

IN THE MATTER OF THE TRUSTS UNDER THE  
WILL OF THE HONOURABLE SIR ALBERT \* <sup>1939</sup> Nov. 14, 15.  
EDWARD KEMP, K.C.M.G., DECEASED. <sup>1940</sup>  
\* March 4.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Will—Construction—Provisions for benefit of testator's wife and direction that "all income taxes which may be payable in respect of" said provisions "shall be paid out of my estate by my trustees"—Wife receiving income from other sources also—Extent of indemnification by the trustees in respect of wife's income taxes, in view of effect of taxing Acts in increasing rate of tax on gradual scale as amount of net income increases, in imposing surtax, and in treating sum paid by trustees for income tax as part of wife's income.*

By clause 3 of the testator's will, he gave and devised to his trustees his residence in Toronto known as "Castle Frank" upon the following trusts: During his wife's lifetime, so long as she remained his widow, and so long as she desired to use Castle Frank as her residence, they were to keep it up in suitable condition; pay all taxes, insurance, repairs, etc.; allow her to occupy it free of rent (the furniture, etc., were given to her outright); bear the expense of maintenance and management, to cover the cost of which they were to pay her \$2,250 monthly. If she should cease to occupy it as her home, she was to be paid \$75,000 out of the general estate, the monthly allowance of \$2,250 should cease and in lieu thereof she was to be paid \$2,000 monthly during her widowhood. After the testator's death she continued to occupy Castle Frank as her residence and home.

Clause 4 of the will directed (*inter alia*) that "all income taxes which may be payable in respect of the said above provisions for my wife shall be paid out of my estate by my trustees."

The testator's wife received also under the will (clause 16) a portion of the residuary estate and the income (not given free from income tax), during life and widowhood respectively, from two other portions thereof. Also she had income of her own.

Under the income taxing Acts, the tax is computed by applying, to the whole net income of the tax-payer, rates which increase on a gradual scale as the amount of the net income increases, and by imposing a surtax on incomes exceeding a certain amount. Therefore the testator's widow paid a higher rate because of the addition of her benefits under clause 3 of the will (so far as they were assessable as income against her) to her income from other sources. Also, under said taxing Acts, the sum paid by the trustees for income tax as directed by clause 4 of the will, is treated as part of her income.

The questions in issue arose under said clauses 3 and 4 of the will and had to do with the extent to which the testator's widow was entitled to be indemnified by the trustees in respect of income taxes assessed against her.

*Held:* The trustees must repay to the testator's widow under clause 4 of the will only such proportion of the whole of the income tax

\* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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assessed against her in respect of each year's income under each Statute imposing an income tax upon her income, as the total amount expended or paid out in such year by the trustees under the provisions of clause 3 and of clause 4 of the will (to the extent that the same is or is deemed to be assessable as income against her under the provisions of such Statute) bears to the total amount which is or is deemed to be assessable as income against her in such year under the provisions of such Statute. (Rinfret and Davis JJ. did not feel justified in taking a contrary view to the judgments in *In re Bowring*, [1918] W.N. 265, and the *Fleetwood-Hesketh* case, [1929] 2 K.B. 55, which, though not binding on this Court, carry the greatest weight. Were it not for those judgments, they would have held (as was held by McTague J., [1939] O.R. 59, before whom the questions came in the first instance) that the amount of the allowance to the testator's widow for the maintenance and management of Castle Frank (which under the will are paid upon a condition) should not increase the burden of her income taxes beyond the amount which she would have had to pay in any year, were such allowance not received by her).

Judgment of the Court of Appeal for Ontario, [1939] O.R. 245, varied to the extent that (by effect of above holding) the trustees must (subject to the principle of an apportionment as above) indemnify the testator's widow against any tax payable in respect of the sum paid by the trustees under clause 4 of the will for income tax. (The holding below that the deductions and exemptions allowed under the taxing Acts are to be calculated as belonging to and intended for the exclusive benefit of the testator's widow—subject to an apportionment, by consent, with regard to deductions in respect of charitable donations—was not disturbed).

APPEAL by Lady Kemp, widow of, and a beneficiary under the will of, Sir Albert Edward Kemp, deceased, from the judgment of the Court of Appeal for Ontario (1), allowing the appeal of certain residuary beneficiaries under the said will from the judgment of McTague J. (2), on an application by the executors and trustees of the will, by way of originating motion, for an order construing and interpreting the will and for the opinion, advice and direction of the Court upon certain questions arising out of the trusts declared in and by the will.

Clauses 3 and 4 of the will read as follows:

3. I GIVE AND DEVISE to my said Trustees my residence and lands in the City of Toronto, known as "Castle Frank," including houses, out-houses and other buildings thereon, and all the appurtenances used and enjoyed therewith (all of which are to be understood as being included in the term "Castle Frank") upon the following trusts:

(a) During the lifetime of my wife, Virginia, so long as she shall remain my widow, and so long as she desires to make use of the same as her residence, to keep up Castle Frank in a suitable condition for that

(1) [1939] O.R. 245; [1939] 2 D.L.R. 338.

(2) [1939] O.R. 59; [1939] 1 D.L.R. 117.

purpose; and all costs and charges for the payment of taxes, insurance and for repairs, renewals and other like expenditures for the proper structural upkeep of the said houses and buildings shall be borne by my estate and be paid by my Trustees.

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(b) To allow my said wife during her lifetime, and so long as she shall remain my widow, to occupy Castle Frank as her home and residence, free of rent.

(c) The furniture, plate, pictures and other personal chattels constituting the ordinary contents of said house at the time of my death, I give and bequeath to my wife, together with any automobile or automobiles which I may then own.

(d) While my said wife shall occupy Castle Frank as her home and residence, my Trustees shall also bear the expense of the maintenance and management thereof; and to cover such cost, my Trustees shall pay to my wife the sum of Two Thousand Two Hundred and Fifty Dollars (\$2,250) each month in advance so long as she continues to reside in Castle Frank and to use it as her home.

(e) If my wife shall cease to occupy Castle Frank as her home for any of the reasons aforesaid, I desire my said Trustees to raise out of my general estate the sum of Seventy-five Thousand Dollars (\$75,000), which sum will enable her, if she so desires, to purchase or build or otherwise provide a suitable house for herself, including the necessary land in connection therewith, and to pay the said sum to my wife as soon as conveniently may be after she shall inform my Trustees of her desire to give up her occupation of Castle Frank; the said sum of Seventy-five Thousand Dollars (\$75,000) is intended to be an absolute gift to my wife, and she shall not be obliged, unless she wishes to do so, to expend that sum or any part of it, in purchasing, building or otherwise acquiring any residence; the receipt of my wife therefor shall be an absolute discharge of my Trustees for the payment of the said sum of Seventy-five Thousand Dollars (\$75,000).

(f) Upon my said wife ceasing to occupy Castle Frank as her residence, the monthly allowance to her of Two Thousand Two Hundred and Fifty Dollars (\$2,250) for the upkeep thereof, as provided in Paragraph 2 (d) of this Will, shall cease; and in that event, I give her in lieu thereof, and direct my Trustees to pay to her while she shall remain my widow, a monthly allowance of Two Thousand Dollars (\$2,000).

4. I DIRECT that the above provisions in favour of my wife shall be a first charge upon my estate, and shall be provided for and paid by my Trustees in priority to any other legacies payable under my said Will, and I further direct that any Succession Duties, and all income taxes which may be payable in respect of the said above provisions for my wife shall be paid out of my estate by my Trustees.

By another clause (16) of the will, Lady Kemp was given a one-sixteenth portion or share of the residuary estate, and the income, during her life, from a further one-sixteenth portion or share thereof, and the income, during her widowhood, from a one-eighth portion or share thereof. (These gifts were not expressed to be free from income tax). Also Lady Kemp had at the time of her marriage and at the time of the making of deceased's will and still has, an independent income of her own.

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The deceased's will was dated December 1, 1927. He died on August 12, 1929.

The questions raised on the application were as follows:

Question (I) Are the amounts of income taxes which the Executors are directed under Clause 4 of the Will to repay to Lady Kemp, to be determined upon the footing

(a) that Lady Kemp has no income apart from the income received under Clause 3 of the Will; or

(b) that her income from any or all of the following sources is to enter into the computation,

(1) sources outside the Will,

(2) under Clause 16 of the Will,

(3) the repayment of income tax under Clause 4?

Question (II) If Question 1 (b) is in whole or part answered in the affirmative, must the Executors repay to Lady Kemp

(a) the whole of the income tax payable by her, or

(b) a proportion only of such income tax, and, if so, what proportion?

Question (III) Must the Executors, in determining the amount of income tax which they are directed to repay to Lady Kemp, take into the computation

(a) the whole of the deductions and exemptions allowed to her by the Income Tax Acts, or

(b) a proportion only of such deductions and exemptions, and, if so, what proportion, or

(c) no part of the said deductions and exemptions?

Question (IV) Do the "income taxes" referred to in Clause 4 of the Will include all taxes from time to time imposed on income (including the Ontario Income Tax, first imposed in 1936) or only such taxes as were imposed on income at the date of the testator's death?

Question (V) Are the income taxes which are repayable by the Executors to be paid by them out of capital or income of the estate or apportioned between capital and income and if so on what basis?

McTague J., in concluding his reasons for judgment, indicated his answers as follows:

Therefore my answers to the questions will be in the following terms. Income taxes directed to be paid by the executors under clause 4 of the will are to be determined upon the footing that Lady Kemp's income includes income from sources outside of the will, income under clause 16 of the will and repayment on income tax under clause 4. The executors should repay to Lady Kemp all additional income tax which becomes payable by virtue of the income under clause 3 being superimposed upon her income from all other sources. Deductions and exemptions are to be taken as belonging to and for the benefit of Lady Kemp and not for the benefit of the executors, subject to this, that counsel for Lady Kemp has intimated that she is willing that the executors shall have the benefit of a proportion of the saving due to deduction for charitable donations. If counsel cannot agree on an appropriate term in the formal order to cover this concession, that matter may be spoken to. The words "income taxes" referred to in clause 4 of the will, include all income taxes from time to time on income and specifically include Ontario income tax.

The income taxes repayable by the executors to Lady Kemp are to be paid out of income primarily and if there is a deficiency of income, then out of capital.

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And accordingly the formal order declared that the answers to the questions should be respectively as follows:

(I) The amounts of income taxes which the Executors are directed under Clause 4 of the Will to repay to Lady Kemp are to be determined upon the footing that her income includes income from sources outside of the Will, income under Clause 16 of the Will, and the repayment of income tax under Clause 4 of the Will.

(II) The Executors must repay to Lady Kemp all income tax levied against her in excess of the income tax which would have been levied against her if she were in receipt of no income under Clause 3 of the Will.

(III) Deductions and exemptions allowed to Lady Kemp by the Income Tax Acts are to be calculated as belonging to and intended for the exclusive benefit of Lady Kemp and not for the benefit of the Executors, except that the executors shall be entitled in each year to that proportion of any deductions allowed to Lady Kemp in respect of charitable donations which the payments made to Lady Kemp under Clause 4 of the Will during such year bear to Lady Kemp's total income during such year.

(IV) The words "income taxes" in Clause 4 of the Will include all income taxes from time to time imposed on income, and specifically include the Ontario Income Tax, imposed by Act of the Legislature of Ontario.

(V) The income taxes repayable by the Executors to Lady Kemp are to be paid out of income primarily and in case of a deficiency of income, then out of capital.

On appeal to the Court of Appeal for Ontario, the judgment of McTague J. was varied, and in the formal order it was declared that the answers to the questions should respectively be as follows:

(I) The amounts of income taxes which the executors are directed under Clause 4 of the will to repay to Lady Kemp are to be determined on the footing that her income consists of

- (a) payments made by the executors under Clause 3 of the will;
- (b) income under Clause 16 of the will;
- (c) repayment of income tax under Clause 4 of the will; and
- (d) income from all other sources;

to the extent that all or any thereof are or are deemed to be assessable income of Lady Kemp under the provisions of any statute from time to time in force imposing income tax upon her income.

(II) The executors must repay to Lady Kemp under Clause 4 of the will only such proportion of the whole of the income tax assessed against her in respect of each year's income under each Statute imposing an income tax upon her income, as the total amount expended or paid out in such year by the executors under the provisions of Clause 3 of the will (to the extent that the same is or is deemed to be assessable as income against Lady Kemp under the provisions of such Statute) bears to the total amount which is or is deemed to be assessable as income against Lady Kemp in such year under the provisions of such Statute.

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(III) Deductions and exemptions allowed to Lady Kemp by the Income Tax Acts are to be calculated as belonging to and intended for the exclusive benefit of Lady Kemp and not for the benefit of the Executors, except that the executors shall be entitled in each year to that proportion of any deductions allowed to Lady Kemp in respect of charitable donations which the payments made to Lady Kemp under Clause 4 of the will during such year bear to Lady Kemp's total income during such year.

(IV) The words "income taxes" in Clause 4 of the will include all income taxes (which the Executors are required to repay to Lady Kemp as set forth in the answer to question II above) from time to time imposed on income, and specifically include the Ontario income tax imposed by Act of the Legislature of Ontario.

(V) The income taxes repayable by the Executors to Lady Kemp are to be paid out of income primarily, and in case of deficiency of income then out of capital.

On appeal to this Court the judgment pronounced was as follows:

"The answer to question II is as follows:

The executors must repay to Lady Kemp under clause 4 of the will only such proportion of the whole of the income tax assessed against her in respect of each year's income under each Statute imposing an income tax upon her income, as the total amount expended or paid out in such year by the executors under the provisions of clause 3 and of clause 4 of the will (to the extent that the same is or is deemed to be assessable as income against Lady Kemp under the provisions of such Statute) bears to the total amount which is or is deemed to be assessable as income against Lady Kemp in such year under the provisions of such Statute.

"The judgment of the Court of Appeal will be varied accordingly. Subject to this variation the appeal is dismissed.

"The costs of appeal of all parties will be paid out of the estate, the costs of the executors as between solicitor and client."

*I. F. Hellmuth K.C.* and *G. B. Balfour K.C.* for the appellant.

*H. C. F. Mockridge* for adult respondents.

*J. M. Baird K.C.* for infant respondents.

*Donald M. Fleming* for Executors, respondents.

THE CHIEF JUSTICE—The pertinent words of clause 4 of the will are these:

I direct \* \* \* that all income taxes which may be payable in respect of the said above provisions for my wife shall be paid out of my estate by my Trustees.

My conclusion is that the indemnity under clause 4 is a complete indemnity as to the part of Lady Kemp's income taxes in respect of which that clause takes effect.

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To be precise, she is entitled in each year to be indemnified by the Trustees against (*inter alia*) any tax payable in respect of moneys received by her under the words of the clause quoted above.

I should add that I agree with the Court of Appeal as to the principle by which the amount payable as indemnity under clause 4 is to be calculated; and I think that principle governs the calculation of the amount payable pursuant to the view herein expressed.

The formal order of the Court of Appeal should be amended accordingly.

The judgment of Rinfret and Davis JJ. was delivered by

DAVIS J.—No question of the liability of Lady Kemp for income taxes (either Dominion or provincial) in respect of the particular moneys in question is raised in this appeal. The only question is: To what extent is Lady Kemp entitled to be reimbursed by the trustees of her husband's will in respect of income taxes assessed against and paid by her on certain moneys received by her from the trustees under the said will?

From the residuary part of her husband's estate she was given a one-sixteenth portion outright, the income from a further one-sixteenth portion so long as she lives, and the income from a further one-eighth portion so long as she remains the widow of Sir Edward Kemp. While the exact amounts are not disclosed in the material filed, it is admitted that they are very substantial amounts. No question is raised with respect to whatever income tax Lady Kemp may have to pay on that part of her total income which arises from these several sources; none of it is made free from income tax under the provisions of the will. Further, Lady Kemp had at the time of her marriage to Sir Edward Kemp, and retains, investments from which she receives additional income.

The question raised in these proceedings for the interpretation of the will is solely concerned with certain moneys that are paid to Lady Kemp by the trustees of her husband's will in respect of the maintenance and

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management of his large residential property in the City of Toronto known as "Castle Frank." Sir Edward dealt with that property at the very commencement of his will. He devised it to his trustees upon certain trusts and refers to it as

my residence and lands in the City of Toronto, known as "Castle Frank," including houses, out-houses and other buildings thereon, and all the appurtenances used and enjoyed therewith (all of which are to be understood as being included in the term "Castle Frank").

During the lifetime of Lady Kemp, "so long as she shall remain my widow, and so long as she desires to make use of the same as her residence," the trustees of the will are directed "to keep up" Castle Frank in a suitable condition for that purpose, and

all costs and charges for the payment of taxes, insurance and for repairs, renewals and other like expenditures for the proper structural upkeep of the said houses and buildings shall be borne by my estate and be paid by my trustees.

Permission is given to Lady Kemp during her lifetime so long as she remains Sir Edward's widow to occupy Castle Frank as her residence free of rent. The furniture, plate, pictures and other personal chattels "constituting the ordinary contents of said house" are given outright to Lady Kemp. Then follows this provision:

While my said wife shall occupy Castle Frank as her home and residence, my trustees shall also bear the expense of the maintenance and management thereof; and to cover such cost, my trustees shall pay to my wife the sum of Two Thousand Two Hundred and Fifty Dollars (\$2,250) each month in advance so long as she continues to reside in Castle Frank and to use it as her home.

Lady Kemp has been occupying Castle Frank as her home and residence and has been assessed for income tax in respect of her total annual income including the receipt by her of the amount of the allowance made for the maintenance and upkeep of the Castle Frank property.

It is important to observe that the particular language of the will is that while Lady Kemp shall occupy Castle Frank as her home and residence, the trustees of the will "shall also bear" the expense of "the maintenance and management thereof" and "to cover such cost" the trustees are to pay Lady Kemp \$2,250 each month in advance. This provision, among others, in favour of Lady Kemp

shall be a first charge upon my estate, and shall be provided for and paid by my trustees in priority to any other legacies payable under my



said will, \* \* \* and all income taxes which may be payable in respect of the said above provisions for my wife shall be paid out of my estate by my trustees.

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It is perfectly plain that the testator's intention was that the amount of the allowance to the widow for the maintenance and management of the Castle Frank property should not be cut down in her hands by the imposition of any income tax. The effect of the language of the testator was that Lady Kemp was to be completely indemnified against all income taxes, in respect of the amount of that allowance, that she might be called upon to pay.

It is contended by counsel for Lady Kemp in effect that this money, which Sir Edward obviously considered necessary for the purpose for which it was provided, should be treated as in an air-tight compartment by itself and that the receipt of the amount of this allowance for the maintenance and management of Castle Frank should not increase the burden of income taxes payable by Lady Kemp over and above whatever amount she would have had to pay in any year were this allowance not received by her.

On the other hand, counsel for other residuary beneficiaries contended that the proper approach to the problem is to take Lady Kemp's total income from all sources in any year and the total amount of income taxes levied against her in respect thereof and, after ascertaining the proportion of the one to the other, apply that percentage or rate to that portion of her total income which is received as the allowance for the maintenance and management of the Castle Frank property.

If the latter contention prevails then it is perfectly plain, although the exact figures are not given to us, that Lady Kemp will not receive indemnity from the trustees for so much of the income tax she is required to pay in any year that she would not be required to pay but for the receipt of the amount of the allowance in question.

The moneys paid to Lady Kemp are not impressed with a trust but are paid upon a condition; and unless Lady Kemp is indemnified by the trustees for so much of her income tax as she would not otherwise be required to pay but for this allowance, the plain intention of her husband may be frustrated by judicial decision. We are not to look for some course that may appear to us to be more fair and equitable among all the members of the family than

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that which commended itself to and was plainly expressed by the testator. After all, in the interpretation of a particular will with its own particular language, very little assistance may be gained from decisions on other instruments and on other language. And if I may say so, with the greatest respect, the vice in some decisions on somewhat similar language is the approach made to the problem on the basis of determining whether the particular income should be regarded as "the bottom slice" or the "upper slice" or the "middle slice" of the total income of the person affected. That approach, it seems to me, is entirely unwarranted. It has led to the conclusion that the fair and equitable way of dealing with the matter is to take neither the bottom slice nor the upper slice, but to work out a general average which, for convenience, is sometimes spoken of as the middle slice. It seems to me that this approach to the solution of the problem may lead one entirely away from a testator's intention where it is plain that a particular sum for a particular purpose shall not be cut down in the hands of the recipient as a result of the imposition of income taxes. In such a case it may well be that the intended indemnity against income taxes occasioned by the receipt of the particular sum can only be complete when the indemnity goes to that sum of money which the recipient is required to pay in income taxes that would not be payable were it not for the receipt of the particular sum.

That was the conclusion of McTague, J., who heard the motion for interpretation in the first place, although he rather seemed to base his conclusion upon his view that the allowance arises out of some obligation on the part of Lady Kemp to reside in and keep up Castle Frank, and that, she having assumed such obligation, her husband's intention was that no income tax burden should be placed upon her as a result of her compliance with his wishes. With respect, however, I do not think that there is anything in the nature of an obligation upon Lady Kemp under the clause in question and that this case cannot be distinguished from other cases upon that ground. The Court of Appeal took a different view and followed the principle applied by Sargant J. (as he then was) in *In re Bowring* (1). Lady Kemp appealed from that judgment to this Court.

(1) [1918] W.N. 265; 34 T.L.R. 575.

Were it not for the judgments of Sargant J. (as he then was) in the *Bowring* case (1) and of the Court of Appeal in the *Fleetwood-Hesketh* case (2), I would have accepted the contention of counsel for Lady Kemp. While those decisions are not binding upon us, they are judgments that carry the greatest weight and I do not feel justified in taking a contrary view. The principle is clearly stated by Lawrence, L.J., in the *Fleetwood-Hesketh* case (2) at the foot of p. 58—"the proper way of apportioning" the total tax "between the parties is not to marshal" the several parts of the total income so that some part "may come first and profit by the \* \* \* lighter burden of the lower scale of payments and thus throw the burden of the heavier rate upon" some other part, "but to apportion the" tax "payable on the total income of the wife upon" all the component parts of that income "in the proportion which the amount of the one bears to the amount of the other." Sankey, L.J. (as he then was) agreed with that judgment. Greer, L.J., at p. 61, in referring to the sliding scale of rates for ascertaining the total super-tax payable, said it was

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merely a convenient method of describing how the total amount payable on any given income is to be estimated, and not as a direction that the income is to be separated into slices, of which the lowest is to be free from super-tax and the highest is to bear the heaviest charge, and intermediate parts bear burdens graduated according to their relative positions.

Greer, L.J., said further that he thought the decision of Sargant, J. (as he then was) in *In re Bowring* "is useful as providing a formula."

Another point raised in the appeal was the question whether the indemnity applied to the tax upon the tax—that is, whatever be the amount of the indemnity paid by the trustees in any year, that amount becomes taxable against Lady Kemp the next year as part of her total income—and the question is whether the indemnity extends to the tax upon the tax. I think the authorities clearly indicate that it does. *Michelham's Trustees v. Commissioners of Inland Revenue* (3). Sub-paragraph (2) of paragraph 1 of the judgment of McTague J., as varied

(1) [1918] W.N. 265; 34 T.L.R. 575. (2) *Fleetwood-Hesketh v. Fleetwood-Hesketh*, [1929] 2 K.B. 55.

(3) (1930) 144 L.T.R. 163.

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by the Court of Appeal, should be amended by adding the words "and of clause 4" after the words "under the provisions of clause 3" in the seventh line of the printed copy of the said sub-paragraph as the same appears on p. 35 of the Appeal case.

The variation sought by the respondents in their factum was not the matter of any appeal or cross-appeal on their part but in any event cannot be granted. I am satisfied that the order in respect of deductions and exemptions was a matter of consent.

CROCKET J.—I agree with the Court of Appeal that there is nothing in paragraph 4 of this will to indicate that the testator intended that Lady Kemp should be relieved, not only of all liability to pay all income taxes in respect of the moneys payable to her under the provisions of paragraph 3 for the maintenance and upkeep of the Castle Frank property as her home and residence, but that the trustees should reimburse her as well for any increase in her own personal income tax rate, which should result from the addition to her own independent income by reason of the monthly and other payments made to her by the trustees under those provisions, or, in other words, that she should be indemnified at the expense of the residuary legatees for any and all moneys which she should be required to pay as income taxes upon her whole net income over and above the income taxes which would otherwise have been payable by her.

The relevant words of the direction to the trustees are "all income taxes which may be payable in respect of the said above provisions for my wife." The direction, to my mind, is clearly limited to the payments provided for in the Castle Frank gift. Had the intention been to reimburse Lady Kemp as well for any extra income tax for which she would become liable as a result of this gift, "it would," as Robertson, C.J., says, "have been a simple matter to say so."

With all respect, however, I cannot agree with the Court of Appeal that the explicit direction in paragraph 4 to the trustees to pay out of the estate "all income taxes which may be payable in respect of the said above provisions for my wife" is to be construed as excluding the moneys, which the trustees are thus required to pay in her behalf,

from the benefits of the Castle Frank gift. In my opinion, paragraphs 3 and 4 must be read together, and clearly shew that immunity from income tax liability to the extent indicated was intended as part of this gift. The widow was to receive the monthly payments specified and other benefits unimpaired and undiminished by any liability for payment of income tax thereon. If Lady Kemp herself paid these taxes directly with her income tax upon other independent income, she was entitled to be recouped out of the estate to the amount thereof. Whether the trustees paid her the money to meet the income tax payments before they became due or recouped her afterwards, the money under the provisions of the Income Tax Act was, in my opinion, part of her income for income tax purposes, as it was also part of the intended gift. See *Michellham's Trustees v. Commissioners of Inland Revenue* (1).

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For these reasons I am of opinion that the formal judgment of the Court of Appeal should be varied so as to provide that the trustees must repay to Lady Kemp under paragraph 4 of the will such proportion of the whole of the income tax assessed against her in respect of each year's income under each statute imposing an income tax upon her income as the total amount expended or paid out in such year by the trustees under the provisions of paragraphs 3 and 4 of the will (to the extent that the same is or is deemed to be assessable as income against Lady Kemp under the provisions of such statute) bears to the total amount, which is or is deemed to be assessable as income against Lady Kemp in such year under the provisions of such statute.

To this extent and to this extent only I would allow the appeal, with costs to all parties out of the estate, those of the solicitors for the trustees as between solicitor and client.

KERWIN J.—This is an appeal by Lady Kemp and a cross-appeal by the other residuary beneficiaries under the will of Sir Albert Edward Kemp from the order of the Court of Appeal for Ontario, which reversed the order of McTague J. in its most important provisions. The matter arose on an originating motion by the executors and trus-

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tees of the will for an order construing and interpreting the will, and for the opinion, advice and direction of the Court upon certain questions arising out of the trusts declared thereby.

Clauses 3 and 4 of the will read:—

3. I GIVE AND DEVISE to my said Trustees my residence and lands in the City of Toronto, known as "Castle Frank," including houses, out-houses and other buildings thereon, and all the appurtenances used and enjoyed therewith (all of which are to be understood as being included in the term "Castle Frank") upon the following trusts:

(a) During the lifetime of my wife, Virginia, so long as she shall remain my widow, and so long as she desires to make use of the same as her residence, to keep up Castle Frank in a suitable condition for that purpose; and all costs and charges for the payment of taxes, insurance and for repairs, renewals and other like expenditures for the proper structural upkeep of the said houses and buildings shall be borne by my estate and be paid by my Trustees.

(b) To allow my said wife during her lifetime, and so long as she shall remain my widow, to occupy Castle Frank as her home and residence, free of rent.

(c) The furniture, plate, pictures and other personal chattels constituting the ordinary contents of said house at the time of my death, I give and bequeath to my wife, together with any automobile or automobiles which I may then own.

(d) While my said wife shall occupy Castle Frank as her home and residence, my Trustees shall also bear the expense of the maintenance and management thereof; and to cover such cost, my Trustees shall pay to my wife the sum of Two Thousand Two Hundred and Fifty Dollars (\$2,250) each month in advance so long as she continues to reside in Castle Frank and to use it as her home.

(e) If my wife shall cease to occupy Castle Frank as her home for any of the reasons aforesaid, I desire my said Trustees to raise out of my general estate the sum of Seventy-five Thousand Dollars (\$75,000), which sum will enable her, if she so desires, to purchase or build or otherwise provide a suitable house for herself, including the necessary land in connection therewith, and to pay the said sum to my wife as soon as conveniently may be after she shall inform my Trustees of her desire to give up her occupation of Castle Frank; the said sum of Seventy-five Thousand Dollars (\$75,000) is intended to be an absolute gift to my wife, and she shall not be obliged, unless she wishes to do so, to expend that sum or any part of it, in purchasing, building or otherwise acquiring any residence; the receipt of my wife therefor shall be an absolute discharge of my Trustees for the payment of the said sum of Seventy-five Thousand Dollars (\$75,000).

(f) Upon my said wife ceasing to occupy Castle Frank as her residence, the monthly allowance to her of Two Thousand Two Hundred and Fifty Dollars (\$2,250) for the upkeep thereof, as provided in Paragraph 2 (d) of this Will, shall cease; and in that event, I give her in lieu thereof, and direct my Trustees to pay to her while she shall remain my widow, a monthly allowance of Two Thousand Dollars (\$2,000).

4. I DIRECT that the above provisions in favour of my wife shall be a first charge upon my estate, and shall be provided for and paid by

my Trustees in priority to any other legacies payable under my said Will, and I further direct that any Succession Duties, and all income taxes which may be payable in respect of the said above provisions for my wife shall be paid out of my estate by my Trustees.

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By clause 16, the testator made the following additional provisions for the appellant:—

(a) He gave her a one-sixteenth portion of his residuary estate absolutely.

(b) He gave her the income for life from a further one-sixteenth portion of his residuary estate.

(c) He gave her the income during widowhood from a further one-eighth portion of his residuary estate.

From the time of the appellant's marriage to the testator in 1925 until his death, the average monthly expense of the maintenance and management of Castle Frank exceeded the sum of \$2,250. Since her husband's death the appellant has continuously occupied Castle Frank as her home and residence and she has received the stipulated monthly sum in advance for the maintenance and management thereof, all of which she has expended for those purposes. At the time of the marriage and the making of the will, the appellant had, to the knowledge of the testator, a private income of her own, which she continued and still continues to receive.

The questions propounded to the Court arise because under the *Dominion Income War Tax Act* the appellant is assessed to income tax on the benefits conferred upon her under clause 3 of the will. Without attempting a precise listing of what benefits, as between the appellant and the taxing authorities, are so taxable, it may be stated generally that they include at present the occupation of Castle Frank rent free, the upkeep thereof, and the monthly payments of \$2,250. According to clause 4 of the will, "all income taxes which may be payable in respect of the said above provisions for my wife shall be paid out of my estate by my trustees." It is clear that, however that expression may be construed, it must bear the same meaning if the appellant should cease to occupy Castle Frank and should receive the monthly allowance of \$2,000 mentioned in paragraph (f) of clause 3.

Under the *Income War Tax Act*, the income tax payable is computed by the application to the whole net income of the taxpayer, of rates which increase on a

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gradual scale as the amount of the net income increases, and by the imposition of a surtax on incomes that exceed a certain amount. The appellant, therefore, in adding the benefits received under clause 3 of the will to her private income and to her income under clause 16, pays a higher rate than if those benefits had not been conferred upon her.

Lady Kemp's contention on the first question submitted to the Court is that the income tax that would have been payable by her if there were no such benefits should be computed, and that under clause 4 of the will the trustees should pay the difference between that sum and the total amount of the tax for which she is actually liable. That was the conclusion of Mr. Justice McTague, but the Court of Appeal, adopting the argument of the other residuary beneficiaries, determined that the proper method was that the trustees should pay only such proportion of the income tax assessed against Lady Kemp as the total amount paid out by them under clause 3 bears to the total amount assessable as income against her. In my opinion the Court of Appeal is right.

The testator provided an income for his widow other than that mentioned in clause 3; he knew that she had a private income; he knew that she would be required to pay income tax on both these items of income and made no provision that such tax should be paid by his trustees. It was only income taxes which might be payable "in respect of" the provisions made by him for Lady Kemp under clause 3 that he directed should be paid out of his estate. If taxation under the Act were a fixed rate on the dollar, each part of Lady Kemp's income would bear its proportionate share, but how may it be said that the total amount of the additional tax payable by reason of adding to her other income the benefits conferred by clause 3 is payable "in respect of" the latter? If it is not to be paid out of the estate under that clause, there is no other rule or law by which the appellant may require payment by the trustees. The contention advanced by the other residuary beneficiaries and adopted by the Court of Appeal gives full effect to the clause.

The second question arises in this way. Whatever sum the trustees pay for income taxes in respect of the provisions for Lady Kemp, made in clause 3, is treated, under



the Act, as part of Lady Kemp's income. I might here say that my own view is that clause 4 directs the trustees to pay these income taxes in the year in which they are payable and that the obligation is not upon Lady Kemp to pay the total and then seek a repayment from the trustees. If the repayment by the trustees is made in the same year, it can, of course, make no difference but it might conceivably do so if the repayment were delayed until the following year. However, the problem would still remain as to whether the extra income tax payable by Lady Kemp, because of the payment or repayment by the trustees, should be paid entirely by the estate, or whether the principle of apportionment adopted in answering the first question should apply. Mr. Justice McTague held that this extra tax should be paid by the trustees under clause 4 of the will. The objecting residuary beneficiaries agree that it is quite clear that to the extent that the repayments of tax swell Lady Kemp's total assessable income they necessarily increase the total amount of income tax payable by her, and on the principle of apportionment adopted in answering the first question, this increases the tax which each part of Lady Kemp's income must bear. But, it is submitted, the estate should not bear more of such increased income tax than the proportion thereof which the provisions for Lady Kemp under clause 3 of the will (to the extent that they form part of her assessable income) bear to her total assessable income. It is argued that for the purpose of computing the proportion, the amounts reimbursed to Lady Kemp in respect of income tax under clause 4 of the will should be treated as part of her income *apart from clause 3 of the will*.

The Court of Appeal agreed with this argument; that is, while, in the answer to question I, "repayment of income tax under clause 4 of the will" is treated as part of Lady Kemp's assessable income, according to the answer to question II, the trustees must repay to Lady Kemp only such proportion of the whole of the income tax assessed against her in respect of each year's income as the total amount expended or paid out in such year by the trustees under the provisions of clause 3 of the will bears to the total amount of Lady Kemp's assessable income. I quite agree that such extra income tax is not entirely payable in respect of the provisions made for Lady Kemp by clause

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3 of the will and is, therefore, not to be paid by the trustees. However, I am of opinion that, reading together clauses 3 and 4 of the will, the payments or repayments to be made by the trustees form part of the benefits conferred by clause 3 and that the proportion of Lady Kemp's income tax with respect to any year, to be paid by the trustees, should be the proportion that the total amount paid out by them in such year under the provisions of clause 3 and clause 4 bears to the total amount deemed to be assessable income of Lady Kemp in such year, and I would vary the order of the Court of Appeal accordingly.

The residuary beneficiaries other than Lady Kemp did not cross-appeal but they argue that the answer given by the Court below to question III is inconsistent with the answers given to questions I and II. The answer to question III deals with deductions and exemptions allowed to Lady Kemp by the Income Tax Acts. I would have thought that, the net taxable income being ascertained, the trustees would receive no benefit from the deductions and exemptions except that, of course, neither they nor Lady Kemp would pay any tax upon them. However, throughout the course of the proceedings Lady Kemp has agreed that the trustees should be entitled, in each year, to that proportion of any deductions allowed to her in respect of charitable donations which the payments made to Lady Kemp under clause 4 of the will, during such year, bear to Lady Kemp's total income during such year. The orders of McTague J. and the Court of Appeal include the terms of this agreement but also provide that, with that exception, deductions and exemptions allowed to Lady Kemp are to be calculated as belonging to and intended for her exclusive benefit and not for the benefit of the trustees. Bearing that in mind, I read the answer to question I as providing that by it Lady Kemp's income is to be determined on the footing of her total assessable income without subtracting any deductions and exemptions, leaving the latter to be dealt with by the answer to question III.

The judgments of the Court of Appeal in *Michelham's Trustees v. Commissioners of Inland Revenue* (1) and in *In re Reckitt* (2), and the other judgments cited at bar

were decided on the terms of other wills differently phrased and under the provisions of a taxing Act modelled in a form far different from ours, and I have been unable to secure any assistance from them in coming to a conclusion in this case. I would vary the order of the Court of Appeal to the extent indicated. All parties should have their costs out of the estate, those of the trustees as between solicitor and client.

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*Appeal dismissed subject to a variation  
in the judgment appealed from.*

Solicitors for the appellant: *Balfour, Drew & Taylor.*

Solicitors for the adult residuary beneficiaries, respondents:  
*Osler, Hoskin & Harcourt.*

Solicitor for the infants, respondents: *P. D. Wilson*, Official  
Guardian.

Solicitors for the Executors, respondents: *Kingsmill, Mills,  
Price & Fleming.*

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