1929

*May 30.
*June 13.

CLIFFORD SIFTON (PLAINTIFF).....APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO (DEFENDANT).....} RESPONDENT.

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

Assessment and taxation—Municipal income tax—Assessment made in one year adopted as assessment for following year—Removal of person from municipality—Assessment Act, R.S.O. 1914, c. 195, s. 57, s. 11 (2) (as enacted by 12-13 Geo. V, c. 78), s. 95 (3) (as enacted by 7 Geo. V, c. 45, s. 9)—Consolidated Municipal Act, 1922, c. 72, ss. 249 (1), 297 (1).

Plaintiff removed from the city of Toronto to the township of York on December 14, 1923. He paid an income tax to the City of Toronto in 1923 and to the Township of York in 1924. An assessment roll for the City of Toronto was prepared and settled in 1923, pursuant to by-law under s. 57 of the *Assessment Act,* R.S.O. 1914, c. 195, and plaintiff, then resident in Toronto, was entered on this roll for income. This assessment of 1923 was, pursuant to subs. 5 of said s. 57, adopted by the city council of 1924, by by-law passed February 28, 1924, and the City levied on plaintiff an income tax in 1924, which he paid under protest. He now sought repayment.

Held (reversing judgment of the Appellate Division, Ont., 63 Ont. L.R. 397, which, by equal division, sustained the judgment of Widdifield, Co. C. J., dismissing the action), that plaintiff should succeed. The income assessed in 1924 was the income for 1924 (*City of Ottawa* v. *Egan* [1923] S.C.R. 304) notwithstanding 12-13 Geo. V, c. 78, s. 11, changing subs. 2 of s. 11 of said *Assesment Act.* That subsection, as so changed, merely made the amount of the previous year's income conclusive as to the amount of income to be assessed in the current year, instead of (as formerly) a mere basis for estimating the amount for the current year. The income to be assessed was still the income for the current year. Therefore, under its by-law of February 28, 1924, the city council was assessing and levying on plaintiff's income of 1924; and in doing so was attempting to exercise jurisdiction outside the municipality, contrary to s. 249 of the *Consolidated Municipal Act, 1922,* was going beyond the jurisdiction given it by s. 297 of said Act to "levy on the whole rateable property within the municipality," and was attempting to assess plaintiff in respect of income in a municipality in which he did not reside, contrary to s. 12 of said *Assessment Act.* Subs. 3 of s. 95 of said *Assessment Act,* as enacted by 7 Geo. V, c. 45, s. 9, did not give power to the City to collect from plaintiff a tax on his income of 1924; that subsection only applies to rates properly assessable, and not to rates levied on an income not assessable at all. The fact that the assessment roll of 1923 was finally revised and settled without an appeal by plaintiff, then resident in Toronto, did not make the matter *res judicata* (*Hagersville* v. *Hambleton,* 61 Ont. L.R. 327, distinguished).

*PRESENT:—Anglin C. J. C. and Newcombe, Rinfret, Lamont and Smith JJ.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (1) dismissing (on equal division of the court) his appeal from the judgment of Widdifield, Co. C. J., dismissing his action for return of money paid, under protest, to the defendant, the City of Toronto, for income tax.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed with costs.

The appellant in person (with him *John C. M. Macbeth*) for the appellant.

G. R. Geary K.C. and *F. A. A. Campbell* for the respondent.

The judgment of the court was delivered by

SMITH J.—The appellant for some time had been a resident of the City of Toronto, but, on the 14th December, 1923, he removed to the Township of York, where he has since continuously resided. He paid an income tax to the City of Toronto in 1923, and to the Township of York in 1924. The City of Toronto assessed and levied on him an income tax in 1924 of $176.46, which he paid under protest on the 9th day of March, 1925, and which he seeks to recover with interest in this action.

The trial judge dismissed the action, and this judgment was sustained by the First Appellate Division (1), the Court of four being equally divided.

Section 249 of the *Consolidated Municipal Act, 1922* (now s. 258) is as follows:

249 (1) Except where otherwise provided, the jurisdiction of every council shall be confined to the municipality which it represents and its powers shall be exercised by by-law.

Section 297 (1), now s. 306 (1), provides that,

Subject to subsection 13 of section 397 (not material here), the council of every municipality shall in each year assess and levy on the whole rateable property within the municipality a sum sufficient to pay all debts of the corporation, whether of principal or interest, falling due within the year.

Section 300 (now s. 309) provides that,

The rates imposed for any year shall be deemed to have been imposed and to be due on and from the 1st day of January of each year unless otherwise expressly provided by the by-law by which they are imposed.

(1) (1929) 63 Ont. L.R. 397.

1929

SIFTON v. CITY OF TORONTO.

Smith J.

Sections 11 and 12 of R.S.O. 1914, c. 195, provide as follows:

11. (1) Subject to the exemptions provided for in sections 5 and 10 (not material here)—

(*a*) Every person not liable to business assessment under section 10 shall be assessed in respect of income;

((*b*) and (*c*) not material here.)

(2) Where such income is not a salary or other fixed amount capable of being estimated for the current year, the income of such person for the purposes of assessment shall be taken to be not less than the amount of his income during the year ending on the 31st December then last past.

12. (1) Subject to subsection 6 of section 40 (not material here), every person assessable in respect of income under section 11 shall be so assessable in the municipality in which he resides either at his place of residence or at his office or place of business.

Section 50 of the *Assessment Act*, R.S.O. 1914, c. 195, provides that, subject to ss. 56 to 60, the Assessor shall begin to make his roll in each year not later than the 15th day of February, and complete it not later than the 30th day of April.

Section 57 provides that the council of a city may, by by-law, provide for making the assessment at any time prior to the 30th September, and may fix prior and separate dates for the return of the roll of each ward, and shall provide for holding a Court of Revision.

Subsections 3 and 4 provide that the County Judge may sit throughout the year to hear appeals as therein provided.

Subsection 5 provides that,

The assessment so made and completed may be adopted by the council of the following year as the assessment on which the rate of taxation for such following year shall be fixed and levied, and the taxes for such following year shall in such case be fixed and levied upon the said assessment.

7 Geo. V, c. 45, s. 9, amended s. 95 of the *Assessment Act* by adding subs. (3) as follows:

(3) Subject to the provisions of section 118 (now 121) every person assessed in respect of business or income upon any assessment roll which has been revised by the Court of Revision or County Judge shall be liable for any rates which may be levied upon such assessment roll notwithstanding the death or the removal from the municipality of the person assessed or that the assessment roll had not been adopted by the council of the municipality until the following year.

An assessment roll for the City of Toronto was prepared and settled in 1923, pursuant to by-law under s. 57, and the appellant was entered on this roll for income quite properly, as he was a resident of Toronto in that year and in receipt of the income mentioned in the roll. He

made no appeal, and had no ground for appeal. This assessment of 1923 was, pursuant to subs. (5) of s. 57 quoted above, adopted by the council of the following year by by-law No. 9942, passed 28th February, 1924, and by this same by-law the council exercised the power given it by s. 297 of the *Municipal Act*, and nowhere else, to "assess and levy on the whole rateable property within the municipality the sum required for the current year."

The effect of subs. (2) of s. 11 of the *Assessment Act* as quoted above was considered in *City of Ottawa* v. *Egan* (1). The City of Ottawa assessed and levied in 1921 an income tax on Sir Henry K. Egan in respect of moneys received from an industrial company in 1920. It was established that no similar amount was received from the company in 1921. The Appellate Division of the Supreme Court of Ontario held that this amount must be deducted from the income assessment, and this was affirmed by the unanimous judgment of this Court.

The decision was that the income to be taxed was the income for the current year, and that the income of the preceding year was only a basis from which to estimate the former. Duff J. says, at p. 309:

> The principle of income assessment and taxation clearly expressed in the legislation which comes under consideration on this appeal is that it is the income for the current year which is assessable.

We must accept this as still the law, unless it has been changed by subsequent legislation.

Subsection (2) of section 11, quoted above, was repealed by 12-13 Geo. V., c. 78, s. 11, and the following substituted:

> (2) The income to be assessed shall be the amount of the income received during the year ending on the 31st of December then last past.

This provision has remained unchanged, and is now subs. (2) of s. 10 of the Act. No other statutory change material here seems to have been made.

Has, then, this change in subs. (2) entirely altered the principle of income assessment expressed in the legislation prior to this change as laid down in *City of Ottawa* v. *Egan* (1), and has it had the effect of enacting that, in case of a city proceeding under s. 57 (5), the income to be assessed shall be not the income for the current year, but the income for the previous year? I am of opinion that

(1) [1923] S.C.R. 304. Judgment below: (1922) 52 Ont. L.R. 183.

1929

SIFTON v. CITY OF TORONTO.

Smith J.

the substituted subsection (2) has no such effect. It merely makes the amount of the previous year's income conclusive as to the amount of income to be assessed in the current year, instead of a mere basis for estimating the amount for the current year. The income to be assessed is still the income for the current year, to be fixed at the amount of the previous year's income, and not subject to be changed to the actual amount of the current year's income, as previously.

It follows, therefore, that the decision in *City of Ottawa* v. *Egan* (1) applies in this case, and that the assessment in question was on appellant's income of 1924, during which year he was a resident of another municipality, and was properly assessed there for that income. The city council, therefore, in assessing and levying by its by-law of 28th February, 1924, on appellant's income of 1924, was attempting to exercise jurisdiction outside the municipality that it represented, contrary to s. 249 of the *Municipal Act;* was going beyond the jurisdiction given it by s. 297 to "levy on the whole rateable property within the municipality"; was attempting to assess the appellant in respect of income in a municipality in which he did not reside, contrary to s. 12 of the *Assessment Act;* and was thus attempting to subject the appellant to taxation twice on his income of 1924.

It is contended, however, that, notwithstanding these sections, the added subs. (3) of the statute of 1917, quoted above, gives the city council power to collect from the appellant a tax on his income of 1924.

I agree with the view expressed by Hodgins, J. A., in the Appellate Division that this subsection only applies to rates properly assessable, and cannot apply to rates levied on an income not assessable at all, as in this case.

It is further argued that, because the assessment roll of 1923 was finally revised and settled without an appeal by the appellant, then resident in Toronto, the matter is *res judicata,* and the case of *Hagersville* v. *Hambleton* (2), is relied on. There the defendant was assessed for income and appealed to the Court of Revision on the ground that he was not a resident; his appeal was dismissed and he

(1) [1923] S.C.R. 304. Judgment below: (1922) 52 Ont. L.R. 183.
(2) (1927) 61 Ont. L.R. 327.

made no further appeal. In an action by the corporation for these taxes, defendant pleaded that there was no right to tax, because he was not a resident, and the decision was that, as the Court of Revision, being a court of competent jurisdiction, had decided that point, that decision was final.

I am quite unable to see that this decision has any application to the present case. We have in question here the assessment of appellant's income of 1924. The assessment roll of 1923 had to do with the income of 1923, and the Court of Revision for that year had no jurisdiction to deal with the income of 1924. Appellant was properly placed on the 1923 roll for the income appearing there. He could not appeal successfully against being placed there for that income, and he clearly could not have appealed then against being assessed for the same amount for income in 1924, by by-law of that year. The assessment and levy on his income for 1924 were first made by by-law of 28th February, 1924, and there was no tribunal to which he could appeal against that improper assessment and levy except the ordinary courts to which he has resorted.

The only passage in the judgments in *Hagersville* v. *Hambleton* (1) that seems to me to have any application to this case is the quotation by Riddell J. from *Board* v. *Board* (2), as follows:

> If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of Justice.

The appeal is allowed with costs, and there will be judgment for the appellant (plaintiff) for the amount claimed with interest and costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *MacBeth & MacBeth.*

Solicitor for the respondent: *C. M. Colquhoun.*

---

(1) (1927) 61 Ont. L.R. 327. (2) [1919] A.C. 956, at p. 962.