

ON APPEAL FROM THE SUPREME COURT OF  
CANADA.

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IN THE MATTER OF THE INCOME WAR TAX ACT

AND

IN THE MATTER OF THE APPEAL OF THE PETER  
BIRTWISTLE TRUST OF THE CITY OF TORONTO IN THE  
PROVINCE OF ONTARIO.

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BETWEEN

THE MINISTER OF NATIONAL REVENUE - - *Appellant*

AND

THE TRUSTS AND GUARANTEE COMPANY LIMITED  
AS TRUSTEES OF THE PETER BIRTWISTLE  
TRUST - - - - - *Respondents.*

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CASE FOR THE APPELLANT.

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RECORD.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada dated the 19th day of December 1938 which, by a majority of four judges to one, reversed a judgment of the Exchequer Court of Canada dated the 4th day of January 1938 which had held that the Appellant is entitled to income tax on income from invested trust funds being accumulated by the Respondents for the benefit of the trust funds, which in 1948 will become payable to the Council of the town of Colne in Lancashire to be used or kept invested for the benefit of the aged and deserving poor of the town. The judgment of the Exchequer Court is reported in (1938) 10 Exchequer Court Reports, page 95. The judgment of the Supreme Court is reported in [1939] 1 Dominion Law Reports, page 365. pp. 52-54, p. 44. p. 17.

2. The section of the Income War Tax Act (being chapter 97 of the Revised Statutes of Canada, 1927 as amended by section 7 of chapter 55

RECORD. of the Statutes of Canada, 1934) on which the Respondents' liability to income tax depends is section 11 sub-section 2 which enacts that :

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.

During the material time there have been certain changes in the sub-section, which also contains provisions regarding allowances and other matters, but none of the changes or other provisions affect the issues in dispute. 10

pp. 57-63. 3. On the 27th May, 1918 Peter Birtwistle, who resided in the City of London in the Province of Ontario until his death on the 19th April, 1927,

by deed agreed with the Respondents, *inter alia*, that, as Trustees of the Peter Birtwistle Trust, the Respondents should convert into money specified property and, with the money previously paid to the Respondents and accretions thereto, form an investment account from which in each year the Respondents should pay to Peter Birtwistle from the income of that year only such sum or sums as the Respondents in their discretion might deem fitting and proper for Peter Birtwistle to expend in his living expenses, with a small additional sum for charity; and surplus of income in any year to be added to the account, and the whole account with accumulations thereon to be paid to the Municipal Council of the Town of Colne in Lancashire at the end of the period of 21 years after Peter Birtwistle's death to be used by the Council for the benefit of the aged and deserving poor of the town of Colne in such manner and without restriction of any kind as shall be deemed prudent to the Council save and except for Peter Birtwistle's wish thereby declared that the Council should insofar as possible or convenient leave any of the fund not required for immediate distribution to be held by the Respondents under an arrangement similar to that of the deed. 20

p. 58, ll. 4-5.  
p. 58, l. 1;  
pp. 62-63.  
p. 59, ll. 28-33;  
pp. 55-56.  
p. 60,  
ll. 18-34.  
p. 60, ll. 35-38.  
p. 60, ll. 12-17.  
p. 59, l. 42-  
p. 60, l. 2.  
p. 60,  
ll. 2-11.

4. In each year from 1919 to 1934 the Respondents supplied to the Appellant on the regular form the information required from trustees. An entry on the form in the space provided for the name and address of the beneficiary stated each year that "Income accrues to the Municipal Council of Colne, England, for the benefit of aged and deserving poor." The Appellant and the officials administering the Income War Tax Act under him did not realise that the income was being accumulated in Canada by the Respondents and no assessment to income tax was made on the Respondents in any of these years in respect of the income of the trust. 30

p. 13, l. 15;  
p. 15, l. 20.  
p. 13,  
ll. 19-40;  
p. 15, l. 21.

5. Peter Birtwistle died on the 19th April, 1927. Through certain proceedings concerning the fund in the Supreme Court of the Province of Ontario, in the year 1935 (*vide* Ontario Reports for that year, page 433) the Appellant first became aware that the income of the fund was accumulating in the hands of the Respondents; and in February, 1936, the Commissioner of Income Tax made and forwarded to the Respondents Notices of Assessments for income tax during all the years 1919 to 1934. The Notices 40

of Assessment were directed to "The Peter Birtwistle Trust, c/o Trusts and Guarantee Company Ltd." Undoubtedly the Notices of Assessment should have been directed to the Respondents, but no point was made of this form of Assessment; and in fact in all subsequent proceedings by both the Appellant and the Respondents, the Respondents were designated as "The Peter Birtwistle Trust of the City of Toronto in the Province of Ontario." The assessments were made under the authority of Section 55 of the Income War Tax Act (being Revised Statutes of Canada 1927, Chapter 97, and Amending Acts) which is in the following terms :

RECORD.

- 10 " 55. Notwithstanding any prior assessment, or if no assessment  
 " has been made, the taxpayer shall continue to be liable for any  
 " tax and to be assessed therefor and the Minister may at any time  
 " assess, re-assess or make additional assessments upon any person  
 " for tax, interest and penalties."

The total amount claimed including interest was \$36,053.25.

p. 13,  
 ll. 20-40.

6. The Respondents appealed from the assessments to the Appellant, who by his decision dated the 21st April, 1936 affirmed the assessments. The Respondents thereupon gave Notice of Dissatisfaction desiring their appeal to be set down for trial, and attached to the Notice a statement giving the grounds on which they claimed relief. The Appellant delivered a Reply, and pleadings were subsequently filed in the Exchequer Court. The matter came on for hearing on the 11th and 12th February, 1937 and by judgment dated the 4th January, 1938 the Court dismissed the Respondents' appeal, without costs.

pp. 3-5.  
 pp. 5-6.  
 p. 7.

p. 8.  
 pp. 10-12; p. 12,  
 l. 24-p. 17, l. 8.  
 p. 17.

7. In considered reasons for his judgment the Honourable Mr. Justice Maclean dismissed the appeal on the grounds that the income is not accumulating for the benefit of the Town of Colne but of a class of which the members are presently unascertainable and will always be fluctuating; that section 11 sub-section 2 makes no exception in favour of charitable trusts; that there is but one trust with two trustees, the fund of which is being administered by the Canadian Trustee in Canada; that neither trustee is a charitable institution; that interest had been properly charged under sections 48, 49 and 54 of the Income War Tax Act; that section 55 continued the liability for interest, and that section 66 does not vest in the Exchequer Court a discretion to forgo the statutory interest.

pp. 18-23.  
 p. 21,  
 ll. 1-16.  
 p. 21,  
 ll. 17-31.  
 p. 21,  
 ll. 32-36.  
 p. 21, l. 37-  
 p. 22, l. 5.  
 p. 22, ll. 6-16.  
 p. 22, ll. 16-22.  
 p. 22, l. 23-  
 p. 23, l. 19.

8. The Respondents appealed to the Supreme Court of Canada which heard the appeal on the 14th and 15th June 1938, and by a judgment dated the 19th December 1938, allowed the appeal and held the Respondents not liable to taxation.

p. 23,  
 ll. 24-40.  
 p. 44, l. 11-  
 p. 45, l. 10.

9. The Right Honourable the Chief Justice of Canada (Sir Lyman Poore Duff) and the Honourable Mr. Justice Crocket concurred in the reasons for judgment of the Honourable Mr. Justice Davis who stated the facts and referred to the history of section 11 (2) and the statutory definitions

p. 45, l. 13.  
 p. 45, l. 13-  
 p. 49, l. 4.  
 p. 45, l. 13-p. 46,  
 l. 39, p. 46,  
 l. 40-p. 47, l. 26;  
 p. 47, ll. 27-35.

## RECORD.

- p. 47,  
ll. 36-39. of "person" and "taxpayer" and to the Colne Corporation Act, 1933 (being the private Imperial Statute 23 and 24 George V. Chapter XXXV) which
- p. 9. by section 140 empowers the corporation to accept, hold and administer any gift of property for any public purpose connected with the borough.
- p. 47, l. 40-  
p. 48, l. 4. He did not find it necessary to consider section 4 exempting from taxation the income of charitable institutions. The learned judge held that the charging section 11 (2) contemplates income that will vest in and ultimately pass to persons for the time being unascertainable, such as unborn issue, or to persons whose rights are for the time being merely contingent interests; whereas the Peter Birtwistle trust fund is not intended to pass to any particular person or persons but is intended for a purpose namely that the fund should be used for the benefit of the aged and deserving poor of the Town of Colne, without any particular person ever acquiring a right to receive the beneficial interest in any part of the fund. In his view it was inconceivable that when in 1948 the Town of Colne, with a population of 25,000, receives approximately a million dollars it will distribute it or any substantial part of it among particular persons; the purpose will not probably be satisfied by the building and maintenance of an institution. The learned judge then distinguished *Holden v. The Minister of National Revenue* (1933) Appeal Cases 526 by saying that the accumulating income would under the will considered in that case inevitably become payable as of right at a future date to particular persons, whereas in the present case it is being accumulated for the purpose of making provision for the benefit of the aged and deserving poor of Colne. As no other provision imposed a charge the income of the fund in the Respondents' hands in his opinion is not taxable and the assessments should be set aside with costs throughout.
- p. 48,  
ll. 21-30. 10
- p. 48,  
ll. 31-45. 20
- p. 48, l. 45-  
p. 49, l. 4. 30
- p. 49,  
ll. 5-14. 30
10. The Honourable Mr. Justice Hudson stated that after much hesitation he had come to the conclusion that the income accumulated in the trust is not for the benefit of unascertained persons within the meaning of section 11 (2), as the persons there intended are persons who might become entitled to specific portions of the fund and not a general class who would ultimately get the benefits of the fund as charitable assistance.
- p. 49, l. 16  
p. 51, l. 41. 40
- p. 50,  
ll. 1-3. 40
- p. 50,  
ll. 13-18. 40
- p. 50,  
ll. 19-26. 40
- p. 50, l. 27-  
p. 51, l. 41. 40
11. In his reasons for judgment the Honourable Mr. Justice Kerwin dissented on the ground that the language of the deed showed that there is but one trust with two successive trustees and that the beneficiaries are the aged and deserving poor of Colne. *Holden v. The Minister of National Revenue* (1933) Appeal Cases 526 had held section 11 (2) to be a true charging section and in his view the beneficiaries are unascertained persons. The examination of the deed also showed that the income was not the income of a charitable institution exempt from taxation by section 4. The learned judge also held that the Act made the Respondents liable to pay interest and section 66 gave the Court no power to disregard the plain provisions of the Act; and he would therefore have dismissed the appeal without costs.

12. The Appellant respectfully submits that the reasons of the majority of the Supreme Court do violence to the plain language of section 11 (2), and are inconsistent with the interpretation of the section adopted by the courts in *McLeod v. The Minister of Customs and Excise* (1926) Supreme Court Reports 457, and *The Minister of National Revenue v. Holden* (1932) Supreme Court Reports 655; (1933) Appeal Cases 526; that the words "for the benefit of unascertained persons" cannot by any recognised canon of construction be held to imply a restriction to persons who, when ascertained, will be entitled to particular shares of the accumulated income; and that the distinction drawn between the accumulation of income for the benefit of unascertained persons and for the purpose of benefiting unascertained members of a class is not merely unsound but ignores language in the deed which shows that Peter Birtwistle contemplated distribution of the fund among the beneficiaries.

RECORD:

p. 60,  
ll. 3-7.

13. The Appellant accordingly submits that the appeal should be allowed and the judgment of the Honourable Mr. Justice Maclean should be restored for the following amongst other

### R E A S O N S

1. Because the income of the Peter Birtwistle trust in respect of which it is sought to tax the Respondents was accumulating in Canada in trust for the benefit of unascertained persons.
2. Because income so accumulating is taxable under Section 11 (2) of the Income War Tax Act in the hands of the trustees, namely the Respondents.
3. Because the accumulating income is not within any provision or principle of law which exempts it from taxation.
4. Because the Income War Tax Act provided for the charging of interest on arrears of income tax, and the Exchequer Court has not, under section 66 or otherwise, any power to disallow such interest.
5. For the other reasons given by Mr. Justice Maclean and Mr. Justice Kerwin.

FRANK GAHAN.

In the Privy Council.

No. 41 of 1939.

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OF CANADA.

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COMPANY LTD. AS TRUSTEES  
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CASE FOR THE APPELLANT.

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