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the property indicated by "chattels and effects" construed as already indicated, and I am therefore of opinion that no right to the receipts or certificates (which were merely indicia of the property represented by them) was transferred to the appellants by the deed of July 1900. The appeal therefore fails.

Appeal dismissed.

Solicitors, for appellants, *J. F. Fitzgerald & Power.*
Solicitors, for respondent, *Flower & Hart.*

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Ovtt
Syme v Commissioner of Taxes (Vic)
(1914) 18 CLR 519

[HIGH COURT OF AUSTRALIA.]

THOMAS PROUT WEBB (COMMISSIONER OF TAXES OF VICTORIA) . . . APPELLANT;

AND

SYME AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March*, 14, 15, 16, 17, 18; *June* 18.

Griffith C.J., Barton, O'Connor and Isaacs JJ.

Income tax—Income derived from trust estate—Trade carried on by trustees—Income from personal exertion or income the produce of property—Income Tax Act 1895 (*Vict.*) (*No.* 1374), *secs.* 2, 8, 9, 12—*Income Tax Act* 1896 (*Vict.*) (*No.* 1467), *secs.* 4, 12.

Under the Victorian Income Tax Acts the income tax is an impost laid upon individual persons in respect of annual incomes received by them for their own use and disposition.

Where a business is carried on by trustees under trusts which, although for the benefit of the beneficiaries, do not constitute them the owners of the business, and the beneficiaries are entitled to the income of the trust estate, the beneficiaries and not the trustees are the taxpayers in respect of the incomes of the beneficiaries, and the trustees are not taxpayers at all except

so far as they are answerable under sec. 12 of the *Income Tax Act* 1895 for income tax payable by the beneficiaries or except so far as they may be liable under sec. 12 (1) (*d*) of the *Income Tax Act* 1896.

A testator gave the whole of his real and personal estate to six trustees, who included his five sons, upon trusts for conversion with full power of postponement and management, but the power of conversion was not to be exercised as to a newspaper business, which had been carried on by the testator, until the death of the last survivor of the sons. After giving certain legacies and annuities, payable in one case out of the general income of the estate and in another out of the profits from the newspaper business, and directing certain sums to be set aside for specific purposes, he directed that, subject to these trusts, the trustees should hold his "residuary real and personal estate including" the newspaper business upon trust, until the death of the last survivor of the sons, to divide the income into five equal shares and to pay one share to each of his five sons during his life or until attempted alienation, and on further trusts which would not terminate until the death of the last survivor of the sons. He gave to the trustees the fullest powers of carrying on and managing the newspaper business, and expressed his desire that that business should "remain in the possession of his five sons and the survivors and survivor till the death of the last survivor." A large part of the fund annually distributable by the trustees among the five sons consisted of the profits from carrying on the newspaper business.

Held, by *Griffith* C.J., *Barton* J. and *O'Connor* J. (*Isaacs* J. dissenting) that each of the five sons was under the Income Tax Acts primarily liable to payment of income tax in respect of the income derived by him from the trust estate, and that the whole of that income was taxable as income the produce of property.

Decision of the Supreme Court of Victoria: *In re the Income Tax Acts* (*No.* 1) (1909) V.L.R., 584; 31 A.L.T., 127, reversed in part.

APPEAL from the Supreme Court of Victoria.

A special case was stated by the Commissioner of Taxes for the opinion of the Supreme Court of Victoria asking in reference to the income received by the five sons of David Syme, deceased, from the trustees of his estate, the following question:—"Is the income derived by the taxpayers from the estate of the testator during the year 1908 taxable as income the produce of property or as income derived from personal exertion?"

The facts are sufficiently set out in the judgments hereunder.

The Supreme Court having decided that the income so far as it could be definitely traced to a business carried on by the trustees was taxable as income derived from personal exertion:

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In re the Income Tax Acts (No. 1) (1), the Commissioner now appealed to the High Court.

Irvine K.C. and *A. H. Davis* (with them *Schutt*), for the appellant. Under the Income Tax Acts it is the beneficiaries who are taxed and not the trustees under the circumstances of this case. They are taxed in respect of their share of the fund produced by the working of the estate by the trustees, and there is no direct personal exertion on the part of the beneficiaries or of any person on their behalf in the production of that fund. The income which a beneficiary receives from a trust estate is income derived from property, no matter of what the estate consists. "Income" in these Acts does not merely mean money, but connotes a relation between the taxpayer and the immediate source from which he receives it. The Acts were intended to give the benefit of the lower rate of duty to persons by whose exertions, including the exertions of agents controlled by them, the income was secured, and the burden is on the taxpayer to prove that he is entitled to the concession. If income is traced back far enough it always is derived from the personal exertion of some one. The amendment of the definition of "income from personal exertion" made by sec. 4 of the Act of 1896 in consequence of the dictum of *Madden* C.J. in *Commissioner of Taxes* v. *Everitt* (2), is intended to make it clear that that expression includes the produce of the personal exertion or trade of an agent of the taxpayer, and has no reference to a trustee over whom the taxpayer has no control. Although in the aggregate the beneficiaries may be said to be equitable owners of their trust estate no one of them can be said to be the equitable owner of any part of the estate.

[ISAACS J. referred to *Lord Sudeley* v. *Attorney-General* (3).]

The nature of the deductions mentioned in sec. 9 of the Act of 1895 show that the beneficiary is the person taxed, and not his trustee.

[They also referred to *Crowley* v. *Commissioner of Taxes* (4); *London County Council* v. *Attorney-General* (5); *In re Income*

(1) (1909) V.L.R., 584; 31 A.L.T., 127.
(2) 21 V.L.R., 481, at p. 486; 17 A.L.T., 225.
(3) (1897) A.C., 11.
(4) 21 V.L.R., 593, at p. 598; 17 A.L.T., 235.
(5) (1901) A.C., 26, at p. 35.

Tax Act 1902 (1); *In re Income Tax Acts* (2); *In re Income Tax Acts* (3); *In re Income Tax Acts* (4); *Colquhoun* v. *Brooks* (5); *Darbyshire* v. *Darbyshire* (6); *Theobald on Wills*, 7th ed., p. 457; *Bullen and Leake's Precedents of Pleadings*, 6th ed., p. 171; *Stroud's Judicial Dictionary*, 2nd ed., vol. III., p. 2106.]

Mitchell K.C. and *Starke*, for the respondents. Where trustees are carrying on a trade for the benefit of the beneficiaries the income of the beneficiaries is income from personal exertion. The definition of "income from personal exertion" in the Act of 1895 would have included the income from a trade carried on by an agent, and the intention of the amendment in sec. 4 of the Act of 1896 was to include income from a trade carried on by a trustee for beneficiaries. It makes no difference whether the trust property consists of a business alone and the whole income has to be paid to one beneficiary or whether the trust property includes also real estate from which income is also derived and the whole income has to be distributed among several beneficiaries. Nor does it make any difference if certain deductions have to be made by the trustees before paying over the income to the beneficiaries. If the beneficiaries are entitled to say to the trustees "you must account to us for the profits of the business," each beneficiary's share of that profit is his income from personal exertion.

[ISAACS J. referred to *Cooper* v. *Cooper* (7); *Blake* v. *Bayne* (8); *In re Income Tax Acts* (9).]

Under the testator's will the beneficiaries are entitled to the whole of the income after provision is made for payment of legacies, annuities and charges, and in the case of the *Age* business the shares of the beneficiaries come within the amended definition of income from personal exertion as being income which has accrued to them although it has not been derived from their own trade. The beneficiaries are equitably entitled to the very income derived from the *Age* business within the meaning of sec. 12 (1) (*e*) of the *Income Tax Act* 1896.

(1) 1904 St.R. Qd., 57.
(2) 28 V.L.R., 102; 23 A.L.T., 240.
(3) 25 V.L.R., 554; 21 A.L.T., 206.
(4) 22 V.L.R., 539; 18 A.L.T., 233.
(5) 14 App. Cas., 493.
(6) 2 C.L.R., 787.
(7) L.R. 7 H.L., 53, at p. 64.
(8) (1908) A.C., 371, at p. 383.
(9) (1907) V.L.R., 358; 28 A.L.T., 215.

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Under the will the five sons are entitled to have possession and control of the *Age* business: *Lewin on Trusts*, 11th ed., p. 848; *Tidd* v. *Lister* (1); *In re Wythes*; *West* v. *Wythes* (2), and that makes their position stronger than that of ordinary beneficiaries. *Lord Sudeley* v. *Attorney-General* (3) is distinguishable, for here the real question is whether the income actually comes within the definition of income from personal exertion. In that case the question was to determine where the property was situated, and for that purpose the Court determined what were the rights of the parties and whether those rights were not rights to the property itself. In regard to the *Age* business the principles laid down in that case would entitle the beneficiaries to be taxed as upon income from personal property, for after the charges are paid they are entitled to the very income from that business.

[GRIFFITH C.J. referred to *Attorney-General* v. *Johnson* (4).]

The intention of the Acts is to tax incomes from all businesses under all circumstances and without regard to whose the businesses are, and to tax those incomes as incomes from personal exertion. It is also the intention of the Acts, as set out definitely in sec. 8 of the Act of 1895, to tax trustees in respect of businesses carried on by them. Liability to the tax depends on the subject matter indicated by the Acts, and that being so the provisions of the will are irrelevant to the inquiry as to what is that liability. Sec. 8 of the Act of 1895 is the section which primarily imposes liability, and it imposes it upon every person. By itself it imposes personal liability on trustees, and sec. 12 of that Act really limits that personal liability and imposes no liability which was not imposed by sec. 8. Sec. 15 bears out this view, for it provides for the assessment of trust estates, and so does sec. 17, which includes trustees in taxpayers. Sec. 12 of the Act of 1896 does not widen the area of taxation, but widens the area of persons liable to pay the tax, and provides against double taxation in the case of trust estates.

[ISAACS J. referred to *Pearson* v. *Lane* (5).]

(1) 5 Madd., 429.
(2) (1893) 2 Ch., 369.
(3) (1897) A.C., 11.
(4) (1907) 2 K.B., 885.
(5) 17 Ves., 101, at p. 104.

A. H. Davis in reply, referred to *Commissioners of Taxation* v. *Abbey* (1); *In re Smyth*; *Leach* v. *Leach* (2).

Cur. adv. vult.

June 18.

The following judgments were read :—

GRIFFITH C.J. The respondents in this case are five sons of the late David Syme, who are entitled under his will to the income of his residuary real and personal estate in equal shares. Under the Victorian Income Tax Acts the rate of tax payable depends upon the source of the income. For this purpose income is divided into two artificial classes, designated "Income derived from personal exertion" and "Income the produce of property," the former comprising all income earned by personal services, past or present, and all income arising or accruing from any trade carried on in Victoria, and the latter comprising all income not derived from personal exertion, *i.e.*, all other income, from whatever source arising, whether actually from property or not. The testator was the proprietor of the *Age* newspaper, and it is not in controversy that the income derived from that undertaking while in the hands of the testator was income arising from a trade carried on in Victoria within the meaning of the Acts. He also carried on other businesses in the State.

The question for determination is whether in the assessment of income tax upon the separate shares of the respondents of the income of the residuary estate, which comprised various sources of income not in any sense derived from personal exertion, they are entitled to the benefit of the lower rate as to so much of the income received by them as can be identified as derived from the *Age* and other businesses which stand on the same footing. This involves a preliminary question whether any part of their income can be said to arise from personal exertion within the meaning of the definition. If it can, it would be necessary to apportion their whole income from the residuary estate, attributing it to the several sources from which the net income of the trust estate in the hands of the trustees of the will is derived, and, I suppose, in proportion to the several amounts derived from the respective

(1) 1 S.R. (N.S.W.), 4. (2) (1898) 1 Ch., 89.

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sources. This may be illustrated by a simple formula: Let a and b respectively represent the income derived from the trade and other properties of the testator, and x the charges for which under the will provision must be made before the income of the residuary estate can be ascertained. Then $a + b - x$ will represent the income of the residuary estate to be divided among the beneficiaries. The question is whether that income is to be regarded as severable into two distinct amounts, $a - \frac{a}{a+b}x$, and $b - \frac{b}{a+b}x$, derived from different sources, or as income derived from a single source, namely, the trust estate, and earned by the trustees as administrators of that estate. The actual amounts receivable by the respondents are the same in either point of view.

To use another illustration, the income of the residuary estate may be compared to a lake fed by several streams, losing much water by evaporation, and issuing in several channels. Ought the water in those channels to be regarded as deriving from a single source, the lake, or from the several streams in proportion to their respective volumes?

Before discussing in detail the provisions of the Acts on which the question arises I will briefly refer to the provisions of the will. The testator gave his whole estate to six trustees, of whom the respondents are five, upon trusts for conversion with full powers of postponement and management, but the power of conversion was not to be exercised as to the *Age* newspaper until the death of the survivor of his sons. After giving legacies to a considerable amount, and annuities to the extent of some thousands of pounds, payable in one case out of the general income of his estate, and in another out of the income of his residuary estate and the profits arising from the *Age*, and directing certain large sums of money to be set aside for specific purposes, he directed that, subject to these trusts, his trustees should hold his "residuary real and personal estate, including the *Age* newspaper," upon trust until the death of the last survivor of his five sons to divide the income into five equal shares, and to hold the share of each son upon trust to pay it to him during his life or until attempted alienation, and on further trusts which do not terminate until the death of the last survivor. He gave his trustees *eo nomine* the fullest powers with regard to carrying on and

managing the *Age* newspaper, and expressed a desire that it should "remain in the possession of his five sons and the survivors and survivor, till the death of the last survivor," when, as already said, the distribution of his trust estate was to take place.

The fact that the respondents are five of the six trustees is unimportant. If the trustees were changed, the respondents' rights and obligations as beneficiaries would not be affected.

I pass now to the Statutes, beginning with Act No. 1374.

Two views were presented to the Court as to the scheme of the Acts, one that the income tax is an impost laid upon individual persons in respect of annual incomes received by them for their own beneficial use and disposition, the other that the impost is payable upon all annual revenues, irrespective of the question whether any one gets the benefit of them as income for his own individual use. In the latter view a trustee (which term includes executors and administrators) would be bound to pay income tax upon the revenue received by him from his trust estate, although it were all expended in payment of the testator's or intestate's debts, and although no one obtained the benefit of any part of it as personal income.

The scheme of the Acts can only be ascertained from their express provisions, for there is no common law of income tax.

I remark at the outset that in the definition of the two classes of income to which I have already referred the term "personal exertion," used in such a context, *primâ facie* means, in my opinion, the personal exertion of the person by whom, and not that of the person from whom, the income is received, including, in the case of income derived from trade, the personal exertion of the agents and servants of the trader.

The phrase "a man's income" seems to me to connote, *primâ facie*, both that the money spoken of is not capital and that it belongs beneficially to the man whose income it is, and not to some one else. If I ask a man "What is your income?" I mean, "What are your annual resources available for your expenditure?"

Primâ facie, then, the person liable to pay the tax, the tax-paper as he is called, is the person to whom the income belongs for himself. And in my opinion this view is entirely supported by the terms of the Acts. The definition of the term "trustee"

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given in sec. 2 of Act No. 1374 includes a "person having . . . . the possession administration or control of any income affected by any express or implied trust." Here a plain distinction is drawn, with regard to money received by a trustee, between a person having control of income and the person whose income it is. By sec. 8 every person who receives income is made liable as a taxpayer, and by sec. 14 he is bound to make a return of it, and to pay tax in respect of it. By sec. 9 (3) it is provided that in the case of a partnership a joint return is to be made, but the partners are liable to tax only in their separate individual capacities. By sub-sec. (5) of the same section each taxpayer is entitled to a deduction to the extent of £50 for sums paid by him for life assurance, and by sec. 7 (1) (*b*) he is entitled to deduct £200 from his total income. These provisions seem to me to show, unless there is something in the Act inconsistent with such a conclusion, that the obligation is a personal one imposed upon individuals, *quâ* individuals, *i.e.* in their capacity of persons, and does not attach until the income has come into the hands of some one who has such control of it that he may make out of it payments for life assurance, and who must bring into account his other receipts before claiming the deduction of £200.

Is there, then, anything in the Act which forbids this conclusion? Reliance was placed by Mr. *Starke* in his ingenious argument upon the provisions of sec. 12 of Act No. 1374. By that section every agent for an absent taxpayer and every trustee is answerable for the doing of all such things as are necessary to ensure the assessment of the income of his principal or *cestui que trust* (sub-sec. 1 (A)), and is authorized and required to retain from time to time in each year out of any money which comes to his hand as such agent or trustee so much as is sufficient to pay the tax for the current year in respect of any income subject to the tax (sub-sec. 1 (C)). By sub-sec. (1) (D) he is made personally liable for the tax payable in respect of any income if while the tax remains unpaid he disposes of the income or disposes of any fund or money which comes to him after the tax is payable from or out of which it could legally have been paid, but he is declared to be not otherwise personally liable for any tax. So far from these provisions showing that the tax is payable by a

trustee as the immediate recipient of the money, they appear to me to point strongly to the opposite conclusion, namely, that the primary liability to income tax falls upon the beneficial recipient of the money as his income, and that the liability of the trustee is only secondary, and contingent upon the beneficiary failing to pay the tax for which he is liable. I think that there is nothing in this section, nor can I find anything else in Act No. 1374, to negative the conclusion to which I was led *primâ facie*. The provisions of this Act requiring trustees to make returns of income appear to me to be merely ancillary, in the nature of machinery for ensuring payment by the beneficiary.

Mr. *Starke* also relied upon sec. 12 of Act No. 1467, which provides (sub-sec. 1) that income tax shall be payable:

"(D) In respect of income earned derived or received by any trustee where there is no other person presently entitled to such income who is in actual receipt thereof and liable as a taxpayer in respect thereof, by such trustee; and

"(E) in respect of every other income and in all other cases by the person to whom the income arises or accrues or who is legally or equitably entitled to the receipt thereof."

In my opinion clause (E) is to be construed as meaning that the tax is payable by the person who is beneficially entitled to the income, whether his beneficial interest is both legal and equitable or equitable only at the moment of the income leaving its source. This clearly appears when clauses (D) and (E) are contrasted, and this view is confirmed by sub-sec. 2 of the same section, which provides that:—

"(2) Where a person is entitled to receive or receives income from any agent or trustee nothing in this section shall be taken to relieve such person from any tax due or payable in respect of such income unless such agent or trustee has paid the tax in respect thereof."

For these reasons I think that the taxpayer is the person who is entitled to the beneficial enjoyment of the income, and that the obligation of the trustee, which is only secondary, does not exist with respect to any greater sum than the aggregate amounts

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payable by all the beneficiaries of his trust. I think, therefore, that the taxable income of the respondents consists of the sums which they have actually received from the trustees as income of the residuary estate of the testator.

This conclusion is consistent with all the provisions of the Acts, while the opposite view is irreconcileable with many of them, and particularly with those of sec. 12 (1) (D) of Act No. 1374 to which I have already referred. I understand that the learned Judges of the Supreme Court were also of this opinion.

I will next refer to an argument based on sec. 4 of Act No. 1467, which provides that in the definition of income from personal exertion the income subject to tax shall be deemed to include income of the taxpayer although it has not arisen or been earned, derived or received from his own personal exertion or trade. This declaratory enactment seems to have been passed in consequence of a dictum of *Madden* C.J. in the case of *Commissioner of Taxes* v. *Everitt* (1), which was apparently misunderstood. In my opinion it made no alteration in the law. As I construe it, it merely declares that the income of a taxpayer derived from personal exertion (which includes trade) shall include income which is his income, whether it is earned or derived from his own individual exertion, in trade or otherwise, or not. The provision is only operative in regard to income derived from trade, since all the other forms of personal exertion mentioned in the definition in Act No. 1374 are the individual exertion of the taxpayer. It is, of course, obvious that a trader's income arises in part from the personal exertion of his employés and agents, but it is none the less his income. It was contended for the appellant that this extension, if it be one, does not include the case of a person for whom a trade is carried on by another who is not an agent but a trustee. But in either case the income, as it is received, belongs, in one case legally, in the other equitably, to the person beneficially entitled, and I think that the same consequences follow.

The respondents, on the other hand, contend that the effect of sec. 4 is that all income derived from trade retains that character for the purposes of the Acts until it reaches the hands of the

(1) 21 V.L.R., 481; 17 A.L.T., 225.

ultimate beneficiary. The test, in my opinion, is whether the trade is the trade of the trustee or of the beneficiary in the sense just indicated.

If any part of the respondents' income ought to be treated as income arising from a trade, the returns in respect of it (which can only be made by the trustees) should show what deductions are proposed to be made from the gross receipts, which deductions must not exceed those specified in sec 9 of Act No. 1374. In my opinion these provisions are only applicable to income derived from trade which at the moment of receipt becomes the actual property (legal or equitable) of the taxpayer, and do not extend to a case where a business is carried on by trustees of a will under trusts which, although created for the benefit of beneficiaries, do not constitute them the owners of the business.

In my judgment the whole scheme of the Acts is inconsistent with the notion that the trustees of such a will are to be regarded as the taxpayers in respect of the income of the beneficiaries, or as taxpayers at all, except so far as they are answerable under sec. 12 of Act No. 1374 for income tax payable by the beneficiaries, or except so far as they may be liable under sec. 12 (1) (D) of Act No. 1467.

What then is the source from which the income of the respondents is derived ? I think that, adapting the rule *Causa proxima non remota spectatur*, we should say *fons proxima non remota spectatur*.

In the case of *Lord Sudeley* v. *Attorney-General* (1), the question was whether a certain interest in property was locally situated in England so as to be liable to probate duty, or in New Zealand, where the property in respect of which the beneficial interest arose was situated. In order to determine the question the test applied was: "What is the right which passed by the will?" Then, it having been ascertained what the right was, the question "where is it situated" could be answered. So here, in order to determine from what source the taxable income is derived we must first first ask: What is the property from which it is derived ?—in other words, what are the rights of the beneficiaries under the testator's will with respect to his residuary

(1) (1897) A.C., 11.

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estate? For those rights are their property, and their property consists of those rights, and nothing else.

I think it is clear that they are not entitled to a penny of the money received by the trustees of the will *ipso instanti* of the receipt, and that their property consists in a right to have an account of the annual receipts and disbursements of the trustees of the will, and to claim their share of the income of the residuary estate ascertained by such account. This, it appears to me, is the *fons proxima* to which regard must be had.

It is contended that, even so, the fact remains that the real source from which a large portion of the respondents' income arises is the *Age* business, and it is said that the case is the same as if all the receipts of the trustees by way of incomings of the trust estate were put in a chest from which the outgoings were taken, so that every portion of the contents ought to be regarded as derived in part from all the sources.

Reverting to the analogy of a lake, every drop of water in the effluent channels may in one sense be regarded as containing some particles from each of the contributing streams. But I think that in the case of a mixed fund, such as that created by the will now in question, it is impossible to make such a division of sources for the purpose of the Income Tax Acts. If the circumstances were such that the beneficiary could be, and had been, put in actual possession, for his exclusive benefit, of any part of the trust estate, the case might be different. But these are not the circumstances in the present case, which relate to the income of the estate for the year 1908, during part of which the testator was alive, and while the estate was wholly unadministered.

For these reasons I think that the contention of the appellant is sound, and that no part of the respondents' income derived from the estate of the testator during the year 1908 was income derived from personal exertion within the meaning of the Acts. The whole is therefore taxable as income the produce of property, and the question must be answered accordingly.

BARTON J. This appeal raises an important question on the construction of the Income Tax Acts of this State, Nos. 1374 and 1467, passed in 1895 and 1896. The facts are stated by the

Commissioner of Taxes under sec. 17 of the Act of 1896 in a case for the opinion of the Supreme Court. The question is whether the income derived by the taxpayers, the respondents, from the estate of the testator, David Syme, during 1908 is taxable as "income the produce of property," or as "income derived from personal exertion," as those terms are severally defined and explained in the two Acts, which are to be read as one: sec. 1 of No. 1467. The rate which the respondents will have to pay is twice as high in the first of those cases as in the other (sec. 5 of No. 1374), and the Commissioner of course contends for the higher rate. The Supreme Court having decided against him, he appeals to this Court. I need not repeat the definitions of the two classes of income in question, which are given in sec. 2 of the Principal Act. The respondents resist the demand for the higher rate as beneficiaries under the trusts of the will. The case is not complicated by the fact that they are also, with their mother, trustees of the residuary estate, including, with other property, the testator's newspaper and other businesses. It must be dealt with as if some other persons were the trustees, as indeed others may become.

A copy of the will is annexed to the special case, and its provisions, so far as they are material to this case, have already been summarized.

The appellant contends, firstly, that the scheme of the Acts, subject to a few express exceptions which will be mentioned, is to impose liability primarily on the person deriving income which he beneficially enjoys, and therefore that it is the beneficiary and not the trustee who is ordinarily, and in a case like the present, the taxpayer. The source of the beneficiary's income, the appellant says, is not the business concerns conducted by the trustees, but the trust itself, for it is in respect of its immediate source that the quality of the income is ascertainable.

Secondly, he contends that the income is not due to any "personal exertion" of the beneficiary within the meaning of the Acts, since the "trade" or business, though still "carried on," is not conducted by the beneficiary or under his direction or control, so that the income is not earned by him, even vicariously.

The appellant's final contention is that the income of each

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beneficiary is not the income as it springs from its original source, like the income of the testator in his lifetime, but is merely the share of the beneficiary in the annual proceeds of a general or commingled fund produced by the working of the estate, and that for this added reason it is not derived from "personal exertion."

These propositions are all controverted by the respondents, who argue that on the true construction of the Acts the trustees are primarily liable to pay, and that this and other considerations show that it is the income that is the subject of taxation, irrespective of persons and of beneficial enjoyment; that the income is taxable at its source, that is, as soon as it has come to the hands of the trustees, the source being their carrying on of the business concerns described in the special case, and therefore their "personal exertion." The respondents further contend that, even if there is no actual earning of income, either personally or vicariously, on their part as beneficiaries, or on the part of any agent or employé of theirs, the existence of such a condition is not essential, as it is not necessary under the Acts that the "trades" or enterprises described should be their "own personal exertion or trade" (see sec. 4 of No. 1467) in order to enable them to escape the higher rate of taxation.

The case of "Melbourne Mansions," set forth in the special case, is not included in the subject matter of this appeal. The other going concerns, namely, "Killara" and the farm at Mordialloc, in addition to the newspaper business, are the subjects of the questions raised before us.

I will first inquire into the question whether it is the income beneficially enjoyed in respect of which the tax is levied, and whether the appellant is right in arguing that it is the beneficiaries who are primarily liable.

The tax is levied on all income "derived by any person from personal exertion" or "by any person from the produce of property": sec. 5 of Act No. 1374. The ordinary meaning of deriving income from a particular source is obtaining or receiving it for one's own benefit. The section looks in the first instance to the person "deriving" the income, if the contrary intention is not elsewhere indicated, no matter whether there be recourse against any other person or not. Trustees do not "derive" a

penny of the income they receive, in the sense in which that word is generally understood, as income is derived by a clerk, a manufacturer, a professor or the like, from his vocation. The tax is to be "levied collected and paid"; that is, levied and collected for the Crown by its officers, and paid by the person deriving the income, to whom it belongs. If in any particular case it is to be paid by anyone else, we may expect the Act to say so elsewhere, and we shall find that these exceptional cases are dealt with expressly elsewhere in the Act. So far as they relate to trustees I shall make some reference to them. The presumption from sec. 8 is the same as that from sec. 5, that it is in respect of the income which is his to enjoy that a person is liable to the tax, not that a person, even if a trustee, is to be made liable in respect of the income of another. This intention is again apparent in sec. 9, sub-secs. (4) and (5) of which are especially inconsistent with any design to exact the tax from persons without beneficial interest in the income. Sec. 12 is important in this connection. Sub-sec. (1) clause (A) makes a trustee "answerable," that is to say responsible, for everything necessary to ensure the assessment of the income which is the subject of his trust, or which is received by him, and for paying the tax in respect thereof. This in effect excludes any primary liability on the part of the trustee, but gives the Crown recourse to him in aid of the enforcement of the Act and for ensuring the payment which the beneficiary should make. Clause (B) gives the trustee recourse against the fund if he is compelled to pay tax in the beneficiary's behalf. Clause (C) enables and requires him to keep back out of the trust receipts enough to pay the tax if it is not obtained from the beneficiary and demand is made on himself, and indemnifies him for all payments he may make under the Act or by the Commissioner's requirement. Clause (D) relates to the only events in which, so far as I can discover, the trustee is made personally liable, except where he makes default under sec. 41 (1); and they are where he charges or disposes of the "income" in respect of which the tax is payable—that is, the beneficiary's income—while the tax is unpaid; and where he parts with any "fund or money" which comes to him after the tax has become payable, out of which the tax could legally have

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been paid. This provision is in aid of clause (c), and imposes the personal liability, apparently, as a penalty for not keeping a reserve of income or funds in hand to satisfy the tax, until it is seen whether it is paid by or recoverable from the beneficiary. Sub-sec. (3) helps to show where the primary liability really is. It gives the Commissioner the like remedies against all land or property of any kind vested in, controlled, or managed by any trustee as he would have against the land or property of any person "liable to pay tax." So that although power has been given to make a beneficiary's property in the hands of the trustee liable, as if it were in the hands of the owner himself, it is still recognized that the trustee is not the person "liable to pay tax." Although sec. 15 (2) makes every trustee "chargeable" in respect of the income of which he is trustee "as if such income were the income of such . . . . trustee," that section must be read with and in the light of sec. 12, and cannot avail to convert into a primary liability a mere alternative recourse which sec. 12 proves to be reserved for exceptional cases. Reconciling the terms of the two sections, we see that the word "chargeable" in this instance merely enables the Commissioner to resort to the trustee to prevent any risk of the beneficiary's income escaping the payment legally due. It is primarily the beneficiary who is to pay; but the amount of the tax is to come out of his income in any event—if necessary, before it comes to his hands. So, again, a provision that trustees must make returns of the trust income and be assessed in respect of it is merely ancillary. Here it may be pointed out that where recourse is given against the trustee in respect of the tax payable by the beneficiary, the sum for which the trustee is made answerable is that which the beneficiary is liable to pay, and no more, so that the trustee may make the statutory deductions.

An argument is raised on sec. 6 (2), but it is not of much moment. Though assessment be a condition precedent to taxation, it does not follow that everyone when assessed is liable to pay the tax, nor will assessment make a trustee liable except in the circumstances in which his liability is defined. Otherwise an assessment need only be regular in form to establish conclusively the liability of the person assessed.

Turning to the Act No. 1467 we find in sec. 12 ample support for the view of the appellant. Sub-sec. (1) enacts that "subject to the provisions of the Income Tax Acts, tax shall be payable" by the trustee "(C) in respect of the income of any person under legal disability; (D) in respect of income earned derived or received by any trustee where there is no other person presently entitled to such income who is in actual receipt thereof and liable as a taxpayer in respect thereof." These cases seem to be expressly provided for because when they arise some artificial means of obtaining the tax becomes necessary, and the plan adopted would naturally suggest itself.

The numerous exceptions I have cited only serve to emphasize the general rule that the trustee is not the person liable, and added emphasis is given by the next clause of the sub-section (E) which provides that in all cases other than those dealt with in the preceding clauses, the tax shall be payable "by the person to whom the income arises or accrues or who is legally or equitably entitled to the receipt thereof." This provision is in contradistinction to those immediately preceding it, in which for cogent and exceptional reasons resort to the trustee is authorized. First, it distinguishes him from the person to whom the income accrues, and next, if he were intended to be included as "the person who is legally entitled," there was scarcely a necessity for the two preceding clauses, (C) and (D). They would probably have been dispensed with, as clause (E) would have covered all cases of trusteeship. I have no difficulty in coming to the conclusion which is indicated by the context, that the person "legally or equitably entitled" is the person beneficially entitled to receive the income, free of trusts, of course, if legally entitled, and through his trustee if his title is equitable. That the liability in all cases not expressly excepted is that of the person benefited by the income becomes even clearer when we read sub-sec. (2) of the same section, which is really a proviso. It prescribes that nothing in the section shall be taken to relieve from the tax any person entitled to receive or in the receipt of income from a trustee unless the trustee has already paid the tax in respect of that income. This may have happened under sub-sec. (1), clause (C), or clause (D); and, apart from any statutory compulsion of

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the trustee, it is not open to doubt that in some cases a trustee who has paid the tax on behalf of the beneficiary may be allowed for it in his account.

I am of opinion therefore that the respondents, and not their trustees, are liable for the payment of the tax in respect of the incomes paid or payable to them by the trustees; and therefore that the income of the respondents is not "taxable at its source" in the sense in which they use that phrase. It may be, however, more correct to say that their income being taxable as it is derived by them from the fund, the fund is the source at which it is taxable.

I proceed to consider the appellant's second contention. Does the taxable income of the respondents arise from "personal exertion" within the meaning of the Acts? Do they earn the income, even in the sense of controlling the businesses? In this connection it is necessary to refer again to the Acts. About a year after the passing of the Principal Act the case of *Commissioner of Taxes* v. *Everitt* (1) was decided by the Supreme Court of Victoria. Certain money had been received during the year of assessment as the distributive share in an intestate's estate. Clearly it was not income, and that was all that it was necessary to determine. But in his judgment, after so deciding, the learned Chief Justice expressed the opinion that the Principal Act, in sec. 5, meant that income, in order to be taxable at the lower rate, as being derived from "personal exertion," must not arise from vicarious exertion, but must be income from the taxpayer's own exertion, and that "the income from property must be limited in the same way." He considered that income of the latter class meant income derived from the property of the taxpayer himself. Probably his Honor's attention had been more closely directed to sec. 5 than to the definition of that class of income in sec. 2. At the most the passage is *obiter dictum*, but it gave rise to apprehensions that, unless the legislature intervened to make its meaning clearer, persons deriving annual profit from enterprises conducted for them by others, as agents, managers or the like, would be taxable at the rate imposed in respect of income "the produce of property," while, on the other hand, a class of

(1) 21 V.L.R., 481; 17 A.L.T., 225.

persons receiving income from property not their own, such as annuities under wills or settlements, would only be taxable as in respect of incomes from "personal exertion." The legislature did not wait for any case to arise. In the same year, 1896, it passed the Act No. 1467, which in sec. 4 made the declaration so much quoted in this case as to the meaning of the definitions of the two classes of incomes in sec. 2 of the Principal Act. Now no reason for this statutory declaration was suggested to us except the dictum of *Madden* C.J. above cited, and its enactment so soon after the dictum seems to indicate that utterance as the reason. If that is the true inference, the declaration of sec. 4 (*a*) means merely that the term "personal exertion" includes vicarious exertion, so that, for instance, a person conducting a business *per alium* would be entitled to the benefit of the lower rate. Mr. *Mitchell*, however, contended for the respondents that it was intended to make the lower rate applicable to cases in which the taxpayer received or participated in income which he had not produced either personally or vicariously, including, at any rate, cases in which the income was earned by a trustee and paid over to a beneficiary. I do not think Mr. *Mitchell* established that position. The 4th section of Act No. 1467 is purely declaratory in its terms, and we heard no reason why it should be read as an amendment. Mr. *Mitchell*, indeed, thought that the meaning he assigned to it was its meaning in the Principal Act. Did that Act then include in the term "income derived by any person from personal exertion" income of the taxpayer which he had not earned or produced, whether personally or vicariously? If produced by him through the exertions of others employed by him but not by exertion strictly his own, it was in a sense income not derived from "his own" personal exertion; and reference to the judgment of *Madden* C.J., already cited in part, will show that he used the term "his own exertion" in the sense of exertion "not vicarious," and so that vicarious exertion had in his view the ordinary meaning of the exertion of others who nevertheless represented the taxpayer. Now the declaration of sec. 4 of No. 1467 deals expressly and wholly with the definitions of income given by sec. 2 of the Principal Act. Income "derived by any person from personal exertion" is there made

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to embrace two categories. The first, "all income consisting of earnings salaries wages allowances pensions superannuation or retiring allowances or stipends," constitutes a class of incomes derived from the actual personal labours, past or present, of the recipients. When we say that a man's income consists of earnings we mean that it consists of what he earns himself; and so as to all the other items of the same group. That I take to be beyond question. The second category includes "all income arising or accruing from any trade carried on in Victoria"; that is, according to the same section, "every profession, vocation, trade, business, calling, employment and occupation." A profession cannot generally be carried on vicariously; but most of the other methods of earning a livelihood enumerated under the definition of "trade" can be so carried on. The incomes then which are in the first category cannot be derived by the taxpayer from the earnings of others, even if they are his agents. Those therefore which can be derived by the taxpayer from the labours of others are all included in the category of "trade" incomes, excepting perhaps professional emoluments. Does the definition then mean that incomes derived from any of these vocations are taxable at the lower rate in the hands of all those who have not earned them either personally or vicariously? It is obvious that if we upheld the respondents' construction there would be no stopping short of the inclusion of all such incomes though the taxpayer had been in no wise concerned in their production. For at what point could the process of inclusion be stayed? For what reason of construction are we to include incomes receivable from trusts, and then call a halt? I cannot accept the meaning thus contended for. On the other hand, the definition may mean that a taxpayer is not to have the benefit of the lower rate unless for income earned by his own personal exertion in the literal sense. That again would be a rendering contrary to reason, and is not even suggested by either party. It would narrow the definition in the direction contrary to that in which the respondents would lead us. Here then are two possible constructions at opposite extremes. A third remains, and that is, that the incomes in respect of which the lower rate of tax may be claimed are those "derived" from a trade by the tax-

payer himself in the broad sense in which such a term would be generally understood; that is, that a person "derives" income "from any trade carried on in Victoria" when the trade is carried on by himself, either by his work in the shop, or the factory, or the farm, or whatever else the business may be, or by his managing it for himself or for another, or lastly by his owning the business and committing its management to others on his behalf. That is the interpretation which I place on this difficult part of the interpretation clause, and which, I think, is declared by the Act of 1896, with the intention of allaying apprehensions arising from the dictum in *Commissioner of Taxes* v. *Everitt* (1), placing it beyond question that vicarious exertion was included in the definition, but without any intention to alter it. I am of opinion that this unaltered definition does not include among incomes entitling the taxpayer to the lower rate those which are derived neither from the personal nor the vicarious exertion of the taxpayer. Now under this will it is the trustees who are to conduct the businesses, but they are not the agents of the beneficiaries, who cannot as such meddle in the management of the trust. Therefore they do not derive their incomes from personal exertion within the meaning of the Acts.

It is not necessary for me to deal at length with the third contention of the appellant, since I think the considerations I have mentioned are sufficient to sustain the appeal.

I am of opinion that the income of each beneficiary is the share payable to him, when prior claims are accounted for, out of a mixed fund resulting from the working of the estate. This fund, and not the businesses managed by the trustees, is, I think, the source of his income. Having regard to the nature of the fund, I find it difficult to say that any of the respondents is the equitable owner of any definable part of the estate. The income of each of them arises from the administration of the estate by the trustees. Each is entitled to receive his income in due course, but that fact does not enable us to answer the question what his interest is. It is impossible to bring an income so arising within the meaning of the statutory term "personal exertion."

I agree with the learned Chief Justice as to the application of

(1) 21 V.L.R., 481; 17 A.L.T., 225.

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the case of *Lord Sudeley* v. *Attorney-General* (1), since applied by *Romer* J. in *In re Smyth*; *Leach* v. *Leach* (2), and by *Bray* J. in *Attorney-General* v. *Johnson* (3).

In my opinion the appeal must be allowed.

O'CONNOR J. The respondents are beneficiaries under the will of the late David Syme. Each is in the receipt of a separate income from the estate, each has sent in his return of income to the Commissioner and has been separately assessed. For convenience of all parties, however, the assessments have been dealt with together in the one reference. The Commissioner, having determined that the income in each case was derived from the produce of property and not from personal exertion within the meaning of the Income Tax Acts, has claimed income tax at the rate imposed on the produce of property. The beneficiaries contend that the income was derived from personal exertion within the meaning of the Income Tax Acts, and that they are liable only for the lower rate which the Statute imposes on income so derived. The Supreme Court was called upon to determine which contention was correct. It upheld the beneficiaries' contention, and this Court is now to determine whether that view is right.

The controversy turns upon the interpretation of the *Income Tax Act* 1895 (No. 1374) and the amending Act of the following year (No. 1467). Before examining these Statutes it will be necessary to consider what is the nature and source of the incomes under consideration. The estate of the late David Syme includes the *Age* newspaper business, certain country properties mentioned in the special case, and other interests. The trustees have under the will very full powers of conversion and management, and, after payment of certain legacies, annuities, and other disbursements, they are directed to hold the residuary estate real and personal in trust to divide the income into five equal shares and to pay one share to each of the five respondents. The income therefore comes to each of the beneficiaries out of a mixed fund, the result of the conversion, invest-

(1) (1897) A.C., 11, at p. 14. (2) (1898) 1 Ch., 89.
(3) (1907) 2 K.B., 885.

ment, and management of the various assets of the estate by the trustees. The income of the estate which goes to make up this mixed fund arises as to some parts of it from trade carried on in Victoria which, according to the definition in sec. 2 of the *Income Tax Act* 1895, is income accruing from personal exertion; the balance is the produce of property. It may be assumed for the purposes of this case that the amounts derived respectively from these different sources of income in the residuary estate are capable of being traced and identified in the accounts of the trustees. The circumstance that the respondents as trustees and employés take an active part in the management of the newspaper and other businesses and are actually engaged in the production of the income is immaterial. It is not their income as employés or their remuneration as trustees, but their income as beneficiaries that is now under consideration. The Court can regard them only as beneficiaries, and for that purpose they stand in the same position as if they drew their incomes from the trust estate without taking any part in its production. Whether under these circumstances the income of the beneficiaries is income derived from personal exertion within the meaning of the Income Tax Acts is the question to be determined. There is no doubt that in respect of the *Age* business the income of the estate is derived from trade carried on in Victoria. But it is from trade carried on by the trustees, not by the beneficiaries. The income therefore paid over to each beneficiary does not come from any trade carried on by him any more than if the payments were made to him in respect of an annuity out of the estate.

Such being the nature and source of the income to be taxed, the question next arises whether the beneficiaries can claim in respect of income so derived the benefit of the rate applicable to incomes arising from trade. Looking at the income alone, it no doubt has its source in the carrying on of trade. But it is impossibe to determine the rate of the tax without considering whether the beneficial recipient of the income does or does not take part in its production. The income which comes to the trustees from the businesses of the estate is the direct result of their trading. But, after it comes to their hands together with income from other sources, they must go through the process of

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applying their discretion and judgment in the management of the whole estate in order to ascertain the amount of the fund distributable amongst the five beneficiaries. Until that process is gone through the beneficiary's income cannot come into existence. The income, which thus comes to the beneficiary as the result of the trustees' management of the mixed fund constituting the income of the estate, is certainly not derived directly from trade, and the question is whether the Income Tax Acts have conferred on recipients of incomes derived from trade not carried on by them, and ascertained and set apart under the circumstances I have mentioned, the benefit of the rate applicable to incomes arising from personal exertion. In my opinion they have not done so. The language used by the legislature indicates a clear intention to confer the advantage of the lower rate only on the taxpayer whose income is derived directly from trade carried on by him. The scheme of the Acts is to tax the actual, not the formal, recipient of the income, and to tax the income which actually comes to his hands. Sec. 8 of the *Income Tax Act* 1895 enacts that "every person shall be liable to tax in respect of income the produce of property and also in respect of income from personal exertion." The ninth section lays down the method of ascertaining the portion of the taxpayer's gross income which is taxable: "All losses and outgoings actually incurred in Victoria by any taxpayer in production of income," &c., may be deducted from the gross amount of his income. By sub-sec. 2 of sec. 8 "no person who has been out of Victoria for six consecutive months of the year during which the income was received shall be entitled to any deduction by way of exemption." The various sub-sections of sec. 9 prohibiting certain deductions deal with expenditure in the making of income which would in the ordinary course of business have to be allowed for by the person who carries on the trade in arriving at his nett income. The language of all these provisions clearly indicates an intention to constitute the beneficial recipient of the income the actual taxpayer and to tax the income as it reaches his hands. Then follow the two secs. 11 and 12 constituting Part IV., headed "Public Officers of Companies—Agents and Trustees." *Primâ facie* the individuals holding such positions

are "persons" within the meaning of sec. 8, and it is to them that the incomes come, though in their representative capacity. But both sections make it plain that such persons are not under ordinary circumstances made liable to pay the tax; they are made answerable for its payment. In the case of agents and trustees that appears plainly from sec. 12, paragraphs A, B, and C, which imposes on them obligations in respect to the income of the principal or *cestui que trust*, as the case may be, with the object of ensuring payment of the tax and of making them effectively answerable for its payment. It is only when, under the circumstances referred to in paragraph D, they neglect those obligations that they become personally liable. Sec. 14 requires all taxpayers, which by definition includes representative taxpayers, such as officers of public companies, agents and trustees, to send in returns of income coming to them in their representative capacity, and sec. 15 directs the Commissioner to assess them in respect of that income separately from their respective personal incomes. So that both principal and agent, trustee and *cestui que trust* may be assessed at the same time in respect of the same income. The tax is not payable twice over, but the assessment of the agent and trustee is necessary in order that everything may be in order for obtaining payment of the tax by them in the event of the principal or *cestui que trust* failing to pay. The respondents' counsel relied on the following words in sub-sec. 2; "and shall be chargeable with the tax payable in respect thereof in the same manner as if such income were the income of such agent or trustee." But those words impose no new liability; they are applicable only to the special circumstances in which the Act exacts payment from the agent or trustee, not as representative, but in his own person. These are all the sections material on the point with which I have been dealing, and the consideration of them leads me to the conclusion that the *Income Tax Act* 1895 clearly imposes the tax primarily on the beneficial recipient of the income and on the income as it comes to his hands. It follows that, when sec. 8 makes a rate applicable to income derived from personal exertion as defined by the Act, it must be taken to apply only to cases in which the beneficial recipient of the income makes the income by

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his personal exertion or by the carrying on of his own business. That position would, I think, be incapable of being questioned if it were not for some provisions of the *Income Tax Act* 1896. Shortly after the passing of the Act of 1895 the Victorian Supreme Court decided in the *Commissioner of Taxes* v. *Everitt* (1) that the tax could be levied only on incomes derived from the taxpayer's own personal exertion or the produce of his own property, and that the distributive share in an intestate estate coming to a beneficiary was not within either class of taxable income, and escaped taxation altogether. It was to stop this serious gap in the original Act that sec. 4 of the Act of 1896 was enacted, and, in interpreting the somewhat ambiguous language which the legislature has used in amending the law, the legislative history of the amendment cannot be left out of consideration. The plan of the section is to further define the expression "income from personal exertion." Its object is obviously to make it clear that income may be taxed under that heading although it has not been earned solely by the brain and hands of the taxpayer himself. It was contended by the respondents that the section got rid of the necessity of showing that the personal exertion or trade was that of the respondents, and that it was intended to enact that so long as the income could be traced as coming from trade or personal exertion it was immaterial whether the personal exertion or trade was that of the taxpayer or of some other person. That interpretation would make such a serious alteration in the scheme of the original Act that it ought not to be adopted if the words can reasonably be given any other meaning. Other portions of the amending Act were referred to with which I shall deal in detail from another point of view. But, speaking generally, I can see nothing in the amending Act which would entitle a taxpayer to have his income rated on the personal exertion scale in a case where the business earning the income was not in some way under his control as owner. Mr. *Starke*, in his very able argument, founded the respondents' contention on a new view of the whole scheme of the Act. His argument may be concisely stated. The subject of the tax is the income. On that is stamped according to its source the quality

(1) 21 V.L.R., 481; 17 A.L.T., 225.

which makes it taxable at one rate or the other. The actual earner of income in a trust estate is the trustee, and he is liable to pay the tax. The beneficiary may at the option of the Commissioner also be taxed. But the same income cannot be taxed twice, and, if the beneficiary is taxed in respect of an income earned from trade carried on by his trustee, he is entitled to the benefit of the personal exertion rate just as the trustee would be entitled if he were called upon to pay the tax. As far as the original Act is concerned that contention cannot be supported by any reasonable construction of its provisions which, as I have already pointed out, are workable only on the footing of a primary liability in the beneficial recipient of the income to pay the tax. The impossibility of working the Act on Mr. *Starke's* suggested reading of it becomes very apparent when it is attempted to apply the provisions of sec. 9 to the ascertainment of the taxable amount of the beneficiary's interest. A beneficiary could not claim the advantage of the lower rate applicable to an income derived from trade without having the taxable amount of that income ascertained in accordance with the provisions of sec. 9. The income actually paid over to the beneficiary is the subject of taxation. That is fixed by the trustee as the result of his management of the business of the whole estate. In arriving at the total amount available for distribution amongst the five beneficiaries he may, and probably will, in the exercise of his discretion as trustee, make at least some deductions in arriving at the nett sum available for distribution which would be prohibited by sec. 9. In other words, the trustee arrives at the amount of income which he ought to make available for distribution amongst the beneficiaries on an entirely different method from that which must be followed under sec. 9. Where the trustee is taxed in respect of the trust estate there is no difficulty. The deductions are allowed in accordance with the Act from the gross income which comes to his hands. But the beneficiary's income which is the subject of taxation is a nett income, already ascertained by the making of deductions and calculations which may or may not relate to the cost of earning it. Sec. 9 cannot be applied to that income unless the Commissioner goes back to the gross earnings of the business as it passes into the general income

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of the estate. But that is not the taxpayer's income; it is the trustee's income. The impracticability of working the Act as Mr. *Starke* would have us read it may, I think, be fairly judged by that test. The portions of sec. 12 which were relied on by the respondents in no way support the construction for which they contended. On the contrary, the whole section would appear to be in aid of the general scheme of the original Act as I have interpreted it in the earlier part of this judgment, namely, that the beneficial recipient of the income is in general the person primarily bound to pay the tax, the liability of the trustee as trustee being ordinarily secondary, his personal liability arising only under special circumstances. The object of sec. 12 is evidently to make more effective the system of securing payment by a representative taxpayer who may have the income to be taxed actually in hand or under his control. Sub-sec. (1) (D) puts the obligation of payment on the trustee "where there is no other person presently entitled to such income who is in actual receipt thereof and liable as a taxpayer in respect thereof." The next paragraph (E) is in aid of the same system. The tax is to be paid by the person to whom the income arises or accrues, or who is entitled to receipt of it, whether his title is legal or equitable. Sub-sec. 2 uses, as it appears to me, very plain language to indicate that, where a person receives or is entitled to receive income from an agent or trustee, nothing can relieve him of his obligation to pay if the agent or trustee has not already paid it. Reading both Acts together, therefore, according to the ordinary meaning of the language used, and bearing in mind the broad features of the system for assessing, imposing and collecting the tax which they have enacted, it seems to me impossible to hold that the beneficiary who draws his income from the trustees of a trading estate under the circumstances set forth in this case is or can be entitled to have his income rated on the same footing as if the trading concern which produced it was his own. It follows that as the income cannot be classed as derived from personal exertion it must, for the purposes of the Income Tax Acts, be rated as income the produce of property. In my opinion, therefore, the Supreme Court ought to have answered the question submitted that the income was the produce of property. Conse-

quently the appeal must be allowed and the case remitted to the Commissioner with the answer which the Supreme Court ought to have made.

ISAACS J. This appeal arises upon a case stated by the Victorian Commissioner of Taxes, under sec. 17 of the Act No. 1467, for the opinion of the Supreme Court. The facts upon which the opinion is to be founded are therefore those stated in the case, including the will.

They include the following: that the respondents actually received the income in respect of which the tax is claimed, that they were entitled to receive it, and necessarily therefore that all prior claims and charges for the year 1908 must be taken to have been satisfied or duly provided for.

The only question then is, under which of the two categories, arbitrarily created by the Act for the classification of all income for taxation purposes, the income received by the respondents falls.

Their title to the income depends upon these words "And after and subject to the several trusts, matters and things aforesaid, my trustees shall hold and stand possessed of my residuary and personal estate including the *Age* business, until the death of the last survivor of my said five sons . . . upon trust to divide the income thereof into five equal shares for each of my said five sons, and to hold the share of each such son respectively upon the trusts following, namely upon trust to pay the same to such son, and subject to such trust," &c.

Assuming as we must, for that is the necessary basis of the Commissioner's case, that all prior trusts are for the period under consideration lawfully satisfied, that the balance of the residuary income was duly divided, held, and paid over as directed by the will, it then becomes the question what is the nature of the income so paid over, for the purposes of the Act.

The Commissioner's contention is that it is all income the produce of property, and not any of it is income from the *Age* business, because it is all a new kind of income, created for the first time by the testator out of a general mass; and that its source is that general mass or the cash box that contains it, and not the business or property from which it actually sprang. The

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respondents on the other hand say that any balance of income derived from the *Age* business remaining after satisfying prior claims still continues to be business income and passes on as such to those who receive it.

The short point then, from a common sense aspect, is—does the income of the *Age* business lose its identity in the course of transition from the trustees to the respondents ?

But we have to be guided by the true construction of the *Income Tax Act* (see *per* Lord *Halsbury* L.C. in *Tennant* v. *Smith* (1) and *Lord Advocate* v. *Fleming* (2)), and it is therefore necessary to see how far that construction representing the will of Parliament leads us away from common sense. The scheme of the Act is, of course, a legitimate subject of inquiry (*per* Lord *Halsbury* L.C. in *Attorney-General* v. *Beech* (3)); and I therefore have regard to it.

Act No. 1374 is intituled "An Act to impose a Tax on Income.' It is divided into Parts, with indicative headings; and these, which are part of the enactment (*Acts Interpretation Act* 1890, sec. 21), are material aids for our guidance. Part II. is headed "Nature of the Taxation and Exemptions." This is, therefore, where one naturally looks for the real intention of Parliament as to the subject matter of taxation. It contains sec. 5, which imposes the tax in two scales—the lower scale upon all income derived by any person from personal exertion, and the higher scale upon all income derived by any person from the produce of property. These terms by the interpretation section mean "all income consisting," and "all income arising," &c. The same system, though with different rates, has been followed in subsequent years, including 1908. The tax therefore is imposed on "income"; in other words, sec. 5 regards as the object of taxation all income whatsoever derived from Victorian "trade," or Victorian "property," as those terms are defined by sec. 2.

It is, of course, true that practically "income" connotes some person to receive it; but the point is, that for the revenue purposes of this Act, except where otherwise specially indicated, the legislature is directing its attention to *the thing received* and not

(1) (1892) A.C., 150, at p. 154.
(2) (1897) A.C., 145, at p. 149.
(3) (1899) A.C., 53, at pp. 57, 58.

to the person receiving it. Otherwise gross inequalities would arise.

Sec. 6 is a most important section. It provides that the tax shall be charged, levied, collected, paid, and enforced on "assessments," and any person described as "liable" under the Act means, in the absence of inconsistent context, a person assessed, or liable to be assessed, under the Act. "Assessment" by sec. 2 includes an estimate both of the amount of income liable to taxation and the amount of the tax "imposed thereon." Sec. 6 is not in a machinery part of the Act; it is in a part which describes the nature of taxation, and makes the assessed person—whether trustee or beneficiary—"liable to tax" unless otherwise stated.

Secs. 5 and 6 unqualified consequently reach the gross amount of all Victorian income derived by "any person"; and as a trustee is a "person," the income of a trustee is as much within its scope as any other. Indeed, the word "trustee" is defined by sec. 2 as including "a person having . . . . the possession administration or control of any *income affected by any express or implied trust*," an expression exactly fitting the whole of the income of this trust estate. This definition accords with the ordinary meaning of trustee: see Lord *Selborne* L.C. in *Barnes* v. *Addy* (1), and *Stirling* J. in *In re Blundell*; *Blundell* v. *Blundell* (2). A trust, said *Lindley* L.J. in *In re Williams*; *Williams* v. *Williams* (3), is an "equitable obligation to deal with property in a particular way."

The trustees in this case are the legal owners.

Sec. 7 introduces exemptions of income derived by persons specified from sources specified and to a limit specified. Among the persons so specified, ordinary trustees as such are not included, notwithstanding the fact that in sub-sec. (A) a large number of officials and public trustees are mentioned, including "trustees under the *Agricultural Colleges Act* 1890," and that sub-section (E) exempts the income derived by all trusts not carrying on trade, or not engaged in trade for the purposes of gain to be divided among shareholders or members.

We start then with the income of private trustees being taxable like the income of any other legal owner.

(1) L.R. 9 Ch., 244, at p. 255. (2) 40 Ch. D., 370, at p. 378.
(3) (1897) 2 Ch. 12, at p. 18.

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Part III. is headed "Special Provisions as to Income Tax." These *special* provisions are supplemental to and qualify the general provisions of Part II., but they assume the tax is already fully imposed. First among them is sec. 8 which says that every person shall be *liable* to tax in respect of income the produce of property and also in respect of income from personal exertion. This, by virtue of sec. 6 already quoted, relates to persons liable to be "*assessed*," and therefore is not confined to those persons who are beneficially entitled to the income. It is an enlarging section and not restrictive, nor is it a section creating the tax. That is done by sec. 5 alone. Then sec. 9 provides for deductions, and will be more particularly referred to presently. No exemption in favour of trustees appears among the special provisions. Part IV. deals specifically with public officers of companies, and with agents and trustees. Sec. 12 refers to some agents, and *all* trustees. No express distinction is made between one kind of private trust and another; there is not one rule for a trustee whose trust is constituted *inter vivos* and another where the trust is by will; there is not one rule where the beneficiaries are within Victoria, and therefore personally within the jurisdiction, and another where they are beyond the State; there is not one rule for a trustee whose obligation is to pay the whole income to one specified legatee, and another for one who is to divide it among twenty; one where an annuity is first to be satisfied and the balance only to be paid over, and another where no annuity intervenes; one rule for a trustee where the residuary estate is cleared, and another where it is not. And the appellant in order to succeed must show such a distinction by necessary implication. Sec. 12 contains no trace of it. Perhaps the full effect of that section will be better understood if Part VI. is first considered. Part VI. is headed "Assessment of Income," and as we have seen "assessment" is made by sec. 6 the basis of all other proceedings under the Act, and is by sec. 2 interpreted comprehensively.

Sec. 14 requires every "taxpayer" to make returns for assessment purposes, stating separately the two classes of income. "Taxpayer" by sec. 2 includes a trustee. Sec. 15 is an important section and, taken along with sec. 6, holds perhaps the key to the

whole problem. Its first sub-section requires the Commissioner to prepare assessments. Its second sub-section declares that every trustee is to be (*a*) assessed separately for his trust income; (*b*) chargeable with the tax payable in respect thereof *as if it were his own income*; (*c*) *assessed as trustee*, such assessment being kept separate and distinct from his individual assessment. Thus the assessment of a trustee is as separate and distinct from his individual assessment as if he were an altogether different person. But being assessed under sec. 15 he is struck by the conjoint operation of secs. 6 and 8. We now turn to sec. 12, which treats of trustees specifically, and to the extent that they are not differently provided for, but no further, they are exactly on the same footing as other legal owners of income. The first and third sub-sections are relevant. The first makes the trustee answerable for doing all that is necessary to enable an assessment to be prepared of the income of the trust estate, or which is received by him as trustee, and answerable for paying the tax in respect thereof; "thereof" meaning in respect of all such income; and it requires him to retain the amount of tax and pay it over, and gives him full indemnity. If, notwithstanding these mandatory and protective provisions, he alienates, charges or disposes of such income—still all the trust income—or parts with any property out of which he could legally have paid the tax, then, and not otherwise, he is made personally liable to pay the tax. Paragraph (E) of sub-sec. 1 enables him to apply *any part* of the trust property, land or otherwise, to pay any income tax payable as trustee. This regards *the whole of the trust property as a unity, as one personality in the hands of the trustee to satisfy the claims of the revenue in respect of any portion of it.* Sub-sec. 3 is the complement of that. If the trustee fails to pay, and to exercise his powers of raising the tax, then the Commissioner may himself have recourse to *the whole trust estate*, land or otherwise, just as he would against the property of "any person liable to pay tax and in as full and ample a manner." To say that the trustee is merely to stand in the place of the several distributees respectively, and to regard each of their respective shares as separate estates for the purpose of the Act, appears to me in hopeless conflict with these provisions.

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This all satisfies me of three cardinal principles in relation to income tax material to the present case :—(1) The tax is on all income—subject only to specified exemptions and deductions.

(2) Income accruing to a trust estate is for taxation purposes regarded as the income of one personality, viz. the trustee, and is taxable as such.

(3) The trustee is regarded as a separate legal personality, distinct from his individual character, but otherwise treated like any other legal owner of the property—except where the contrary is provided.

There are several passages in the Act where its language confirms this view—as in the definition of "Trustee" where we find the words "income affected by any express or implied trust"; in sec. 12 already quoted, "the income . . . which is the subject of the trust"; in sec. 15 "income for which such . . . . trustee is . . . trustee"; in sec. 18 enabling the Commissioner to require any person "entitled to or in receipt of any income whether on his own . . . behalf or as . . . trustee," to attend to be examined "respecting the income of any *such* person"; sec. 4 of the Act No. 1467; sec. 12 of No. 1467, sub-sec. (1) (E), and sub-sec. 2.

The last-mentioned sub-section was relied on by the Commissioner as showing that the beneficiary's interest was all that the Act looked at, the trustee being made only subject to secondary liability; but that argument loses sight of the fact that money coming to a beneficiary as income may or may not have been received as income by the trustee, and that money received as income by the trustee may or may not be money to which the *cestui que trust* is entitled as such income. Sec. 12 of No. 1374 covers every such case, but sub-sec. (2) of sec. 12 of No. 1467 does not affect to apply to every case. Where the beneficiary is liable he remains liable, notwithstanding anything in that section, unless the trustee has paid the tax. The contention that the trustee's liability is only secondary and is based on what he pays away, and not on what he receives, is not consonant with the scheme of the Act as I have construed it. Nor is it found expressed anywhere. That position, however, is adopted as the foundation of the Commissioner's argument that the respondents'

receipts from the proceeds of the *Age* business have lost their business character, and are income the proceeds of property. It is conceded that you cannot tax the same identical income twice; and, in order to tax it as property in the hands of the respondents, the Commissioner contends that it is not taxable as business income in the hands of the trustee. If the Commissioner is correct that the source of the beneficiaries' income is not the business, but the general mass of the income from the residuary estate, he might be entitled to two sets of taxation in respect of this money; one as income from business accruing to the trustees, the legal owners; the other as a separate creation by the testator, proceeding, it is true, out of the proceeds of the business in conjunction with all other income of the estate, but not identical with any of it. I do not agree with the Commissioner's contention. I do not agree that the trustee as such is not taxable for the trust income; nor that the income of the respondents is a separate and novel creation of the will. The will in this respect simply passes on the title to an independently existing property, the surplus income of the business. If the Commissioner is right, he is entitled to tax the business income as non-business income, even after all prior claims are permanently secured and provided for, and there remains nothing but a simple trust to pay. The learned Chief Justice adopts the simile of a lake with an effluent stream. I consider that misleading, because the water of a lake becomes indistinguishable, but the rights of the beneficiaries do not. They may follow the income *eo nomine*, and it is the duty of the trustees to keep accounts which will enable them to do so, See *In re Hallett's Estate*; *Knatchbull* v. *Hallett* (1), which is a good example of what I mean.

But adopting the illustration for a moment, I would say with great deference its fallacy consists in considering the effluent stream to represent the rights of these beneficiaries.

They are entitled to every drop in the lake, subject only to any effluent stream drawn therefrom to satisfy prior claims. It is not that which leaves the lake but what *remains* in it, that belongs to them.

If the suggested evaporation is to be taken as analogous, not to

(1) 13 Ch. D., 696.

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trust expenses, but to the satisfaction of prior claims, then there is no effluent stream possible, since the water which gets there in those circumstances is wholly there for simple division among the beneficiaries. See *Mutlow* v. *Bigg* (1). The underlying principle is that these beneficiaries are the real owners of the income of the residue—subject to prior claims. *Sir William Grant* M.R., in *Pearson* v. *Lane* (2), said of the case then before him, what is applicable here *à fortiori*:—"It is true, in the estate to be sold, they had no interest, legal or equitable, expressly limited to them: but the equitable interest in that estate must have resided somewhere: the trustees themselves could not be beneficial owners; and if they were mere trustees, there must have been some *cestui que trust*. In order to ascertain, who they are, in such a case a Court of Equity inquires, for whose benefit the trust was created; and determines, that *those, who are the objects of the trust, have the interest in the thing, which is the subject of it*; and therefore, where money is given to be laid out in land, which is to be conveyed to A., though there is no gift of the money to him, yet in equity it is his; and he may elect not to have it laid out: so, on the other hand, where land is given upon a trust to sell, and to pay the produce to A., though no interest in the land is expressly given to him, *in equity he is the owner*; and the trustee must convey, as he shall direct. If there are also other purposes, for which it is to be sold, still, *he is entitled to the surplus of the price, as the equitable owner subject to those purposes*; and, if he provides for them, he may keep the estates unsold."

Now, if the testator in his lifetime had constituted himself trustee of his property on the same trusts as are created by the will, surely he would have been taxable on the receipts of his business as income derived from personal exertion, although he would have been a mere trustee. The Crown would not have been obliged to go, and could not have been permitted to go, beyond the fact that the income was so derived and to treat the ultimate recipients as in receipt of income of a totally different character. The conscientious obligations which bind the legal owner in the *distribution* of the income cannot affect for better or for worse the right of the Crown to tax the income as it really

(1) 1 Ch. D., 385.

(2) 17 Ves., 101, at p. 104.

is. If a trader, taxable in the ordinary way on the income of his business, assigns his property to a trustee for the benefit of his creditors, reserving surplus income and capital to himself, it would be strange that the trust to pay over surplus income to the debtor should thereby become income the produce of a new kind of property created by the deed, and not income arising or accruing from trade. But, if the Commissioner is right, the residual income in both the *inter vivos* cases I have instanced would be technically the produce of a new kind of property.

The learned counsel for the Commissioner, however, say that sec. 5 impliedly refers only to beneficial ownership. I have already said sufficient to answer that. They also say that sec. 9 by necessary implication points the same way, and drives one to the conclusion that no trustee is liable for income received by him, but only for income handed by him to the *cestuis que trustent*. That section has received attention from both sides, and must be carefully examined. Sec. 5, taken alone, taxes gross income. But sec. 9 brings that down to nett income by allowing deductions. These deductions are :—

(*a*) Losses and outgoings in the production of the income;

(*b*) Parliamentary taxes paid by the taxpayer;

(*c*) Interest paid by the taxpayer on money borrowed and used or invested;

(*d*) Commission for collecting income;

(*e*) Mining calls.

Applying that part of the section to the present case, if rent or salaries were paid for the purpose of the business, or if land tax were paid by the trustee on trust land, or if interest were paid on money which had been borrowed by the testator or the trustees for trust purposes and the statutory conditions existed, if commission were paid for collecting estate debts, or if mining calls were paid on shares belonging to the estate, these might be all deducted. So far there is no difficulty. Sub-sec. (2) eliminates from lawful deductions some possible claims. Then partners are specially dealt with—an express departure from the general scheme. Sub-sec. 4 does not assist either view. In view of sec. 15 delimiting the trustee's personal income from his representative income, sub-sec. 5 is not important. No life assurance by

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a trustee could be a trust matter. Sub-secs. 6, 7, and 8 apply to calls or contributions to which the estate is liable. The applicability of sub-secs. 9 and 10 would depend entirely on the nature of the trust property. Sub-sec. 11 is really interpretation. In sub-sec. 12 there is nothing to help the appellant, but the words "sole individual right" appear to me to militate against it. Sub-sec. 13 is colourless.

The Act consequently does not, in my opinion, shake the *primâ facie* liability of a trustee as legal owner to pay to the Crown tax upon income received by him as trustee.

There is one matter further to be referred to. For some time I thought *Lord Sudeley's Case* (1) might have some bearing on the case. But after hearing Mr. *Starke's* argument I do not think that possible. In that case Lord *Halsbury* L.C. says (2) until the residue is ascertained "the actual right capable of instant assertion does not exist," and again, "the legatee had no right to go and say 'I will have this or that part of the assets.'" Here, I think, the respondents have an absolute right, once the residuary estate is cleared of prior claims—and the case assumes it was so cleared for 1908—to demand their shares of the income of the residue. I am not concerned with the question of whether the trustee could select trade income for one, and property income for another. Perhaps he could, perhaps he would amply fulfil his trust duties by giving each one a fifth of the surplus income, and perhaps the existence of an Income Tax Act makes no difference to his fiduciary obligations except to give information to his *cestuis que trustent*. But, however that may be, the respondents were absolutely entitled to the remaining income *as such*, and no change in its nature was worked by the will, or by the act of handing it over.

The surplus income was theirs as much as that of Mrs. Tidd was hers in *Tidd* v. *Lister* (3), or that of Colonel Grey was his in *In re Jones* (4). There *Baggallay* L.J. said (5):—"It appears to me that Colonel Grey is *entitled to the income* of the land under the trust to pay the surplus rents to him." And the learned Lord Justice anticipating the decision in *Lord Sudeley's Case* (1)

(1) (1897) A.C., 11.
(2) (1897) A.C., 11, at p. 15.
(3) 5 Madd., 429.
(4) 26 Ch. D., 736.
(5) 26 Ch. D., 736, at p. 741.

said:—"I entirely agree with the suggestion of Lord Justice *Cotton* in the course of the argument, that you must look at the terms of the settlement to see what the person is entitled to." *Cotton* L.J. (1) also thought Colonel Grey was entitled subject to encumbrances in the position of being entitled to receive the income. *Lindley* L.J. said (1):—"The interest of Colonel Grey is this: he is *entitled to the income*, should there be any, subject to the trusts of a prior term of 2000 years."

The provision in the will as to the five sons having possession of the business relating to the *Age* and *Leader* newspapers is, I think, merely to meet the difficulty as to possession that arose in *Tidd* v. *Lister* (2), and *Ex parte Taylor*; *Taylor* v. *Taylor* (3). That clause does not alter the property in the income, but it strongly supports the view that the respondents' interest in the income is in the nature of a life tenancy, and that the income is theirs as such.

I am of opinion the judgment of the Full Court of Victoria was correct, and that this appeal should be dismissed.

Appeal allowed. Order appealed from varied by declaring that all the income in question is taxable as income the produce of property, and ordering the respondents to pay the costs of the special case. Respondents to pay the costs of the appeal.

Solicitor, for the appellant, *Guinness*, Crown Solicitor for Victoria.

Solicitors, for the respondents, *Gillott & Moir*.

B. L.

(1) 26 Ch. D., 736, at p. 743. (2) 5 Madd., 429.
(3) L.R. 20 Eq., 297.