1923
Feb. 26.
*June 15.

JAMES BARBER McLEOD.....APPELLANT;

AND

THE CITY OF WINDSOR.....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Assessment and taxes—Trustee under will—Income to be accumulated—Unknown beneficiaries—Constitutional law—Direct or indirect taxation—Assessment Act R.S.O. [1914] c. 195 ss. 13 (1) and 83.

By section 5 of the Ontario Assessment Act "all income derived either within or without Ontario by any person resident therein" is assessable and by section 13 (1) "every agent, trustee, or person who collects or receives, or is in any way in possession or control of, income for or on behalf of a person who is resident out of Ontario shall be assessed in respect of such income."

Held, reversing the judgment of the Appellate Division (50 Ont. L.R. 305), Idington J. dissenting, that a trustee under a will cannot be assessed for income received which, as directed by the will, had to accumulate for a designated term of years and then be apportioned among testator's children when neither the identity of the beneficiaries nor the amount to be assessed against the trustee can be presently ascertained. As to beneficiaries resident in Ontario they and not the trustee should be assessed if their identity could be ascertained.

Per Duff J. Sec. 13 (1) provides for indirect taxation and is *ultra vires* of the Ontario Legislature.

By section 83 of the Act every tribunal or judge to which an appeal may be taken can determine whether "any person or things are or are not assessable or are or were legally assessed or exempted from assessment."

Held per Duff J. that notwithstanding these provisions a person assessed may, after the assessment has been upheld, bring action for a judgment declaring it illegal on the ground that the legislation professing to impose it is *ultra vires.* Idington J. *contra.*

Per Davies C.J. and Anglin, Brodeur and Mignault JJ. The judgment of this court declaring the assessment illegal deprives the trustee of any interest he may have had to challenge the validity of the provisions of the Assessment Act assuming to impose it and the dismissal of the action for a declaratory judgment (52 Ont. L.R. 562) should be affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment of the County Court judge and confirming the assessment on income received by the appellant and *per saltum* from the judgment of Mr. Justice Orde (2) dismissing the appel-

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 50 Ont. L.R. 305. (2) 52 Ont. L.R. 562.

lant's action for a judgment declaring the assessment illegal on the ground that the legislation imposing it is *ultra vires*.

The material facts are sufficiently stated in the above head-note. The appellant appealed with success to the County Court judge whose judgment was reversed by the Appellate Division. He then brought an action for a declaratory judgment as stated above.

MacMaster K.C. and *Fraser* for the appellant. The Act does not allow a personal action to be taken against an executor in respect to income of persons resident out of the province. *In re Gibson* and *The City of Hamilton* (1).

This is indirect taxation which the legislature cannot impose. See *Burland* v. *The King* (2) at pages 223 to 225. See also *Oriental Bank* v. *Wright* (3).

F. D. Davis K.C. for the respondent.

Bayly K.C. for the Attorney General of Ontario.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin, in which I concur, I am of the opinion that the appeal from the judgment of Mr. Justice Orde should be dismissed, the costs, including those of the Attorney General, to be paid by the appellants; and that the appeal from the judgment of the Appellate Division should be allowed and that the costs in that court and here should be paid by the municipal corporation to the appellant.

IDINGTON J. (dissenting).—Two appeals by said appellant are herein presented and heard together involving the assessment of his income as surviving trustee under the last will of the late John Curry of the said city, who died on or about the 11th day of May, 1912.

By his said last will the testator devised and bequeathed, after payment of his debts, testamentary and funeral expenses, all his real and personal property wherever situate, to his wife, his son, and his son-in-law in trust to convert same into money and to hold, invest, accumulate and dispose of same under and in accordance with the trusts hereinafter set out.

Said executors and executrix obtained probate of said will.

(1) 45 Ont. L.R. 458.
(2) [1922] 1 A.C. 215.
(3) 5 App. Cas. 842.

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The said wife died a few months after the testator, and the said son died in March, 1920, leaving the appellant, who was said son-in-law, sole surviving executor and trustee when the assessment in question was made.

The appellant, at the time of the testator's death and ever since, has resided in said city of Windsor. He was assessed in respect of the John Curry estate for an income assessment "liable for all taxes" of the sum of $100,000, and notice of such assessment is dated 30th October, 1920.

The appellant then gave the following notice of appeal:

NOTICE OF APPEAL

To the Assessment Commissioner of the municipality of the city of Windsor:

Sir,—Take notice that I intend to appeal against the above assessment for the following reasons:

Only the income of the estate payable to one annuitant under deceased's will resident in Windsor, to amount of $8,000 is assessable. The rest of income is accumulated until 1933 and is not taxable.

J. B. McLEOD,
Appellant.

The Court of Revision of said city confirmed the said assessment.

Thereupon the appellant appealed to the learned senior judge of the County of Essex who, holding himself bound by the authority of *In re Gibson* and *City of Hamilton* (1), allowed the appellant's appeal and reduced the said assessment for income to $14,000.

He then, no doubt intending to conform with the amendment of 1916 to the Assessment Act providing for an appeal to the Appellate Division of the Supreme Court of Ontario, by way of a stated case set forth the relevant facts of the amount of the income and what part thereof he had held assessable and the amount of the income derivable from real estate securities and submitted the following questions:—

First—Whether the income from the said estate is assessable for income under the Assessment Act.

Second—Whether in the event of income being payable by the said estate as found by the Assessment Commissioner for the city of Windsor and the Court of Revision thereof the interest upon moneys payable under the said agreements for sale of real estate of the deceased is exempt from income tax under section 21, s.s. 5 of the said Assessment Act or otherwise.

Dated this 7th day of February, 1912.

(1) [1919] 45 Ont. L.R. 458.

I am of the opinion that the income from the said estate is assessable and would answer the first question in the affirmative.

The legal owner thereof resides in Windsor and on the facts stated the income was not derived from anything outside Ontario.

Indeed on the case submitted we have nothing to do with that or with who may be the ultimate recipient, or his or her residence, though we were confused in argument by much irrelevant discussion thereof.

The case submitted to the Appellate Division of the Supreme Court of Ontario is all we have anything to do with except the decision of that court pursuant thereto. See the case of *Dreifus* v. *Royds* (1).

In passing from the first question and the bearing thereon of the decision in *In re Gibson* and *Hamilton* (2), I may be permitted to say that I fail to see how it can have any bearing on this case.

There a very curious situation was produced by reason of the testator having been domiciled in Beamsville and his trustees having been scattered so that it may have been difficult to find in the Assessment Act language to so fit such a case as to entitle Hamilton to assess the income.

Here we have a very simple case in that regard.

The point raised by the second question is quite as simple if we correct the printing of it from section 21, subsection 5, to section 5, subsection (2), as I suspect it should be, to accord with the reasoning of the learned judges below. Section 21 of the Assessment Act has no subsection (5).

So interpreting the second question I would answer the question in the affirmative.

The investment in agreements for sale of real estate has become a well recognized form of investment security.

Its income is neither interest on a mortgage nor rent of real estate.

It clearly falls within the definition of income given by the Assessment Act as amended and there is no exemption to fit it.

(1) [1922] 64 Can. S.C.R. 346.

(2) 45 Ont. L.R. 458.

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We must give effect to the plain language of the Act and not try to engraft upon it another meaning we may think would in some cases be more just.

I therefore conclude that this appeal should be dismised with costs throughout.

The other appeal between same parties and heard at same time seems to me a rather extraordinary one.

It arises in this way—After the better part of a year of litigation pursuing the prescribed course of law and, as I hold, the only course of law (save possibly in case of fraud or an absolutely clear violation of an exemption by refusing to pay taxes) open to any one calling in question a municipal assessment and rectifying it, if wrong, the appellant, on the 8th of June, 1921, two months after the Appellate Division below had given judgment in the other case, and a month after the appeal therefrom to this court had been launched, issued a writ against respondent to restrain its officers from collecting the assessment.

The Assessment Act expressly declares the roll valid subject to such appeals as duly taken. In the case of *Macleod* v. *Campbell* (1), which counsel seem to have overlooked, we decided that a similar attempt should not be made to rectify an erroneous assessment. I still think that is good law though decided six years ago.

Moreover we have nothing to do with assessment appeals save what comes before us in the prescribed method adopted in appellant's first case, unless, of course, by special leave which has not been given herein and I respectfully submit never should be given in such a case as this second one.

I think that appeal also should be dismissed with costs.

DUFF J.—It will be more convenient, I think, to consider the two appeals together.

The effect of sections 5 and 15 of the Ontario Assessment Act is discussed in the judgment of Mulock C.J., in *In re Gibson and Hamilton* (2). The opinion of the learned Chief Justice as to these sections, in which Mr. Justice Riddell concurred, is thus stated by him at page 461:

> According to section 5, "income," to be liable to taxation, must be income "derived" by a person resident in Ontario or "received in Ontario

(1) 57 Can. S.C.R. 517. (2) 45 Ont. L.R. 568.

by or on behalf of a person resident out of Ontario." That is, the income in respect of which any one is liable to taxation must be either (*a*) income derived by such person being resident in Ontario, or (*b*) income received by an agent, trustee, etc., for a non-resident.

In the former case the person assessable is the beneficiary; in the latter, it is his representative. The beneficiary "derives" the income, but the representative merely receives it.

Income to be assessable must, I think, fall within one or other of these two classes.

This view seems to me to be the right view, not only for the reasons appearing in the judgment of the learned Chief Justice, but because the subsequent legislation has adopted it. The decision in *In re Gibson and Hamilton* (1) was pronounced in May, 1919, and the amendment enacted in 1919, section 18, subsection 1 (*a*), 9 Geo. V, c. 50, s. 8, provided that a return to be made by any person as to income should be in the form prescribed by the Lieutenant-Governor in Council. By order in council passed on the 15th July, 1920, pursuant to this enactment, a form of return was prescribed, and the frame of the return so prescribed makes it quite clear that the person making a return, the prospective income taxpayer, is to give items of income which he is to receive beneficially during the current year, except in the case where the person making the return is in receipt of income on behalf of a non-resident in capacity of agent, trustee, guardian or executor. The order in council proceeds upon the theory that where income is received in trust for persons resident within Ontario, it is the beneficiary who is to be assessed and not the trustee; and this view of the Act is again the construction upon which the legislature itself proceeded in enacting s. 6, c. 67, 11 Geo. V, by which it is required that agents, trustees, executors and other persons who collect or receive or have in their possession or control income for or on behalf of a person resident in Ontario shall, on receipt of notice from the assessor, furnish a statement in writing giving the names and addresses of the persons resident in the municipality who

ought to be assessed for their income therein, together with the amount of income payable

to such person during the current year.

I am not overlooking the fact that by force of the provisions of the Interpretation Act the re-enactment of legis-

(1) 45 Ont. L.R. 568.

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lation which has been judicially construed is not to be treated as a legislative adoption of such construction. What we have here is not a re-enactment merely of legislation which had been construed judicially, but an adoption of a judicial construction by an order in council passed pursuant to specific statutory authority and subsequent legislation, which is plainly founded and shaped upon the theory that the construction so adopted by the order in council is the right construction.

It follows that the appellant was not properly assessed in respect of that part of the income of the estate which is in question on the appeal from the Appellate Division, and that the appeal should therefore be allowed and the judgment of His Honour Judge Coughlin restored.

Such being my view of the effect of s. 5 in so far as it relates to "income derived * * * by any person resident" in Ontario, it is unnecessary to consider the question raised whether or not, if the section, in that branch of it which deals with such income, had the scope which has been ascribed to it by the Appellate Division, it would have been impeachable as *ultra vires* of the legislature. But as regards the second branch of the section, and as regards s. 13, provisions dealing with income received or in possession or in control of any person in Ontario for or on behalf of a non-resident, the constitutional validity of these provisions must, I think, be examined. The trust does provide for the payment of a certain annual sum, $8,000 to a lady who is resident in Detroit and, as I understand it, permanently domiciled there. The municipality has asserted its right to assess the trustee in respect of this income.

It is necessary briefly to advert to the course of the proceedings. The appellant and his co-trustee, who has since died, appealed from the assessment of 1920 to His Honour Judge Coughlin, and before him they expressed themselves content with the assessment in so far only as it included two specific annuities of $8,000 and $6,000 and their liability to assessment in respect to these items of income and their liability to pay taxes in respect of them for the year 1920 are not in question. The judgment of His Honour was delivered December 28, 1920, adopting the contention

of the trustees, and accordingly reducing the assessment to $14,000.

On the 25th April, 1921, the Municipal Council, acting upon the power conferred by s. 56 (1) of the Assessment Act, passed a by-law providing that the municipal taxes for 1921 should be assessed and levied upon the assessment roll prepared in 1920, and the action was commenced in the following June. The necessary result of the decision of this court in appeal no. 1 would be, if s. 13 were *intra vires,* that the appellant would be taxed for 1921 upon income in his control as trustee in respect of the assessment of $8,000, according to the roll of 1920, as amended by His Honour Judge Coughlin.

But I can entertain no doubt that when the objection to an assessment is that the enactment professing to authorize it is *ultra vires* the roll, whether attacked by appeal under the Assessment Act or not, is not binding upon the person assessed.

Section 83 is framed in sweeping terms, no doubt, but it is an enactment relating to procedure, and it must be presumed in the absence of specific words that the legislature in enacting that section was not resorting to the very questionable course of giving force and effect to a tax it had no power to impose by placing obstacles in the path of those seeking a judicial determination upon the point of the legality of the tax. Section 83, in my opinion, applies only to assessments within the lawful authority of the provinces.

The course taken by the appellant before Judge Coughlin would not strictly, in view of the appeal of the municipality from that decision, preclude the appellant from impeaching the assessment of 1920 on the ground now taken in this action; and there can certainly be no impropriety in impeaching it for the purpose of disputing the liability of the estate to taxation in respect of it in 1921. The action in my opinion lies.

Nor is it any answer to the action to say that the annuity payable to Gladys Alma Curry is not income received by the trustee by or on behalf of her. It is quite clear that this income falls within s. 13 in the sense that it is income which has been received in Ontario, and at the moment when it becomes payable to her it is

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income in possession and control of the trustee for her and on her behalf, at which moment the funds in possession of the trustee and applicable in payment of the annuity are subject to a trust in her favour to the extent of the sum she is entitled to receive.

We come, then, to the point of substance, whether ss. 5 and 13, in so far as they apply to income received or held in trust for a non-resident, are within the powers of the legislature of the Province of Ontario to enact. The meaning and effect of the words "direct taxation" as they appear in item no. 2 of s. 92 of the British North America Act have been considered in many cases, and as Lord Moulton says in *Cotton* v. *The King* (1), it "is no longer open to discussion" that the meaning to be attributed to that phrase is substantially the definition quoted from the treatise of John Stuart Mill in these words:

> A direct tax is one which is demanded from the very persons who it is intended or desired should pay it.

It is well to remember a circumstance which has been adverted to in the judgments of Their Lordships of the Judicial Committee more than once, that economists have not been in entire agreement as to the principle of the classification of taxes as direct and indirect. In *Attorney General* v. *Reed* (2) Lord Selborne pointed out in a passage which is cited by Lord Moulton in *Cotton's Case* (1), that the definition given by McCullough, for example, would have been more unfavourable to the provinces than the definition taken from Mill. And it may be added (see Bastable, Public Finance, ed. 1903, p. 271) that on the basis of the distinction adopted by "practical financiers" as the principle of the classification, the provinces would have been in a still less favourable position; that principle being that those taxes are considered direct which are levied on "permanent and recurring occasions," while charges on "occasional and particular events" are brought under the category of "indirect taxation."

On this basis death duties of all kinds would be excluded from the jurisdiction of the provinces.

(1) [1914] A.C. 176, at p. 193.

(2) [1884] 10 App. Cas. 141 at p. 143-4.

Generally speaking income tax, according to any basis of classification, would be regarded as a direct tax, but it is, of course, quite obvious that for the purpose of applying s. 92 of the British North America Act, a principle of classification having been adopted by the courts in giving effect to the language of the Act according to the sense in which it would most probably have been understood by the legislature which passed it, the provinces cannot have that principle applied for the purpose of empowering them to levy death duties and at the same time have it discarded when it seems to impose embarrassing restrictions upon the manner in which provincial fiscal authority is to be exercised.

From the terms of s. 11 (2) it is manifest that the income in respect of which the assessment is made is the income for the current year—the year in which the assessment is made. That is the normal rule, and the rule as given by that section must, I think, apply to assessments under s. 13. That seems to be the construction under which the order in council proceeds, as appears from the form of the prescribed return, and I think it is the correct construction. True, s. 13 applies only to income "collected or received" or "in possession or control," and *prima facie* this means income received in fact or in fact in possession or control. But the language of s. 5 as well as that of s. 11 does not materially differ from this and it is quite clear that where it is a person beneficially entitled who is assessed, it is s. 11 (2) that gives the rule by which the assessor is to be guided, and under that section the amount of the assessment may be the result of estimate or, if estimate is impossible, fixed at a sum not less than an arbitrary minimum determined by the amount of income received in the previous year. I think s. 13 must be read as imposing the liability only, and that s. 11 (2) must be considered as prescribing the method by which the amount of the assessment is to be ascertained. S. 56 must also be adverted to, under which a council may adopt the assessment of the preceding year—a proceeding which may entail the result that a person assessed in the year immediately preceding, pursuant to s. 11 (2), for an amount determined by his income the year before that

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may in consequence become liable to pay in one year—the year following that of the redaction of the roll—income tax in respect of the amount of income received two years before, although such amount may be far in excess of the sum received by him during the year for which he is assessed and taxed.

The effect of this section, then, is that a trustee in receipt of an income for a non-resident beneficiary may be liable to pay income tax in respect of an income of an estimated amount which he may only in part have received or not have received at all. It is past question not intended that he shall ultimately bear the tax. Normally he will indemnify himself, no doubt from moneys in his hands, but his liability is in no way conditioned upon the existence in his hands of a fund out of which the tax can be paid. The tax is not a lien upon the trust property, and the municipality has no recourse against such property. If he resort to funds in his hands for payment, it is not pursuant to any duty laid upon him by the taxing authority so to apply the funds, but as a means of indemnifying himself against the personal liability which the statute imposes upon him directly.

Where personal liability is imposed upon a trustee or agent in respect of income received by him as such and the tax is not charged upon the income and there is no recourse against it by the taxing authority and the trustee is under no duty to the taxing authority to retain the income in his hands and apply it in payment of the tax, we should appear to have a case in which the trustee is the very person from whom the taxing authority demands the tax it being left to him to secure his indemnity from those who are ultimately intended to sustain the burden.

The case is, of course, quite different where no personal liability is imposed, where, for example, the liability of the trustee or agent is limited to the amount in his hands for his beneficiary, as in the case of *Burland* v. *The King* (1).

Where, too, trust property is charged with the payment of the tax, it is conceivable that the proper inference as to the legislative intent would be that the primary source of payment should be the trust fund, and the personal liability

(1) [1922] 1 A.C. 215.

designed only as security for the proper application of the fund, but this is not a point of view with which we are concerned on this appeal.

The reasoning above was foreshadowed in the judgment of Lord Selborne in *Attorney General* v. *Reed* (1), and is that upon which the judgment of Lord Moulton proceeds in Cotton's case, and was expressly approved.

Both appeals to this court should, therefore, be allowed.

ANGLIN J.—The appellant (plaintiff) is the surviving trustee under the will of the late John Curry of the city of Windsor, Ontario, who died on the 11th of May, 1912. By his will he directed certain properties to be held by his trustees and the income thereof accumulated for a period not yet expired. The beneficiaries, who will be definitely ascertained only on the expiry of this period, are some resident in Ontario, some elsewhere, and some yet unborn.

The validity of the municipal assessment for the year 1920 by the city of Windsor of the appellant as such trustee in respect of annual income derived from properties so held forms the subject of this appeal. Following the procedure for appeal provided by the Ontario Assessment Act (R.S.O. 1914, c. 195) the appellant carried his case to the Appellate Divisional Court, unsuccessfully contending that, properly construed, the provisions of that Act do not authorize the impeached assessment. In an action subsequently brought for a declaratory judgment, he challenged the validity of the legislation invoked by the respondent to support the assessment if it should be given the construction put upon it by the Appellate Division. He now appeals from the judgment of the Divisional Court in the former proceeding; and, by consent, under s. 37 (*b*) of the Supreme Court Act (1920), *per saltum* from the decision of Mr. Justice Orde who dismissed the latter action. The tax on $72,310.57, the amount of the assessment in dispute, exceeds $2,000. Our jurisdiction to entertain both appeals in my opinion admits of no doubt.

The late Charles Curry, a co-trustee of the appellant who lives in Windsor, resided at Detroit in the State of Michigan and died there on the 24th March, 1920. A portion

(1) 10 App. Cas. 141 at p. 143.

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of the income of the estate derived from the purchase of properties in the city of Detroit, it is now claimed, was in 1920 kept in the First National Bank in that city, certain payments being made out of it and only the surplus (how much does not appear) was "checked into the estate in Ontario." The latter evidence, however, was not before the court on the original assessment appeal, having been given only in the subsequent action.

The case stated by the County Court Judge in the Assessment Appeal makes no reference to any foreign income but places the "net income within Ontario" at $86,310.57, the details of which appear in an appended statement furnished by the trustee. For the purpose of the appeal from the Divisional Court the suggestion that part of the assessed income did not come into Ontario must, therefore, be disregarded, notwithstanding the fact that the assessment of income for 1920 would appear to have been based by the assessor on the actual receipts of the year 1919, as provided for by section 11 (2) of the Assessment Act. Indeed the sum of $86,310.57 appears to have been treated throughout the proceedings which culminated in the judgment of the Divisional Court as income actually received in Ontario by the appellant trustee for the year 1920; and it was so treated in the factum filed on his appeal to this court from that judgment. It is, I think, too late now to enter upon any discussion of the actual amount of income received in that year in Ontario. The sum mentioned in the stated case must be accepted as accurate for the purposes of this appeal. That income, however, included, as appears in the stated case, a sum of $13,873.34 for interest paid by purchasers of real estate in Ontario, which forms the subject of a distinct ground of appeal.

Of the sum of $86,310.57, $6,000 was paid to a beneficiary residing out of Ontario and $8,000 to another beneficiary residing in the province. To his assessment in respect of this $14,000 the appellant submitted before the County Court Judge. The appeal, therefore, concerns his liability for assessment in respect of the balance of $72,310.57, of which the stated case says:—

> Under the provisions of the said will of the late John Curry the balance of the above-mentioned net income together with that of previous

and subsequent years is to be accumulated by the trustees for a period of twenty-one years commencing on the 11th day of May, 1912, and expiring on the 10th day of May, 1933, whereupon the accumulated trust fund is to be divided among persons at present unascertained and whose right and title will depend on the circumstances at the time fixed for the said division.

On behalf of the appellant it is stated and is not denied that some of the beneficiaries under this trust may be persons still unborn.

The material provisions of the Assessment Act are as follows:—

5. All real property in Ontario, and all income derived either within or without of Ontario by any person resident therein, or received in Ontario on behalf of any person resident out of the same shall be liable to taxation subject to the following exemptions:

(Here follow certain exemptions, including,

Subsection 21. Rent or other income derived from real estate, except interest on mortgages. 4 Edw. VII, c. 23, s. 5, par. 20).

11 (1). Subject to the exemptions provided for in sections 5 and 10: (*a*) every person not liable to business assessment under section 10 shall be assessed in respect of income.

12 (1). Subject to subsection 6 of section 40, every person assessable in respect of income under section 11 shall be so assessed in the municipality in which he resides, either at his place of residence or at his office or place of business. 4 Edw. VII, c. 23, s. 12 (1); 7 Edw. VII, c. 41, s. 2.

13 (1). Every agent, trustee or person who collects or receives, or is in any way in possession or control of income for or on behalf of a person who is resident out of Ontario, shall be assessed in respect of such income.

Section 5 declares the liability of income to taxation. I assume that it evinces a general intention that all income earned, derived or received in the province, not specially exempted, shall be taxable. But, as Taft C. J., said in delivering the judgment of the Supreme Court of the United States in *Smietanka* v. *First Trust and Savings Bank* (1), such an intention

must be carried into language which can reasonably be construed to effect it. Otherwise the intention cannot be enforced by the courts.

Assessment is the only basis of municipal taxation under the Ontario system (s. 3). As put by Sir William Mulock C.J. Ex., in *In re Gibson* and *Hamilton* (2).

there can be no taxation of income without previous assessment of some person in respect of such income.

A person assessed in respect of income is thereby made personally liable to pay a tax upon it at a rate imposed according to other provisions of the law. The only clauses under which it was contended at bar that the appellant is

(1) 257 U.S.R. 602. (2) 45 Ont. L.R. 458, 461.

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liable to assessment are s. 11 (1) and s. 13 (1). The question presented therefore is: Does the appellant in respect of the income for which he has been assessed fall within either of those provisions? The first point for determination is whether under s. 5, in respect of income received by him for accumulation under the trust above stated, the trustee appellant is properly assessable.

There can be no room for doubt that by the words "any person resident out of the same" in s. 5 is meant a beneficiary for or on whose behalf income is paid to some agent, collector, recipient or custodian in Ontario. The corresponding words "by any person resident therein" there can, I think, be little room for doubt are intended to designate a person standing in the like relation to the income, that is, the beneficiary of it, who is said to "derive" it, whereas the agent, trustee, collector, recipient or custodian on behalf of the non-resident is said merely to "receive" it. That distinction is carried out in s. 11 (1) and s. 13 (1). Under the former the resident beneficiary "deriving" the income is made assessable; under the latter, in respect of income derived by the non-resident beneficiary, not he, but the person who collects or receives it for or on his behalf is to be assessed. There may be little difficulty in applying these provisions where the income got in by the trustee or agent is payable forthwith to certain beneficiaries. But other considerations arise where the right of enjoyment is deferred by a trust for accumulation and where, as here, some of the beneficiaries are or may be unborn and the shares of those *in esse* are not presently ascertainable. For what proportion, if any, is the trustee assessable and for what the beneficiaries?

Unborn beneficiaries cannot properly be designated either as resident in Ontario or as resident out of the same. The proportion of the 1920 income to which they may eventually be entitled is problematical. In so far as that income may ultimately be payable to persons now resident in Ontario, if the amounts held for them had been ascertainable in 1920, I should incline to the view that such beneficiaries and not the trustee would have been assessable in respect thereof had the trust for accu-

mulation not prevented their presently obtaining it. I find no provision in the statute making a trustee for accumulation for the benefit of resident beneficiaries assessable in respect of the income ultimately to be "derived" by them.

In so far as the income in question belongs to non-residents, assuming the validity of s. 13 (1), I should think the trustee is the person to be assessed. But here again arises the question, insolvable in 1920, "for how much"?

After giving to the provisions of ss. 5, 11 (1) and 13 (1) much thought and consideration, my conclusion is that in respect to income directed to be accumulated by a trustee for future distribution amongst persons wholly or partially unascertained, some of them within and some of them without Ontario, he is not assessable. As to so much of that income as will ultimately be derived by resident beneficiaries s. 11 (1) applies and such beneficiaries when ascertained and when they derive the income are made assessable. The trustee is not. The contrast between s. 11 (1) and s. 13 (1), when read in the light of the distinction made in s. 5 between resident and non-resident beneficiaries, seems to make this reasonably clear. On the other hand as to so much of the income as is received or collected for or on behalf of non-resident beneficiaries *in esse* and will ultimately go to them the difficulty in the way of assessing the trustee for it seems to lie in the fact that the amount is unascertainable. As to whatever portion, likewise unknown, is to go to persons still unborn it is impossible to classify these either as resident or as non-resident. Hence the liability of the trustee to assessment is uncertain and that of the beneficiaries an impossibility. We seem to be confronted with another instance of *casus omissus* similar to that dealt with by the Supreme Court of the United States in *Smietanka* v. *First Trust and Savings Bank* (1).

For the respondent it is contended that the trustee is the person who "derives" the income of the trust estate; that *qua* income it is in reality his; that the right of the beneficiaries is not to receive income but to share in an

(1) 257 U.S.R. 602.

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accumulated fund; that, therefore, for purposes of taxation the income is that of the trustee and not that of the beneficiaries. It accordingly contends that the word " trustee " in s. 13 (1) is not used in the ordinary legal sense but signifies merely an accountable agent. I cannot accede to that view. It involves deleting the word " trustee " from s. 13 (1). I see no reason for giving that word any such restricted meaning. It is, I think, most improbable that in framing and enacting the Assessment Act the draughtsman and the legislature proceeded on the idea that income received by a trustee belongs to him and not to his *cestui que* trust—that he has any real ownership of it or a taxable interest in it. Where they intended to make him taxable in respect of such income, notwithstanding lack of beneficial interest, they expressly so provided—s. 13 (1). Sections 5, 11 (1) and 13 (1), when read together, seem to me to make it abundantly clear that only in the case of a non-resident beneficiary was it intended that the trustee should be assessable in respect of income.

Nor does s.s. 1 (*h*) of s. 22 of the Assessment Act, referred to by Mr. Justice Lennox, in my opinion help the respondent. Determination of assessability is not the office of section 22. That is dealt with by preceding sections. Section 22 merely defines the method to be pursued by the assessor in preparing the assessment rolls and in placing thereon the names of persons made assessable under such earlier provisions and the particulars of the various subjects of their assessments, etc.

I agree with the opinion expressed by Sir William Mulock C.J. Ex. in *In re Gibson* v. *City of Hamilton* (1).

In the view I have taken it is unnecessary to determine whether the $13,873.34 received as interest upon unpaid purchase money for lands falls within the exemption provided for by clause 21 of s. 5:—

> Rent and other income derived from real estate in Ontario, except interest on mortgages.

I incline to the opinion that it does not.

I am for these reasons of the opinion that the defendant was not assessable in respect of any portion of the $72,310.57 income in question. The appeal from the judg-

(1) 45 O.L.R. 459.

ment of the Appellate Divisional Court should, therefore, be allowed with costs in that court and here to be paid by the municipal corporation to the appellant.

The view I have taken of the assessment appeal proper —and which I understand finds favour with the majority of the members of the court—suffices to dispose of the liability of the appellant for the taxes in question and renders unnecessary consideration of the constitutional question presented in the action tried before Mr. Justice Orde. Indeed it does more; it deprives the appellant of his status to raise that question, inasmuch as in a proceeding already pending when that action was begun the assessment which he would impeach as involving indirect taxation is held not to be within the provisions of the legislation attacked on that ground. It is true that he repeats in that action his claim that the assessment be set aside on the ground already taken in his assessment appeal. But that was quite unnecessary and the only substantial purpose of the action was to bring the constitutional question before the court in the event of the judgment of the Appellate Division in the assessment appeal being upheld. As the result of the disposition of that appeal practically deprives the plaintiff of any interest he might otherwise have had to challenge the validity of the provisions of the Assessment Act under which the respondent sought to tax him, it follows that the judgment of Mr. Justice Orde dismissing that action, though on other grounds, should be upheld and the appeal from it dismissed with costs, including the costs of the Attorney General.

BRODEUR J.—These are two appeals concerning the validity of an assessment on the income of the Curry estate.

Mr. John Curry died in 1912 leaving a will of which the appellant, McLeod, is the sole surviving executor and trustee. Under the provisions of this will, the trustees are directed to pay from the income certain annuities to the wife and children of the testator and to invest the surplus income from the estate for a period of twenty-one years. At the expiration of the accumulation period the whole trust fund will be divided among the children of the testator; and, in the event of the death of any of them, the

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share of the one so dying will be divided amongst the testator's grandchildren.

As a consequence of the provisions of this will, the fund is accumulating in trust for the benefit of unascertained persons.

One of the questions raised is whether unascertained and unborn beneficiaries are assessable under the provisions of the Ontario Assessment Act.

Section 5 of the Act enacts that

> All * * * income derived either within or without of Ontario by any person resident therein or received in Ontario by or on behalf of any person resident out of the same shall be liable to taxation.

In section 13 of the same Act, it is declared that

> Every agent, trustee or person who collects or receives or is in any way in possession or control of income for or on behalf of a person who is a resident of Ontario shall be assessed in respect of such income.

This question is not a new one. It was considered in a case of *Gibson* v. *City of Hamilton* (1), and there it was held by the Chief Justice of the Exchequer and by Mr. Justice Riddell that the income in respect of which any one is liable to taxation must be either income derived by a person resident in Ontario or income received by a trustee for a non-resident.

In the former case, the person assessable is the beneficiary; in the latter case, it is his representative.

Section 13 of the Act says that the trustee can be assessed only in the case where he collects the income for a person who resides out of Ontario.

But *quaere* where the beneficiary is unknown and where a trust fund has been created, as in this case, for persons who cannot be identified or ascertained.

It has been contended that the word "person" in section 5 of the Assessment Act would cover the trustee; and it is claimed then that McLeod as trustee of the estate could be assessed for the whole income of the estate.

It should not be forgotten in that respect that McLeod pays to the living daughters of Mr. John Curry a sum of $14,000 out of the income. The balance of the income, about $72,000, goes into the trust fund. If the City of Windsor can tax Mr. McLeod himself for these $14,000 paid to the children, it could also assess the same persons,

(1) 45 Ont. L.R. 459.

if they live in the City of Windsor; and in such a case those persons would be assessed twice, once through the trustee and once of their own right. That would be the result of the construction of section 5 if "any person" who is mentioned there covers not only the beneficiaries but also the trustee. I am of the view that the trustees can be taxed only for a person when such person resides out of Ontario; and where no such person exists, as in the present case because we do not know to whom the trust fund which is accumulated will be later on given, I am of opinion that the beneficiary in this case does not come within the class of persons mentioned in section 13, namely, persons residing out of Ontario. The assessment can be validly made only on a person living at the present time and residing out of Ontario. The principle is that municipal corporations can levy no tax unless the power is plainly conferred.

Dillon, Municipal Corporations, 5th ed., vol. 4, s. 1377; Maxwell, Interpretation of Statutes, 5th ed., pp. 463, 464; *City of Ottawa* v. *Egan* (1).

The Assessment Act of Ontario does not confer plainly upon the municipal corporations the right of assessing an income which is not to be paid to a living person residing outside of Ontario.

For these reasons the appeal should be allowed with costs of this court and of the court below and the assessment set aside.

There is also to be considered in this appeal the declaratory action instituted by the appellant to have the assessment declared illegal and also unconstitutional. I consider this action useless and it should be dismissed with costs throughout.

MIGNAULT J.—I concur with Mr. Justice Anglin.

Appeal from Appellate Division allowed with costs.
Appeal from Orde J. dismissed with costs.

Solicitor for the appellant: *McLeod and Bell.*
Solicitor for the respondent: *Davis and Healy.*

(1) [1923] S.C.R. 304.