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THE CANADIAN AND BRITISH DEATH TAX CONVENTIONS*

ALAN L. GORNICK**

THE problem of double taxation at death has been a difficult and vexatious one ever since the time the estate tax law became a part of our Federal tax system. As a general rule, in the absence of some international agreement, a citizen domiciled in this country, but owning property in another, runs the risk of subjecting the property to death taxes in both countries. In the past when tax rates were considerably lower than they are now, this was a risk which one might assume without incurring too great a burden. At the present time however, the two taxes may wipe out the property entirely. Moreover, the burden of double taxation has an effect which discriminates greatly against any holding of foreign property. It either discourages investments abroad entirely, or imposes an unfair and discriminatory burden on those who make such investments. The elimination of double taxation in this situation is, therefore, an objective of paramount importance.

By Way of Background

The problem of double taxation at death arises principally from the fact that death taxes are usually imposed on the bases of (1) domicile (or citizenship) of the decedent, and (2) the situs of the decedent's property. Where these two elements are in the same jurisdiction, no difficulty arises. A single tax is usually imposed in that jurisdiction and there is ordinarily no basis for a tax in any other. The problem of double death taxation arises where there is domicile (or citizenship) in one jurisdiction and the property has a situs in another. If both jurisdictions undertake to impose their death tax when there is either domicile (or citizenship) or situs within the jurisdiction, discriminatory double taxation necessarily results. The only solution to prevent double taxation in this situation is for the two jurisdictions to restrict their tax to one basis, or to agree upon some basis for apportioning a single tax between them.

The problem of double death taxation has been considered, and a solution developed, by many of the states of the United States, and the provinces of Canada as well, during a period of more than thirty years.¹ Since the early 1920's at least, multiple death taxation of intangible per-

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sonal property, especially stock, has existed to a greater or lesser degree. The solution which has gradually been worked out by the states has been to impose the tax only on the basis of domicile. "Farsighted States saw that the total revenue resources practically available to the States was not increased by overlapping their taxation and invading each other's domiciliary sources of taxation." By 1930, over two-thirds of the states (and several of the provinces of Canada) had either excluded the intangibles of nonresidents from their tax, or had adopted reciprocal statutes under which the tax was imposed only by the state of domicile of the decedent. In 1929, the Supreme Court held that a state could not constitutionally impose a death tax on stocks or bonds or other intangibles held by a resident of another state. Although this constitutional restriction against taxing intangibles in a state other than that of the domicile was removed by the Supreme Court in the Aldrich case in 1942, the restrictive and reciprocal statutes of the states have not been abrogated. On the contrary, they have been extended, and, in fact, today such statutes are in effect in all forty-eight states, as well as the Hawaiian Islands, Alaska and the District of Columbia. Consequently, interstate and interprovincial death taxation at the present time is based generally upon the principle of the domicile. In New York, the principle of basing the tax on the domicile only was written into the state constitution in 1938.

Progress in the elimination of double death taxes between nations, on the other hand, has lagged far behind that of the states and provinces.

At the present time, under the Internal Revenue Code, the United States imposes its estate taxes on both the basis of domicile (or citizenship) of the decedent, and the basis of situs of the property. Under Section 810 of the Internal Revenue Code, the estate tax is made applicable to all property of a citizen or resident of the United States wherever it may be located "except real property situated outside the United States." At the same time section 860 of the Code imposes a tax on the estates of all alien nonresidents based upon all property "situated in the United

3 See (1930) PROC. NAT. TAX ASS'N 339; Note (1940) 26 IOWA L. REV. 694.
7 See Note (1940) 26 IOWA L. REV. 694; (1945) 81 TRUSTS & ESTATES 336.
8 N. Y. CONST. art XVI, §3 (approved November 8, 1938).
States.” Section 862 (a) provides that stock in a domestic corporation shall be deemed property within the United States but section 863 by way of exemption, provides that the proceeds of life insurance and bank deposits shall not be deemed property within the United States. Under comparable provisions contained in the Revenue Act of 1924, the Supreme Court held that the United States tax was applicable to stocks and bonds of foreign corporations physically located within the United States and to a cash balance on deposit with a New York company not engaged in the banking business.\(^9\) The Supreme Court also held in that case that the United States could constitutionally apply its taxing power to all property located within the United States regardless of where the owner thereof might be domiciled or to which country he may owe his allegiance. The Court pointed out that relief from the double tax that necessarily ensues must be found if at all in international conventions “the advantages of which lie in the mutual concessions or reciprocal restrictions to be voluntarily made or accepted by powers freely negotiating on the basis of recognized principles of jurisdiction.”\(^10\) Despite the invitation to the responsible authorities of this country by the Supreme Court in this case to enter into international agreements to eliminate the double tax effects of this decision,\(^11\) nothing was done until the adoption of the Canadian Death Tax Convention. The Canadian Death Tax Convention in fact is the first international convention relating to death taxes to which this country has ever been a party. Its adoption, therefore, is an event of outstanding importance. It, and the British Death Tax Convention patterned after it, represent milestones in the long and tedious struggle to achieve the elimination of double taxation between nations.\(^12\)

I. **The Convention With Canada**

The Canadian convention, somewhat ponderously entitled “Convention Between Canada and the United States of America for the


\(^10\) Id. at 399, 53 S. Ct. at 463, 77 L. ed. at 854.

\(^11\) Recalling the lines of Hudibras:

“As if the law were now intended
For nothing else but to be mended.”

Avoidance of Double Taxation and the Prevention of Fiscal Evasion in the Case of Estate Taxes and Succession Duties became operative when the instruments of ratification were exchanged at Washington on February 6, 1945. However, it expressly provides that it shall be deemed to have become effective on June 14, 1941, which was the effective date of the Dominion Succession Duty Act.

At the outset, it should be noted that the Canadian convention deals only with taxation by the United States and by the Dominion of Canada, that is, with national taxes. The convention does not affect in any way the imposition by the states of their estate or inheritance taxes or the imposition by the Canadian provinces of their succession duties.

There would seem to be no question of the power of the United States to bind the states in a treaty limiting the imposition of death taxes. The decision to limit the convention to federal estate taxes, therefore, in all probability was dictated by the political reason that the senate might be indisposed to enter into an agreement with another country which would materially affect the taxing powers of the states.

It is regrettable that the convention does not deal with state and provincial taxes as well as with national taxes, for double taxation still may exist as between the states and the provinces. At the present time no state has a reciprocal agreement with any province of Canada for the avoidance of double death taxes. Furthermore, as matters now stand four tax determinations may be necessary in a single estate. For example, if a citizen of Minnesota dies owning stock in a Manitoba corporation, his executor will be concerned not only with United States and Canadian taxes, but also with Minnesota and Manitoba taxes. Thus, four separate tax proceedings may be necessary. The present situation is not only burdensome and expensive, but it also becomes an exceedingly complicated matter, if a credit for the Canadian tax is to be allowed against the United States tax, and another credit for the Minnesota tax against the United States tax (under section 813(b) of the Code). Other complications in the interactions between the several taxes are also possible. While the matter of double taxation is being dealt with, it would seem to be desirable to go as far as possible toward solving the problem. Since all of the states already have adopted reciprocal statutes or otherwise taken

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13 The convention was signed at Ottawa on June 8, 1944, by the American Ambassador for the United States and by the Secretary of State for External Affairs and the Minister of National Revenue for Canada and was ratified by the Senate of the United States on December 6, 1944.
14 Art. XIV.
legislative action directed toward the elimination of double taxation, it would seem that they would in general not be opposed to any action taken by the federal government to eliminate the present unfortunate situation.

The convention adopts situs, rather than domicile, as the governing principle. The convention in general proceeds upon the basis of allowing each country to tax all the personal property of a decedent domiciled therein (or, in the case of the United States, a citizen thereof although not domiciled therein), as well as all such property situated in its borders of a non-domiciliary, with a provision for credit of the tax paid the country of situs against the tax due at the country of domicile. The convention provides that domicile and the situs of property shall be determined in accordance with the laws of the country imposing the tax with two exceptions: (1) real property is deemed to have a situs in the country where it is located and (2) shares of stock of a corporation organized in the United States are deemed to be property situated in the United States, while shares of stock of a corporation organized in Canada are deemed to be property situated in Canada.

The credit provision of the convention (article VI) is undoubtedly the most complicated in the convention. Generally speaking, it is limited to a portion of the domiciliary tax obtained by applying a fraction the numerator of which is the value of the property situated in the other country and subjected to both Dominion succession duties and federal estate tax, and the denominator of which is the total value of the decedent's property. Specifically, in the case of a United States citizen domiciled in this country, the amount of the credit is limited to the proportion of the federal estate tax (computed without allowance of credit for Canadian succession duties) which the value of the property situated in Canada and subjected to both Dominion succession duty and federal estate tax bears to the value of the gross estate. For the purpose of this proportion, the "federal estate tax" refers to the amount of the tax after allowance of credit for state inheritance or similar taxes authorized by section 813 (b) of the Internal Revenue Code but before the allowance of credit for Canadian succession duties. For the purpose of this proportion the "property situated in Canada and subjected to both Dominion succession duties and Federal estate tax" and the "gross estate" do not include any real property situated in Canada, and also do not include any property previously taxed or any property specifically bequeathed or

17 Arts. V, VI.
18 Art. IV.
19 Art. II.
20 Art. III.
transferred for public, charitable, educational, religious or similar uses, and with respect to which a deduction is allowed for federal estate tax purposes. In other words, it does not include any property exempt from, or deductible in computing the net estate subject to, federal estate tax. The values used in this proportion are the values determined for the purpose of the federal estate tax.

The following is an example given in the regulations, T. D. 5455, promulgated under the convention illustrating the operation of the convention's limitations, not involving any credit for federal gift tax, in the case of a decedent domiciled in and a citizen of the United States:

"Decedent was at time of death domiciled in and a citizen of the United States, and his widow and daughter are the beneficiaries under his will. The value of the gross estate for the purpose of the Federal estate tax (in United States money) is $180,000, consisting of stocks of Canadian corporations $50,000, and of other property, $130,000. The amount of the federal estate tax without allowance for Dominion succession duties is $20,140. The value in Canadian money of the widow's succession subjected to the Dominion succession duty is $500,000, consisting of Canadian real property, $460,000, and stocks of Canadian corporations, $40,000. The amount of the Dominion succession duty imposed upon the widow's succession is $79,433 in Canadian money. The value in Canadian money of the daughter's succession subjected to the Dominion succession duty is $15,000, consisting entirely of stocks of Canadian corporations. The amount of the Dominion succession duty imposed upon the daughter's succession is $1,215 in Canadian money. In computing the Dominion succession duties, no property situated outside Canada is taken into account in determining the tax rates. Computations are shown below:

"Computation of portion of Dominion succession duty imposed upon widow's succession attributable to property subjected to Federal estate tax:

1. Amount of Dominion succession duty imposed upon the succession $ 79,433.00
2. Value of property situated in Canada and subjected to both Dominion succession duty and federal estate tax $ 40,000.00
3. Total value of property subjected to Dominion succession duty $500,000.00
4. Amount of Dominion succession duty attributable to item 2 (proportion of item 1 that item 2 bears to item 3) $ 6,354.64

Total Dominion succession duties for which credit is allowable:
1. For widow's succession $ 6,354.64
2. For daughter's succession $ 1,215.00

3. Total $ 7,569.64

The amount of item 3 converted into United States money equals $6,881.49.

"Computation of estate tax with credit for Canadian succession duties (values and amounts in United States money):

1. Federal estate tax without allowance of credit for Dominion succession duties $ 20,140.00
2. Dominion succession duties attributable to Canadian property subjected to Federal estate tax $ 6,881.49
3. Value of property situated in Canada and subjected to both Dominion succession duties and Federal estate tax $ 50,000.00
4. Value of Gross estate $180,000.00
Under the convention the credit for Canadian succession duties is subordinated to the credit for state inheritance and similar taxes authorized by section 813 (b) of the Internal Revenue Code, but is accorded priority over the credit, if any, for federal gift tax. Consequently if credit for federal gift tax is involved it will be necessary to allocate the credit for Canadian succession duties against the basic and additional estate taxes, and, if present, against the defense tax. The computations and allocations of the credits in cases involving gift tax credits (which it is anticipated will rarely occur) present further complications which are explained at length in the regulations.

No provision is contained in the convention for credit in the case where both countries find the decedent domiciled therein, or in other words, in cases of so-called "double domicile." Furthermore, no specific provision is contained in the convention for credit in the case where the decedent is a citizen of the United States but domiciled in Canada. The regulations of the commissioner, however, state that credit in the latter case will be allowed by each of the countries as follows:

"While in most instances the country which imposes the tax on the basis of the decedent's domicile in that country allows a credit for the tax imposed by the other country on the basis of situs of property therein, both countries will allow credits in the case of a decedent who was a citizen of the United States domiciled in Canada. However, in such case credit allowed by each country is restricted to the part of the tax attributable to property situated in the other country."

Presumably, therefore, the same practice will be followed in cases involving "double domicile."

The convention adopts the practice (followed by the United States but not by Canada prior to the adoption of the convention) that in fixing the rate of tax upon the estate of a non-domiciliary of one of the countries, such country will take into account only property situated therein and thus not tax such property in the highest tax bracket which would result if there were taken into account, in determining the tax, property situated outside such country. In other words, it is provided that

5. Federal estate tax attributable to Canadian property subjected to Dominion succession duties (proportion of item 1 that item 3 bears to item 4) ...........$ 5,594.44
6. Credit for Dominion succession duties (item 2, or item 5), if the latter item is smaller ...............$ 5,594.44
7. Net federal estate tax (item 1 minus item 6) ......$ 14,545.56

Note: The table above shows the computations and allocations of credits for the case of "double domicile."
in the case of a decedent who at death was domiciled in the United States, Canada shall, in imposing its succession duties, take into account only property situated in Canada.\(^2^6\)

The United States, of course, similarly agrees that it will take into account only property situated in the United States, in imposing its estate tax in the case of a decedent (other than a citizen of the United States) who at the time of his death was domiciled in Canada.\(^2^6\) It should be noted, however, that this restriction refers only to what may be included for the purpose of fixing the rate of tax. It does not refer to what is included in the gross estate and utilized in ascertaining the proportionate exemption hereinafter discussed, and also utilized in ascertaining the proportionate deductions for administration expenses, debts, etc., prescribed in section 861 (a) (1) of the Internal Revenue Code.\(^2^7\) The convention expressly provides that allowance for debts shall be determined in accordance with the laws of the contracting country imposing the tax.\(^2^8\)

The convention adopts the principle followed heretofore by Canada of allowing a proportionate exemption in the case of a non-domiciliary decedent. This changes the rule followed by the United States of allowing only a nominal exemption of $2,000 in this situation.\(^2^9\) In case of a

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\(^{26}\) Art. V (4) (a).

\(^{28}\) Art. V (2) (a).

\(^{27}\) See T. D. 5455, §§81.52, 82.6.

\(^{28}\) Art. IV(2)

\(^{29}\) Int. Rev. Code §861 (a) (4). An example of the application of this limitation is given in the regulations, T. D. 5455, §82.6, as follows:

"In computing net estate for the purpose of the basic estate tax, the amount of the specific exemption is (a) That proportion of $100,000 which the value of the property situated in the United States bears to the value of the entire gross estate wherever situated, or (b) $2,000, if the decedent died after October 21, 1942, and such latter amount is the greater.

"In computing the net estate for the purpose of the additional estate tax, the amount of the specific exemption is (a) if the decedent died after October 21, 1942, that proportion of $60,000 which the value of the property situated in the United States bears to the value of the entire gross estate wherever situated, or $2,000 whichever is the greater, or (b) if the decedent died before October 22, 1942, that proportion of $40,000 which the value of the property situated in the United States bears to the value of the entire gross estate wherever situated.

"For example, if the decedent, domiciled in Canada at the time of death and not a citizen of the United States, died on July 1, 1944, leaving a gross estate (other than real property outside the United States) of $500,000 of which $100,000 is situated in the United States, the amount of the specific exemption for the purpose of the basic tax is

\[
\frac{100,000}{500,000} \times 100,000 = 20,000
\]

and the amount of the specific exemption for the purpose of the additional tax is

\[
\frac{100,000}{500,000} \times 60,000 = 12,000
\]"
decedent dying after October 21, 1942, the amount of the specific exemption will not be less than the $2,000 provided by the Code in any case.\footnote{30}

In conformity with one of the purposes of the convention expressed in its caption, to wit, to prevent "Fiscal Evasion in the Case of Estate Taxes and Succession Duties," provision is made for a full and complete exchange of information between the respective taxing authorities.\footnote{31} In the ordinary course of business it is provided\footnote{32} that:

"1. That the Commissioner shall notify the Minister as soon as practicable when the Commissioner ascertains that in the case of:

"(a) A decedent, any part of whose estate is subject to the Federal estate tax laws, there is property of such decedent situated in Canada;

"(b) A decedent domiciled in Canada, any part of whose estate is subject to the Dominion Succession Duty Act, there is property of such decedent situated in the United States of America.

"2. The Minister shall notify the Commissioner as soon as practicable when the Minister ascertains that in the case of:

"(a) A decedent, any part of whose estate is subject to the Dominion Succession Duty Act, there is property of such decedent situated in the United States of America;

"(b) A decedent domiciled in the United States of America, any part of whose estate is subject to the Federal estate tax laws, there is property of such decedent situated in Canada."

The convention, in addition, provides that, upon request, the commissioner will furnish the minister any information "the commissioner is entitled to obtain under the revenue laws of the United States" in any case in which the minister deems it necessary.\footnote{33} A reciprocal provision is contained with respect to any information requested by the commissioner from the minister of national revenue of Canada.\footnote{34}

It is provided that the competent authorities of each country may prescribe regulations to carry into effect the terms of the convention.\footnote{35} The commissioner, acting under the authority of this provision, with the approval of the Secretary of the Treasury, on May 31, 1945, issued T.D. 5455 containing his regulations relating to the convention.\footnote{36} These regulations were amplified on June 5, 1945 by Mm. 5872 setting forth the estate tax procedure under the convention.\footnote{37} For convenience in the administration of the convention, it divides decedents' estates into two categories, (1) estates taxed on the basis of situs of the property, and (2)

\footnote{30} Art. XII.
\footnote{31} Arts. VII, VIII, IX.
\footnote{32} Art. VIII.
\footnote{33} Art. IX(1).
\footnote{34} Art. IX(2).
\footnote{35} Art. X.
\footnote{36} C. C.-H. Fed. Inheritance, Estate & Gift Tds, Serv. ¶113891B-3891J.
\footnote{37} Id. ¶3891.01.
estates taxed on the basis of domicile or citizenship. The procedure in each case is set forth as follows:

"For cases in the first category, Form 706b, 'Computations of Net Estates,' has been provided as a supplement to the estate tax return, Form 706. This supplemental form constitutes a part of the return, is to be substituted for Schedule R, and should be inserted in lieu of Sheet XIX. For cases in the second category, Form 706c, 'Computation of Estate Tax with Credit for Canadian Succession Duties,' has been provided as a supplement to the estate tax return, Form 706. This supplemental form constitutes a part of the return and should be inserted immediately after Sheet XX thereof. If credit for Canadian succession duties is claimed at the time the estate tax return is filed, the amount entered at item 7 of Form 706c is the amount of the estate tax as determined by the representative of the estate, instead of the last item, denominated 'Total Estate Tax Payable,' under 'Computation of Tax,' in Sheet XX of Form 706, and the amount of such item 7 is the amount to be assessed and paid. Form 706d, 'Certification of Dominion Succession Duties for Credit against Federal Estate Taxes,' is required for cases within the aforementioned second category. Form 706d should be executed by the representative of the estate and forwarded to the Canadian Revenue Department for certification. Accompanying each form are instructions explaining its use.

"The offices of the internal revenue agents in charge will advise the representatives of estates of any requirements pursuant to the provisions of the convention in cases pending before those offices. The representatives of estates of previously closed cases should file claims for refunds of any overpayments of estate taxes resulting from the provisions of the convention. Any claim for refund of tax based upon the provisions of the convention should be filed with the appropriate collector of internal revenue on Form 843 with supplemental Form 706b or 706c, whichever is applicable, attached thereto in duplicate."

Article XIII, which defines the various terms used in the convention, reveals that, when used in a geographical sense, the term "United States of America" includes not only the states, but also the territories of Alaska and Hawaii, and the District of Columbia. The term "Canada" means the provinces, the territories and Sable Island.

The final article of the convention (article XIV) makes the convention effective retroactively to June 14, 1941 and provides that it shall continue for a period of five years from that date and indefinitely after that period, subject to termination by either of the countries involved upon six months prior notice.

The adoption of situs as the basic principle has a number of adverse effects, and, consequently, the adoption of the convention has met with
severe criticism. The principal reasons expressed for dissatisfaction with the convention are the following:

1. Contrary to domicile principle adopted by many states and provinces. The adoption of the situs principle in the convention is contrary to the domicile principle adopted by all of the states of the United States, and most of the provinces of Canada as well. Executors and administrators should not be forced to determine state and provincial taxes on one basis and national taxes on another. Simplicity and convenience point to making both sorts of taxes rest on the basis of domicile. The situs principle not only introduces an unnecessary complication, but the adoption of the principle in the convention may go far to undo the work which has been done with great effort over so long a period of time with respect to state and provincial taxes.

2. Credit method complicated. The credit method is complicated to begin with, and it becomes very complex when carried into actual operation. Because of varying exemptions and rates of tax, it becomes necessary to put limits and qualifications upon the amount of the credit which makes the computation unusually complicated.

3. Burdensome expense of tax proceedings in both countries. The necessity of tax proceedings in both countries imposes an unnecessary burden on smaller estates. The payment of a $50 or $100 tax may require an expenditure of $500 or more for investigation, advice, administration expenses, travelling expenses, or counsel fees. The full benefits of the credit device, therefore, will be realized only by the larger estates with large foreign assets. Where the tax is imposed only at the domicile, determination of the tax is a normal part of the process of administering the estate and results in little additional tax.

4. Actual increase in taxes payable by many estates. There is an actual increase in the taxes payable by many estates. Apart from the convention, Canada does not tax shares of stock in Canadian corporations when (1) those shares are endorsed in blank and located outside of Canada, or (2) when the particular shares are registered on a register book kept outside of Canada. For example, suppose that a citizen and resident of Ohio dies owning 100 shares of International Nickel Com-

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38 Griswold, supra note 4; Kassell, supra note 4. A resolution was adopted by the National Tax Conference, meeting at St. Louis, Missouri, on September 13, 1944, that it was "the sense of the conference" that "any agreement between the United States and Canada should be arrived at on the basis of taxation at the domicile of the decedent rather than on the basis of the domicile of the corporation issuing the shares."

pany, a Canadian corporation, but transferable in New York. Prior to the adoption of the convention, Canada did not impose a tax on the transfer. The United States can tax, but does so only if the net estate, after all deductions, exceeds $60,000. Under the convention, however, Canada can impose a tax, unless the convention is found by the Canadian courts to be invalid on the ground that it undertakes to extend Canada's taxing power beyond its jurisdiction by imposing Dominion succession duties on shares of Canadian corporations regardless of their actual situs.\(^{40}\) Thus the estate is subject to a tax under the convention when no tax would be due at all in the absence of a convention. Moreover, since the convention takes effect retroactively to June 14, 1941, the result, if Canada undertakes to enforce it, is in many cases to increase the taxes due from decedents already dead and from estates already administered.

(5) Situs principle not in interest of the United States. Since the convention will apparently diminish the revenues of the United States while allowing Canada to impose a tax in situations where it could not tax before, it appears that the convention is not in the fiscal interest of the United States.

Under the convention the tax on all property situated in Canada, including the tax on shares of stock of all Canadian corporations, will go to Canada. Under a convention proceeding on the domicile principle, the United States, in the estate of a decedent domiciled in the United States, would collect a tax based on all assets, Canadian and American, except, perhaps, land or other tangible personal property situated in Canada. There are more American investments in Canada, than Canadian investments in the United States, and hence it would appear that a convention on the domicile principle would be more in the fiscal interest of the United States.

(6) Difficulty of determining "situs." The only situs rule contained in the convention is that with respect to shares of stock and, indirectly, a situs rule covering real property.\(^{41}\) Even the latter is not complete, the convention providing that the decision as to whether "rights relating to or secured by real property" are to be considered "real property" shall be left to the courts of each country.\(^{42}\) These decisions well may be conflicting, and where they do conflict, it would seem that the double taxation which the convention was designed to meet will necessarily result. Important items relating to real property thus left unsettled include:

(1) Mortgages. Are these to be treated as interests in the land taxable

\(^{40}\) See Fairbanks, Succession Duties—Canadian-United States Convention (1944) 22 Taxes 452.

\(^{41}\) Supra page 59.

\(^{42}\) Art. II (3).
only at the situs of the land? Or are they to be treated as debts with the land regarded only as security, so that they are taxable only at the domicile of the decedent? (2) Leases, particularly long term leases. Are they to be considered "personal property" which they clearly are at common law? (3) Contracts for the sale of land unexecuted at date of death. Is the interest of the decedent "real property" within the convention, or is it merely a promise to pay money? (4) Land directed to be sold in the will of decedent and converted into money. At common law this results in what is known as "equitable conversion," the effect of which is to convert the land into personal property. Is it such under the convention?

Apart from the ambiguity of the term "real property" other important items left in a state of uncertainty include (1) debts (2) patents and trademarks (3) copyrights and franchises (4) rights or causes of action (5) proceeds of insurance (6) good will of a business (7) bonds and notes (8) judgments (9) claims, and (10) accounts receivable.

There is much justification for many of the criticisms which have been outlined. A convention proceeding on the domicile principle would, of course, have been consistent with the principle adopted generally by the states of the United States and would have been more convenient and simple in actual operation. Moreover, it probably would have been more in the fiscal interest of the United States. If Canada had insisted on a convention proceeding on the situs principle, it might be that the problem could be solved only on that basis, and it would be better to solve it on that basis than not to solve it at all. However, it is understood that Canada was willing to adopt a convention on the domicile principle. Consequently, there is much force to the argument that the Canadian convention should have proceeded on the domicile principle. On the other hand, it is understood that the United States negotiators believed that conventions on the domicile principle were not generally favored by other nations and, consequently, that a model convention based upon the situs principle followed the only pattern susceptible of general adoption. Furthermore, some fear may have been felt that a convention proceeding on the domicile principle might lead to an avoidance of United States taxes by residents of this country changing their domiciles to Canada or some other country where such action was found to be advantageous.

While the question of whether the convention should have proceeded on the domicile principle is at least an arguable one, the con-

43 See Griswold, supra note 4 at 405.
44 See Carroll, Foreign Trade Advantage in the Canadian-American Convention (1945) 23 Taxes 148.
vention unquestionably is seriously defective in other respects, particularly in failing to deal with the problem of where the numerous assets listed above and "rights relating to or secured by real property" should be taxed, and also in permitting a retroactive increase in taxes in many estates. For some peculiar reason, the drafting of such a convention is treated as a matter of the greatest secrecy. No intimation of the lines to be followed, no opportunity to comment on the draft, nothing in the way of a hearing, is afforded to the public, until after the convention is actually signed by the representatives of both countries and submitted to the senate for ratification. That these defects in the Canadian convention could have been removed if this secrecy had not been present, is evident from the fact that these problems are solved in the British convention, due, no doubt, to the constructive criticism which the Canadian convention encountered in this respect. Under the circumstances, it is, perhaps, not amiss to suggest that the veil of secrecy enshrouding the drafting of these conventions should be lifted to allow a little light upon the subject before the agreements have become a fait accompli.

II. The Convention With Great Britain

The British Death Tax Convention, entitled similarly to the Canadian convention except that the second contracting party is the "United Kingdom of Great Britain and Northern Ireland," was signed at Washington, D. C. on April 16, 1945. The convention was ratified by the United States Senate on June 1, 1946, and it became operative when instruments of ratification were exchanged at Washington, D. C., on July 25, 1946.

The convention with Great Britain, although it is based upon, and generally, is similar to, the Canadian convention, contains many important modifications. Many of these, no doubt, were designed to meet the objections and criticisms which the Canadian convention encountered. For this reason, the British convention is more likely to serve as a model for future conventions with other nations than the Canadian convention. From this standpoint, it would seem to be the more basically important of the two documents.

The British convention, like the Canadian convention, is limited in so far as the United States is concerned, solely to estate taxes imposed by the federal government. The imposition and collection of estate or inheritance taxes by the states are in no way restricted. As to Great Britain, the convention applies to the estate duty imposed by the United Kingdom, applicable to England, Scotland and Wales, with a provision that it

\[48\] Art. I (1) (a).
may be extended to apply to similar taxes in colonies and other territories of the contracting parties. Under article IX, the convention is immediately extended to the estate duty in Northern Ireland.

British legacy and succession duties, which are of comparatively minor importance in the British death-duty system, are not within the purview of the convention. The British legacy and succession duties, with few exceptions, do not apply to estates of decedents domiciled in the United States. The legacy duty is generally restricted to estates of decedents domiciled in Great Britain, and the succession duty is in general restricted to real property situated in Great Britain, which is not subjected to the United States tax.

Article III of the convention, unlike the Canadian convention, prescribes rules of situs covering most of the property usually encountered in ascertaining the bases of estate taxes in the United States. These rules are as follows:

(a) **Immovable property.** Rights or interest (otherwise than by way of security) in or over immovable property are deemed to be situated at the place where such property is located;

(b) **Tangible movable property.** Rights or interests (otherwise than by way of security) in or over tangible movable property, other than such property for which specific provision is made in the Convention, and in or over bank or currency notes, other forms of currency recognized as legal tender in the place of issue, negotiable bills of exchange and negotiable promissory notes, are deemed to be situated at the place where such property, notes, currency or documents are located at the time of death, or, if in transitu at the place of destination;

(c) **Debts.** Debts, secured or unsecured, other than the forms of indebtedness for which specific provision is made in the Convention, are deemed to be situated at the place where the decedent was domiciled at the time of death;

(d) **Stock.** Shares or stock in a corporation other than a municipal or governmental corporation (including shares or stock held by a nominee where the beneficial ownership is evidenced by scrip certificates or otherwise) are deemed to be situated at the place in or under the laws of which such corporation was created or organized;

(e) **Insurance proceeds.** Monies payable under a policy of assurance or insurance on the life of the decedent are deemed to be situated at the place where the decedent was domiciled at the time of death;

(f) **Ships and Aircraft.** Ships and aircraft and shares thereof are deemed to be situated at the place of registration or documentation of the ship or aircraft;

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46 Art. I (1) (b), (2); Art. VIII.
47 Art. III(2) (a); see **Green, Death Duties (1936)** passim.
(g) Goodwill. Goodwill as a trade, business or professional asset is deemed to be situated at the place where the trade, business or profession to which it pertains is carried on;
(h) Patents, trademarks, designs. Patents, trademarks and designs are deemed to be situated at the place where they are registered;
(i) Copyrights, franchises, licenses to use. Copyright, franchises, and rights or licenses to use any copyrighted material, patent, trademark or design are deemed to be situated at the place where the rights arising therefrom are exercisable.
(j) Rights or causes of action. Rights or causes of action ex delicto surviving for the benefit of an estate of a decedent are deemed to be situated at the place where such rights or causes of action arose;
(k) Judgment debts. Judgment debts are deemed to be situated at the place where the judgment is recorded.

Upon suggestion of the British a special exception from the situs rules prescribed by article III is contained in a proviso at the end of the article. This exception applies to settled property which would not be subjected to federal estate tax.

The scope of the application of such rules of situs is expressly limited to estates of decedents domiciled in either of the contracting countries, and such rules have no application to the estate of a citizen of the United States not domiciled in either of the contracting countries.48 In this respect the scope is somewhat narrower than the scope of the situs rules prescribed by article III of the convention with Canada. However, it may be noted that in another respect the scope of the rules of situs pertaining to shares of corporate stock is somewhat broader than the provision in the Canadian convention, which is restricted to shares of stocks of Canadian and American corporations whereas in the proposed British convention these rules apply to all corporations, wherever created.49

It may be noted that stocks of municipal or governmental corporations are excepted from the rule of situs relative to shares of stocks of corporations.50 However, such exception refers only to issues of government stock common in the United Kingdom, which are properly classifiable with government bonds since such stock represents an indebtedness and not a stockholder's proprietary share.51 The term "governmental corporation" refers to either contracting party or political subdivision thereof, such as a state, county, city, or town, and has no reference to a

48 Art. III.
49 Art. III(2)(d).
50 Ibid.
51 Technical Memorandum of Treasury Dep't on the Convention, Hearings before a Subcommittee of Senate Committee on Foreign Relations on Executive D, 79th Cong., 1st Sess. (1945) 34.
corporation that does not itself constitute such a political body or subdivision although it may be sponsored by or established by such a government. It is important to note that the rules of situs pertaining to shares of stock are applicable if the stock is held by a nominee and whether evidenced by scrip certificates or otherwise. The stock and not the scrip certificates in such case is considered the property subjected to the tax.

As suggested by the British representatives, the classifications of "movable property" and "immovable property" have been adopted for this article instead of the classifications of "personal property" and "real property." The former conforms to the British usage with respect to foreign assets and is more commonly used in international relations.

Article III provides that debts, secured or unsecured, and proceeds of insurance on the life of the decedent shall be deemed situated at the place where the decedent was domiciled. These particular rules are in effect exemptions from the tax imposed on the basis of situs of property, and insofar as they cover bank deposits and life insurance proceeds are the substantial equivalents of such exemptions in the Internal Revenue Code. Bonds are included in this exemption, but as bonds have been regarded for federal estate tax purposes as situated only where the bond certificates are located and as bond certificates are usually found at the domicile of the decedent, the new rule in the convention will have but slight effect on the tax.

Article IV of the convention adopts the principle that in fixing its rate of tax upon the estate of a nonresident of one of the contracting countries such country will take into account only property situated therein and thus not tax such property in the highest tax bracket which would result if there were taken into account, in determining the tax, property situated outside such country. The article corresponds in this respect to paragraphs 2 (a) and 4 (a) of article V of the convention with Canada. Because of the wide differences in exemptions existing as between those allowed by the United States and those allowed by the United Kingdom, no provision was framed relating to proration of exemptions as was done in paragraphs 2 (b) and 4 (b) of article V of the Canadian convention. Under the United Kingdom law the exemption is only £100, while under the United States law the exemption is $60,000 for estates of decedents who were domiciled in or citizens of the United

\[\text{\textsuperscript{62} Ibid.}\]
\[\text{\textsuperscript{63} Ibid; see, for the same suggestion, Griswold, \textit{supra} note 4 at 406.}\]
\[\text{\textsuperscript{64} Int. Rev. Code §863 (1939).}\]
\[\text{\textsuperscript{65} Technical Memorandum of Treasury Dep't on the Convention, \textit{supra} note 51 at 35.}\]
States and $2,000 for estates of decedents who were aliens domiciled outside the United States.

Article V of the convention corresponds to article VI of the Canadian convention and provides two rules with respect to credit to be allowed by one country against its estate tax or estate duty, as the case may be, for estate duty or tax imposed by the other country.

The first of such rules deals with the case in which only one of the countries imposes its tax upon the basis of the decedent's being domiciled therein (or upon the basis of citizenship in the case of the United States). Under such rule the United States will allow against its estate tax in the case of a decedent domiciled in, or a citizen of, the United States a credit for United Kingdom estate duty imposed upon decedent's property situated within the United Kingdom. While the provision which prescribes the first rule is less detailed than the corresponding provision in the Canadian convention, the practical effect and objectives of both provisions are substantially identical. Thus, as under the Canadian convention, no credit will be allowed for tax imposed with respect to property not subjected to tax by the crediting country, as, for example, property specifically bequeathed to a charitable organization and for such reason deducted, or otherwise excluded from tax by the crediting country but subject to tax by the country in which the property is situated. As in the Canadian convention, the credit cannot exceed the portion of the tax imposed by the crediting country which is attributable to the property subjected to tax by the country in which the property is situated.

The second rule applies in those unusual cases in which both countries impose tax upon the basis of domicile, that is, in cases of so-called "double domicile." No corresponding provision exists in the Canadian convention. In such case, in addition to the credit allowed under the first rule with respect to property situated in the contracting countries, it is provided that there shall be allowed by each country, with respect to any property (a) deemed situated in both countries, or (b) deemed situated in neither of the contracting countries, a credit against its tax of that portion of the smaller of the two taxes (before the credit) attributable to such property which such tax of the crediting country bears to the sum of such taxes of both countries.

Unlike the Canadian convention, the formula for computing the portion of tax attributable to particular property is not expressly stated. However, it is understood that where particular property taxed constitutes a part of an aggregation of property upon which a tax is imposed at graduated rates, the amount of the tax attributable to such particular
property is the proportion of such whole tax as the value of such property bears to the value of the aggregated property taxed. 58

Paragraph 3 of article V deals with the order of credits and provides, in substantial effect, that the credit authorized by the convention is to be computed after allowance is made for any other credits against the tax. Thus, as in the Canadian convention, the credit authorized by the convention is subordinated to the credit authorized by section 813 (b) of the Internal Revenue Code for estate, inheritance, legacy, or succession taxes paid to any state of the United States. It appears that neither the credit for such tax authorized by section 813 (b) nor the credit for gift tax authorized by section 813 (a) and 936 (b) of the Internal Revenue Code will be affected by the convention.

It is provided that any claim for refund or credit arising under the convention must be filed within 6 years from the date of death of decedent, and that no interest will be allowed with respect to any overpayment involved. 57 In the case of a reversionary interest where payment of tax is deferred until such interest falls into possession, claim may be filed within 6 years from that date.

Article VII of the convention provides for reciprocal exchange of information by the two countries. While the provisions of the article are cast in terms general in their import as compared with the specific provisions of the corresponding article of the Canadian convention, the scope of cooperation envisaged under the article is believed to be as broad as that of the Canadian convention.

Article VIII provides for the extension of the convention to colonies and territories of the two countries. It in reality lays a basis for bringing British Crown colonies within the scope of the convention. Since Puerto Rico and the Philippine Islands are autonomous in matters of revenue, they remain without the scope of the convention unless they voluntarily come within it and thus occupy a position identical in principle with that occupied by the sovereign members of the British Commonwealth, such as Australia and the Union of South Africa. Our own possessions, Guam, Samoa, the Canal Zone, and the rest, do not have estate taxes. Practically all the British Crown colonies impose estate taxes but at rates considerably lower than those levied under United Kingdom law.

It is provided that the convention will be effective with respect to estates of decedents dying on or after the exchange of ratifications, and further provides that the representative of the estate of any decedent who

58 Ibid.
57 Art. VI.
died between December 31, 1944, and the date of exchange of ratifications may elect to have the convention apply to his case. It may be noted, however, that no such optional retroactive application is provided in cases brought under the convention by any further extensions to other territories authorized by article VIII.

Article XI provides that the convention will continue for a period of three years and thereafter until the expiration of six months from the date of notice of termination given by either of the contracting countries.

III.

CONCLUSION

It is apparent from the above discussion of its provisions, that the convention with Great Britain is a much more finished document than the Canadian convention. Unlike the Canadian convention, it contains rules of situs covering practically all property usually encountered in ascertaining the basis of estate taxes in the United States. It should be observed in this regard that corporate stock and real property are estimated by the treasury department to constitute about eighty-five percent of estate values forming the basis for estate tax purposes. The additional rules adopted with Great Britain are estimated to cover perhaps another ten percent leaving about five percent to be determined under existing laws. The aim of eliminating double death taxation is, therefore, substantially accomplished in the British convention.

69 Art. X. Instruments of ratification were exchanged at Washington, D. C., on July 25, 1946, and, accordingly, the convention is effective as to estates of all persons dying on or after that date and, at the election of the personal representatives, shall be effective as to the estate of any person dying before July 25, 1946, and after December 31, 1944.

69 Technical Memorandum of Treasury Dep’t on the Convention, supra note 50 at 32.