36, 1933

In the Privy Council.

No. 76 of 1932.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER OF THE INCOME WAR TAX ACT

AND

IN THE MATTER of the Appeal of JOHN B. HOLDEN, of the City of Toronto, in the Province of Ontario, sole surviving Executor and Trustee of the Estate of DUNCAN MCMARTIN, deceased, late of the City of Montreal, in the Province of Quebec.

BETWEEN

JOHN B. HOLDEN, sole surviving Executor and Trustee of the Estate of Duncan McMartin, deceased (*Respondent*) *Appellant*

AND

THE MINISTER OF NATIONAL REVENUE (*Appellant*) *Respondent.*

RESPONDENTS CASE.

CASE FOR THE RESPONDENT.

1. This is an appeal, by special leave, from a judgment of the Supreme Court of Canada, dated 15th day of June, 1932, reversing a judgment of the Exchequer Court of Canada dated 20th October, 1931. RECORD. p. 47. p. 13.

2. Before proceeding to outline the case for the Respondent it is desired to refer to paragraph 2 of the Appellant's petition for special leave to appeal in which the Appellant set forth the principal questions in dispute. The Respondent submits that the statements set forth in the said paragraph 2 do not contain all of the facts which should have been placed before the Court in order to bring out not merely the Appellant's idea as to the principal questions, but also the Respondent's contentions on the facts in this case.

3. In paragraph 2 (1) of the Appellant's petition, the fact that the executor and trustee who is in actual receipt and control of the income of this estate is a resident of Canada, and the fact that the income received by

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RECORD. the executor and trustee is invested and kept in Canada is important, and should have been mentioned in order that a clear understanding of the Respondent's contention would be placed before the Court.

4. In paragraph 2 (2) of the petition, the Appellant has stated definitely that the 4th March, 1925, was " the period fixed for the distribution " by the Will of the Testator. The Respondent contends that while the 4th March, 1925, was the date of the remarriage of the Testator's widow, p. 11, l. 45. nevertheless the language of Clause F of paragraph 9 of the Will reads :—

> " After the death or remarriage of my wife, which ever event shall first happen, to divide the residue of my estate equally between such of my three children as shall attain the age of twenty-five years, as and when they respectively attain that age, provided that if any of the said children shall have died before the period of distribution arrives, leaving a child or children, such children shall take the share in my estate which his or her parent would have taken had he or she survived the period of distribution, if more than one in equal shares."

From the Respondent's point of view it is important to notice that the Will does not provide for a distribution of the estate upon the death or remarriage of the Testator's wife, but only after the death or remarriage of the widow, and there is a further contingency imposed by the Will, namely, that the division is to be only between such of the three children as shall attain the age of twenty-five years " as and when they respectively attain that age " with the proviso that children of a deceased child, if any, shall take their deceased parent's share. From the Respondent's point of view it is important to keep in mind that there is a further contingency which must happen before the actual distribution of the estate takes place, and should any child have died without children between the date on which the widow remarried and the date when such child attained the age of twenty-five years, such child would have taken nothing under the provisions of Clause F of paragraph 9 of the Will and the residue would have been divided equally between the other children who did attain the age of twenty-five years. In short, the Respondent does not admit that " the period fixed for the distribution " was the 4th March, 1925, and submits that in order to place the Respondent's contention before the Court at the time when the petition for leave was presented, the alternative contention of the Respondent might have been mentioned to show that the parties were not in agreement as to the period fixed for the distribution. To repeat, the Respondent contends that while the expression was used in the Will to cover the date of p. 11, l. 45. remarriage, the language of paragraph 9F of the Will shows clearly that it was used only as a tag or label and that the actual date of distribution was ascertainable only on the attainment of twenty-five years by the children. The date on which the widow remarried would have been the actual date of distribution if the children had attained the age of twenty-five years before the widow remarried, but the widow remarried on the 4th March, 1925, and the oldest child did not attain the age of twenty-five years

until 4th November, 1928. The second oldest child did not attain the age of twenty-five years until the 3rd March, 1930, and the youngest child will not attain the age of twenty-five years until the 17th February, 1934. RECORD. p. 8, l. 6.

5. As to paragraph 2 (3) of the petition for special leave, it is the Respondent's submission that there is no evidence in the Record and no evidence was brought forward at the trial to show that after expending a portion of the one-third part of the income on each child under the provisions of Clause E of paragraph 9 of the Will, the balance of the one-third part of the income which might have been expended in the discretion of the trustee on each child's support, maintenance and education, was kept in a separate account for such child or indeed that it should have been kept in a separate account for such child according to the Respondent's contention under the terms of the Will. On the contrary, the evidence in the Record as contained in the T.3 Information Return for the year 1928, which was duly signed and certified to by the Appellant, shows that even in that year, which is the last year in appeal, all of the income not disbursed for the support, maintenance and education of the children was lumped together and " capitalized and its later distribution is contingent upon each child attaining the age of twenty-five years, subject to which the income is to be equally divided among the three children." This evidence is in the Record at page 65 and is the last item in column 1 of paragraph 21 of the said T.3 Return, giving the name and address of the beneficiaries of the estate. p. 11, l. 34. p. 62. p. 65.

In addition, the Supreme Court of Canada in the reasons for judgment of Duff, J. which were concurred in by Rinfret, Lamont and Smith, JJ. found that until a child attains twenty-five years of age " the accumulated income accumulates as an integer " and not as three separate incomes. p. 48, l. 15.

6. Proceeding now with the case proper, this appeal came before the Exchequer Court by way of appeal from the Decision of the Minister of National Revenue affirming the assessments for the years 1917 to 1928, both inclusive, which had been levied against the trustee, as trustee under the Will of the late Duncan McMartin of Montreal, Canada, upon the income received and accumulating in the hands of the trustee during the said years. p. 78.

The Trust was formed at the date of the death of the late Duncan McMartin in 1914 under and by virtue of his Last Will and Testament, and in particular paragraph 9, Sub-paragraphs E and F. p. 6, l. 30. p. 10. p. 11, l. 19.

The trustee, John B. Holden of the City of Toronto, in the Province of Ontario (the Appellant) the sole surviving executor and trustee of the Will of the late Duncan McMartin, was and is a resident of Canada. The trustee, after being given all the rest, residue and remainder of the Testator's estate, both real and personal upon trust, was required under Section 9 (A) of the said Will to sell and convert the said rest, residue and remainder into money (except certain shares of stock therein referred to). After the payment of certain legacies, the trustee was required under Section 9 (C) to invest and keep invested the balance of the proceeds of such sale and p. 9, l. 22. p. 62. p. 13, l. 9. p. 11, l. 19. p. 11, l. 22. p. 11, l. 28.

RECORD. p. 6, l. 33. to p. 7, l. 11. conversion in such investments as trustees are by the law of the Province of Ontario permitted to invest Trust Funds. (Agreed Statement of Facts.)

The income from such investments not actually used in the support, maintenance and education of the Testator's children (which children are not mentioned by name in any place in the Will but merely referred to p. 11, l. 34. as a class) under Clause 9 (E) of the Will was and is accumulating in the hands of the trustee, and under the provisions of paragraph 9 (E) of the p. 11, l. 41. Will was re-invested by the trustee in like securities for the period of the Trust, and forms part of the residue of the Testator's estate.

7. The pertinent parts of the Will are contained in the Statement of Facts agreed upon (Record, page 6, line 41, to page 7, line 36) particularly paragraphs A, C, E and F of paragraph 9 of the Will.

The children are not specifically or individually named in the Will, but reference is made to the class, namely :—

> " F . . . to divide the residue of my estate equally between such of my three children as shall attain the age of twenty-five years, as and when they respectively attain that age."

p. 7, ll. 29 to 31.

8. During the years under appeal, namely 1917 to 1928, both inclusive, there was " income " accumulating in the hands of the trustee, and during the whole of these taxation periods all of the children were under the age of twenty-five years, the oldest child having attained the age of twenty-five p. 8, l. 6. years on the 4th November, 1928.

9. The Income War Tax Act provides in Chapter 28 of the Statutes of 1917 by Section 2 that :—

> " (*d*) " person " means any individual or person and any syndicate, trust, association or other body and any body corporate and the heirs, executors, administrators, curators and assigns or other legal representatives of such person, according to the law of that part of Canada to which the context extends."

Section 4 of the said Chapter 28 of the Statutes of 1917 reads :—

> " 1. There shall be assessed, levied and paid, upon the income during the preceding year of every person residing or ordinarily resident in Canada or carrying on any business in Canada the following taxes :— " (Rates of tax are then set out.)

The Income War Tax Act was amended in 1920 (retroactively to and including the 1917 taxation period) by Chapter 49. Section 4 of the 1920 Statute (see now Section 11 of Chapter 97, R.S.C. 1927) reads as follows :—

> " The income, for any taxation period, of a beneficiary of any estate or trust of whatsoever nature shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period.

Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustees or other like persons acting in a fiduciary capacity, as if such income were the income of an unmarried person."

Section 16 (1) of the said 1920 Statute provided that the amendment quoted above " shall be deemed to have come into force at the commencement of the 1917 taxation period."

10. There is no dispute that the " income " of the estate is " income " within the meaning of the Act, nor is there any dispute as to the computation of the tax if it be held that the tax is properly exigible.

11. The Appellant contends that in his capacity as trustee under the Will, he is not taxable under the provisions of the Income War Tax Act.

The Respondent contends that the trustee, John B. Holden, the Appellant herein, is taxable under the provisions of Sub-section 2 of Section 11 of the Income War Tax Act, Chapter 97, R.S.C. 1927, originally enacted by Section 4 of Chapter 49 of the Statutes of 1920 as quoted above herein in paragraph 9 of the Respondent's case.

The said provision of the Act says directly and simply that :—

" Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like persons acting in a fiduciary capacity, as if such income were the income of an unmarried person."

12. The Appellant contends that though the income in excess of those amounts actually expended for the support, maintenance and education of the children be accumulating in his hands as trustee, the children have a vested interest and therefore the income accumulating should be divided into three parts and taxed accordingly against the children, if they be taxable, but not against the trustee.

The Minister of National Revenue contends that :—

(*a*) Even though the children may have a vested interest, the imposition of the tax and collection of the revenue has no relation to vesting. The tax is exigible when the income is received and from the person receiving it the end of each taxation period. Although the interest or abstract right be a vested one, no one can say which of the children will live to receive the income; it is contingent on who will be alive at the time of distribution, or, to quote the explicit words of the Will—" to divide the residue of my estate equally between such of my three children as shall attain the age of twenty-five years as and when they respectively attain that age " with a proviso that if any child shall have died before the period of distribution leaving a child or children, such children shall take their parent's share as if the parent had survived the period of distribution. p. 7, l. 29.

(*b*) If the interest be vested it is subject to be divested by death in favour of others, but inquiry as to the character of the

RECORD.

interest—whether vested or contingent—is not conclusive for the determination as to whether the persons possessing the interest are ascertained or not;

(*c*) the persons to receive the income as at the end of each taxation period (which must be the time taken to ascertain liability or otherwise for each period) are unascertained as individuals, and therefore unascertained within the meaning of the Statute. The class (as children) may be known, but the children as individuals or taxpayers are in fact unknown—unascertained;

(*d*) the accumulating income in the hands of the trustee is taxable against the trustee as he is a resident of Canada in receipt and absolute control of the income, all of which is received and invested in Canada.

(*e*) The residence or non-residence of possible or probable ultimate recipients of the accumulating income should not be taken into consideration when determining the tax liability as at the end of each taxation period there is no person other than the trustee who is in receipt or control of the income or entitled to it at such respective dates, and therefore the residence of ultimate possible beneficiaries has no bearing.

ARGUMENT.

13. The question in controversy depends upon the interpretation, in its application to the facts of this case, of the second sentence of Section 4 of Chapter 49 of the Statutes of 1920 quoted above and which is now found as Sub-section 2 of Section 11, Chapter 97, R.S.C. 1927, reading as follows :—

> " 2. Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of an unmarried person."

This section has been before the Canadian Courts on two prior occasions, namely, *McLeod* vs. *The Minister of Customs and Excise*, 1925 Exchequer Court 105, 1926 Supreme Court Reports 457, and *The Minister of National Revenue* vs. *The Royal Trust Company*, 1930 Exchequer Court Reports 172, 1931 Supreme Court Reports 485. In addition the *McLeod* case came before the Judicial Committee of the Privy Council in July, 1926, on a Petition for special leave to appeal by the executor in that case, and leave to appeal was refused by the Committee composed of The Lord Chancellor Viscount Cave, Viscount Haldane, Lord Atkinson, Lord Parmour and Lord Justice Warrington. It is to be noted further than in the *McLeod* case one of the probable beneficiaries was a resident of the United States during the years in question in that appeal.

In the *Royal Trust* case, which did not go beyond the Supreme Court of Canada, all of the probable eight future beneficiaries were residents of the United States.

As a result of the decisions in these cases the law has been settled in Canada for some years that where income is accumulating in the hands of a trustee who is a resident of Canada, and such income is accumulating in Canada for the benefit of unascertained persons or persons with contingent interests, even although such unascertained persons or persons with contingent interests may ultimately when the time for distribution actually arrives be found to be non-residents of Canada, nevertheless the trustee, resident in Canada, is liable under the provisions of the Section quoted above to be taxed on the income accumulating in his hands.

VESTED INTEREST.

VESTED INTEREST SUBJECT TO BE DIVESTED.

14. A probable beneficiary may have a vested interest. Nevertheless, this vesting should not be confused with the specific direction contained in the amendment of 1920 under which " income accumulating in trust for the benefit of unascertained persons or of persons with contingent interests shall be taxable in the hands of the trustees or other like persons acting in a fiduciary capacity, as if such income were the income of an unmarried person."

As Mr. Justice Newcombe stated in the *McLeod* case, 1926 Supreme Court Reports, 457 at 470—

> " Now I think it could have added nothing to the solution of the question in hand if the Will had expressly declared, what is said to be its effect, that the Testator's children shall each take a vested interest in the accumulated fund in the interval, subject to be divested as to any of them who shall die during the period ; the persons who are to enjoy the income would nevertheless, at every moment of the period, be uncertain and unknown, and therefore unascertained in the only sense in which it is reasonable to suppose that the word is used in the Statute."

The Honourable Mr. Justice Duff in the same case at page 460 stated :—

> " The fund was to accumulate for the benefit of the persons among whom it was to be distributed when the time of distribution arrived. It is impossible to affirm that this must include any of the children, nor is it possible to say with regard to the fund or with regard to any ascertained or ascertainable part of the fund, that the persons who are ultimately to share in it—the ultimate beneficiaries in a word—are now ascertained or ascertainable. The fund, in other words, is to accumulate for the benefit of persons who, for the relevant period are not ascertained, and such a fund is, within the ordinary meaning of the words, it seems abundantly clear to me, a fund held for the benefit of " unascertained persons."

The observations of the two Judges referred to above are quite apt when applied to the facts of the present case. Under the Will of Duncan

RECORD. McMartin, as at the end of any taxation period, it is quite impossible to say with certainty whether one or any of the Testator's children would attain the age of twenty-five years or whether, if one or all of the Testator's children died before attaining the age of twenty-five years, they would leave grandchildren of the Testator, or how many grandchildren they might leave. It is impossible to state with certainty, therefore, the exact persons who will ultimately receive the income of the estate which the executor and trustee is accumulating, and accordingly at the end of each taxation period the income accumulating in the trustee's hands is, it is submitted, " accumulating in trust for the benefit of unascertained persons or of persons with contingent interests " and therefore the income under the provisions of the section already quoted is " taxable in the hands of the trustees or other like persons acting in a fiduciary capacity, as if such income were the income of an unmarried person."

The provisions of the Will supporting the Respondent's contention are
p. 11, l. 41. set forth in paragraph 9 (E) where it is stated :—

> " provided that any portion of any child's share not required for his or her support, maintenance and education shall be re-invested by my said executors and trustees and form part of the residue of my estate given and bequeathed to such child "

p. 11, l. 46. and in paragraph 9 (F) wherein the trustee is directed :—

> " to divide the residue of my estate equally between such of my three children as shall attain the age of twenty-five years, as and when they respectively attain that age, provided that if any of the said children shall have died before the period of distribution arrives, leaving a child or children, such children shall take the share in my estate which his or her parent would have taken had he or she survived the period of distribution, if more than one in equal shares."

It is submitted that if one of the children died before attaining the age of twenty-five years and left no children him or her surviving, such child's estate would have taken nothing under the provisions of paragraph 9 (F) and the residue of the estate of the Testator, Duncan McMartin, would have been divided equally between the other two children who did attain the age of twenty-five years.

The greatest interest of the children under the terms of this Will would, it is submitted, be a vested interest subject to be divested. From an Income Tax point of view the income is received by one person, namely, the trustee, and is accumulating in trust in his hands and held by him. Mr. Justice Newcombe in the *McLeod* case, 1926 Supreme Court Reports at page 471, stated :—

> " The truth is that the inquiry as to the character of an interest —whether vested or contingent—is not conclusive for the determination of a question as to whether the persons possessing the interest are ascertained or not."

The ultimate receipt of the income which is accumulating from year to year in the hands of the trustee, as opposed to the present interest or estate of the beneficiaries, is contingent on who will be alive when the time for actual distribution is reached, that is on which of the beneficiaries live to attain the age of twenty-five years. This is another way of saying that the beneficiaries, as at the end of each taxation year in question herein were unascertained and therefore the income accumulating in trust comes within the express wording of the 1920 amendment to the Income Tax Act (now Sub-section 2 of Section 11 of Chapter 97, R.S.C. 1927) and is taxable in the hands of the trustee as if such income were the income of an unmarried person.

In *Commissioners of Inland Revenue* vs. *Henderson's executors*, 1931 Sc. L.T. 496 at 499 Lord Sands stated :—

> " But the collection of Income Tax has no relation to vesting. The tax is exigible when the income is received and from the person receiving it."

Mr. Justice Duff in the *McLeod* case, 1926 S.C.R. at page 460, said :—

> " I desire merely to emphasize the fact that no opinion is expressed upon the question whether or not the children took a vested interest in the fund at the death of the Testator. Upon that question it is quite unnecessary to pass. . . . The fund, in other words, is to accumulate for the benefit of persons who, for the relevant period are not ascertained, and such a fund is, within the ordinary meaning of the words, it seems abundantly clear to me, a fund held for the benefit of unascertained persons."

Newcombe, J., in the same case at page 471 stated :—

> " In a sense of course all beneficiaries of a trust are ascertained when the trust is created, because it is essential that they shall be capable of ascertainment from the provisions of the trust; but, where the income is to accumulate and become payable in the future, and the ascertainment of the beneficiaries is subject to events which may happen in the interval, the beneficiaries are, nevertheless for the purposes of the Statute, unascertained. In my view, the Statute, having regard to the time when the right to possession or enjoyment shall arrive, intends that the trustees shall pay the tax so long as it is uncertain who the persons are, or may be, who will then be entitled to receive the accumulated income."

It is submitted that if the trustee had been asked at the end of each taxation period to say who are the persons for whom he, in the administration of the trust, was accumulating the income, he could, if disposed to answer, only truthfully say that it was for such of the three children of the Testator as shall attain the age of twenty-five years, and if any one or more of the children should not live to be twenty-five years of age, then he was accumulating the income for any of such deceased children's children, or if the

RECORD. deceased child of the Testator died without leaving children, then he was accumulating the income for the survivor or survivors of the Testator's children, provided they attained the age of twenty-five years. This answer would, it is submitted, be truly descriptive of persons who are unascertained or who have contingent interests within the meaning of the Statute.

"Rights" within the law are not to be confused with "income" received by a person resident in Canada (the trustee) through whom those rights may or may not be ultimately realized.

The collection of Income Tax has no relation to vesting. "Vesting" is a conclusion of law in determining a "right." "Income" received and accumulated by a trustee is a fact on which, under the provisions of the Act already quoted, a tax is to be levied as against the recipient trustee.

15. It is important to keep in mind that the subject matter in this p. 11, l. 22. particular case is personal property, inasmuch as by Clause A of paragraph 9 of the Will the executors are to convert all of the Testator's real and personal estate bequeathed to such executors into money as soon after his death as they in their absolute discretion deem advisable, and by Clauses p. 11, ll. 28 to 30 and ll. 41 to 44. C and E of the said paragraph 9 of the Will the executors are directed to invest and keep invested the balance of the proceeds of such sale and conversion of the Testator's real and personal property in such investments as trustees are by the Province of Ontario Laws permitted to invest Trust Funds, and the executors must also invest the unused portion of the income of the estate accumulating in their hands in similar investments.

The Courts have made a definite distinction in determining whether property vested under the terms of a Will or otherwise, depending on whether the property involved was real or personal estate; the trend of Court opinion favours the immediate vesting of real estate wherever that construction could possibly be given to the terms of a Will, but with respect to personal estate a review of the decisions discloses that the Courts have not formulated such strict rules for the immediate vesting of personal property, including the proceeds of real estate directed to be converted into money.

In Underhill and Strahan on Wills and Settlements, third edition, at page 205, under the heading "Gifts Clearly Contingent," it is stated on the authority of *Bull* vs. *Pritchard*, 1826, 1 Russ 213, that :—

> "On the other hand, a clearly contingent gift, *e.g.*, a gift to such of a class of persons as shall be living at a particular date, is not susceptible of explanation; for it is unambiguous, and only those can take vested interests who are living at the date indicated."

It is submitted that this language is quote apposite to the wording of p. 11, l. 41. the Will of Duncan McMartin since by Clause E of paragraph 9 the unused portion of any child's share of the income of the corpus of the estate is to form part of the residue of the estate, which residue, under Clause F of p. 11, l. 46. paragraph 9 of the Will is to be divided equally "between such of my three children as shall attain the age of twenty-five years, as and when they respectively attain that age." The qualification, namely the attaining

of the age of twenty-five years, attaches to the donee and if one of the children dies prior to attaining that age, and without leaving children of his or her own, which event is provided for in the said Clause F, such child's estate would receive nothing from the Testator's estate herein—in short, the gift is clearly contingent upon attaining the specified age and the Testator's children do not take a vested interest unless and until they attain the age of twenty-five years. RECORD.

DIVIDING THE INCOME INTO THREE EQUAL PARTS AND KEEPING IT IN SUCH THREE SEPARATE PARTS.

16. It is contended by the Appellant that if the income is taxable in the hands of the trustee, three separate assessments should have been issued to him with respect to the interest of each of the three children.

It is submitted on behalf of the Respondent that the balance of the income not expended for the support, maintenance and education of the children was accumulating in the trustee's hands as one fund and, accordingly, that the income has been properly assessed by issuing one assessment with respect to the full amount accumulating in the trustee's hands.

A Testator's intention can only be interpreted from the words he has used in the Will as a whole, bearing in mind that a clear intention in a later clause may prevail over a possibly inconsistent intention in an earlier clause. Clause E of paragraph 9 of the Will provides that the executors are :— p. 11, l. 34.

> " to divide the balance of the income from such investments or the income or profits derived from the unrealized portions of my estate, into three equal parts and to pay or apply one of such parts, or so much thereof as my executors and trustees in their discretion deem advisable in or towards the support, maintenance and education of each of my children until they have respectively attained the age of twenty-five years or until the period fixed for the distribution of the capital of my estate which ever event shall last happen, provided that any portion of any child's share not required for his or her support, maintenance and education shall be re-invested by my said executors and trustees and form part of the residue of my estate given and bequeathed to such child."

It is pointed out at once that there are no words in Clause E specifically giving the unexpended portion of the one-third part of the income of the estate to an individual child. Without such words it is submitted that the Appellant's contention must fail. The wording of Clause E is quite explicit that the unexpended portion of any child's share is to be re-invested by the executors " and form part of the residue of my estate given and bequeathed to such child." The words " given and bequeathed to such child " in their grammatical context modify and describe the " residue " and not the " portion of any child's share." In order that the Appellant's contention p. 11, ll. 43-44. p. 11, ll. 41-42.

RECORD. might succeed, it is submitted that the Court would have to entirely ignore the provision in Clause E that the unexpended portion was to form part of the residue of the Testator's estate, and the Court would also have to read into Clause E some such wording as follows—provided that I hereby give and bequeath to such child any portion of such child's share not required for his or her support, maintenance and education but until the period fixed for the distribution of the capital of my estate, the unexpended portion of such child's share shall be re-invested by my said executors and trustees. In order that the Court may arrive at the conclusion that a portion of Clause E may be disregarded and the latter part of the clause wholly re-drafted so as to contain specific words of gift and bequest to each child of the unexpended portion of the one-third of the estate income which may be used for its support and maintenance, the provisions of the Will as a whole must be in such an unsatisfactory state that no other reasonable or actual interpretation is open to the Court. It is submitted on behalf of the Respondent that this is far from being the case and that

p. 11, l. 45. on the contrary the provisions of Clause E, when read with Clause F of paragraph 9 of the Will, are so clear and unambiguous that the Appellant's contention and interpretation is wholly unwarranted.

The Respondent submits that the unexpended portion of any child's share must on the reasonable interpretation of Clause E become part of the residue of the estate and the unexpended portions of the shares of the three children become merged again in the residue of the estate, so that the balance of the income accumulating in trust in the trustee's hands accumulates as an integer and accordingly is taxable as one fund against the trustee. To find what part of the residue of the estate is given and bequeathed to

p. 11, l. 45. such child, one must proceed to Clause F of paragraph 9 of the Will which provides that the executors, after the happening of certain events are " to

p. 11, l. 46. divide the residue of my estate equally between such of my three children as shall attain the age of twenty-five years, as and when they respectively attain that age." Clause F provides for a specific division of the residue of the Testator's estate, including in such residue the unexpended portion of the income of the estate not used for maintenance of the children into as many equal parts as there shall be children who attain the age of twenty-five years, and unless a child attains the age of twenty-five years he or she will receive no part of the corpus of the estate or of the unexpended income of the estate. This, it is submitted, is the plain and simple interpretation of the Will as opposed to the complicated and indeed unwarranted contention put forward by the Appellant.

As was pointed out at the opening of this case there is not a tittle of evidence in the Record to show that the unexpended portions of the income were ever kept in separate accounts by the executors, nor was any evidence offered by the Appellant in this connection at any time during the course of the appeal from its inception by a Notice of Appeal from the assessment until the conclusion of the case in the Supreme Court of Canada. Indeed, the sole piece of evidence on the Record is against the Appellant's contention. This will be found in the T.3 Information Return for the year 1928

which was filed and signed by the trustee of the estate and in which he certified that the return embodied therein, the supplementary statements and additional schedules attached (if any) contained a true and complete statement of all income received by him for or on behalf of the above named estate during the year for which the return was made. The particular piece of evidence referred to will be found on page 65 under item 21 of the return where the executor shows the total amount of income of the Duncan McMartin estate which was not expended by him during the year 1928 as one lump sum of $395,640·10, and states " under the terms of the Will all income not disbursed for the support, maintenance and education of the three children of the deceased is capitalized and its later distribution is contingent upon each child attaining the age of twenty-five years, subject to which the income is to be equally divided among the three children." This voluntary information supplied by the trustee on the 1928 T.3 return is in direct conflict with the contention put forth on his behalf that the trustee should, if taxable, have three separate assessments issued against him for each of the years in question.

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p. 62.

It is submitted that Clause E gives nothing but a power to apply one-third of the income (not more) to each child, and if not so used, the unused balance goes into the residue to be dealt with by Clause F, and there becomes merged with all other assets of the estate. The Supreme Court of Canada has made a definite finding in this respect, namely, that " the accumulated income accumulates as an integer." This is the judgment of Duff, J. concurred in by Rinfret, Lamont and Smith, JJ.

p. 48, l. 15.

It is to be noted particularly that irrespective of the fact that one of the children may have had more spent on his education than the other two children, nevertheless, any unused portion of the one-third of the income which may be spent on each child is ultimately to be divided equally amongst such presently unascertained persons as may attain the age of twenty-five years. Clause E merely limits, in the sense of the maximum, the amount that may be expended on any one child in any one year out of income.

It is to be particularly noted also that under Clause F the residue of the Testator's estate is not to be divided into three parts but is to be divided equally between such of the three children as attain the specific age. If one child dies before attaining twenty-five years of age and without leaving any children, the residue will be divisible equally between the other two who attain the age of twenty-five years, or if two of the children die before attaining the age of twenty-five years and without leaving children, the survivor would get all of the residue, including therein the unexpended portions of income.

The provisions of Clause F of paragraph 9 of the Will, although they refer to the distribution of the capital of the estate, must be referred to for Income Tax purposes, inasmuch as the unexpended income of the estate under the provisions of Clause E became capitalized and added to the residue. While Clause F must be regarded for such purpose, it should be kept in mind that the Income Tax Act is dealing only with income and its taxation, and to endeavour to trace the capital interests in the capital fund out

p. 11, l. 45.

RECORD. of which the income grows is only to introduce confusion into the argument. The facts of this case are quite clear and it is submitted that the interpretation of the Will is also quite clear in that here we have income accumulating for persons who, as at the end of any material taxation period cannot be definitely determined and accordingly are unascertained or persons with contingent interests within the meaning of the taxation provisions of Subsection 2 of Section 11.

Accordingly it is submitted that the Minister of National Revenue would have no foundation in fact or in law, for issuing three assessments in respect to the re-invested income forming part of the residue of this estate as contended for by the Respondent, inasmuch as it would be impossible for him to say, at the end of any material taxation period, which one or more of the children, if any, would ultimately get the income, and the only actual receipt that exists and of which cognizance can be taken at the end of each period is the receipt of the income by the trustee under the Will to accumulate and re-invest it until the period of distribution—hence the issuance of only one assessment.

17. Residence of possible or probable beneficiaries.—It is contended by the Appellant that inasmuch as the three children of the Testator were residing in the United States, therefore no tax can be imposed on their possible or probable interest in the income of the estate.

It is submitted on behalf of the Respondent that the residence of possible or probable beneficiaries is quite immaterial for the decision in this case.

The Appellant founds his contention on the statement that the Canadian Income Tax Act intends and does tax only persons residing in Canada, carrying on business in Canada or rendering services in Canada, with the exception of certain definite provisions now contained in Sections 24 and 25 of the Income War Tax Act, Chapter 97, R.S.C. 1927 and that the said Sections 24 and 25 are the only sections under which the Minister has any power to issue an assessment with respect to non-residents.

Under Section 9 of the Act as contained in the Revised Statutes, it is provided that " there shall be assessed, levied and paid upon the income during the preceding year of every person . . . (*d*) who, not being resident in Canada is carrying on business in Canada during such year; or (*e*) who, not being resident in Canada, derives income for services rendered in Canada during such year, otherwise than in the course of regular or continuous employment, for any person resident or carrying on business in Canada; a tax at the rates applicable to persons which rates are set forth in a schedule to the Act. Under the provisions of Sections (*d*) and (*e*) as quoted, any person who is not a resident of Canada would be taxable on his total income from all sources if he were carrying on business in Canada during such year or derived income for services rendered in Canada during such year. Realizing this, and realizing also that it was not the intention that such non-residents should be taxable on their income from all sources, but only on their income derived from carrying on business in Canada or for

rendering services in Canada, Sections 24 and 25 of the Act as contained in the Revised Statutes were enacted by Parliament and these Sections definitely limit the liability for taxation of such non-residents to the income derived from Canadian sources. That is the whole intent and purpose of Sections 24 and 25 of the Act which are referred to by the Appellant.

The Appellant wholly overlooks the provisions of Section 9 (*a*) which provides for the taxation of every person " (*a*) residing or ordinarily resident in Canada during such year." The trustee, John B. Holden, resided or was ordinarily resident in Canada during each of the years in question and was actually in receipt of the estate's income in Canada, as all of the income of the estate had to be kept in funds authorized for the investment of Trust Funds by the Laws of the Province of Ontario.

In addition, if the Appellant's contention were acquiesced in, it would wholly nullify the provisions of Sub-section 2 of Section 11 as contained in the Revised Statutes, whereby " income accumulating in trust for the benefit of unascertained persons or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of an unmarried person."

It is submitted on behalf of the Appellant that if it is proven that the persons for whom the income is accumulating in the hands of the trustee are persons who are unascertained within the meaning of Sub-section 2 of Section 11, or persons with contingent interests within the meaning of the same Sub-section, the residence or probable residence of such unascertained persons or persons with contingent interests is quite immaterial, provided that the trustee of the estate is a resident of Canada and the Canadian residence of such trustee gives the respondent full power for the imposition of a tax on him by virtue of the said Sub-section 2 of Section 11. The Supreme Court of Canada in the *Royal Trust* case, 1931 Supreme Court Reports 483 at 489 in the unanimous judgment delivered by Chief Justice Anglin held that :—

> " Those who are at the present time probable beneficiaries of the trust, or some of them, it is true reside in the United States. But that fact does not prevent this case coming within Sub-section 6 of Section 3 (now Sub-section 2 of Section 11 of Chapter 97, R.S.C. 1927) nor render exempt from taxation in the hands of the trustee income accumulating in a trust for unascertained beneficiaries or beneficiaries having contingent interests. On the contrary, in our opinion such income accumulating in trust is distinctly a subject of taxation under the Sub-section referred to, regardless of residence, if ascertainable, of probable beneficiaries."

If, for Income Tax purposes, the probable beneficiaries are unascertained during the relevant periods, it follows that their residence is likewise unascertained. It is submitted also that persons with contingent interests cannot be made liable to or escape taxation merely on account of their place of residence. The residence of the trustee of the estate is the only residence

RECORD. which need be considered, and if the trustee is resident in Canada, he is taxable on the income accumulating in his hands, irrespective of the residence of the possible or probable beneficiaries.

To carry the Appellant's contention with respect to residence to its logical conclusion, let us take a simple case in which the principle contended for by the Appellant would show the unreasonableness of his contention. Suppose that a non-resident donor in contemplation of his proposed marriage to a Canadian wife were to set up a Canadian Trust with a Canadian trustee, and that such Canadian Trust was to be for the benefit of his surviving children provided they attained a given age, with the income from the corpus of the fund accumulating in the meantime in the hands of the Canadian trustee. During the first few years until the first child was born, the income would be accumulating in the Canadian trustee's hands but the non-resident donor and his wife would be residents outside of Canada, and there might be no actual beneficiaries in existence during the first few years of the trust, although as soon as a beneficiary came into existence, such beneficiary would be a non-resident probable beneficiary. It is submitted that under the circumstances set forth in this example, there could be no question regarding the residence of ultimate beneficiaries during the first few years of the trust during which there were no beneficiaries in existence.

In short, it is submitted that it was never intended by the Dominion Legislation that the residence of possible or probable beneficiaries would have any bearing on the subject whatever, and the language of Sub-section 2 of Section 11 of the Income War Tax Act (originally enacted in 1920 and retroactive to 1917) is quite clear and simple in its interpretation, namely, that where income is accumulating in trust in the hands of a trustee who is resident in Canada and such income is accumulating for unascertained persons or persons with contingent interests, the income shall be taxable in the hands of such trustee who is resident in Canada as if the income were the income of an unmarried person. The fact that the income accumulating in trust for such persons is accumulating in the hands of a trustee resident in Canada is sufficient to make the tax exigible, and there is no necessity to explore the field of residence of possible or probable beneficiaries.

SUB-SECTION 6 OF SECTION 3 AS ENACTED BY SECTION 4 OF CHAPTER 49 OF THE STATUTES OF 10–11 GEORGE V. (1920).

(Now Section 11 of Chapter 97, R.S.C. 1927.)

18. This amendment of 1920, retroactive to 1917, not only removed any doubt which might have existed that income accumulating in trust in the hands of a trustee for the benefit of unascertained persons or of persons with contingent interests was taxable, but it became a complete taxation measure within itself. It designates the " person " as defined by the Act; the income as defined by the Act; and provides for the exemption to be afforded the trustees as that of " an unmarried person "—namely $1,500.00. It declares that such accumulated income " shall be taxable in the hands of the trustee " and thereby adopts the rates of tax as provided in the Act,

so that in the result we have within this amendment specific mention and a mandatory direction for assessing the person, the income, the statutory exemption and the rates of tax applicable. It is a complete taxing schedule within the larger taxation measure itself. The trustee is *persona designata* within the amendment itself. The remaining requirement is that the trustee be a resident of Canada, and on this there can be no dispute that John Bell Holden, the trustee of the Duncan McMartin estate, is a resident of Canada.

As the Right Honourable Chief Justice Anglin in the unanimous judgment of the Supreme Court of Canada in the *Royal Trust* case, 1931, S.C.R. 485 at 489 stated :—

> " The Income War Tax Act provides expressly for the taxation of accumulating income held in trust for the benefit of unascertained persons, or of persons having contingent interests. The income is made
>
> ' taxable in the hands of the trustees or other like persons acting in a fiduciary capacity, as if such income were the income of an unmarried person.'
>
> (Sub-section 6 of Section 3 of the Income War Tax Act, 1917, as enacted by Section 4 of Chapter 49 of the Statutes of 1920; *see also* Section 10 of the Act of 1920.)
>
> Whether the word ' trust ' means a person or body holding the property, or distributing the trust estate, or means the property itself, or means the trust upon which such property is held, is quite immaterial in view of what is said above."

The amendment is a complete taxation measure within itself.

TAXING INCOME FROM A GIFT OR BEQUEST.

19. The Appellant contends that if the undistributed income in question in this case was not vested in the children, nevertheless it was a gift and bequest and, therefore, not within the definition of income as contained in the Act.

The Respondent contends that the undistributed income was income within the meaning of the Act and falls within the class of taxable income.

Section 3 of Chapter 28 of 7–8 George V (1917) gives the definition of income for the purposes of the Income War Tax Act and provides that :—

> " For the purposes of this Act, ' income ' means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be; and shall include the

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interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source; including the income from but not the value of property acquired by gift, bequest, devise or descent; . . . ."

It is submitted by the Respondent that on the above definition only the corpus of the Testator's property which may go under his Will is exempted from Income Tax, and the definition specifically states that income to be taxed under the Act includes the income from property acquired by gift, bequest, devise or descent. In addition the amendment in 1920 (now Sub-section 2 of Section 11 of the Revised Statutes, 1927) specifically provides for the taxation of income accumulating in trust for the benefit of unascertained persons, and indeed by Sub-section 1 of the said Section 11 it is provided that :—

" The income, for any taxation period, of a beneficiary of any estate or trust of whatsoever nature shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period."

thus definitely showing that income of a deceased Testator's estate is taxable in the hands of the beneficiaries if they are entitled to immediate receipt of such income, or in the hands of the trustee if the income is accumulating in trust for the benefit of unascertained persons or persons with contingent interests. In short, it is only the corpus of the Testator's estate which is excluded under the Act by the definition of " income " set forth above.

20. The Respondent submits that the judgment of the Supreme Court of Canada is correct and should be affirmed for the reasons hereinbefore set forth, in particular :—

1. Upon the clear interpretation of the provisions of the Will of Duncan McMartin the income accumulating in the hands of the trustee, John B. Holden, is accumulating for the benefit of unascertained persons or for persons with contingent interests within the meaning of Sub-section 2 of Section 11 of the Act as originally enacted in 1920 and made retroactive to 1917.

2. That the income accumulating in the said trustee's hands is accumulating as an integer in accordance with the provisions of Clauses E and F of paragraph 9 of the Will of Duncan McMartin.

3. That the trustee, John B. Holden is a resident of Canada.

4. That the residence of possible or probable beneficiaries is immaterial for the decision in this case.

5. That the said Sub-section 2 of Section 11 is a complete taxing Section in itself. RECORD.

6. That the income accumulating is not exempt as being a gift or bequest under the Will.

7. And for such other reasons as Counsel may present.

JAMES MCG. STEWART.

In the Privy Council.

No. 76 of 1932.

On Appeal from the Supreme Court of Canada.

IN THE MATTER OF THE INCOME WAR TAX ACT

AND

IN THE MATTER of the Appeal of JOHN B. HOLDEN of the City of Toronto, in the Province of Ontario, sole surviving Executor and Trustee of the Estate of DUNCAN McMARTIN deceased, late of the City of Montreal in the Province of Quebec.

BETWEEN

JOHN B. HOLDEN, sole surviving Executor and Trustee of the Estate of DUNCAN McMARTIN deceased - - (*Respondent*) *Appellant*

AND

THE MINISTER OF NATIONAL REVENUE (*Appellant*) *Respondent.*

CASE FOR THE RESPONDENT.

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