1946

*May 17, 20, 21
*Oct. 22

THE EXECUTORS OF THE WILL OF THE HONOURABLE PATRICK BURNS, DECEASED, AND OTHERS.... } APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Income War Tax Act, R.S.C. 1927, c. 97, and amendments—Question whether certain income is taxable in hands of executors of estate—"Charitable institution" (s. 4(e))—Whether exemption applicable—"Income accruing to the credit of the taxpayer" (s. 11(1)) —"Income accumulating in trust for the benefit of unascertained persons" (s. (11(2))—"Benefit"—"Person" (s. 2(h))—"Income received by an estate or trust and capitalized" (s. 11 (4)(a))—Adequacy of language to make charging provision operative.

The question was whether certain income received by the executors of a will was taxable in their hands under the *Income War Tax Act* (R.S.C. 1927, c. 97, and amendments).

In the will, the testator gave to his executors and trustees (called his "trustees") the residue of his estate upon trust, to convert, invest, to carry out certain provisions, including gifts of annual payments for life, and to invest the surplus of the annual income as part of the capital of the trust estate; he directed his trustees to appropriate sufficient of the trust estate to insure an annual income therefrom sufficient for payment of annuities outstanding and to hold the trust estate, including accumulations and additions by deaths of annuitants or otherwise, and to pay annually to certain nephews and nieces 60 per cent of the net annual income; and to invest the surplus of such annual income as part of the capital of the trust estate; and, by clause 36, upon the death of the last annuitant or the death of the testator's son's widow, whichever should last happen, the trustees were to hold the trust estate, with all accumulations and additions, upon trust to distribute 67 per cent thereof to certain individuals and to pay and convey the residue (33%) unto the Royal Trust Company "for the creation and establishment of a trust to be known as the Burns Memorial Trust", which it was to administer, and the net annual income therefrom it was to distribute annually in equal shares among The Father Lacombe Home at Midnapore, the Branch of the Salvation Army having its headquarters at Calgary, and three other objects which, after the testator's death, were settled, by schemes approved by an order of court, to be: a fund to be administered by the City of Calgary for the benefit of poor, indigent and neglected children; a fund to be administered for the benefit of widows and orphans of members of the Police Force (in one case) and of the Fire Brigade (in the other case) of Calgary.

*Present: Rinfret C. J. and Kerwin, Hudson, Rand and Estey JJ.

The testator died in 1937. Annuitants and said widow were alive in the years now in question. In each of the years 1938, 1939, 1940 and 1941, of the total net income of the estate, 60 per cent thereof was paid to said nephews and nieces and the remaining 40 per cent was transferred by book entry by the executors from the estate income account into the estate capital account; the executors made no segregation or allocation of said 40 per cent of the net income as between the individuals entitled ultimately to 67 per cent thereof under said clause 36 of the will and the Royal Trust Company to which was to be paid and conveyed eventually the remaining 33 per cent thereof under said clause 36. The question was whether said 33 per cent of 40 per cent of the net income of the estate in each of the years 1938, 1939, 1940 and 1941 was subject to income tax.

Held (varying the judgment of Cameron D.J. in the Exchequer Court, [1946] Ex. C.R. 229): The income in question was taxable in the hands of the executors except two-fifths of the income (the proportion from which the Father Lacombe Home and the Salvation Army are ultimately to receive the income) for the years 1938 and 1939. (Rand and Estey JJ. dissented in part, holding that no part of the income in question was taxable except the income (the whole of it) for the year 1941.)

Per the Chief Justice, Kerwin and Hudson JJ. (the majority of the court): Assuming that the five beneficiaries of the trust to be administered by the Royal Trust Company are charitable institutions within s. 4(*e*) of the Act, that does not give a right of exemption from taxation in respect to the income now in question, as that income is not the income of any of them; they are not to receive it at any time but only the income on the capitalized sums from said company; the income now in question is not income to them at all within the scope of the Act, particularly s. 3, and is not "income accruing to the credit of the taxpayer" within s. 11(1). As to the Burns Memorial Trust, that is merely the name for a fund to be administered by said company; and said company is only a trustee; the income in question does not belong to it beneficially and it is not a charitable organization.

As to the Father Lacombe Home and the Salvation Army, the income in question is not "accumulating in trust for the benefit of unascertained persons" within s. 11(2) of the Act. Those conducting the work of said institutions are bodies corporate and politic, included in "person" as defined by s. 2(*h*) of the Act, and they are ascertained; they are not trustees in any sense; each organization uses its funds generally to help the poor and afflicted but the income in question is accumulating in trust for their benefit (to the extent of their shares) and not for those under their care.

As to the three other institutions which are to receive shares of the income from the Burns Memorial Trust, the income in question is "accumulating in trust for the benefit of unascertained persons" within said s. 11(2); those three institutions are merely trustees to apply the gifts for the benefit of other persons, who are "unascertained"; while the income in question is not income of such last-mentioned persons, it is income accumulating in trust for their benefit, since they are entitled to a share of the income thereon.

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As to the years 1940 and 1941, s. 11(4)(*a*), as enacted in 1940, c. 34, "income received by an estate or trust and capitalized shall be taxable in the hands of the executors * * *" applies. It is a true charging provision, not requiring the aid of s. 11(4)(*c*) enacted in 1941 (c. 18), which was added *ex abundanti cautela*. (Respondent did not contend for application of the former s. 11(4) as it stood in 1938 and 1939.)

In the result, two-fifths of the income in question (the proportion from which the Father Lacombe Home and the Salvation Army are ultimately entitled to the interest thereon) for the years 1938 and 1939 (only) is free from taxation.

Per Rand J. (dissenting in part): Under the direction in the will to accumulate and capitalize the portion of the net income intended for the five charities and, at the time provided, to pay over the whole of the capital, including the added increments, to the trustees of the Burns Memorial Trust to hold in perpetuity and to distribute the annual income, the accumulations never belong to nor come into possession of the charities; they represent solely the growth of the capital which ultimately becomes the principal from which the income benefits to the charities arise. Therefore the accumulations are not income of charitable institutions within s. 4(*e*) of the Act; nor are they "income accruing to the credit of the taxpayer" within s. 11(1). And they are not "income accumulating in trust for the benefit of" unascertained persons, etc., within s. 11(2); the benefit contemplated by s. 11(2) is that the accumulation, when completed, passes in its entirety to the persons entitled; and while, in the present case, in a sense the accumulations are for the "benefit" of the charities in the future increased income from increased capital, the word cannot be extended to that indirect and remote advantage. S. 11(4) seems to be designed to meet precisely the present case, that of capitalization of accumulating income; but the charging language thereof, as applicable prior to 1941, was inadequate for operation of the provision; but the addition of s. 11(4)(*c*) in 1941 made adequate the charging language and thus s. 11(4) was effective to make taxable in the hands of the executors so much of the income in question as was received by them in 1941.

Per Estey J. (dissenting in part): Neither the Royal Trust Company nor the "Burns Memorial Trust" is a charitable institution within the meaning of s. 4(*e*) of the Act. Moreover, even if the "Burns Memorial Trust" could be said to be an "institution", yet the income as income is never paid to or received by it; that trust is not created until the residue of the testator's estate is distributed in the future, when the fund will be paid as capital, not as income, to said company to create the "Burns Memorial Trust". On the same basis, that as the income in question is never received as income by any of the five beneficiaries, it cannot be said that it is the income of them. Nor is it "income accruing to the credit of the taxpayer" within s. 11(1); as income it is never paid or intended to be paid to the Royal Trust Company, the "Burns Memorial Trust" or the five beneficiaries; it is year by year added to and made part of the testator's trust estate and at time of distribution it is to be paid to said company as capital to be used to create the fund from which the beneficiaries will receive the only income

receivable by them. On similar considerations (and bearing in mind the definition of "income" in s. 3(1)), the income in question is not "income accumulating in trust for the benefit of unascertained persons or of persons with contingent interests" within s. 11(2) (*Minister of National Revenue* v. *Trusts and Guarantee Co.*, [1940] A.C. 138, distinguished). S. 11 (4)(*a*) of the Act ("Income received by an estate or trust and capitalized shall be taxable in the hands of the executors", etc.) as enacted in 1940 lacked words essential to the imposition of a tax; but under said s. 11(4)(*a*) along with s. 11(4)(*c*) (enacted in and applicable to 1941), the executors were liable for tax for 1941.

APPEAL from the judgment of His Honour Judge Cameron, Deputy Judge of the Exchequer Court of Canada (1), dismissing an appeal from the decision of the Minister of National Revenue affirming the assessments made upon the appellants, the executors of the will of the Honourable Patrick Burns, late of Calgary, Alberta, deceased, for income tax under the *Income War Tax Act* (R.S.C. 1927, c. 97, and amendments thereto) in respect of the years 1938, 1939, 1940 and 1941. Other parties were added as appellants in the Exchequer Court, namely, the Royal Trust Company (named in the will of the said deceased as Trustee for Burns Memorial Trust), the Father Lacombe Home at Midnapore, the Governing Council of the Salvation Army Canada West, and the respective Trustees of three funds to be administered for benefits provided for in the will of the said deceased.

The material facts and questions in issue sufficiently appear in the reasons for judgment in this Court now reported and in the reasons for judgment in the Exchequer Court (above cited), and are indicated in the above headnote.

G. H. Steer, K.C. and *E. J. Chambers, K.C.* for the appellants.

H. W. Riley and *J. G. McEntyre* for the respondent.

The judgment of the Chief Justice and Kerwin and Hudson JJ. (the majority of the Court) was delivered by

KERWIN, J.—The executors of the will of the Honourable Patrick Burns and other parties added in the Exchequer Court appeal from a judgment of that Court dismissing

(1) [1946] Ex. C.R. 229; [1946] 4 D.L.R. 12; [1946] C.T.C. 13.

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an appeal from the decision of the Minister of National Revenue, confirming the assessments to income tax made upon the executors in respect of the years 1938, 1939, 1940 and 1941, under the provisions of the *Income War Tax Act*. The testator died February 24, 1937, having made his last will and testament and a codicil thereto, probate of which was duly granted. It is unnecessary to refer to the codicil or to set forth all the provisions of the will or the agreements made with the widow of the testator's son. Suffice it to say that, taken in conjunction with certain orders made by the Courts of the Province of Alberta where the testator was domiciled, the Executors, in the events that have transpired, were directed to act as follows, and proceeded accordingly in the administration of the large estate left by the deceased.

After payment of specific legacies, the executors, referred to as "my Trustees", were to hold the balance of the estate, referred to as "my Trust Estate", in trust to pay certain annuities and (paragraph 35)

to appropriate sufficient of the same or of the investments thereof to insure an annual income therefrom sufficient to pay and discharge the Annuities then outstanding and hereinbefore given and bequeathed by this my Will, and to hold "my Trust Estate," including the accumulations thereof and the additions thereto by reason of the deaths of Annuitants or otherwise until the death of the last of the Annuitants to whom I have bequeathed Annuities by this my Will or the death of the widow of my said son, Patrick Thomas Michael Burns, whichever shall last happen and * * * upon further trust to pay:

named nephews and nieces a total of 60 per cent of the net annual income. Upon the death of the last of the annuitants or of the son's widow, the trustees were (paragraph 36) to stand possessed of " 'my Trust Estate' with all accumulations thereof and additions thereto and the whole thereof to hold upon further trust to distribute" 67 per cent thereof among named nephews and nieces

AND UPON THE FURTHER TRUST to pay and convey the rest, residue and remainder of "my Trust Estate" unto The Royal Trust Company for the creation and establishment of a Trust to be known as the "Burns Memorial Trust" to be administered by it as Trustee at its office in the City of Calgary, in the Province of Alberta, and the net annual income therefrom to pay and distribute annually in equal shares thereof amongst the following:

(1) The Father Lacombe Home at Midnapore in the Province of Alberta.

(2) The Branch of the Salvation Army, having its headquarters at the City of Calgary, in the Province of Alberta.

(3) The Children's Shelter carried on under the auspices of the said City of Calgary * * *

(4) To the Fund established for the benefit of Widows and Orphans of Members of the Police Force of the City of Calgary * * *

(5) To the Fund established for the benefit of Widows and Orphans of Members of the Fire Brigade of the City of Calgary, * * *

The residue to be conveyed to the Royal Trust Company for the purposes mentioned thus represents 33 per cent of 40 per cent of the income of "my Trust Estate".

In each of the years 1938 to 1941 inclusive, the annuities and the sums due the widow of the testator's son under the agreements with her were paid and 60 per cent of the total net income of the estate was paid to the nephews and nieces entitled thereto, and the remaining 40 per cent of the net income was transferred by book entry by the trustees from the Estate Income Account into the Estate Capital Account. The trustees made no segregation or allocation of this 40 per cent of the net income as between the individuals entitled ultimately to 67 per cent thereof under paragraph 36 and the Royal Trust Company to which is to be paid and conveyed eventually the remaining 33 per cent.

The trustees filed income tax returns for each of the years 1938 to 1941 inclusive, but the Department disallowed for each year a certain sum claimed by the trustees as deductible from the taxable income. Each deduction represented 33 per cent of 40 per cent of the net income of the estate for that year. These amounts are claimed as proper deductions by the estate and by the added parties, who are the Royal Trust Company, the Lacombe Home, the Governing Council of the Salvation Army Canada West, and the trustees of the three Calgary funds. The basis of the claim is that even if these amounts are taxable under certain provisions of the *Income War Tax Act* (which is denied), they have accrued to the credit

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of an ascertained beneficiary or ascertained beneficiaries which are charitable institutions and are, therefore, exempt under section 4(*e*) of the Act:

> (*e*) The income of any religious, charitable, agricultural and educational institution, board of trade and chamber of commerce, no part of the income of which inures to the personal profit of, or is paid or payable to any proprietor thereof or shareholder therein;

It should be stated that by an order of the Supreme Court of Alberta, dated December 11, 1939, the gifts of income to the Lacombe Home, the Salvation Army, the Children's Shelter, the Fund established for the benefit of Widows and Orphans of Members of the Police Force of the City of Calgary, and the Fund established for the benefit of the Widows and Orphans of Members of the Fire Brigade of the City of Calgary were declared to be good and valid charitable bequests. By the same order, after reciting that it appeared that there was no institution existing in Calgary known and administered as a Children's Shelter or carried on under the auspices of the City, that no fund had been established for the benefit of widows and orphans of Members of the Police Force of the said City, and that no fund had been established for the benefit of the widows and orphans of Members of the Fire Brigade of the said City, schemes were approved for the setting-up and administration of funds for "The Trustees for Poor, Indigent and Neglected Children of the City of Calgary", "The Trustees for Widows and Orphans of the Police Force of the City of Calgary" and "The Trustees for Widows and Orphans of the Fire Brigade of the City of Calgary", and provision was made in each scheme for the appointment of trustees for the several purposes.

According to the evidence, the Lacombe Home is conducted as part of the charitable work carried on by Les Soeurs de Charité de la Providence, and the work of the Salvation Army in Calgary falls under the jurisdiction of the Governing Council of the Salvation Army Canada West. They are religious or charitable organizations and, for the purposes of this present discussion, I will assume that the other three funds mentioned in the will and for

which trustees were set-up by the schemes approved by the order are also charitable organizations within the meaning of section 4(*e*) of the Act as expounded by the Privy Council in the *Birtwistle* case, *Minister of National Revenue* v. *Trusts and Guarantee Co.* (1). The difficulty in the appellants' way in seeking exemption under this clause is that the income in question is not the income of any of these bodies. They are not to receive it at any time from any one, but only the income on the capitalized sums from the Royal Trust Company. It is not income to them at all within the scope of the Act, particularly section 3, and is not "income accruing to the credit of the taxpayer" within subsection 1 of section 11:

> The income, for any taxation period, of a beneficiary of any estate or trust of whatsoever nature shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period.

Mr. Steer argued that, as by paragraph 35 of the will the trustees were to "appropriate" sufficient of "my Trust Estate" to insure an annual income sufficient to pay the annuities, it should be taken in equity as having been done, leaving the balance of the annual income to be divided 60 per cent and 40 per cent; and that, therefore, the 40 per cent was vested,—as to 67 per cent thereof in the named beneficiaries, and as to 33 per cent in the five bodies mentioned above or, in the alternative, in the Burns Memorial Trust. As to the five bodies, the mere fact of charities being entitled to income does not give them the right to demand payment of the corpus, *Halifax School for the Blind* v. *Chipman* (2). As to the Burns Memorial Trust, I agree with the trial judge that it is merely a name for a fund to be administered by the Royal Trust Company and that Company is nothing more than a trustee as was the Council of Colne in the *Birtwistle* case (3). The income in question does not belong to it beneficially and, like the Council of Colne, it is not a charitable organization.

The claim for exemption therefore fails, but it is still necessary for the respondent to show that the estate is

(1) [1940] A.C. 138.
(2) [1937] S.C.R. 196.
(3) [1940] A.C. 138.

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taxable in respect of the income in question. He seeks, first of all, to hold the trustees taxable under subsection 2 of section 11:

> Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of a person other than a corporation; provided that he shall not be entitled to the exemptions provided by paragraphs (*c*), (*d*), (*e*) and (*i*) of subsection one of section five of this Act, and provided further that should more than one such trust be created, substantially all the assets of which are received from one person (whether or not administered by the same or different trustees) and be so conditioned as to fall in ultimately in favour of one beneficiary, class or group of beneficiaries, then the income of the several trusts shall be taxed as one trust in the hands of such one of the trustees as the Minister may determine.

on the ground that the income is "accumulating in trust for the benefit of unascertained persons." In the *Birtwistle* case (1), the Privy Council held

> the subsection applies in every case where income is being accumulated in trust for the benefit of unascertained persons whether those persons will or will not ultimately take a vested interest in such income, and whether they will or will not ever become entitled to specific portions of it. In the present case the accumulated interest in the hands of the respondents as trustees will in the year 1948 have to be handed over to the Municipal Council of Colne as trustees in trust to be applied for the benefit of the aged and deserving poor of that town. Such aged and deserving poor are without any question persons, and equally without question they are unascertained. The case, therefore, seems to fall within the very words of the subsection.

The trial judge was of opinion that the Lacombe Home and the Salvation Army were "unascertained persons", but I am unable to agree. Les Soeurs de Charité de la Providence and the Salvation Army are bodies corporate and politic, as mentioned in section 2(*h*) of the Act:

> (*h*) "person" includes any body corporate and politic and any association or other body, and the heirs, executors, administrators and curators or other legal representatives of such person, according to the law of that part of Canada to which the context extends;

and they are ascertained. I quite agree that the interposition of trustees between executors and ultimate beneficiaries cannot avoid the liability to taxation under subsection 2 of section 11, as this was distinctly held in the *Birtwistle* case (1), but the Lacombe Home and the Salvation Army are not trustees in any sense. Each organi-

(1) [1940] A.C. 138.

zation uses its funds generally to help the poor and afflicted, but the income under discussion is accumulating in trust for their benefit and not for the ones under their care. It is true that in the *Birtwistle* case (1), the accumulated income was to be handed over by the Trust and Guarantee Company to the Municipal Council to be used by the latter for the benefit of aged and deserving poor of Colne, while here the Royal Trust Company is to hand over merely a share of the income on the income in dispute to the two bodies. The income is still accumulated in trust for their benefit to the extent of their shares.

I agree, however, that the income is accumulating in trust for the benefit of unascertained persons so far as the gifts of income thereon to the other three funds are concerned. The trustees of each of these funds are merely trustees to apply the gifts, according to the approved schemes, for the benefit of (*a*) poor, indigent and neglected children, (*b*) widows and orphans of members of the Calgary Police Force, (*c*) widows and orphans of members of the Calgary Fire Brigade. Such trusts fall clearly within the decision in the *Birtwistle* case (1), and the judgment of this Court in *Cosman's Trustees* v. *Minister of National Revenue* (2). While it is not their income, it is income accumulating in trust for their benefit, since they are entitled to a share of the income thereon.

The respondent then contents that subsection 4 of section 11 applies to the income for 1940 and 1941. From 1934 to 1940 this subsection read:

> Dividends received by an estate or trust and capitalized shall be taxable income of the estate or trust.

Counsel for the respondent, before the trial judge and before this Court, did not attempt to succeed on this point for the years 1938 and 1939 under this wording of the subsection, so that we are free from the responsibility of construing it and of considering whether, to the extent that dividends may have entered into the income of "my Trust Estate", part of the 33 per cent of 40 per cent of the income for the years 1938 and 1939 are taxable. However, by chapter 34 of the 1940 Statutes, the above subsection 4 was repealed and the following enacted in lieu

(1) [1940] A.C. 138. (2) [1941] 3 D.L.R. 224.

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thereof and made applicable to income of the 1940 taxation period and fiscal periods ending therein and to all subsequent periods:

4. (*a*) Income received by an estate or trust and capitalized shall be taxable in the hands of the executors or trustees, or other like persons acting in a fiduciary capacity.

(*b*) Income earned during the life of any person shall, when received after the death of such person by his executors, trustees or other like persons acting in a fiduciary capacity, be taxable in the hands of such fiduciary.

Mr. Steer contended that this was not a true charging subsection, as no provision was made as to the appropriate rates of taxation, and he pointed out that it was only in 1941, by section 19 of chapter 18, that paragraph (*c*) was added:

(*c*) Income taxable under the provisions of this subsection shall be taxed as if such income were the income of a person other than a corporation, provided that no deduction shall be allowed in respect of the exemptions provided by paragraphs (*c*), (*d*), (*e*), (*ee*) and (*i*) of subsection one of section five of this Act.

In my view this clause was added *ex abundanti cautela*. In *Holden* v. *Minister of National Revenue* (1), the Privy Council decided that subsection 2 of section 11 as it then stood was a valid charging provision. It is true that the words "as if such income were the income of an unmarried person" appeared therein, but I have no doubt that no other conclusion would be arrived at under the present wording of that subsection, "as if such income were the income of a person other than a corporation", since their Lordships had no difficulty in deciding as they did, although there was nothing to indicate that the unmarried person was to be a person who was not a householder and without dependents. Clause (*a*) of subsection 4 being a true charging provision, its terms are too clear to admit of any doubt that where, as here, income is received by an estate and capitalized, it is taxable in the hands of the trustees.

It is contended in the respondent's factum, but was not argued, that the definition of "person" in section 2(*h*) is wide enough to include executors and trustees and that, therefore, income accumulating in trust in the hands of trustees and capitalized can be taxed under section 9. This argument misconceives the meaning of section 2(*h*) and

(1) [1933] A.C. 526.

the whole tenor of the Act. "Person" is stated to include the heirs, executors, administrators and curators or other legal representatives of such person, but this has no bearing upon the question of taxation of *post mortem* income accumulated in trust by executors, administrators, or other legal representatives, including trustees. If such income is not caught by section 11, it is not covered.

The income for the years 1940 and 1941, from which the Lacombe Home and the Salvation Army would receive two-fifths of the income thereof in due course is, therefore, covered by subsection 4 of section 11, leaving only two-fifths of the income for the years 1938 and 1939 from which these institutions are ultimately to receive the income, free from taxation. The appellants have succeeded in part. They should receive one-half of their costs of the appeal to this Court and there should be no costs in the Exchequer Court.

RAND J.—The controlling fact in this controversy is the direction to accumulate and to capitalize until the death of the annuitants the portion of the net income intended for the five charities. At that time, the whole of the capital, including the added increments, is to be paid over to the trustee of the Burns Memorial Fund to hold in perpetuity and to distribute the annual income among those entitled. Under that provision, the accumulations never belong to nor come into the possession of the charities: they represent solely the growth of the capital which ultimately becomes the principal from which the income benefits to the charities arise.

For that reason I think it impossible to say that the accumulations are the income of charitable institutions, and they are not then within the exemption of section 4(*e*) of the *Income War Tax Act*. Likewise, they are not income "accruing to the credit of the taxpayer whether received by him or not during such taxation period" within section 11(1).

In support of this view of "income" to the ultimate beneficiary, the decision of Rowlatt J. in *Inland Revenue Commissioners* v. *Blackwell* (1) was cited; but Mr. Steer

(1) [1924] 2 K.B. 351.

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pointed out that the Court of Appeal, in dealing with this case (1), expressly abstained from passing on the rule laid down; and that in *Inland Revenue Commissioners* v. *Pakenham* (2), Rowlatt J. expresses doubts that his former view was sound. But there is an essential difference between the factual basis of the *Blackwell* decision and that here. There, the accumulated income would go ultimately to a beneficiary; and it was held that even if the interest of the son was vested, a postponement during minority of payment over would prevent the accumulations from being his "income". Here, as I have stated, the beneficiaries never become entitled to receive the annual increments in any form, and the purpose of accumulation is to capitalize them for a subsequent enjoyment of income from them only.

Are they "income accumulating for the benefit of" unascertained persons or of persons with contingent interests within section 11(2)? The plain meaning of that language is, I think, that the accumulation, when completed, passes in its entirety to the persons entitled: and that transmission is the benefit contemplated. Here in a sense the accumulations are for the "benefit" of the charities in the future increased income from increased capital. But the word cannot, in my opinion, be extended to that indirect and remote advantage. If it were, the subsection would be duplicated, in respect of capitalization of income for unascertained persons or for contingent interests, by subsection 4 unless it is said, as I think it impossible to say, that subsection 4 does not apply to capitalization when such persons or interests are involved. It would seem, moreover, to be contradictory to say that these annual increments are not income either under 4(*e*) or 11(1) because they never reach the beneficiaries and yet to treat their accumulation as "income" of the same beneficiaries under 11(2). To do that would be to distinguished between "income of" a beneficiary and "income accumulating for the benefit of" a beneficiary. They are not, therefore, "for the benefit of" these charities whatever may be the latter's interest in them.

(1) [1926] 1 K.B. 389 at 392. (2) [1927] 1 K.B. 594.

There remains subsection 4, and this seems to me to be designed to meet precisely the case we have here, that of capitalization of accumulating income. Subsections 1 and 2 of the section distribute the cases of income to ascertained or unascertained persons with vested or contingent interests, which at some stage passes to them as income; subsection 4 deals with the capitalization of income regardless of its ultimate destination.

The difficulty, however, facing the respondent is that of the adequacy of the charging language. Paragraph (*a*) was enacted in 1940 and paragraph (*c*) only in 1941, and the question is whether under (*a*) alone the charge is sufficiently provided. The paragraph is as follows:

> Income received by an estate or trust and capitalized shall be taxable in the hands of the executors or trustees, or other like persons acting in a fiduciary capacity.

On what basis is that taxation to be calculated? Is an "estate or trust" to be a person or a corporation, and in either case what, if any, exemptions are to be allowed? Subsection 2 cannot be resorted to because it deals with different subject matter and conditions, to which it is limited, and there is no other section that can be called in aid. In the presence in the Act of several scales of taxation, how can we find in that initial provision a guide to the measure of charge which the legislation intends? I think the provision incomplete, it is *casus omissus*, and, for the years in question up to and including 1940, inoperative. For the year 1941, however, it is applicable to the income in question. I would, therefore, allow the appeal and reduce the assessments of income for 1938, 1939 and 1940 by the amounts so accumulated respectively. The 1941 assessment on these items should be made under subsection 4 of section 11. The appellant should recover three-quarters of the costs in both courts.

ESTEY J.—The appellants are the executors of the will of the Honourable Patrick Burns, who died February 24, 1937. Their contention is that the Minister of National Revenue was in error in disallowing certain deductions (on the basis that the items of income deducted were non-taxable) made by them in the income tax returns filed in

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this estate for the years 1938, 1939, 1940 and 1941. The Minister's disallowance was upheld in the Exchequer Court.

After directing certain specific devises and bequests the will provides for the conversion into money of the residue from which funeral, testamentary and other specified expenses should be paid, and then

my Trustees shall stand possessed of the balance of the said rest, residue and remainder * * * with the income and accumulations thereof herein referred to as "my Trust Estate" upon further trust to invest * * * and out of the net annual income therefrom and from all parts of "my Trust Estate", to pay annually

certain annuities. After payment of these annuities, the will provides

and to invest the surplus (if any) of such annual income in the names of my Trustees as part of the capital of "my Trust Estate" at compound interest.

The will then directs

my Trustees to hold "my Trust Estate" and to appropriate sufficient of the same or of the investments thereof to insure an annual income therefrom sufficient to pay and discharge the Annuities * * * and to hold "my Trust Estate", including the accumulations thereof and the additions thereto by reason of the deaths of Annuitants or otherwise until the death of the last of the Annuitants to whom I have bequeathed Annuities by this my Will or the death of the widow of my said son * * * whichever shall last happen,

and during that period to pay from the net annual income to specified nephews and nieces 60 per cent of that income and

to invest the surplus, if any, of such annual income in the names of my Trustees as part of the capital of "my Trust Estate" at compound interest.

This surplus is the 40 per cent "of the net income of the estate" referred to in para. 9 (hereinafter quoted) of the Agreed Statement of Facts.

The will then provides that the residue of "my Trust Estate" shall be distributed "upon the death of the last of the annuitants to whom I have bequeathed annuities in this my will or the death of the widow of my said son, whichever last shall happen". This distribution shall be upon the basis of 67 per cent to specified beneficiaries, and 33 per cent thereof shall be paid and conveyed

unto The Royal Trust Company for the creation and establishment of a Trust to be known as the "Burns Memorial Trust" to be administered

by it as Trustee at its office in the City of Calgary, in the Province of Alberta, and the net annual income therefrom to pay and distribute annually in equal shares thereof amongst the following:

(1) The Father Lacombe Home at Midnapore in the Province of Alberta.

(2) The Branch of the Salvation Army, having its headquarters at the City of Calgary, in the Province of Alberta.

(3) The Children's Shelter carried on under the auspices of the said City of Calgary, towards which I have bequeathed Fifty (50) 4% non-voting, non-cumulative, redeemable Preference Shares in the Capital Stock of Burns Foundation (Limited) by this my Will.

(4) To the Fund established for the benefit of Widows and Orphans of Members of the Police Force of the City of Calgary, towards which I have bequeathed Fifty (50) 4% non-voting, non-cumulative, redeemable Preference Shares in the Capital Stock of Burns Foundation (Limited) by this my Will.

(5) To the Fund established for the benefit of Widows and Orphans of Members of the Fire Brigade of the City of Calgary, towards which I have bequeathed Fifty (50) 4% non-voting, non-cumulative, redeemable Preference Shares in the Capital Stock of Burns Foundation (Limited) by this my Will,

In each year after all payments were made there was a surplus of income which has been invested in compliance with the terms of the will "in the names of my Trustees as part of the capital of 'my Trust Estate' at compound interest". The surplus invested as capital has in each year increased the corpus of "my Trust Estate" to be divided 67 per cent and 33 per cent as above indicated.

At the hearing before the Exchequer Court the parties filed an agreed statement of facts, para. 9 of which reads as follows:

9. That the taxable income submitted by the Appellant, the taxable income as assessed by the Department, and the amount disallowed by the Department during the years 1938 to 1941 inclusive, are as follows:

	Taxable Income Per Department	Per Estate	Amount Disallowed by Income Tax Department
1938	$10,597 94	$ 9,199 01	$1,398 93
1939	11,656 57	7,809 90	3,846 67
1940	20,096 97	14,382 57	5,714 40
1941	26,775 24	18,118 03	8,657 21
	$69,126 72	$49,509 51	$19,617 21

The amounts disallowed by the Income Tax Department represent 33 per cent of 40 per cent of the net income of the estate. These amounts are claimed as proper deductions by the estate on the ground

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that they have accrued to the credit of an ascertained beneficiary or ascertained beneficiaries which are charitable institutions. This view is not accepted by the Income Tax Department.

The issue here to be determined: is 33 per cent of the income realized from the investment of 40 per cent of the income—being the surplus after paying in each year 60 per cent thereof to the nephews and nieces—subject to income tax?

It is agreed that in each of the years 1938 to 1941 inclusive, 60 per cent of the net income was paid out to the specified nieces and nephews and the executors, by book entry, transferred the remaining 40 per cent from the estate income account into the estate capital account. The executors made no segregation or allocation of the net income from the said 40 per cent as between the individuals entitled to 67 per cent thereof and the parties entitled to the remaining 33 per cent thereof.

The appellants' contention is that income derived from the 33 per cent is not taxable because (*a*) the "Burns Memorial Trust" is a charitable institution and as such not taxable within the meaning of section 4(*e*), or alternatively, the income accrued to the credit of the Royal Trust Company, or in the alternative to the five named ascertained beneficiaries, or in the further alternative, to the Salvation Army and Lacombe Home, which are ascertained beneficiaries, and therefore, under section 11(1) the individual beneficiaries and not the executors are taxable with respect thereto.

The Crown on the other hand contends that neither section 4(*e*) nor 11(1) apply because the income in question was received by the executors and used by them to make certain payments and invest the surplus as part of the capital of "my Trust Estate". At the time of distribution 33 per cent of the residue of "my Trust Estate" will be paid over to the Royal Trust Company not as income but as capital. The Royal Trust Company will receive it as capital and hold it in trust and pay the income therefrom to the specified charities. In other words, that neither the Royal Trust Company as trustee nor any of the beneficiaries will ever receive any portion of the amounts in question as income and therefore they cannot

be taxed nor be granted an exemption with respect to income which they never received. Further, that the trustees are liable under section 11(2) in that the beneficiaries are unascertained and if not, then they are liable under section 9.

Section 4(*e*) of the *Income War Tax Act* reads:

> 4. The following incomes shall not be liable to taxation hereunder:
> (*e*) The income of any religious, charitable, agricultural and educational institution, board of trade and chamber of commerce, no part of the income of which inures to the personal profit of, or is paid or payable to any proprietor thereof or shareholder therein;

The money is paid to the Royal Trust Company for the creation and establishment of a Trust to be known as the "Burns Memorial Trust" to be administered by it as Trustee at its office in the City of Calgary, in the Province of Alberta, and the net annual income therefrom to pay and distribute annually in equal shares thereof amongst the five specified beneficiaries. It is not, nor could it be successfully, contended that the Royal Trust Company is a charitable institution within the meaning of section 4(*e*), but it is contended that the "Burns Memorial Trust" is a charitable institution.

An order made and issued out of the Supreme Court of Alberta under date of December 11, 1939, declared all of these gifts "good and valid charitable bequests". Such a declaration, however, does not conclude the issue. In order to be exempt under section 4(*e*), it must be "the income of any * * * charitable * * * institution". A somewhat similar question was dealt with in *Minister of National Revenue* v. *Trusts and Guarantee Co.* (1) where, speaking on behalf of the Privy Council, Lord Romer, at p. 149, stated:

> That it is a charitable trust no one can doubt. But their Lordships are unable to agree that it is a charitable institution such as is contemplated by s. 4(*e*) of the Act. It is by no means easy to give a definition of the word "institution" that will cover every use of it. Its meaning must always depend upon the context in which it is found. It seems plain, for instance, from the context in which it is found in the sub-section in question that the word is intended to connote something more than a mere trust. Had the Dominion Legislature intended to exempt from taxation the income of every charitable trust, nothing would have been easier than to say so. In view of the language that has in fact been used, it seems to their Lordships that the charitable institutions exempted are those which are institutions in the sense in which boards of trade and chambers of commerce are institutions, such,

(1) [1940] A.C. 138.

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for example, as a charity organization society, or a society for the prevention of cruelty to children. The trust with which the present appeal is concerned is an ordinary trust for charity. It can only be regarded as a charitable institution within the meaning of the sub-section if every such trust is to be so regarded, and this, in their Lordships' opinion, is impossible. An ordinary trust for charity is, indeed, only a charitable institution in the sense that a farm is an agricultural institution. It is not in that sense that the word institution is used in the sub-section.

The appellants submit the discussion of the word "institution" in *Mayor of Manchester* v. *McAdam* (1), where, at p. 511, Lord Macnaghten, after pointing out that "institution" is "a little difficult to define", continues:

> It is the body (so to speak) called into existence to translate the purpose as conceived in the mind of the founders into a living and active principle.

They contended that the testator had two purposes in mind, (1) to benefit the five named beneficiaries and (2) to perpetuate the name of the benefactor. They contend that the phrase "Burns Memorial Trust" gives to the trust "the perpetual memorial idea", and this provides what Lord Romer requires by his words "something more than a mere trust" and therefore the "Burns Memorial Trust" is a charitable institution. This phrase perpetuates the name of the benefactor in association with this trust, but does not make it a perpetual charitable trust. If the words "to be known as the 'Burns Memorial Trust'" are deleted from para. 36 of the will, which provides for this trust, neither the permanency of the trust, the management and disposition thereof, nor the position of the beneficiaries would be in any way affected. It is a perpetual charitable trust upon the construction of the will quite apart from these words under the authority of *The Halifax School for the Blind* v. *Lewis Chipman* (2).

Further, all the work in connection with this fund is to be performed by the Royal Trust Company as trustee. That company receives from the trustees the fund "for the creation and establishment of a Trust to be known as the 'Burns Memorial Trust' to be administered by it as Trustee" and "to pay and distribute annually" the income amongst the five beneficiaries. It is a perpetual charitable trust fund, the income from which is used for charitable

(1) [1896] A.C. 500. (2) [1937] S.C.R. 196.

purposes through the medium of the five beneficiaries. There is nothing to be performed in connection with this trust by the "Burns Memorial Trust", nor is there a body or entity which could be described as an institution styled the "Burns Memorial Trust".

Under both of the foregoing discussions of the word "institution" there is contemplated a body or entity functioning to attain some charitable purpose. Moreover, the will creating this perpetual charitable trust not only does not contemplate that the "Burns Memorial Trust" will be such an institution, but specifically states that the trust is to be "known as the 'Burns Memoral Trust' ".

Indeed, from all its relevant provisions, the will indicates that the testator, in using this phrase, intended to give to the trust a name that would embody a memoir of its founder. In its legal significance it is but the name of the trust, and I am therefore in agreement with the conclusion of the learned Judge of the Exchequer Court that these words are "a name attached to a fund" and that under this will the "Burns Memorial Trust" is not an institution as contended by the appellants.

The appellants further submit that the situation here created is identical with that which would have existed had the testator provided for the creation of a "Burns Memorial Corporation" or a "Burns Memorial Trust Corporation" with general charitable objects and then have directed that this money should be paid to that Corporation for charitable purposes. If a corporation so constituted could, upon an examination of its nature and purpose, be held a charitable institution, the conclusion suggested by the appellant might follow. That would be a situation entirely different from that which here obtains where a capital sum of money is given to a corporation that is not a charitable institution to create and administer a trust fund to be known as the "Burns Memorial Trust".

Moreover, and quite apart from the foregoing, because this income is received and applied by the executors as above indicated, even if the "Burns Memorial Trust" could be construed as an institution, there still remains the fact that the income as income is never paid to or received by the "Burns Memorial Trust". That trust will not be

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created until the residue of "my Trust Estate" is distributed some time in the future. At that time the fund will be paid as capital, not as income, to the Royal Trust Company to create the trust known as the "Burns Memorial Trust". It therefore cannot be construed as "the income of any * * * charitable * * * institution" within the meaning of section 4(e) and is not entitled to the benefit of the exemption therein provided for.

On the same basis, that as income it is never received by any of the beneficiaries, the appellants' submission that the income is that of the five named beneficiaries cannot be supported.

Then with respect to the appellants' contention that the executors are not taxable because the income here is "income accruing to the credit of the taxpayer whether received by him or not during such taxation period":

> 11. (1) The income, for any taxation period, of a beneficiary of any estate or trust of whatsoever nature shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period.

It is not contended that the income is year by year received by the Royal Trust Company or the "Burns Memorial Trust" or the five beneficiaries, but that it is "income accruing to the credit of" either the Royal Trust Company or the "Burns Memorial Trust" or the five beneficiaries within the meaning of section 11(1).

In order to come within the terms of this section it must be "income accruing to the credit of the taxpayer". As income it is never paid, nor is it intended that it should ever be paid, to the Royal Trust Company, the "Burns Memorial Trust" or the five beneficiaries. It is year by year added to and made part of "my Trust Estate" and at the time of distribution thereof it is paid to the Royal Trust Company as capital to be retained and used by it to create a perpetual trust fund ("Burns Memorial Trust"). It is only after the creation of this trust fund that the beneficiaries will receive income which this capital fund will earn and that is the only income that, under the terms of the will, these beneficiaries will receive. A somewhat similar provision came before the Privy Council

in *St. Lucia Usines and Estates Co.* v. *St. Lucia (Colonial Treasurer)* (1), where Lord Wrenbury at p. 512, speaking on behalf of the Privy Council, stated:

> The words "income arising or accruing" are not equivalent to the words "Debts arising or accruing". To give them that meaning is to ignore the word "income". The words mean "money arising or accruing by way of income". There must be a coming in to satisfy the word "income". This is a sense which is assisted or confirmed by the word "received" in the proviso at the end of s. 4, sub-section 1.

Their Lordships pointed out that "it does not follow that income is confined to that which the taxpayer actually receives", and illustrated this statement by reference to deduction of income at the source and as it is arrived at by business men and others in the preparation of their balance sheets and profit and loss accounts.

Moreover, the view expressed by Lord Wrenbury in the *St. Lucia* case (1) appears particularly applicable because of the definition of "income" in section 3 (1) of the *Income War Tax Act:*

> 3. (1) For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from * * *

This definition makes it clear that the income must be "directly or indirectly received", and with respect to cases coming under section 11(1) it is there provided "whether received by him or not during such taxation period". This is further emphasized by Mr. Justice Newcombe in *In re McLeod* v. *The Minister of Customs and Excise* (2):

> If the income be accruing to the credit of an ascertained person who is the beneficiary of an estate or trust, the taxation of it is provided for by the first sentence of the section; but, whatever may be the meaning of "taxpayer" in the context, income which by the terms of the trust he may never receive cannot be said to be accruing to his credit, and therefore such income is not that of the testator's children or grandchildren within the intent of that clause.

This income is never received by any of the foregoing beneficiaries within the meaning of section 11(1) and cannot therefore be "income accruing to the credit" of any of them under that section.

(1) [1924] A.C. 508.

(2) [1926] S.C.R. 457, at 470.

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The first of the respondent's contentions is that this income is received by the trustee and is "accumulating in trust for the benefit of unascertained persons" and therefore the appellants are taxable under section 11(2).

11. (2) Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of a person other than a corporation; * * *

The express provisions of section 3(1) defining "income" for the purpose of this Act are clearly applicable to both subsections (1) and (2) of section 11, more particularly as there is no effort to otherwise define that word in section 11. In 11(2) it is the income "accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests" that is dealt with. Therefore, the income which is here accumulating must some time be "directly or indirectly received" as income in order to come within the definition of section 3(1). Without repeating the considerations already mentioned, it is abundantly clear that no part of the trust fund, or specifically that part of it that the respondent seeks to tax, is income that will ever be received as such by the beneficiaries who it is now contended are unascertained persons. It will never reach them as either income or capital. It will be added to "my Trust Estate", a part of which will be the capital of the perpetual charitable trust provided for and only a share of the income from that trust will the beneficiaries ultimately receive.

That the funds we are here concerned with will create a perpetual charitable trust, the principal of which will remain always intact and only the income therefrom will ever be received by a beneficiary, distinguishes this case from *Minister of National Revenue* v. *Trusts and Guarantee Co.* (1), where Lord Romer, speaking on behalf of the Privy Council, stated at p. 148:

In the present case the accumulated interest in the hands of the respondents as trustees will in the year 1948 have to be handed over to the municipal council of Colne as trustees in trust to be applied for the benefit of the aged and deserving poor of that town. Such aged and deserving poor are without any question persons, and equally without question they are unascertained.

(1) [1940] A.C. 138.

In that case the income was "accumulating in trust for the benefit of unascertained persons" and at a specified time was "to be applied for the benefit of the aged and deserving poor". Ultimately these unascertained persons received the income there in question and that is a requisite if income as defined in 3(1) is to be taxed under section 11(2). Under the Burns will, as already pointed out, the income sought to be taxed will never be "directly or indirectly received" by any person or persons unascertained or otherwise. It cannot, therefore, be taxed under section 11(2).

In 1940, Parliament amended section 11 by repealing subsection 4(*a*) and inserting a new 4(*a*) reading as follows:

> 11. (4) (*a*) Income received by an estate or trust and capitalized shall be taxable in the hands of the executors or trustees, or other like persons acting in a fiduciary capacity.

Section 11 is a charging section: *Holden* v. *Minister of National Revenue* (1). When in section 11(2) Parliament imposed a new tax it specified the rate. The tax there imposed was upon "income accumulating in trust for the benefit of * * *", while section 11(4) (*a*) deals with "income received by an estate or trust and capitalized", which is different in character and may be quite different in result. Nor do I find any words which indicate an intention either that the rate specified in 11(2) be made applicable to both subsections, or to adopt any other rate specified in the statute. Without a rate or determinable amount there can be no impost. A tax is defined as "an impost; a tribute imposed on the subject": Wharton's Law Lexicon, 14th Ed., 978. Therefore in the enactment of this subsection 4(*a*) a factor essential to the imposition of a tax is omitted and the result is that no tax is imposed.

Parliament in the following year, 1940-41, S. C., c. 18, s. 19, added section 11(4) (*c*):

> (*c*) Income taxable under the provisions of this subsection shall be taxed as if such income were the income of a person other than a corporation, provided that no deduction shall be allowed in respect of the exemptions provided by paragraphs (*c*), (*d*), (*e*), (*ee*) and (*i*) of subsection one of section five of this Act.

(1) [1933] A.C. 526.

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and by section 32 of the same Act this provision was made applicable to the income of the 1941 taxation period:

32. Sections one, two, four, five, six, seven, nine, ten, eleven, twelve, seventeen, nineteen, twenty, twenty-one, twenty-four, twenty-five and twenty-six of this Act shall be applicable to income of the 1941 taxation period and fiscal periods ending therein and of all subsequent periods.

It therefore follows that with respect to the 1941 period the executors are under section 11(4)(*a*) and (*c*) liable for the tax with respect to the income here in question.

The respondent's second contention is that, quite apart from the provisions of section 11(2), the appellants are liable under the provisions of section 9 for all of the years in issue. Section 9 in part reads:

9. (1) There shall be assessed, levied and paid upon the income during the preceding year of every person * * *

The word "person" is defined in section 2(*h*):

2. (*h*) "person" includes any body corporate and politic and any association or other body, and the heirs, executors, administrators and curators or other legal representatives of such person, according to the law of that part of Canada to which the context extends;

Sections 9 and 11 are both charging sections and the language used indicates that under these sections Parliament imposes a tax upon entirely different persons. Section 9(1) provides for the assessing, levying and paying upon income during the preceding year of every person other than a corporation or joint stock company, and 9(2) deals with the corporation and the joint stock company. The income tax is here imposed upon the person, corporation or joint stock company *per se* even though that tax may be assessed, levied and collected from their "heirs, executors, administrators and curators or other legal representatives".

Section 11 charges an income with respect to that earned by the estate or trust and imposes the tax upon either the party administering the estate or trust, or the beneficiary. The amendment of 1940-41 was a further step in the attainment of that end and provided for a tax not previously imposed.

Under the provisions of these sections it follows that prior to the amendment of section 11, when in 1940-41 the above quoted section 11(4) (*c*) was passed, no tax was

imposed upon the trustees with respect to the income here in question. In the result the amounts here in question were not taxable in the years 1938, 1939 and 1940 and therefore were improperly disallowed by the Crown, while in 1941, because of the enactment of 11(4)(*c*), the amount in that year was taxable and the deduction properly disallowed.

The judgment appealed from should be so varied and the appellants should have three-fourths of their costs throughout.

Appeal allowed in part; two-fifths of the income in question, being that proportion from which the Lacombe Home and the Salvation Army are ultimately entitled to the interest thereon, are declared free of income tax for the years 1938 and 1939. Appellants to receive one-half of the costs of their appeal to this Court. No costs in the Exchequer Court.

Solicitors for the appellant Executors: *Hannah, Nolan, Chambers, Might & Saucier.*

Solicitor for added appellants: *G. H. Steer.*

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