PHYLLIS BOUCK (APPELLANT) .....APPELLANT; 1952

*Feb. 22, 25
*March 22

AND

THE MINISTER OF NATIONAL REVENUE (RESPONDENT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income—Trusts—Income War Tax Act, R.S.C. 1927, c. 97, s. 3—Whether money paid into an "income account" in trust for the support of a widow and her children and the education of the latter subject to the sole control of the widow is income within the meaning of The Income War Tax Act.

A testator by his will directed that his trustee pay to the credit of an "income account" the annual net profit from a trust until all his children should have attained the age of twenty-five years. The moneys to the credit of the account to be under the sole control of his wife to be used by her to maintain herself and the children, and educate the latter, as the wife in her sole discretion from time to time determined.

The appellant, widow of the testator, in 1944 received payment from the income account and the whole amount so paid her was assessed for income tax purposes as her income.

Held: (Rinfret C.J. and Kerwin J. dissenting)—That although the income in question was under the sole control of the appellant it was not hers absolutely but impressed with the obligation that it be devoted to the objects provided for as set out above. It could not therefore be said that the entire income was to be regarded as hers for the purpose of *The Income War Tax Act*. *Singer* v. *Singer* 52 Can. S.C.R. 447; 33 O.L.R. 602 at 611; *Allen* v. *Furness* 20 Ont. App. R. 34; *In re Booth* 2 Ch. 282. The wife being obligated to apply the income needed for the benefit not only of herself but also of the children, although her discretion was absolute, had an interest limited to that which she appropriated for herself, and the children became entitled to the remainder in the proportions she from time to time determined *Re Coleman* 39 Ch. D. 443.

Per Rinfret C.J. and Kerwin J. dissenting—The decision in *Singer* v. *Singer, supra* prevented a holding that under the will either child was entitled to an aliquot part of the income. Even if that were not so, the income received by the appellant from the "income account" was her income. She was not a trustee and the mere fact that there was the responsibility upon her as such as described in the *Singer* case did not make the money any less her income than if she had received the income from "B" though she might be bound by bond to "C" to pay the latter a certain annual sum. *Manning v. Federal Commissioner of Taxation* 40 C.L.R. 506; *Cohen* v. *Commissioners of Inland Revenue* 26 Tax. C. 472.

Decision of the Exchequer Court [1951] Ex. C.R. 118, reversed.

*PRESENT: Rinfret C.J., and Kerwin, Rand, Kellock and Locke JJ.

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APPEAL from the judgment of the Exchequer Court of Canada, Graham J., Deputy Judge (1), dismissing the appeal of the appellant from an assessment made in respect of the appellant's income for the year 1944.

R. A. MacKimmie for the appellant. The judgment appealed from is erroneous in the following respects:

1. In holding that the moneys received by the appellant from the income account of the Estate of Charles Bouck is her income within the meaning of *The Income War Tax Act.*

2. In holding that the control over the moneys paid by the appellant was sufficiently absolute in its nature to constitute income as defined by s. 3 of the Act.

3. In failing to apportion the moneys paid by the Trustee into the income account of the Estate as income received between the appellant and her two children *or* remitting the assessment back to the respondent for re-assessment under s. 65 of the Act.

This appeal, briefly, is to determine whether the money earned by the Estate and placed by the Trustee in an income account and subject to the sole control of the appellant for the specific purposes provided by the Will is income in her hands or a fund which she administers for the actual benefit of herself and her two children.

S. 3 of *The Income War Tax Act* defines income: "Annual net profit or gain or gratuity" are the defining words. S. 9 of the Act is the charging section: "There shall be assessed, levied and paid upon the income during the preceding year of every person..." Use of the word "of" denotes absolute ownership. *Poe* v. *Seaborn* (2). From the wording of ss. 3 and 9, it is submitted a fair definition of income within the meaning of the Act is "annual net profit or gain or gratuity" of the taxpayer. It is well established law that title to the bequest is determined from the intention of the testator as declared in his Will. *Lewin on Trusts* 14 Ed. 82-87. Hansbury's *Modern Equity* 5 Ed. 127. *Comiskey* v. *Bowring-Hanbury* (3).

(1) [1951] Ex. C.R. 118; C.T.C. 119.

(2) 75 L. ed. 239; 282 U.S. 101.

(3) [1905] L.J. 74 Ch. 263 at 268.

Clause 5 of the Will creates the fund in question. (Clause 5 and the other relevant clause of the will are fully set out in the reasons for judgment which follow). The significant features of clause 5 are:

(i) The Trustee is directed to pay into an income account and not to pay any amount directly to the Appellant until both children have attained the age of 25 years;

(ii) Use of the words "under the sole control of my wife" in para. 1 are words of administration and not of gift;

(iii) The concluding sentence in para. 1 says: "Any moneys from time to time to the credit of the said income account and not required by my wife for the purposes aforesaid may be taken by my Trustee and shall become part of the capital of the trust hereby created." This is clear evidence negativing intention of absolute gift. Note the use of the words "for purpose aforesaid."

Clause 7 of the Will when read in conjunction with clause 5 gives further weight to the interpretation that the testator never intended an absolute gift to the appellant in clause 5 until she was to receive her share when both children attained the age of 25 years. The significant feature of clause 7 is the change of procedure now directing the Trustee to make payments directly to the appellant and no longer into the income account. Here are clear words of gift. The effect of the clause is that when the responsibilities and obligations to the children are satisfied on their attaining the age 25 years, the widow (Appellant) then receives one-half of the income earned by the estate. This is not only evidence negativing absolute gift to the appellant in clause 5 but is evidence of apportionment between the widow and children. It would be repugnant to the tenor of the whole Will to find the testator intended his widow to reduce her standard of living when the youngest children reached the age of 25 years.

The use of the words in clause 4 of the Will of "each of my beneficiaries" and "but not including my wife in the event of her remarrying" show the testator was thinking of his children as well as the appellant. If he was thinking only of his widow the clause is meaningless for clauses 5 and 7 provide for the widow's remarriage and the children attaining the age of 25 years. It is submitted that reading

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clauses 5 and 7 together and giving them their normal meaning, the money paid into the income account for the purposes named is not net gain, profit or gratuity of the appellant and is not income in her hands. It is obvious the testator intended by the choice of words and procedure in the first paragraph of clause 5 of the Will to make a different disposition of the money earned by the estate than he intended in making the gift under clause 7 of the Will.

Looking at the Will in its entirety there is no intention expressed nor can one be implied to support the view that the testator intended the funds paid into the income account under clause 5 of the Will were to be given to the appellant absolutely. Had he had such an intention he could have used simple words to achieve such a purpose. Had he intended that his widow was only to use so much of the income produced by his estate for specific purposes he could not have used more effective wording or procedure to carry out such a purpose. Conversely had he intended an absolute gift to his widow of the income produced by the estate until his youngest child was 25 he would have said so in the clearest terms.

Decided cases, apart from their general reasoning and explanation of rules of construction are of little assistance, for each Will must be treated in accordance with its own terms. The following cases are of general assistance.– *Raikes* v. *Ward* (1); *In re Harris* (2); *Bibby* v. *Thompson* (3); *Crockett* v. *Crockett* (4); *Newill* v. *Newill* (5); *In re G* (6); *Booth* v. *Booth* (7).

H. W. Riley, Q.C. and *F. J. Cross* for the respondent. The point in issue is—Are the moneys received by the appellant pursuant to para. 5 of the Will income of the appellant within the meaning of the *Income War Tax Act*?

The onus is on the appellant to demolish the basic fact on which the taxation rests. *Johnson* v. *Minister of National Revenue* (8). The appellant has not kept accounts or made any accounting of the said sum of $3,797.26 and must fail for the reason she is unable to discharge the onus.

(1) (1842) 1 Hare 445; 66 E.R. 1106.
(2) (1852) 21 L.J. Ex. 92.
(3) (1863) 32 Bear. 646; 55 E.R. 253.
(4) (1847) 2 Ph. 553; 41 E.R. 1057.
(5) (1872) 41 L.J. N.S. 432.
(6) (1899) 68 L.J. Ch. 374.
(7) (1894) 63 L.J. N.S. 560.
(8) [1948] S.C.R. 486 at 489; 4 D.L.R. 321 at 323.

By para. 5 of the Will there is an absolute gift to the appellant of the moneys the Trustee is directed to place to the credit of the Income Account coupled with the express desire of the testator that the appellant occupy with respect to the children after his decease the same position that he would have occupied; the manner of her so doing being expressly let in her sole discretion. The principles applicable to the construction of para. 5 is well put in Snell's *Principles of Equity* 21st Ed., 77; *Comiskey* v. *Bowring-Hanbury* (1).

In construing the Will as a whole the following points support the respondent's contention:

(*a*) The fact that The Royal Trust Co. is appointed executor;

(*b*) The general scheme of the Will is such that whenever a trust is created the same is expressly created in clear, apt and unequivocal language. In para. 5 thereof there is a complete absence of any words creating a trust expressly or impliedly.

(*c*) Particular attention is drawn to the words *"under the sole control of my wife"* and *"in her sole discretion"*. By para. 5 the moneys are placed under the sole control of the appellant to be expended in her sole discretion.

(*d*) After placing the said moneys in her sole control the testator merely states what in his opinion is a reasonable method for the exercise of her sole control and in no sense creates a trust. The remaining words in the said para. merely express the motive for the gift to the wife (the appellant). *Hill* v. *Hill* (2).

The Agreement as to Facts, para. 4 reads:

"4. That the said Appellant, Phyllis Bouck, has since the death of her husband the late Charles Bouck, occupied substantially the same position toward the said children as the late Charles Bouck occupied himself in his lifetime and in particular..." In this connection reference is made

(1) [1905] A.C. 84.

(2) [1897] 1 Q.B. 483 at 488.

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to *Singer* v. *Singer* (1) and the reasons of Anglin J., as he then was, at 458 and 460. He agrees with and quotes the reasons of Middleton J. as to the testator's intention. His judgment and the portion quoted by him from the judgment of Middleton J. is very much in point in view of para. 4 of the Agreement of Facts quoted *supra*. See also *Lambe* v. *Eames* (2); *Thorp* v. *Owen* (3); *Manning* v. *Federal Commrs. of Taxation* (4).

The cases cited in support of the appellant's contention have been discredited or over-ruled insofar as they conflict with the modern trend of authority as indicated by the case cited above and by *In re Diggles* (5). See also Hanbury, *Modern Equity* 2 Ed. 133. No injustice results from the respondent's view herein:

(*a*) Irrespective of the terms of the Will the infant children were entitled to support from the appellant. *Singer* v. *Singer, supra.*

(*b*) The testator undoubtedly had unbounded confidence in the appellant. His dominant intention was that during her lifetime she would occupy substantially the same position toward the children as he had. *Singer* v. *Singer, supra.* Para. 4, Statement of Facts.

(*c*) Had the testator lived the income in his hands would no doubt have been taxable even though expended for the support of his wife and children.

(*d*) Had the appellant earned the income and expended it on the maintenance of herself and the children she would have been taxable, and because the income is unearned and used for their respective maintenance does not mean she is freed from income tax with respect to the whole or any portion of the said money.

The dissenting judgment of the Chief Justice and Kerwin J. was delivered by:—

KERWIN J.:—The appellant, Mrs. Phyllis Bouck, was assessed to income tax for the year 1944 in an amount that she considers unauthorized by the provisions of the *Income War Tax Act*. She is the widow of Dr. Charles Bouck,

(1) (1916) 52 Can. S.C.R. 447.
(2) (1871) 6 Ch. App. 597.
(3) 2 Hare 607; (1843) 67 E.R. 250.
(4) (1928) 40 C.L.R. 506.
(5) (1888) 39 Ch. Div. 253.

who died at Calgary, July 19, 1944, leaving an estate of the aggregate value of $867,111.72 and net value of $845,940.72. Probate of Dr. Bouck's last will and two codicils thereto was duly granted to the executors named therein, viz., the Royal Trust Company and the appellant. While this is not a proceeding commenced in the Courts of Alberta to construe these documents, it is necessary to come to a conclusion as to the position thereunder of Mrs. Bouck in connection with the income of the estate since it is the assessment on that income, paid to her in the year 1944, that is in question.

By the testamentary documents, she was devised and bequeathed the testator's interest in their city and summer residences, together with such of their contents as already did not belong to her, and all personal property, including automobiles, and the sum of $5,000. While the Royal Trust Company was by the will appointed executor, the second codicil appointed the appellant an executrix to act with it. No such change was made in the designation of the Trust Company as trustee to which the testator devised and bequeathed all the rest and residue of his assets and property upon trust for realization and investment and to pay out of the capital of the trust during the lifetime of the appellant, and so long as she should occupy their family residence and summer residence, and so long as she should not remarry, all taxes that might be assessed against the two residences, and the premiums on all policies against loss or damage thereto by fire. By clause 4 of the will the trustee was to pay all taxes upon income assessed or levied in each year against each of the beneficiaries of the trust, but not including the appellant in the event of her remarrying. Then comes clause 5, the first paragraph of which is the important one:—

5. To pay to the credit of an "income account" all the net revenue of the trust hereby created (after payment of the cost of administration and the said income taxes) in every year until all of my children shall have attained the age of twenty-five (25) years. The moneys to the credit of the said account shall be under the sole control of my wife to be used by her to maintain a home for herself and my children, for the maintenance of my wife and my children, for the proper education of my children and otherwise for the benefit of my wife and my children as my wife in her sole discretion may from time to time determine. In every such year in which the said net revenue is less than the sum of TEN THOUSAND ($10,000) DOLLARS, my Trustee shall pay to the credit of the said income account out of the capital of the trust an additional sum which

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with the revenue for such year will equal the said sum. If through any unforeseen cause the sum above mentioned should in any such year or years prove insufficient for the said purposes, then my Trustee may in its discretion pay in to the said income account such additional moneys out of the capital of the trust as may be reasonably required for the said purposes. Any moneys from time to time to the credit of the said income account and not required by my wife for the purposes aforesaid, may be taken by my Trustee and shall become part of the capital of the trust hereby created.

Provision is made in case the widow remarried and for various other contingencies.

The case was heard in the Exchequer Court on an agreed statement of facts. There were two children, a girl and boy, issue of the marriage of Dr. Bouck and the appellant and, at the death of the testator, they were respectively sixteen and thirteen years of age. The appellant has not remarried. Since the death of her husband she has "occupied substantially the same position towards the said children as the late Charles Bouck occupied himself in his lifetime and in particular:—

(*a*) She has maintained, supported, educated and borne all expenses in bringing up her son, the said John Bouck, from the date of her husband's death until the present time;

(*b*) She has maintained, supported, educated and borne all expenses in bringing up her daughter, Marilyn (Bouck) McDaniel, from the date of her husband's death until the marriage of the said Marilyn (Bouck) McDaniel in the month of October, A.D. 1948. Subsequent to the said marriage she has contributed varying amounts to the welfare of her said daughter;

(*c*) She has maintained a large home at the premises municipally known in the City of Calgary, in the Province of Alberta, as 1014-Prospect Avenue, the same having been the family residence for a number of years prior to the death of the late Charles Bouck. Further she maintains a summer home at Sylvan Lake, in the Province of Alberta, for her own use and for the use of her children, John and Marilyn, although apart from occasional visits Marilyn has not made use of the said residences since the date of her said marriage;

Although it is the 1944 income that is in question, the assessment thereon was not made until 1948. Included in the total income upon which the respondent assessed the appellant to income tax for 1944 is the sum of $3,797.26, being moneys received by the appellant pursuant to clause 5 of the will. Paragraphs 6, 7, 8 and 9 of the agreed statement of facts are as follows:—

6. That the Appellant did in fact receive the whole of the said sum of $3,797.26, which said sum was under her sole control, and was expended and used by the Appellant in her sole discretion, and pursuant to said

Clause 5 of the said Last Will and Testament to maintain a home for herself and the said children, for the maintenance of herself and the said children for the proper education of the said children, and otherwise for the benefit of herself and her children, and as the Appellant in her sole discretion did from time to time determine.

7. The Appellant has not kept accounts or made any accounting whatever of the said sum of $3,797.26, nor has the Appellant furnished nor is she able to furnish any accounts to the Minister as to the portions thereof:—

(a) Expended by her in maintaining a home for herself and children;
(b) For the maintenance of herself and her children;
(c) For the proper education of the children;
(d) Otherwise for the benefit of herself and her children;
(e) For her separate use;
(f) For the direct or indirect use of John Bouck and Marilyn Bouck, or either of them;

8. The Appellant pays for services of a hired man in the maintenance of her home in the City of Calgary, in the Province of Alberta.

9. That presently:
(a) The Appellant maintains two automobiles for the use of herself and her son John Bouck;
(b) If the Appellant had not the responsibility of the maintenance and control of her children she would not require to maintain the large home now maintained by her;
(c) She estimates that as a minimum her expenses would have been reduced annually by $5,000 had she not supported and maintained her said children.

It is understood and agreed that paragraph (c) supra is merely an estimate which the Appellant would make of the position at the present time if she were called to give evidence on her own behalf, and that nothing in the said paragraph 9 is to prejudice or affect the Respondent's position that the assertions made in the said paragraph are inadmissible in evidence and irrelevant, the Respondent's position being that the appeal solely concerns that portion of the year 1944 subsequent to the 19th day of July, A.D. 1944, and that period alone.

It should be noted that in case both children died, or either of them, there is no provision whereby the appellant, during her widowhood, should receive less than the moneys to the credit of the "income account" so long as they are "required". The decisions as to what words create a trust are legion but, in each case, the intention is to be gathered from the document as a whole. In *Singer* v. *Singer* (1), the will of the late Jacob Singer directed:—

"my said trustees to pay to my wife Annie Singer during the term of her natural life and as long as she will remain my widow the net annual income arising from my estate for the maintenance of herself and our children. Should however my wife remarry then such annuity shall cease."

(1) (1915) 33 O.L.R. 602.

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Middleton J. who heard the originating motion for the construction of the will in the first instance, held:—

> The said Annie Singer is not entitled to the net annual income arising from the said estate to her own use absolutely, but subject to the obligation to use the same not only for her maintenance, but also for the maintenance of the children of the testator, and that the right of any child to maintenance does not cease on attaining majority or marriage;

and he directed a reference to determine what allowance, if any, should be made to each of the children of Jacob Singer out of the income of the estate.

The Appellate Division varied this judgment by declaring:—

> The said Annie Singer is entitled to the net annual income arising from the said estate during her widowhood for her own use absolutely, but subject to an obligation to provide thereout for the maintenance of the children of the testator or such of them as in her discretion to be exercised in good faith she shall deem to require the same, but such obligation does not extend to any child who has or shall be married or otherwise be forisfamiliated.

An appeal to this Court (1), was dismissed. The Chief Justice and Duff J. expressed no views upon the point; Sir Louis Davies accepted the Appellate Division's opinion as the correct one, as did Idington J., Anglin J. and Brodeur J. As Anglin J. points out, the difference between the orders made by Middleton J. and by the Appellate Division was that under the latter the discretion of the mother was wider and enabled her, for reasons that seemed to her sufficient, to exclude any child from maintenance.

Here, to adapt the language of Sir William Meredith, at page 611 of 33 O.L.R., the appellant was entitled to receive the income, subject to an obligation on her part to maintain and educate the children out of it but leaving to her discretion the manner in and the extent to which provision should be made for any child, a discretion not subject to control or interference by the Court so long as it should be exercised in good faith.

We are, of course, dealing with the position in 1944 when the appellant had not remarried and the children were under the age of twenty-five years. As has been pointed out, this is not a proceeding to construe Dr. Bouck's will and codicils in which the widow and children are represented. Consequently, we do not know anything about

(1) (1916) 52 Can. S.C.R. 447.

such things as medical expenses for any of the family, charitable donations and entertainment expenses of the appellant, or the cost of help in and around the Calgary home or the summer home although, in March, 1951, when the agreed statement of facts was signed, we know that the appellant was paying for the services of a hired man in the maintenance of the Calgary house. We also know that at that time the appellant maintained two automobiles for the use of herself and John,—the daughter having by that time been married. No doubt in the year of the daughter's marriage, the appellant would have incurred considerable expense with respect to the preparation therefor, a great part of which it could no doubt be asserted was her expense as head of the family. In truth, the money spent by the appellant for the maintenance, education and benefit of either child might be very slight in one year and considerably greater in another. There are such things as premiums on insurance on the automobiles and many other expenses which Dr. Bouck would presumably have in mind as being incurred by the appellant and which it would be difficult to say were for anyone's benefit except her own. In a proceeding upon the construction of the will, these are matters that might be gone into but we know practically nothing about them for the year 1944, which is the year of the income in question.

In the first income tax return made by the appellant in April, 1945, although it was a mere estimate of the income of her husband's estate for that part of the year 1944 remaining after his death, the total amount of such estimated income was returned by her as being her income. It was only in January, 1946, that a new return was made in which the income of the appellant from her husband's estate for the relevant part of 1944 was arbitrarily put by her at one-third of the total income. She had, of course, received the total amount in accordance with the provisions of the will and we are not called upon to deal with a case where she received a certain amount from the trustee of the income account for herself and other specific amounts therefrom for each child. Nothing is said as to whether this is possible under the will, or as to the result if it in fact occurs. As the trial judge states, the appellant may find some comfort in the fact that if she succeeded

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in these proceedings, she would be taxed as a single person without a deduction for each child; to which might be added that in the possible circumstances envisaged above, each child might be subject to tax upon what would be found to be his or her income.

While clause 7 of the will commences:—"From and after the time when all of my children shall have attained the age of twenty-five years", and that event might not happen because one might die before attaining that age, provision is subsequently made for the death of either child without issue. Then finally comes clause 14:—

> 14. In the event of the death of both of my children without issue then the entire income shall be payable to my wife during her lifetime and after her death the capital of the trust hereby created shall be distributed to my heirs according to the laws of the Province of Alberta then in force with respect to the devolution of intestate estates.

Reading the whole of the will, it appears that if both children died before the ages of twenty-five, clause 14 would operate.

However, the appellant points to clause 7 of the will, dealing with the situation where the children would have attained the age of 25 years. It reads:—

> 7. From and after the time when all of my children shall have attained the age of twenty-five (25) years. To pay to my wife during her lifetime in monthly instalments without power of anticipation, one-half the net income of the trust hereby created (after the payment of the cost of administration), and to pay to each of my children during their respective lifetimes, in monthly instalments without power of anticipation, one-quarter of the said net income.
>
> Provided that in the event of my wife remarrying the said net income shall be thereafter divided one-third to my wife and one-third to each of my children.
>
> Provided further that if the aggregate amount of the net income payable to my wife and my children in any year is less than the sum of ten thousand ($10,000) dollars, my Trustee shall in every such year pay out of the capital, of the trust hereby created to my wife and my said children a further sum which with the share of income received by them in such year shall amount to the said sum, and such further sum shall be divided among them in the same proportion as the income is divided.
>
> Provided further that if through any unforeseen cause the sum mentioned in the proviso next preceding should not be sufficient for the proper maintenance of my wife and my children, my Trustee may in its discretion pay to my wife and to my children such additional moneys out of the capital of the trust as may be reasonably required for their respective maintenance.

It is said that the change in procedure whereby the trustee is directed to make payments directly to the appellant and no longer into the income account is significant and that in clause 7, as compared with clause 5, are clear words of absolute gift. However, the testator was dealing with an entirely different situation and I am unable to perceive that the manner in which he directed the trustee to deal with the income under those circumstances can affect a matter arising under clause 5.

The appellant then refers to clause 4, reading as follows:

> 4. To pay in each and every year out of the income of the trust hereby created all taxes upon income assessed or levied in such year against each of the beneficiaries of the said trust with respect to the share of the income of the said trust payable in such year to each respective beneficiary, but not including my wife in the event of her remarrying.

The use of the words "each of the beneficiaries of the said trust" indicates that the testator had in mind not only his wife, under whose sole control the moneys in the income account should be in accordance with clause 5, but also the children when they should have attained the age of twenty-five years, in accordance with clause 7.

The case of *Drummond* v. *Collins* (1), has no application. There, the trustees of a deceased United States man were required to exercise their discretion as to providing money for the maintenance of the testator's grandchildren who were, at the time in question, minors. In pursuance of this authority the trustees exercised their discretion and remitted to Mrs. Drummond, the mother of these children, certain sums of money for their maintenance. It was held that, within the meaning of the British Income Tax Act, these sums were derived from remittances from the United States payable in Great Britain, or from money or value received in Great Britain and arising from property that had not been imported into Great Britain. It was also held that they came within the words of Schedule D as profits or gains accruing from property to a person residing in the United Kingdom. There it was the income of the children that was in question.

(1) [1915] A.C. 1011.

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More to the point is the decision of Sir Adrian Knox, Chief Justice of the High Court of Australia, in *Manning* v. *Federal Commissioner of Taxation* (1), where a testator devised and bequeathed the whole of his property to his wife in trust for his children—the wife during her life to receive the income thereof for the support and maintenance of herself and the children and after her death the proceeds of the sale of such property to be equally divided between the children. It was held that the wife was entitled to receive the income of the estate subject to no liability to account for its application, provided she discharged the duty of supporting and maintaining the children, following *Browne* v. *Paull* (2):—

> Where the interest of the children's legacies is given, to a parent, to be applied for or towards their maintenance and education, there, in the absence of anything indicating a contrary intention, the parent takes the interest subject to no account, provided only that he discharges the duty imposed on him of maintaining and educating the children.

It was also held by Macnaghten J. in *Waley Cohen* v. *Commissioners of Inland Revenue* (3), that sums payable under a trust to a father (the settlor) towards the upkeep of a joint establishment with his sons (the beneficiaries) are income of the father.

The decision in *Singer* v. *Singer* prevents a holding that under Dr. Bouck's will either child is entitled to an aliquot part of the income. Even if that be not so, the income received by the present appellant in the year 1944 from the "income account" is her income. She is not a trustee and the mere fact that there is the responsibility upon her such as is described in the *Singer* case does not make the money any less her income than if she had received income from B though she might be bound by bond to C to pay the latter a certain annual sum.

The appeal should be dismissed with costs.

The judgment of Rand, Kellock and Locke, JJ. was delivered by:—

KELLOCK J.:—Under the will in question, the testator, by para. 5, directed his trustee to pay to the credit of an "income account" the annual net revenue from a trust fund until all his children should have attained the age of

(1) (1928) 40 C.L.R. 506. (2) (1850) 1 Sim. (N.S.) 92 at 103, 104.
(3) (1945) 26. Tax. C. 472.

twenty-five years, directing that these monies should be under the sole "control" of his wife

> to be used by her to maintain a home for herself and my children, for the maintenance of my wife and my children, for the proper education of my children, and otherwise for the benefit of my wife and my children as my wife in her sole discretion may from time to time determine.

The testator further provided that any monies to the credit of the account "not required by my wife for the purposes aforesaid" should be returned to capital. In the event of the death of his wife before all the children should have attained the specified age, he directed, similarly, that the guardian whom he had appointed for his children should have control of the monies to the credit of the account

> to the extent required to provide for the maintenance, education and benefit of my children as the said guardian in her sole discretion may from time to time determine *in the same manner as my wife if living.*

By para. 7 he further provided that from and after the time when "all" his children should have attained twenty-five, his wife was to be paid one half of the net income of the trust fund for life, and each of the children one quarter during their respective lives, with the further provision that in the event of the net income being less than $10,000 in any year, the deficiency should be made up out of capital. The trustee was also given a discretion to make further payments out of capital should even this sum be insufficient to provide for the proper maintenance of the wife and children. From and after the death of the wife, all of the income was to be paid to the children equally.

By para. 9, it is provided that upon the death of either of the children without issue, the income "which would have gone" to the deceased child if living, should, during the lifetime of the testator's wife and the surviving child, be paid to the surviving child, with the proviso that

> In the event of the death of my son without issue but leaving a wife surviving, the share of the income which would have gone to him if living shall be paid * * * to his wife until her death or until she remarries, whichever shall first occur.

Para. 10 provides that upon the death of his daughter leaving issue, then until the death of the testator's wife and son, "the share of the income which my daughter would have received if living" should, until all the issue should have attained twenty-five years, be paid to his

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widow if living, or if not, to his son, to be used for the maintenance and education of the issue of the daughter until all should have attained the age of twenty-five, and should thereafter during the same period be paid to the issue.

Similarly, it is provided by para. 11 that upon the death of his son leaving issue, then until the death of the testator's wife and daughter, the share of the income "which my son would have received if living" should, until the issue attained twenty-five years, be paid to his son's widow for the maintenance of herself and the issue and the education of the issue until all shall have attained twenty-five years, and thereafter during the lifetime of his daughter and the testator's widow, be paid to the wife and issue of his son, with the proviso that in the event of the death or remarriage of his son's widow, then "her interest in the said income" should cease, and the share "which should have gone to her" shall go to the issue. The will contains an ultimate trust, upon the death of the testator's children and wife, for the benefit of his grandchildren who attain twenty-one years.

It seems plain on the scheme of this will, that, for example, should the son marry and die before attaining age twenty-five, his widow and children, if any, would stand in his stead with respect to the income. It does not appear that it was the intention of the testator that all benefit in respect of income to the widow of the son and the son's issue should depend upon the son himself having attained the specified age. It is to be observed that the term of existence of the "income account" in para. 5, as well as the coming into operation of the provision with respect to payment of specific shares of income to the wife and each of the children, depends upon ALL the testator's children reaching the age of twenty-five years, an event which would, in the case put, never happen.

The testator left surviving two children in fact, a son and a daughter, neither of whom has as yet attained the age of twenty-five years. In the existing circumstances, the provisions of para. 5 are the operative provisions, and although the income is under the sole control of the wife, the income is not, in my view, hers absolutely, but is impressed with the obligation, to use no other word, that it

be devoted to the objects provided for in that paragraph. I think, therefore, it cannot be said that the entire income is to be regarded as that of the widow for purposes of *The Income Tax Act*.

While the provisions of this will are not the same as those in question in the will under consideration in *Singer* v. *Singer* (1), it is to be observed that even on the terms of that will, it was held that while the mother had a discretion, she was subject to an obligation. The court approved of the judgment of the Chief Justice of Ontario in the Appellate Division (2), Meredith C.J.O., at 611, said:

> Apart from authority, I should have no doubt as to what the testator meant, or as to what the language he has used to express his wish imports, and that is, that his wife should be entitled during her widowhood to receive the income, subject to an obligation on her part to maintain the children out of it, but leaving to her discretion the manner in and extent to which provisions should be made for any child, a discretion not subject to control or interference by the court so long as it should be exercised in good faith * * *

The learned Chief Justice thus viewed the decision of the Court of Appeal in *Allen* v. *Furnes* (3).

In Allen's case, the gift was to a father for life "for the support and maintenance of himself and children." The defendant had been appointed receiver of the interest of the father, the plaintiff, and although there was no trust constituted in favour of the children, the court would not permit the receiver appointed at the instance of creditors to take the whole, but allocated three-quarters of the income for the support of the children.

In *Re Booth* (4), a similar result was arrived at where the mother had become bankrupt and her trustee in bankruptcy claimed the whole of the income. North J. directed an inquiry as to the amount which should be allocated to the children. Although he proceeded on the basis of trust, the result does not differ in a case of this character whether the case be one of trust or "obligation."

Where, as in the case at bar, income is placed under the control of a wife and mother for the benefit of herself and children, she being under obligation so to apply it, it would appear to be a contradiction in terms to say that

(1) (1916) 52 Can. S.C.R. 447.
(2) 33 O.L.R. 602 at 610 ff.
(3) (1893) 20 A.R. 34.
(4) (1894) 2 Ch. 282.

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her interest is absolute, and yet that, while her discretion will not be interfered with so long as it is being exercised bona fide, the court will interfere where she is not acting properly in the application of the income, or where creditors intervene for the purpose of seizing it. The fact that the court will thus intervene indicates that the obligation in favour of the children fastens upon the *res* itself.

In *Re Coleman* (1), a testator gave his residue to trustees, directing them to apply the income

towards the maintenance, education and advancement of my children in such manner as they shall deem most expedient.

until the youngest should attain twenty-one, with a gift over to the children as his wife should appoint, and in default of appointment, then equally to the children then living.

One of the children had assigned his interest to the plaintiff, and it was held that the latter was entitled to such

moneys or property, if any, as may be paid or delivered, or appropriated for payment or delivery

by the trustees to the assignor. I think equally, in the present case, that the wife, being obligated to apply the income needed for the benefit not only of herself but also for the children, although her discretion is absolute, as was that of the trustees in the case just cited, has an interest limited to that which she appropriates for herself, and the children become entitled to the remainder in the proportions she from time to time determines.

The appellant in the returns filed claimed on the basis of an equal apportionment of the income as between herself and the children. The total amount in question is $3,797.26 and this is in respect of the period from the date of the death of the testator on the 19th of July, 1944, to the end of that year. Although the Minister is always in a position, under s. 41 of the statute, to obtain additional information from the taxpayer, no request was made, and the agreed statement of facts contains a statement that the appellant estimates the minimum annual expense of maintaining the children was $5,000. For the period under

(1) (1898) 39 Ch. 443.

review this is approximately $2,500. When the maintenance of the appellant herself is taken into consideration, the total maintenance for the three approximates the amount of income here in question. This tends to support the basis of allocation upon which the income tax returns were made.

I do not think the failure of the appellant to keep an exact account, in the circumstances here present, affects the matter. It is obvious that the expense of maintaining the two children as well as the widow herself was substantial. The family was living as a unit in the home maintained for them, as the testator directed, and a very substantial part of the account would consist of items apportionable only by dividing into three parts. Special expenditures for the benefit of any one of the objects of the gift of income would, of course, stand on a different footing, but the appellant had other income of her own, and if there were such special expenditures, she was entitled to use her own income for the purpose if she saw fit. Accordingly, I think the appellant has sufficiently met the onus resting upon her.

I would allow the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Porter, Allen & MacKimmie.*

Solicitor for the respondent: *H. W. Riley.*