TRIBUTE RESOURCES INC.

BOOK OF AUTHORITIES

November 2, 2015

Application to Determine Whether Certain Pipelines are Transmission Pipelines

EB-2015-0206

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act,* S.O. 1998, C.15, Schedule B, and in particular Section 21(2) thereof;

AND IN THE MATTER OF the *Assessment Act,* R.S.O. 1990, c.A31, and in particular Section 25(3) thereof;

AND IN THE MATTER OF an Application by Tribute Resources Inc. for an Order determining whether or not the natural gas pipelines owned and operated by Tribute Resources Inc. in Norfolk County, the Municipality of Bayham and the Township of Malahide are gas transmission pipelines.

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EB-2015-0206

Assessment Act – please refer to Tab A in the OEB Staff Submission dated October 20, 2015

Tab A

EB-2015-0206

Indexed as:

Ontario Natural Gas Storage, and Pipe Line Storage, and Pipe Line Ltd. v. Dawn (Township)

Between
Ontario Natural Gas Storage, and Pipe Line Storage, and Pipe Line, Limited, plaintiff, and
The Corporation of the Township of Dawn, defendant

[1960] O.J. No. 290

Ontario Supreme Court - High Court of Justice

McLennan J.

September 7, 1960.

(9 pp.)

Counsel:

Frank R. Gee and K.E. Hansen, for the plaintiffs.
J.G. Cullen, for the defendant.

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1 **McLENNAN J.**:-- This is an action for a declaration that certain equipment owned by the plaintiff is not assessable for business tax and for an injunction restraining the defendant from levying taxes on assessments made with respect to that equipment.

2 The plaintiff is a company engaged in the business of buying, storing and selling natural gas. It buys gas produced in Western Canada and in the United States, taking delivery of the former gas in Trafalgar Township and of the latter at Detroit or Windsor. The gas is then pumped through the plaintiff's pipe lines to a five acre site in the defendant Municipality called the Dawn Station where there is considerable plant and equipment and from there the gas is stored under pressure in what were once producing gas wells. From these storage wells, gas is shipped to gas distributing companies and chiefly to the plaintiff's parent company the Union Gas Company of Canada

Limited. The plaintiff also sells direct to Municipalities such as the City of Sarnia, Kitchener and Stratford. To carry on its business the plaintiff company has about 25 miles of pipe line within the defendant Municipality.

3 In the year 1959, the defendant assessed for taxation in 1960, 140,000 feet of pipe of various diameters belonging to the plaintiff and being within the defendant Municipality. This assessment was made under s. 37a of The Assessment Act as enacted in 1957 by the Statutes of Ontario Ch. 2 s. 7. In the same year 1959, the defendant assessed for business tax the equipment at the plaintiff's Dawn Station comprising valves, compressors, a header site, fin fan units, meters, recorders and gauges as described in paragraph 2 of the Statement of Claim.

4 It is alleged by the plaintiff that this equipment is part of a pipe line within the meaning of s. 37a and because the terms of ss. 11 of that section provide that a pipe line shall not be assessable for municipal purposes otherwise than as provided by that section, then the assessment of the equipment for business tax purposes is invalid.

5 The method of assessment of a pipe line is set out in ss. (5) where it is provided that a pipe line shall be assessed at rates based upon a set value per foot varying according to the diameter of the pipe.

6 The following are the provisions of s. 37a of The Assessment Act which contain the answers to the claim made by the plaintiff.

> "37a. (1)In this section,
> (a) 'gas' means gas as defined in The Ontario Fuel Board Act, 1954;
> (b) 'oil' means crude oil or liquid hydrocarbons or any product or by-product thereof;
> (c) 'pipe line' means a pipe line for the transportation or transmission of gas that is designated by the Ontario Fuel Board as a transmission pipe line and a pipe line for the transportation or transmission of oil, and includes,
>
> (i) all valves, regulators, couplings, cathodic protection apparatus, protective coatings, casing curbboxes, meters, and all incidental fastenings, attachments, appliances, apparatus and appurtenances,
> (ii) all haulage, labour, engineering and overheads in respect of such pipe line,
> (iii) any section, part or branch of any pipe line,
> (iv) any easement or right-of-way used by a pipe line company, and
> (v) any franchise or franchise right,

but does not include a pipe line or lines situate wholly within an oil refinery, oil storage depot, oil bulk plant or oil pipe line terminal;

(d) 'pipe line company' means every person, firm, partnership, association or corporation owning or operating a pipe line all or any part of which is situate in Ontario.

2. The Ontario Fuel Board shall designate as transmission pipe lines all gas pipe lines in Ontario that in its opinion are transmission pipe lines.

...

4. All disputes as to whether or not a gas pipe line is a transmission pipe line shall, on the application of any interested party, be decided by the Ontario Fuel Board and its decision shall be final."

Pipe lines dealt with by the section are of two kinds, pipe lines for gas and pipe lines for oil. Each kind is defined according to purpose, namely, the transportation or transmission of the product, and also as including certain things which are perhaps usually not considered part of a pipe line. But for a pipe line which carries gas to fall within the section it must in addition to its purpose as described in the section be designated as a gas transmission line by the Ontario Fuel Board. That Board is bound to designate as a pipe line what it considers to be such, ss. (2), and in the event of a dispute as to what is a gas transmission line, the decision of the Board is final when an application is made to it by any interested party. In my opinion it is quite clear that no pipe line carrying gas is a pipe line within the meaning of that section unless so designated by the Board and therefore the question in this case is what has the Board designated as pipe line and does that designation include either expressly or by operation of ss. (1)(c)(i), the equipment described in the Statement of Claim.

7 The only evidence of what the Board has designated as pipe lines of the plaintiff is approximately 140,000 feet of pipe of various diameters as shown in Exhibit 9. Neither in that designation or in the evidence is it stated that such footage is all the pipe line used by the plaintiff for transporting or transmitting gas within the Municipality. Whether the piping within the Dawn Station is included in the designation does not appear in the evidence. At the conclusion of the trial, I requested counsel to furnish me with information as to whether the piping within the five acre Dawn Station was included in the footage supplied to the assessor by the Fuel Board, provided such information could be supplied by agreement. The counsel agreed to furnish this information or whatever information they had and I subsequently received a letter dated July 6th, 1960, which was not responsive to the question and it may well be that neither the plaintiff, the defendant or the Fuel Board know the answer. So far as the evidence discloses the Fuel Board may have excluded from

their designation the pipe within the limits of the Dawn Station. If they did it would be difficult, if not impossible, to say that the equipment attached to the excluded pipe line fell within the definition subsections of the section. It is therefore my opinion that the plaintiff has not proved sufficient facts to show that the equipment in question falls within the definition of the gas pipe line in s. 37a and the action must be dismissed with costs.

McLENNAN J.

qp/s/cbk/emm

Tab B

EB-2015-0206

Indexed as:

Kemp v. Toronto (City)

Kemp v.
City of Toronto
National Trust Co. Ltd. v.
City of Toronto
Kilmer v.
City of Toronto

[1930] O.J. No. 129

65 O.L.R. 423

[1930] 4 D.L.R. 91

Ontario Supreme Court - Appellate Division

Latchford C.J., Masten, Orde and Fisher JJ.A.

May 9, 1930.

(116 paras)

Assessment and Taxes -- Income Tax -- Assessment in 1929 in Respect of Income Received in 1928 -- Death before Completion of Roll of Person Receiving Income -- Assessment of Personal Representatives -- Assessment Act, sec. 24(1)(i).

K., a resident of the city of T., died on the 12th August, 1929. In 1928 he had made a return to the assessment commissioner of the city of his income received in the year ending on the 31st December, 1927. He was assessed on that return in 1928, and paid the income tax due in respect thereof in 1929. On the 8th February, 1929, he made a return of the income received by him for the year ending on the 31st December, 1928, and an assessment of $386,120 was made in respect of that Income. The assessment commissioner, learning of the death of K., entered upon the assessment roll, as permitted by sec. 24 (1)(i) of the Assessment Act, R.S.O. 1927, ch. 238, instead of the name of the deceased, the words "Representatives of K., deceased;" and the executors of K., to whom probate of his will had been granted on the 18th October, 1929, were assessed for $365,120 in respect of income:

Held (FISHER, J.A., dissenting), that the executors were not assessable in respect of an income which they had not received-the income was received in 1928 by K. himself, whose death before the completion of the roll made impossible his assessment in 1929 for the 1928 income.

Provisions of the Assessment Act, R.S.O. 1927, ch. 238, of the amending Act of 1929, 19 Geo. V. ch. 63, sec 1, and of the Municipal Act, R.S.O. 1927, ch. 233, considered.

Re Baskerville and City of Ottawa (21st January, 1929), unreported decision of the Appellate Division, distinguished.

Sifton v. City of Toronto, [1929] S.C.R. 484, applied.

(The same conclusion was reached in two other assessment appeals).

Counsel:

D.W. Saunders, K.C., and D.M. Fleming, for the Kemp executors, appellants.
A.J. Thomson, K.C., for the National Trust Company, representing the Wilder estate, appellants.
H.H. Davis, K.C., for the Kilmer executors, appellants.
G.R. Geary, K.C., and F.A.A. Campbell, for the Corporation of the City of Toronto, respondent.

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1 APPEALS by the executors of Sir Albert Edward Kemp, deceased, by the executors of William Edward Wilder, deceased, and by the executors of George H. Kilmer, deceased, upon special cases stated by the Senior Judge of the 'County Court of the County of York, from his orders affirming the assessments of the appellants in respect of income.

2 In all three cases the same question was in effect stated. The question submitted in the Hemp case was as follows:

> "Was I right in holding that under the provisions of the Assessment Act and the amendments thereto the representatives of the late Sir Edward Kemp (being the executors under his will) were properly placed upon the assessment roll of the City of Toronto and assessed in the year 1929 in respect of the income received by the testator in the year 1928?"

3 January 29 and 30. The appeals were heard by LATCHFORD, C.J., MASTEN, ORDE, and FISHER, JJ.A.

4 D.W. Saunders, K.C., and D.M. Fleming, for the Kemp executors, appellants, argued that there is nothing in the Assessment Act which empowers the municipal authorities to assess the appellants

in 1929 in respect of income received by the testator in 1928. Under the law as it was prior to the passing of the Assessment Amendment Act, 1929 (19 Geo. V. ch. 63), the income tax paid by the deceased in 1928 was upon this income for that year; and his executors could not now be assessed in respect of the same income for 1929. The personal representatives of a deceased person are liable to be assessed in respect of income only in cases where the persons beneficially entitled to the income are resident out of Ontario, or where the income is directed to be accumulated and is not presently distributable, and neither of these conditions appeared here. If the relevant statutes and by-laws authorised the assessment in 1929 of the executors of the deceased for income received by him in 1928, it would be indirect taxation, and therefore ultra vires. The Baskerville case, which was relied upon by the learned County Court Judge, is distinguishable, and in any event the sections of the Assessment Act under consideration in that case have since been amended or repealed by the Assessment Amendment Act, 1929 (19 Geo. V. ch. 63). The assessment and taxation on income can only be enforced against the very person who receives the income. There must be the conjunction of a living person residing in the municipality and the receipt of the income by such parson. The word "person" in sec. 10(1) (a) of the Assessment Act cannot be enlarged by the general definition of the word in the interpretation clause, sec. 1(l). Reference to Re Donald Mason & Co. (1927), 61 O.L.R. 350; Re Gibson and City of Hamilton (1919), 45 O.L.R. 458; Sifton v. City of Toronto, [1929] S.C.R. 484, at pp. 486 and 488. A taxing statute must be strictly construed: Section 4 of the Assessment Act does not affect the appellants: McLeod v. City of Windsor, [1923] S.C.R. 696. Section 10 shews what is really taxed. Section 4 is not the taxing clause, but only a declaration of property liable to taxation. The two sections have to be read together. Income cannot be "derived" by executors.

5 A.J. Thomson, K.C., for the National Trust Company, representing the Wilder estate, appellants, stated the particular facts of the Wilder case, adopted and relied upon the argument of counsel for the Kemp appellants, and further contended that "person" meant "natural person," and did not include representatives. In dealing with income tax matters, special Sections deal with personal representatives. It is fair to assume that the general word "person" in other sections does not include such persons. Section 24, subsec. (1), para. (i), is merely intended to cover the case of a man who has died and no personal representative has been appointed, or the case of the personal representative not being known. As to sec. 98, subsec. 3, at the moment of the assessment there had to be some one in existence against whom the assessment could properly be made.

6 H.H. Davis, K.C., for the Kilmer executors, appellants, stated the particular facts of the Kilmer case, and adopted and relied upon the argument of counsel for the Kemp appellants. Both Sir Edward Kemp and Mr. Wilder had died in 1929. Mr. Kilmer died in 1928, and, income tax having been paid in 1929, the city sought to assess in 1929, for the purpose of levying in 1930 on income received by the late Mr. Kilmer in his lifetime in 1928. To impose an income tax on executors by virtue of the definition of "person" in sec. 1 (l) of the Assessment Act, as including legal representatives, overlooks the fact that the liability of executors for income tax is expressly decreed by the amendment of 1929, 19 Geo. V. ch. 63, sec. 2 (4). To impose income tax as here sought would be indirect taxation and would be in the teeth of sec. 98 of the Act, and the law as laid down

in McLeod v. City of Windsor, [1923] S.C.R. 696, at pp. 709 and 712.

7 G.R. Geary, K.C., and F.A.A. Campbell, for the Corporation of the City of Toronto, respondent, contended that assessment and taxation are different things, and that the question before the Court was one of assessment. The word "person" in sec. 10, subsec. 1(a), of the Act includes executors. See para. (1) of sec. 1. The Baskerville case (unreported), a decision of this Court, is on all fours with this case, and the learned County Court Judge was right in founding his judgment upon the decision in that case. The income which the city corporation seeks to assess was received by the deceased in his lifetime, was "derived" by him, and the city corporation rightly assessed him through his representatives. This (being income not received by a representative, but by the testator, we are entitled to assess it. We are not taxing the representative in respect of income he received for a beneficiary or otherwise. We are assessing income received by the deceased in his lifetime, derived by him. We are assessing income in the hands of Sir Edward Kemp, derived by him, end assessing Sir Edward Kemp's executors, that is Sir Edward Kemp continuing in his executors. Reference to Re Palmer and City of Toronto (1924), 26 O.W.N. 84; City of Ottawa v. Nantel (1921), 51 O.L.R. 269; Re Bayack (1929), 64 O.L.R. 14, at pp. 16 and 22; Attorney-General of British Columbia v. Ostrum, [1904] A.C. 144; City of Halifax v. Fairbanks' Estate, [1928] A.C. 117; City of Windsor v. McLeod, [1926] S.C.R. 450; Rattenbury v. Land Settlement Board, [1929] S.C.R. 52.

8 May 9. MASTEN J.A. (dealing with the Kemp case):-- This is an appeal on a special case stated by his Honour Judge Denton, Senior Judge of the County Court of the County of York, on the 7th December, 1929, pursuant to the provisions of the Assessment Act respecting appeals to a Divisional Court.

9 The question submitted by the learned County Court Judge is as follows:

> "Was I right in holding that under the provisions of the Assessment Act and the amendments thereto the representatives of the late Sir Edward Kemp (being the executors under his will) were properly placed upon the assessment roll of the City of Toronto and assessed in the year 1929 in respect of the income received by the testator in the year 1928?"

10 The facts as they appear in the special case submitted are as follows:-

> "Sir Albert Edward Kemp, a resident of the City of Toronto, died on the 12th August, 1929. Probate of his will was granted on the 18th October, 1929, to the National Trust Company Limited, Virginia Kemp, and Arthur B. Colville, the executors named in the said will.
>
> "In the year 1928 he had made a return to the assessment commissioner of the City of Toronto of his income received in the year ending on the 31st

December, 1927. He was assessed on that return in 1928, and paid the income tax due in respect thereof in 1929.

"On the 8th February, 1929, Sir Albert Edward Kemp made a return to the assessment commissioner of the income received by him for the year ending on the 31st December, 1928, and an assessment was made for that income of $365,120.

"The assessment commissioner of the City of Toronto, learning of the death of Sir Albert Edward Kemp, as permitted by the provisions of the Assessment Act, R.S.O. 1927, ch. 238, sec. 24(1)(i), entered upon the assessment roll, instead of the name of the deceased, the words 'Representatives of Sir Albert E. Kemp, deceased,' and the amount of the income for which they were assessed was $365,120.

"The executors, the above-named appellants, served a notice of appeal from such assessment to the Court of Revision, the following being the grounds of appeal as endorsed upon the assessment notice:-

"'Sir Edward Kemp, within named, died on the 12th August, 1929, and there is no provision in the Assessment Act for assessing him, his representatives, or his estate. The assessment had not been made at the time of his death. In any event the amount of the assessment is excessive.'

"The appeal came to be heard before the Commissioner of D the Court of Revision on the 23rd October, 1929. The Commissioner reserved judgment, and on the 24th October, 1929, gave judgment dismissing the appeal.

"The appellants then appealed to the Judge of the County Court of the County of York from the decision of the Court of Revision, and the appeal came on for hearing before me on the 25th November, 1929. The amount of the assessment was not in dispute before me."

11 The learned County Court Judge also makes his reasons for judgment a part of the special case submitted.

12 The facts are not in dispute, and the question to be determined on the appeal depends on the

construction of certain provisions of the Municipal Act, R.S.O. 1927, ch. 233, and of the Assessment Act, R.S.O. 1927, ch. 238.

13 For convenience of reference and also in order that the relevant statutory provisions may conveniently be read together and viewed as a whole, I attach to this judgment a schedule containing copies of all the somewhat numerous sections of these Acts which are alleged to bear on the questions here involved.

14 In considering the question presented for determination on this appeal, it is important to bear in mind that it relates to the preparation and settlement in 1929 of an assessment roll which is to form the basis for consideration by the Council of Toronto when in 1930 it proceeds to enact a by-law adopting the roll prepared in 1929 and assessing and levying on the ratable property set forth in the assessment roll of 1929 the municipal taxes for 1930; further, that the proposed assessment roll here under consideration was completed and returned by the assessor after the 12th August, the data of Sir Edward's death; to that at the time of his death the roll in question did not exist; also that no question arises with respect to the payment by Sir Edward of his income tax for the year 1929. It is presumed to have been paid.

15 Before discussing in detail the questions arising on this appeal, I desire to refer to two general rules or principles which I think apply and govern the assessing authorities, viz., the assessor, the Court of Revision, the County Court Judge, and the Court of Appeal, in exercising their jurisdiction to determine whether any particular property or person ought or ought not to be recorded on the assessment roll as liable to taxation.

16 First, no property and no person can be entered on the roll as ratable unless the Assessment Act makes it or him assessable and provides for entry on the roll. Neither principles of equity nor implication will suffice; the authority must be found in the Assessment Act and must be clear and explicit.

17 In Cox v. Rabbits (1878), 3 App. Cas. 473, at p. 478, Lord Cairns says:-

> "A taxing Act must be construed strictly; you must find words to impose the tax, and if words are not found which impose the tax, it is, not to be imposed."

18 In Tennant v. Smith, [1892] A.C. 150, at p. 154, Lord Halsbury says:-

> "This is an Income Tax Act, and what is intended to be taxed is income. And when I say 'What is intended to be taxed', I mean what is the intention of the Act as expressed in its provisions, because in a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as the statute imposes. In various cases the principle of construction of a taxing Act, has been referred to in various forms, but I believe

> they may be all reduced to this, that, inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed.
>
> "Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation."

19 This rule of interpretation has been adopted and applied in numerous cases by our Court of Appeal and by the Supreme Court of Canada when considering the Assessment and Taxation Acts of Ontario.

20 The second rule or principle is that nothing is assessable unless it is taxable, and thus a duty is imposed on assessing tribunals to inquire, as a preliminary, whether the council of the municipality is empowered to levy a tax on a person in respect of the property which it is proposed to enter on the roll.

21 Mr. Geary, on behalf of the respondent corporation, submits that assessment is one thing, and taxation another-and that on this appeal we are concerned only with assessment and the Assessment Act. I quite agree that assessment in the sense of "preparation of the roll" is one thing, and taxation in the sense of levying a rate is another; also that on this appeal we are concerned only with the settlement of the roll. But it does not follow that the Court is to be confined to a consideration of the Assessment Act alone, and that the extent of the taxing power conferred on municipal corporations is excluded from our consideration.

22 Under Ontario law, preparation and settlement of the assessment roll is an essential preliminary to taxation. "There can be no taxation of income without previous assessment of some person in respect of such income:" per Mulock, C.J., in Re Gibson and City of Hamilton, 46 O.L.R. 468, at p. 461. Both assessment and taxation are directed to a common purpose and object, viz., the raising of the sums necessary for paying the municipal outlay for the current year. As nothing is taxable unless it appears on the roll, so in like manner nothing can properly appear on the roll as taxable unless the municipality is empowered to levy taxes on it. In the other words, the purpose of the roll is to prepare a record of the property and of the persons legally taxable.

23 It is on the basis of the assessment roll as finally adopted by council that the general tax rate for the year in which it is adopted is declared and levied by the council. It follows as a necessary implication that nothing should be included in the report of ratable properties (i.e. the assessment roll) except that which the council is empowered to tax, and so, in order to ascertain whether any property alleged to be assessable ought to be entered on the roll, the first inquiry must be: "Is it taxable?"

24 Inasmuch as the preparation of the roll is an administrative proceeding preliminary to the executive act of taxation, and consists in setting forth the persons and property that are taxable, the consideration of what is taxable is not only directly relevant but necessary to be considered by this Court on its final settlement of the roll on this appeal.

25 I shall at a later stage discuss the authority to tax which the statute confers on municipal councils, with the view of inquiring whether it empowers the respondent to tax the income in question.

26 For reasons about to be stated, I have reached the conclusion that the application to the facie of this case of the two rules or principles just stated necessitates an answer in the negative to the question propounded by the learned County Court Judge.

27 The respondents, in their argument, bow to the observation of Anglin, J. (as he then was), in McLeod v. City of Windsor, [1923] S.C.R. 696, at p. 709, and admit that, while sec. 4 of the Assessment Act declares a general intention that all income earned, derived, or received in the Province, not specially exempted, shall be taxable, yet taken by itself that section does not authorise the assessing authorities to enforce such general intention. See also the judgment of Latchford, C.J., in Re Fox and City of Windsor (1926), 57 O.L.R. 243, at p. 244. It is also conceded by the respondent corporation that sec. 24(1)(i) of the Act is concerned with the form of the roll which the assessor is to make up and return but does not confer power to assess executors.

28 Counsel for the respondent corporation rest their main contention on the combined effect of sec. 10, subsec. 1(a), and para. (1) of sec. 1, of the Assessment Act, and submit that the word "person" in sec. 10 includes executors, as if it read, "Every person and the executors of every person who has died during any year before his income has been assessed shall be assessed in respect of income."

29 I deal first with this contention of the respondent corporation that the interpretation clause, sec. 1(1), enables the assessing authorities to assess the executors of Sir Edward, assuming (though I do not find it established) that they are living persons residing in the municipality, and I consider along with it the argument of the appellants that assessment and taxation on income can only be enforced against the very person who receives the income.

30 All taxation may be divided into two categories-taxation in rem and taxation in personam. Taxation of land and taxation of a fund in the hands of trustees (sec. 12 as amended in 1929) afford examples of taxation in rem. See also the case of Erie Beach Co. Ltd. v. Attorney-General for Ontario, [1930] A.C. 161, for a recent example of taxation in rem.

31 A poll tax affords the outstanding example of taxation in personam.

32 Income tax appears to me to be a tax in personam, for income cannot be assessed without the assessment of an individual or legal person because it has no tangible existence and can only be

reached through persons.

33 In the case under consideration, there is no res which can be segregated and assessed. According to the Assessment Act as amended in 1929 the income to be assessed shall be the income received during, the year ending on the 31st December then last past.

34 The income received by Sir Edward Kemp in 1928 did not, in October, 1929, when the assessment took place, form a segregated fund which could be assessed in rem. I take it that without direct evidence the Court is entitled to assume by way of common knowledge that in part it was eaten up in current living expenses during 1928, and that the surplus became intermingled with capital investments and indistinguishable from them. But, whether this is so or not, when Sir Edward died in August, 1929, the surplus of his income not exhausted in prior expenditures passed to his executors as capital indistinguishable from any other capital. It is plain therefore that in October, 1929, there was no fund of 1928 income in the hands of the executors which could be assessed as such. It therefore seems clear that the assessment in question cannot be an assessment in rem of the income received by Sir Edward Kemp in 1928.

35 Then if this cannot be an assessment in rem because there is no res, it must be an assessment in personam, and that agrees with the words of sec. 10 of the Assessment Act, "Every person ... shall be assessed in respect of income."

36 The clause of the Assessment Act making income ratable property is clause 10, which as amended in 1929 reads as follows:-

> "10.-(1) Subject to the exemptions provided for in sections 4 and 9:
>
> "(a) Every person not liable to business assessment under section 9 shall be assessed in respect of income ...
>
> "(2) The income to be assessed shall be the income received during the year ending on the 31st of December then last past."

37 Then does the statute of 1929 change the quality of the tax in question from a tax in personam to a tax in rem?

38 No doubt the Legislature is supreme, and if within the ambit of its jurisdiction it declares that, in Ontario, black shall hereafter be white, the courts are bound to adjudicate in accordance with the law so enacted. But, if the statute is capable of a reasonable and fair interpretation which at the same time accords with reality, such an interpretation is naturally to be preferred by the Court. The statute of 1929 does not say that the person is no longer to be assessed. That would have been fatal to the enforceability of the tax. What it does say is that an intangible something, viz., an income

received two years prior, shall be taxed. The statute, as it seems to me, can only mean that the person who has received the income shall be taxed, but that the amount of the tax shall depend on the income received in the second preceding year.

39 I think that the language of the statute of 1929 was ineffective to accomplish a purpose which was probably intended by its promoters, and, with the highest respect for the opinion of Judge Denton, I think that the situation still remains exactly as indicated by Smith, J., in Sifton v. City of Toronto, [1929] S.C.R. 484, at p. 488:-

> "The income to be assessed is still the income for the current year, to be fixed at the amount of the previous year's income."

40 To hold in accordance with the respondent corporation's contention, involves a conclusion that the income which was received by Sir Edward in 1928 is actually and physically located as an entity within the municipality of Toronto, when in 1930 the assessment made in 1929 is adopted by the council, and the tax levied; for only ratable property within the municipality is liable to be taxed.

41 Then, in so far as it relates to income tax, what is the jurisdiction of the council when adopting, in 1930, the assessment roll prepared in 1929?

42 The act of the, council in 1930 when it passes its by-law adopting the assessment roll prepared in 1929, is the act which then for the first time creates an assessment roll binding on the ratepayers, for until the by-law adopting it is passed the council is at liberty to abandon the 1929 assessment and prepare a new roll in 1930, as was formerly the general practice.

43 I refer to this in order to emphasise the fact that the by-law passed by the council in 1930 is the act of assessment for 1930. And hence the council can validly adopt in 1930, as ratable property, only that which in 1930 it is empowered to tax.

44 I agree with my brother Orde that the meaning of sec. 10, when read in the light of the other provisions of the Assessment Act, is that you must assess the person who receives the income. There must be the conjunction of a living person residing in the municipality and the receipt of income by such person. If either element is lacking, there is no power to assess. Sir Edward, who received the 1928 income, was not assessable, being dead, and no longer resident in Toronto, and his executors are not assessable, for they never received any income in 1928. Even if the names of the executors were to be entered on the roll, the conclusive statutory measure of income to be assessed against them is nil.

45 At the date of Sir Edward's death, the 12th August, 1929, the assessment roll for 1929 had not yet come into existence. Even if it had been completed and returned, it would not have imposed any liability on him, for under sec. 60, subsec. 5, the assessment made in 1929 may be adopted by the council of 1930 as the assessment on which the rate of taxation for 1930 shall be fixed and levied.

46 But, unless and until it is so adopted, it imposes not even an inchoate liability on any ratepayer. Thus in regard to municipal taxes for 1930, Sir Edward was, at the time of his death, under no legal obligation, inchoate or otherwise; which his executors could inherit.

47 Then do the words of sec. 1(l) empower and require the assessing tribunal to impose on the executors personally a new obligation, viz., a tax for which Sir Edward had never become liable?

48 The words of sec. 1(l) are:

> "'Person' shall include ... the executors ... of a person to whom the context can apply according to law."

49 Now, when the word "person" occurs in sec. 10(1)(a), it means Sir Edward Kemp. He is the person who received the income of 1928 and who, if living, would have been liable for income tax under this section.

50 But Sir Edward Kemp was dead before the assessment took place, and so was not a person to whom the context of sec. 10(1)(a) can apply according to law, because, it applies only to persons living in the municipality at the date of the assessment.

51 As Sir Edward Kemp was not in October, 1929, a "person" within the meaning of sec. 10, the context of that section cannot apply to him according to law. But under the interpretation section it is the executors only of "a person to whom the context can apply" according to law who stand in the shoes of the testator. Sir Edward was not such a person, and so his executors cannot be assessed.

52 Though Sir Edward Kemp had in 1928 received the income in question, that imposed on him no obligation to the municipal corporation of Toronto, for, as is illustrated by the Sifton case, if he had during 1929 changed his residence to another municipality, the council could not have taxed him in 1930, though his name appeared on the 1929 assessment roll.

53 Does then the fact that he is removed from the municipality by death, instead of by volition, increase the jurisdiction of the council and enable it to levy this tax on his executors personally? If, as I think, this income tax is a tax in personam and not in rem, I find no adequate authority in the statute for the respondent corporation's contention.

54 Closely connected with the grounds which I have last discussed is the question whether the executors can he assessed in view of the definition of income contained in sec. 1(e) of the Assessment Act:-

> "'Income' shall mean the profit or gain ... directly or indirectly received by a person from any office or employment, or from any profession or calling or from any trade, manufacture or business, as the case may be."

55 No income of such a description has been received by these executors.

56 How, then, can they be personally assessed for it? For it is not the corpus of the estate in their hands, but the executors themselves, who are to be assessed-otherwise the taxation would be ultra vires as an indirect tax. I observe further in the same connection that the liability of executors for income tax derived by them is specifically dealt with by secs. 12 and 13 of the Assessment Act, as amended in 1929; and the maxim "Mentio unius esclusio alterius" applies.

57 Bearing in mind the principle first noted above, that the tax must be expressly imposed and the power to assess expressly given, these reasons lead me to the conclusion that the Assessment Act omits to make any effective provision for the entry of the names of the executors of Sir Edward Kemp on the municipal assessment roll of Toronto for 1929, for income tax, and fails to empower or authorise the assessing tribunals so to assess them.

58 I proceed to consider the application to the facts of this case of the second principle noted above, viz., that the municipal council is not empowered or authorised to levy in 1930 an income tax on these appellants, and that not being taxable they are not assessable. Whether the executors of Sir Edward Kemp are or are not taxable in respect of the income here in question depends on the extent of the authority to levy a tax which the Legislature has conferred on the council representing the municipality. For it is elementary that the council can levy the rate only on such persons and in respect of such property as it is empowered by the statute to tax.

59 In Sifton v. City of Toronto (1929), 63 O.L.R. 397, at p. 403, Magee, J.A., says:-

> "What was intended by the Legislature was that the city council might adopt the roll (prepared in 1923) instead of making a fresh assessment against those persons or properties liable to pay, but took the risk of invalidity of the roll in 1923 as against persons whom it could not assess" (quaere, tax?)-"who might be dead or in China."

60 As Sifton had removed his residence from Toronto in 1923, Magee, J.A., thought the attempted taxation invalid, agreeing with Hodgins, J.A., and their opinion was upheld by the unanimous judgment of the Supreme Court of Canada, [1929] S.C.R. 484. It was there determined that the income of Sifton was not taxable by Toronto in 1924. For, though his name appeared on the assessment roll of 1923, which had been adopted in 1924 without amendment as the basis of taxation for that year, yet the council had no jurisdiction to levy a tax on him, because he had ceased to have a residence in Toronto in December, 1923, and in consequence the assessment, though right when made, had become invalid before the adoption of the roll in 1924. The decision thus establishes the rule that, if the person or the property is not taxable, the fact that the name of the person or the property p appears on the assessment roll end on the collector's roll is an error immaterial and ineffective to create liability to taxation.

61 If non-taxability develops before the assessment roll is completed and settled, the name or the property should not appear on the roll: Be Bayack, 64 O.L.R. 14.

62 A consideration of the taxing authority which the Legislature has conferred on municipalities thus becomes essential to the determination of this appeal. The only authority of the municipal council to levy taxes is found in sec. 306(1) of the Municipal Act:-

> "The council of every municipality shall in each year assess and levy on the whole ratable property within the municipality, a sum sufficient to pay all debts of the corporation, whether of principal or interest, falling due within the year."

63 And sec. 258(1) enacts:-

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

64 Section; 307 provides:-

> "(2) One by-law or several by-laws for assessing and levying the rates may be passed as the council may deem expedient."

65 The meaning of the words "assess" and "levy," as employed in an Act respecting assessment and taxation, is referred to by Fitzpatrick, C.J., in Nova Scotia Car Works v. City of Halifax (1913), 47 Can. S.C.R. 406, at p. 414, where he says: "To 'assess' means to consider and determine the whole amount necessary to be raised by rate," citing Mogg v. Clark (1885), 16 Q.B.D. 79, at p. 82.

66 Mogg v. Clark related to the qualification of a vestryman under the Metropolis Management Act, 1855, sec. 6 of which Act provided that the vestry was to consist of persons rated or assessed to the relief of the poor, and at p. 82 Lord Esher says:-

> "Perhaps a person can be 'assessed' without being 'rated;' but if he acts as a member of a vestry, he will be within the penal clause of sec. 54, although he is assessed, unless he is also rated. The words 'rated' and 'assessed' both apply to the person and to nothing else. But is it possible to be 'rated' without being 'assessed"? The overseers assess the amount of the rate for the whole parish, that is, they consider what is the amount wanted for the whole parish: this they 'assess.' Then they fix the amount to be paid by each occupier, so that he also is 'assessed.' He is afterwards put into the rate book, and then he may be said to be 'rated.' He cannot be 'rated' until he is 'assessed,' he cannot be 'rated' without being 'assessed.' Although there may be different processes, yet it is one operation."

67 A different meaning was ascribed to the term "assess" in the case of City of Ottawa v. Nantel, 51 O.L.R. 269, at p. 277, and at p. 274, though it is to be observed that there the collocation of

words under consideration was not identical with the words of sec. 306.

68 Whether the term "assess," as used in sec. 306, has reference only to the fixing of the total sum which must be raised, or includes as well the apportionment of a certain part of that total against each particular ratepayer, it is manifest that the proceeding by which the council in 1930 adopts the assessment roll which was prepared and settled in 1929, fixes the total sum to be raised for the year, computes the rate, and directs the levy in accordance with that rate, is in reality one single proceeding on the part of the council, whether it is embodied in one or in more than one by-law, and it is essential to the valid exercise by the council of this function that there should be compliance with all the requirements and limitations prescribed both by the Municipal Act and by the Assessment Act. The essential requirements and limitations so prescribed seem to be as follows:-

(1) The adoption of the roll of the previous year and the assessment and levy by the council of the municipality must take place in the same year. "The council ... shall in each year assess and levy" (Municipal Act, sec. 306(1)); and if the assessment roll prepared in 1929 is to form the basis for taxation in 1930 it must be adopted by a by-law of the council passed in 1930: Assessment Act, sec. 60(5).

(2) The authority of the municipal council to adopt, assess, and levy in any year is limited to the ratable property then within the municipality.

The levy is to be on the whole ratable property within the municipality (Municipal Act, sec. 306(1)), and the jurisdiction of every council is confined to the municipality it represents (Municipal Act, sec. 258(1)).

(3) For reasons heretofore stated in the discussion of the Assessment Act, income tax is a tax in personam, i.e., on the person who has theretofore received an income.

(4) The person taxed must be at the time of taxation a resident of the municipality in which he is taxed (Assessment Act, sec. 11(1)).

(5) The levy must be made in 1930 on the ratable property within the municipality in that year (Municipal Act, sec. 306(1)).

(6) The amount of the ratable property so to be taxed is the amount for

which the "person" has been assessed in 1929: Re Gibson and City of Hamilton, 45 O.L.R. 458.

(7) The sum so to be entered on the assessment roll of 1929 is the amount of income received by the "person" taxed during the year ending on the 31st December, 1928.

(8) Income becomes "ratable property" within the municipality in 1930 only if the very person who received an income in 1928 resides in the municipality in 1930: Sifton v. City of Toronto, 63 O.L.R. 397, [1929] S.C.R. 484.

(9) The authority of the council to impose an income tax is confined to what is conferred on it by sec. 306 of the Municipal Act, and no authority is conferred to substitute the executors of Sir Edward Kemp for Sir Edward himself.

(10) The result is that the council has no power to levy an income tax on the executors of Sir Edward Kemp in respect of the income received by him in 1928.

(11) As there is no power to impose such a task, the executors cannot be entered on the roll as assessable in respect of the 1928 income.

69 I should only, add that I desire to state my respectful agreement with the interpretation of sec. 98(3) of the Assessment Act as expressed by Hodgins, J.A., in Sifton v. City of Toronto, 63 O.L.R. at p. 405, and with the confirmation of that view by the Supreme Court of Canada, Smith, J., at p. 488 of [1929] S.C.R.

70 The conclusions which I have expressed seem to me to accord with the judgment of the Chief Justice of Ontario in Re Gibson and City of Hamilton, 45 O.L.R. 458, at p. 461, and with the observations of Anglin, J. (as he then was), and of Duff, J., in McLeod v. City of Windsor, [1923] S.C.R. 696, which I have carefully considered, but to which it is unnecessary more particularly to refer.

71 As this appeal falls to be determined on the interpretation and construction of the Acts respecting assessment and taxation, it may not be strictly relevant to discuss the effect of the varying contentions of the appellants and the respondent corporation. Nevertheless, before parting

with the case, I desire to make certain observations regarding the results which would accrue from the differing contentions.

72 Sir Edward Kemp paid his taxes for the year 1928. It is true that the quantum of that payment was based on his income for 1926, for which he was entered on the roll in 1927 and taxed in 1928, and he paid his taxes in 1929 based on his income for 1927 and the entry on the roll in 1928, and I assume that in every year preceding 1928 he had paid his taxes. His income tax was therefore paid at the time of his death down to the 31st December, 1929.

73 If now his executors are made liable to pay in 1930 an income tax on his 1928 income and in 1931 an income tax based on the income he received prior to his death in August, 1929, the city corporation will be receiving income taxes for a period of one year and seven months after Sir Edward's death, and at the same time, under the provisions of sec. 12 of the Assessment Act (as amended in 1929) the executors will be assessed from the date of his death in August, 1929, on the income from so much of his estate as is not distributed to persons within the jurisdiction, and all beneficiaries who are within the jurisdiction will be liable for income tax on the sums received by them. Thus the income of the estate will be taxed twice.

74 On the other hand, if the present assessment is vacated, the income tax will have been paid by Sir Edward down to the 31st December, 1929, and the executors and beneficiaries will pay, under sec. 12, on the income of the estate from the date of Sir Edward's death.

75 If the construction of the provisions of the Assessment Act is doubtful or ambiguous, these results may have a bearing on the interpretation which is to be preferred-and, when coupled with the recognised principle that a taxing statute is to be strictly construed, I am led to the conclusion, for the various reasons I have endeavoured to state, that the Assessment Act does not authorise the assessment here appealed against, and that the question asked in the present case should be answered in the negative.

76 With regard to the Baskerville case on which reliance was placed in the Court below, I agree, for the reasons stated by my brother Orde, that it does not stand in the way of the conclusion at which I have arrived.

77 I would allow the appeal with costs, and answer the question in the negative.

78 SCHEDULE A TO THE FOREGOING JUDGMENT (containing the statutory provisions therein considered):-

The Municipal Act, R.S.O. 1927, ch. 233, secs.:-

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

shall be exercised by by-law.

306.-(1) The council of every municipality shall in each year assess and levy on the whole ratable property within the municipality, a sum sufficient to pay all debts of the corporation, whether of principal or interest, falling due within the year, but shall not assess and levy in any year more than two and a half cents in the dollar on the assessed value of such property according to the last revised assessment roll, exclusive of school and local improvement rates and exclusive of any rate not exceeding two mills in the dollar for granting aid to public hospitals for the purposes mentioned in paragraph 28 of section 396.

307.-(2) One by-law or several by-laws for assessing and levying the rates may be passed as the council may deem expedient.

79 The Assessment Act, R.S.O. 1927, ch. 238, secs.:-

1(e). "Income" shall mean the profit or gain or gratuity, wages, salary, bonus or commission, or other fixed amount, or fees or emoluments, or profits from a trade or commercial or financial or other business or calling directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and also profit or gain from any other source.

1(l). "Person" shall include any partnership, any body corporate or politic, any agent or trustee, and the heirs, executors, administrators or other legal representatives of a person to whom the context can apply according to law.

4. All real property in Ontario and all income derived either within or out of Ontario by any person resident therein, or received in Ontario by or on behalf of any person resident out of the same shall be liable to taxation, subject to the following exemptions. (The exemptions have no application to this appeal).

10.-(1) Subject to the exemptions provided for in sections 4 and 9:

(a) Every person not liable to business assessment under section 9 shall be assessed in respect of income ...

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

80 By the statute of 1929, subsec. 2 was amended as follows:-

"The income to be assessed shall be the income received during the year ending on the 31st of December then last past."

11.-(1) Subject to subsection 6 of section 40 every person assessable in respect of income under section 10 shall be so assessed in the municipality in which he resides either at his place of residence or at his office or place of business.

81 Sections 12 and 13 of the Assessment Act, as amended in 1929:-

12.-(1) The income of money invested in Ontario by a person resident out of Ontario and the income of money invested by such a person through an agent or trustee resident within Ontario shall not be assessed.

(2) Subject to subsection 1 the income of every estate or trust, fund held by executors or administrators, trustees or agents shall, when the person beneficially entitled is resident out of Ontario, be assessed in the hands of such executors, administrators, trustees or agents who may pay the amount of taxes but of the income in their hands.

(3) Any executor, administrator, trustee or agent failing to pay the income tax thereon out of the trust fund shall be personally liable therefor.

(4) Income received by an executor, administrator, trustee or agent which is not distributable annually but is accumulated shall be liable to assessment from year to year but shall not be liable to be again assessed when the accumulated fund is distributed.

(5) An assessment under this section shall be made at the place of the

residence of the testator at the time of his death or of the settlor at the date of the settlement, or, if this is not within Ontario, where the trustee or agent resides, or, if there be more than one, where the chief business of the trust is carried on.

24.-(1)(i) No assessment shall be made against the name of any deceased person, but when the assessor is unable to ascertain the name of the person who should be assessed in lieu of the deceased person, he may enter instead of such name, the words, "Representatives of A.B., deceased (giving the name of such deceased person).

57.-(2) If at any time during the year in which an Assessment has been made and taxes levied on that assessment in the, same year or, if at any time during the year in which an assessment has been adopted under the provisions of sections 59 or 80, it appears to any assessor or any officer of the municipality that any income or business assessment has been omitted from such assessment roll either in whole or in part or that the amount thereof has been incorrectly stated, he shall forthwith report the same to the clerk of the municipality who shall forthwith enter the same on the assessment and collector's rolls for the current year and the party so assessed and taxed shall have the right of appeal as provided is section 121.

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

85. Upon an appeal upon any ground against an assessment the judge of the county court or the Railway and Municipal Board hearing an appeal under section 83, or a Divisional Court, as the case may be, may reopen the whole question of the assessment, so that omissions from, or errors in, the assessment roll may be corrected, and the accurate amount for which the assessment should be made, and the person or persons who should be assessed therefor may be placed upon the roll by such Judge, Board or Court, and, if necessary, the roll of any particular ward or subdivision of the municipality, even if returned as finally revised, may be opened so as to make the same correct in accordance with the findings of such Judge, Board or Court."

86. It is hereby declared that the court of revision, the county judge, the Railway and Municipal Board, and every court to which and every judge to whom an appeal lies under this Act have jurisdiction to determine not only the amount of any assessment, but also all questions as to whether any persons or things are or were assessable or are or were legally assessed or exempted from assessment.

98.-(1) The taxes payable by any person may be recovered with interest and costs, as a debt due to the municipality; in which case the production of a copy of so much of the collector's roll as relates to the taxes payable by such person, purporting to be certified as a true copy by the clerk of the municipality, shall be primâ facie evidence of the debt ...

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

82 LATCHFORD, C.J., agreed with MASTEN, J.A.

83 ORDE J.A.:-- Sir Albert Edward Kemp, a resident of Toronto, died on the 12th August, 1929. The appellants were granted probate of his will on the 18th October, 1929.

84 The deceased had made an income return to the assessment commissioner on the 8th February, 1929, but, as he died before the completion of the roll, the commissioner entered in the roll, instead of the name of the deceased, the words "Representatives of Sir Albert E. Kemp, deceased," and assessed them for $365,120 in respect of income. Paragraph (i) of sec. 24(1) of the Assessment Act, R.S.O. 1927, ch. 238, provides that in preparing the assessment roll "no assessment shall be made against the name of any deceased person, but when the assessor is unable to ascertain the name of the person who should be assessed in lieu of the deceased person, he may enter instead of such name, the words "Representatives of A.B., deceased."

85 The learned County Court Judge has held that this constituted a valid assessment against the executors for the year 1929 in respect of the income received by the testator during the year 1928. From that ruling the executors now appeal by way of a special case stated under the provisions of sec. 84 of the Assessment Act.

86 It may be helpful in understanding the reasons for my conclusions, and particularly as to the application of the judgment of this Court in the Baskerville case to which reference will be made, if

I set out seriatim the successive changes in the recent methods of assessing income, as I understand them.

87 1. Prior to 1922, the legislative authority to tax income directly was embodied in sec. 11 of the Assessment Act, R.S.O. 1914, ch. 195. That section did not provide expressly that the income to be assessed should be the income for the current year, that is, for the year in which the assessment was to be made. But that that was the intention is plain, because subsec. 2 provided that where the income was not a salary or other fixed amount capable of being estimated for the current year, the income for the purposes of assessment should be taken as not less than the amount of the income for the preceding calendar year. Any doubt as to this was removed by the addition of sec. 19a in 1920, by 10 & 11 Geo. V. ch. 63, sec. 5. That section made it clear that the return required by sec. 18 of the Assessment Act should chew the "total income from all sources during the current year," such income to be ascertained as provided by sec. 11. But upon whatever basis the calculation was made the income assessed was that for the year in which the assessment was made.

88 2. In 1922 (by 12 & 13 Geo. V. ch. 78, sec. 11), sec. 11 of the Assessment Act was amended by repealing subsec. 2 and substituting the words, "The income to be assessed shall be the amount of the income received during the year ending on the 31st of December then last past" This had the effect of removing the distinction between the two methods of computation, one where the income for the current year was so fixed as to be capable of being estimated, the other where the income for the current year had to be calculated upon the basis of that of the preceding year. But the income to be assessed under this amendment still remained that of the current year, as was determined by this Court in Re Donald Mason & Co., 61 O.L.R. 350. No further change was made in this respect up to the revision of 1927, sec. 10 of the Assessment Act as then revised being the same as sec. 11 of the Act of 1911 as amended in 1922.

89 3. The amendment of 1929 effected a further change. By sec. 1 of 19 Geo. V. ch. 63, the words "the amount of" in subsec. 2 of sec. 10 of the Act were struck out, so that the subsection thereafter read: "(2) The income to be assessed shall be the income received during the year ending on the 31st of December then last past." It was no longer to be the income for the current year, but that of the preceding year, that was to be assessed. And the result unquestionably is that in effecting the transition from the former system to the new one there will have been throughout this Province, technically, a double assessment during a period of two successive years of the income for the same year.

90 I do not think it is necessary to review in detail the legislative changes in the law as to the assessment of executors, etc., in respect of income received by them in their representative or fiduciary character. Some of the changes in the law as it stood in 1914 were made in order to overcome the effect of the judgment in Re McLeod and City of Windsor (1925), 57 O.L.R. 15, as to the constitutionality of the provision for the taxation of income so received on behalf of persons not residing in the Province, and others because of the judgment in the Donald Mason & Co. case, already mentioned.

91 The income in respect of which the city corporation seeks to assess the executors of Sir Edward Kemp is that received by. him in his lifetime during the year 1928. Had he been assessed in 1929 for him 1928 income, and the assessment roll been completed and revised before his death, then different considerations would arise. A liability to pay income tax in respect of his income would have attached during his lifetime in such a way as probably to subject his estate to liability for the subsequent taxes levied in respect of such assessment, by virtue of subsec. 3 of sec. 98 of the Assessment Act.

92 But that is not what happened. No assessment was made against him in 1929 for the 1928 income. His death before the completion of the roll made that impossible. Finding it impossible, the city corporation now attempts to assess his executors, not in respect of any income which they themselves have ever received, but in respect of income which was received by their testator.

93 Where is there any authority in the Assessment Act for this? I cannot find it. It is quite clear that the power to assess personal representatives as such under secs. 12 and 13 of the Act, either as they stood before 1929 or as they now stand, is limited to income which has come to their hands for or on behalf of non-residents.

94 Nowhere else in the Act is there any provision which justifies the assessment of legal personal representatives far income received by the deceased person whose estates they represent. I think I am safe in saying that under the scheme of the Act, in so far as it relates to the assessment of income, there must be a coincidence of the income assessed and the person assessed in respect thereof. The Act provides no means of assessing income except in conjunction with some person, and the person assessed must have actually received the income in respect of which he is assessed. Counsel for the city corporation relied upon the definition of the word "person" in para. (1) of sec. 1: "'person' shall include spy partnership, any body corporate or politic, any agent or trustee, and the heirs, executors, administrators or other legal representatives of a person to whom the context can apply according to law."

95 I must confess that I do not understand just what the second part of this definition is intended to mean. Mr. Geary applies it to pars, (a) of sec. 10 of the Act, go as to make it read, "Every person including the heirs, executors, administrators or other legal representatives of such person ... shall be assessed in respect of income," the italicised words, being those he would introduce. This suggestion at first blush seems rather a plausible one, but when the effect of it is examined it will be found to infringe what has been called "the valuable rule never to enact under the guise of definition:" Cruise on Statute Law, 3rd ed. (1923), p. 191. Of course, if the definition were so worded as to make the suggested application of it imperative, it would have to be so applied even though the valuable rule just mentioned were thereby infringed. But the application of the definition in the way suggested is fallacious. The primary purpose of a definition of this character is in effect to substitute, for the expression itself, some other expression which might not otherwise be included within the meaning of the defined expression, and so make the statutory provision apply to something to which it would not or might not apply otherwise.

96 But it is one thing to substitute another expression for the defined expression and quite another so to apply the definition as to couple the defined expression and the substituted expression together in such a way as to make the legislation operative in the particular circumstances, when; if read with one or other expression omitted, it could have no application. In other words, if an interpretation clause says that when the word "A" is used it shall be deemed to extend to and include "B," then when you find "A" used you may read it, the context permitting, as if "A" meant "B;" but when applying the legislation to a particular case you are not justified in reading it as if "A" meant both "A" and "B" at the same time.

97 That is what is attempted here by Mr. Geary's argument. He is not substituting the word "executors" for the word "person," but he is seeking by combining the word "person" and the word "executors" to make sec. 10(a) apply to a combination of circumstances of which one factor, namely, the income to be taxed, is referable to the "person" only, and the other factor, namely, the personal liability in respect of the assessment, is referable to the "executors" only. To accede to this argument would, in my opinion, be enacting "under the guise of definition."

98 Mr. Geary also referred to sec. 24(1), which sets out the duties of assessors when preparing the assessment roll and to para. (i) thereof as to deceased persons. If this were a provision dealing solely with income assessment it might have some bearing upon the question now before us. But the duties of the assessor defined by this section cover a wide range of things, including not only information as to things to be assessed, whether land or income or business, but numerous other items of, information required by the municipality such as the age and occupation and status of the person assessed, the persons in his family, religion, births and deaths, number of dogs, etc., etc. And it is to be observed that para. (i) is grouped with several other paragraphs which relate solely to the assessment of land. There is nothing in para. (i), standing where it does, which can be construed as giving power, not found elsewhere in the Act, to assess one person, in whatever character it is sought to fasten liability upon him, in respect to income which came to the hands of another.

99 Counsel for the city argued that we were bound by our own unreported decision in Re Baskerville and City of Ottawa on the 21st January, 1929. That was an appeal by the executrix of the will of one Baskerville upon a case stated by a County Court Judge, and the appeal was dismissed at the conclusion of the argument. Whatever reasons were then given were very short and were not recorded. The circumstances were these. The deceased had died in September, 1926. He had been assessed during his lifetime in 1926 in respect of his income for that year, based, as the statute required that it should be, not being a salary or a fixed amount capable of being estimated, upon the income received by him in 1926. Of the income for 1926, which, had he lived during the whole year, would have been received by himself, part was received by him prior to his death and the balance came to the hands of his executrix. When called upon to make an income return in 1927, which as the law then stood would be in respect of income for 1927, though computed on the basis of the previous year's income, the executrix claimed that she should be assessed only for an amount equal to the income which she had received between the date of her husband's death in September, 1926, and the end of that year. That amount was clearly less than the amount which,

having regard to the estate left by her husband, would almost certainly be received by her during 1927. The city contended that her income for 1927, which was what was being assessed, must be calculated upon the basis of the whole income which the testator and the executrix had together received during the year 1926, and not upon the lesser amount which she alone had received. The County Court Judge gave effect to the city's contention, and we upheld that view, and gave judgment on the spot.

100 In applying our decision in the Baskerville case regard must be had to the question to which we were limited by the special case there stated for our consideration. The executrix raised no question as to whether or not she could be assessed at all in her representative capacity. She admitted her liability to be assessed for something. The legislation then in force was different from that applicable to the present case, and all that we were called upon to determine was the basis for computing the income which she would be deemed to receive during the year then current, namely 1927. Our judgment upon that question can have no bearing upon the question here, which involves the liability of the executors for assessment for income which they themselves never received at all.

101 I prefer not to deal with the argument that any assessment of the estate in respect of the deceased's income for 1928 would have the technical effect of conferring a double taxation in respect of the income for that year. That argument is applicable to all of us who came within the operation of the old law and the amendment of last year. I base my judgment upon the broad and simple ground that the Assessment Act gives no power to a municipality to create a liability to taxation by means of an assessment of any person in respect of income received by another. There must be a conjunction of both the person and the income to be assessed.

102 I would allow the appeal and declare the assessment of the executors invalid. The costs of the executors both here and below should be paid by the city.

103 FISHER J.A.:-- The questions for determination all turn on the construction of the Assessment Act of 1927 and the 1929 amendment.

104 After consideration of the facts-which are not in dispute-and a careful consideration of the relevant sections of the Assessment Act and amendment, I am of the opinion that the learned County Court Judge came to the right conclusion, and I can see no useful purpose in repeating what he has said in his well-considered reasons, other than to make reference to the Baskerville case, which counsel for the appellants argued was, because of the 1929 amendment, not now applicable.

105 The question asked in the Baskerville case was whether or not the income received by the testator Baskerville in his lifetime during 1926 should be accounted for with income received by his executrix after his death in the same year, for the purpose of determining the amount for which his estate should be assessed for income upon the assessment roll for the year 1927.

106 The learned County Court Judge decided that there was a right to assess in the hands of the present representatives the income received by a man who is dead, and this Court was unanimous in

confirming that decision, and until that case is reversed we are bound to follow it.

107 The only change in the Assessment Act, since the Baskerville case was decided, is the amendment made in 1929 repealing secs. 12 and 13 of the Assessment Act, and amending subsec. (2) of sec. 10 of the said Act, by striking out the words "the amount of."

108 Subsection (2) of sec. 10 of the Assessment Act, R.S.O. 1927, ch. 238, reads as follows:-

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

109 As amended, this section reads as follows:-

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

110 In my opinion, the effect of this change is that the income to be assessed shall not be deemed to be the amount of the income received during the past year, but shall be the income received during the past year, and I am therefore unable to see how the change made by the amendment of 1929 can affect the question whether or not Mrs. Baskerville could be assessed as executrix. I can see nothing in the amendment which causes any difference so far as that aspect of the case is concerned.

111 I would dismiss the three appeals with costs.

112 MASTEN J.A.:-- For the reasons stated in my judgment in "the Kemp case, which was argued along with the Wilder and Kilmer cases, I would allow the appeals in these cases with costs and answer in the negative the questions propounded in them.

113 LATCHFORD, C.J., agreed with MASTEN, J.A.

114 ORDE J.A.:-- There is no difference so far as the law is concerned between the Wilder case and that of Sir Edward Kemp's estate. Mr. Wilder died on the 28th May, 1929, having made an income return earlier in the year. The assessment roll was not completed before his death.

115 For the same reasons as in the Kemp case, I would allow the Wilder appeal and declare the assessment invalid, with costs to the appellant here and below.

116 In the Kilmer case the result is the same.

Appeals allowed (FISHER J.A. dissenting).

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