will or by intestate succession, is usually, as Blackstone points out, conceded to be a mere privilege granted by the law, and not a natural right. Blackstone[1] says:

> . . . Naturally speaking, the instant a man ceases to be, he ceases to have any dominion. . . . All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society: for, then, . . . the next immediate occupant would acquire a right to all that the deceased possessed. But as, under civilised governments, which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased. . . . And farther, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of escheats is adopted in almost every country; whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title can be found.

The above passage is given (in condensed and somewhat altered form) by Bayly,[2] in proof of the clear right of the State to levy succession taxes, but we must read further if we are not to be left with a mistaken impression of the relative positions, historically, of testate and intestate succession, respectively. Blackstone[3] continues:

> The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive at first view that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is . . . clearly a political establishment. . . . Wills, therefore and testaments, rights of inheritance and successions, are

[1] Commentaries, Book II, Cap. I, p. 10.
[2] Succession Duties in Canada, Introduction.
[3] Op. cit., Book II, Cap. 1.

all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them: . . . In England particularly (it seems) . . . as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be, that has not its foundation in the positive rules of the state.

It may be interesting here to consider the testimony of two such able modern writers as John Stuart Mill and Sir Henry Maine, treating as they do the subjects of inheritance and bequest from quite distinct viewpoints. We find Mill[4] saying:

It follows, therefore, that although the right of bequest, or gift after death, forms part of the idea of private property, the right of inheritance, as distinguished from bequest, does not.

Mill, however, is treating here of the essentials of private property from the economic point of view, and readily admits the priority of inheritance from the historical one. He considers that there should be practically absolute freedom of bequest, but that the right of succeeding to property upon an intestacy should, generally speaking, be limited to near relatives. This idea, as we shall see later, originated with Jeremy Bentham, and was one of the earliest modern arguments in favour of the inheritance tax.

Maine[5] deals as follows with the argument that testamentary disposition is an institution of the Law of Nature:

It is certainly never quite safe to pronounce dogmatically as to the range of association embraced by modern minds when they reflect on Nature and her Law; but I believe that most persons, who affirm that the Testamentary Power is of Natural Law, may be taken to imply either that, as a matter of fact, it is universal, or that nations are prompted to sanction it by an original instinct and impulse. With respect to the first of these positions, I think that, when explicitly set forth, it can never be seriously contended for in an age which has seen the severe restraints imposed on the Testamentary Power by the *Code Napoléon,* and has witnessed the steady multiplication of systems for which the French codes have served as a model. To the second assertion we must object that it is contrary to the best-ascertained facts in the early history of law, and I venture to affirm generally that, in all indigenous societies, a condition of jurisprudence in which Testamentary privileges are *not* allowed, or rather not contemplated, has preceded that later stage of legal development in which the mere will of the proprietor is permitted under more or less restriction to override the claims of his kindred in blood.

We have not the space here to follow Maine through the development of the testamentary power, except to note that in the Roman Law he finds the earliest form of will to be a fictitious sale of the whole property of the testator, as we may term him, to a trustee.

[4] Principles of Political Economy, Bk. II, Cap. II, Sec. 3.
[5] Ancient Law (Pollock's Edition), Cap. VI., p. 190.

This is the well-known will *per aes et libram*—"By copper and scales." As a matter of fact, there appears to have been an even earlier form, namely a proceeding by which an heir was adopted to succeed to the property which would otherwise have gone to the collateral relatives.[6] Such a proceeding seems to have existed at an early stage of Hebrew history, also, and we find Abraham saying:[7] "Lo, one born in my house is mine heir," he having presumably made him such by a similar form of adoption. And to show us the development of the testamentary power, we may read of Jacob's saying to Joseph,[8] "Moreover, I have given to thee one portion above thy brethren," indicating a more elaborate kind of proceeding.

It is at any rate certain that succession to the property of another at his death, whether by will or otherwise, is purely a privilege granted by the State, which may, it would therefore appear, regulate, modify, tax, or even entirely rescind this privilege. There is, then, theoretically at any rate, no limit to the amount of tax which may be levied by the State, since it might take all if it wished. True, considerable discussion has taken place in the United States as to whether excessively heavy taxation of this kind would not constitute an infringement of the rights secured to the individual by the Constitution. The question, however, is settled in favour of the State, by a reference to the American Constitution itself, for it will be noted that while the Constitution guarantees to the citizen the right of acquiring, possessing and protecting property, (which includes the right of disposal) the guarantee ceases to operate on the death of the possessor. There is no provision securing the right to anyone to control or dispose of his property after his death, nor the right to anyone, whether kindred or not, to take it by inheritance. Even "Life, liberty and the pursuit of happiness" does not seem to comprehend any right of testate or intestate succession.

The Inheritance Tax.

The writer prefers, and has used in the title of this work, the term "Death Tax," as being a brief and fully self-explanatory phrase to cover all exactions by the State on property changing owners by reason of a death, or on persons benefitting or presumed to benefit in a material way by death. There are shades of meaning expressed in the phrases, Probate Duty, Estate Duty, Succession Duty, Legacy Duty, Inheritance Tax, etc., but as this is not a legal

[6] Leage, Roman Private Law, Pt. II, sec. IV, subsec. i.
[7] Genesis. Cap. 15, v. 3.
[8] *Idem*, Cap. 48, v. 22.

treatise, we shall not draw fine distinctions, and shall probably use the terms, Inheritance Tax, Death Tax, and Succession Duty, more or less interchangeably.

Death Duty has been judicially defined[9] as,

> An exaction by the State to be collected from the property left by a deceased person in its custody, prescribed upon the occasion of his death and the consequent devolution of his property by force of its laws.

This is sufficient for our purpose.

Taxes on inheritances are of considerable antiquity, having apparently existed in Egypt under the Ptolemies, and perhaps earlier. Readers of Gibbon will recall the tax of five per cent. placed on legacies and inheritances by Augustus.[10] It is interesting to note that it applied only if the legacy or inheritance was above a certain value, and could not be exacted from the nearest of kin on the father's side. This tax applied only to Roman citizens, and its effect was extended with the widening of citizenship until in the third century, A.D., it affected all freemen. By the greed of the Emperor Caracalla, the tenth instead of the twentieth part was taken, but the old proportion was restored at his death. The tax was finally abolished in the sixth century. Death taxes and legacy taxes existed in Italy in the fourteenth century, and two hundred years later in Spain and the Netherlands. There were the feudal exactions of Relief and Heriot in the middle ages, and also systems of charges on transfers and transactions, and on the probating of wills. It is, therefore, possible to deal with modern death taxes as developments of such older taxes, and certainly some of the present English taxes can be recognized as obvious survivals.

Modern death taxes, however, according to Professor Seligman,[11] are much more than mere survivals, for the development of this form of taxation appears to have gone hand in hand with the spread of democratic ideas. Two explanations accordingly present themselves: if democracy tends necessarily toward socialism, the inheritance tax is imposed through jealousy of large fortunes; if, on the other hand, modern democracies are simply endeavouring to do away with the abuses that have come down to us from the aristocracies of the past, the inheritance tax may be only a means of securing equality in taxation and of realizing the principle of *ability to pay*. Let us then consider

[9] Appeal of Hopkins, 77 Conn. Rep. 644.
[10] Decline and Fall of the Roman Empire, Vol. I, Cap. VI.
[11] Essays in Taxation, Cap. V.

THE ECONOMIC ARGUMENTS FOR INHERITANCE TAXATION.

A. *Extension of Escheat*: This was Jeremy Bentham's suggestion for the abolition of intestate succession except in the case of immediate relatives, and for a considerable limitation of the power of bequest in the case of testators having no direct heirs. Bentham's argument, based as we have seen, upon a true conception of history, was that as there is no natural right of inheritance, only near relatives have any moral claim to property on an intestacy, and if the laws of succession were to be altered accordingly, the tax would lack the usual oppressive character of a tax since collateral and distant relatives, knowing that they had no legal claim to the property, would feel no deprivation. This gives us, at any rate, the germ of the more modern argument for the graduation of death taxes according to closeness of relationship to the deceased.

B. *State Co-Partnership or Co-heirship*: This argument, which originated with Bluntschli, has also been credited, erroneously, to Bentham. It brings in the state as the larger family, in which the bond of kinship between more distant relatives becomes merged, a view which can hardly be accepted, save as a figure of speech. Bentham, of course, based the claim of the State, not on any right of inheritance as such, but on the absence of any reason for inheritance by collaterals.

C. *Diffusion-of-Wealth*: This argument, which regards the tax as a means of achieving a more equal distribution of wealth, is not necessarily socialistic and was not so in its origin. J. S. Mill, in advancing it, says:[12]

> The inequalities of property which arise from unequal industry, frugality, perseverance, talents, and to a certain extent even opportunities, are inseparable from the principle of private property, and if we accept the principle, we must bear with those consequences of it; but I see nothing objectionable in fixing a limit to what any one may acquire by the mere favour of others, without any exercise of his faculties, and in requiring that if he desires any further accession of fortune, he shall work for it.

Seligman points out that the argument involves too much of a modification of the idea of inheritance to be generally acceptable, since, despite the fact that inheritance is not now defended as a natural right or as a necessary consequence of the right of private property, it is regarded as an institution that is on the whole socially desirable. Other writers, of course, have taken up this argument in all its socialistic implications, claiming that it is the duty of the State to provide for the equalisation of all fortunes, and it is

[12] Op. cit., Book II, Cap. II, Sec. 4.

such writers who now support this argument, which has been pretty generally abandoned by all who cannot accept socialistic reasoning.

D. *Cost-of-Service*: This argument treats the death tax simply as a fee to the government to reimburse it for the cost of operation of the Probate Courts. It would justify only very light charges, and the tax should logically be a regressive one, i.e., with a decreasing rate for the larger estates, as it costs proportionately less to probate a large estate than a small one. Taxes have actually been based on this theory, e.g., in Wisconsin, in 1889, but its validity is no longer recognised to any extent.

E. *Special Privilege*: This theory considers the tax as a charge proportioned to the advantages that accrue to the recipient of the inheritance which is permitted by the state. This argument has considerable merit, particularly from the legal point of view in the United States, as it enables taxing authorities there to circumvent certain constitutional limitations on the taxing power. Economically, this theory has a certain amount of justification, but only as it approaches the *Faculty,* or *ability to pay* theory, next to be touched upon, i.e., as the privilege of succession undoubtedly adds to the ability of the recipient of the inheritance to pay the tax.

F. *Accidental-Income*: This theory regards *faculty* or *ability to pay,* of the individual as the proper basis of taxation. It is the modern theory, and, we may note, the peculiar justification of the income tax. The best test of faculty is considered to be the revenue of the individual. An inheritance is an accidental addition to income or revenue for which there is no proper place in a scheme of income taxation, and yet which clearly increases the faculty of the recipient. The inheritance tax thus becomes a direct tax on the recipient of the inheritance, and is supplementary to other taxes, such as income taxes, in attempting to reach the real ability of the individual taxpayer. This suggests the answer to Adam Smith's objection[13] that

> Such taxes, even when they are proportioned to the value of the property transferred, are still unequal, the frequency of transference not being always equal in property of equal value.

According to modern reasoning, however, it does not matter that a certain amount of property passes on A's death to B, on B's death to C, and on C's death to D, all within the space, say, of a year, as the tax is not considered to have been imposed on the property, but on B, C and D, respectively, whose respective abilities to pay were each in turn enhanced by the acquisition of the estate.

[13]The Wealth of Nations, Bk. V, Cap. II, Part II, Arts. I & II, Append.

As a matter of practice, however, this theory is not pushed to extremes, and most statutes imposing a death tax contain some provision for total or partial remission of tax in the case of what is known as "quick succession," although the Manitoba Succession Duty Act is singularly lacking in that respect.

It is probable that the best case for the imposition of death taxes can be made out by a combination of the *Accidental-Income* argument with the *Special-Privilege-of-Inheritance* argument, since the former regards the tax as levied on the individual in proportion to his ability to pay it, and the latter regards it as levied upon the estate as a whole in proportion to the privilege of devolution granted by the state. This, in a system of graduated taxation, logically leads to the imposition of two taxes, as in Great Britain, the one on the individual legacies and benefits, and the other on the whole estate. And also logically, the tax on the share of any individual should be graduated, if at all, not according to the total value of the estate, but according to the increase thus made in the property and income which he now possesses. According to this method of reasoning the structure of the Succession Duty Act of Manitoba leaves something to be desired, since a legacy of $1,000.00, say, left to a domestic servant by a decedent worth $1,000,000.00, would be taxed at $250.00, as against a tax of only $140.00 on a similar legacy from a decedent worth only $100,000.00, although the faculties of the respective recipients might be exactly the same.

The Progressive Death Tax.

There are two types of graduation applicable to the inheritance tax; graduation according to remoteness of relationship to the deceased, and graduation according to the amount of property passing on death. We have already noticed the arguments in favour of the first of these advanced by Jeremy Bentham and J. S. Mill. It seems naturally and morally justifiable that the tax should be levied at a higher rate as the natural and moral claims upon the bounty of the deceased diminish with the degree of relationship, and this form of progression has met with almost universal approval.[14] It may also, as Professor Taussig[15] carefully points out, be justified economically on the ground that as less powerful motives presumably exist for the saving and accumulation of capital to be left to collaterals and strangers, inheritances and bequests in favour of

[14] Bastable, Public Finance, Bk. IV, Cap. 9, Sec. IV; Seligman, Op. cit., Cap. V; Taussig, Principles of Economics, Vol. II, Cap. 67, Sec. 5.

[15] Op. cit., Vol. II, Cap. 67, Sec. 5.

such may be taxed at higher rates without unduly checking the accumulation and investment of capital.

Graduation according to amount is a somewhat larger problem. Graduated taxation as we know it in modern fiscal systems is of two kinds: progressive and degressive. In progressive taxation, the rate increases as the amount of property or income to be taxed increases; in degressive taxation, the increases in rate cease at some point, above which the tax is proportional. Strictly speaking, all our modern graduated inheritance taxes are degressive, as a point, however high, is always fixed beyond which there is no further increase in rate. In deference to common usage, we shall employ only the term "progressive" in discussing this kind of taxation.

Progression in death taxation has its very determined opponents. Professor Bastable, for instance, argues that it is bad because of its necessarily arbitrary character, because of the added incentive to evasion, and finally because of its deterrent effect on the accumulation of capital.[16] However, as the principle has been quite generally adopted in practice, and as it appears in the Succession Duty Act of this Province, we shall, before proceeding to the statistical studies before-mentioned, consider the economic arguments in its favour.

The Economic Arguments for Progression.

A. *Special Compensatory*: Professor Bastable has pointed out[17] that individual taxes must be considered always as parts of the whole tax system of the state, and should be adjusted to the other component parts in order to make an harmonious whole. If, therefore, we find that certain taxes, such as indirect taxes on consumption, fall more heavily upon the less fortunate classes, we may defend progression in the income and inheritance taxes as tending to redress the inequality. The difficulty, however, appears to arise in the attempt to show precisely how the one inequality will counterbalance the other. If this can be done, the argument is sound.

B. *Faculty, or Ability-to-Pay*: This theory had its genesis in the Equality-of-Sacrifice theory.[18] The more money a person has, the less would seem to be the utility to him of successive increments and, therefore, the less the disutilities of decrements caused by taxation. The difficulty with the argument is that it furnishes us with no definite scale of progression for production of mathematical

[16] Op. cit., Book III, Cap. III, Sec. 7.
[17] *Idem*, Book IV, Cap. IX, Sec. 3.
[18] "Equality of taxation . . . means equality of sacrifice." J. S. Mill, Op. cit., Book V, Cap. II, Sec. 2.

equality, and it cannot do so for the reason that sacrifice is personal and psychological and cannot by its very nature be reduced to exact quantitative forms. It is impossible, then, to establish a definite relationship between the material thing taken away by the tax, and the psychical element of individual sacrifice, but as Professor Nicholson says,[19] this theory has a distinct negative value as a canon of criticism, e.g., if it be shown that a certain tax necessarily involves unequal sacrifices, it stands condemned on that ground.

Just as equality of sacrifice is subjective in its standard of measurement, faculty is objective. It does not look to the feelings of the taxpayer, but to the money value of his taxable capacity.[20] Modern experience shows that the mere possession of a large fortune affords in itself a decided advantage in increasing it. Therefore the ability of the individual to pay the tax increases more than in strict proportion to the amount of the inheritance which he receives, and justifies proportion in the rates applicable.

> The rich man may be said to be subject in a certain sense to the law of increasing returns.[21]

Even this theory, while certainly more acceptable on account of its objectivity, will not provide us with any convenient mathematical formula for progression. All we can say is that a moderate rate of progression—which does not tend to provoke evasion or check accumulation to an appreciable extent—would appear to be justifiable as probably achieving greater equality. The actual scale of progression, however, must be arrived at by experimental means.

(To be continued.)

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[19] Principles of Political Economy, Vol. III, Bk. V, Cap. 7.
[20] Nicholson, *Op. cit.*, Vol. III, Book V, Cap. 7.
[21] Seligman, The Income Tax, Intro., Sec. 8.