
BETWEEN:

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

1945
Oct. 5
1946
Jan. 9

AND

THE ROYAL TRUST COMPANY ET AL.

ADDED APPELLANTS;

AND

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

Revenue—Income Tax—Income—Charitable trust—Income War Tax Act R.S.C. c. 97, sects. 2(h), 3(1), 4(e), 11(2), 11(4) (a)—Income in hands of trustees—Income accumulating in trust for the benefit of unascertained persons—Appeal dismissed.

The will of the late Honourable Patrick Burns provided for distribution of sixty per cent of the net annual income from his Trust Estate. The balance of forty per cent of the net annual income is to be accu-

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mulated until the death of the last annuitant named in his will or the death of the widow of the son of the testator, whichever should last occur. Sixty-seven per cent of this corpus is to be distributed to certain persons named in the will. The balance of thirty-three per cent of the corpus is to be used for the creation and establishment of a trust to be known as the "Burns Memorial Trust". The net annual income from this fund is to be distributed amongst five named institutions.

The appeal is from the assessment for income tax in each of the years 1938, 1939, 1940 and 1941 during which years the executors transferred by book entry forty per cent of the net income of the estate from estate income accrued to estate capital account.

Held: That the Burns Memorial Trust and the five organizations which will eventually benefit by the income from the Burns Memorial Trust Fund, when established, are persons within the meaning of s. 2(1) (*h*) of the Income War Tax Act.

2. That an estate is a person within the definition contained in s. 2(1) (*h*) of the Income War Tax Act, and the money received by the executors is income within the meaning of the Income War Tax Act.

3. That the income assessed in the hands of the executors is not income of any religious, charitable, agricultural or educational institution as set out in s. 4(*e*) of the Income War Tax Act.

4. That the Burns Memorial Trust is not a charitable institution; it is merely a name descriptive of the character of a certain fund and the fact that the trust is to be administered in perpetuity does not make it an institution.

5. That no part of the income for the taxation years in question is income of the five beneficiaries of the Burns Memorial Trust since it is received by and remains in the hands of the executors of the will of deceased, during the taxation years.

APPEALS under the provisions of the Income War Tax Act.

The appeals were heard before His Honour Judge J.C.A. Cameron, Deputy Judge of the Court, at Calgary.

G. H. Steer, K.C. for Royal Trust Company.

E. J. Chambers, K.C. for Executors of the Honourable Patrick Burns, deceased.

H. W. Riles, Jr., J. G. McEntyre and *N. D. McDermid* for respondent.

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

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CAMERON, D.J., now (January 9, 1946) delivered the following judgment:

This case has to do with four appeals from assessment made in respect of the appellant's income for the years 1938, 1939 and 1940, dated March 17, 1942, and in respect of the income for 1941, dated November 19, 1943.

Notices of Appeal were duly given and the decision of the Minister in respect of all said assessments was delivered on June 5, 1944, and is in part as follows:

> The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notices of Appeal, and matters thereto relating, hereby affirms the said Assessments on the ground that all the income accumulating in the hands of the executors is taxable in their hands under the provisions of Subsection 2 and paragraph (*a*) of Subsection 4 of Section 11 of the Act; that no part of the said income is the income of any religious, charitable, agricultural or educational institution within the meaning of paragraph (*e*) of Section 4 of the Act. Therefore on these and related grounds and by reason of other provisions of the Income War Tax Act the said Assessments are affirmed.

The appellant served Notice of Dissatisfaction on June 30, 1944, and by the reply of the Minister, dated July 28, 1944, the said assessments were affirmed and these appeals now follow.

The appellants are the present executors of the will of the Honourable Patrick Burns, late of the City of Calgary, who died on the 24th day of February, 1937. On May 4, 1937, probate of his will, dated January 15, 1932, and of a codicil dated March 4, 1933, was granted. The will is a lengthy one and Exhibit 2 is a certified copy thereof. A chief beneficiary named in the will was his son who, however, predeceased the testator, leaving a widow but no issue. By reason of these facts it is not necessary to consider many of the clauses in the will, but careful attention must be given to a number of its provisions.

At the trial, by consent, I added The Royal Trust Company as party appellant; and pursuant to application made at the trial and upon filing consents later I added as additional appellants the five organizations and funds hereinbefore named, in order that all parties interested in the appeal should be before the Court. Such consents have now been filed.

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Substantial testamentary provision was made for the widow of the testator's son, but, prior to the testator's death, an order was made by Mr. Justice Ewing, of the Supreme Court of Alberta, on December 21, 1936, on the application of the then guardians of the testator, which provided for a monthly payment of $350 to the son's widow during her lifetime upon her releasing all her interest in her husband's life insurance policies and waiving any benefits to which she might be entitled under the will of the testator. Such a release was executed on January 18, 1937. In order to take care of this liability the executors have appropriated the sum of $145,000, which has been administered separately from the general estate. Following the death of the testator a further and final settlement was made with the son's widow which provided for an additional monthly payment to her of the sum of $150 during her lifetime in consideration of certain releases, and this was approved by the Court on June 21, 1938. This last mentioned amount is provided for by the executors out of the general revenue of the estate in the same manner as the other annuities later to be referred to.

All the specific legacies in the will were paid or transferred by the executors on or before February 24, 1939, and it is understood that all succession duties and debts were duly paid.

By paragraph 20 of his will, the testator bequeathed to the Children's Shelter at Calgary certain preference shares of a par value of $5,000, and provided that if there were no such institution, the bequest should be used as a nucleus of a fund for establishing such an institution, or alternatively, for the establishing of a fund to be administered by the City for the benefit of the poor, indigent and neglected children.

By Section 21 a similar bequest was made for a fund for the benefit of widows and orphans of members of the Police Force of the City of Calgary, and by paragraph 22 a similar bequest was made for the benefit of widows and orphans of members of the Fire Brigade of the City of Calgary.

It appears that at the time of the testator's death no such institutions as those refererred to were in existence but by order of Mr. Justice Ewing, of the Supreme Court of Alberta, dated December 11, 1939, and filed as Exhibit 8 herein, schemes for the establishment and administration of each of the said funds were established and approved and trustees thereof appointed. It is understood that the bequests above referred to have been paid to such trustees.

By paragraph 30 of his will the testator directed "that my trustees shall stand possessed of "my trust estate" and the income therefrom and all parts thereof, Upon Further Trust" and then followed gifts of certain annuities. Some of the annuitants predeceased the testator and one has since died and the funds necessary to meet the remaining annuities are provided out of the general income from the trust estate. These annuities directed by the will and the second annuity payable to the son's widow, total a relatively small portion of the total income from the trust estate.

Paragraph 35 of the will contains a further direction that in the event of the testator's son having predeceased the testator, or should he survive the testator, but die without leaving lawful issue, but leaving a wife surviving, (as was actually the case) and subject to the provisions thereinbefore mentioned as to the payment of annuities, the trustees should stand possessed of the trust estate, including the accumulations thereof and additions thereto upon further trusts:

(*a*) To allow the use of a residence and the upkeep thereof to his son's widow, and

(*b*) to pay her an annuity of $15,000.

Both of these provisions are now of no effect due to the settlements made with the said widow as heretofore mentioned. Following these provisions for his son's widow the testator in said paragraph 35 further provided:

And I Further Direct 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 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

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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 subject to prior payment of the said annual income of fifteen thousand dollars ($15,000) per annum to the widow of my said son during all the days of her life which she shall survive my said son and during the period aforesaid, Upon Further Trust To Pay:—

and then followed provision for payments to certain nephews and nieces aggregating 60 per cent of the net annual income derived from his trust estate. Distribution of these percentages has been made in each of the years referred to. The final sentence in paragraph 35 is important and is as follows:

And, until the death of the last annuitant to whom I have bequeathed an annuity by the terms of this my will, or the death of the widow of my said son, whichever shall last happen, *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.*

From the above it will be seen that 40 per cent of the net surplus income of the trust estate is to be accumulated until the death of the last annuitant or of the son's widow whichever shall last occur.

Paragraph 36 of the will is as follows:

And I Further Direct that 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 shall last happen and if my said son, Patrick Thomas Michael Burns, shall have predeceased me, or having survived me, shall have died without leaving lawful issue, that my trustees shall stand possessed of "my trust estate" with all accumulations thereof and additions thereto and the whole thereof to hold Upon Further Trust to distribute the same as follows:—

Subsection (*a*)—This section provides for distribution to the persons therein named of 67 per cent of the corpus of the estate then remaining and need not be dealt with in further detail. Then follow in paragraph 36 the clauses which are particularly relevant to this matter:

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 anuually 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 per cent 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 per cent 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 per cent non-voting, non-cumulative, redeemable preference shares in the capital stock of Burns Foundation (Limited) by this my will.

This last clause of paragraph 36 therefore provides for the final distribution of 33 per cent of the corpus of the trust estate remaining in the hands of the executors at the date of death of the last of the annuitants or of the sons's widow, whichever shall last occur. Certain of the annuitants and the son's widow are still alive.

For the appellants it is contended that 33 per cent of 40 per cent of the income accumulating in said estate in each of the said years accumulates for the benefit of the Burns Memorial Trust and that the Burns Memorial Trust is a charitable institution; that the institutions beneficially entitled to the Burns Memorial Trust were named in the will and definitely ascertained as beneficiaries at the date of the testator's death; that the shares of income and capital so bequeathed to the said beneficiaries vested immediately upon the death of the said testator, that they are charitable institutions and therefore the said 33 per cent of 40 per cent of the income being accumulated as aforesaid was exempt from taxation by virtue of Section 4 (*e*) of the Income War Tax Act, which is as follows:

Section 4. The following income 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.

It is also to be noted that by the order of Mr. Justice Ewing, dated 11th of December, 1939 (Exhibit 8) it was ordered that according to the true construction of the last

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will and testament of the deceased the legacies contained in paragraphs 20, 21 and 22 of the said will constituted good and valid charitable bequests; and further, that under that portion of paragraph 36 of the said will by which the remaining 33 per cent of the residue of the trust estate was payable to the Royal Trust Company for the creation and establishment of a trust to be known as the Burns Memorial Trust and for the distribution of the income to The Father Lacombe Home, the Salvation Army, the Children's Shelter, the funds established for the benefit of widows and orphans of members of the Police Force and the Fire Brigade of the City of Calgary, were good and valid charitable bequests.

The organizations known as The Father Lacombe Home at Midnapore and the branch of the Salvation Army at Calgary, were in existence at the time of the testator's death. It was admitted by all parties that the executors' accounts for each of the said years were duly filed in the proper Court and approved of; copies of these accounts and orders are filed as Exhibit 9.

In the statement of agreed facts filed at the hearing paragraph 10 is as follows:

> In each of the years 1938 to 1941 inclusive of the total net income of the estate 60 per cent thereof was paid out by cheque to the nephews and nieces named in sub-paragraphs (*a*) to (*e*), inclusive of paragraph 35 of the will, as found on pages 31 and 32 thereof, and the remaining 40 per cent was transferred by book entry by the executors from the estate income account into the estate capital account as shown on the accounts filed as exhibits. The books of account of the executors show that they have made no segregation or allocation of the said 40 per cent of the net income as between the individuals entitled to 67 per cent thereof under paragraph 36, sub-paragraph (*a*) of the will, and the party or parties entitled to the remaining 33 per cent thereof under the last paragraph of the said paragraph 36.

In order to succeed the appellants must come within the provisions of Section 4 (*e*) (supra). They must show not only that the amounts in question in each year are income but also income of charitable institutions as described in the subsection.

"Income" is defined in Section 3.1. as "annual net profit or gain or gratuity.....directly or indirectly received by a person....." "Person" is defined in Section 2.1. (*h*) as—

"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.

I am satisfied that the Burns Memorial Trust and the five organizations which will eventually benefit by the income from the Burns Memorial Trust Fund, when established, are "persons" within the meaning of the above definition.

In this Court it was held in the case of *Capital Trust Corporation et al* v. *Minister of National Revenue* (1) that the Income War Tax Act assesses income for the year in which it is received, irrespective of the period during which it is earned or accrues due. This judgment was affirmed in the Supreme Court of Canada (2). But as pointed out by Davis J. at p. 196, section 11 had no application to the facts of that case inasmuch as it related only to income of a beneficiary or trust. This section relates to income from estates or trusts and provides that income *for any taxation period* includes income accruing to the credit of a taxpayer whether received by him or not during such period. The words "accruing to the credit of" would seem to imply that the amount is actually made available for disposal by the taxpayer. Section 2.1. (*k*) defines taxpayer as including any person whether or not liable to pay the tax.

Does the "income" here sought to be declared exempt from taxation partake of the nature or characteristics of income as defined in the Act? The Act provides for a scheme of taxation based on the *annual* net profit or gain. Section 9 is the charging section and provides for the levy upon the income during the preceding year (i.e. calendar year). Section 11(1) refers to the taxation period—the calendar year.

An estate is a "person" within the definition contained in section 2(*h*). It is therefore taxable upon its income but may charge as proper deductions amounts paid to or which accrue to or are credited to any beneficiary and such amounts are then taxable in the hands of the beneficiaries; but in the event of such beneficiary being such an institution as is described in section 4(*e*) no tax would be payable by such recipient.

(1) (1936) Ex. C.R. 163. (2) (1936) S.C.R. 192.

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In the instant case it is manifest that none of the income in question in any of the relevant years was paid to or received by the beneficiaries but was accumulated. Was it then received indirectly or did it accrue to the beneficiaries? Reference is made to the case of *St. Lucia Usines and Estates Company* v. *St. Lucia Colonial Treasurer* (1) where Lord Wrenbury said at p. 512 "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' ".

In the present case so far as the beneficiaries are concerned there was "no coming in" in any of the relevant years and there was no "arising or accruing *by way of income*". The Burns Memorial Trust will never receive it as income but as corpus; and the five named beneficiaries will never receive the income for any of the relevant years in any form. They will merely receive shares in the income earned on such corpus at some time in the future. The income in question for the years mentioned will never, as income, be available for any charitable institutions. It has been capitalized in accordance with the terms of the will.

I am, therefore, of the opinion that the income here assessed in the hands of the executors is not *"income"* of such an institution as is referred to in Section 4 (*e*) of the Act. (Reference may be made to the case of *Inland Revenue Commissioners* v. *Blackwell,* later referred to).

In my view of my finding as above it might not be necessary to deal with other matters raised by the appellants and respondent but they are of importance and should, I think, be considered.

Are the ultimate beneficiaries of this portion of the income charitable institutions such as are referred to in Section 4 (*e*)? The Royal Trust Company to which the accumulated corpus will eventually be turned over is obviously not a charitable institution. It is merely the trustee of a fund and will invest it and turn over the income therefrom in equal proportions to the five named

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

organizations. The trust which it administers is admittedly a charitable trust but that is not the same as a charitable institution. Reference may be made to the case of *Minister of National Revenue* v. *Trusts and Guarantee Company* (1) where Lord Romer stated at p. 149 "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 the same case consideration was given to the words "charitable institution". At p. 149 it is stated:

> It is by no means easy to give a definition of the words "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 subsection in question that the word is intended to connote something more than a mere trust.

Counsel for the appellants urged on me strongly that applying this text to the instant case something more than a mere trust here existed—that it was also a "Memorial Trust" to do honour to a well known Westerner and having charitable objectives and that therefore it was a charitable institution.

Lord Romer in continuing his judgment said further:

> 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, 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 subsection 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 subsection.

In my view the fact that the charitable trust is also designated as a memorial trust does not make the Burns Memorial Trust a charitable institution. The word "Memorial" is merely descriptive of the fund. The Burns Memorial Trust is nothing more than a name attached to a fund; it is not a charitable institution. The fund in due course will be the source of income for five organizations but neither the fund nor its trustees has any charitable functions. It is in no sense an organization

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

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devoted to charitable purposes. It is merely a name descriptive of the character of a certain fund, naming its founder, honouring his memory, and indicating that it is a trust. It falls far short of being a charitable institution. It holds no assets and distributes no funds, all these functions being performed by The Royal Trust Company. Everything that is to be done in connection with the administration of the 33 per cent of the residue is to be done by The Royal Trust Company and nothing is to be done by the Burns Memorial Trust. It is clearly a name and nothing more. The fact that the trust is to be administered in perpetuity, does not, I think, make it an institution, such as is contemplated in the section, any more than it would be if established for a specific number of years.

See also the case of *Cosman's Trustees* v. *Minister of National Revenue* (later referred to) in which it was held that the Nova Scotia Trustees of a fund established by a will did not constitute a charitable institution within the meaning of section 4 (*e*) so as to render the income exempt from taxation.

The appellants alternatively argue that the five organizations which will eventually receive the income from the Burns Memorial Trust are charitable institutions. It is true that they are the organizations which will be paid the income of the trust. But holding as I have done that no part of the income for any of the relevant years will at any time reach the beneficiaries as income, it is quite unnecessary for me to determine this point and I make no finding in regard thereto.

A further argument of the appellants was that this income vested in the persons entitled to it a *morte testatoris* and I was referred to the well known case in the Privy Council of *Brown* v. *Moody* (1). I doubt very much whether the principles there laid down are applicable in the instant case inasmuch as the intervening annuities constitute a charge on all the estate, principal as well as income, and it is conceivable that the executors might have to use all the interest and even resort to the principal at some later date to meet them. The beneficiaries, therefore, had no absolute right in the

(1) (1936) 2 A.E.R. 1695.

trust estate until the death of all of the annuitants and the son's widow. See *Bowen* v. *Inland Revenue Commissioners* (1). And, while it could be said that they have an interest in the income of the years in question inasmuch as it may eventually form part of the corpus of the trust, no part of that income will ever be received by them in any form.

The question of vesting or non-vesting of the income in the five named organizations is in my view of no importance in this case because of my finding that the income in the years 1938 to 1941 was not income of a charitable institution in any of those years. Upon that question it is therefore quite unnecessary to pass any opinion.

Reference may be made to the case of *Inland Revenue Commissioners* v. *Blackwell* (2) where Rowlatt J. said at p. 362:

> The first point which Mr. Latter makes is that it does not matter whether the interest which the eldest son takes under the will is vested or contingent, because, even assuming that this specific bequest is vested in the eldest son, just as the shares in the residue are vested in all the children under the other part of the will, still, inasmuch as there is a trust to accumulate a fund during the infancy of the eldest son, subject to a power to the trustees to apply such sum as they think proper for his maintenance, the part of the income which is accumulated is not the income of the minor. It is a very important point, but I have come to the conclusion that he is right. It is perfectly true to say, as Mr. Harman did, that in a case of that kind the income must come to the infant in the end if the interest which he takes is a vested interest: but in my judgment it will not come to him as income; it will come to him in the future in the form of capital. The trustees are directed to accumulate the surplus income, and they are bound to comply with that direction and to accumulate it. It is income which is held in trust for him in the sense that he will ultimately receive it, but it is not in trust for him in the sense that the trustees have to pay the income to him year by year while he is an infant. All the minor can get while he is an infant is such amount as the trustees allow for his maintenance. I think that view of the case is supported by what was said in *Inland Revenue Commissioners* v. *Wemyss* (1924) S.C. 284; 61 S.L.R. 262. In my judgment it is fallacious to look into the future and say: This fund that is being accumulated is for his benefit and he will get it all. What you have to do is to ask, whether the surplus income that is accumulated is the annual profits and gains of the year of this infant now? I do not think it is.

For the same reason I shall not deal with another argument of the appellants, namely, that while the executors did not in fact appropriate any portion of the trust estate

(1) (1937) 1 A.E.R. 607 at 612. (2) (1924) 2 K.B. 351.

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for the purpose of meeting the annuities as may seem to have been required by the will, that actually they did so in substance. This submission was based on the judgment of the Appellate Division of the Supreme Court of British Columbia in *Hamilton* v. *Hart* (1). That judgment indicated that where there was a duty to appropriate, the estate should be administered as though it had been appropriated although in fact the executor had not done so. It is to be observed, however, that paragraph 30 of the will is the one which provides, *inter alia*, for payment of the annuities and the direction there to the trustees is "And I further direct that my trustees shall stand possessed of my trust estate and the income therefrom and all parts thereof Upon Further Trust". That is in fact what the trustees have done. They have appropriated the entire estate for the purpose of meeting the annuities. I must assume that they were quite entitled to do so in view of the above instructions, notwithstanding the later direction to appropriate as stated on page 31 of the will (Exhibit 2).

The annuities created by the will are charged on all the income and corpus of the trust estate; and the annuity of the son's widow established by the Court is a charge against the net income of the estate. In the case of *Blake-Berry* v. *Geen* (2) Farwell J. said: "Prima facie when residue is given subject to annuities, the annuities are charged on the whole of the residue." This judgment was affirmed in the House of Lords (3).

The respondent also relies on section 11 (4) (*a*) 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.

The last paragraph in clause 35 of the will is as follows:

> And until the death of the last annuitant to whom I have bequeathed an annuity by the terms of this my will or the death of the widow of my said son, whichever shall last happen, 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 terms of section 11 (4) (*a*) are clear and unambiguous, and, so far as I am aware, permit of no exception. The general scheme of the Act is to tax all incomes

(1) (1919) 2 W.W.R. 164.
(2) (1937) 1 A.E.R. 742.
(3) (1938) 2 A.E.R. 362.

(save as excepted in the Act) in the hands of the recipients. This subsection provides for the taxation in the hands of the trustees of capitalized income. This section itself in my view is a complete answer to the appellants' claim in respect of the years 1940 and 1941, the section having been added to the Act in 1940.

Counsel for the respondent admitted that for the years 1938 and 1939 he could not succeed on this point as the section then read.

The respondent further relies on Section 11 (2) of the Act which in part is as follows:

> 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 * * *

As pointed out by the late President of this Court in *McLeod* v. *Minister of National Revenue* (1) (affirmed in the Supreme Court of Canada) (2), the general scheme of the Act is to tax all incomes save such as are specially exempted. Section 11 (1) makes it clear that the beneficiary of a trust is liable to tax on income accruing to his credit whether received or not during the taxation period. Subsection 2 was meant apparently to make clear where income should be taxed when it was accumulating for unascertained persons or for persons with contingent interests or in other words where it was not accruing annually to the credit of known beneficiaries. And he used these words, p. 110:

> I think the words "contingent interests" were intended to cover the case where no person had a present and ascertained interest, in the income for any taxation period * * *
>
> Further the words of a statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonize with the subject of the enactment, and the object which the legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion in which they are used, and the object to be attained. If there are circumstances in the Act showing that the phraseology is used in a larger sense than its ordinary meaning, that sense may even be given to it. Maxwell on Statutes at page 95. In dealing with matters relating to the general public, statutes are presumed to use words in their popular sense. If the object of an enactment had reference to the subject of wills, or the distribution of property, the word "contingent" might possibly be con-

(1) (1925) Ex. C.R. 105 at 110. (2) (1926) S.C.R. 457.

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Cameron D.J.

strued to have a different meaning than the same word would have in a general statute, such as is under consideration, where it should, I think, be construed in a popular and not technical sense.

I have no doubt that the income accumulated by the trustees in the year in question, and which, unless it is used in later years for the purpose of meeting annuities, will form part of the fund, the income on which will be distributed by the trustees of the Burns Memorial Trust for the benefit of poor, indigent and neglected children, and for the benefit of widows and orphans of members of the Fire Brigade and of the Police Force of the City of Calgary, is income accumulating in trust for the benefit of unascertained persons. Reference may be made to the case of *Cosman's Trustees* v. *Minister of National Revenue* (1) affirmed in the Supreme Court of Canada (2); and the case of *Minister of National Revenue* v. *Trust and Guarantee Co.* (3). Further I do not think that liability for the tax under Section 11 (2) of the Act can be avoided by intervening a body of trustees between the executors of a testator's will and the ultimate beneficiaries of a charitable trust created under that will.

There remains for consideration therefore only the question as to whether for the years 1938 and 1939 the income which was said to have accumulated for the benefit of the Father Lacombe Home and the branch of the Salvation Army at Calgary is liable to tax. It must be kept in mind that the prior annuities are charged on the whole of the net estate—both principal and interest—and that there is always the possibility that the executors in order to meet the annuities might have to resort to part or all of the accumulated income. In the *McLeod* case (*supra*) Newcombe J. said in the Supreme Court of Canada, p. 470:

> It is uncertain at present who is to have or enjoy the income, and it is for that very state of uncertainty that I think the clause, in its application to this case, is intended and apt to provide * * * In a sense of course all beneficiaries of a trust are ascertained when the trust is created, because it is essential that they shall be capable of ascertainment from the provisions of the trust; but, where the income is to accumulate and become payable in the future, and the ascertainment of the beneficiaries is subject to events which may happen in the interval, the beneficiaries are, nevertheless, for the purpose of the statute, unascertained.

(1) (1941) Ex. C.R. 33. (1941) 2 D.L.R. 218.
(2) (1941) 3 D.L.R. 224.
(3) (1940) A.C. 138.

It would therefore seem that even these two organizations are "unascertained persons" within the meaning of section 11 (2).

I have reached the conclusion therefore that the income of the appellant in the years 1938-1939, now in question, was subject to tax under the provisions of section 11 (2).

It follows from what I have stated above that all of the income received by the appellant in each of the years 1938, 1939, 1940 and 1941, and which is the subject of these appeals, is subject to tax.

The appeal is therefore dismissed. The costs of all parties appearing on the appeal will be payable by the estate of the Honourable Patrick Burns, deceased, forthwith after taxation; the costs of the executors to be taxed on a solicitor and client basis.

Judgment accordingly.