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In the Privy Council.

UNIVERSITY OF LONDON
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 LEGAL STUDIES
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ON APPEAL FROM THE SUPREME
 COURT OF CANADA

BETWEEN

THE EXECUTORS OF THE WILL of the HONOURABLE PATRICK
 BURNS, deceased APPELLANTS

AND

10 THE ROYAL TRUST COMPANY, named in the Will of the said
 Honourable Patrick Burns as Trustee for Burns Memorial Trust ;
 THE FATHER LACOMBE HOME AT MIDNAPORE ; THE
 GOVERNING COUNCIL OF THE SALVATION ARMY
 CANADA WEST ; THE TRUSTEES OF THE FUND TO BE
 ADMINISTERED BY THE CITY OF CALGARY FOR THE
 BENEFIT OF POOR, INDIGENT AND NEGLECTED
 CHILDREN under the Will of the Honourable Patrick Burns ;
 THE TRUSTEES OF THE FUND TO BE ADMINISTERED
 FOR THE BENEFIT OF WIDOWS AND ORPHANS OF
 20 MEMBERS OF THE POLICE FORCE IN THE CITY OF
 CALGARY under the Will of the Honourable Patrick Burns ;
 THE TRUSTEES OF THE FUND TO BE ADMINISTERED
 FOR THE BENEFIT OF WIDOWS AND ORPHANS OF
 MEMBERS OF THE FIRE BRIGADE IN THE CITY OF
 CALGARY under the Will of the said Honourable Patrick Burns

ADDED APPELLANTS

AND

THE MINISTER OF NATIONAL REVENUE RESPONDENT.

CASE FOR THE APPELLANTS

RECORD

1.—This is an Appeal by special leave from a Judgment of the
 30 Supreme Court of Canada dated the 22nd October, 1946, in so far as such
 Judgment did not allow the Appellants' appeal from a Judgment of the
 Exchequer Court dated the 19th January, 1946, which had dismissed

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CASE FOR THE APPELLANTS

RECORD

the Appellants' appeal under the Income War Tax Act from a decision of the Minister of National Revenue confirming assessments to income tax made upon the Appellants for the years 1938, 1939, 1940 and 1941.

p. 40, l. 18 to
p. 50, l. 15
pp. 35-40

2.—Two of the Judges in the Supreme Court of Canada (Rand and Estey JJ.) would have allowed the appeal in respect of 1938, 1939 and 1940 in its entirety, but the majority (Rinfret C.J., Kerwin and Hudson JJ.) held that the appeal succeeded only as to two-fifths of the amount in controversy in respect of the years 1938 and 1939. All the Judges held that the appeal failed in respect of 1941 and their decision, unless reversed, will also govern the tax liability of the Appellants for all years subsequent to 1941.

pp. 53-74

3.—The matters in controversy arise out of the Will of Patrick Burns, a Senator of Canada, and depend on the status as charities of the Burns Memorial Trust set up under the Will, of the Salvation Army, of the Father Lacombe Home, and of the trustees of three funds under the Will for the administration of which schemes were approved in 1939 by the Supreme Court of Alberta.

4.—The Income War Tax Act (Revised Statutes of Canada, 1927, chapter 97, with relevant amendments) provides :

4. The following income shall not be liable to taxation 20
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 Appellants contend that by virtue of this provision of the Act the income in question in this case is not liable to taxation.

5.—The varying views of the learned deputy Judge of the Exchequer Court, the majority of the Judges in the Supreme Court, Mr. Justice Rand 30 and Mr. Justice Estey, were all based on excluding the income from the exemption of Section 4 (e) and on the effect of Section 11 of the Act. In 1938 Section 11 was as follows :

- (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.
- (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, provided that he shall not be entitled to the exemptions provided by paragraphs (c), (d), (e) and (i) of sub-section 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.

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(3) In determining the taxable income of deceased persons, interest, rents, royalties, annuities and other income payable periodically shall be deemed to have accrued by equal daily increment during and within the period for or in respect of which such income arose and shall be apportionable in respect of the period of time accordingly and that portion accrued to the date of death shall be taxed as income of the deceased.

20

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

(5) Any amount paid by an estate or trust for the upkeep, maintenance and taxes of any property which, under the terms of the will or trust is required to be maintained for the use of any tenant for life, and which in any case is in excess of such an amount as the Minister may prescribe, shall be deemed to be taxable income received by such tenant for life.

In 1940 there was substituted for Section 11 (4) the following provision :

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(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.

In 1941 there was added to the amended sub-section a further clause :

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(c) Income taxable under the provisions of this sub-section 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 sub-section one of section five of this Act.

6.—Patrick Burns died on the 24th February, 1937, having disposed of his estate by a Will dated the 15th January, 1932, and a Codicil thereto, dated

p. 18, l. 29
p. 18, ll. 25-28

RECORD

p. 18, l. 30
 p. 18, l. 34
 p. 18, l. 35 to
 p. 19, l. 49

the 4th March, 1933, which were duly proved and which provided for a number of eventualities including that of his only son dying before him without issue. Patrick Burn's only son did so die. The son's widow received benefits under the Will which were the subject of agreements approved by the Supreme Court of Alberta. Under these agreements the son's widow released all claims under the Will.

p. 59, l. 21 to
 p. 60, l. 4

p. 66, l. 24

7.—This case is concerned only with that part of the income of the estate which forms the Burns Memorial Trust for the benefit of five charities. Under the operative clauses of the Will, Patrick Burns directed the executors to make certain payments including a large number of legacies. The balance remaining with the income and accumulations thereof was described by Patrick Burns as "my Trust Estate" and out of it (under Clause 30 of the Will) the executors were to pay various annuities and to invest any surplus of annual income as part of the capital of "my Trust Estate." Under Clause 35 of the Will further annuities were left to named nephews and nieces amounting to 60 per cent. of the net annual income. 10

p. 68, l. 41

8.—The remaining 40 per cent. is governed by Clause 36 of the Will which provides that upon the death of the last of the annuitants or the son's widow, which ever shall last happen, the executors are to hold the trust estate with all accumulations and additions thereto upon further trust to transfer 67 per cent. among named nephews and nieces : 20

p. 69, l. 21

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. 30
- (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 40

the first moneys distributed in pursuance of this bequest to be made after the expiration of one year from the date of the

10 payment conveyance and transfer by my Trustees of the rest, residue and remainder of "my Trust Estate" units the said The Royal Trust Company, and while it is my desire that the said annual income shall be expended annually and I direct the said The Royal Trust Company so to expend the said income derived from the said Burns Memorial Trust, I hereby provide that in the event of there being at any time a surplus of the said income in any one year that such surplus may be invested in the name of the said The Royal Trust Company, as part of the capital of the said Trust, to be known as the "Burns Memorial Trust."

9.—The Appellants submit that the Burns Memorial Trust is a charitable institution administered by The Royal Trust Company and that the five beneficiaries, each of whom is entitled to one-fifth of 33 per cent. of the income from the 40 per cent. of the net annual income which was accumulated during the years 1938 to 1941 inclusive, are all charitable institutions.

20 10.—The Father Lacombe Home is an institution carried on for the purposes of (i) the care, up-bringing and education of orphaned, delinquent, poor and homeless children, and (ii) the care of aged, infirm and poor persons, and is conducted as part of the work carried on by "Les sœurs de Charite de la Providence des Territoires de Nord Ouest" incorporated by Chapter 13 of the Ordinances of the North West Territories, 1902.

p. 37, ll. 5-6 ;
affidavit of Sister
St. Edwards (not
printed)

11.—The Branch of the Salvation Army having its Headquarters in the City of Calgary in the Province of Alberta, is a local branch of the Governing Council of the Salvation Army Canada West which was incorporated by Act of the Parliament of Canada (Chapter 64 of the Statutes of Canada, 1916) the powers of which as set out in Section 5 thereof show it to be a charitable institution.

p. 37, ll. 7-9 :
affidavit of
Norman Buckley
(not printed)

30 12.—There was not in existence at Patrick Burn's death a Children's Shelter carried on under the auspices of the City of Calgary, or a fund established for the benefit of widows and orphans of members of the police force of the City of Calgary, or a fund for the benefit of widows and orphans of members of the fire brigade of the City of Calgary. Accordingly, on application of the executors to the Supreme Court of Alberta, schemes were established in order that the provisions of the Will could be carried out. The Supreme Court of Alberta held that the gifts of income under the provision of the Will set out in paragraph 8 hereof, were good and valid charitable bequests.

p. 20, ll. 28-51

p. 77, ll. 25-45 ;
pp. 80-93

p. 76, l. 27 to
p. 77, l. 12

40 13.—In each of the years 1938 to 1941 the annuities for which the Will provided were duly paid, and of the remaining net income 60 per cent. was duly paid to the nephews and nieces entitled thereto ; and the balance of 40 per cent. was transferred to a capital account. The Appellants submit

p. 21, l. 42 to
p. 22, l. 5

RECORD

that each of the charities mentioned in Clause 36 of the Will had a vested interest in its proportion of 33 per cent. of the said balance at all times material for determining the liability to taxation of such 33 per cent. of the said balance.

p. 21, ll. 25-41

14.—The executors of the Will were assessed to income tax by the Minister of National Revenue for the years 1938, 1939, 1940 and 1941 and appealed with respect of 33 per cent. of 40 per cent. of the net annual income of the estate on the ground that so much of the income was exempt from taxation under Section (4) (e) of the Income War Tax Act. On the Minister confirming the assessments the executors appealed to the Exchequer Court and under Section 36 of the Act the matter became an action in the Exchequer Court to which by order of the Exchequer Court the Added Appellants were added as parties. 10

pp. 22-23
p. 27, ll. 13-23

15.—In his reasons for Judgment the learned deputy Judge of the Exchequer Court expressed himself as satisfied that the Burns Memorial Trust and the five organisations which will eventually benefit from the trust fund, when established, are persons within the definition in Section 2 (h) of the Income War Tax Act of "person" as including "any body, "corporate and politic, and any association or other body, and the heirs, "executors, administrators and curators, other legal representatives of "such person, according to the law of that part of Canada to which the "context extends." He held, however, that none of the income in question in any of the relevant years was arising or accruing to any of the beneficiaries, because the Burns Memorial Trust will receive the moneys' not as income but as corpus, and the five organisations will only receive the income earned on such corpus at some future time, and not the income now in question, which is capitalised. The learned deputy Judge also stated his opinion that the trust to be administered was a charitable trust, but that it is not the same as a charitable institution, and the Burns Memorial Trust falls far short of being a charitable institution. He further held that in respect of 1940 and 1941 Section 11 (4) (a) of the Income War Tax Act is a complete answer to the Appellants' claim. In his view, moreover, the income was taxable under Section 11 (2), even the Father Lacombe Home and the branch of the Salvation Army being unascertained persons within the meaning of that section. 20

p. 28, ll. 1-20

p. 28, l. 28 to
p. 29, l. 42

p. 31, ll. 24-41

p. 31, l. 45 to
p. 33, l. 21

p. 50, ll. 28-31

16.—On the Appellants' appeal to the Supreme Court of Canada the Court declared "that two-fifths of the income in question herein being "that proportion from which the Lacombe Home and the Salvation Army "are ultimately entitled to the interest thereon, are free from income tax "for the years 1938 and 1939." 40

pp. 35-40
p. 37, ll. 5-14

17.—The reasons for Judgment of Rinfret C.J., Kerwin and Hudson JJ. was delivered by Kerwin J. who, after setting out the facts, held that the

Lacombe Home and the Salvation Army in Calgary are charitable organisations, and assumed that the other three funds under the approved schemes are also charitable organisations within Section 4 (e) of the Income War Tax Act. But in his opinion no part of the income in question was their income or accruing to their credit, notwithstanding the direction to appropriate in Clause 35 of the Will; and the Burns Memorial Trust is a mere name for a fund to be administered by The Royal Trust Company which is not entitled to the income, and is not a charitable organisation.

RECORD

p. 37, ll. 15-41

18.—Kerwin J. then considered whether the executors are taxable in respect of the income in question, and held that the income was accumulating in trust for the benefit of unascertained persons and taxable under Section 11 (2) so far as the gifts of income thereon to the three funds are concerned, but not so far as concerned the Lacombe Home and the Salvation Army, who are not unascertained persons. For 1940 and 1941, however, Kerwin J. was of opinion that all the income in question is taxable under Section 11 (4).

p. 37, l. 41 to
p. 39, l. 4

p. 39, ll. 5-48

19.—Rand J. held that the accumulations of income never belong to or come into the possession of the five charities, but represent solely the growth of capital which becomes the principal from which the income to the charities arises: with the result, in his opinion, that Section 4 (e) does not exempt the income from taxation, nor does Section 11 (1) tax it as accruing to the credit of the taxpayer. Rand J. further held that the income was not within Section 11 (2) as income accumulating for the benefit of unascertained persons or of persons with contingent interests. He thought, however, that Section 11 (4) was designed to meet the present case but had no effective charging provision until 1941. Accordingly Rand J. thought the income in question for 1938, 1939 and 1940 not to be taxable, but the income for 1941 to be taxable.

p. 40, ll. 18-47

p. 40, l. 48 to
p. 41, l. 17

p. 41, ll. 18-43

20.—Estey J. reached the same result as Rand J. After setting out the facts and contentions of the parties, he held that the Burns Memorial Trust is not an institution or to be treated as such, and moreover the income is never received as income either by the Burns Memorial Trust or any of the five beneficiaries so as to come within the exemption of Section 4 (e). Nor in the opinion of Estey J. was the income accruing to the credit of The Royal Trust Company, the Burns Memorial Trust, or the five beneficiaries within Section 11 (1), as it was never to be received as income. On the other hand Estey J. rejected the Respondent's contention that the income is taxable under Section 11 (2). Estey J. thought that the 1940 amendment of Section 11 (4) (a) was ineffective to tax as it imposed no rate of charge, but that the defect was remedied in 1941 so that the income for 1941 but not for the earlier years is taxable.

p. 41, l. 45 to
p. 50, l. 15
p. 46, ll. 10-36p. 46, l. 37 to
p. 47, l. 51

p. 48, ll. 1-45

p. 48, l. 46 to
p. 49, l. 30

21.—The Appellants respectfully submit that the Supreme Court has misconstrued the Income War Tax Act and that the Judges have failed

satisfactorily to deal with a number of important relevant questions, including the following questions :

(1) When at the end of any year the executors and trustees of the Will have made up their accounts ; ascertained the net income ; paid 60 per cent. thereof to the persons named in the Will as being entitled to it annually, and transferred the balance to the estate capital fund for investment ; who is the real beneficial owner of the money received as surplus net income by the Will trustees, to whom the Will trustees must account for such income ?

(2) Does the fact that the accumulated fund goes to The 10
Royal Trust Company to be held in perpetuity by it, and the fact that it is only the income from the fund that goes to the beneficiaries make any difference to the liability to tax ?

(3) Is the Burns Memorial Trust a charitable institution, or, assuming that the Burns Memorial Trust is not a charitable institution, are the five beneficiaries, or at least the Salvation Army and Lacombe Home, charitable institutions and therefore within Section 4 (e) of the Income War Tax Act ?

22.—The Appellants submit that on the proper determination of these questions none of the income in question is subject to taxation. 20

23.—The Appellants therefore submit that the Judgments of the Supreme Court of Canada and of the Exchequer Court were wrong and should be reversed, and that the Appellants should be declared entitled to the relief claimed by them in the Exchequer Court, for the following amongst other

REASONS

1. BECAUSE the income in question is exempt from taxation under the Income War Tax Act, by virtue of Section 4 (e) thereof.
2. BECAUSE the income in question does not fall within any 30 of the charging provisions of the Act.
3. BECAUSE the Judges below misconstrued the Act.
4. BECAUSE, in so far as Rand and Estey JJ. disagreed with the majority of the Supreme Court and with the Exchequer Court, their reasoning is to be preferred.

H. G. NOLAN.
S. G. DIXON.
FRANK GAHAN.

In the Privy Council.

No. 52 of 1947.

ON APPEAL FROM THE SUPREME COURT OF
CANADA.

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PATRICK BURNS, deceased APPELLANTS

AND

THE ROYAL TRUST COMPANY named in the Will
of the said Honourable Patrick Burns as Trustee
for Burns Memorial Trust; THE FATHER
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Patrick Burns ADDED APPELLANTS

AND

THE MINISTER OF NATIONAL REVENUE
RESPONDENT.

CASE FOR THE APPELLANTS

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