THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

C. J. G. MOLSON AND THE NATIONAL TRUST COMPANY, LTD., EXECUTORS OF THE ESTATE OF KENNETH MOLSON, DECEASED ..... RESPONDENTS.

1937
*Nov. 18.
*Dec. 1.
1938
*Mar. 18.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Liability for—Transfer of property in 1925 by husband to wife in fulfilment of ante-nuptial marriage contract made in 1913—Assessment of husband for income tax in respect of income received by wife in 1930 from said property—Right to such assessment—Income War Tax Act, 1917 (Dom.), c. 28, as amended—Amending Act, 1926, c. 10, ss. 7, 12—R.S.C., 1927, c. 97 (Income War Tax Act), s. 32—Act respecting the Revised Statutes, 1924, c. 65, and Schedule A to the Commissioners' Roll—Statutes—Construction—Application—Effect of repeal.

By a contract of marriage made in 1913, M. donated $20,000 to his future wife, to be paid at any time he might elect after solemnization of the marriage, in one sum or by instalments or (if accepted by her) by investments in her name. Both parties lived in the province of Quebec. The marriage was solemnized in 1913. On March 23, 1925, M. by deed transferred to his wife certain securities in fulfilment of said obligation (his wife accepting them in full payment and satisfaction thereof); and thereafter all dividends and revenues therefrom were received by her and used as her absolute property. M. died in 1932, and in 1933 his estate was assessed for Dominion income tax in respect of income from said securities since their said transfer in 1925. The right to such assessment was disputed. It was agreed that

*PRESENT:—Duff C.J. and Cannon, Davis, Kerwin and Hudson JJ.

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the question of liability should be determined solely by reference to the assessment for income received in 1930. Angers J. in the Exchequer Court ([1937] Ex. C.R. 55) set aside the assessments. The Minister of National Revenue appealed.

The *Income War Tax Act* (Dom.) was first enacted in 1917 (c. 28). By s. 7 of c. 10, 1926, subs. 4 of s. 4 of the original Act was repealed and new subs. 4 substituted as follows: "* * * (*b*) Where a husband transfers property to his wife, or *vice versa*, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made." S. 12 of the 1926 Act made s. 7 thereof (enacting said substituted subs. 4) applicable "to the year 1925 * * * and to all subsequent years * * * and to the income thereof." In the R.S.C., 1927, c. 97 (*Income War Tax Act*), said subs. 4 (as enacted in 1926) appears as s. 32 (and under the caption—not in the 1926 Act—"Transfers to Evade Taxation"). The R.S.C., 1927, came into effect on February 1, 1928, by proclamation pursuant to "An Act respecting the Revised Statutes of Canada," c. 65, 1924. By force of s. 5 of that Act, and the proclamation thereunder, s. 12 of the 1926 Act stood repealed (on February 1, 1928), and it does not reappear in R.S.C., 1927.

Held: The appeal should be dismissed.

Per Duff C.J., Davis and Hudson JJ.: Sec. 32 of c. 97, R.S.C., 1927, had not the effect of making M. liable to be taxed on the income derived in 1930 from the property transferred by him to his wife in 1925, in the circumstances mentioned, because s. 32, as it stands in the Revised Statutes, can have no application to properties transferred prior to the original enactment of it in 1926. The reproduction (as s. 32 of c. 97) in the R.S.C. of that original enactment of 1926 preserved that original enactment "in unbroken continuity" (passage in *Licence Commissioners of Frontenac* v. *County of Frontenac*, 14 Ont. R. 741, at 745, approved). But s. 12 of the Act of 1926 (making said original enactment applicable to 1925 and subsequent years) stood repealed and disappeared on February 1, 1928, and therefore ceased to have effect, unless its effect was preserved by s. 7 or s. 8 of c. 65, 1924 (Act respecting the Revised Statutes) or s. 19 of the *Interpretation Act* (R.S.C., 1927, c. 1). It could not be said that, on February 1, 1928, within the meaning of any of those last mentioned statutory provisions, any "liability" had been "incurred" by M. to be taxed (or any correlative "right" of the Crown "acquired") under the Act of 1926 in respect of income not derived from the transferred property until 1930—the conditions of any such liability had not come into being (the "liability" preserved by s. 19 of the *Interpretation Act* is not the "abstract" liability imposed by the repealed enactment) (*Hamilton Gell* v. *White*, [1922] 2 K.B. 422, at 431); nor could the transfer of 1925 be relied upon, as a "transaction, matter or thing" anterior to February 1, 1928, within s. 8 (2) of c. 65, 1924, as constituting a liability to be taxed in respect of income derived from the property in 1930; nor, on February 1, 1928, had any right to receive taxes in respect of the income of 1930 "accrued," nor was any such right "accruing," to the Crown.

Per Cannon J.: Under the law of Quebec (arts. 1265, 1257, 778, *C.C.*), the transfer made in 1925, in order to be valid and binding, must necessarily be related and linked to the ante-nuptial contract of 1913; they must form one complete non-severable transaction. In order to

transfer validly the securities to his wife, M. had to act by force of and under the exceptional authority of the contract of 1913, which clearly, under the provisions of the *Income War Tax Act* which originated in 1917, is not governed thereby.

Per Kerwin J.: At the time of the repeal, on February 1, 1928, of s. 12 of c. 10, 1926, no liability to the taxation in question (within the meaning of "liability" in s. 7 (1) of c. 65, 1924) had been incurred, since the only assessment period in question (1930) had not arrived. (*Heston and Isleworth Urban District Council* v. *Grout*, [1897] 2 Ch. 306; *Abbott* v. *The Minister for Lands*, [1895] A.C. 425; *In re The Tithe Act, Roberts* v. *Potts*, [1893] 2 Q.B. 33, at 37; *Starey* v. *Graham*, [1899] 1 Q.B. 406; *Hamilton Gell* v. *White*, [1922] 2 K.B. 422; and principles enunciated in those cases, reviewed). Nor was any such liability "accruing" within the meaning of s. 19 (*c*) of the *Interpretation Act* (R.S.C., 1927, c. 1). Moreover, even if there were such an accruing liability, it is shown by statements in Schedule A to the Commissioners' Roll, provided for in c. 65, 1924 (Act respecting the Revised Statutes) and having statutory force, that the preservation of such accruing liability was inconsistent with the object and intent of said c. 65, 1924, and therefore did not apply (*Interpretation Act*, s. 2).

APPEAL by the Minister of National Revenue from the judgment of Angers J. in the Exchequer Court of Canada (1) allowing the appeal of the Executors of the estate of Kenneth Molson, late of the City of Montreal, in the Province of Quebec, deceased, against certain assessments, affirmed by the Minister of National Revenue, against the said estate under the *Income War Tax Act* (Dom.) for income tax alleged to have been payable in respect of income on certain property which had been transferred by the deceased to his wife in settlement of an obligation under an ante-nuptial contract of marriage.

The ante-nuptial contract of marriage was made in the Province of Quebec (where the parties resided) and was dated March 28, 1913. The marriage was duly solemnized two months later. The deed of transfer (of certain shares of the capital stock of certain corporations) in fulfilment of said contract was dated March 23, 1925. From that date all dividends or revenues from the transferred property were received by Mrs. Molson and used by her as her absolute property.

Mr. Molson died on April 9, 1932, at Montreal, Province of Quebec.

In assessing the deceased's estate for income tax, there was added to the income disclosed in the returns for the

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years 1925 to 1931, both inclusive, the income derived from the property transferred to his wife as aforesaid, and a tax was assessed by notices of assessment dated April 11, 1933. The additional assessment was, on appeal by the executors of the deceased's estate, affirmed by the Minister of National Revenue. In the litigation which ensued, it was agreed that the question of liability to the assessment in question should be determined solely by reference to the assessment for income received in 1930. The disputed assessment was set aside by the said judgment of Angers J. now appealed from.

C. P. Plaxton K.C. and *W. S. Fisher* for the appellant.

Hugh O'Donnell for the respondent.

The judgment of the Chief Justice and Davis and Hudson JJ. was delivered by

THE CHIEF JUSTICE.—The consideration of this appeal is much simplified by the agreement between counsel for the Minister, who appeals, and counsel for the Molson estate that the question of liability is to be determined solely by reference to the assessment for income received in the year 1930; and the question is whether or not, in respect of that assessment for the taxation period 1930, the reciprocal rights of the Crown and the respondent estate are governed by section 12 of chapter 10 of the statutes of Canada of 1926 which came into force on the 15th of June of that year.

By section 7 of the statute, subsection 4 of section 4 of the *Income War Tax Act* (chapter 28 of 1917) was repealed and for that subsection a new subsection was substituted in these terms:

(4) For the purposes of this Act,—

(*a*) Where a person transfers property to his children such person shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made, unless the Minister is satisfied that such transfer was not made for the purpose of evading the taxes imposed under this Act.

(*b*) Where a husband transfers property to his wife, or *vice versa*, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

It is not necessary to consider the subsection thus repealed, since, in the view we take, it has no relevancy to the question before us.

By section 12 of this statute of 1926 (chapter 10), it was provided that section 7, which brought into force the substituted subsection (and, consequently, the substituted subsection itself),

shall apply to the year 1925 or fiscal periods ending therein and to all subsequent years or fiscal periods, and to the income thereof.

The Revised Statutes of Canada of 1927 came into effect on the 1st of February, 1928, in virtue of a proclamation of the Governor in Council made pursuant to section 4 of 14 & 15 Geo. V, chapter 65, entitled "An Act respecting the Revised Statutes of Canada," which was assented to on the 19th of July, 1924. In the Revised Statutes of 1927 the *Income War Tax Act* is chapter 97, and subsection 4 of section 4, chapter 28, Statutes of 1917, as introduced (by way of amendment) into that Act by section 7 of the statute of 1926, appears in chapter 97 as section 32, and under the caption "Transfers to evade taxation." Section 12, however, of this statute of 1926, which made subsection 4 applicable to the year 1925 and subsequent years and to the income thereof, stood repealed (on the date on which the Revised Statutes came into effect, February 1, 1928) by force of section 5 of the statute (of 1924), already mentioned, (the Act respecting the Revised Statutes), and the proclamation thereunder; and that section (s. 12) does not reappear in chapter 97 or elsewhere in the Revised Statutes.

The question before us concerns the effect of this repeal in the circumstances we now proceed to state.

On the 28th of March, 1913, Kenneth Molson, now deceased, entered into a contract of marriage with his future wife, Miss Isabel Graves Meredith. That marriage was duly solemnized two months later. By clause 7 of the contract, he donated the sum of $20,000 to his future wife to be paid in one sum or by instalments or by investments in the name of his said future wife as he might see fit. On the 23rd of March, 1925, Kenneth Molson, by deed executed before a notary, transferred to his wife certain securities therein specified in fulfilment of this obligation under his marriage contract; and these securities were accepted by his wife in full payment and satisfaction of the obligation. It is not disputed that after this transfer all dividends and revenues accruing from the securities were received by Mrs. Molson and used by her as her

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absolute property and that her husband had no interest in them or in the corpus.

Mr. Molson died on the 9th of April, 1932; and by notice of assessment dated April 11th, 1933, the Molson estate was called upon to pay an additional income tax for the period of 1930, amounting to $302, on the ground that the income received by Mrs. Molson from the securities mentioned should have been included in her husband's income for purposes of taxation in virtue of subsection 2 of section 32 of chapter 97 of the Revised Statutes of Canada, 1927, which, as explained above, was originally enacted (by way of amendment) as subsection 4 of section 4 of the *Income War Tax Act* on the 15th of June, 1926.

Since by the law of the Province of Quebec the transfer of 1925 would (in the absence of the antecedent marriage contract of 1913) have been incompetent as between spouses, it is contended on behalf of the respondent estate that this transfer is entirely outside the purview of section 32 of the *Income War Tax Act*. It is also contended, and the learned trial judge has acted upon this contention, that the heading "Transfers to evade taxation," which did not appear in the statute of 1926, but appeared for the first time in the Revised Statutes, manifests an intention that section 32 should have no application except to transfers made with such intent; and that in this case such intent is conclusively negatived by the fact that the transfer was executed pursuant to an ante-nuptial contract.

We do not think it necessary to consider either of these questions. We express no opinion upon them. In our opinion, section 32 of chapter 97 of the Revised Statutes of Canada, 1927, had not the effect of making the late Kenneth Molson liable to be taxed on the income derived in 1930 from the property transferred by him to his wife in 1925, in the circumstances mentioned, because that section, as it stands in the Revised Statutes, can have no application to properties transferred prior to the original enactment of it on the 15th of June, 1926.

The general effect of the Revision of 1927 is accurately stated (*mutatis mutandis*) in the following passage in the judgment of the late Chancellor Boyd in *Licence Com-*

missioners of Frontenac v. *County of Frontenac* (1), in which he discusses the revision of 1886:

> The purpose of the revision was to revise, classify, and consolidate the public general statutes of the Dominion, and the repeal of the old statutes incorporated in the revision was rather for convenience of citation and reference by giving a new starting point than with a view of abrogating the former law. That is manifest from a study of the scope of 49 Vic., ch. 4 (D), respecting the Revised Statutes of Canada. Sec. 5, subsec. 2, provides for the repeal of the Acts mentioned in Schedule A above mentioned. But this repeal is not to affect any matter pending at the time of repeal (sec. 7). By sec. 8 the Revised Statutes are not to be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law in the Acts repealed for which the Revised Statutes are substituted; but if on any point the provisions of the revision are not in effect the same as the earlier Acts, then the revision shall prevail as to all matters subsequent to their taking effect, and as to all prior matters the provisions of the repealed Acts remain in force. See also Interpretation Act, R.S.C., ch. 1, sec. 7 (51). The effect of the revision, though in form repealing the Acts consolidated, is really to preserve them in unbroken continuity.

As regards the enactments reproduced in the Revised Statutes, there is unbroken continuity. As regards enactments repealed by virtue of section 5 of the Act respecting the Revised Statutes (cap. 65 of 1924) and not re-enacted in the Revised Statutes, the effect of the revision is to be ascertained from sections 7 and 8 of this statute of 1924 and from section 19 of the *Interpretation Act.*

In the case before us, subsection 4, as introduced by the statute of 1926, though repealed, was *uno flatu* re-enacted as section 32 of chapter 97 of the Revised Statutes of 1927 and is, therefore, preserved in unbroken continuity; while section 12 of the statute of 1926 is repealed and disappears. Subsection 4 (which has become section 32 of chapter 97 in the Revised Statutes) applies only to the income of property transferred after the day on which it was originally enacted, June 15th, 1926.

The result would appear to be the same, for our present purpose, as if the revision had not taken place (that is to say, as if subsection 4 had not been repealed and re-enacted but had remained in force continuously in form as well as in substance), while section 12 had been repealed on the 1st of February, 1928. It is, as Boyd C. says, "the Acts consolidated" which "are preserved in unbroken continuity." As to enactments repealed and not re-enacted in

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the Revised Statutes, they disappear and cease to have effect except as regards matters in respect of which their effect is preserved by the statutes mentioned: sections 7 and 8 of the statute of 1924 and section 19 of the *Interpretation Act*.

It is argued that, by force of the second subsection of section 8, section 12 of the Statutes of 1926 continues to govern the rights of the Crown and the liability of the taxpayer because, by that subsection,

> as respects all transactions, matters and things anterior to the said time [the 1st of February, 1928], the provisions of the said repealed Acts and parts of Acts shall prevail.

The deed of the year 1925 is said to be a "transaction, matter or thing" within the meaning of this provision. It is further argued that, by force of section 19 (1) (*c*), the liability of the taxpayer is preserved. That section declares:

> 19. Where any Act or enactment is repealed, or where any regulation is revoked, then, unless the contrary intention appears, such repeal or revocation shall not, save as in this section otherwise provided,
>
> * * *
>
> (*c*) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, enactment or regulation so repealed or revoked.

The liability in question in these proceedings is a liability alleged to have arisen in respect of income derived in the taxing period 1930, that is to say, in the year ending December 31st, 1930, from the securities transferred to Mrs. Molson by the deed of 1925.

The first point concerns the contention of the Crown that this was a liability *in esse* on the 1st of February, 1928, when the repeal of section 12 of the Act of 1926 took effect.

We are unable to perceive the existence of any liability in respect of the income in question on that date except in the sense that, if the law remained unrepealed and the conditions of statutory liability came into being, the taxpayer could be called on to pay. We do not think that "liability" in this sense is what is meant. The observations of Atkin L.J. in *Hamilton Gell* v. *White* (1) seem to be apposite:

> It is obvious that that provision was not intended to preserve the abstract rights conferred by the repealed Act, * * * It only applies to the specific rights given to an individual upon the happening of one or

(1) [1922] 2 K.B. 422 at 431.

other of the events specified in the statute. Here the necessary event has happened, because the landlord has, in view of a sale of the property, given the tenant notice to quit. Under those circumstances the tenant has "acquired a right," which would "accrue" when he has quitted his holding, to receive compensation.

So also "liability" in section 19 of the *Interpretation Act* is not the "abstract" liability to taxation under the statute of all persons to whose circumstances the terms and conditions of the statute apply. It would be a distortion of language to say that on the 1st of February, 1928, a liability had been "incurred" by Mr. Molson to be taxed under the statute of 1926 in respect of income not derived from the transferred property until 1930. The like considerations apply to sections 7 and 8 of the Statute of 1924 respecting the Revised Statutes. The only "matter or thing" within section 7 (*f*), and the only "transactions, matters and things" within section 8, that are pertinent at the moment are those which are relied upon as constituting the liability now in question, the liability to be taxed in respect of the income derived during the taxation period 1930 from the property transferred in 1925. It is perfectly true that the transfer of 1925 was a condition *sine qua non* of the liability of Kenneth Molson in respect of any taxing period anterior to the 1st of February, 1928; and it is also true that, as regards income derived from that property prior to that date, he had incurred a liability to taxation, and the Crown had acquired a correlative right (s. 10, cap. 28, *Income War Tax Act, 1917;* s. 55, cap. 97, R.S.C., 1927); but, no such liability was "incurred" (within the meaning of s. 7 (*a*)) and no such correlative right was "acquired" in respect of the income of 1930 before that year.

Nor can it be said that any right to receive taxes in respect of the income of that year was on the 1st of February, 1928, "accruing" to the Crown. It is not suggested that even the income of that year, which is the basis of the assessment, was "accruing" on that date.

Once income was received, the liability to taxation was "incurred" and the right of the Crown was "acquired"; but the right would not strictly accrue before, at least, the day fixed by the statute for the taxpayer's return although, in the meantime, it might very well be said to

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be "accruing." But that could not be affirmed of the right before the income was received.

The appeal will be dismissed with costs.

CANNON J.—The Minister of National Revenue appeals from the judgment of the Honourable Mr. Justice Angers, rendered on the 9th January, 1937, allowing the respondents' appeal from a decision of the appellant affirming an assessment for additional income taxes. The additional taxes assessed against the respondents' estate are in respect of income received between the 23rd March, 1925, and the 31st December, 1931, by Mrs. Isabel Graves Molson on some stocks which she received on or before the 23rd day of March, 1925, and accepted in payment or execution of a donation *inter vivos* of $20,000 which her deceased husband made to her, as his future wife, by their ante-nuptial contract of marriage before Mtre. Charles Delagrave, Notary, at the City of Quebec on the 28th day of March, 1913.

The trial Judge maintained the appeal and found:

1. That the gift of $20,000 made by the deceased to his future wife in the said ante-nuptial contract of marriage was a valid gift under the law of Quebec and was irrevocable;

2. It was made before the *Income War Tax Act* came into force;

3. The delivery of these stocks to Mrs. Molson by the deceased on or before the 23rd day of March, 1925, was in payment and in satisfaction of the obligation he had undertaken in his ante-nuptial contract of marriage, and the acceptance of the said stocks by Mrs. Molson in satisfaction of the said gift was not a "transfer of property" to evade taxation within the meaning of the *Income War Tax Act* of 1917 and amendments thereto.

The clause of the ante-nuptial contract, which was duly registered in the registry office of Montreal West on the 28th day of May, 1913, reads as follows:

Seventh

In view of there being no Community and no Dower and of the love and affection of said future husband for his said future wife, he the said future husband, doth by these presents give and grant by way of donation *inter vivos* and irrevocably unto his said future wife, thereof accepting:

1. The sum of Twenty Thousand Dollars, which the said future husband promises and obliges himself to pay to the said future wife at any time he may elect after the solemnization of said intended marriage, either in one sum or by instalments or by investments or investment in the name of the said future wife, and in such securities as he may see fit. Any investment so made shall operate as payment however, only in so far as the same may be accepted by the future wife, and any payment made by the said future husband to the said future wife on account of the said sum of Twenty Thousand Dollars, or any investment made by the said future husband in the name of the said future wife on account of the said sum of Twenty Thousand Dollars, shall be evidenced by a Declaration to that effect made and signed by the said future husband and the said future wife before a Notary Public and recorded in the office of such Notary. Should the death of the future husband occur before the said sum has been fully paid, the unpaid balance shall become due and exigible at his death, should the said future wife be then living, and it is also further agreed between the parties that should the said future husband during the existence of said intended marriage become Insolvent, without having first paid the sum of Twenty Thousand Dollars, in its entirety, then in such case the said future wife shall have the right to claim and demand the same or any part thereof then unpaid.

To have and to hold the said sum of Twenty Thousand Dollars unto the said future wife as her absolute property, but it is specially stipulated and agreed that in the event of her predeceasing her said future husband without having received payment in full of the said sum, the balance of the said sum of Twenty Thousand Dollars which shall not have been paid by the said future husband to the said future wife during her lifetime shall belong to the child or children issue of the said intended marriage, and in default of such child or children the said unpaid balance of the said sum of Twenty Thousand shall revert to the said future husband or his heirs.

The *Income War Tax Act* was first enacted by chapter 28 of the Statutes of 1917. Subsection 4 of section 4 of said chapter reads as follows:

Transfer of property to evade taxation.

(4) A person who, after the first day of August, 1917, has reduced his income by the transfer or assignment of any real or personal, movable or immovable property, to such person's wife or husband, as the case may be, or to any member of the family of such person, shall, nevertheless, be liable to be taxed as if such transfer or assignment had not been made, unless the Minister is satisfied that such transfer or assignment was not made for the purpose of evading the taxes imposed under this Act or any part thereof.

While this provision was in force, and pursuant to the provisions of the marriage contract, Kenneth Molson appeared before Marchessault, Notary Public, on the 23rd day of March, 1925, and declared that, to fulfill the conditions of the said contract in so far as the sum of $20,000 was concerned, he transferred to his wife, duly accepting, certain shares of capital stock of different corporations

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therein enumerated in full payment and satisfaction of his pre-nuptial donation.

From the date of the execution of the deed of the 23rd of March, 1925, all dividends or revenues accruing from these securities were received by the wife and used as her absolute property, Molson having no interest whatever in said dividends or revenues.

The original subsection 4 of section 4 of c. 28 of the statutes of 1917, concerning transfer of property to evade taxation, was repealed on the 15th June, 1926, by sec. 7 of c. 10 of the statutes of that year, and the following subsection was substituted therefor:

Transfer of property.

(4) For the purposes of this Act,—

(*a*) Where a person transfers property to his children such person shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made, unless the Minister is satisfied that such transfer was not made for the purpose of evading the taxes imposed under this Act.

(*b*) Where a husband transfers property to his wife, or *vice versa*, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

By section 12 of said chapter 10 of 1926, it was provided that section 7 of the said Act:—

shall apply to the year 1925 or fiscal periods ending therein and to all subsequent years or fiscal periods, and to the income thereof.

When the Revised Statutes of Canada of 1927 were brought into force on the 1st February, 1928, the above enactments were consolidated and the statutes repealed and were replaced by the following section 32, where they appear as follows:—

Transfers to Evade Taxation.

Transfer of property.

32. Where a person transfers property to his children such person shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made, unless the Minister is satisfied that such transfer was not made for the purpose of evading the taxes imposed under this Act.

2. Where a husband transfers property to his wife, or *vice versa*, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

Prior to the institution of the appeal, it was agreed between the parties that the decision of the Exchequer Court with reference to the notice of assessment no. 88893

for the taxation period for 1930 shall apply to and include six similar notices of assessment, all bearing date the 11th April, 1933, and covering the other taxation periods included from the 23rd March, 1925, to the 31st December, 1931.

For that period of 1930, we must apply to the above facts parag. 2 of sec. 32, R.S.C., 1927, c. 97, which says:

> Where a husband transfers property to his wife, or *vice versa,* the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

I take it that the "transfer of property" means and contemplates a valid and real transfer. This section, when property is transferred gratuitously between husband and wife or *vice versa,* cannot apply to consorts governed by the Quebec law, because, under section 1265 of the *Civil Code,*

> After marriage, the marriage covenants contained in the contract cannot be altered (even by the donation of usufruct, which is abolished), *nor can the consorts in any other manner confer benefits into vivos upon each other,* except in conformity with the provisions of the law, under which a husband may, subject to certain conditions and restrictions, insure his life for his wife and children.

In order to favour and encourage marriages, article 1257 of the *Code* says:

> All kinds of agreements may be lawfully made in contracts of marriage, even those which, in any other act *inter vivos,* would be void; such as the renunciation of successions which have not yet devolved, the *gift of future property,* the conventional appointment of an heir, and other dispositions in contemplation of death.

Article 778 reads as follows:

> Present property only can be given by acts *inter vivos.* All gifts of future property by such acts are void, as made in contemplation of death. Gifts comprising both present and future property are void as to the latter, but the cumulation does not render void the gift of the present property.
>
> The prohibition contained in this article does not extend to gifts made in a contract of marriage.

Both litigants have considered the transfer as valid and binding on the parties. It appears from the above quotations that, in order to be valid and binding, the transfer made in 1925 must necessarily be related and linked to the ante-nuptial contract of March, 1913, whereby was created the obligation and indebtedness of the future husband to his future wife, and the deed of conveyance of the 28th March, 1925, which evidences the payments, satisfaction and discharge of this pre-nuptial obligation cannot be con-

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sidered apart from the other, as they must, to be valid and legal under the law of Quebec, form but one complete non-severable transaction. The legislation which is now sought to be applied originated in 1917, years after the ante-nuptial contract; and subsection 4 of section 4 of 7 & 8 Geo. V, c. 28, applied only to a person who, "after the first day of August, 1917, has reduced his income" by the transfer of any movable or immovable property to such person's wife or husband, as the case may be, if the Minister was satisfied that such transfer or assignment was made for the purpose of evading the taxes imposed under the Act.

In order to transfer validly the securities to his wife, Molson had to act by force and under the exceptional authority of the deed of 1913, which clearly is not governed by the provisions of the Act of 1917 and amendments thereto.

I would, therefore, dismiss the appeal with costs.

KERWIN J.—On March 28th, 1913, Kenneth Molson and his future wife, Isabel Graves Meredith, entered into an ante-nuptial contract by which Mr. Molson "doth by these presents give and grant by way of donation *inter vivos* and irrevocably unto his said future wife, thereof accepting," the sum of twenty thousand dollars, which the future husband promised and obliged himself to pay to the future wife at any time he might elect after the solemnization of the intended marriage, either in one sum or by instalments, or by investments or investment in the name of the future wife, and in such securities as he might see fit. Any investment was to operate as payment only in so far as the same might be accepted by his future wife.

Some time after the marriage of these parties, viz., on March 23rd, 1925, certain securities of a total market value of approximately twenty thousand dollars were transferred by deed of conveyance by Mr. Molson to his wife. He had previously included the income on these investments in his income tax returns but after the transfer made no further reference to it. Mr. Molson died on April 9th, 1932, and in April, 1933, assessments for income were made against the executors of his estate, including therein as income of the deceased the income from the securities transferred by

him to his wife by the conveyance of March 23, 1925. One assessment notice stated that, under the provisions of the *Income War Tax Act* and amendments, notice was given that for the 1930 taxation period the amount of tax assessed and levied upon Mr. Molson's income for that period was as indicated. There was a similar notice with reference to each of the other taxation periods of 1925 to 1931 inclusive.

Believing that the estate was not subject to taxation in respect of the income from the securities, the executors appealed to the Minister of National Revenue, and, upon the latter affirming the assessments, required their appeal to be set down for trial by the Exchequer Court. It is alleged in the statement of claim, which deals only with the assessment for the year 1930, and admitted in the statement of defence, that the parties had agreed that the decision of the court with reference to that assessment would apply to the assessments for the other years. The appeal was allowed, the assessments set aside, and the Minister now appeals to this court. In accordance with the agreement *inter partes*, we confine our consideration of respondents' liability to the year 1930.

That question depends upon the construction of several statutory enactments. At the time the notice of assessment was given, subsection 2 of section 32 of a consolidating statute, the *Income War Tax Act*, R.S.C., 1927, chap. 97, provided:—

> 2. Where a husband transfers property to his wife, or *vice versa*, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

The Revised Statutes of 1927 were brought into force on February 1st, 1928, by proclamation of the Governor General in Council, and as the transfer of securities occurred before that date it is apparent that the income on the securities would not be taxable by this subsection. However, chapter 65 of the 1924 Statutes intituled "An Act respecting the Revised Statutes of Canada" (hereinafter referred to as the Revised Statutes Act),—after providing by section 5 that from and after the date of the coming into force of the Revised Statutes the enactments in schedule A to the Roll of the Commissioners appointed to revise the statutes should stand and be re-

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pealed to the extent mentioned in the third column of schedule A,—further provided by subsection 1 of section 7:—

> The repeal of the said Acts and parts of Acts shall not defeat, disturb, invalidate nor affect any * * * liability * * * incurred before the time of such repeal;

and by subsection 2 thereof, that every such liability

> may and shall remain and continue as if no such repeal had taken place, and, so far as necessary, may and shall be continued, prosecuted, enforced and proceeded with under the said Revised Statutes, and other the statutes and laws having force in Canada, and subject to the provisions of the said several statutes and laws, as if no such repeal had taken place.

Fortified with this enactment, the appellant accordingly rests his claim upon the provisions of subsection 4 of section 4 of the *Income War Tax Act* as enacted by section 7 of chapter 10 of the 1926 statutes and upon section 12 of the last mentioned Act. So far as material, subsection 4 of section 4 as so enacted is as follows:—

> (4) For the purposes of this Act,—
>
> (*b*) Where a husband transfers property to his wife, or *vice versa*, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

Section 12 of the 1926 Act provides that section 7 thereof

> shall apply to the year 1925 or fiscal periods ending therein and to all subsequent years or fiscal periods, and to the income thereof.

The contention of the appellant is that these sections, 7 and 12, by their terms embrace the transfer of March 23rd, 1925, and that a liability to taxation had been incurred within the meaning of section 7 of the Revised Statutes Act which was preserved by its provisions.

This argument requires the consideration of other matters. Schedule A to the Commissioners' Roll already mentioned appears at the end of Volume IV of the Revised Statutes of 1927, and under the heading "1926" in the three columns headed respectively "Chap.", "Title of Act" and "Extent of Repeal," appear the following:—

10.	An Act to amend The Income War Tax Act, 1917.	The whole, except s. 2, the first sentence of par. (*f*) of s. 3, the last eighteen words of ss. 11 of s. 3, and s. 6.

By force of subsection 2 of section 5 of the Revised Statutes Act, both section 7 and section 12 of chapter 10

of the 1926 Act stand repealed. While not having similar statutory force, Appendix 1, printed at the commencement of Volume V of the Revised Statutes of 1927, contains a table of Acts of R.S.C., 1906, and Acts passed thereafter, showing how each has been dealt with; and at page 50 under the year 1926, with reference to chapter 10 under the heading "Disposal," is the following:—

Consolidated, except s. 2, the first sentence of para. (*f*) of s. 3 "10," the last eighteen words of s. 3, "11," not repealed nor consolidated; s. 4, "(1A) (*c*)," repealed 1927, c. 31, s. 3; ss. 2 of s. 4, spent; s. 6, not repealed nor consolidated; s. 12, spent.

From this it is evident that, in the opinion of the Commissioners, the effect of section 12 of the 1926 Act was exhausted.

The first point to be determined is as to whether, at the time of the coming into force of the Revised Statutes of 1927, any liability had been incurred within the meaning of section 7 of the Act respecting the Revised Statutes. I know of no decision in our own courts in which the meaning of these words as so used has been determined, but in *Heston and Isleworth Urban District Council* v. *Grout* (1) the Court of Appeal in England dealt with the effect of an identical expression as used in paragraph (*c*) of subsection 2 of section 38 of the 1889 *Interpretation Act*. The decision there was that a certain statute of 1892 did not affect the validity or effect of a notice given by the plaintiff, while section 150 of the *Public Health Act*, 1875, was in force in the district, although after the adoption of the 1892 Act no fresh notice could be given under section 150; and that, if there would otherwise have been any doubt on the point, it was removed by section 38, subsection 2, of the 1889 *Interpretation Act*, which saves everything duly done, etc., and every right, obligation or liability acquired, accrued, or incurred under it before the repeal, etc., and that the subsequent proceedings of the local authority under the notice were sufficient. North, J., before whom the matter came in the first instance, states at page 309:—

the matter stands in this way—proceedings had been taken long before the adoption of the Act under s. 150 of the Act of 1875; those proceedings were in active progress at the time when the Act was adopted.

In the Court of Appeal, Lindley, L.J., with whom Lopes, L.J., and Rigby, L.J., agreed, was of opinion that the

(1) [1897] 2 Ch. 306.

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plaintiffs were entitled to succeed without the aid of the *Interpretation Act*. He thought, however, that that Act applied,—referring as well to clause (*b*) as to clause (*c*) of subsection 2 of section 38. As this subsection has already been mentioned and will be referred to again, it is, perhaps, advisable to reproduce it so far as material:—

(2) Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not * * *

(*b*) affect the previous operation of any enactment so repealed, or anything duly done or suffered under any enactment so repealed; or

(*c*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed.

The position here is quite different. At the time of the repeal, by the Revised Statutes (February 1st, 1928), of the only enactments by virtue of which it is suggested the respondents could possibly be assessed for the income on the transferred securities, no liability to taxation had been incurred, since the only assessment period in question had not arrived. This proposition appears so obvious that no authority would, I apprehend, be required to substantiate it. *Saunders* v. *Newbold* (1), cited by Mr. Plaxton, does not assist the appellant. At page 277 of the report appears a discussion of the meaning of the word "liable" in a section of a statute which provided:—

Any court * * * may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent.

The legislation there referred to is so different in form and intent that no analogy exists between it and the section at present under review.

The expression "right accrued" or "right acquired" in paragraph (*c*) of subsection 2 of section 38 of the English *Interpretation Act* has been considered in several cases, some of which are reviewed in *Hosie* v. *County Council of Kildare and Athy* (2). Although decided on the provisions of a special statute, *Abbott* v. *The Minister for Lands* (3) is cited in this connection as the leading authority. There, a statute repealing an earlier one contained the following saving proviso:—

Provided always that notwithstanding such repeal—

(*b*) All rights accrued and obligations incurred or imposed under or by virtue of any of the said repealed enactments shall subject to any

(1) [1905] 1 Ch. 260. (2) [1928] Ir. R. 47.
(3) [1895] A.C. 425.

express provisions of this Act in relation thereto remain unaffected by such repeal.

It was held that the mere right, existing at the date of the repealing statute, to take advantage of the provisions repealed was not a "right accrued."

In *In re The Tithe Act, 1891, Roberts* v. *Potts* (1), it is stated, at page 37, that the court doubted whether the general provisions of the *Interpretation Act* could, consistently with the context of the Act of 1891, be read into it so as to override the special provisions therein contained, but that even if the *Interpretation Act* was to be taken as modifying the Act of 1891, the provisions of the former would not seem to cover the case. The judgment continues:—

> In the present case, until the notices were given or some steps taken to enforce payment of the rates by the occupiers, there could not be even an inchoate right on the part of the occupiers to deduct the rates they had not paid from payments due to the landlord or to anyone else. As no notice was given nor steps taken to demand the rates from the occupiers until long after the passing of the Act of 1891, there were no existing rights to be preserved by the saving clause in the *Interpretation Act*.

Starey v. *Graham* (2) decided that a patent agent who had been *bona fide* in practice prior to the passing of the *Patents, Designs, and Trade-Marks Act,* 1888, and who was consequently entitled under section 1, subsection 3, of that Act to be registered as a patent agent, must pay before registration the fee prescribed by The Register of Patents Agents Rules, 1889; and that the right which a person had prior to the passing of the 1888 Act, to practise as a patent agent and describe himself as such, was not a "right acquired" which was saved from the operation of the Act by section 27 thereof which provided:—

> Nothing in this Act shall affect the validity of any act done, right acquired or liability incurred before the commencement of this Act.

In *Hamilton Gell* v. *White* (3), the landlord of an agricultural holding, being desirous of selling, had given his tenant notice to quit. By an Act of 1914, when a tenancy was determined by a notice to quit, given in view of a sale, the notice was treated as an unreasonable disturbance within an Act of 1908, and the tenant was entitled to compensation upon the terms and subject to the conditions of that Act. One of the conditions of the tenant's right

(1) [1893] 2 Q.B. 33. (2) [1899] 1 Q.B. 406.
(3) [1922] 2 K.B. 422.

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to compensation thereunder was that he should within two months after the receipt of the notice to quit give the landlord notice of his intention to claim compensation; and another condition was that he should make his claim for compensation within three months after quitting the holding. The tenant duly gave notice of his intention to claim compensation, but before the tenancy had expired and, therefore, before he could satisfy the second condition, the relevant provisions of the 1908 Act were repealed. He subsequently made his claim within the three months limited thereby and it was held that notwithstanding the repeal he was entitled to claim compensation under section 38 of the *Interpretation Act* because, as soon as the landlord had given the tenant notice, the latter "acquired a right" to compensation for disturbance, subject to his satisfying the conditions of the repealed provisions. In the Court of Appeal, Lord Justice Bankes distinguished *Abbott* v. *The Minister for Lands* (1), pointing out that there the tenant's right depended upon some act of his own, while in the *Gell* case (2) it depended upon the act of the landlord. Lord Justice Scrutton stated that, as soon as the tenant had given notice of his intention to claim compensation, he was entitled to have that claim investigated by an arbitrator, although in the course of the arbitration he would have to prove that that right in fact existed, i.e., that the notice to quit was given in view of a sale. Lord Justice Atkin stated that section 38 of the *Interpretation Act* was not intended to preserve the abstract rights conferred by the repealed Act but that it applied only to the specific rights given to an individual upon the happening of one or other of the events specified in the statute; that the necessary event had happened and, therefore, the tenant had acquired a right, which would accrue when he had quitted his holding, to receive compensation. He referred to the *Abbott* case (3), pointing out that the Privy Council there determined that

> the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed to be a "right accrued" within the meaning of the enactment.

(1) [1895] A.C. 425. (2) [1922] 2 K.B. 422.
(3) [1895] A.C. 425.

None of these decisions is precisely in point but a review of the principles enunciated in them rather strengthens than otherwise the conclusion at which I have arrived that no liability to taxation had been incurred.

In view of the statement in section 13 of the Revised Statutes Act that

> This Act * * * shall be subject to the same rules of construction as the said Revised Statutes,

reliance was also placed on section 19 of the *Interpretation Act*, R.S.C., 1927, chapter 1, by which the repeal of any Act shall not

> (c) affect any * * * liability * * * accruing * * * under the Act * * * so repealed.

In my opinion no liability was accruing. Not merely had the time for Mr. Molson to make a return not arrived nor the time for the Government officials to make an assessment, but the value of the securities might depreciate or vanish before 1930. The remarks of Lord Tomlin, speaking for the Judicial Committee, in *Dominion Building Corporation Limited* v. *The King* (1), are, I think, apposite. After referring, at page 549, to the provisions of the Ontario *Interpretation Act*, R.S.O., 1927, c. 1, s. 10, whereby it was provided that no Act should affect the rights of His Majesty, his heirs or successors, unless it was expressly stated therein that His Majesty should be bound thereby, his Lordship declared that the expression "the rights of His Majesty" in the context meant the accrued rights, and did not cover mere possibilities, such as rights which, but for the alterations made in the general law by the enactment under consideration, might have thereafter accrued to His Majesty under some future contract.

There is another obstacle in the way of applying section 19 of the *Interpretation Act* to the case at Bar. By section 2 of the same statute section 19, in common with the other provisions of the Act, extends and applies to the Revised Statutes Act "except in so far as any such provision (1) is inconsistent with the intent or object of such Act." It appears to me that, even if there were an accruing liability, the object and intent of the Revised Statutes Act are inconsistent with a determination that the statute meant to preserve it. And for this reason. Section 3 of chapter 10 of the 1926 Act, amending the *Income War*

(1) [1933] A.C. 533.

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Tax Act by adding subsection 10 and other subsections to section 3 of the main Act, dealt with what were known as "personal corporations," and the first sentence of paragraph (*f*) of that section provides:

> This subsection shall be applicable to income of the year 1925 and fiscal periods ending therein and to each year or period thereafter.

This sentence is not repealed according to the note under "extent of repeal," which statement, as has already been shown, has the sanction of Parliament. Applying the maxim *expressio unius est exclusio alterius,* the conclusion seems inescapable that it was not the intention of Parliament to preserve the suggested accruing liability.

For these reasons, I am of opinion that the respondents are not liable to assessment on the specified income for the year 1930, and by reason of the consent between the litigants the same result follows with respect to the income for the other years. In this view of appeal, it is unnecessary to deal with the other points mentioned in the argument.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. S. Fisher.*

Solicitors for the respondents: *Magee, Nicholson & O'Donnell.*