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THE CITY OF WINDSOR.. .. ..APPELLANT;

AND

JAMES BARBER McLEOD.. .. ..RESPONDENT.

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

Constitutional law—Taxation—Ontario Assessment Act, R.S.O. 1914, c. 195, s. 13 (3), as enacted by 1922, c. 78, s. 12—Assessment of trustee in respect of income not wholly distributed annually—Indirect tax—Ultra vires—B.N.A. Act, s. 92 (2).

A municipal tax sought to be imposed on a trustee on assessment under the *Ontario Assessment Act*, R.S.O., c. 195, s. 13 (3), as enacted by 1922, c. 78, s. 12, in respect of income "not wholly distributed annually," is an indirect tax and *ultra vires* of the province.

Section 13 (3) does not restrict the liability of the trustee to property of the estate in his hands so as to make the tax direct within s. 92 (2) of the B.N.A. Act. The liability of the trustee assessed is personal, as for a debt due to the municipality, and therefore unrestricted, and his right of re-imbursement out of the trust property or by the beneficiaries make the tax indirect.

Judgment of the Appellate Division of the Supreme Court of Ontario (57 Ont. L.R. 15) aff.

(1) 4 Ex. C.R. 14.

APPEAL by the city of Windsor and by the Attorney-General for Ontario (intervenant) from the decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment of the County Court of the County of Essex, Coughlin J., which affirmed the decision of the Court of Revision of the city of Windsor, which had confirmed an assessment by the Assessment Commissioner of the city assessing the respondent in respect of certain income of the estate of John Curry, deceased.

The appeal to the Appellate Division was upon a case stated by the County Court judge. John Curry died on 11th May, 1912, domiciled at and a resident of the city of Windsor, Ontario. Under the provisions of his will, all the income derivable from his estate, after payment of his debts, etc., and certain legacies and annuities, was to be accumulated by his trustees for a period of twenty-one years from the date of his death, and on the expiration of that period, which will not be until 10th May, 1933, the whole residuary trust fund, including the accumulations of income, is to be divided one-third share to each of his three children (named) and in case any of his children shall have died before the expiration of the said twenty-one years, the one-third share of each or any of his children so dying shall vest in the trustees to divide the same amongst his grandchildren, if any, as the trustees may think best. One of the deceased's children died in 1920, leaving no children. Another, living in Windsor, Ontario, is married and has three children, and the other is unmarried and is living in the State of New York. The assessment in question was made in 1923 in respect of the net income of the estate for the year 1922, after deducting disbursements made in the ordinary course of administration, and was made under the provisions of the *Assessment Act*, R.S.O. 1914, c. 195, as amended. S. 5 provides that (subject to certain exemptions) all real property in Ontario and all income derived either within or out 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. S. 13 (3), enacted in 1922, c. 78, s. 12, provides that "* * * every agent, administrator, trustee, executor or person who collects or receives or is in any way in possession or control

(1) 57 Ont. L.R. 15.

1926

CITY OF WINDSOR v. MCLEOD.

of income for or on behalf of an estate and which income is not wholly distributed annually shall be assessed in respect of the income not so distributed, on behalf of the estate in the municipality wherein the testator was domiciled at the time of his death." S. 13 (4) (also enacted in 1922) provides that "income which has been assessed against any agent, administrator, trustee, executor or other person on behalf of an estate under the foregoing subsection 3 shall not be again assessed, when received by the beneficiary or person entitled thereto". The main question for consideration by this court on this appeal was whether or not the tax sought to be imposed on the respondent was an indirect tax and, therefore, *ultra vires*.

F. D. Davis for the appellant, the city of Windsor.

Nesbitt K.C. and *O. W. Rogers* for the appellant, the Attorney-General for Ontario.

A. C. MacMaster K.C. for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The question presented for determination in this appeal is whether the municipal tax to be levied upon the respondent trustee in respect of "income not wholly distributed annually," as a basis for which assessment in respect of such income is provided for by subs. 3 of s. 13 of the Ontario *Assessment Act,* R.S.O., 1914, c. 195, as enacted in 1922 (c. 78, s. 12), is direct or indirect—is valid or *ultra vires* under s. 92 (2) of the *British North America Act.* The answer to this question would seem to depend on whether the liability of the person to be assessed under subs. 3 is unqualified, or is imposed only "to such extent as he has property" of the estate on behalf of which he is assessed " available for payment of such taxes," the restriction expressly enacted in regard to lands held by trustees, agents, executors, or administrators by s. 37 (12) of the Ontario *Assessment Act.* If the liability is personal and unrestricted, the right of the respondent to re-imbursement out of the trust property or by the beneficiaries renders the tax distinctly indirect.

The material facts in regard to the character of the income in respect of which the question arises are fully stated

in the judgment appealed from (1), and in the report of the former appeal to this court in *McLeod* v. *City of Windsor* (2). That case had to do with an assessment for the year 1920 and involved consideration of the *Assessment Act* as it stood prior to the insertion of subs. 3 of s. 13 made in 1922. The applicability of that amendment to the present case, which involves a similar assessment for 1923, may be assumed.

This court held in the former appeal that the *Assessment Act,* as it then stood, did not provide for assessment of income which was to be accumulated for a period of years by the trustee whom it was sought to assess in respect of it and was to be distributed ultimately amongst a class unascertained and then unascertainable. But the judgment proceeded on the footing that every person assessable in respect of income, upon assessment therefor, incurred personal liability for the tax to be imposed. In the case of a trustee for a non-resident beneficiary (s. 13 (1)) that liability was not restricted to trust funds available to pay such tax.

The majority of the court thought it unnecessary in that case to pass upon the question of the validity of such taxation. But Mr. Justice Duff, after indicating the definition of a direct tax within the legislative jurisdiction conferred by s. 92 (2) of the *British North America Act,* as authoritatively stated in *Cotton* v. *The King* (3), and discussing the provisions of s. 11 (2) of the *Assessment Act* as it then stood, expressed his views upon the validity of s. 13 (1), which reads as follows:

> 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.

He said, at p. 706:

> 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 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 resorts

(1) 57 Ont. L.R. 15. (2) [1923] S.C.R. 696.
(3) [1914] A.C. 176, at p. 193.

1926

CITY OF WINDSOR v. McLEOD.

Anglin C.J.C.

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, of course, is 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 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* (2), and is that upon which the judgment of Lord Moulton proceeds in *Cotton's Case* (3), and was expressly approved.

Does the amendment of 1922—subs. 3 of s. 13—so restrict the liability of the trustee to property of the estate in his hands that it may be upheld as providing for direct taxation? That subsection is in these terms:

(3) Notwithstanding anything contained in this section or any other section of this Act, every agent, administrator, trustee, executor or person who collects or receives or is in any way in possession or control of income for or on behalf of an estate and which income is not wholly distributed annually shall be assessed, in respect of the income not so distributed, on behalf of the estate in the municipality wherein the testator was domiciled at the time of his death.

Subsection 4, likewise added in 1922, is as follows:

(4) Income which has been assessed against any agent, administrator, trustee, executor or other person on behalf of an estate under the foregoing sub-section 3 shall not be again assessed, when received by the beneficiary or person entitled thereto.

Although incorporated in s. 13, subs. 3 deals with a distinct subject-matter. Subsection 1 applies only to income received for a beneficiary who is a non-resident. Subsection 3 deals with all income which is not wholly distributed

(1) [1922] 1 A.C. 215. (2) 10 App. Cas. 141, at p. 143.
(3) [1914] A.C. 176.

annually, regardless of the residence of the beneficiary. It may, therefore, be argued with some force that the construction of subs. 3 is not affected by the view taken as to the effect of subs. 1. Nevertheless it is significant that in both subsections alike the qualification of the person made liable to be assessed is the same—"the agent, trustee, etc.," save that the additional words "administrator" and "executor" are inserted in subs. 3, probably unnecessarily as the comprehensive phrase

> every person who collects or receives or is in any way in possession or control of income for or on behalf of an estate

would include these personal representatives.

The manifest purpose of introducing this amendment was to cover the case of "income not wholly distributed annually," which it was contended in the earlier *McLeod Case* (1) was a *casus omissus*: and that view ultimately prevailed.

The difficulty of ascertaining the amount for which the appellant should be assessed proved to be formidable in *McLeod* v. *Windsor* (1). Having regard to the provisions of subs. 20 of s. 5 as to the partial exemption of income derived from investments, etc., this feature of the assessment now in question might require further consideration before its validity could be upheld. But it was not adverted to in the discussion at bar which was confined to the constitutional question. We, therefore, deal only with this latter aspect of the case.

Section 11 (1) declares every person not subject to business tax to be assessable in respect of income. Subsection 3 of s. 13 designates the "agent, administrator, trustee, etc.," as the person to be assessed in respect of the income here in question. Section 95 makes the tax to be imposed recoverable as a debt. The intent to impose personal liability on the respondent would, therefore, seem to be clear. Indeed, subject to the question as to its extent, the respondent's personal liability was not seriously contested. In the court below, Mr. Justice Ferguson says,

> The Deputy Attorney General * * * argued that * * * the tax was to be demanded from the trustee and ultimately paid and borne by him.

It is equally clear that no attempt has been made to fasten the tax as a lien or charge on the income. The section does

(1) [1923] S.C.R. 696, at p. 710.

1926

CITY OF WINDSOR v. MCLEOD.

Anglin C.J.C.

not enjoin retention of it, or of any part of it, to meet the tax. This omission is most significant in the case of an agent, one of whose primary duties is the prompt remittance of moneys collected to his principal: yet the mere agent is made liable for the tax equally with the trustee, etc. The municipality is not given the right to attach or impound or otherwise reach the income directly. Its only recourse is personal against the trustee. Nor is there any clear expression of the restriction of the liability of the trustee to funds of the estate in his hands, such as is found in s. 37 (12) already adverted to.

But it is contended that this restriction is implied in the direction of subs. 3 of s. 13 that the assessment of the agent, administrator, trustee, etc. shall be *"on behalf of the estate"*. We are, however, unable to find in this equivocal phrase evidence of an intent on the part of the legislature to depart in this instance from the general scheme of the *Assessment Act*, so clearly manifested in the sections above alluded to, that the liability of the person assessed shall be as for a debt due to the municipality and, therefore, unrestricted. The office of the words directing that the assessment shall be *"on behalf of the estate"* would rather seem to be to make clear—perhaps quite unnecessarily—the right of the person so assessed to recoupment out of the funds of the estate (R.S.O., 1914, c. 121, s. 35), or as put by Mr. Justice Ferguson, " to pass the tax on to the beneficiary."

An example of language apt to convey the intention to relieve the person to be assessed from personal liability beyond the estate property in his hands is found in a provision of the Quebec *Succession Duty Act* (4 Geo., V, c. 10) dealt with in *Alleyn-Sharples* v. *Barthe* (1):

> No notary, executor, trustee or administrator shall be personally liable for the duties imposed by this section. Nevertheless the executor, the trustee or the administrator may be required to pay such duties out of the property or money in his possession belonging or owing to the beneficiaries, and if he fails so to do may be sued for the amount thereof, but only in his representative capacity, and any judgment rendered against him in such capacity shall be executed against such property or money only.

The suggestion that all this was present to the minds of the Ontario legislators and was meant to be covered and intended to be enacted by the phrase "assessed * * * on behalf of the estate," imposes too great a strain on curial

(1) [1922] 1 A.C. 215, at p. 228.

credulity. Although always anxious to uphold impugned legislation by giving to it any construction of which it reasonably admits that will make for its validity, we feel that the implication contended for in order to support the taxation here in question would not be justified.

With the Appellate Divisional Court, we are of the opinion that the whole structure of the scheme for the imposition of taxes on income or in respect of income in the hands of persons in possession or control for the benefit of others depends on a system designed to make the trustee pay taxes which he is not intended to bear, but to obtain from other persons, and that consequently the tax sought to be imposed upon or collected from McLeod is an indirect tax, *ultra vires* of the province, and illegal. *Re Grain Futures Taxation Act, Manitoba* (1).

The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Davis, Healy* and *Plant.*
Solicitor for the Attorney-General for Ontario: *E. Bayly.*
Solicitors for the respondent: *McLeod* and *Bell.*