1945
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BETWEEN:

THE EXECUTORS OF THE ESTATE OF DAVID FASKEN ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Revenue—Income tax—The Income War Tax Act, 1917, St. of C. 1917, c. 28, s. 4 (4)—An Act to amend the Income War Tax Act, 1917, St. of C. 1926, c. 10, ss. 7, 12—Income War Tax Act, R.S.C. 1927, c. 97, s. 32 (2), 32 (4)—An Act respecting the Revised Statutes of Canada, St. of C. 1924, c. 65, ss. 2, 5 (2)—Interpretation Act, R.S.C. 1927, c. 1, s. 19—Transfer of property from husband to wife—Meaning of words "property", "transfer"—Meaning of rule that taxing Act must be construed strictly—Words in taxing Act to be read in their ordinary sense—Purpose of evading taxation need not be shown—Presumption of execution of documents from their date—Liability of taxpayer under assessment to be determined according to law in force in period for which assessment made—Appeal from income tax assessment not a private dispute.

Midland Farms Company owed a large sum of money to David Fasken. At his request the Company acknowledged its indebtedness of such sum to three trustees who declared the trusts under which they held it, including the right of David Fasken's wife to receive a portion of the interest thereon which should come into their hands. The acknowledgment and declaration of trust were dated December 31, 1924. During the years 1925 to 1929 Mrs. Fasken received amounts of income from the Company which were treated by the trustees as having been received by them and paid to her under the declaration of trust. After the death of David Fasken it was sought to hold his estate liable for income tax on the income so received by Mrs. Fasken as having been derived from property transferred by David Fasken to his wife. Appeals from assessments for 1925 to 1929 allowed.

Held: That in construing a taxing Act the Court ought not to assume any tax liability under it other than that which it has clearly imposed in express terms.

2. That unless the context otherwise requires the words in a taxing Act should be read in the sense in which they are ordinarily used.

3. That the word "transfer", as used in section 32(2) of the Income War Tax Act or its predecessor, section 7 of the 1926 Act, is not a term of art and has not a technical meaning. It is not necessary to a transfer of property from a husband to his wife that it should be made in any particular form or that it should be made directly. All that is required is that the husband should so deal with the property as to divest himself of it and vest it in his wife, that is to say, pass the property from himself to her. The means by which he accomplishes this result, whether direct or circuitous, may properly be called a transfer.

4. That liability under section 32(2) of the Act or its predecessor, section 7 of the 1926 Act, is not confined to cases where the transfer of property was made for the purpose of evading taxation nor does the fact that the transfer was made in good faith or for valuable consideration place it outside the scope of the sections. *Molson et al* v. *Minister of National Revenue* (1937) Ex. C.R. 55 disapproved.

5. That the word "transfer" in section 32 (2) of the Act or its predecessor, section 7 of the 1926 Act, can not be read to mean or include "has transferred".

6. That in the absence of evidence to the contrary documents should be considered as having been executed on the day they bear date.

7. That it is a fundamental principle that the validity of an income tax assessment and the liability of the taxpayer thereunder must be determined according to the law in force in the period for which the assessment was made and in which the liability, if any, of the taxpayer was incurred, and not according to the law in force at the time the assessment was made.

8 That in order that a taxpayer should be liable under section 7 of the 1926 Act in respect of income derived from property transferred by him to his wife it would be necessary to show not only that such income was derived while the section was in effect but also that the transfer had been made after it had come into force.

9. That an appeal from income tax assessment is not a private dispute between the appellant taxpayer and the Minister or a *lis* in the ordinary sense, in which the agreement of counsel may bind the parties thereto and so preclude the Court from dealing with the issue on the appeal on its merits; the public has an interest in the disposition of the appeal and in seeing that taxpayers are held liable for the tax which Parliament has imposed upon them and that no taxpayer is released therefrom pursuant to an agreement of counsel and the acquiescence of the Court in its application. It is the duty of the Court in such an appeal to determine the liability of the taxpayer under each assessment appealed from according to the law which Parliament has made applicable to it regardless of what agreement counsel may have made as to its disposition. It is not for counsel to fix such liability by agreement. That is for adjudication by the Court. *Minister of National Revenue* v. *Molson et al* (1938) S.C.R. 213 disapproved.

APPEALS from income tax assessments under the provisions of the Income War Tax Act.

The appeals were heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

J. W. Pickup K.C. for appellant.

D. J. Coffee K.C. and *E. S. MacLatchy* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

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THE PRESIDENT now (October 8, 1948) delivered the following judgment:

The appeals herein are from income tax assessments for the years 1925 to 1929 in respect of amounts of income received in such years by Alice Fasken, the wife of David Fasken, on which it is sought to hold the estate of the said David Fasken liable for income tax. The appeals from all the assessments were heard together.

The facts on which the assessments were based were as follows. In 1913 David Fasken, who was resident in Toronto, bought a large farm of 226,000 acres in Texas. Since the law of Texas did not permit an alien to own real property or any interest therein a corporation, known as Midland Farms Company, was created with an authorized capital of $300,000 consisting of 3,000 shares of $100 each. The farm was bought in the name of a trustee for David Fasken and conveyed to Midland Farms Company in consideration for the issue of 2,997 fully paid up shares. The remaining 3 shares were subscribed for in cash in the name of nominees of David Fasken. All of the shares in the Company belonged to David Fasken, 2,999 being transferred to him in his own name and one to his nominee, R. E. H. Morgan, since the law required at least two shareholders. The title to the farm was vested in Midland Farms Company "subject to a lien indebtedness for the purchase price of the same, amounting to the sum of $1,092,313.75". It may be assumed that David Fasken had advanced the purchase price and that the said indebtedness was in his favour. At the first stockholders' meeting on January 28, 1914, David Fasken, R. E. H. Morgan and Alexander Fasken, a nephew of David Fasken, were elected directors and at the directors' meeting on the same date David Fasken took on the office of vice-president, that of president being taken by R. E. H. Morgan. On March 27, 1917, the share issued to R. E. H. Morgan was transferred to Robert Fasken, the only son of David Fasken, and at the stockholders' meeting on that date Robert Fasken, David Fasken and Andrew Fasken were elected directors and at the directors' meeting on the same date Robert Fasken became president, Andrew Fasken secretary and David Fasken continued as

vice-president. At the directors' meeting on January 16, 1918, at which the same officers were elected, the following resolution was passed:

Upon motion duly made it was resolved that a note be given to Mr. David Fasken for the sum of $ being the amount of principal with interest down to December 31, 1917, as set forth on statement filed.

The probable explanation for this resolution is that under the law of Texas the period of limitation for actions for debt was two years and it was passed to prevent the indebtedness from being outlawed. Similar resolutions were passed at the stockholders' and directors' meetings on February 5, 1919, and January 27, 1920. In each case the amount of the principal was left blank. Moreover, there is no record of any note having ever been given by the Company to David Fasken. On September 1, 1920, David Fasken transferred his 2,999 shares in the Company to his son Robert Fasken, who had become an American citizen.

Thereafter, there were other changes in the shareholdings in the company, with which we are not concerned, but after that date David Fasken was never a shareholder, director or officer of the company, nor did he or the executors of his estate ever claim any interest in any of the shares. At the stockholders' meeting on February 7, 1921, and at the directors' meeting on the same date the following resolution was passed:

Upon motion duly made it was resolved that a note, acknowledgement, lien or mortgage on the property of the Company as may be demanded be given J. H. Black and Alex Fasken, Trustees for the persons advancing or having advanced money to the Company or for its account or benefit or on its behalf to meet obligations for unpaid purchase money. The amount so to be secured being the sum of $1,860,757.92 with interest from the first day of January 1921 at 8 per cent per annum. Such security to be given when and in the form demanded by the said trustees or the survivor of them.

J. H. Black was a personal friend and close business associate of David Fasken and Alex Fasken was his brother. It may be assumed that David Fasken was one of the persons for whom these two persons were trustees. This is the first resolution in which a specific amount of indebtedness is mentioned. Similar resolutions were passed at the stockholders' meeting and directors' meeting on January 2, 1922, and on January 2, 1923, except that the amounts of the indebtedness were larger and that in the resolution passed on January 2, 1923, the Trustees were R. Fasken

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and Alex Fasken. There is no record of any note, acknowledgment, lien or mortgage ever having actually been given to the Trustees pursuant to any of these resolutions.

This brings us to 1924. At the stockholders' and directors' meetings held on March 8, 1924, the following resolution was passed:

Upon motion duly made it was resolved that a note, acknowledgment, lien or mortgage on the property of the Company as may be demanded be given Alex Fasken, Chas. Q. Parker and Andrew Fasken, Trustees for the persons advancing or having advanced money to the Company or for its account or benefit or on its behalf to meet obligations for unpaid purchase money. The amount so to be secured being the sum of $2,239,602.67 with interest from the first day of January, 1924, at 8 per cent per annum. Such security to be given when and in what form demanded by the said trustees or the survivor of them.

There can be no doubt that David Fasken was one of the persons for whom these three persons were trustees. The next date of importance is December 31, 1924. On that date Midland Farms Company under its seal executed the following acknowledgment:

To:

Alexander Fasken, Charles Q Parker and Andrew Fasken, Trustees.

We, the Midland Farms Company, do hereby acknowledge that we are indebted to you in the sum of $2,374,461.99, and we agree to pay the same to you on demand with interest as well after as before maturity at the rate of eight per centum per annum computed from this date. Interest to be payable half yearly on the first days of January and July in each year beginning with the first day of July 1925.

Dated this 31st day of December, 1924.

Midland Farms Company
(Sgd.) A. Fasken,
President.
(Sgd.) H. W. Rowe,
Secretary.

Witness:

(Seal of Midland Farms Co.)

On the same date as this acknowledgment the Trustees, Alexander Fasken, Charles Q. Parker and Andrew Fasken, acknowledged and declared the trusts, terms and conditions under which they held the indebtedness. The declaration of trust contained the following paragraph:

(5) It is declared that the said Andrew Fasken is entitled to an interest equal to $100,000 in the capital of the said indebtedness, and out of the net interest on the said indebtedness which shall come to their hands from time to time the trustees shall pay to the said Andrew Fasken for his own use and benefit the interest at the rate of 5 per cent per annum on the said sum of $100,000 or on such lesser sum as shall from time to time equal the capital interest of the said Andrew Fasken, in the fund, after crediting the payments made him under Clause 6 hereof, such

interest to be computed from the 31st day of December 1924 and the Trustees shall pay the balance of the net interest which shall come to their hands from time to time (including the net income mentioned in Clause 7 hereof) in equal shares to Alice Fasken, wife of David Fasken and Robert A. W. Fasken his son and to the survivor of them during his or her lifetime.

We are not concerned with the trusts relating to the capital of the indebtedness. At the stockholders' and directors' meetings on January 6, 1925, the following resolution was passed:

Upon motion duly made it was resolved that a note, acknowledgment, lien or mortgage on the property of the Company as may be demanded, be given to Alex Fasken, Charles Q. Parker and Andrew Fasken, Trustees for persons having claims either personally or through assignments or claims against the Company for moneys advanced to the Company or for its account, or for its benefit or for services rendered to the Company or on its behalf. The amount so to be secured being the sum of $2,374,461.99 with interest from the first day of January, 1925, at 8 per cent per annum. Such security to be given when and in what form demanded by the said trustees (or the trustees for the time being of the said claim) or the survivor of them.

The changes in the description of the persons for whom the persons named are trustees are significant and must, I think, relate to the acknowledgment and declaration of trust of December 31, 1924. Similar resolutions, but with differing amounts, were passed at the stockholders' and directors' meetings of February 5, 1926, February 10, 1927, January 27, 1928, January 7, 1929, and January 27, 1930. Apart from the note or acknowledgment of December 31, 1924, there is no record of any note, acknowledgment, lien or mortgage having been actually given to the trustees pursuant to any of the resolutions referred to.

After Midland Farms Company had executed the acknowledgment of indebtedness to the Trustees of December 31, 1924, and the trustees had declared the trusts upon which they held it the Company made certain payments direct to Mrs. Fasken, namely, $10,000 in June, 1925, $5,000 in May, 1926, $11,000 in June, 1927, $10,000 in May, and $5,000 in July, 1928, and $20,000 in May, 1929. The trustees did not direct the Company to make these payments but treated them as though they had been made to them by the Company as payments of interest on the indebtedness and in turn made by them to Mrs. Fasken under the declaration of trust. Subsequently the trustees reported the making of these payments to the income tax

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authorities. David Fasken died on December 2, 1929. On March 3, 1944, as appears from notices of assessment, the amounts paid to Mrs. Fasken in the years 1925 to 1929 were added to the amounts shown by David Fasken in his income tax returns for these years and his estate was assessed accordingly for the years 1925 to 1929. The executors and trustees under David Fasken's last will and testament appealed from these assessments on the ground that there was no power to impose income tax against the estate on the income of Mrs. Fasken. The decision of the Minister affirming the assessments was as follows:

> The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notices of Appeal, and matters thereto relating, hereby affirms the said Assessments on the ground that the amounts received by the said Alice Fasken were taxable income of the taxpayer according to the provisions of Subsection 4 of Section 4 of the said Chapter 28 of the Statutes of 1917 and as amended by Section 7 of Chapter 10 of the Statutes of 1926 and according to the provisions of Subsection 2 of Section 32 of Chapter 97 of the Revised Statutes 1927. Therefore on these and related grounds and by reason of other provisions of the Income War Tax Act the said Assessments are affirmed.

Being dissatisfied with the decision of the Minister the appellant brings its appeals from the assessments to this Court.

The appeals involve the construction of the statutory enactments referred to by the Minister in his decision. Section 4(4) of The Income War Tax Act, 1917, Statutes of Canada, 1917, chap. 28, which will hereafter be referred to as the 1917 Act, provided as follows:

> 4. (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.

By Section 7 of An Act to amend the Income War Tax Act, 1917, Statutes of Canada, 1926, chap. 10, which will hereafter be referred to as the 1926 Act, it was provided:

> 7. Subsection four of section four of the said Act is hereby repealed and the following substituted therefor:—
>
> (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 the 1926 Act it was provided that certain sections, including section 7, "shall apply to the year 1925 or fiscal periods ending therein and to all subsequent years or fiscal periods, and to the income thereof." Finally section 32(2) of the Income War Tax Act, R.S.C. 1927, chap. 97, which will hereafter be referred to as the 1927 Revision, provides:

32. 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 first contention of counsel for the appellant was that there had never been any transfer of property from David Fasken to his wife within the meaning of the Act. The argument was that prior to December 31, 1924, Midland Farms Company owed a debt to David Fasken, that on that date it assumed an obligation to three trustees, that these trustees acted as such at the request of David Fasken and that the Company gave the acknowledgment of indebtedness of December 31, 1924, to them at his request, that by this novation the former indebtedness was extinguished and a new indebtedness by it to the trustees created, that such novation was not a transfer of the indebtedness to anyone but a contract whereby David Fasken released the Company from its indebtedness to him in consideration of its assuming a new obligation to the trustees with the result that the debt passed out of existence altogether, and that since the indebtedness of the Company to David Fasken was the only property which he had owned and it had ceased to exist there could not have been any transfer of it by him to anyone. In the alternative, it was contended that if there was any transfer such transfer was to the trustees and not to Mrs. Fasken; the argument was that the only thing she was given was the right to receive a certain portion of the interest, that she never became entitled to any portion of the indebted-

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ness, either directly or as a beneficiary, that she could not have sued the Company for it, her only remedy being against the trustees, and that what went to the trustees and through them to her was not property that had ever belonged to David Fasken but something else substituted for it, that it was not the same property as that which he had owned and that consequently it could not be said that he had transferred any of his property to his wife within the meaning of the Act.

The second point urged by counsel was that if there was any transfer of property by David Fasken to his wife the property so transferred was not the kind of property referred to in the section. It was argued that the section was applicable only to the transfer of property from which an income was derived and that since all that Mrs. Fasken was given was a right to receive income it could not be said that such right was property from which income was derived within the meaning of the Act.

These two arguments may be considered together, but before they are dealt with specifically certain observations may be made. It has been said on numerous occasions that a taxing Act such as the Income War Tax Act must be construed strictly. This does not mean that the rules for the construction of such an Act are different in principle from those applicable to other statutory enactments. All that is meant is that in construing a taxing Act the Court ought not to assume any tax liability under it other than that which it has clearly imposed in express terms. Nowhere has this fundamental principle of construction of such an Act been better expressed than by Lord Cairns in *Partingdon* v. *Attorney-General* (1):

> As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

and by Lord Halsbury in *Tennant* v. *Smith* (2):

> 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

(1) (1869) 4 E & I App. 100 at 122. (2) (1892) A.C. 150 at 154.

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.

It is the letter of the law, and not its assumed or supposed spirit, that governs. The intention of the legislature to impose a tax must be gathered only from the words by which it has been expressed, and not otherwise. Obviously, the rule of strict construction, understood in the sense indicated, is applicable to the sections of the Act under review, under which it is sought to make the taxpayer liable for income tax on income which he himself has never received. Unless the income received by Mrs. Fasken under the declaration of trust during the years 1925 to 1929 has been reached by the words of one or more of the sections of the Act relied upon by the Minister in such a way as to make David Fasken liable for income tax thereon the appeals from the assessments herein must be allowed.

It is also a cardinal principle of interpretation of the words in a taxing Act that, unless the context otherwise requires, they should be read in the sense in which they are ordinarily used. This is consistent with the statement of Lord Wensleydale in *Grey* v. *Pearson* (1):

> In construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.

And in *Rhodes* v. *Rhodes* (2) Lord Blackburn accepted this as the rule and also quoted with approval the statement of Lord Cranworth in *Thelluson* v. *Rendlesham* (3):

> Words are to be construed according to their plain ordinary meaning, unless the context shows them to have been used in a different sense, or unless the rule, if acted on, would lead to some manifest absurdity or incongruity; indeed, the latter branch of the rule is perhaps involved in the former, for supposing that the rule, if acted on, would lead to manifest absurdity or incongruity, the context must be considered to show that the words could not have been used in their ordinary sense.

(1) (1857) 6 H.L. Cas. 61 at 106.
(2) (1881-2) A.C. 192 at 204.
(3) (1860) 7 H.L. Cas. 428 at 493.

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Later in *Smelting Company of Australia* v. *Commissioners of Inland Revenue* (1) Pollock B. said:

It has often been said by judges of very great experience that, in construing Acts relating to the revenue, the popular sense of words rather than their strict legal meaning should be looked at, and the reason for that is obvious. The object of taxing Acts has nothing to do with the strict legal meaning of words, unless the words used are words of art, such as words which describe an estate in real property, or technical terms peculiar to English law.

And in *Inland Revenue Commissioners* v. *Herbert* (2) Lord Haldane laid down the governing principle in these terms:

The duty of a Court of law is simply to take the statute it has to construe as it stands, and to construe its words according to their natural significance. While reference may be made to the state of the law, and the material facts and events with which it is apparent that Parliament was dealing, it is not admissible to speculate on the probable opinions and motives of those who framed the legislation, excepting in so far as these appear from the language of the statute. That language must indeed be read as a whole. If the clearly expressed scheme of the Act requires it, particular expressions may have to be read in a sense which would not be the natural one if they could be taken by themselves. But subject to this the words used must be given their natural meaning, unless to do so would lead to a result which is so absurd that it cannot be supposed, in the absence of expressions which are wholly unambiguous, to have been contemplated.

But it has been held that where words have a legal technical meaning they should be construed according to such meaning: *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (3).

While the use of definitions in dictionaries in construing the meaning of words in an Act of Parliament has been deprecated, for example, by Lord Macnaghten in *Midland Railway Co. et al* v. *Robinson* (4), dictionaries may properly be consulted for guidance as to the meaning of words in their ordinary sense. In *The Queen* v. *Peters* (5) Lord Coleridge C. J. said:

I am quite aware that dictionaries are not to be taken as authoritative exponents of the meanings of words used in Acts of Parliament, but it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense, and we are therefore sent for instruction to these books.

Vide also *Spillers Ld.* v. *Cardiff (Borough) Assessment Committee,* per Lord Hewart C.J. (6).

(1) (1896) 2 Q.B. 179 at 184
(2) (1913) A.C. 326 at 332.
(3) (1891) A.C. 531.
(4) (1890) 15 A.C. 19 at 34.
(5) (1885-6) 16 Q.B.D. 636 at 641.
(6) (1931) 2 K.B. 21 at 42.

The first thing to consider is whether what Mrs. Fasken became entitled to under the declaration of trust was "property" within the meaning of the Act. The word "property" is a term of wide import. The new English Dictionary gives the following as one of its definitions:

2. That which one owns; a thing or things belonging to or owned by some person or persons; a possession (usually material), or possessions collectively; (one's) wealth or goods.

And Webster's New International Dictionary, Second Edition, puts it similarly as follows:

5. That to which a person has a legal title; thing owned; an estate, whether in lands, goods, money or intangible rights, such as copyright, patent rights, etc.: anything, or those things collectively, in or to which a man has a right protected by law;

The Courts have also recognized the wide extent of the word. For example, in *Jones* v. *Skinner* (1) Lord Langdale M.R. said:

It is well-known, that the word "property" is the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have.

Vide also *Re Lunness* (2), per Riddell J. What Mrs. Fasken became entitled to is manifest from clause (5) of the declaration of trust, namely, the right to receive from the trustees one half of the interest on the indebtedness that should come to their hands from time to time after the interest on Andrew Fasken's claim had been paid. In my view, the word "property" as used in the Act is clearly wide enough in meaning to include such a right.

The next question is whether there was a transfer of such property from David Fasken to his wife. The word "transfer" is another term of wide meaning. The New English Dictionary gives this meaning of it:

2. Law. To convey or make over (title, right or property) by deed or legal process.

And Webster's New International Dictionary, Second Edition, says:

2. To make over the possession or control of, to make transfer of; to pass; to convey, as a right, from one person to another; as, title to land is *transferred* by deed.

(1) (1836) 5 L J. (N.S.) Ch. 87 at 90

(2) (1919) 46 O L.R. 320 at 332.

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In *Gathercole* v. *Smith* (1) James L.J. spoke of the word "transfer" as "one of the widest terms that can be used" and Lush L.J. said, at page 9:

> The word "transferable," I agree with Lord Justice James, is a word of the widest import and includes every means by which the property may be passed from one person to another.

The word "transfer" is not a term of art and has not a technical meaning. It is not necessary to a transfer of property from a husband to his wife that it should be made in any particular form or that it should be made directly. All that is required is that the husband should so deal with the property as to divest himself of it and vest it in his wife, that is to say, pass the property from himself to her. The means by which he accomplishes this result, whether direct or circuitous, may properly be called a transfer. The plain fact in the present case is that the property to which Mrs. Fasken became entitled under the declaration of trust, namely, the right to receive a portion of the interest on the indebtedness, passed to her from her husband who had previously owned the whole of the indebtedness out of which the right to receive a specified portion of the interest on it was carved. If David Fasken had conveyed this piece of property directly to his wife by a deed such a conveyance would clearly have been a transfer. The fact that he brought about the same result by indirect or circuitous means, such as the novation referred to by counsel involving the intervention of trustees, cannot change the essential character of the fact that he caused property which had previously belonged to him to pass to his wife. In my opinion, there was a transfer of property from David Fasken to his wife within the meaning of the Act.

Moreover, I think that the transferred property was property from which income was "derived", meaning thereby the source or origin of such income: *Vide Gilhooly* v. *Minister of National Revenue* (2); *Kemp* v. *Minister of National Revenue* (3). If the property that was transferred was the interest that Mrs. Fasken received then, of course, her husband could not be taxed on it for that would be tantamount to making him liable on the whole amount of the transferred property, instead of only on the income derived therefrom, as the Act contemplates, and there

(1) (1880-81) 17 Ch. D. 1 at 7.
(2) (1945) Ex. C.R. 141.
(3) (1947) Ex. C.R. 578.

would be some substance in the argument that the transferred property was not the kind of property contemplated by the Act. But it was not the interest itself that was transferred. There was not a fresh transfer of property from David Fasken to his wife in each of the years 1925 to 1926 when she received payments of interest. What was transferred was the right to receive the interest, not the interest itself, and that right could be and was transferred only once. The amounts of interest received by Mrs. Fasken were the fruits of such right and could properly be regarded as income derived from it. The right was, therefore, property from which income was derived. I come to this conclusion notwithstanding the fact that in 1934 Parliament deemed it desirable to add subsection 4 to section 32 of the Act whereby it was provided that a transfer of the right to income came within the operation of the section even although the ownership of the property producing such income was not transferred. The finding that David Fasken transferred property to his wife and that the amount received by her under the declaration of trust in each of the years 1925 to 1929 was income derived therefrom disposes of the appellant's first two arguments.

It was also argued by Counsel for the appellant that section 32(2) of the 1927 Revision and its predecessor, the corresponding part of section 7 of the 1926 Act, were applicable only in cases where the transfer of property from the husband to the wife, or *vice versa,* was made for the purpose of evading taxation, that the transfer from David Fasken to his wife, if there was any, had no such purpose but was made to prevent an asset from being lost to his beneficiaries including his wife and that, consequently, it was outside the scope of the sections. In support of this argument he relied upon the judgment of Angers J. in this Court in *Molson et al* v. *Minister of National Revenue* (1). There the facts were that Kenneth Molson by his marriage contract on March 28, 1913, had made to his future wife a donation *inter vivos* of the sum of $20,000, which he promised to pay after the marriage. Then on March 23, 1925, in order to fulfil this obligation he transferred certain securities to his wife which she accepted in full payment of the sum of $20,000. After his death in April, 1932, his

(1) (1937) Ex. C.R. 55.

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estate was assessed for income tax on the income derived from the transferred property in each of the years 1925 to 1931. The executors appealed from such assessments and Angers J. held that they must be set aside. After setting out the facts and finding that the donation was made in good faith he referred to the statutory provisions and the fact that section 32 of the 1927 Revision appears under the heading "Transfers to Evade Taxation", that opposite section 7 of the 1926 Act are the words "Transfer of property", and that the marginal note opposite section 4(4) of the 1917 Act is "Transfer of property to evade taxation", and then held, at page 61:

> It seems to me obvious that the object of section 32 is, as, prior to the revision of the statutes in 1927, the object of subsection 4 of section 4 was, to tax in the hands of the transferor property transferred for the purpose of evading taxation.
>
> The conveyance made by Kenneth Molson to his wife was not a transfer to evade taxation; it is not, in my opinion, subject to the provisions of section 32 of the Income War Tax Act. This conveyance was effected by said Molson in fulfilment of the donation of $20,000 which he had made and which he had the right to make to his wife by his marriage contract.

When the case went to the Supreme Court of Canada, the majority of the Court did not think it necessary to consider these grounds and expressed no opinion on them. In *Connell* v. *Minister of National Revenue* (1) I expressed the view that, under the circumstances, the *Molson* case (*supra*) could not be regarded as authority for holding that section 32(2) of the 1927 Revision applied only to transfers made for the purpose of evading taxation and that the question was left open. Then I stated that I could see no reason for restricting the application of the section to transfers made for the purpose of evading taxation, and that I was not prepared to hold that a transfer made for valuable consideration was necessarily excluded from its scope, but that in view of the conclusion I had reached on other grounds it was not necessary to decide the question. My remarks were thus, strictly speaking, *obiter*. But in this case the question does come up for decision in view of counsel's contention.

There are, I think, several reasons for not following the reasons for judgment of Angers J. in the *Molson* case (*supra*). In the first place, I see no justification for resort-

(1) (1946) Ex. C.R. 562 at 565.

ing to the heading "Transfers to Evade Taxation" in aid of the construction of section 32(2) of the 1927 Revision. In the construction of an Act only a limited use may be made of the headings in it. While a heading may perhaps be referred to in order to determine the sense of any doubtful expression in a section ranged under it, *Hammersmith and City Railway Co.* v. *Brand* (1), it is clear that there must be some ambiguous expression in a section before the aid of the heading under which it appears can be invoked to define its meaning: *Fletcher* v. *Birkenhead Corporation* (2). I am unable to see any ambiguous expression in section 32(2) of the 1927 Revision that could warrant the use of the heading in the construction of it. It should also be noted that the heading "Transfers to Evade Taxation" appears in the Act for the first time in the 1927 Revision. Prior thereto the words "Transfer of property to evade taxation" appeared only as a marginal note opposite section 4(4) of the 1917 Act but this was repealed by section 7 of the 1926 Act and the only marginal note opposite that section was "Transfer of property". It would, therefore, be quite impossible to import into section 7 of the 1926 Act any purpose of evading taxation as a condition of liability under it. That being so, no such condition can be imported into section 32(2) of the 1927 Revision, for section 8 of An Act respecting the Revised Statutes of Canada, Statutes of Canada, 1924, chap. 65 provided:

> 8. The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted.

If then it was not a condition of liability under section 7 of the 1926 Act that the transfer therein referred to was made for the purpose of evading taxation there can be no such condition in section 32(2) of the 1927 Revision. Moreover, quite apart from any statutory provisions relating to the Revised Statutes, it is not permissible, where the words in a taxing Act are clear, to read into it either conditions of liability thereunder or exemptions therefrom other than those that are within its express terms. Full effect must be given to its words without additions or subtractions. In my opinion, the words section 32(2) of the 1927 Revision and the corresponding part of

(1) (1869) 4 H.L. 171.
(2) (1907) 1 K.B. 205 at 214.

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its predecessor, section 7 of the 1926 Act, are free from any ambiguity and liability thereunder is not confined to cases where the transfer of property was made for the purpose of evading taxation, nor does the fact that the transfer was made in good faith or for valuable consideration place it outside the scope of the sections.

The remaining argument advanced for the appellant is the most important one. It was urged that the taxpayer's liability for income tax for the years 1925 to 1929 must be determined by the law that was in force in such years, namely, section 4(4) (*b*) of the Act, as enacted by section 7 of the 1926 Act, from January 1, 1925, to which date it was made retroactive by section 12 of the said Act, up to February 1, 1928, when the 1927 Revision came into effect, and thereafter section 32(2) of the 1927 Revision, that the word "transfers" in each section cannot be read to mean or include "has transferred", that if there was any transfer of property from David Fasken to his wife it must have been prior to December 31, 1924, when Midland Farms Company acknowledged its indebtedness to the trustees and they made their declaration of trust and, therefore, prior to the effective dates of either section 7 of the 1926 Act retroactive to January 1, 1925, or section 32(2) of the 1927 Revision and was, consequently, not caught by the words of either of them.

While the word "transfers", as used in section 7 of the 1926 Act and section 32(2) of the 1927 Revision, is a term of wide meaning and must be given its full and complete effect, it seems plain that it speaks prospectively and contemplates only a transfer made after the Act had come into effect and cannot be expanded to mean or include "has transferred" and thus apply to a transfer that had already been made before the Act was in effect. There are a number of reasons for this conclusion. In the first place, to construe "transfers" as meaning or including "has transferred" would violate the rule of strict construction to which I have referred. The word "transfers" does not, in ordinary language, mean or include "has transferred". A further objection to such a construction is that it would give the enactment retrospective effect and "it is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a

construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication": Maxwell on Interpretation of Statutes, 9th edition, page 221. There is nothing in the Act under review to rebut the presumption against the retrospective operation of section 7 of the 1926 Act any farther back than January 1, 1925. If Parliament had intended to catch past transfers of property as well as future ones it could easily have indicated such intention by using the words "transfers or has transferred" or words to the like effect. The fact that it did not do so negatives any such intention. If, therefore, it appears that David Fasken had already transferred the property to his wife prior to January 1, 1925, to which date section 7 of the 1926 Act was made retroactive, then such transfer was not caught by the word "transfers" in section 7 of the 1926 Act or section 32(2) of the 1927 Revision.

It thus becomes important to determine the date of the transfer from David Fasken to his wife. The acknowledgment of Midland Farms Company to the trustees and their declaration of trust were both date December 31, 1924. The acknowledgment was executed in Texas. The declaration of trust was executed by two of the trustees in Ontario and by one of them in Texas. Counsel for the respondent, being anxious to show execution subsequent to December 31, 1924, contended that while the declaration of trust was dated December 31, 1924, it could not have been executed by all of the trustees on that date and must have been executed either by the Ontario trustees or the Texas trustee subsequently to such date. There is no evidentiary support for this contention. It could just as easily have been executed by the trustees in Ontario and sent on to the trustee in Texas for execution by him prior to December 31, 1924. There is no evidence as to the actual date of execution. I think that under the circumstances, the date which the documents bear should be accepted as the date of their execution. Phipson on Evidence, 8th Edition, page 506, says that "documents are presumed to have been executed on the day they bear date". At page 666, the same author says that "it is a general *prima facie* presumption that all documents, whether ancient or modern, whether formal, as deeds and wills, or informal, as receipts and letters, and whether emanating from parties or strangers, were written

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on the day they bear date", and also that "it rests, therefore, not on the party producing the document to confirm its date, but on his opponent to impeach it." He cites a number of cases as authorities: namely, *Anderson* v. *Weston* (1); *Potez* v. *Glossop* (2). While it is true that in *Butler* v. *Mountgarett,* (3) Lord Wensleydale expressed his opinion that the point was not finally settled, there is no doubt that the weight of judicial opinion supports Phipson's statement and I adopt it in the present case. Consequently, in the absence of evidence to the contrary, I find that the acknowledgment of indebtedness and the declaration of trust were both executed on the date they bear, namely, December 31, 1924.

It is obvious that before the acknowledgment and declaration of trust were executed David Fasken must have made the necessary arrangements for their execution. The contract of novation under which he divested himself of his interest in the Company's indebtedness to him on its assuming an indebtedness to the trustees and the arrangements with the trustees as to the trust under which they were to hold the indebtedness must, I think, have been made prior to the execution of the documents. At the latest, they were made at the same time. Consequently, if the transfer of property from David Fasken to his wife consisted of the total of the circuitous means which he adopted to divest himself of it and vest it in her, and so pass it from himself to her, as I have found it did, all such means were accomplished prior to or at the date of the execution of the documents, namely, December 31, 1924. The result is a finding that the transfer of property from David Fasken to his wife took place either prior to December 31, 1924, or, at the latest, on such date.

Counsel for the respondent sought to escape from this conclusion by arguing that the transfer was not complete until sometime after December 31, 1924. He urged that the acknowledgment of that date could not be effective until it had been ratified by the shareholders and directors and that such ratification did not take place until the resolution of January 6, 1925. I am quite unable to accept this. That resolution was that "a note, acknowledgment,

(1) (1840) 6 Bing. (N.C.) 396.
(2) (1848) 2 Ex. 190.
(3) (1858-1860) 7 H.L. Cas. 632.

lien or mortgage . . . be given." This is not language that would have been used if it had been intended to ratify an acknowledgment already made and I cannot see how a ratification of the acknowledgment of December 31, 1924, can be read into it. Indeed, no ratification of it was necessary for, as counsel for the appellant pointed out, the making of the acknowledgment was already fully and completely authorized by the resolution of March 8, 1924, to which I have already referred. Much was made of the fact that the amount mentioned in the resolution of January 6, 1925, was the same as that of the acknowledgment and that the latter was less than the amount mentioned in the resolution of March 8, 1924, with interest thereon from January 1, 1924, at 8 per cent. The explanation may well be that the difference represents the amount of interest paid during 1924, as to which there is no evidence. Moreover, it seems to me that the resolution of January 6, 1925, authorizes the giving in the future of a note, acknowledgment, lien or mortgage in the light of the new state of affairs resulting from the dispositions already made by David Fasken and the documents of December 31, 1924, and, like the similar annual resolutions that followed it, was made for the purpose of starting off a new period of time for the running of the statutory limitation in Texas with regard to debts. Under these circumstances, I am of the view that the appellant's contention that the acknowledgment of December 31, 1924, was made pursuant to the resolution of March 8, 1924, is a much more reasonable submission than that put forward by counsel for the respondent. I find equally untenable his contention that because Mrs. Fasken was not to receive any interest until after January 1, 1925, there was no transfer of property to her until after that date. The fallacy of this contention lies either in a misconception of the nature of the property that was transferred or in the erroneous assumption that the date of the transfer of a property depends upon the date of the receipt of the income derived from it. As already indicated, the subject matter of the transfer of property to Mrs. Fasken was not the interest but the right to receive it. Moreover, it is plain that the date of transfer of property is not determined by the date when the income derived from it is received. Here we are concerned with the date

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of the transfer to Mrs. Fasken of the right to receive the interest, not with the date of the receipt of the income derived from it. In my opinion, there is no merit in the contention of counsel for the respondent that the transfer of property to Mrs. Fasken was not complete until after December 31, 1924. Under the circumstances, and in view of my finding that the transfer was made on December 31, 1924, or prior thereto, it follows that I must hold, as I do, that neither it nor the income derived from the transferred property was caught either by section 7 of the 1926 Act or section 32(2) of the 1927 Revision.

Counsel for the respondent then argued that if the transfer of property was made prior to January 1, 1925, it was caught by section 4(4) of the 1917 Act and that there was a continuity of liability on the part of the taxpayer and of right in the Crown under it, notwithstanding its repeal by section 7 of the 1926 Act. In support of this contention he relied upon certain statements in the reasons for judgment given by the majority of the Supreme Court of Canada in *Minister of National Revenue* v. *Molson et al* (1). That decision is of such importance as to warrant the most careful scrutiny of it. I have already referred to the judgment in that case in this Court and the fact that while the Supreme Court of Canada dismissed the appeal therefrom, the majority of the Court did so on grounds quite different from those relied upon by Angers J. in this Court. It will be recalled that Kenneth Molson had transferred certain property to his wife on March 23, 1925, and that after his death in April, 1932, his estate was assessed for income tax in respect of the income derived from the transferred property during the years 1925 to 1931. The validity of these assessments and the liability of the taxpayer thereunder were in issue. It appears from the judgment of Duff C.J., who spoke for Davis and Hudson JJ. as well as for himself, and also from that of Kerwin J. that it was agreed between counsel for the Minister and counsel for the Molson estate that the question of liability was to be determined solely by reference to the assessment for income received in the year 1930 and the judgment proceeded on that basis. With the utmost respect, I must say that I

(1) (1938) S.C.R. 213.

consider the judgment an astonishing one. At page 218, Duff C.J., after referring to the reasons for judgment given by Angers J. in this Court and saying:

> We do not think it necessary to consider either of these questions. We express no opinion upon them.

went on to express his opinion as to the effect of section 32 of the 1927 Revision, as follows:

> 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 Chief Justice then quoted with approval the statement of Boyd C. in *License Commissioners of Frontenac* v. *County of Frontenac* (1) as to the effect of a revision of the statutes on the statutes repealed by it but re-enacted in it. I need quote only the last sentence of this statement:

> The effect of the revision, though in form repealing the Acts consolidated, is really to preserve them in unbroken continuity.

Then the Chief Justice said, at page 219:

> 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.

From this statement of the effect of the 1927 Revision the Chief Justice then stated his conclusion as to the application of section 4(4) of the Act, as introduced by section 7 of the Act of 1926, and re-enacted by section 32 of the 1927 Revision, in the following terms:

> 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 15, 1926.

With regard to the last sentence of this statement I have no hesitation in saying that, even if it is correct as to the effect of subsection 4 of section 4 after it had become section 32 of the 1927 Revision, as to which I entertain serious

(1) (1887) 14 Ont. R. 741 at 745.

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doubt, it cannot possibly, for the reasons hereafter set forth, be correct as to its effect prior to the coming into force of the 1927 Revision.

In arriving at his conclusion Duff C.J. applied to the question of the validity of the assessment for 1930 the law as he conceived it to be after the 1927 Revision had come into effect, namely, after February 1, 1928. In effect, he held that section 4(4) of the Act, as introduced by section 7 of the 1926 Act, was preserved in unbroken continuity by section 32 of the 1927 Revision, except as to the retroactive effect which had been given to section 7 of the 1926 Act by section 12 thereof, his reason for making this exception being that section 12 of the 1926 Act had been repealed and not re-enacted in the 1927 Revision. The result, according to the Chief Justice, was that section 32 of the 1927 Revision did not have the retroactive effect which its predecessor, section 7 of the 1926 Act, had had. Without such retroactivity section 32 of the 1927 Revision dated back through such predecessor only to June 15, 1926, the date when section 7 of the 1926 Act was assented to, whereas section 7 of the 1926 Act dated back to January 1, 1925, by reason of the retroactivity imparted to it by section 12 thereof. By thus applying section 32 of the 1927 Revision without the retroactive effect which its predecessor had had the Chief Justice found that the Molson estate could not be held liable for income tax on income derived in 1930 from property which Kenneth Molson had transferred to his wife prior to June 15, 1926, namely, on March 23, 1925. In view of the agreement of counsel to which I have referred the appeals from all the other assessments, even for the period prior to February 1, 1928, were also allowed without consideration of whether the law properly applicable to the validity of the assessments for such prior period was the same or not.

Quite apart from whether the view of the law thus taken by the Chief Justice is correct or not, it is obvious that the reasoning which he applied in holding the 1930 assessment invalid was equally applicable to the other assessments for the period subsequent to February 1, 1928, that is to say, the assessments for 1929 and 1931 and also that for 1928 in respect of the income derived from the transferred property in that year after February 1. If,

therefore, the Molson estate was properly held not liable to tax on the income derived from the transferred property in 1930 it was equally not liable in respect of the income derived therefrom at any time after February 1, 1928.

But the same reasoning could not possibly apply to the assessments for the period prior to February 1, 1928, when section 7 of the 1926 Act with the retroactivity imparted to it by section 12 thereof was in effect. It is a fundamental principle that the validity of an income tax assessment and the liability of the taxpayer thereunder must be determined according to the law in force in the period for which the assessment was made and in which the liability, if any, of the taxpayer was incurred, and not according to the law in force at the time the assessment was made. In the light of such principle let us test the validity of one of the assessments for the year prior to February 1, 1928, say the assessment for 1927, and the liability of the Molson estate thereunder in respect of the income derived in that year from the transferred property. Clearly the law applicable to such assessment would be section 4(4) of the Act, as introduced by section 7 of the 1926 Act, with the retroactive effect imparted to it by section 12 thereof making it date back to January 1, 1925. In order that a taxpayer should be liable thereunder in respect of income derived from property transferred by him to his wife it would be necessary to show not only that such income was derived while the section was in effect but also that the transfer had been made after it had come into force. Both of these conditions of liability would have to be complied with. It could not have been soundly argued that because the transfer of March 23, 1925, was made prior to June 15, 1926, the date when section 7 of the 1926 Act was assented to, it was not affected thereby, for such argument would have been tantamount to a denial of its retroactivity. When section 12 of the 1926 Act made section 7 thereof retroactively applicable to the year 1925 the effect was the same as if section 7 had been enacted on January 1, 1925, and it should have been construed and applied accordingly. I am unable to see how it could be given its retroactive effect otherwise. That being so, the transfer from Kenneth Molson to his wife of March 23, 1925, was made after the retroactive coming into force of section 7 of the 1926 Act

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and both the transfer and the income derived in 1927 from the transferred property became subject to it. Both of the necessary conditions of liability thereunder were fully complied with. Consequently, if the law properly applicable to the assessment for 1927 had been applied to it such assessment would have been held valid and the appeal therefrom dismissed. The same disposition would have necessarily followed in respect of the other assessments for the period prior to February 1, 1928, namely, the assessment for 1925 in respect of the income derived from the transferred property in the balance of that year after the date of the transfer, the assessment for 1926, and also that for 1928, in respect of the income derived from the transferred property in that year up to February 1. The result would then have been what it ought to have been, namely, that the Molson estate would have been held liable to tax on the income derived from the transferred property during the period from March 23, 1925, the date of the transfer, up to February 1, 1928, when the 1927 Revision came into effect.

There is, I think, an implied recognition of this in the remarks of Duff C.J., at page 221:

> 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.

But the majority of the Court confined themselves to determining whether the assessment for 1930 was valid and did not consider whether the law they applied thereto was applicable to the other assessments, although the appeal from each assessment is a separate appeal, but disposed of all the assessments and the appeals therefrom on the basis agreed upon by counsel. There was, therefore, no adjudication as to the validity of the assessments other than that for 1930, certainly not of those for the period prior to February 1, 1928, but merely an acquiescence in disposing of them as counsel had agreed. By such course they allowed the law as they conceived it to be after February 1, 1928, to govern the assessments for the period prior thereto without consideration or recognition of the fact that the law properly applicable to such assessments

was radically different therefrom. In effect, they made section 7 of the 1926 Act, as carried into section 32 of the 1927 Revision, but without any retroactive effect and, therefore, dating back only to June 15, 1926, applicable to all the assessments, even to those for the period prior to February 1, 1928, although the law properly applicable to the assessments for such prior period was section 7 of the 1926 Act with the retroactive effect imparted to it by section 12 and, therefore, dating back to January 1, 1925. The result of the agreement of counsel and the unquestioning acquiescence by the majority of the Court therein was that with regard to the period prior to February 1, 1928, the retroactive effect which Parliament had given to section 7 of the 1926 Act was wholly denied and the Molson estate released from an income tax liability to which it was lawfully subject.

It is unfortunate that the Court did not deal with the several assessments under appeal according to the law properly applicable to each instead of proceeding on the basis agreed upon by counsel, for if they had done so there can be no doubt that the result to which I have referred would have been avoided. The responsibility for such result must, I think, lie with the Court for acting upon the agreement rather than with counsel for making it. An appeal from an income tax assessment is not a private dispute between the appellant taxpayer and the Minister or a *lis* in the ordinary sense, in which the agreement of counsel may bind the parties thereto and so preclude the Court from dealing with the issue on the appeal on its merits; the public has an interest in the disposition of the appeal and in seeing that taxpayers are held liable for the tax which Parliament has imposed upon them and that no taxpayer is released therefrom pursuant to an agreement of counsel and the acquiescence of the Court in its application. It is the duty of the Court in such an appeal to determine the liability of the taxpayer under each assessment appealed from according to the law which Parliament has made applicable to it regardless of what agreement counsel may have made as to its disposition. It is not for counsel to fix such liability by agreement. That is for adjudication by the Court. It may, I think, in fairness to counsel, be assumed that when they made their agree-

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ment they considered that the law applicable to all the assessments was the same and did not intend that the liability of the taxpayer under any of them should be determined according to a law that was not properly applicable thereto. Yet that turned out to be the result of the Court's finding that the taxpayer was not liable under the assessment for 1930 and the application of such finding to the other assessments without adjudication as to the law applicable thereto. Under the circumstances, I am of the opinion that the *Molson* case (*supra*) was wrongly decided by the Supreme Court of Canada at least so far as the judgment relates to the assessments in respect of the income derived from the transferred property during the period from March 23, 1925, the date of the transfer, up to February 1, 1928, and that the Molson estate ought to have been held liable to tax on such income.

I am also of the view that the judgment in the *Molson* case (*supra*) is open to doubt as to the assessments covering the period subsequent to February 1, 1928. If the reasoning of the majority of the Court is correct that, because section 12 of the 1926 Act was repealed, section 32 of the 1927 Revision applied "only to the income of property transferred after the day on which it was originally enacted, June 15, 1926", which is the effect of what Duff C.J. said, then we have the extraordinary result that if a transfer of property from a husband to his wife was made at any time during the interval between December 31, 1924, and June 15, 1926, the transferor would be liable to be taxed on the income derived from such property up to February 1, 1928, because of the retroactive effect imparted to section 7 of the 1926 Act by section 12 thereof, but would not be liable in respect of any income derived therefrom after such date. I do not think that Parliament could have intended such an anomalous result. Since Parliament decided by section 7 of the 1926 Act that if a husband transferred property to his wife he should be liable to be taxed on the income derived from such property as if such transfer had not been made and by section 12 of the said Act made section 7 thereof retroactive to January 1, 1925, so that it was applicable to the income derived from property transferred after that date, I see no reason for assuming, in the absence of clear words indicating such an intention, that it intended

that the husband should be free from liability to tax on income derived from the transferred property after February 1, 1928. I am unwilling to accept a construction of the Act that leads to such an anomalous result, unless I am plainly driven to it. I do not think I am so driven. The unreasonableness of the result prompts an enquiry as to the correctness of the construction.

The reason for the result is to be found in the view which the majority of the Court took of the effect of the non-appearance of section 12 of the 1926 Act in the 1927 Revision. With the greatest deference, I doubt the correctness of such view. It is established that the effect of the 1927 Revision was to preserve the Acts consolidated by it in unbroken continuity. That being so, I am unable to see how the reasoning of Duff C.J. that, because section 12 of the 1926 Act did not appear in the 1927 Revision, section 32 thereof could date back through its predecessor, section 7 of the 1926 Act, only to June 15, 1926, can be consistent with the preservation in unbroken continuity of section 7 of the 1926 Act with its retroactivity back to January 1, 1925. How could it be said in the case of the hypothetical transfer to which I have referred that there was a preservation in unbroken continuity of section 7 of the 1926 Act by section 32 of the 1927 Revision if there was such a cessation of the liability which had previously existed? All that was preserved by the view taken by Duff C.J. was section 7 of the 1926 Act without its retroactivity.

Yet that was not the state of the law to which section 32 of the 1927 Revision succeeded. I have already expressed the view that when section 12 of the 1926 Act made section 7 thereof retroactive to January 1, 1925, the effect was the same as if it had been enacted on that date and that it ought to be construed and applied accordingly. It remained with its retroactivity up to February 1, 1928. That being so, it was carried into section 32 of the 1927 Revision with exactly the same force and applicability that it had had up to that date. Any other construction would, I think, amount to a denial of the doctrine that the Revision preserved the Acts consolidated by it in unbroken continuity.

There is a further reason for questioning the correctness of the construction adopted in the *Molson* case (*supra*). It was assumed that section 7 of the 1926 Act was repealed

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pursuant to section 5(2) of An Act respecting the Revised Statutes of Canada, to which I have already referred, which provided:

5. 2. On, from and after such day, (which was later by proclamation fixed as February 1, 1928) all the enactments in the several Acts or parts of Acts in Schedule A. above mentioned shall stand and be repealed to the extent mentioned in the third column of the said Schedule A.

In the said Schedule A, which appears at the end of Vol. IV of the Revised Statutes of Canada, under the heading "Extent of Repeal" the following appears with regard to the 1926 Act:

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.

Section 12 of the 1926 Act is thus included among the Acts and parts of Acts repealed. But the said section 5 and Schedule A must be read in the light of section 2 of the same Act, which provides:

2. There shall be appended to the said Roll a Schedule A similar in form to Schedule A appended to the Revised Statutes of Canada of 1906; and the Commissioners may include in the said Schedule all Acts and parts of Acts which though not expressly repealed, are superseded by the Acts so consolidated, or are inconsistent therewith, and all Acts and parts of Acts which were for a temporary purpose, the force of which is spent.

I venture the opinion that it is thus clearly indicated that not all the Acts or parts of Acts included in the third column of Schedule A as having been repealed are of the same nature or have the same effect because of such inclusion. Section 12 of the 1926 Act comes within the category of "Acts and parts of Acts which were for a temporary purpose, the force of which is spent" and its inclusion in Schedule A ought not to be construed as affecting any change in the law or cessation of liability under it. When it gave section 7 of the 1926 Act retroactive effect back to January 1, 1925, its purpose was wholly served and its force spent. Section 7 continued to have such retroactive effect up to February 1, 1928, when it was succeeded in unbroken continuity by section 32 of the 1927 Revision. Thereafter, since its purpose was completely accomplished and its force was spent there was no further need for it. Under the circumstances, I am unable to see how its non-appearance in the 1927 Revision or its inclusion in Schedule A can have the effect which the majority of the Court ascribed to it, namely, a change in the law by removing

the retroactivity which section 32 of the 1927 Revision had inherited from its predecessor and thus giving it a different applicability from that which its predecessor had had. It follows from what I have said that, in my opinion, the Molson estate ought to have been held liable for income tax under all the assessments levied against it.

If the decision of the Supreme Court of Canada in the *Molson* case (*supra*) is correct, it would follow in the present case that the appellant ought not to be held liable in respect of the income derived from the transferred property in the period from 1925 to 1929 even if the transfer was made in 1925, as counsel for the respondent suggests, or, indeed, at any time prior to June 15, 1926, when section 7 of the 1926 Act was assented to. *A fortiori* that would be so if the transfer was made prior to January 1, 1925. But in view of what I have said, if I had held that the transfer was made subsequent to January 1, 1925, I would have held the appellant liable under all the assessments under appeal notwithstanding the decision in the *Molson* case (*supra*).

But since the transfer was made prior to January 1, 1925, the appellant should not be held liable in respect of any income derived from the transferred property either under section 7 of the 1926 Act or section 32(2) of the 1927 Revision on the ground that it was made before either of these sections came into force, even if section 7 of the 1926 Act is construed and applied with its full retroactive effect back to January 1, 1925, since one of the essential conditions of liability to which I referred cannot be complied with. If, therefore, there is any liability on the part of the appellant it can only be under section 4(4) of the 1917 Act. Here is where the argument of counsel for the respondent based upon certain remarks by the majority of the Court in the *Molson* case (*supra*) came in. The contention was that just as section 4(4) of the Act, as introduced by section 7 of the 1926 Act, was preserved in unbroken continuity by section 32 of the 1927 Revision, as Duff C.J. had said, so also a continuity of liability and right under section 4(4) of the 1917 Act was preserved, notwithstanding its repeal by section 7 of the 1926 Act, just as if such section had not been passed; that there was a liability under the 1917 Act which continued until June 15, 1926,

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when section 7 of the 1926 Act was enacted, to which section 12 thereof did not apply, and that later assessments might come under the new Act because of such continuity; and that rights acquired by the Crown under the 1917 Act were likewise preserved. From these premises he argued that since the income derived by Mrs. Fasken from the transferred property in the years 1925 and 1926 was received by her in June, 1925, and May, 1926, respectively, there was a liability incurred by the taxpayer and a correlative right acquired by the Crown in respect of such income before section 7 of the 1926 Act was enacted and that the making of such section retroactive could not cause such liability or right to disappear. I am unable to accept this argument. In the first place, the statement of Duff C. J. that section 7 of the 1926 Act was preserved in unbroken continuity by section 32 of the 1927 Revision was applicable only because it was re-enacted in the revision in identical form and cannot be extended to apply to the repeal of section 4(4) of the 1917 Act by section 7 of the 1926 Act. There was a change in the law by such repeal and, consequently, no preservation of any continuity of it. Thereafter section 4(4) of the 1917 Act ceased to have any effect except such as was saved by section 19 of the Interpretation Act, R.S.C. 1927, chap. 1, which provides in part:

> 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.

In order that a taxpayer shouud be held liable under section 4(4) of the 1917 Act it would be necessary to show not only that he had made a transfer of property to one of the persons named therein after the date named therein and while it was in effect but also that the reduction in his income thereby had occurred while it was still in force. Both conditions of liability must be complied with. It is obvious that if the transfer by David Fasken to his wife was made on December 31, 1924, there could not have been any reduction in his income thereby in 1924. The only reductions that occurred in such income by reason of the transfer prior to June 15, 1926, were those of $10,000 in May 1925 and $5,000 in June 1926. The utmost liability that David Fasken

could have incurred under section 4(4) of the 1917 Act would, therefore, be in respect of these amounts as contained in the assessments for 1925 and 1926. But his liability under such assessments must be determined by the law properly applicable to the assessments for such years. The law must be section 7 of the 1926 Act made applicable by section 12 thereof to 1925 and subsequent years. This retroactivity of section 7 of the 1926 Act back to January 1, 1925, prevented any incurring of liability or acquiring of right under section 4(4) of the 1917 Act after such date. To hold a taxpayer liable under such section 4(4) for a reduction of income in 1925 and in 1926 would be a denial of the retroactivity of section 7 of the 1926 Act.

Consequently one of the conditions of liability under section 4(4) of the 1917 Act, namely, that there should be a reduction of income while it was in force cannot be complied with and there can be no liability under it.

Since there is also no liability under section 7 of the 1926 Act or section 32(2) of the 1927 Revision it follows that the appellant is not liable to tax on any of the income derived from the transferred property. The appeals from all the assessments must, therefore, be allowed with costs.

Judgment accordingly.