RE THE INCOME WAR TAX ACT, 1917,

AND

IN THE MATTER OF JAMES B. McLEOD, SURVIVING EXECUTOR, ON BEHALF OF THE ESTATE OF JOHN CURRY, DECEASED, ... } APPELLANT;

AND

THE MINISTER OF CUSTOMS AND EXCISE ..... } RESPONDENT.

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*Mar. 2, 3.
*May 4.

AN APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Dominion Income War Tax Act, 1917, and amendments—S. 3 (6) as enacted 1920, c. 49, s. 4—Income accumulating in trust for the benefit of "unascertained persons or persons with contingent interests"—Construction of will—Vested or contingent interests—Right to deduct income from Dominion tax-free bonds from income accumulating in trust.

C, who died in 1912, domiciled in Ontario, by his will directed that his estate be converted into money and invested and, after payment of debts, etc., and certain legacies and annuities, the surplus income be

(1) [1924] S.C.R. 317; [1925] A.C. 561, 566.

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

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invested and accumulated during 21 years from his death and at the expiration of that period the whole residuary trust fund be divided into three parts and conveyed to his three children and that "in case any of my children shall have died in the meantime, that the one-third share of each or any of my children that shall die before the expiration of said 21 years, shall vest in my trustees to divide the same amongst my grandchildren, if any, as they may think best." One of the testator's children died in 1920, leaving no children, another is married and has three children, and the other is unmarried and lives in New York State. A dispute arose between the Dominion taxing authorities and the sole surviving trustee (the appellant) as to the return of income for 1921 under The Income War Tax Act, 1917, and amendments, the former contending (as was sustained by the Exchequer Court) that the income accumulating in trust for the benefit of those who will be entitled to receive it at the expiration of the 21 years is taxable in the hands of the trustee as "income accumulating in trust for the benefit of unascertained persons or of persons with contingent interests" within the second part of subs. 6 of s. 3 (as enacted 1920, c. 49, s. 4) of the said Act, and the trustee contending that such income, if taxable at all, is taxable only under the first part of the subsection as income accruing to the credit of the different beneficiaries though not received by the beneficiary during the taxation period. It was agreed that any income to which the child living in the State of New York was entitled or which was vested in her was not taxable.

Per Anglin C.J.C., Idington and Mignault JJ.—On the construction of the will, the vesting of the shares in the testator's children took place at the testator's death; and on the death of any of them before the expiration of the 21 years his share was divested and became vested in the trustees for distribution among the grandchildren at the time of the division of the estate as the trustees might think best. The words "contingent interests" in the Act should be given their legal meaning and do not include the case of a share vested subject to be divested. The share of each of the living children in the accumulating fund was not taxable against the trustee as "income accumulating in trust for the benefit of unascertained persons or persons with contingent interests," but (in the case of the child living in Canada) was taxable against the child herself. But the grandchildren were "unascertained persons" and the share of the fund which would have gone to the deceased child had he lived was taxable against the appellant as trustee.

Per, Duff, Newcombe and Rinfret JJ. (sustaining in the result, on equal division of the court, the judgment of the Exchequer Court).—Whether or not there are interests vested subject to be divested, the persons who are to enjoy the income are nevertheless, throughout the period of 21 years, uncertain and unknown, and therefore "unascertained" within the meaning of the Act. The Act, 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 may be who will then be entitled to receive the accumulated fund.

The trustee in his return claimed as a deduction a sum included in the net revenue, being the interest on Dominion of Canada tax-free

bonds, and also claimed as a deduction from income subject to the normal tax a sum received as dividends from Canadian companies liable to income tax. The question arose whether (as between the trustee and the Crown) the income accumulating in trust should be deemed to contain the whole of the tax-free bond income or only a proportionate part thereof, a proportionate part being passed on for each of the annuitants in respect of the annuities paid from the income of the estate. It was agreed that what was decided as to the income received from the tax-free bonds applied to the dividends received from Canadian companies liable to income tax.

Held that the trustee was entitled to deduct the income derived from the tax-free bonds from the net amount of income in respect of which he was taxable.

APPEAL by the appellant executor and trustee on behalf of the estate of John Curry, late of Windsor, Ontario, deceased, from the judgment of the Exchequer Court of Canada, Maclean J. (1), in so far as it held that the fund accumulating in the hands of the trustee under the deceased's will was income accumulating in trust for the benefit of unascertained persons or persons with contingent interests within the meaning of s. 3, subs. 6, of The *Income War Tax Act*, 1917, as enacted 1920, c. 49, s. 4, and as such liable to taxation; and a cross-appeal by the Minister of Customs and Excise from the said judgment in so far as it held that the appellant is entitled to retain for the benefit of the trust fund the full amount of income received from tax-free Dominion Government bonds. As to the right to retain for the advantage of the trust fund dividends from companies which had paid the tax on earnings, the parties agreed that the same principles apply as in respect of tax-free Dominion Government bonds. The material provisions of the deceased's will are set out or described, and the material facts given, in the judgments of Mignault and Newcombe JJ., and the questions dealt with by the court are indicated in the headnote.

A. C. McMaster K.C. for the appellant.

C. F. Elliott for the respondent.

ANGLIN C. J. C.—I concur with Mr. Justice Mignault.

IDINGTON J.—I concur with Mr. Justice Mignault.

(1) [1925] Ex. C.R. 105.

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DUFF J.—I have had an opportunity of reading the judgment of my brother Newcombe, and I concur in his reasons, as well as in his conclusion. 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 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 these 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 were 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".

MIGNAULT J.—John Curry, in his lifetime of the city of Windsor, province of Ontario, banker, died on the 11th of May, 1912, leaving a large estate comprising, *inter alia,* land in and about Windsor and in and about the city of Detroit, U.S. His wife, Frances Arabella Curry, and his three children, one son, Charles Francis Curry, and two daughters, Verene May McLeod, the wife of the appellant, and Gladys Alma Curry, survived him.

By his last will, after payment of his debts and testamentary and funeral expenses, he devised and bequeathed all his real and personal property wherever situate to his wife, Frances Arabella Curry, his son, Charles F. Curry, and his son-in-law, James Barber McLeod, whom he appointed executors and trustees of his will, their heirs, executors and administrators, in trust for sale and to convert into money. The time at which the properties would be sold and the conditions of the sale, either for cash or on credit, were left to the discretion of the trustees, who were empowered to lease the real estate for a term not exceeding ten years, with right to renew the leases for a like term. And out of the fund so formed, he directed his trustees to pay, free from legacy or succession duties, certain legacies and annuities, *inter alia,* during twenty-one years, $2,000,

per year to Verene May McLeod, $1,000 per year to Gladys Alma Curry, with power to increase the annuity to $2,000 in the event of her marriage, and $2,000 to Charles Francis Curry. The will also left an annuity and certain bequests to the testator's widow, with the free use of his house during her lifetime.

By the terms of the will, any surplus revenue not required for the payment of the legacies, annuities and expenses was to be invested and accumulated during twenty-one years from the testator's death, and as to the disposal of the accumulated fund at the end of that period, the testator ordered as follows:

> At the expiration of the said period of twenty-one years from my death, I direct my Trustees after setting apart an amount sufficient to produce at three and one-half per cent per annum the annual payments hereinbefore directed to my beloved wife and the rates and charges on said house, to divide the balance of my estate in three parts and I direct that each of the said shares shall be conveyed or transferred to my children, Charles Francis Curry, Verene May Curry McLeod and Gladys Alma Curry. I further direct that as and when the capital which shall have been set apart at three and one-half per cent to produce the yearly sum to be paid to my beloved wife shall fall in and not be further required by reason of the death of my said wife, it shall be included in the division of the fund into three shares, or if it fall in after such division, it shall be divided in the same manner and amongst the same persons.
>
> At the expiration of twenty-one years after my death and at the time of the division of my estate, I direct that in case any of my children shall have died in the meantime, that the one-third share of each or any of my children that shall die before the expiration of said twenty-one years, shall vest in my Trustees to divide the same amongst my grandchildren, if any, as they may think best.

The testator's wife survived him only a few months and died on the 31st of October, 1912. Charles Francis Curry, his son, also died on the 24th of March, 1920, and left no children. Verene May McLeod has three children, John C. McLeod, Frances V. McLeod and Gladys E. McLeod, all minors. Gladys Alma Curry is, since 1915, a resident of the city of New York, U.S. She is unmarried. Both daughters of the testator now receive as annuities under the will $8,000 per year, to which sum the annuities were increased by order of the Supreme Court of Ontario.

The litigation has arisen over the return of income for 1921 made by the sole surviving trustee, James B. McLeod, the appellant, under the provisions of *The Income War Tax Act*, 1917, and amendments. This return shewed a gross income of $161,478.02, from which Mr. McLeod

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deducted $84,298.85 for interest on borrowed money, real estate expenses, payment of annuities and other costs, leaving as net income $77,179.17. The appellant also caused a return to be made for Verene May McLeod of one-third of the net revenue, and for each of her three children of one-ninth of the net revenue (being a third of the third share bequeathed to Charles Francis Curry). The trustee in his own return claimed as a deduction $1,650 included in the net revenue, being the interest on Dominion of Canada Bonds (referred to hereafter as tax-free bonds) issued exempt from income tax, and also claimed as a deduction from income subject to the normal tax $68,531.25 received as dividends from Canadian companies liable to income tax.

The trustee paid income tax on the basis of his returns, but in May, 1924, the Commissioner of Taxation claimed from him $16,285.15, after crediting the payments made. The trustee having appealed from this assessment, it was affirmed by the Minister of Finance, and the appellant then served a notice of dissatisfaction under section 15 of the Act, thus bringing the matter of the assessment before the Exchequer Court.

In the latter court, three questions were submitted as stated by the formal judgment:—

1. Whether the fund accumulating in the hands of the trustee under the will is "income accumulating in trust for the benefit of unascertained persons or persons with contingent interests" within the meaning of section 3, subsection 6, of *The Income War Tax Act*, 1917, as enacted by 10-11 Geo. V, c. 49, s. 4 (1920), and as such liable to taxation?

2. Whether the estate as such was carrying on a business within the meaning of the Act, resulting in taxable profit?

3. Whether the income accumulating in trust should be deemed to contain the whole of the tax-free bond income or only a portion thereof, the balance being passed on as tax-free income to the annuitants?

The learned President of the Exchequer Court, Mr. Justice MacLean, answered the first question in the affirmative and the second in the negative. The answer to the third question was that the appellant was entitled to retain for the benefit of the trust fund the full amount of the income received from the tax-free bonds. And in the event of the parties being unable to agree upon the remaining points raised in the appeal, right was reserved to apply for further directions in regard thereto.

The decision of the Exchequer Court on the second question is not impugned by either party on this appeal. The appellant appeals against the answer of the Exchequer Court to the first question, and by a cross-appeal the respondent asks that the judgment be set aside with respect to the determination it gave to the third question. Both parties take the position that what is decided as to the income derived from the tax-free bonds applies to the dividends received from Canadian companies liable to income tax. It will therefore not be necessary to deal separately with these dividends, the exemption as to which is only in respect of the normal tax. The parties also agree that any income to which Miss Gladys A. Curry is entitled or which is vested in her is not taxable under the Act, inasmuch as she does not reside in Canada.

Taking up first the main appeal, which involves the answer given in the court below to the first question, although the question as framed would not appear to involve more than measuring the facts of this case by the rule contained in the second part of subsection 6, the learned President, in his reasons for judgment, considered himself free to refer to any other provision of the Act which could help in solving the problem submitted to him. In the argument before us, the parties also discussed other sections of the Act, and it may be well to do likewise in so far as these other provisions can be of any assistance.

It is obvious however that the whole of subsection 6 must be considered, and not merely its second part. This subsection, as first enacted by chapter 55 of the statutes of 1919, stated that the

> income of a beneficiary of an estate shall be deemed to include the amount accruing during each taxation year to which he, his heirs or assigns are entitled from the income of an estate whether distributed or not.

The 1920 amendment changed this language, and added the provision concerning income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests. As the subsection now stands, it reads as follows:

> 6. 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 bene-

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fit 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.

Taken as a whole, subsection 6 seems designed to cover every case of income derived from an estate or trust. The first sentence provides for the taxation of the beneficiary on

all income accruing to the credit of the tax-payer (in the French version, "l'intégralité du revenu accumulé au credit du contribuable") whether received by him or not during such taxation period.

This of course supposes that there is an ascertained beneficiary presently or ultimately entitled to the income, even though this income may be accumulated and not paid over to him during the taxation period. The second sentence of subsection 6 deals with another situation, namely where it cannot be said that the income is presently appropriated to any certain beneficiary, for this income is

accumulated in trust for the benefit of unascertained persons, or of persons with contingent interests ("in the French text, "s'accumulant au bénéfice de personnes inconnues ou de personnes ayant des intérêts éventuels"),

and then the income 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.

All this is in accord with the general policy of the Act which imposes the income tax on the person and not on the property. In other words, it is the person who is assessed in respect of his income. We were referred to the definition of "income" in subsection I of section 3. In so far as this definition can be of any help, it considers as income annual gains or profits "whether such gains or profits are divided or distributed or not"; but here we are dealing with something which, as received and accumulated by the trustee, is undoubtedly income. Our attention was also called to the definition of "person" in section 2. And as "person" means any "trust", it was argued that any "trust" receiving income was taxable as a person. Still the Act having specifically provided by subsection 6 of section 3 for the case where income is derived from any estate or trust, we must, in the last analysis, come back to that subsection to determine the liability of the appellant under the Act. We were also referred to subsection 11 of section 7, which requires any trustee receiving income on

behalf of a person who is resident outside of Canada to make a return of such income. But this subsection evidently contemplates the case where a non-resident is liable for income tax, and Miss Gladys A. Curry, the parties agree, does not come within the class of non-residents so liable (subsection 1 of section 4), and consequently subsection 11 of section 7 is of no assistance. Subsection 6 of section 3 therefore governs the matter under controversy.

Mr. McMaster contended on behalf of the appellant that the beneficiaries under the Curry will are not unascertained persons or persons with contingent interests, that their interests in the legacy are vested subject to being divested in a certain contingency, and that consequently the accumulating revenue is not taxable against the trustee, but can only be taxed against the beneficiary if the latter is subject to taxation under the Act.

This of course involves consideration of the terms of the will, and in this connection we were referred to a large number of decided cases, some of them dealing with devises of real estate or of money charged on real estate, others with legacies of personal property, but obviously each decision depended on the language of the devise or legacy under consideration.

The Curry will ordered the formation of a fund by the sale of the testator's property real and personal and its conversion into money, and after payment out of the income of the fund of the special legacies, annuities and expenses, the surplus revenue was to be accumulated in the hands of the trustees, and at the expiration of twenty-one years from the testator's death the trustees were directed to divide the estate into three parts and to convey and transfer each of such shares to the testator's children, Charles Francis Curry, Verene May Curry McLeod and Gladys Alma Curry. So far, there would appear to be nothing of a contingent character, and it certainly cannot be claimed that these children are unascertained persons. It sufficiently appears from the provisions of the will, and especially from articles 3, 4 and 5—which give the trustees a discretion as to the time when they shall sell the properties of the estate, and authorize them to sell for cash or on credit and to make leases of the real estate—that the

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setting apart as well as the payment and distribution of the shares of the fund belonging to the children was postponed for the convenience of the fund, and for no reason personal to the legatees. Under these circumstances, and although the gift here is contained in the direction to pay or distribute the shares at a future time, I think that the vesting of the shares in the children is not deferred to the time of payment or distribution of the shares, but took place at the death of the testator (Jarman on Wills, 6th ed., vol. 2, p. 1404. See also Theobald on Wills, 7th ed. p. 585). The time when the legacy must be paid is certain, and the rule *dies incertus conditionem in testamento facit* is thus excluded.

This is also indicated by the direction in the will that at the expiration of the twenty-one years, and at the time of the division of the estate, in case any of the children shall have died in the meantime, the one-third share of each or any of the children that shall die before the expiration of the twenty-one years shall vest in the trustees to divide the same amongst the grandchildren, if any, as they may think best. This language shews that the children were vested with their shares in the fund to be formed after the death of the testator, and on the death of one of them before the expiration of the twenty-one years his share was divested and became vested in the trustees for distribution among the grandchildren at the time of the division of the estate, as they may think best.

In construing subsection 6, the terms "contingent interests" should be given their legal meaning. It is argued that a construction should be placed on this expression that can be applied in all the provinces, including the civil law province of Quebec, and for this reason it is urged that the popular rather than the technical meaning should be given to the terms. In the province of Quebec, there can be no doubt as to the interpretation of the words " contingent interests" or their equivalent in the French version of the Act "intérêts éventuels." They mean there what I find they mean in the language of the common law. Were this not so, in construing these terms, effect should be given to the rule of construction laid down in *Commissioners for*

Income Tax v. *Pensel* (1). See also *Chesterman* v. *Federal Commissioners of Taxation* (2).

The appellant's contention that the second part of subsection 6 only applies when the income is accumulated wholly for persons with contingent interests or wholly for unascertained beneficiaries cannot be supported. It may be accumulated partly for one class and partly for the other, and the trustee may administer a fund as to a portion of which ascertained beneficiaries have vested interests, while another portion of the fund may be left to persons with contingent interests, or to persons who are as yet unascertained. The subsection as a whole covers all these cases, and its first part may be well applied to one class and the second part to another under the same will.

My opinion therefore is that each of the testator's children had a vested interest in the gift of a third share of the fund. There is however more difficulty as to the vesting of the gift over in favour of the grandchildren. Charles Francis Curry died in 1920 and by his death was divested of the share that had vested in him. The title of the grandchildren to any portion of the fund was contingent on the death of one or more of the children before the expiration of the twenty-one years. By virtue of the will, on the death of Charles Francis Curry, his share became vested in the trustees to divide it among the grandchildren as they may think best. This division is to take place at the expiration of the twenty-one years, that is to say in 1933. There are now three grandchildren and there may be others, or none at all, at the latter date. Moreover, the share which any surviving grandchild may receive, should there be more than one, rests wholly in the discretion of the trustees. It seems at least doubtful, under all the circumstances, whether the grandchildren were vested in 1921 with any interest in Charles Francis Curry's share of the fund, but it is not necessary to decide the point because the grandchildren, during the period of assessment in question, were unascertained persons within the meaning of subsection 6. It is said that the class was ascertained, but the statute refers to the persons and not to the class, and no persons of the class were ascertained as beneficiaries when the assessment was made.

(1) [1891] A.C. 531, at p. 580. (2) [1926] A.C. 128, at p. 131.

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On the main appeal therefore the judgment should be varied so as to declare that the share in the accumulating fund of Mrs. McLeod and Miss Curry is not taxable against the appellant. Mrs. McLeod's share is taxable against herself. The share of the fund, however, which would have gone to Charles Francis Curry, had he lived, should be declared taxable, for the 1921 period of taxation, against the appellant as trustee. As the appellant's appeal is successful in respect of a material part of the assessment, he should have his costs here and in the court below.

With respect to the cross-appeal of the respondent, there appears to be no reason for disturbing the judgment. The income derived from the tax-free bonds was part of the income received by the appellant as trustee, and he is entitled to deduct it from the net amount of income in respect of which he is taxable. The reasons given by the learned President for so deciding are satisfactory. The cross-appeal should be dismissed with costs.

The case should be remitted to the Exchequer Court as some questions, which may be involved in the appeal from the assessment, and as to which the parties were to be at liberty to apply for further directions, were not determined.

NEWCOMBE J.—The question in controversy depends upon the interpretation, in its application to the facts of the case, of s. 3, subs. 6, of the *Income War Tax Act*, 1917, as amended. This subsection provides that:

> (6) 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.

The testator died on 11th May, 1912, leaving his wife and three children surviving, one son and two daughters. By his will, he left his property to his wife, his son, and his son-in-law, James B. McLeod, the appellant

> in trust for sale and to convert into money and to hold, invest, accumulate and dispose of the same, trust and subject to the provisions hereinafter set out.

He directed that the proceeds should be invested by his trustees in securities of the various descriptions which he mentioned; that the income of the fund should be added to

the principal and follow its destination, and that the accumulations should be made for and during the period of twenty-one years from his death. He directed that out of the income of the fund certain annuities and legacies should be paid, including a specified annuity to each of his children, to be paid quarterly during the period; also an annuity to his wife of $3,000, to be paid quarterly during her natural life, and that she should have the free use of his house. Then followed two clauses providing that:

At the expiration of the said period of twenty-one years from my death, I direct my trustees after setting apart an amount sufficient to produce at three and one-half per cent per annum the annual payments hereinbefore directed to my beloved wife and the rates and charges on said house, to divide the balance of my estate in three parts and I direct that each of the said shares shall be conveyed or transferred to my children, Charles Francis Curry, Verene May Curry McLeod and Gladys Alma Curry. I further direct that as and when the capital which shall have been set apart at three and one-half per cent to produce the yearly sum to be paid to my beloved wife shall fall in and not be further required by reason of the death of my said wife, it shall be included in the division of the fund into three shares, or if it fall in after such division, it shall be divided in the same manner and amongst the same persons. At the expiration of twenty-one years after my death and at the time of the division of my estate, I direct that in case any of my children shall have died in the meantime that the one-third share of each or any of my children that shall die before the expiration of said twenty-one years, shall vest in my trustees to divide the same amongst my grandchildren, if any, as they may think best.

The testator's widow died on 31st October, 1912, and his son died on 24th March, 1920. The latter left no children. One of the testator's daughters is married to the appellant, and has three children; the other is unmarried.

It is held that the income accumulating in trust for the benefit of those who will be entitled to receive it at the expiration of the period of twenty-one years is taxable in the hands of the trustees. The appellant questions this decision, and principally upon the ground that, according to his contention, the respective interests of the testator's children and grandchildren, as defined by the will, are vested in them and not contingent.

I shall not enter upon the enquiry as to whether the interests of the children and grandchildren, or any of them, are vested or not. In my view of the case, in either event, the beneficiaries are equally ascertained or unascertained. The testator gave practically his whole estate to his trustees to convert into money and to invest, the proceeds to be ac-

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cumulated at interest for twenty-one years, subject to the payment of the legacies and annuities. There has been no severance or separation into parts. At the expiry of the twenty-one years, the dispositions were made subject to contingent events; the trustees were to set apart an amount sufficient to produce the annual payments provided for the testator's widow, and to divide the balance of his estate into three parts; one of these shares to be conveyed or transferred to each of his children who survived; and he directed that if, as the event happened, his widow should die during the period, the fund set apart to produce her annuity should fall into and become part of the residue, and be divided accordingly. 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.

If the income be accruing to the credit of an ascertained person who is the beneficiary of an estate or trust, the taxation of it is provided for by the first sentence of the section; but, whatever may be the meaning of "taxpayer" in the context, income which by the terms of the trust he may never receive cannot be said to be accruing to his credit, and therefore such income is not that of the testator's children or grandchildren within the intent of that clause. Presumably the concluding sentence of subs. 6 was intended to reach income accumulating in trust which is not accruing to the credit of a beneficiary because he is unascertained—unknown, uncertain; or because his interest is contingent. It is uncertain at present who is to have or enjoy the income, and it is for that very state of uncertainty that I think the clause, in its application to this case, is intended and apt to provide. There is income acmulating in trust for the benefit of some person. Let it be assumed that the interests of the children are vested; nevertheless there are or may be other persons interested who

may be solely entitled at the expiry of the period, and who do not derive their interests from the children; and the persons for whose benefit the income is accumulating, that is, those who will ultimately receive it, are therefore unascertained.

The express mention of "persons with contingent interests" serves to indicate that "unascertained persons" do not include or are not limited to these, and therefore, if or in so far as an interest in personality must be either vested or contingent, persons with vested interests may, within the intent of the subsection, be unascertained. The truth is that the enquiry 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. 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.

I should imagine that if the trustees were asked at the present time to say who are the persons for whom they are, in the administration of the trust, accumulating the income, they could, if disposed to answer, only truthfully say that it is for the two daughters of the testator, if they survive the period; and, as to the one-third which each of the testator's children who has died or may die during the period would otherwise receive, for division among the testator's grandchildren, if any, as the trustees in charge of the trust at the time of distribution may think best; and, if there be no grandchildren at the end of the period, then for those who may be entitled by law according to the happening of the uncertain events. This answer would, I should think, be truly descriptive of persons who are

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unascertained, or who have contingent interests, within the meaning of the statute.

But it is said that at least, the testator's grandchildren now living are ascertained, that they have a vested interest under the will in that part of the fund which would have gone to the testator's son had he survived, and that they must receive that share at the expiry of the period; that therefore there are ascertained persons for whom the income is accumulating in trust, and consequently that the persons for whom the income is so accumulating are not unascertained. I am not however willing to accept either the premises or conclusion of this argument. If I be right in the view which I have expressed that the testamentary disposition of the income accumulating in trust as an undivided whole is for the benefit of persons who at present are not, and cannot be, ascertained, that condition would not I think be affected by the fact, if it be a fact, that there are some individuals ascertained who, if they survive the period, will be entitled to an uncertain share in one-third of the entire fund.

RINFRET J.—I concur with Mr. Justice Newcombe.

Appeal dismissed without costs.

Cross appeal dismissed with costs.

Solicitor for the appellant: *A. C. Bell.*

Solicitor for the respondent, *C. F. Elliott.*