

ON APPEAL FROM THE SUPREME COURT OF
CANADA.

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

BETWEEN

THE MINISTER OF NATIONAL REVENUE - - - *Appellant*

AND

THE TRUSTS AND GUARANTEE COMPANY LIMITED
as TRUSTEES of the PETER BIRTWISTLE TRUST *Respondents.*

RECORD OF PROCEEDINGS.

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No. 41 of 1939.

ON APPEAL FROM THE SUPREME COURT OF
CANADA.

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

BETWEEN

THE MINISTER OF NATIONAL REVENUE - - - *Appellant*

AND

THE TRUSTS AND GUARANTEE COMPANY LIMITED
as TRUSTEES of the PETER BIRTWISTLE TRUST *Respondents.*

RECORD OF PROCEEDINGS.

No. 1.

Notice of Appeal from Assessment.

IN RE THE INCOME WAR TAX ACT, and THE PETER BIRTWISTLE TRUST,
of the City of Toronto, Province of Ontario.

No. 1.
Notice of
Appeal from
Assessment,
18th March,
1936.

APPELLANT.

Notice of appeal is hereby given from the assessments bearing date
the 21st day of February, 1936, wherein taxes in the sums of \$516.10,
\$1,307.30, \$1,592.80, \$1,911.35, \$1,742.45, \$1,931.70, \$1,744.00; \$1,657.30,
\$1,707.15, \$1,857.30, \$2,023.50, \$2,109.50, \$3,019.15, \$3,766.45, \$4,173.45 and
10 \$4,993.75, are levied in respect of income for the taxation years 1919, 1920,
1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932,
1933 and 1934 respectively.

No. 1.
 Notice of
 Appeal from
 Assessment,
 18th March,
 1936—con-
 tinued.

The said assessments are made in respect of the income of the trust (herein referred to as the Primary Trust) received and accumulated under and subject to the terms of an Indenture (herein referred to as the Indenture) made between Peter Birtwistle (herein referred to as the Settlor) and The Trusts and Guarantee Company Limited (herein referred to as the Primary Trustee) and dated the 29th day of May, 1919, and to be paid to the Municipal Council of the Town of Colne in Lancashire, England (herein referred to as the Secondary Trustee) on the 19th day of April, 1948, the said date being twenty-one years after the death of the Settlor, which occurred on the 19th day of April, 1927, to be used by the Secondary Trustee for the benefit of the aged and deserving poor of the Town of Colne in such manner and without restriction of any kind as should be deemed prudent to the Secondary Trustee save and except, and the Settlor thereby declared it to be his wish that the Secondary Trustee should leave any of the said fund (being the principal and accumulated interest of the Primary Trust) which was not required for immediate distribution to be held by the Primary Trustee and invested by the Primary Trustee under an arrangement similar to that comprised in the Indenture, the Settlor believing that it would be advantageous for the Secondary Trustee to retain this Colonial investment which the Settlor considered likely to make a better return of interest than could readily be obtained in England. The fund so vested in and to be received by the Secondary Trustee for the use aforesaid is herein referred to as the Secondary Trust. 10

The said assessments are, and each of them is, hereby appealed against upon the following grounds:—

1. The income in question was received by and is accumulating in the hands of the Primary Trustee for the benefit of the Secondary Trust and/or the Secondary Trustee which—

- (a) are not a person or persons within the meaning of the Act;
- (b) are not unascertained; and 30
- (c) are not, and cannot be resident in Canada.

2. The income in question is the income of a charitable institution and as such excepted from taxation.

3. Alternatively, if it is contended that the income in question is accumulated for the benefit of the ultimate beneficiaries of the trusts, namely, the aged and deserving poor of the said Town of Colne, the assessments are invalid and are appealed against because—

- (a) the said ultimate beneficiaries are not the beneficiaries of the Primary Trust;
- (b) no income has as yet been received by the Secondary Trust 40 or the Secondary Trustee;
- (c) the said ultimate beneficiaries are not unascertained as to any characteristic relevant to the question of liability for taxation under the Act;

(d) none of the said ultimate beneficiaries could by possibility become liable to taxation in Canada as being resident therein or as having an income sufficient to be taxable.

Dated this 18th day of March, 1936.

WOOD & JARVIS,
Solicitors for Appellant.

Wood & Jarvis,
80 King Street West,
Toronto, Ontario.

No. 1.
Notice of
Appeal from
Assessment,
18th March,
1936—con-
tinued.

10

No. 2.

Decision of the Minister.

No. 2.
Decision
of the
Minister,
21st April,
1936.

IN THE MATTER OF THE INCOME WAR TAX ACT, BEING CHAPTER 97 OF THE REVISED STATUTES OF CANADA, 1927 AND AMENDMENTS THERETO, AND IN THE MATTER OF THE APPEAL OF THE PETER BIRTWISTLE TRUST, OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO, HEREINAFTER CALLED THE TAXPAYER, - - - - - *Appellant.*

DECISION OF THE MINISTER.

Whereas The Trusts and Guarantee Company Limited in its capacity of Trustee of the Peter Birtwistle Trust, the Taxpayer, duly filed Income Tax Returns showing the income of the said Trust for the years ended 31st December, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933 and 1934.

And whereas taxes were assessed by Notices of Assessment dated the 21st February, 1936.

And whereas a Notice of Appeal was received from the Solicitors for the taxpayer dated the 18th March, 1936, in which objection is taken to the assessed tax for the reasons therein set forth and in particular that the income in question was received by and is accumulating in the hands of the Primary Trustee for the benefit of the Secondary Trust and/or the Secondary Trustee which are not a person within the meaning of the Act, are not unascertained and are not resident in Canada; that the income is the income of a charitable institution and as such excepted from taxation or, in the alternative, if the income is accumulated for the benefit of the ultimate beneficiaries of the trusts, namely, the aged and deserving poor of the town of Colne, the assessments are invalid because the said beneficiaries are not the beneficiaries of the Primary Trust; no income has yet been received by the Secondary Trust or Trustee; that the said ultimate beneficiaries are not unascertained and that they could not become liable to taxation in Canada.

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No. 2.
Decision
of the
Minister,
21st April,
1936—con-
tinued.

And whereas Peter Birtwistle during his lifetime deposited with The Trusts and Guarantee Company Limited \$100,000.00, which sum was subsequently added to and the Trust Deed altered until the agreement dated 27th May, 1918. Under the terms of the said Trust Agreement, the income of the trust in excess of administration costs and other stated expenses, accumulates for a specified time to be paid over to the Municipal Council of the town of Colne, Lancashire, England, to be used at its discretion in such manner and without restriction as said council shall deem prudent, for the benefit of the aged and deserving poor of the said town of Colne.

The Honourable the Minister of National Revenue, having duly con- 10
sidered the facts as set forth in the Notice of Appeal and matters thereto relating, hereby affirms the said assessments on the ground that the taxpayer is a person within the meaning of the Act and has an annual income on which it is liable to taxation; that the income of the Trust accumulating in the hands of the Trusts and Guarantee Company Limited, the trustee, is income for the benefit both of unascertained persons and of persons with contingent interests and as such is taxable under the provisions of Sub-section 2 of Section 11 of the Act and that Section 4(e) of the Act has no application as the income is not the income of a charitable institution. Therefor under the provisions of the said Section 11 and other provisions 20
of the Income War Tax Act in that respect made and provided, the assessments are properly levied.

Notice of such decision is hereby given in accordance with Section 59 of the said Act.

Dated at Ottawa this 21st day of April, A.D. 1936.

JAMES L. ILSLEY,
Minister of National Revenue.

Per C. F. ELLIOTT,
Commissioner of Income Tax.

To : The Trusts and Guarantee Company, Limited, 30
302 Bay Street,
Toronto, Ontario.

And to : Messrs. Wood & Jarvis,
80 King Street West,
Toronto, Ontario.
Its Solicitors herein.

No. 3.
Notice of Dissatisfaction.

THE INCOME WAR TAX ACT.
NOTICE OF DISSATISFACTION.

No. 3.
Notice of
Dissatisfac-
tion,
20th May,
1936.

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

Notice is hereby given that the Appellant desires its appeal from the assessments bearing date the 21st day of February, 1936, and from the decision of the Minister dated the 21st day of April, 1936, to be set down
10 for trial.

Dated this twentieth day of May, A.D. 1936.

WOOD & JARVIS,
Solicitors for Appellant.

STATEMENT OF FURTHER FACTS, STATUTORY PROVISIONS
AND REASONS IN SUPPORT OF THIS APPEAL.

1. Appended as Schedule "A" hereto (Record p. 70) is a copy of one of the Notices of Assessment appealed against, namely: No. H9723 for \$4,993.75 in respect of income for the taxation year 1934; the other assessments in question are similar thereto so far as affects the matters involved in this appeal.
- 20 2. Appended as Schedule "B" hereto (Record p. 57) is a copy of the Indenture dated the 27th day of May, 1918, which is the document referred to in the Notice of Appeal and herein as "the Indenture."
3. It is proposed in support of this appeal to refer to the Income War Tax Act, being Chapter 28 of the Statutes of Canada, 1917, The Income War Tax Act, being Chapter 97 of the Revised Statutes of Canada, 1927, and the several Acts amending the same, and to deposit King's Printer's copies thereof for use upon the hearing of this appeal. It is proposed to refer particularly to the following sections of Chapter 97 of the Revised Statutes aforesaid, namely: Section 2, clauses (b) and (k); section 3,
30 sub-sections (1) and (3); section 4, clause (e) as amended by Chapter 40 of the Statutes of 1935, and clause (k); section 9B as enacted by Chapter 41 of the Statutes of 1932-1933, and Chapter 55 of the Statutes of 1934; section 11 as amended by Chapter 55 of the Statutes of 1934; section 78; section 88 as enacted by Chapter 40 of the Statutes of 1935; and to the corresponding sections in earlier Acts. It is proposed also to refer to section 140 of the Colne Corporation Act, 1933, being 23 and 24 George V (Imp.) Chapter 35, a copy whereof is appended as Schedule "C" hereto.
4. If by the assessments appealed against it was intended to assess the
40 Trust has not received any income and the Trustee thereof, and the *cestuis qui trustent* thereof, are not and cannot be in Canada.

No. 3.
Notice of
Dissatis-
faction,
20th May,
1936—con-
tinued.

5. If by the assessments appealed against it was intended to assess the Primary Trust, the assessments are invalid and should be disallowed for the following

REASONS.

(a) The Payee of the income is the Secondary Trustee, the Town of Colne in Lancashire, England, that is to say : a Municipal body in England empowered to act as such Trustee, and the Minister is not entitled to look beyond the Secondary Trustee for the purposes of the Act. The income in question, therefore, is not accumulated for a person within the meaning of the Act, or for a person resident in Canada within the meaning of the Act, or for an unascertained person or persons, or for a person or persons with contingent interests within the meaning of the Act; 10

(b) If it be contended that the Minister may look beyond the Secondary Trustee, then the Secondary Trust must be regarded as the Payee or beneficiary of the income. The Secondary Trust is not a person within the meaning of the Act; it is a charitable institution within the meaning of the Act and it is not, nor is its Trustee or any possible beneficiary under it, resident in Canada;

(c) If it be contended that the Payee or beneficiary might be changed by the Secondary Trustee ceasing to exist or becoming disqualified to act as such Trustee, or by the fund in question not being required for the purposes designated, the gift being of a generally charitable nature, the Secondary Trust would still continue and would be applied *cy-pres*, another Trustee and/or other objects being appointed and/or determined by the Courts of England, and such Trustee and/or objects would be situated in England in or near the Town of Colne; 20

(d) The Primary Trust is a charitable institution within the meaning of the Act and as such, the income being accumulated is not liable to taxation under the Act;

(e) If it be contended that regard may be had to the ultimate beneficiaries of the charitable scheme embodied in the Indenture, namely : The aged and deserving poor of the Town of Colne, such contention would be erroneous because none of them can by possibility acquire any rights against the income in the hands of the Primary Trustee under the Indenture. Even if regard be had to these ultimate beneficiaries they are still not properly to be regarded as " unascertained persons or persons with contingent interests " within the meaning of the Act, section 11(2). They are completely ascertained for all purposes relevant to the determination of their liability to taxation under the Act. None of them could, consistently with the terms of the Indenture, become liable to taxation under the Act as being resident in Canada or having taxable income. 30 40

Dated at Toronto this 20th day of May, 1936.

WOOD & JARVIS,
Solicitors for the Appellant.

SCHEDULE A IS PRINTED AT PAGE 70.

SCHEDULE B IS PRINTED AT PAGE 57.

SCHEDULE "C."

(23 & 24 Geo. V)

(Ch. XXXV.)

COLNE CORPORATION ACT, 1933.

PART XII.

MISCELLANEOUS.

140.—(1) Subject to the provisions of this section the Corporation may accept hold and administer any gift of property whether real or
 10 personal for any public purpose connected with the borough and may execute any works (including works of maintenance or improvement) incidental to or consequential on the exercise of the powers conferred by this section and where the purposes of the gift are purposes for which the Corporation are empowered to expend money raised from the general rate they may subject to any condition or restriction attaching to such power expend moneys so raised in the execution of such works in relation to the subject-matter of the gift.

(2) This section shall not extend to property relating to affairs of the church within the meaning of the local Government Act 1894 or to an
 20 ecclesiastical charity within the meaning of that Act.

(3) Accounts of the income and expenditure of the Corporation under this section shall be kept by the treasurer and shall be made up and audited as part of the general accounts of the Corporation.

No. 3.
 Notice of
 Dissatis-
 faction,
 20th May,
 1936—con-
 tinued.

No. 4.
Reply
of the
Minister,
22nd June,
1936.

No. 4.
Reply of the Minister.

IN THE MATTER OF THE INCOME WAR TAX ACT, BEING CHAPTER 97 OF
THE REVISED STATUTES OF CANADA, 1927, AND AMENDMENTS THERETO;

AND IN THE MATTER OF THE APPEAL OF PETER BIRTWISTLE TRUST OF
THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO, HEREINAFTER
CALLED THE TAXPAYER - - - - - *Appellant.*

REPLY OF THE MINISTER.

Notice of Dissatisfaction with the Decision of the Minister having been received from the Solicitors for the Appellant herein in respect of the appeal 10
from the assessments levied upon the said Appellant in respect to the taxation periods 1919 to 1934 inclusive, and security for costs having been duly furnished as required by the said Act, the Honourable the Minister of National Revenue having further considered the Notice of Appeal and the Notice of Dissatisfaction herein, replies thereto as follows :

1. That by agreement dated October 20th, 1916, Peter Birtwistle of London, Ontario, hereinafter called the Settlor did pay to the Trust and Guarantee Company, Limited, of Toronto, hereinafter called the Trustee, the sum of \$100,000.00 to be held by the Trustee under the terms of an agreement whereby the money plus accumulated 20
interest was to be paid 21 years after the death of the Settlor to such person or corporation as the Settlor might by deed or will appoint; and that by indenture of the same date the Settlor did assign certain assets, real and personal, to the Trustee to be converted and administered upon the terms of the said investment agreement;

2. That on the 27th day of May, 1918, an agreement was entered into between the Settlor of the first part and the Trustee of the second, affirming the aforesaid payment of money and assignment of property and setting up the trust upon which the Trustee was to administer the same. The said trust specified that the Trustee should, 30
inter alia, hold the funds which constituted the investment account for the period of 21 years from the death of the Settlor and then to pay the whole, together with accumulations thereon, to the Municipal Council of the Town of Colne in Lancashire, England, to be used by the said Council for the benefit of the aged and deserving poor of the said Town of Colne in such a manner and without restriction of any kind, as shall be deemed prudent to the said Council;

3. That the Trustee by the said indenture is required to accumulate all interest earned by the investment account, except such as might be required to pay the living expenses of the Settlor, 40
and add such interest to the corpus of the investment account;

4. That the Trustee by the said indenture is to pay to the Settlor during his lifetime out of the income of the investment account such sum or sums as the Trustee may in his discretion deem fitting and proper for the Settlor to expend in his living expenses;

No. 4.
Reply
of the
Minister,
22nd June,
1936—con-
tinued.

5. That the Trustee by the said indenture is entitled to retain as his remuneration for his management and guarantee the surplus of interest or profit, if any, resulting from the investment or loaning of the investment account over and above the rate of $5\frac{1}{4}$ per cent.;

10 6. That the Settlor, Peter Birtwistle, died on or about April 19th, 1927; that under the aforesaid indenture, income was accumulated by the Trustee in accordance with the aforesaid trust in the following amounts each year :

For the taxation year ended 31st December,—

	1918—\$ 7,111.35.
	1919— 9,934.10.
	1920— 11,287.42.
	1921— 12,398.25.
	1922— 14,193.35.
	1923— 13,734.18.
20	1924— 14,043.38.
	1925— 15,730.02.
	1926— 16,439.35.
	1927— 17,960.46.
	1928— 19,069.60.
	1929— 20,283.69.
	1930— 21,143.40.
	1931— 22,253.44.
	1932— 23,421.72.
	1933— 24,651.40.
30	1934— 25,945.60.

7. That Notices of Assessment dated 21st February, 1936, were sent to the above Trustee assessing the accumulations for the years 1919 to 1934, inclusive, under and by virtue of the Income War Tax Act, Revised Statutes of Canada, 1917, Chapter 28, as amended by Chapter 49, R.S. 1920, S. 4, and by virtue of Revised Statutes of Canada, 1927, Chapter 97, S. 11, Ss. 2, and 1934 R.S. Chapter 55, S. 7, copies of which Notices of Assessment are filed herein;

8. That the Trustee is a taxpayer under the Income War Tax Act and is subject to the aforementioned sections of the Act;

40 9. That under the terms of the agreement between the late Peter Birtwistle and the Trustee the accumulating income aforesaid is for the benefit of a person or persons with a contingent interest;

10. That under the terms of the agreement between the late Peter Birtwistle and the Trustee the accumulating income aforesaid is for the benefit of unascertained persons;

No. 4.
Reply
of the
Minister,
22nd June,
1936—con-
tinued.

11. That the said accumulating income is not the income of any religious, charitable, agricultural or educational institution and consequently is not within the exemption from taxation contained in S. 4(e) of the Act;

12. That no provision of the Act entitles the appellant to exemption from the tax imposed herein.

And the Honourable the Minister of National Revenue hereby confirms the assessment appealed against for the reasons set forth herein and in the Decision of the Minister dated the 21st day of April, A.D. 1936, and for such other and further reasons as may be deemed advisable. 10

Dated at Ottawa this 22nd day of June, A.D. 1936.

J. L. ILSLEY,
Minister of National Revenue.

Per C. F. ELLIOTT,
Commissioner of Income Tax.

To : The Trusts & Guarantee Company, Limited,
302 Bay Street,
Toronto, Ont.

And to : Messrs. Wood & Jarvis,
80 King St. West,
Toronto, Ont. 20

Its Solicitors.

No. 5.

Statement of Claim.

Filed the 30th day of October, 1936.

In the
Exchequer
Court of
Canada.

No. 5.
Statement
of Claim,
30th Octo-
ber, 1936.

1. This is an appeal from the assessment under The Income War Tax Act of certain income accumulated under the provisions of an Indenture dated the 27th day of May, 1918 (hereinafter referred to as the Indenture), made between Peter Birtwistle of the City of London, Ontario, Canada (hereinafter referred to as the Settlor), and The Trusts and Guarantee Company, Limited, a Trust Company having its head office at the City of Toronto, Ontario, Canada (hereinafter referred to as the Primary Trustee), whereby it was provided that the income of the fund therein referred to should, save as to certain disbursements therein provided for, be received and accumulated by the Primary Trustee and at the expiration of twenty-one years after the death of the Settlor should, with the corpus of the fund, be paid to the Municipal Council of the Town of Colne in Lancashire, England (hereinafter referred to as the Secondary Trustee), a municipal body in England empowered to accept, hold and administer the same, to be used by the Secondary Trustee for the benefit of the aged and deserving poor 40

of the said Town of Colne in such manner and without restriction of any kind as should be deemed prudent to the Secondary Trustee, save and except, and the Settlor declared it to be his wish, that the Secondary Trustee should, insofar as possible or convenient, leave any of the said fund which was not required for immediate distribution to be held by the Primary Trustee and invested by the Primary Trustee under an arrangement similar to that comprised in the Indenture, the Settlor believing that it would be advantageous for the Secondary Trustee to retain this Colonial investment which the Settlor considered likely to return a better rate of
 10 interest than could readily be obtained in England. The trust of which the Primary Trustee is Trustee, is hereinafter referred to as the Primary Trust, and the trust of which the Secondary Trustee is Trustee is hereinafter referred to as the Secondary Trust. It is proposed, and leave is craved, to refer to the Indenture upon the trial of this action.

2. The Settlor died on or about the 19th day of April, 1927.

3. Since the date of the Indenture the Primary Trustee has received and accumulated income of the said fund pursuant to the terms of the Indenture, and has duly made returns thereof, Form T-3 under the Act for each of the years 1919 to 1934, inclusive; on the 21st day of February,
 20 1936, the assessments of taxes, additional tax, surtax and interest in question herein were made as follows:—

Assessment Number	Taxation Year	Tax, including additional tax and surtax	Interest	Total
H9776 - - -	1919	\$ 516.10		\$ 516.10
H9737 - - -	1920	690.40	\$616.90	1,307.30
H9736 - - -	1921	868.76	724.04	1,592.80
H9735 - - -	1922	1,077.79	833.56	1,911.35
H9734 - - -	1923	1,016.95	725.50	1,742.45
30 H9733 - - -	1924	1,168.32	763.38	1,931.70
H9732 - - -	1925	1,094.50	649.50	1,744.00
H9731 - - -	1926	1,080.80	576.50	1,657.30
H9730 - - -	1927	1,158.63	548.52	1,707.15
H9729 - - -	1928	1,314.03	543.27	1,857.30
H9728 - - -	1929	1,495.12	528.38	2,023.50
H9727 - - -	1930	1,630.95	478.55	2,109.50
H9726 - - -	1931	2,447.78	571.37	3,019.15
H9725 - - -	1932	3,209.85	556.60	3,766.45
H9724 - - -	1933	3,748.32	425.13	4,173.45
40 H9723 - - -	1934	4,740.50	253.25	4,993.75

Notice of appeal against these assessments, the reply of the Respondent affirming the said assessments, notice of dissatisfaction and Security for the costs of this appeal have been duly delivered and given pursuant to the Act. It is proposed, and leave is craved, to refer to the said returns, assessments, notice of appeal, reply and notice of dissatisfaction upon the trial of this action.

*In the
Exchequer
Court of
Canada.*

No. 5.
Statement
of Claim,
30th Octo-
ber, 1936—
continued.

*In the
Exchequer
Court of
Canada.*

*No. 5.
Statement
of Claim,
30th Octo-
ber, 1936—
continued.*

4. The said assessments are claimed to be made under the provisions of the Act now embodied in subsection (2) of section 11 of chapter 97 of the Revised Statutes of Canada, 1927, as amended by sections 7 and 8 of chapter 55 of the Statutes of Canada, 1934; no tax was paid nor was any assessment made in respect of the said income under the said subsection until the said 21st day of February, 1936.

5. It is proposed, and leave is craved, to refer upon the trial of this action to the Income War Tax Act, Chapter 28 of the Statutes of Canada, 1917, the Income War Tax Act, Chapter 97 of the Revised Statutes of Canada, 1927, the several Acts amending the said Acts (all of which Acts and amending Acts are herein sometimes referred to as the Act), and Section 140 of the Colne Corporation Act, 1933, being Chapter 35 of the Imperial Statutes 1923-1924 George V. 10

6. The Appellant says that the income in question is accumulated for the benefit of the Secondary Trustee and/or the Secondary Trust and is not taxable under the said Subsection (2) of Section 11 of the Act or otherwise because it is not accumulated for the benefit of any person or persons within the meaning of the Act or for the benefit of unascertained persons within the meaning of the Act, or for the benefit of any person or persons resident in Canada within the meaning of the Act. 20

7. Neither the Secondary Trustee nor the Secondary Trust nor any beneficiary of the Secondary Trust has or have received any of the income in question.

8. The Primary Trust and the Secondary Trust are both charitable institutions and as such excepted from taxation by virtue of the provisions now contained in clause (e) of Section 4 of the Act.

9. Alternatively, if it be contended on behalf of the Respondent that the income in question should be considered as being accumulated for the benefit of the beneficiaries of the Secondary Trust, namely, the aged and deserving poor of the said Town of Colne, it is not taxable in the hands of the Primary Trustee because the said beneficiaries are not beneficiaries or *cestuis que trustent* of the Primary Trust, and have no interest therein; and further alternatively because the said beneficiaries are not unascertained persons within the meaning of the Act, and none of them could become liable to taxation in Canada in respect of any sum or sums received out of the fund as being resident in Canada or as receiving taxable income in Canada or elsewhere. 30

10. Further alternatively, it is submitted that if it be held that the said income or any part thereof is taxable under the Act, it is right and proper that interest should be allowed only in respect of such tax, additional tax and surtax as is allowed from the 21st day of February, 1936. 40

The Appellant therefore claims:—

1. Judgment declaring that the income in question is not subject to taxation under the Act, and disallowing and setting aside the said assessments.

2. In the alternative that interest charged in respect of any period prior to the 21st day of February, 1936, should be disallowed and the said assessments amended accordingly.

3. The costs of this action.

4. Such further and other relief as the nature of the case may require, and as to this Honourable Court may seem right and proper.

S. CASEY WOOD,

G. M. JARVIS,

Of Counsel for the Appellant.

*In the
Exchequer
Court of
Canada.*

No. 5.
Statement
of Claim,
30th Octo-
ber, 1936—
continued.

10

No. 6.

Statement of Defence.

No. 6.
Statement
of Defence,
15th Decem-
ber, 1936.

Filed the 15th day of December, A.D. 1936.

In answer to the Statement of Claim filed herein on the 30th October, 1936, the Respondent replies as follows :

1. The Respondent admits the facts set out in paragraph 1 thereof, save and except all allegations contained therein which interpret or attempt to interpret the Indenture in question; in regard to the interpretation of the said Indenture the Respondent craves leave to refer the Court to the Indenture itself;

20 2. The Respondent admits paragraph 2 thereof;

3. The Respondent admits paragraph 3 thereof, but adds that a Reply of the Respondent was duly sent to the Appellant in answer to his Notice of Dissatisfaction, and leave is craved to refer to this document upon the trial of this action;

4. The Respondent admits paragraph 4 thereof;

30 5. The Respondent denies paragraph 6 thereof and in particular denies that the income in question is accumulating for the benefit of the Municipal Council of the Town of Colne, called by the Appellant the Secondary Trust, and/or for what is called by the Appellant the Secondary Trust, but the Respondent alleges that the income is, by the words of the trust Indenture referred to in the Statement of Claim herein, accumulating with the Trusts & Guarantee Company, Limited, called by the Appellant the Primary Trustee, for a period of twenty-one years after the death of the Settlor, at the end of which period it is to be paid over with the capital " to the Municipal Council of the Town of Colne in Lancashire, England . . . to be used by the said Council for the benefit of the aged and deserving poor of the said Town of Colne in such manner and without restriction of any kind, as shall be deemed prudent to the said Council "; and in further answer denies the relevance of the statement

*In the
Exchequer
Court of
Canada.*

No. 6.
Statement
of Defence,
15th Decem-
ber, 1936—
continued.

contained in said paragraph 6 of the Appellant's Statement of Claim that the said income is not accumulating for the benefit of any person or persons resident in Canada within the meaning of the Act; and the Respondent in further regard to the point raised by the Appellant alleges that the liability imposed by Section 4 of 10-11 George V, Canada, Chapter 49, as continued in the Revised Statutes of Canada (1927), Chapter 97, Section 11, Subsection 2, and Section 11, Subsection 2 of The Income War Tax Act as enacted by 24-25 George V, Chapter 55, Section 7, is a liability of the Trustee or other like person acting in a fiduciary capacity who accumulates income for the benefit of unascertained persons or persons with contingent interest, which liability in no way depends upon the status, residence or chargeability under the Act of the said unascertained persons or persons with contingent interests; 10

6. The Respondent admits paragraph 7 thereof;

7. The Respondent denies paragraph 8 thereof and in further answer thereto alleges that the exemption afforded by virtue of the provisions now contained in Section 4, clause (e) of the Act, has no relevance or bearing upon the liability imposed upon the Trustee or other like person acting in a fiduciary capacity under the sections of the Act referred to in paragraph 5 hereof to pay a tax on the income accumulating in his lands in trust for the benefit of unascertained persons, or of persons with contingent interests; 20

8. The Respondent denies paragraph 9 thereof;

9. The Respondent denies paragraph 10 and alleges that the interest charged on the assessments in question is the interest provided for by the Income War Tax Act and that no provision is contained in the Act for the waiving thereof;

10. The Respondent says that the Appellant is liable for the assessments in question herein which have been assessed against it.

Wherefore the Respondent claims :

30

1. That the appeal of the Appellant herein be dismissed;
2. That the assessments herein be affirmed;
3. The costs of this action;
4. Such further and other relief as the case may require and as to this Honourable Court may seem right and proper.

G. A. URQUHART,
Of Counsel for the Respondent.

No. 7.
Reply.

*In the
Exchequer
Court of
Canada.*

Filed the 18th day of December, 1936.

1. In reply to paragraph 9 of the Statement of Defence the Appellant refers to Section 66 of the Act.

2. The Appellant joins issue upon the Statement of Defence.

No. 7.
Reply,
18th Decem-
ber, 1936.

S. CASEY WOOD,
G. M. JARVIS,
Of Counsel for the Appellant.

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No. 8.

Formal Judgment.

No. 8.
Formal
Judgment,
4th Janu-
ary, 1938.

IN THE EXCHEQUER COURT OF CANADA.

Tuesday, the 4th day of January, A.D. 1938.

PRESENT THE HONOURABLE MR. JUSTICE MACLEAN.

IN THE MATTER OF THE INCOME WAR TAX ACT

and

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

Appellant

20

and

THE MINISTER OF NATIONAL REVENUE - - - - -

Respondent.

The Appeal from the Decision of the Minister herein having come on to be heard before this Court at the City of Ottawa on the 11th and 12th days of February, A.D. 1937, in the presence of counsel for both parties, upon hearing read the pleadings herein and the documents and exhibits filed, and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said Appeal should stand over for Judgment and the same coming on this day for Judgment;

30 This Court doth order and adjudge that the Appeal of the Appellant be and the same is hereby dismissed;

And this Court doth further order and adjudge that there be no costs to either party.

By the Court,

ARNOLD W. DUCLOS,
Registrar.

*In the
Exchequer
Court of
Canada.*

No. 9.

Reasons for Judgment.

MACLEAN, J.

Judgment rendered January 4th, 1938.

No. 9.
Reasons for
Judgment.
Maclean J.,
4th Janu-
ary, 1938.

This is an appeal from the assessment, under the Income War Tax Act, of certain income received and accumulated under the subject to the terms of an indenture, dated May 27, 1918, and made between Peter Birtwistle (hereafter referred to as the Settlor), a Canadian citizen, then resident in the City of London, in the Province of Ontario, and The Trusts and Guarantee Co. Ltd., (hereafter referred to as the Canadian Trustee), a trust company having its head office in the City of Toronto, in the same Province. By this indenture it was provided that the principal of a certain fund, called the Investment Account, and certain assets real and personal, mentioned in a schedule to the said indenture, should be transferred in trust to the Canadian Trustee by the Settlor, and that the same, with any proceeds therefrom, and with any accruals thereto, should, save as to certain disbursements therein provided for, be invested and reinvested, administered and managed, by the Canadian Trustee, and that at the expiration of twenty-one years after the death of the Settlor, the whole of the fund, and the proceeds of the assets real and personal so transferred, together with accumulations thereon, should be paid to the Municipal Council of the Town of Colne, in Lancashire, England (hereafter referred to as the Colne Trustee), to be used by the Colne Trustee "for the benefit of the aged and deserving poor of the said Town of Colne in such manner and without restriction of any kind, as shall be deemed prudent to the said Council." The indenture provided that the real and personal assets transferred by the Settlor should be converted into money, under the terms and conditions and at the time or times therein provided, and added to the Investment Account, and I understand this has already been done. The Settlor died on April 19, 1927. The corpus of the Investment Account, ultimately to be paid to and administered by the Colne Trustee, is estimated to reach the sum of one million dollars and over, at the end of the twenty-one year period, April, 1948.

It may be desirable to explain more fully the origin of the trust in question. On September 20, 1916, the Settlor paid, over to the Canadian Trustee, subject to the terms and conditions contained in an agreement of the same date, the sum of \$100,000, and by indenture of even date did transfer to the said Trustee further assets, real and personal, by it to be converted into money and the proceeds thereof added from time to time to the said fund of \$100,000. In this agreement the Settlor was called "the Investor," and the agreement was known as an "Investment Agreement." That agreement was revoked and superseded by another agreement, also known as an "Investment Agreement," made between the same parties, and dated October 20, 1916, pursuant to which the said fund

of \$100,000, and all additions thereto made from time to time, was to be held by the said Trustee, subject to the trusts, terms and conditions, therein set out, the said Trustee guaranteeing the payment of the corpus of the fund to such person, persons or corporation as the Settlor might by will or otherwise appoint, at the period of twenty-one years after his decease, with the interest at a specified rate. Later, the Settlor being desirous of transferring to the said Trustee certain other assets, real and personal, to be converted and administered by the said Trustee, and being desirous also of determining definitely the corporation to whom the said assets, with the accruals thereon, should be paid at the end of the twenty-one year period, another agreement was entered into between the same parties, on May 27, 1918, and it is this agreement with which we are here concerned.

*In the
Exchequer
Court of
Canada.*

No. 9.
Reasons for
Judgment.
Maclean J.,
4th Janu-
ary, 1938—
continued.

By the terms of this agreement the Settlor agreed to assign and set over unto the Canadian Trustee, its successors and assigns, all his right, title and interest, in the assets held by the said Trustee under the agreement of October 20, 1916, and certain additional assets, real and personal, which the Settlor desired to make subject to the terms of the same agreement, all of which was transferred to and received by the Canadian Trustee as "Trustee of Birtwistle Trust." The terms and conditions of this agreement need not be mentioned, with the exception of one paragraph, as all other terms of that trust instrument were stated by counsel not to be relevant to the controversy here. And there is no dispute apparently as to the amount of the yearly income, the assessment of which is here questioned. If the amount of the income is questioned that may be the subject of a reference, if ultimately it is held that the appellant is liable for the tax. Paragraph 4(b) of the agreement is the important one here, and it reads as follows :—

"4(b) The Trustee shall pay the whole of the Investment Account, together with accumulations thereon, to the Municipal Council of the Town of Colne in Lancashire, England, at the end of the period of twenty-one years after the death of the Settlor, to be used by the said Council for the benefit of the aged and deserving poor of the said Town of Colne in such manner and without restriction of any kind, as shall be deemed prudent to the said Council, save and except and the Settlor hereby declares it to be his wish that the said Council should insofar as possible or convenient, leave any of the said fund which is not required for immediate distribution to be held by the Trustee hereunder and invested by the Trustee under an arrangement similar to that comprised in this indenture, the Settlor believing that it will be advantageous for the Council to retain this colonial investment which the Settlor considers likely to return a better rate of interest than can be readily obtained in England."

The assessments in question, for the years 1919 to 1934 inclusive, were made under s. 11, s.s. (2) of the Income War Tax Act, Chapter 97 of the Revised Statutes of Canada, 1927, as amended by sections 7 and 8 of

*In the
Exchequer
Court of
Canada.*

No. 9.
Reasons for
Judgment.
Maclean J.,
4th January,
1938—
continued.

Chapter 55 of the Statutes of Canada, 1934. That subsection reads as follows:—

“ 11. (2) Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interest shall be taxable in the hands of the trustee or other like person acting in the 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.”

Sec. 4 of the Act defines incomes that are not liable to taxation and 10
s.s. (e) reads:—

“(e) The income of any religious, charitable, agricultural and educational institutions, board of trade and chamber of commerce . . . ”

It is the words “charitable . . . institution” that are of importance here.

It is the contention of the appellant that the income in question is being accumulated for the benefit of the Colne Trustee, or for the Colne Trust, and is not taxable under s.s. 2 of s. 11 of the Act, or otherwise, because it is not being accumulated for the benefit of any person 20
or persons within the meaning of the Act, or for the benefit of unascertained persons within the meaning of the Act, or for the benefit of persons resident in Canada within the meaning of the Act; that neither the Colne Trustee nor the Colne Trust, nor any beneficiary of the Colne Trust has or have received any of the income in question; and that the Canadian Trust, and the Colne Trust are both charitable institutions and as such excepted from taxation. Alternatively, it was pleaded that if the respondent contended that the income in question should be considered as being accumulated for the benefit of the beneficiaries of the Colne Trust, namely, the aged and deserving poor of the Town of Colne, 30
the income was not taxable in the hands of the Canadian Trustee because the said beneficiaries are not beneficiaries of the Canadian Trust, and have no interest therein; that the income is not taxable because the said beneficiaries are not unascertained persons within the meaning of the Act, and none of them could become liable to taxation in Canada in respect of any sum or sums received out of the fund as being resident in Canada, or as receiving taxable income in Canada or elsewhere; and that if the said income or any part thereof is held to be taxable under the Act, interest should be allowed only in respect of such tax, additional tax and surtax, as is allowed from February 21, 1936, the date when first 40
the assessments in question were made. All these contentions are contested by the respondent. What I have referred to above as the “Canadian Trust” is the trust in question being administered in Canada by the Canadian Trustee.

The case is rather an unusual one. The income here is accumulating for the benefit of a class, of the Town of Colne, the members or units of which are presently unascertainable and will always be fluctuating; in that class the trust estate can never be vested, and they can never discharge the trustee; the individuals of that class may never be the recipients of any portion of the accumulated fund and any benefits received therefrom may be indirect only; and the interest of that class, in any event, will never be more than an equitable interest, that is, the right to enforce in equity the specific execution of the Settlor's intention, to the extent of the particular interest of the beneficiaries therein, which interest may be distributed in one of many forms. The income is not accumulating for the benefit of the Town of Colne. There is little or no authority to assist one upon the major points in issue; most of the authorities to which I was referred by counsel, or those which my own researches have discovered, are based upon the particular language of other statutes, and argument by analogy is unsafe, particularly where taxing statutes are involved.

After giving a most anxious consideration to the construction of s. 11, s.s. (2) I am unable to reach any other conclusion than that the income in question is taxable. I think the word "trust" must be construed widely enough to embrace a charitable trust, and no exception is made in favour of charitable trusts. The persons who may in the future become beneficiaries of the trust are certainly unascertained, and any interest of persons in the trust fund is, and must be, a contingent one. In the last analysis the beneficiaries of the trust are persons, and it matters not, I think, that they fall within the class described by the Settlor. The beneficiaries of charitable trusts are usually a class of unascertained persons, and as the income of such trusts, when accumulating, is not excepted from the tax, it is to be presumed that the legislature had not in mind any distinction between the beneficiaries of charitable trusts and any other trust where income was accumulating for unascertained persons, or persons with contingent interest. If I am correct in this there is not much more that can be usefully added. The contention that there is more than one trust is, in my opinion, untenable. There is but one trust, with two trustees, and the trust fund, as conceived and formulated by the Settlor, is being administered by the Canadian Trustee, in Canada, where it must remain until 1948, and where I think the income is taxable.

Sec. 4(e) provides that the income of any charitable institution shall not be liable to the tax. A charitable institution is, I think, an organization created for the promotion of some public object, of a charitable nature, and functioning as such, and I do not think it can be said that either the Canadian Trustee or the Colne Trustee, or the Town of Colne, or the trust fund itself fall within that definition. A charitable institution is, I think, clearly distinguishable from a charity, or a charitable trust. The trust instrument here does not purport to create a charitable institution; its purpose is to set up a charitable trust. In any event the income in question here cannot, I think, be construed as the income of a charitable institution. The income which is here accumulating is not, in the true sense of the word,

*In the
Exchequer
Court of
Canada.*

No. 9.
Reasons for
Judgment.
Maclean J.,
4th January,
1938—
continued.

*In the
Exchequer
Court of
Canada.*

No. 9.
Reasons for
Judgment.
Maclean J.,
4th Janu-
ary, 1938—
continued.

the income of a charitable institution within the meaning of the Act; such income if belonging to a charitable institution would be something to which it had the right to present enjoyment. There is no charitable institution which can claim the income here. The Australian case, *In re the Will of MacGregor, Deceased*, (1), might usefully be referred to.

A question arises as to whether the appellant is liable for interest upon the tax, prior to the assessment. It appears that annual returns of income were made by the Canadian Trustee on behalf of the "Peter Birtwistle Trust", beginning with the year 1919. The first assessment seems to have been made in 1936, for the years 1919 to 1934 inclusive, and that apparently was the consequence of an application made in the Supreme Court of Ontario by the Colne Trustee, but that application, and the decision of Rose, C.J. thereon, (2) has nothing to do with the issue here, and no purpose would be served by any discussion of it. Sections 48, 49 and 54 of the Act provide for the imposition of interest, if the tax is not wholly paid at maturity. Section 55 provides for the continuation of liability for any tax where no assessment has been made. It is as follows: ". . . 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, with interest and penalties." It is the assessment made by the Minister under the powers granted by that section, that is here in question. Then s. 66 provides as follows:—"Subject to the provisions of this Act, the Exchequer Court shall have jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act and in delivering judgment may make any order as to payment of any tax, interest or penalty or as to costs as to the said Court may seem just and proper."

The submission made on behalf of the appellant was that as the terms of the Act in respect of the filing of returns of income were duly complied with, that it would be right and proper if the appeal is dismissed, to relieve the appellant of any interest charges, for the years prior to the assessments in question, and that it was within the discretion of the Court so to do by virtue of s. 66. The language of the latter part of that section is extremely awkward and confusing, whatever was intended. It is arguable that the section is open to the construction that the Court might, in the exercise of its discretion, refuse any claim for interest if it was thought right and proper to do so, by reason of any special circumstances appearing in the case. On the other hand section 55 expressly provides for preserving any liability to the tax, and to interest and penalties, if for any reason no assessment has been made. The imposition of interest in respect of any tax not paid when due, seems to be a definite principle of the Act, and therefore indiscriminately to be applied, so unless there is very clearly vested in the Court a discretion to relieve the taxpayer of interest charges, and that in the circumstances of the case it is right and proper so to do,

(1) *The Argus Law Reports*, Vol. 24, p. 17; (2) 1935, 4 D.L.R. p. 137.

I think the taxpayer must be held liable for the statutory interest, in addition to the tax. Whether the words of the latter portion of section 66 are to be treated as mere surplusage, or as the bestowal of a discretion in the Court is a question not altogether free of difficulty. It is, however, difficult to believe that the section was intended to mean, for example, that liability for payment of the "tax" was to be a matter in the discretion of the Court, and not something to be determined wholly according to the provisions of the statute. It is difficult also to understand why it was necessary to say that the matter of costs was within the discretion of the Court; as an exception to the rule the Customs Act provides that, in suits brought under that Act for penalties, or to enforce any forfeiture, if the Crown succeeds he shall be entitled also to recover full costs of suit. I am inclined to the view that this section is not to be construed as vesting a discretionary power in the Court to forego interest on any tax recovered by a judgment of the Court, though conceivably it might be a right and proper thing to do in many cases. Presently, I do not feel warranted in holding that the appellant, whom I find liable for the tax, should escape the interest charges imposed by statute upon any unpaid tax. It may be that the Minister has power to do so.

The appeal is therefore dismissed. This is a case where, I think, in all the circumstances there should be no order as to costs.

*In the
Exchequer
Court of
Canada.*

No. 9.
Reasons for
Judgment.
Maclean J.,
4th January,
1938—
continued.

No. 10.

Notice of Appeal.

Take notice that the Appellant herein intends to appeal, and does hereby appeal, to the Supreme Court of Canada from and against the judgment of the Exchequer Court of Canada given by the President of the said Court on the 4th day of January, A.D. 1938, and that the said Appellant intends to prosecute an appeal to the Supreme Court of Canada aforesaid in accordance with the practice of this Honourable Court and of the Supreme Court of Canada aforesaid, and the Appellant has this day deposited with the Registrar of the Supreme Court of Canada the sum of Fifty dollars (\$50.00) by way of security for costs upon the said appeal and in accordance with the Exchequer Court Act and amendments thereto.

Dated at Toronto this 2nd day of February, 1938.

WOOD & JARVIS,
Solicitors for the Appellant.

To: C. F. ELLIOTT,

Commissioner of Income Tax, for J. L. Ilsley,

Minister of National Revenue;

And to: The Registrar of the Exchequer Court.

*In the
Supreme
Court of
Canada.*

No. 10.
Notice of
Appeal,
2nd February,
1938.

*In the
Supreme
Court of
Canada.*

No. 11.
Certificate
as to
Security on
Appeal,
2nd Febru-
ary, 1938.

**No. 11.
Certificate as to Security on Appeal.**

“ B ”

No. 720

THE BANK OF MONTREAL

2nd day of February, 1938.

PETER BIRTWISTLE TRUST
and

THE MINISTER OF NATIONAL REVENUE.

\$50.00

This is to certify that Geo. F. Macdonnell, K.C., has this day paid 10
into this Bank, to the credit of the account of the Registrar of the Supreme
Court of Canada and one of the Judges thereof, the sum of Fifty 00/100
Dollars.

For Bank of Montreal,

1-5 Ottawa, Ont.

J. C. BROWN,

Manager.

(Endorsement)

This appeal is set down to be heard at the session of the Supreme
Court of Canada beginning the 26th day of April, A.D. 1938. 20

“ J. F. SMELLIE,”

Registrar.

No. 12.
Notice of
Setting
down,
3rd Febru-
ary, 1938.

**No. 12.
Notice of Setting Down.**

Take notice that this appeal has been set down to be heard at the
session of the Supreme Court of Canada beginning the 26th day of April,
A.D. 1938.

Dated at Ottawa this 3rd day of February, 1938.

WOOD & JARVIS,

Solicitors for the Appellant 30
by their Ottawa agent,

GEORGE F. MACDONNELL.

To : W. S. Fisher, Esq.,
Solicitor for the Respondent.

No. 13.

Consent as to Contents of Case, 17th March 1938.

(Not printed.)

In the
Supreme
Court of
Canada.

No. 13.

No. 14.

Order dispensing with printing of certain documents.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Before the Registrar in Chambers } Friday the 18th day of March,
A.D. 1938.

No. 14.
Order
dispensing
with
printing of
certain
documents,
18th March,
1938.

10 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 - - - - - (Appellant) Appellant

and

THE MINISTER OF NATIONAL REVENUE - (Respondent) Respondent.

Upon the application of the appellant, upon reading the consent of the respondent and the affidavit of George Frederick Macdonnell filed

20 1. It is ordered that the printing of notices of assessment for the years 1919 to 1933 inclusive, and of Income Tax Returns for the years 1919 to 1933 inclusive, in the case on appeal herein be dispensed with.

2. And it is further ordered that the costs of and incidental to this order be costs in the appeal.

J. F. SMELLIE,
Registrar.

{ Law Stamps }
Cancelled
{ \$2.00 }

In the
Supreme
Court of
Canada.

No. 15.

Factum of The Trusts and Guarantee Company Limited.

PART I.

STATEMENT OF FACTS.

No. 15.
Factum of
The Trusts
and
Guarantee
Company
Limited.

This is an appeal from a judgment of the Honourable Mr. Justice Maclean, President of the Exchequer Court of Canada, affirming the assessment, under the Income War Tax Act, of certain income received and accumulated by Trusts and Guarantee Company Limited (hereinafter referred to as the Canadian Trustee and sometimes referred to as the Primary Trustee) under and subject to the terms of an Indenture dated 10
May 27th, 1918, made between Peter Birtwistle (hereinafter referred to as the Settlor) then resident in the City of London in the Province of Ontario, and the Canadian Trustee, which is a Trust Company having its head office in the City of Toronto in the same Province.

By this Indenture it was provided that the income of the fund therein referred to should, save as to certain disbursements therein provided for, be received and accumulated by the Canadian Trustee and at the expiration of 21 years after the death of the Settlor, should, with the corpus of the fund, be paid to the Municipal Council of the Town of Colne in Lancashire, England (hereinafter referred to as the English Trustee and sometimes 20
referred to as the Secondary Trustee or the Colne Trustee), a municipal body in England empowered to accept, hold and administer the same, to be used by the English Trustee for the benefit of the aged and deserving poor of the said Town of Colne in such manner and without restriction of any kind as should be deemed prudent to the English Trustee, save and except, and the Settlor declared it to be his wish, that the English Trustee should, insofar as possible or convenient, leave any of the said fund which was not required for immediate distribution to be held by the Canadian Trustee and invested by the Canadian Trustee under an arrangement similar to that comprised in the said Indenture, the Settlor believing that 30
it would be advantageous for the English Trustee to retain this Colonial investment which the Settlor considered likely to return a better rate of interest than could readily be obtained in England.

The said Indenture is set out at p. 57 *et seq.* of the Record.

The Settlor died on the 19th day of April, 1927, and the fund therefore will, under the terms of the said Indenture, become payable to the English Trustee on the 19th day of April, 1948.

The Canadian Trustee has, pursuant to the said Indenture, received and accumulated the income of the said fund, and has duly made returns thereof, Form T-3, under the Income War Tax Act for each of the years 40
1919 to 1934 inclusive. No assessment was made in respect of the income for any of these years until the 21st day of February, 1936, when the assessments of taxes, additional taxes, surtax and interest in question in

this appeal were made, in the aggregate amount of \$36,053.25, of which \$8,794.45 was for interest.

The returns and assessments were in substance (except as to amount) identical in respect of each of the said years.

The return and the notice of assessment for the year 1934 are set out in the Record at pages 64 and 70 respectively.

The amounts claimed for taxes (including additional tax and surtax) and for interest are summarized in the statement of claim (Record p. 13, ll. 19-40).

10 The said assessments were made under the provisions of The Income War Tax Act now embodied in sub-section (2) of section 11 of Chapter 97 of the Revised Statutes of Canada, 1927, as amended by sections 7 and 8 of Chapter 55 of the Statutes of Canada, 1934. The said section as so amended is as follows :

INCOME FROM ESTATES AND TRUSTS.

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.

20 (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 subsection one of section five of this Act.

30 (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.

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

40 (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.

Notice of appeal was served, and the other proceedings prescribed by the Act were taken, in due time to complete the appeal for hearing by the Exchequer Court of Canada (Record pp. 3-12).

*In the
Supreme
Court of
Canada.*

No. 15.
Factum of
The Trusts
and
Guarantee
Company
Limited—
continued.

*In the
Supreme
Court of
Canada.*

No. 15.
Factum of
The Trusts
and
Guarantee
Company
Limited—
continued.

The Appellant pleaded that the income in question was the income of a charitable institution and as such exempted from taxation; that the said income was accumulated for the Trust as such, and payable only to the English Trustee and was in any event not accumulated for the benefit of unascertained persons or persons having contingent interests within the meaning of s-s. 2 of section 11 of the Act. The Appellant further alternatively pleaded that if it were held that any part of the said income were held to be taxable, it was right and proper that interest should be allowed in respect of any such tax only from the date of the assessments, namely, the 21st day of February, 1936, (Record p. 14, ll. 14-41). 10

The Respondent pleaded that the said income was not the income of a charitable institution, and was income accumulated for the benefit of unascertained persons or of persons having contingent interests within the meaning of the Act, and that there was no provision in the Act for the waiving of any interest, (Record p. 15, l. 26 to p. 16, l. 27).

The learned Judge held that the said income was not income of a charitable institution (Record p. 21, l. 37 to p. 22, l. 5), but was income of a charitable trust, was not exempted from taxation, and was income accumulated for the benefit of unascertained persons or persons having contingent interests within the meaning of the Act (Record p. 21, ll. 1-31). He further held that he was not warranted in holding that the Appellant should escape payment of any of the interest charges in question (Record p. 22, l. 29 to p. 23, l. 19). He made no order as to costs (Record p. 23, ll. 20-21). The appeal, therefore, was dismissed without costs. 20

PART II.

ERRORS IN JUDGMENT APPEALED FROM.

It is submitted that the learned trial Judge erred:—

1. In holding that the income in question was not the income of a charitable institution within the meaning of the Act.

2. In holding that the said income was accumulated for the benefit of unascertained persons or of persons with contingent interests within the meaning of the Act. 30

3. In affirming the assessments in question as to interest for the period prior to the 21st day of February, 1936.

PART III.

ARGUMENT.

The points of argument herein advanced are alternative and independent, in the sense that if this Honourable Court sees fit to uphold the argument of the Appellant upon any one point, it will not be necessary in order to determine and allow this appeal to consider any point subsequently herein set out. 40

1. It is submitted that the income in question is the income of a charitable institution. It is therefore expressly exempted from taxation under section 4 (e) of the Act, which is as follows :—

“ Excepted Incomes.

4. The following incomes shall not be liable to taxation hereunder :—

10 (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 enures to the personal profit of, or is paid or payable to any proprietor thereof or shareholder therein.”

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The Settlor, by the execution of the Indenture, brought into being and constituted the organization for carrying out the charitable intention; the Settlor provided a body, the property given to the Canadian Trustee; means, in the duties imposed upon and undertaken by the Canadian Trustee, for ensuring its growth to full stature; a transfer to England of its field of function and its method of function therein by the powers given to and the duties imposed upon the English Trustee. He has not specifically provided for the permanence or any set duration of the charity, but that 20 he intended more than an ephemeral thing is evident from the size of the fund (estimated to amount in 1948 to approximately a million dollars, (Record p. 68, ll. 18–19), the size of the Town of Colne (24,752 in 1921—Encyc. Brit. 14th Ed., Vol. 6, p. 29) and the wish expressed as to the investment in Canada of funds not immediately required for the purpose of the scheme.

The whole organization or undertaking created by the Settlor, it is submitted, comes squarely within the language used by Lord Herschell and Lord Macnaghten in *Mayor, etc., of Manchester v. McAdam* (1896), A.C. 500, substituting only “ charitable ” for “ literary ” or “ scientific.” Lord 30 Herschell says, (p. 507)—

“ It may be well to consider, first, what is the meaning of the word ‘ institution ’ as used in the section. It is a word employed to express several different ideas. It is sometimes used in a sense in which the ‘ institution ’ cannot be said to consist of any persons, or body of persons, who could, strictly speaking, own property. The essential idea conveyed by it in connection with such adjectives as ‘ literary ’ and ‘ scientific ’ is often no more than a system, scheme or arrangement, by which literature or science is promoted without reference to the persons with whom the management may rest, or in whom the property appropriated for these purposes may be vested, 40 save insofar as these may be regarded as part of such system, scheme or arrangement. That is certainly a well recognized meaning of the word. One of the definitions contained in the Imperial Dictionary is as follows :—‘ A system, plan, or society, established either by law, or by the authority of individuals, for promoting any object, public or social.’ ”

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Lord Macnaghten says (p. 511) :—

“ It is a little difficult to define the meaning of the term ‘ institution ’ in the modern acceptation of the word. It means, I suppose, an undertaking formed to promote some defined purpose having in view generally the instruction or education of the public. 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. Sometimes it comprehends everything that goes to make up the institution—everything belonging to the undertaking in connection with the purpose which informs and animates the whole.”

10

2. The income is accumulated “ for the benefit of ” the trust.

The English Trustee, when its turn to function as Trustee of the Trust comes, and not until then, is the only party entitled to receive any of the income received and accumulated by the Canadian Trustee. No other could give a valid receipt for it.

This being so, the income in question is not taxable because—

(a) both the trust and the field of function thereof and the English Trustee when acting as Trustee, are confined to, and must always be, in England.

(b) neither a trust, nor a trustee is a “ person ” within the meaning of the Act, and the Act purports to tax “ persons ” only.

20

“ Person ” is defined by sec. 2 (*h*) as follows :—

“ ‘ 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.”

It is submitted that this clause (*h*), which first appeared in the Revised Statutes of 1927, is a legislative adoption of an interpretation of the former clause (*d*) of section 2 of Chapter 28 of the Statutes of Canada, 1917, similar to that adopted by Mr. Justice Audette in *Royal Trust Co. v. Minister of National Revenue* (1930) Ex. C.R. 172 at 174, where he held that the word “ trust ” used in the 1917 clause was to be interpreted as a merger or combination of companies for purposes of gain, and not a trust created under an instrument which empowers the Trustee to hold certain property and to exercise a certain power over it for the benefit of some other person, and not including such a trust as is created by the Indenture here in question.

30

This, it is submitted, excludes from taxation any such trust or trustee thereof.

Obviously, if a trust or a trustee in this sense is to be considered a “ person ”, all income received by any trustee will be taxable. There will thus be double taxation of all income of a trust received in Canada and paid, whether immediately or after accumulation, to any person in Canada. There will also be taxation of income received by a trust and properly paid out in charity or to a charitable institution.

40

3. There is, as the learned Judge points out, (Record p. 21, ll. 19-21), no provision in the Act exempting income of a charitable trust—but this, it is submitted, is not because such income is intended to be taxed, but because there is no provision for charging the income of any trust—charitable or otherwise—until it reaches the beneficiary, or can be found to be accumulated or held for taxable or possibly taxable persons.

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4. The trust here being a charitable trust, it is submitted that regard cannot be had to the “aged and deserving poor” otherwise than as a class of the community; that to do so necessitates regarding them as a fluctuating
10 body of individuals; that so to regard them destroys the legality of the trust as a charitable trust “for the benefit of the community or of an appreciably important class of the community”. Lord Wrenbury (delivering the judgment of the Board) in *Verge v. Somerville* (1924) A.C. 496, expresses the principle thus:—

“To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first enquiry must be whether it is public—whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such
20 inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot.”

5. If, notwithstanding the foregoing, it be thought open to argument that regard may be had to the “aged and deserving poor of the Town of Colne” it is submitted that the case is still not brought within sec. 11 of the Act, because—

(a) the application of the fund by the English Trustee is to be in such manner and without restriction of any kind as shall be deemed prudent to the English Trustee (Record p. 59, l. 45 to p. 60, l. 2), and
30 therefore neither the aged and deserving poor of the Town of Colne of 1948 or any subsequent year nor any individual who might be so described, can have any right, legal or equitable, to demand or receive the income here in question or any part thereof, or to give a valid receipt therefor. Therefore they are not to be treated as persons for whose benefit the income is accumulated within the meaning of the section;

(b) none of the said poor could receive as his or her income any of the income here in question. If any such individual received any part of the fund it would be merely as a gratuitous charitable
40 payment, and therefore not income.

(See Plaxton and Varcoe, *Income Tax*, 2nd Ed. pp. 159-161 and cases there cited, and particularly *Turton v. Cooper*, 92 L.T. 863; *Re A. B.*, 2 Argus Law Reports 199.)

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(c) none of the said poor could be subject to taxation under the Act, because the objects of the Settlor's charity must, by the terms of the Indenture, be resident in the Town of Colne in England.

(d) the words "unascertained persons or persons with contingent interests" are inapplicable to the circumstances of this case. The objects of the Settlor's charity are, by the terms of the Indenture, fully ascertained for all purposes relevant to taxation under the Act, and none can possibly be taxable. It has never been held that it is immaterial (for the purpose of deciding whether sec. 11 (2) of the Act is applicable) that the destination of the accumulated income is such that no recipient could be taxable under the Act. 10

In *Holden v. Minister of National Revenue* (1933), 3 D.L.R. 81, the income was accumulated for the benefit of—that is to say, would under and by force of the will there in question, become payable as of right to—natural persons who would become entitled to compel payment to themselves. What was decided was that the residence, prior to the time of distribution, of persons presumptively or contingently so entitled was irrelevant for the purposes of sec. 11 (2). There was nothing in the will to preclude the beneficiaries at the time of ascertainment or of distribution from being resident in Canada, 20 and taxable under the Act.

Here, the terms of the Indenture are such that no payment of the income here in question can be made, either by the Canadian Trustee or the English Trustee, to any person in Canada or as income.

6. If the Court is to be precluded from considering, in connection with the taxation or attempted taxation of income accumulating in a Trust, the fact that all possible ultimate beneficiaries are either not charged or are expressly excepted from taxation, then income of a trust directed to be accumulated for five years and then paid over to such one or more of several charitable institutions in Ontario, such as, say, The Hospital for Sick Children in Toronto, The Crippled Children's Foundation Fund Incorporated, and The Muskoka Hospital for Consumptives, as the trustees may at the expiration of the five years decide, would be taxable in the hands of the trustees, as being accumulated for the benefit of unascertained persons or persons with contingent interests, though all of the above are excepted from taxation. 30

7. If it be held that the income here in question is taxable, it is submitted that interest should be allowed only from the date of the first assessments, namely the 21st day of February, 1936.

Section 66 of the Act provides:—

"Subject to the provisions of this Act, the Exchequer Court shall have exclusive jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act and in delivering judgment may make any order as to payment of any tax, interest or penalty or as to costs as to the said Court may seem right and proper." 40

The assessments here in question are made under the discretionary power conferred on the Minister by sec. 55 of the Act, which is as follows :—

“ 55. Notwithstanding any prior assessment, or if no assessment has been made, the taxpayer shall continue to be liable for any tax and 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.”

10 It is submitted that the words in section 66 “ subject to the provisions of the Act ” are merely to preserve the judicial powers given to the Minister and the conclusive effect of assessments not appealed against, with which the general terms of the section would otherwise seem to be inconsistent, and that the words “ the Exchequer Court . . . may make any order as to payment of any . . . interest . . . as to the said Court may seem right and proper ” should be given their natural meaning and full effect.

The judgment appealed from is in conflict with the decision in *National Trust v. The Minister of National Revenue* (1935), Ex. C.R. 178, where interest was disallowed on a portion of the tax which the Minister had elected not to assess for some years.

20 It is submitted, therefore, that the judgment of the learned Judge is wrong, and should be reversed, and that judgment should be entered declaring that the income in question is not subject to taxation under the Act, and disallowing and setting aside the said assessments, or, alternatively, amending the said assessments by disallowing all interest charged in respect of the period prior to the 21st day of February, 1936.

S. CASEY WOOD,

G. M. JARVIS,

Of Counsel for the Appellant.

No. 16.

Factum of The Minister of National Revenue.

PART I.—STATEMENT OF CASE.

1. This is an appeal from the decision of the Honourable Mr. Justice A. K. MacLean, delivered on the 4th day of January, 1938, the appeal being taken by The Trusts and Guarantee Company Limited, acting as trustee for and on behalf of the Peter Birtwistle Trust. The Judgment appealed from disallowed the Appellant's appeal from certain assessments under the Income War Tax Act and declared that the said assessments had been properly made and were valid and binding. The assessments in question were for the years 1919 to 1934 inclusive, totalling a sum of \$27,258.80, with interest

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thereon totalling a sum of \$8,794.45, and were levied upon income accumulating in trust in the hands of the said Trustees during the respective years. The assessments were levied under and by virtue of section 11, subsection 2 of the said Act. All assessments were made on February 21st, 1936.

2. The Trust Fund was first set up under the terms of an Indenture dated October 20th, 1916, made between Peter Birtwistle and the Trusts and Guarantee Company Limited, the Trust Company having then and at all subsequent times, its head office in the City of Toronto, Province of Ontario. A copy of the said Indenture is filed herein as Exhibit No. 1 and forms part of the case (Record, p. 55). This Indenture was superseded by a second Indenture dated May 27th, 1918, which Agreement is Exhibit No. 2 (Record, p. 57), and is the Agreement which has governed the Trust Fund since May 27th, 1918. The material provision for the disposition of the corpus and accumulating income earned by the Trust Fund are contained in paragraph (b) of the said Indenture of 1918. 10

3. The Settlor died on April 19th, 1927. The income earned and accumulated by the Trustees of the said Trust Fund has been assessed in the hands of the said Trustees for the years 1919 to 1934 inclusive, such assessments being dated February 21st, 1936. The assessments are made on the Trustees by virtue of section 11, subsection 2 of the Income War Tax Act, which, at the time when the assessments herein were made, read as follows— 20

“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.”

This section as originally enacted by section 4 of Chapter 49 of the Statutes of Canada, 1920, read as follows:— 30

“Income accumulating in trust for the benefit of unascertained persons, or 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 an unmarried person.”

The original enactment of 1920 was by section 16 of the same Statute deemed to have come into force at the commencement of the 1917 taxation period. That original enactment remained in force until 1927 when it was reproduced verbatim in section 11, subsection 2 of the Revised Statute, namely Chapter 97, R.S.C. That section remained in force until 1934 when by Chapter 55, section 7, it was repealed and the following substituted therefor:— 40

“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 the income of 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."

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By section 18 of the same Act this amendment was made applicable to the income of the 1933 taxation period and fiscal periods ending therein and to all subsequent periods. In 1936, by Chapter 38, section 10 of the Statutes of that year, the section was further amended in a manner that has no bearing on the issues in this Appeal.

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10 4. Therefore, with respect to all the years 1919 to 1934, for which the assessments of income tax are in question in this Appeal, the subsection has remained the same in charging Trustees with a tax on the income accumulating in their hands for the benefit of an unascertained beneficiary or beneficiaries with contingent interests.

5. Section 2 of the Income War Tax Act, as it was in 1936, contained the following definitions :

20 “(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;”

“(k) “taxpayer” means any person paying, liable to pay, or believed by the Minister to be liable to pay, any tax imposed by this Act.”

30 6. The Imperial Parliament in 1933 enacted “The Colne Corporation Act, 1933” being 23 and 24 Geo. V. Cap. 35, the whole of which it is agreed by Counsel, if that be necessary, shall be deemed to be before the Supreme Court of Canada. The preamble of the Act is important and will be referred to. The general substance of the Act may be gathered from Section 2, which is as follows :

“2. This Act is divided into Parts as follows :—

- Part I.—Preliminary.
- Part II.—Water.
- Part III.—Gas.
- Part IV.—Electricity.
- Part V.—Lands.
- Part VI.—Joint transport committee.
- Part VII.—Streets, buildings, sewers, and drains.
- Part VIII.—Infectious disease and sanitary matters.
- Part IX.—Human food.
- Part X.—Police provisions.
- Part XI.—Finance.
- Part XII.—Miscellaneous.”

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Section 4 provides—

“ And in this Act—

“ The borough ” means the borough of Colne;

“ The Corporation ” means the mayor, aldermen and burgesses of the borough;

“ The Council ” means the council of the borough; ”

Section 140 is set out in full in the Record on page 9.

7. Section 4 of the Income Tax Act, so far as relevant, was as follows :

“ The following incomes shall not be liable to taxation hereunder,—

(d) the income of any religious, charitable, agricultural and educational institution, board of trade and chamber of commerce.”

No amendments were made to this paragraph between 1917 and the revision of the Statutes in 1927, and in the Revised Statutes of 1927 the paragraph was reproduced verbatim, appearing as section 4 (e) of Chapter 97, R.S.C. In 1935 by Section 4 of Chapter 40 of the Statutes of that year the paragraph was repealed and re-enacted with the addition of the phrase—

“ 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; ”

By section 16 of the same Act this amendment was made applicable to the income of the 1934 taxation period and fiscal periods ending therein and of all subsequent periods. During the whole period involved in the present appeal therefore the exempting clause of the Income War Tax Act giving exemption to charities provided only for an exemption in the case of

“ the income of any . . . charitable . . . institution.”

8. On the statement of facts and law, as hereinbefore set forth, except with respect to any part of the Colne Corporation Act, 1933, other than Section 140, the Learned Trial Judge held that the income taxed herein is income accumulating in the hands of The Trusts and Guarantee Company Limited for the benefit of unascertained beneficiaries, or persons having a contingent interest; that it is not the income of a charitable institution and that therefore it is properly taxed under and by virtue of section 11, subsection 2 of the Income War Tax Act. The Learned Trial Judge further held that interest is payable on the assessments appealed herein under the provisions of sections 48 and 55 of the said Act and under the corresponding sections in the original Act as amended.

PART II.—ISSUES ARISING ON THE APPEAL.

The issues which fall to be disposed of on the hearing of this Appeal are as follows :—

1. Does the Indenture (Exhibit 2, Record, p. 57) create two separate trusts with two separate Trustees or simply one trust with two Trustees ?

2. Is the income accumulating in the hands of the Trusts and Guarantee Company Limited, "accumulating in trust for the benefit of," The Municipal Council of the Town of Colne, or is it accumulating in trust for the benefit of the aged and deserving poor of the Town of Colne?

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3. Is the income accumulating in the hands of the Trusts and Guarantee Company Limited, as Trustee, income accumulating for
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 (b) Persons with contingent interests;

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10 within the meaning of the Income War Tax Act, Section 11 (2).

4. Is the income accumulating in the hands of the Trusts and Guarantee Company Limited, income of a charitable institution, 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?

5. If the issue set forth in the last preceding paragraph should be answered in the affirmative, does the benefit of the exemption provided for by Section 4 (e) extend to the income of a charitable institution locally situated outside of the limits of the Dominion of Canada?

20 6. Does the fact, if it be a fact, that the ultimate beneficiaries could not be held liable for taxation in Canada, relieve the accumulating income in the hands of the Trusts and Guarantee Company Limited from liability for assessment for income tax?

7. Is interest upon the amount of the unpaid assessments properly chargeable against the income in the hands of the Trusts and Guarantee Company Limited?

ARGUMENT

30 1. Does the Indenture (Exhibit 2, Record, p. 57) create two separate trusts with two separate Trustees or simply one trust with two Trustees?

40 The pith and substance of the Indenture (Exhibit 2, Record, p. 57) is that a fund should be accumulated in Canada for the given period and thereafter should be used for the benefit of the aged and deserving poor of the Town of Colne. The purpose of the settlor in having the fund invested and accumulated in Canada is clearly shown in paragraph (b) of the said Indenture (Record, pp. 59-60) being expressed as his belief that the fund would be "likely to return a better rate of interest than can be readily obtained in England." The Trusts and Guarantee Company Limited would not be in a good position to exercise any judgment as to the distribution of the fund and, therefore, the actual distribution among the aged and deserving poor of the Town of Colne is left to the discretion of the Municipal Council of that Town. There is nothing in this provision to create two separate trusts; but rather two

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instruments are used for the purpose of carrying out the one intent; viz. the accumulation and distribution of the fund donated by the settlor.

2. Is the income accumulating in the hands of the Trusts and Guarantee Company Limited, "accumulating in trust for the benefit of" the Municipal Council of the Town of Colne, or is it accumulating in trust for the benefit of the aged and deserving poor of the Town of Colne?

It cannot be suggested that the income accumulating in the hands of the Trusts and Guarantee Company Limited was accumulating in trust for the benefit of the Municipal Council of the Town of Colne. That Council was simply an instrument for distribution to the aged and deserving poor. If we are to accept the Appellant's contention that the Municipal Council was a secondary Trustee, then it must follow that they could not obtain any benefit from their trust. 10

LEWIN ON TRUSTS, 13 Ed. p. 255,
Section 5 and p. 261 Section 20.

The Town of Colne Act, Section 4 clearly distinguishes between the Corporation of the Town of Colne and the Municipal Council thereof. Upon no construction of the Indenture could it be suggested that the Municipal Council is intended to be a beneficiary of the trust. They were merely the instruments for distributing the accumulated money; and so the income accumulating was not, in the words of Section 11 (2) of the Income War Tax Act, "Income accumulating in trust for the benefit of" the Municipal Council of the Town of Colne. 20

The beneficiaries of the trust are and could only be the aged and deserving poor of the Town of Colne, and it is for their benefit that the income of the fund is accumulating in trust.

3. Is the income accumulating in the hands of the Trusts and Guarantee Company Limited, as Trustee, income accumulating for

(a) Unascertained persons; or

(b) Persons with contingent interests; 30

within the meaning of the Income War Tax Act, Section 11 (2).

(a) *Unascertained Persons* :

It is the contention of the Appellant that because it is to pay the original fund with accumulations to the Municipal Council of the Town of Colne, therefore the income is "accumulating in trust for" ascertained persons. The Appellant fails to distinguish between the Municipal Corporation and the Municipal Council and fails to give effect to their own contention that the payee is a Trustee, and, as such, could not benefit from the accumulating income. 40

If the reasoning under the preceding heading is correct and the only beneficiaries of the trust and those for whose benefit the income is accumulating in the hands of the Trusts and Guarantee Company Limited are the

aged and deserving poor of the Town of Colne, then there could be no question that the income is accumulating for the benefit of unascertained persons. How could it be suggested that those who will be the aged and deserving poor of that Town in the year 1948 and subsequent years are now ascertained persons? Indeed, it is open to argument that on the true construction of section (b) of Exhibit 2 (Record, pp. 59-60), not all the aged and deserving poor but only such of them as are selected by the Municipal Council of the Town of Colne are to benefit under the trust. If this be the true construction, then the beneficiaries of the trust are even still less ascertained at the present time.

(b) *Persons with contingent interests :*

Where there are beneficiaries of a trust, their interest must be either vested or contingent.

McLeod vs. The Minister of National Revenue,
1926, S.C.R., p. 457, at p. 471.

There is clearly no vested interest in any person whatsoever under the Indenture (Exhibit 2) and, therefore, the interest conferred upon the ultimate beneficiaries of the trust must be and are contingent interests. The income accumulating in the hands of The Trusts and Guarantee Company Limited is income accumulating for the benefit of persons with contingent interests within the meaning of section 11 (2) of the Income War Tax Act.

4. Is the income accumulating in the hands of the Trusts and Guarantee Company Limited, income of a charitable institution, 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?

Section 4 of the Income War Tax Act provides that certain income shall not be liable to taxation under the Income War Tax Act and such exempted income includes

“ 4. (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 Appellant submits that the income is accumulating for the benefit of the Town of Colne and that it is a charitable institution, with the result that the income is not liable to taxation under the Income War Tax Act.

It is first necessary to distinguish between a “ charity ” and again “ a charitable institution. ” A charitable institution is an organization which may be either incorporated or unincorporated, formed and continuing in existence for the purpose of receiving, investing and managing moneys and disbursing them for a charitable object.

England vs. Webb, 1898, A.C. 758 at 759.

Re Douglas, 35 Chy. Div. 472 at p. 484.

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In Re The Will of William Adams.
8 Gazette Law Reports (N.Z.), p. 46.
In Re The Will of McGregor.
24 Argus Law Reports 17.
*Adamson vs. Melbourne & Metro-
politan Board of Works, 1929, A.C.*
142.

The Town of Colne is a Municipal Corporation incorporated and em-
powered to carry on the ordinary functions of a Municipal Corporation, as
appears from the Town of Colne Act. The full title of the Act is

10

CHAPTER XXXV

A.D. 1933

“ An Act to amend the provisions of the Colne and Marsden
Local Board Act 1881 with respect to compensation water to confer
further powers upon the corporation of Colne with respect to their
water gas and electricity undertakings to enact further provisions
with respect to the transport services in the borough and elsewhere
to make better provision for the health local government and finance
of the borough and for other purposes. (18th July, 1933.) ”

The powers and duties of a Municipal Corporation may be gathered 20
without reading the whole Act from Section 2. Clearly it is not a charitable
institution but a Municipal Corporation. The power of the Town of
Colne to accept and deal with a charitable donation, if it have any
such power, would appear to be given by Section 140 (1) of the Town
of Colne Act, printed in full (Record, p. 9). It is submitted that the pro-
visions of this subsection do not vest the Town of Colne with power to
accept and manage a charitable gift.

It must be always borne in mind, however, that the Trustee for dis-
tribution is not the Municipal Corporation; but is the Municipal Council of
the Town of Colne. The Town of Colne Act, Section 4, clearly distinguishes 30
between the Corporation and the Council. If the true construction of
Exhibit 2 is that the income accumulating in the hands of the Trusts and
Guarantee Company Limited is accumulating for the benefit of the Municipal
Council of the Town of Colne, then clearly the accumulating income is not
the income of a charitable institution.

The functions and duties of the Municipal Council of the Town of Colne
are set forth and defined in the Town of Colne Act. It is impossible to
suggest that the Municipal Council of the Town of Colne is a charitable
institution.

5. If the issue set forth in the last preceding paragraph should 40
be answered in the affirmative, does the benefit of the exemption
provided for by Section 4 (e) extend to the income of a charitable
institution locally situated outside of the limits of the Dominion of
Canada?

There is nothing in the Income War Tax Act which in express words says that the exemption from liability for taxation of the income of a charitable institution shall be limited to charitable institutions carrying on their charitable work within the territorial limits of the Dominion of Canada. It is, however, submitted that that must be the purport and intention of the Act. The principle of public policy upon which the income of charitable institutions is not liable for taxation is that its expenditure for charitable objects relieves the taxpayers of the necessity which might otherwise fall upon them to expend monies to accomplish the same charitable objects.

- 10 There could be no relief to taxpayers in the Dominion of Canada from the expenditure of the original corpus and the accumulated income of the fund in question for the benefit of the aged and deserving poor of the Town of Colne in Lancashire, England, and, therefore, the grounds of public policy upon which such income is declared not to be liable for taxation do not exist in the case under consideration. It must be apparent that the Parliament of Canada had this ground of public policy in mind and that they intended to exempt from liability for income tax only the income of charitable institutions within the Dominion. The provision goes back to the inception of the Income War Tax Act and it is not to be assumed that
- 20 the Parliament of Canada were legislating with intent to effect an extra-territorial result, or to relieve taxpayers of an English town.

England vs. Webb, 1898, A.C. p. 758,
at p. 761.

In Re The Will of William Adams,
8 Gazette Law Reports (N.Z.)
p. 46, at p. 52.

Jeffreys vs. Boosey, 4 H. of L. p. 815.

The intention of Parliament may also be found in the charging Section of the Income War Tax Act. Section 9 clearly has territorial limitations.

- 30 It reads in part as follows :

“ 9. There shall be assessed, levied and paid upon the income during the preceding year of every person

(a) residing or ordinarily resident in Canada during such year; or

(b) who sojourns in Canada for a period or periods amounting to one hundred and eighty-three days during such year; or

(c) who is employed in Canada during such year; or

(d) who, not being resident in Canada, is carrying on business in Canada during such year; or

- 40 (e) who, not being resident in Canada, derives income for services rendered in Canada during such year, otherwise than in the course of regular or continuous employment, for any person resident or carrying on business in Canada;

(f) who, before his appointment was a resident of Canada, and is now or hereafter becomes a Minister, High Commissioner, officer, servant or employee of the Government of Canada, or an

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agent general for any of the provinces of Canada, or any officer, servant or employee thereof, resident outside of Canada, except upon income received by way of salary from the said Government;

a tax at the rates applicable to persons other than corporations and joint stock companies set forth in the first Schedule of this Act upon the amount of income in excess of the exemptions provided in this Act: Provided that the said rates shall not apply to corporations and joint stock companies.”

6. Does the fact, if it be a fact, that the ultimate beneficiaries 10 could not be held liable for taxation in Canada, relieve the accumulating income in the hands of the Trusts and Guarantee Company Limited from liability for assessment for income tax ?

The general scheme of the Income War Tax Act is to levy an assessment on all incomes earned or accrued in Canada, not as a charge upon property but as payable by “ persons ” as defined in the Act, with only those exceptions which are provided for by Section 4. If the person entitled to the income be definitely ascertained and be a non-resident of Canada, the persons making payments to such non-residents must deduct the prescribed tax (*see* Section 9B). This is true whether the person making the payment is a 20 Trustee or a debtor or whomsoever they may be. In Section II, subsection 2, with which we are particularly concerned in this Appeal, a charge is made upon the income of unascertained persons, or persons with contingent interest, without any limitation whatsoever as to the persons who are or may become the beneficiaries of the trust. The tax is based upon the fact that the person managing the fund and receiving the income is within Canada. The tax is imposed upon the income in such person’s hands; both the person and the income, are subject to the jurisdiction of the Parliament of Canada; and there is no ground upon which it could be said that such income is not taxable. The contention that the ultimate 30 beneficiaries could not be taxed in Canada is entirely beside the point.

The matter is no longer one merely of argument, but has been expressly determined in accordance with this view in

McLeod vs. The Minister of National Revenue, 1926, S.C.R. p. 457.

Holden vs. Minister of National Revenue, 1932, S.C.R. p. 655, 1933, A.C. 526.

Minister of National Revenue vs. Royal Trust Company, 1931, 3 40 Dominion Law Reports, p. 474.

7. Is interest upon the amount of the unpaid assessments properly chargeable against the income in the hands of the Trusts and Guarantee Company Limited ?

Sections 48 and 55 of the Income War Tax Act give statutory authority for the collection of interest. Indeed, Section 48 makes the collection of interest the absolute duty of the Minister of National Revenue. Sections 48 and 55 are as follows :—

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10 “ 48. Every person liable to pay any tax under this Act shall send with the return of the income upon which such tax is payable not less than one-quarter of the amount of such tax, and may pay the balance, if any, of such tax, in not more than three equal bi-monthly instalments thereafter, together with interest at the rate of six per centum per annum upon each instalment from the last day prescribed for making such return to the time payment is made.

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“ 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 argument of the Appellant is based upon Section 66 of the Act, which reads as follows :

20 “ 66. Subject to the provisions of this Act, the Exchequer Court shall have exclusive jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act and in delivering judgment may make any order as to payment of any tax, interest or penalty or as to costs as to the said Court may seem right and proper.”

30 Under this Section the Appellant contends that liability for interest (no penalties have been imposed in this case) is a matter entirely within the discretion of the Court and that the Court should not have imposed interest in view of the fact that the assessments were not made until the year 1936. The Respondent relies upon the reasoning of the Learned Trial Judge in his Reasons for Judgment—Record, p. 18, particularly at pp. 22–23. Whatever may be the meaning of the latter part of Section 66, it is submitted that it could not give the Court power to relieve the Minister from the mandatory provisions of Section 48. The later words of the Section cannot be construed to give the Exchequer Court an arbitrary discretion, nor any other than a judicial discretion to make any order which is consistent with the provisions of the Act as a whole. To accept the Appellant’s interpretation of this Section would mean that the Exchequer Court was empowered arbitrarily and without regard to the express charging
40 provisions of the Act, to relieve any taxpayer from the payment of any tax no matter how completely supported by the other provisions of the Act the assessment might be. Parliament could not have intended to confer any such power on the Exchequer Court. In any event if there be anything left to the discretion of the Court in regard to interest, the

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Judge of first instance has exercised that discretion and his discretion should not lightly be disturbed.

On all issues herein the Respondent relies upon the Reasons for Judgment of the Learned Trial Judge.

The Respondent submits that this Appeal should be dismissed with costs payable by The Trusts and Guarantee Company Limited.

JOHN JENNINGS

J. R. TOLMIE

Of Counsel for the Respondent.

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Formal
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No. 17.
Formal Judgment.

10

IN THE SUPREME COURT OF CANADA

Monday, the 19th day of December, A.D. 1938.

Present :

THE RIGHT HONOURABLE SIR LYMAN POORE DUFF, P.C., G.C.M.G.,
Chief Justice;

THE HONOURABLE MR. JUSTICE CROCKET;

THE HONOURABLE MR. JUSTICE DAVIS;

THE HONOURABLE MR. JUSTICE KERWIN;

THE HONOURABLE MR. JUSTICE HUDSON.

20

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 - - (Appellant) Appellant
and

THE MINISTER OF NATIONAL REVENUE - - (Respondent) Respondent.

The appeal of the above named Appellant from the judgment of the Exchequer Court of Canada pronounced in the above cause on the 4th day of January in the year of our Lord one thousand nine hundred and thirty-eight whereby the appeal from the decision of the Minister herein was dismissed, having come on to be heard before this Court on the 14th and 30
15th days of June in the year of our Lord one thousand nine hundred and thirty-eight in the presence of Counsel as well for the Appellant as for the Respondent, whereupon and upon hearing what was alleged by Counsel aforesaid this Court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment—

1. This Court did order and adjudge that the said appeal should be and the same was allowed; that the said judgment of the Exchequer Court

of Canada should be and the same was reversed and set aside; and that the assessments in question for the year 1919 to 1934 inclusive made under the Income War Tax Act and amendments should be and the same were set aside.

2. And this Court did further order and adjudge that the said Respondent should and do pay to the said Appellant the costs incurred by the said Appellant as well in the said Exchequer Court of Canada as in this Court.

(Sgd.) J. F. SMELLIE

Registrar.

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No. 18.

Reasons for Judgment.

(a) DAVIS, J. (concurrent in by the CHIEF JUSTICE and CROCKET, J.).

On the 27th day of May, 1918, Peter Birtwistle, of the city of London in the province of Ontario, made a deed of settlement of certain real and personal properties to The Trusts & Guarantee Company Limited, of the city of Toronto in the said province as trustee upon the terms and conditions therein set forth. This settlement superseded an earlier settlement of the 20th of October, 1916, with respect to a sum of \$100,000, the
20 investments of which were covered, together with additional property, by the settlement of the 27th of May, 1918. The Trust Company was to administer and manage the trust [subject to the directions and control of the settlor during his lifetime and after his death in its absolute discretion] with the usual powers of administration and management of the trust fund. The fund was to be held and accumulated until the expiration of 21 years after the death of the settlor, at which date the trustee was to pay the whole of the then fund to the Municipal Council of the town of Colne in Lancashire, England, to be used by the said Council for the benefit of the aged and deserving poor of the said town of Colne in such manner
30 and without restriction of any kind, as shall be deemed prudent to the said Council. The exact words of the provision are as follows:

“The trustee shall pay the whole of the investment account, together
“ with accumulations thereon, to the Municipal Council of the town of Colne
“ in Lancashire, England, at the end of the period of twenty-one years after
“ the death of the settlor, to be used by the said Council for the benefit of
“ the aged and deserving poor of the said town of Colne in such manner
“ and without restriction of any kind, as shall be deemed prudent to the
“ said Council, save and except and the settlor hereby declares it to be his
“ wish that the said Council should insofar as possible or convenient, leave
40 “ any of the said fund which is not required for immediate distribution to be
“ held by the trustee hereunder and invested by the trustee under an
“ arrangement similar to that comprised in this Indenture, the settlor
“ believing that it will be advantageous for the Council to retain this

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“ colonial investment which the settlor considers likely to return a better rate of interest than can be readily obtained in England.”

Peter Birtwistle died on April 19th, 1927; the fund with accumulations would therefore become payable to the Council of the town of Colne on April 19th, 1948. At December 31st, 1936, the fund amounted to \$572,767.88 and it was estimated by the general manager of the Trust Company that if the trust were continued to the expiration of the twenty-one years from the date of death, the fund would then amount to approximately one million dollars. The fund has been earning approximately \$25,000 a year. The town of Colne became desirous of terminating the trust and receiving immediate payment of the fund; the first intimation was a letter from the Town Clerk to the trustee of the 5th of September, 1933. Subsequently the question was raised in proceedings taken in the Supreme Court of Ontario for approval of a proposed compromise whereby substantial amounts were to be paid over to the town of Colne at that time. Rose, C.J., refused to approve the proposed agreement, 1935 O.R., 433. 10

The Trust Company each year (1919 to 1934 inclusive) reported to the Dominion Government on the regular form required to be filed by trustees, executors, administrators, assignees, receivers and persons acting in a fiduciary capacity, known as Form T-3, the amount of the income received. The purpose of this return is for information and not for taxation at the source. The amount of the income was set out opposite the printed words “ Income accumulating in hands of Trustees ” and by way of information there were written in under the printed heading “ Name and address of Beneficiary ” on the form, the words “ Income accrues to the Municipal Council of Colne, England, for the benefit of aged and deserving poor.” 20

No assessment for income taxation in respect of the accumulating income from this fund was made by the Dominion of Canada under the Income War Tax Act 1917 and amendments (now R.S.C. 1927 ch. 97) during any of the years 1919 to 1934 inclusive until February 21st, 1936, when assessments were made for all these years at the one time. To the normal tax were added surtaxes and interest aggregating \$36,053.25. Of this sum \$8,794.45 was interest alone. It is rather obvious that the litigation in the Ontario courts in 1935 attracted the taxing officials of the Dominion to endeavour to collect an income tax from this fund. The trust company denied that it was liable to pay a Dominion income tax on the income from the fund. The assessments were actually made against “ The Peter Birtwistle Trust ” but no objection was taken by the trust company to this error; obviously the fund itself could not be assessed. 30

Speaking broadly (apart from non-residents) the Dominion income tax legislation does not contemplate taxation at its source but imposes the tax upon the persons or corporations who receive the income. A beneficiary under a will, for instance, receives his income from the estate intact; he is directly assessed by the Dominion upon the sum which he receives. The executor is required to make a return of the income received by him from the estate and to state the names and addresses of the beneficiaries entitled to that income. But there is a section in the Income War Tax 40

Act, 11 (2), which provides that where income is accumulating in trust for the benefit of unascertained persons or persons with contingent interests that income shall be taxable in the hands of the trustee. The original enactment was by sec. 4 of ch. 49 of the Statutes of Canada 1920, and read as follows :—

Income accumulating in trust for the benefit of unascertained persons, or 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 an unmarried person.

10 By sec. 16 of the 1920 statute, this section was deemed to have come into force at the commencement of the 1917 taxation period. The original enactment remained in force until 1927 when it was reproduced verbatim as sec. 11 (2) of the Revised Statutes of 1927, ch. 97. The section remained in force until 1934 when by ch. 55, sec. 7 of the Statutes of 1934, the section was repealed and the following substituted therefor :

20 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, 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.

By sec. 18 of the 1934 statute this new section was made applicable to income of the 1933 taxation period and to all subsequent periods. In 1936 by ch. 38, sec. 10 of the Statutes of that year the section was further amended but without any bearing on the question at issue in this appeal.

Section 2 of the Income War Tax Act as it was in 1936 contained the following definitions :

30 (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 ;

(k) " taxpayer " means any person paying, liable to pay, or believed by the Minister to be liable to pay, any tax imposed by this Act.

The Colne Corporation Act 1933 (being Imperial statute 23 and 24 George V. ch. 35) by sec. 140 empowers the Corporation of Colne to accept, hold and administer any gift of property, whether real or personal, for any public purpose connected with the borough.

40 It may be convenient to mention here that sec. 4 of the Income War Tax Act, so far as relevant, provides :

The following incomes shall not be liable to taxation hereunder:—

(d) the income of any religious, charitable, agricultural and educational institution, board of trade and chamber of commerce.

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(a) Davis J.
(concurring
in by the
Chief Justice
and Crocket
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tinued.

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(a) Davis J.
(concurrent
with the
Chief Justice
and Crocket
J.)—con-
tinued.

It was contended that upon a proper construction, the exemptions of subsection (d) must be confined territorially to institutions that are within Canada but it is not necessary in the view I take of the appeal to put a construction upon the subsection.

Section 11 (2), which is a charging section, contemplates income that will vest in and ultimately pass to persons for the time being unascertainable, such for instance as unborn issue, or to persons whose rights are for the time being merely contingent interests. The statute is dealing generally with income of persons or corporations. The trust fund with which we are dealing is not intended to pass, either capital or income, to any particular person or persons; the fund was created for a purpose, not for any particular person or persons. The purpose was that the fund should be used "for the benefit of the aged and deserving poor" of the town of Colne. It was an arrangement or undertaking established by the Settlor for promoting a defined public or social object without reference to the property appropriated for the purpose becoming vested at any time in any particular person or persons. Aged and deserving poor cannot be regarded otherwise than as a class in the community; to regard them otherwise is to destroy the character of what is obviously a charitable trust. No particular person will ever acquire a right to demand and receive the beneficial interest in the income from the fund, or in any part thereof. The population of the town of Colne is said to be about 25,000 and it is inconceivable that when the town in 1948 receives approximately a million dollars it will distribute it, or any substantial part of it, among particular persons; the purpose of the Settlor will not improbably be satisfied by the erection and maintenance of a hospital or a home or some such institution that will serve the needs of the aged and deserving poor of the town. If I understood counsel aright during the argument, that was the sort of use to which the town intended to put the money when it sought in 1935 to obtain from the Ontario Court payment over to it of the fund, or substantial portions of it.

The particular section in question, sec. 11 (2), was considered by the Privy Council in *Holden v. The Minister of National Revenue*, 1933 A.C., 526, and in the judgment of their Lordships delivered by Lord Tomlin the section was said to be a true charging section and fixed the trustee of the accumulating income with liability for the tax. But the accumulating income in that case would, by force of the will of the testator there in question, inevitably become payable as of right at a future date to particular persons who would become entitled to compel payment of such income to themselves. The point in issue now before us did not arise for consideration in that case.

Under the trust that is before us the income is not being accumulated for persons presently unascertainable or for persons with merely contingent interests within the meaning of sec. 11 (2). It is being accumulated for a purpose—and the purpose is to make provision for the benefit of the aged and deserving poor of the town of Colne. It is not suggested that the accumulating income is taxable except under sec. 11 (2) and as that section

does not apply, the income of the fund in the hands of the trust company was never taxable under the statute.

The appeal should be allowed and the judgment appealed from and the assessments in question set aside, with costs to the appellant throughout.

(b) HUDSON, J. :

The charging section of the Income War Tax Act applicable to this case, if any, is section 11 (2) and after much hesitation I have come to the conclusion that income accumulated in the trust here is not for the benefit of unascertained persons within the meaning of that section. I
10 think that the persons there intended are persons who might become entitled to specific portions of the fund, and not to a general class who would ultimately get the benefits of the fund in the way of charitable assistance.

For this reason I think that the appeal should be allowed and the judgment appealed from and assessment set aside.

(Sgd.) A. B. H.

(c) KERWIN, J. :

Under the Agreement of May 27th, 1918, between the Settlor, Peter Birtwistle, and the Trustee, The Trusts and Guarantee Company, Limited, the distinction between the borough of Colne and the Council of the Borough
20 is not maintained. By Clause 2 (b) the Trustee is to pay the whole of the investment account provided for by the Agreement, together with accumulations, to the Municipal Council of the Town of Colne at the end of the period of twenty-one years after the death of the Settlor "to be used by the said Council for the benefit of the aged and deserving poor of the said Town of Colne in such manner and without restriction of any kind, as shall be deemed prudent to the said Council." On the other hand, under the latter part of Clause (d) of paragraph 2 "the Settlor hereby expressly relinquishes and surrenders to the Trustee and the Municipality of Colne all the said income in excess of the amount thereof necessary to cover his
30 expenses of living," and under Clause (g) it is provided that :—

"Upon the payment over to the Municipality of Colne at the expiration of the period hereinafter determined, together with interest at the rate and in the manner guaranteed hereunder, the securities held by the Trustee in respect of the said Investment Account shall become the property of the Trustee freed from the terms of the trusts hereby created in reference to the said account without any formal assignment or release from the Settlor or the Council of the Municipality of Colne."

I have mentioned the terminology of the Agreement in this one respect
40 in order to draw attention to what appears to me to be another inexactitude. Clause 3 of the Agreement provides :—

"The Trustee shall render to the Settlor regular statements in such form as may be required quarterly during the life of the Settlor and thereafter on similar dates to the Beneficiaries of the estate."

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A careful reading of the Agreement leaves no doubt in my mind that there is but one trust with two successive trustees and that the real beneficiaries of the trust are the aged and deserving poor of Colne.

This becomes of importance in considering both main grounds of appeal. The first is whether the members of the class who will benefit are unascertained persons within the meaning of sub-section 2 of Section 11 of the Income War Tax Act :—

“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.” 10

It has been determined in *Holden v. Minister of National Revenue* (1933) A.C. 526, that this is a true charging section, and in my opinion the question whether such members are unascertained persons within the ambit of that provision should be answered in the affirmative. Until the period of distribution arrives the recipients of the Settlor's bounty are unascertainable.

The second ground raised by the Appellant is that the income is income of a charitable institution within the meaning of those words as used in Section 4 (e) of the Act and therefore exempt from taxation. What has already been said disposes of the suggestion that the income is income of anyone other than the unascertainable aged and deserving poor of Colne and I do not find any assistance in the English cases referred to, which deal with statutes expressed in terms totally unlike the enactment under consideration. 20

It has also been urged that in any event no interest is payable upon the tax prior to the date of assessment. Commencing with the year 1919 the Trustee furnished annual returns under the Act and under the heading “Name and Address of Beneficiary” inserted “Income accrues to the Municipal Council of Colne, England, for the benefit of aged and deserving poor.” No assessment was made until 1936—apparently in consequence of the publicity occasioned by the report of a decision of the Supreme Court of Ontario (1935 O.R. 433) given on an application made by the trustee for approval of a proposed agreement between it and the Mayor, Aldermen and Burgesses of the Borough of Colne. The assessment was then made for the years 1919 to 1934 inclusive and included interest at the statutory rate from the times each annual tax was payable. 30

Interest is provided for by Sections 48, 49 and 54 and Section 55 enacts :— 40

“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.”

It is suggested that in applying the provisions of these sections a difficulty arises by virtue of Section 66 :—

“ Subject to the provisions of this Act, the Exchequer Court shall have exclusive jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act and in delivering judgment may make any order as to payment of any tax, interest or penalty or as to costs as to the said Court may seem right and proper.”

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It is contended that this provision leaves it to the Court's discretion whether
10 interest should be exacted from the taxpayer.

The suggested difficulty disappears, however, when Section 66 is considered in conjunction with the sections dealing with the rights of a party assessed who objects to the amount at which he has been assessed for income tax or who considers that he is not liable to taxation. By Section 58 such a person may serve a notice of appeal upon the Minister of National Revenue who shall then “duly consider the same and shall affirm or amend the assessment appealed against and shall notify the appellant of his decision by registered post.” (Section 59.) If the appellant is dissatisfied with the Minister's decision, he may notify the Minister that he desires his appeal
20 to be set down for trial, and furnish a statement of facts (Section 60). The Minister is to reply thereto (Section 62) and transmit to the Exchequer Court certain documents and the matter is thereupon deemed to be an Action in that Court (Section 63) Section 65 provides for the Court permitting any fact or statutory provision not set out in the notice of appeal or notice of dissatisfaction to be pleaded or referred to and empowers the Court to refer the matter back to the Minister for further consideration. Then comes Section 66 already quoted.

In my opinion this Section is merely an enactment establishing the exclusive jurisdiction of the Exchequer Court to deal with the dispute.
30 The power of the Court to make any Order as to payment “of any tax, interest or penalty” is similar to the power conferred upon the Minister by Section 55 to “assess, re-assess or make additional assessments upon any person for tax, interest and penalties.” In any event the opening words of Section 66, “Subject to the provisions of this Act,” make it evident, I think, that the Court has no power to disregard the plain provisions of the Act imposing upon the taxpayer a liability for interest. The question of costs stands in a different position and there appears to be nothing in the Act to prevent the Court withholding costs from the Minister of National Revenue when successful and as a matter of fact that is what
40 was done by the President of the Exchequer Court in the present case.

I would dismiss the appeal without costs.

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Privy
Council.

No. 19.

Order in Council granting special leave to appeal to His Majesty in Council.

The 25th day of May 1939.

No. 19.
Order in
Council
granting
special leave
to appeal to
His Majesty
in Council,
25th May,
1939.

* * * * *

Whereas there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 12th day of May 1939 in the words following, viz. :—

“ Whereas by virtue of His late Majesty King Edward the Seventh’s Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the Minister of National Revenue in the matter of an Appeal from the Supreme Court of Canada 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 between the Petitioner Appellant and The Trusts and Guarantee Company Limited as Trustees of the Peter Birtwistle Trust Respondents setting forth (amongst other matters) that the Petitioner desires special leave to appeal from a Judgment of the Supreme Court dated the 19th December 1938 which by a majority of four Judges to one reversed a Judgment of the Exchequer Court of Canada dated the 4th January 1938 which had held that the Petitioner 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; that 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; any 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

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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 : that Peter Birtwistle died on the 19th April 1927 and the fund will by the 19th April 1948 amount in the opinion of the Respondents to over \$1,000,000 : that the income accumulated by the Respondents for the benefit of the fund was in 1918 \$7,111.35 and (with the exception of a slight fall in 1923), increased each year and in 1934 amounted to \$25,945.60 : that in 1937 the income was \$28,581.55 : that in each year from 1919 to 1934 the Respondents supplied to the Petitioner on the regular form the information required from trustees : that 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 ' : that the Petitioner 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 respect of the income in any of these years : that through certain proceedings in the Supreme Court of the Province of Ontario in the year 1935 the Petitioner first became aware that the income of the fund was accumulating in the hands of the Respondents and in February 1936 the Petitioner through his Commissioner of Income Tax made and forwarded to the Respondents notices of assessments for income tax during all the years 1919 to 1934 : that the total amount claimed including interest was \$36,053.25 : that the Respondents appealed to the Petitioner who affirmed the assessments whereupon the Respondents appealed to the Exchequer Court and alleged that they were under no liability to income tax on grounds set forth in the Petition : that the Exchequer Court dismissed the Appeal : that the Respondents appealed to the Supreme Court which by Judgment dated the 19th December 1938 allowed the Appeal and held the Respondents not liable to taxation ; that the amount directly involved in the Appeal is very substantial and it is estimated that during the period of accumulation a sum will be involved of approximately \$150,000 : that the Petitioner also humbly submits that the case raises an important point of law of general public importance throughout Canada and is fit to be determined by Your Majesty in Council : And humbly praying Your Majesty in Council to order that the Petitioner shall have special leave to appeal from the Judgment of the Supreme Court dated the 19th December 1938 or for such further or other Order as to Your Majesty in Council may appear fit :

*In the
Privy
Council.*

No. 19.
Order in
Council
granting
special leave
to appeal to
His Majesty
in Council,
25th May,
1939—*con-
tinued.*

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30

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*In the
Privy
Council.*

No. 19.
Order in
Council
granting
special leave
to appeal to
His Majesty
in Council,
25th May,
1939—*con-
tinued.*

“ The Lords of the Committee in obedience to His late Majesty’s said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Supreme Court of Canada dated the 19th day of December 1938 :

“ And Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioner upon the hearing of the Petition ought to be accepted 10 (subject to any objection that may be taken thereto by the Respondents) as the Record proper to be laid before Your Majesty on the hearing of the Appeal.”

His Majesty having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly. 20

EXHIBITS.

1.—Agreement between Settlor and The Trusts and Guarantee Company Limited

EXHIBIT I.

Memorandum of Agreement made in duplicate this 20th day of October, 1916.

BETWEEN

PETER BIRTWISTLE OF THE CITY OF LONDON IN THE COUNTY OF MIDDLESEX,
ESQUIRE, HEREINAFTER CALLED "THE INVESTOR,"

Of the First Part,

10

and

THE TRUSTS AND GUARANTEE COMPANY, LIMITED, OF TORONTO, CANADA,
HEREINAFTER CALLED "THE TRUSTEE," - Of the Second Part.

Whereas the Investor has paid over to the Trustee the sum of One Hundred Thousand Dollars (\$100,000.00) under the terms and subject to the conditions contained in an agreement dated 20th September, 1916, and has by Indenture of even date herewith transferred to the Trustee further assets, real and personal, to be converted by the Trustee into moneys and the proceeds thereof added from time to time to the said fund of One Hundred Thousand Dollars (\$100,000.00).

20 Now this Indenture witnesseth that the parties hereto hereby cancel and revoke the said agreement dated 20th September, 1916, and hereby covenant, agree and declare that the said fund of One Hundred Thousand Dollars (\$100,000.00) and all additions thereto from time to time made pursuant to the said agreement of even date herewith shall be held by the Trustee subject to the trusts, terms and conditions hereinafter set out, that is to say :

30 1. The Trustee shall invest and reinvest the said fund in or loan upon such securities as it deems best without being confined to such investments as Trustees and Executors are by law required to invest in and the Trustee shall have the same liberty of investment after as well as before the death of the said Investor, such investments or loans to be made in the name of the Trust Company but to be held by it as trustee for the Investor according to the terms hereof.

40 2. The Trustee hereby guarantees the repayment of the whole corpus of the said fund to such person, persons or corporation as the Investor may by will or otherwise appoint, at the end of the period of twenty-one (21) years after the death of the Investor with interest on the corpus of the said fund in the meantime at the rate of five and one-quarter per cent. (5¼%) per annum from the date on which the said fund or any part thereof is paid over to the Trustee, such interest to be payable in quarterly instalments on the 1st days of January, April, July and October in each year during the term of this agreement, the first of such payments of

Exhibits.

1.

Agreement
between
Settlor and
The Trusts
and
Guarantee
Company
Limited,
20th Octo-
ber, 1916.

Exhibits.
—
1.
Agreement
between
Settlor and
The Trusts
and
Guarantee
Company
Limited,
20th Octo-
ber, 1916—
continued.

interest to be made on the 1st day of January next. Payments of interest are to be made to the Investor or to such person, persons or corporations as he may by will or otherwise appoint.

3. In consideration of this guaranty the Trustee shall be entitled to retain for its own use and benefit by way of remuneration for such guaranty and management the surplus of interest or profit, if any, resulting from the investment or loaning of the said fund over and above the rate of interest payable to the Investor as set forth in the preceding paragraph hereof.

4. The Investor may draw the whole or any part of the income to 10
which he is entitled hereunder from time to time but in the event of the Investor not requiring payment of the whole amount of interest earned on this fund from time to time, the Trustee will on the 1st of January in each year form a rest and the balance of the income or interest on the said fund for the preceding year which has not been drawn or disposed of by the Investor shall be added to and become a part of the corpus of the said fund.

5. Upon the payment of the said fund and interest at the rate and in the manner guaranteed hereunder, the security shall become the property 20
of the Trustee freed from the terms of the trust hereby created without any formal assignment or release from the Investor.

6. The Investor shall have no right to withdraw or demand payment of the whole or any part of the corpus of the said fund at any time before the maturity of this agreement save and except that the Trustee hereby agrees if and when required by the Investor to advance to him a sum of money not greater in amount than one-half year's interest at the rate of five and one-quarter per cent. ($5\frac{1}{4}\%$) per annum on the funds at such time in the hands of the Trustee and as security for such advance if and when made the Trustee shall have a charge on the corpus of the said fund in its 30
hands and for the purpose of the calculation of interest the corpus shall be reduced by the amount of such advance but such advance shall be repaid to the Trustee out of the income thereafter coming to its hands until the whole amount of such advance has been repaid.

In witness whereof the Investor has hereunto set his Hand and Seal and the Trust Company has caused its Corporate Seal to be hereto affixed attested by the signature of its duly authorized Officer.

Signed, sealed and delivered
in the presence of

R. C. WINLOW.

P. BIRTWISTLE. 40

The Trusts and Guarantee Company, Limited,

E. B. STOCKDALE,
General Manager.

2.—Agreement between Settlor and The Trusts and Guarantee Company Limited.

Exhibits.

2.

Agreement between Settlor and The Trusts and Guarantee Company Limited, 27th May, 1918.

EXHIBIT 2.

(Schedule B to Notice of Dissatisfaction)

Memorandum of Agreement made in duplicate this twenty-seventh day of May, A.D. 1918.

between :—

PETER BIRTWISTLE, OF THE CITY OF LONDON IN THE COUNTY OF MIDDLESEX, ESQUIRE, (HEREINAFTER CALLED THE "SETTLOR"),

10

Of the First Part

and

THE TRUSTS & GUARANTEE COMPANY, LIMITED, OF TORONTO, CANADA, (HEREINAFTER CALLED THE "TRUSTEE") - Of the Second Part

Whereas by an agreement bearing date the 20th day of October, 1916, made between the Settlor and the Trustee, the Settlor did pay to the Trustee the sum of One Hundred Thousand (\$100,000.00) Dollars to be held by the Trustee under the terms of an agreement known as an "Investment Agreement" whereby the moneys, together with interest thereon were to be paid twenty-one years after the death of the Settlor to such person or corporation as the Settlor might by deed or will appoint; and

20

Whereas the Settlor by Indenture bearing date the 20th day of October, 1916, made between the Settlor and the Trustee, did transfer, assign and set over unto the Trustee certain assets real and personal to be converted and administered by the Trustee and to become subject to the terms and conditions of the Investment Agreement; and

Whereas the Settlor desires to grant and transfer to the Trustee certain other assets, real and personal, to be converted and administered by the Trustee; and

Whereas the Settlor desires now to definitely name and determine the Corporation to whom the said assets, with the accruals thereon shall be paid at the end of the said period :—

30

Now this Indenture Witnesseth :—

1. The Settlor doth hereby grant, assign, transfer and set over unto the Trustee its successors and assigns all his right, title and interest in and to the said assets, real and personal, set out in the Schedule hereto (the said assets set out in the said Schedule hereto consisting of the assets, real and personal, held by the Trustee under the agreement dated the 20th day of October, 1916, and the additional assets, real and personal, which the Settlor, as hereinbefore recited, desires to make subject to the trust thereof) to be held by the Trustee subject to and upon the terms and conditions hereinafter set out :—

40

(a) The Settlor agrees to execute such assignments, transfers and conveyances as shall be necessary or proper to effectually vest in

Exhibits.
 2.
 Agreement
 between
 Settlor and
 The Trusts
 and
 Guarantee
 Company
 Limited,
 27th May,
 1918—con-
 tinued.

the Trustee the properties described in the said Schedule, such property to be transferred to and received by the Trustee as "Trustee of Birtwistle Trust."

(b) The Trustee shall sell and convert into money the said property as soon as conveniently may be, subject to the following terms and conditions:—

(1) After the death of the Settlor the Trustee may sell and convert into money the said properties upon such terms and conditions as they may deem in the best interests of the estate and in its absolute discretion, but during the life time of the Settlor no sale or conversion of the said properties shall be made except with the approval and consent of the Settlor, provided that for the purpose of maintaining the primary purpose of this agreement, the Settlor agrees that the stock of the London Loan Company mentioned in the Schedule hereto, may be sold at any time provided a price at the rate of One hundred and twenty-five (\$125.00) dollars for two (2) shares or better can be secured and the remaining shares mentioned in the schedule shall be disposed of before the 20th day of October, 1919, or at such later date as may be mutually agreed between the Trustee and the Settlor. For a similar purpose it is understood and agreed that the real estate and mortgages mentioned in the Schedule shall be converted and realized upon within five (5) years after the date of the signing of the terms of peace between the Governments of Great Britain and Germany.

(2) Such sale or conversion may be made either for cash or partly for cash and partly by way of mortgage or other security for payment of the balance of the sale price.

(c) Pending the conversion of the said property into money as hereinbefore provided, the Trustee shall stand seized and possessed of the same, to administer and manage it subject to the direction and control of the Settlor during his lifetime and after his death in their absolute discretion with power to lease the said properties, receive and collect rents, to distrain or take such other proceedings as may be advisable to get in the same, to pay taxes, interest, insurance and other maintenance charges as the same may become due, to make all necessary repairs and improvements and generally to administer and manage the said property; to receive and collect interest on the mortgages as the same falls due and to collect the principal thereof when they respectively mature for payment, subject, however, to the right to the Settlor to grant such reasonable extensions of time for the payment of the principal in order not to unduly press or embarrass the Mortgagors so far as the principal is concerned; to receive and collect all dividends on stock and generally to do and perform all things necessary for the general management and control of the properties to the best advantage of the estate.

(d) All policies of insurance mentioned in the said Schedule shall be realized upon by the Trustee as soon as conveniently may be after the death of the Settlor and the proceeds thereof dealt with as hereinbefore provided.

10 (e) The Trustee shall be entitled to retain out of the moneys coming to its hands either by way of income or interest from the properties mentioned in the Schedule or by way of proceeds of the sale and conversion thereof, such disbursements and expenses as may be incurred in the management and administration of the said properties without charging or receiving any remuneration for its services and management, and the net proceeds, after providing for such disbursements and expenses shall be transferred quarterly by the Trustee to the "Investment Account" of the Settlor and such net proceeds shall be held by the Trustee subject to the terms and conditions hereinafter made applicable to the "Investment Account."

20 (f) The Trustee shall be charged and chargeable, in the administration of the trusts of the assets not transferred to the "Investment Account" only with such moneys as it shall actually receive by virtue of the trusts hereby in it reposed and it shall not be answerable for any loss, misfortune or damage which may happen in the execution of any of the aforesaid trusts or in relation thereto unless the same shall happen by or through the Trustee's wilful default and the said Trustee shall and may out of such moneys as shall come to its hands by virtue of the trusts aforesaid, retain and reimburse itself for all costs, damages, charges and expenses which it may suffer, sustain, expend, disburse, be at, or put to in and about the execution of any of the aforesaid trusts or in relation thereto.

30 II. The Trustee shall hold the moneys paid to the Trustee by the said Settlor under the agreements of the 20th day of October 1916, together with all accretions thereto to this date and which may from time to time be added thereto, pursuant to the terms of this agreement (all of which is hereinafter referred to as the "Investment Account") upon the trusts, terms and conditions hereinafter set out:—

40 (a) The Trustee shall invest and reinvest the said Investment Account in the purchase of or loan upon such securities as it deems best without being confined to such investments as Trustees and Executors are by law required to invest in, and the Trustee shall have the same liberty of investment after as well as before the death of the said Settlor, such investments or loans to be made in the name of the Trustee, but to be held by it as Trustee, according to the terms hereof.

(b) The Trustee shall pay the whole of the Investment Account, together with accumulations thereon, to the Municipal Council of the Town of Colne in Lancashire, England, at the end of the period of twenty-one years after the death of the Settlor, to be used by the said Council for the benefit of the aged and deserving poor of the

Exhibits.

2.

Agreement
between
Settlor and
The Trusts
and
Guarantee
Company
Limited,
27th May,
1918—*con-
tinued.*

Exhibits.
 2.
 Agreement
 between
 Settlor and
 The Trusts
 and
 Guarantee
 Company
 Limited,
 27th May,
 1918—con-
 tinued.

said Town of Colne in such manner and without restriction of any kind, as shall be deemed prudent to the said Council, save and except and the Settlor hereby declares it to be his wish that the said Council should insofar as possible or convenient, leave any of the said fund which is not required for immediate distribution to be held by the Trustee hereunder and invested by the Trustee under an arrangement similar to that comprised in this Indenture, the Settlor believing that it will be advantageous for the Council to retain this colonial investment which the Settlor considers likely to return a better rate of interest than can be readily obtained in England. 10

(c) All the interest earned on the Investment Account and not paid over by the Trustee to the Settlor under the next succeeding clause hereof, shall be by the Trustee paid into the Investment Account on the 1st day of January in each year, and added to and become part of the corpus thereof, and bear interest at the said rate of five and one-quarter per cent.

(d) Provided the amounts so paid during any one calendar year shall not exceed the income from the Investment Account for that period, the Trustee shall be entitled to and shall pay out of said income to the Settlor during his life at such times and in such places as the Settlor may desire, such sum or sums as the Trustee may in its discretion deem fitting and proper for the Settlor to expend in his living expenses, and while there shall be no duty cast upon the Trustee to inform itself as to the necessities of the Settlor or the use made by him of the said moneys, it is distinctly understood that the term "living expenses" shall not be deemed to include any obligations incurred by the Settlor by way of subscription for stock in any company or going security for any person or company or any attempted investment or speculation, and the Settlor shall not be able to assign or pledge the moneys payable to him under this clause or deal therewith in any way other than in meeting the necessary and usual expenditures incident to the living expenses of a person in the station in life and of the age and tastes of the Settlor. And in addition to such living expenses the Trustee shall be entitled to and shall pay out of the income One hundred and fifty dollars (\$150.00) a year to such charitable purpose or purposes as the Settlor may request. The Settlor hereby expressly relinquishes and surrenders to the Trustee and the Municipality of Colne all the said income in excess of the amount thereof necessary to cover his expenses of living, and the said charitable bequests, as hereinbefore defined. 20 30 40

(e) The Trustee guarantees the payment of the corpus and that the interest at the said rate shall be credited to the fund and paid as provided in clauses (b), (c) and (d) hereof.

(f) The Trustee shall be entitled to retain for its own use and benefit by way of remuneration for such guaranty and management the surplus of interest or profit, if any, resulting from the investment or loaning of the said Investment Account over and above the rate of interest ($5\frac{1}{4}\%$).

10 (g) Upon the payment over to the Municipality of Colne at the expiration of the period hereinafter determined, together with interest at the rate and in the manner guaranteed hereunder, the securities held by the Trustee in respect of the said Investment Account shall become the property of the Trustee freed from the terms of the trusts hereby created in reference to the said account without any formal assignment or release from the Settlor or the Council of the Municipality of Colne.

III. The Trustee shall render to the Settlor regular statements in such form as may be required quarterly during the life of the Settlor and thereafter on similar dates to the beneficiaries of the estate. The Trustee agrees to afford to the Settlor or his duly authorized agent at all reasonable times access to the securities held under the terms of this agreement for the purpose of examination.

20 IV. The Settlor hereby assigns, transfers and sets over unto the Trustee the diamond ring in trust to permit the Settlor to have the custody thereof and wear same during his life, provided the Trustee Company are satisfied of its safety, and on the death of the Settlor to take and transmit the said ring to the Municipal Council of the said Town of Colne, Lancashire, England, to be held by them in trust to permit the Mayor or Mayoress of the said Town to have the custody of and wear same during his or her term of office, provided, however, that before delivering the said ring to the said Mayor or Mayoress the said Council shall take satisfactory security for the
30 return of the said ring at the expiration of the said term of office, or the replacing thereof in case it should be lost by the then custodian thereof.

In witness whereof the Settlor has hereunto set his hand and seal and the Trustee has caused its Corporate Seal to be hereto affixed attested by the signature of its duly authorized Officers.

Signed, sealed and delivered

in the presence of

“DONALD B. SINCLAIR.”

“PETER BIRTWISTLE.”

(Seal)

The Trusts and Guarantee
Company, Limited,

(Seal)

40

by

“E. B. STOCKDALE,
General Manager.”

Exhibits.

2.

Agreement
between
Settlor and
The Trusts
and
Guarantee
Company
Limited,
27th May,
1918—con-
tinued.

Exhibits.

“ P.B.”

2.
 Agreement
 between
 Settlor and
 The Trusts
 and
 Guarantee
 Company
 Limited,
 27th May,
 1918—con-
 tinued.

THIS IS THE SCHEDULE OF THE ASSETS REAL AND PERSONAL OF PETER BIRTWISTLE REFERRED TO IN THE ANNEXED AGREEMENT DATED 27TH DAY OF MAY, 1918.

Real estate :

Store No. 116 Dundas Street in the City of London, Ontario, being part of Lot 15, on the north side of Dundas Street, having a frontage of fifteen feet and a depth of ninety-four feet, more particularly described in Deed No. 659, registered on the 11th August, 1885, in the Registry Office for the City of London - - - - - \$10,000.00 10

Mortgages :

Mortgage dated 10th October, 1916, made by Lawrence C. Howell and wife to Peter Birtwistle upon, firstly : part of Lot 15 on the north side of Dundas Street, comprising four thousand three hundred and thirty-five square feet more or less; and secondly, thirty acres more or less, being part of Lot 20, in the 1st Concession of the Township of London, lying between the Travelled Road and the River Thames, which parcels may be more fully described in said mortgage which was registered on the 10th October, 1916, in the Registry Office for the City of London as No. 18826 - - - 20,000.00 20

Mortgage dated 30th August, 1913, for \$4,000.00 made by John W. G. Winnett of the City of London to Peter Birtwistle, covering part of Lot No. 15 on the north side of Dundas Street more particularly described in said mortgage registered in the Registry Office for the City of London on the 4th September, 1913, as No. 16831. Balance - - - 3,800.00

Mortgage dated 23rd February, 1917, made by Robert A. Henderson and wife of Florida to Peter Birtwistle, covering all of the land now owned by mortgagors in Fort Myers, County of Lee, State of Florida, and more particularly described in said mortgage registered in the Office of the Clerk of the Circuit Court, Lee County, on the 26th February, 1917, Book 15 of Mortgages, on page 159 - - - - - 6,000.00 30

Mortgage dated 2nd February, 1918, made by James Hutton and wife and James B. Parker and wife to Peter Birtwistle, covering all the land owned by the mortgagors in Fort Myers, Lee County, Florida, on the north side of Oak Street, having a frontage of seventy feet by a depth of one hundred and fourteen feet more particularly described in said mortgage recorded on page 590 in Mortgage Book No. 15 - - - - - 1,600.00 40

Mortgage dated 8th January, 1918, made by John D. Lynn and wife of Fort Myers, Florida, to Peter Birtwistle, being comprised of Lots Nos. 1, 2 and 3 of Block No. 3, in Poinciana Park Addition, according to Plat thereof on file in

	Plat Book 3, page 49, Lee County Public Records, and also Lots Nos. 6, 7, 8, 9, 10, 11, 12 and 13 of Block No. 2 in the Poincianna Park Addition to Fort Myers, according to said Plat Book 3, page 49. - - - - -	3,000.00	Exhibits. — 2. Agreement between Settlor and The Trusts and Guarantee Company Limited, 27th May, 1918— <i>con- tinued.</i>
	Stocks :		
	483 permanent shares of stock in the London Loan Company of Canada of par value - - - - -	24,150.00	
	25 shares of Dominion Steel Corporation, Limited, valued at - - - - -	1,650.00	
10	167 shares Corn Products Refining Company, valued at -	2,800.00	
	3 shares Northern Crown Bank, par value - - -	300.00	
	13 shares British American Watch Company, Limited, no value		
	60 shares Dominion Savings and Investment Society, par value - - - - -	3,000.00	
	Insurance :		
	Policy on life of Peter Birtwistle paid up in the Pelican and British Empire - - - - -	18,000.00	
	Promissory Note :		
20	Dated September 28th, 1916, payable in six months, made by W. A. Bluethner, bearing interest at 6% - - -	145.00	
	“ DONALD B. SINCLAIR.”		

Exhibits.

3.—Income Tax Return for the year 1934.

Part of Exhibit No. 3.

3.
Income Tax
Return for
the year
1934.

All communications addressed to the Inspector of
Income Tax must have sufficient postage affixed.



Form T 3

1934

117
118

DOMINION OF CANADA
INCOME TAX

DATE
FACED
BY
1935

RETURN OF INCOME REQUIRED FROM TRUSTEES, EXECUTORS, ADMINISTRATORS, ASSIGNEES,
RECEIVERS OR PERSONS ACTING IN A FIDUCIARY CAPACITY FOR THE YEAR ENDED
31st DECEMBER, 1934

(Form prescribed and authorized by the Minister of National Revenue)

This return is to be prepared in triplicate. One copy is to be retained by the person filing this return and two must be deliv-
ered or mailed post-paid to the INSPECTOR OF INCOME TAX, DOMINION PUBLIC BLDG., Cor. Front and Yonge Sts., TORONTO (2), ONT.
on or before the last day of February, 1935.

PRINT NAME AND ADDRESS PLAINLY

- 1. Return of the ~~Estate or Trust of~~ Peter Birtwistle
State name by which Estate or Trust is known
- 2. Return made by J. G. G. & H.
Give names of Trustees, Executors or others representing the Estate or Trust
- 3. Address in full 302 Bay St. Toronto Ont.
Street and number Place Province
- 4. Acting in capacity of Trustee
Trustees, Executors, etc.
- 5. Date Trust or Estate originated Oct. 20. 11. 16. Was a return of this nature made for 1933? yes
- 6. If a partial distribution of the corpus of this Estate or Trust has been made during 1934 a statement is required to be attached showing the names and addresses of resident Canadian beneficiaries who received \$10,000 or over.
- 7. If the ~~Estate~~ ^{Trust} has been wound up and the ~~Executors~~ ^{Trustees} discharged please give date no

8. (a) ~~We~~ ^I hereby certify that this return contains a full and complete disclosure of the total income from all sources of the above
~~Trust~~ ^{Estate} for the year 1934 and that the information given and the statements of income and expenditures herein and all state-
ments and information contained in any documents furnished herewith are true in every respect and that the expenditures
claimed were actually incurred and that the statements pertaining to the distribution and application of the income are like-
wise true in every respect.

(b) IT IS ALSO CERTIFIED in respect of income paid or credited after 3rd July, 1934, to non-resident beneficiaries
that in accordance with Section 9B, Subsection 2, of The Income War Tax Act (Item 9 below) five per centum thereof has been
withheld and remitted to the Inspector of Income Tax at The Trusts and Guarantee Co. Ltd.

WA 3861

Signature "C. H. Erwood"
Gen Manager

Date Feb 21 1935. Telephone Number of Trustee as executor and Trustee of Estate of

- 9. Sec. 9B, s. 2. In addition to any other tax imposed by this Act an Income Tax of five per centum is hereby imposed on all persons who are non-
residents of Canada in respect of—
- (b) All interest received from Canadian debtors if payable solely in Canadian funds except the interest from all bonds of or guaranteed by the
Dominion of Canada.
- (d) All income for any taxation period received from any Canadian Estate or Trust, which income shall be deemed to include all income accruing
to the credit of non-resident beneficiaries whether received by them or not during such taxation period. The tax payable by virtue of this para-
graph shall be deducted by the Trustee from the amount paid or credited to such beneficiary at the time of paying or crediting and shall be
remitted to the Receiver General of Canada.

Sec. 37. "Every trustee in bankruptcy, assignee, liquidator, curator, receiver, administrator, heir, executor and such other like person or legal
representative administering, managing, winding-up, controlling, or otherwise dealing with the property, business or estate of any person who has not
made a return for any taxable period or for any portion of a taxable period for which such person was required to make a return in accordance with
the provisions of this Act shall make such return."

Sec. 50. "Every person who is required by section thirty-seven of this Act to make a return of income shall pay any tax and interest and penalties
assessed and levied with respect to such income before making any distribution of the property, business or estate which he is administering, managing,
winding-up or otherwise controlling or dealing with."

Sec. 51. "Every trustee in bankruptcy, assignee, administrator, executor and other like person, before distributing any assets under his control
shall obtain a certificate from the Minister certifying that no unpaid assessment of income tax, interest and penalties properly chargeable against the
person, property, business or estate, as the case may be, remains outstanding. DISTRIBUTION WITHOUT SUCH CERTIFICATE SHALL
RENDER THE TRUSTEE IN BANKRUPTCY, ASSIGNEE, ADMINISTRATOR, EXECUTOR AND OTHER LIKE PERSON PERSONALLY
LIABLE FOR THE TAX, INTEREST AND PENALTIES."

FOR DEPARTMENTAL USE	PAYMENT OF 5% TAX	DATE FORWARDED
Carded by.....	Checked by.....	To Head Office.....
Abstracted by.....	Checked by.....	T 3-A to Inspector.....

PENALTY—For failure to file this return on or before the last day of February, 1935, Ten Dollars for each day of default; maximum
penalty Fifty Dollars.

10. NET INCOME FROM BUSINESS, as per statement attached.....		\$	c.
<small>NOTE—See last page for instructions.</small>			
11. GROSS INCOME FROM RENTALS (give amount received from and name and address of each tenant)			
12. NET INCOME FROM FARM LANDS OPERATED, as per return on Form T 1-a attached.....			
<small>NOTE—Give address or location of property and attach statement showing how amount is arrived at.</small>			
13. GROSS INCOME FROM COMMISSIONS			
14. DIVIDENDS in Cash or Stock. Give names and amounts received from:—		\$	c.
(i) Canadian Corporations (except mining companies):			
.....			
.....			
(ii) British and Foreign Corporations (except mining companies):			
.....			
.....			
(iii) Mining Companies:			
	Gross	Less Depletion	
.....	\$	\$	
.....			
Total of 14 (i), (ii) and (iii).....			
Less carrying charges (if any). State to whom paid.....			
		Net.....	
15. INCOME FROM DOMINION OF CANADA BONDS—		\$	c.
(a) Issued exempt from Income Tax (1937 maturity only).....			
Less carrying charges.....			
(b) Issued liable to Income Tax.....			
Less carrying charges.....			
16. INTEREST FROM— (a) Bank Deposits.....		\$	c.
(b) From fully registered bonds and debentures.....			
(c) Received by way of bearer coupons.....		25945	60
(d) From mortgages as per schedule attached.....			
(e) From notes and other securities as per schedule attached.....			
		25945	60
17. INCOME FROM OTHER ESTATES AND TRUSTS.....			
<small>NOTE—Give name of Estate and name and address of Trustee, etc.</small>			
18. INCOME FROM (a) Premium on Exchange.....			
(b) Other sources not elsewhere enumerated (specify).....			
.....			
19. TOTAL INCOME.....		25945	60

Where the space provided above is not sufficient, supplementary sheets properly identified containing full information must be attached to this Return.

INSTRUCTIONS.—In cases where an Estate is carrying on a business, the trustees, executors, etc., are required to attach financial statements in duplicate, including statement of assets and liabilities, trading and profit and loss. In determining the net income under item 19 the fiscal year ended within the calendar year may be used. For all other items the calendar year only must be used.

Exhibits.

3.
Income Tax
Return for
the year
1934—con-
tinued.

Page 3

DEDUCTIONS FROM INCOME FOR CALENDAR YEAR 1934

20. INTEREST PAID ON BORROWED MONEY (exclusive of any amount charged in arriving at Items No. 10, No. 14 or No. 15)—
- (i) Mortgage interest on rented property Paid to.....
Address.....
 - (ii) Other interest not elsewhere claimed..... Paid to.....
(Specify for what purpose borrowed) Address.....

NOTE.—Give name and address of person to whom interest is paid. If paid to a non resident see Item 9 (b).

21. TAXES. Provincial and Municipal Taxes on property (exclusive of any amounts claimed elsewhere). Do not claim Dominion, Provincial or Municipal Income Tax.

Premium paid for Fire Insurance on rented property (give details).....

Repairs to rented property (give details).....

NOTE.—Under each heading give address of and amount expended on each property.

22. FEES PAID TO TRUSTEES—

"A" Charged to Capital

Name Address..... \$.....

"B" Charged to Income

Name Address.....

NOTE.—Item "B" only to be shown as deduction.

23. GENERAL EXPENSES of administration of Estate not included in statement herewith (full details must be given).....

24. DEPRECIATION

Nature of Asset If building, state material and date of construction. If machinery, give description and date of purchase.	Year Acquired	Cost (not including land)	Rate per cent per Annum	Wear and Tear charged as reflected by books of account			
				Total previously charged	Amount this year charged		
		d	c	\$	c.	\$	c.

Depreciation charged 1934

NOTE.—Do not include depreciation on stock in trade, land or securities or any other asset not subject to exhaustion through wear and tear. This schedule must not include any amount already charged before arriving at total opposite Item 16 of this Return.

25. OTHER DEDUCTIONS not elsewhere enumerated (specify).....

Income from Distribution of Canada Bonds issued exempt from taxation included in Item 15 (a) must not be shown as a deduction hereafter as this Return is concerned. See Item 20 (2).

26. SUM OF THE ABOVE DEDUCTIONS.....

rit

Where the space provided above is not sufficient, supplementary sheets properly identified, containing full information, must be attached to this Return.

73
1934

Page 4

SUMMARY AND APPORTIONMENT

Exhibits.

3.
Income Tax
Return for
the year
1934—con-
tinued.

27. TOTAL INCOME brought forward from Item 19.....	\$ 25945	c. 60
28. TOTAL DEDUCTIONS brought forward from Item 26.....		
29. NET INCOME (to be apportioned as required, to Items 30, 31 and 32).....	25945	60

30. Name and address of Beneficiary—(See Item 34) NOTE—Give surname first, then initials, number, street and city. Give age of any beneficiary under twenty-one years of age. (1)	Total Amount of Income owing to Beneficiary (2)	Apportionment of Accrued Income of each Beneficiary		
		Interest from Dom. of Canada Bonds or Stock Issued subject from Income Tax (3)		Other Revenues (4)
NOTE—As to non-residents' share see Item 9 (d).		\$	c.	c.
<i>Income accrues to the Municipal Council of Colone, England for the benefit of aged & deserving poor</i>				
31. Amount of 5% tax withheld from non-resident beneficiaries (See Items 8 (a) and 9 (d).) SUB-TOTAL.....				
32. Income accumulating in hands of Trustees (See Item 35).....	25945			60
33. Total agreeing with Item 29.....				

34. The Income War Tax Act provides that "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."
35. "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 (f) of subsection 1 of section 5 of this Act." In every case of this kind the Trustee or other like person must file return on Form T 1 in addition to the return on Form T 3.

Income and distribution checked by..... Date.....

Account Insp. Office

Exhibits.

4.—Letter from The Trusts and Guarantee Company Limited to
S. Casey Wood, Esq., K.C.

4.
Letter from
The Trusts
and
Guarantee
Company
Limited to
S. Casey
Wood, Esq.,
K.C., 9th
February,
1937.

EXHIBIT 4.

THE TRUSTS AND GUARANTEE COMPANY, LIMITED.

February
Ninth
1937

S. Casey Wood, Esq., K.C.,
Star Building,
80 King Street, West,
Toronto, Ontario.

10

Dear Mr. Wood :—

RE PETER BIRTWISTLE TRUST :

With further reference to our telephone conversation, I am enclosing herewith copies of the last statements rendered herein under date of January 8th, 1937, showing the accounts as at December 31st, 1936.

You will note that the total fund as of that date amounted to \$572,767.88. If the Trust is continued to the 19th of April, 1948, the fund will then amount to \$1,021,000.00 (approximately).

The first request or intimation that the Town of Colne was desirous 20 of terminating the Trust was contained in the Town Clerk's letter of the 5th of September, 1933.

Yours very truly,

C. S. HAMILTON,
General Manager.

GSH : EAD
Enclosures

January 8th, 1937.

Peter Birtwistle Trust.
1936

INVESTMENT ACCOUNT.

30

Oct. 1	By	Balance at credit as per statement dated October 19, 1936	-	-	\$544,186.33
Dec. 31	To	Balance	-	-	\$544,186.33
					<u>\$544,186.33</u>
					<u>\$544,186.33</u>

THE TRUSTS AND GUARANTEE COMPANY, LIMITED,
C. S. HAMILTON,
General Manager.

				January 8, 1937.	Exhibits.
Peter Birtwistle Trust.					—
		INCOME ACCOUNT.			4.
1936 :					Letter from
Oct. 1	By	Balance at credit as per statement			The Trusts
		dated October 19, 1936	-	\$21,439.11	and
Dec. 31	By	1/4 year's interest at 5 $\frac{1}{4}$ %	-	7,142.44	Guarantee
		Balance	-		Company
			-		Limited to
			-	\$28,581.55	S. Casey
			-	\$28,581.55	Wood, Esq.,
			-	\$28,581.55	K.C., 9th
			-	\$28,581.55	February,
			-	\$28,581.55	1937— <i>con-</i>
			-	\$28,581.55	<i>tinued.</i>

10

THE TRUSTS AND GUARANTEE COMPANY, LIMITED,
C. S. HAMILTON,
General Manager.

Exhibits.
Assessment
or the year
934.

Assessment for the year 1934.
(Schedule "A" to Notice of Dissatisfaction.)

LVM
ORIGINAL
Revised—1934—Revised

1934
DOMINION OF CANADA T. 7 IND. No.
INCOME TAX—IMPÔT SUR LE REVENU
NOTICE OF ASSESSMENT—AVIS DE RÉPARTITION
FOR 19 34

H 9723

File No.
Dossier
Account No. Bi. 8-82
Compte
Code 11-13-M
Numéro

The Peter Birtwistle Trust,
c/o The Trusts & Guarantee Co. Ltd.,
302 Bay St.,
TORONTO, Ont.

1. District Office Dominion Public Bldg., Date mailed Feb. 21st, 193 6
Bureau de district Toronto, Ont. Mis à la poste le

2. (A) Total Income.....\$ 25,945.60 Total du revenu	3. Tax\$ 3,876.94 Impôt
(B) Deductions.....\$ Déductions	4. Additional 5% Tax\$ 193.85 Impôt additionnel de 5 p.c.
(C) Net Income\$ 25,945.60 Revenu net	5. TOTAL.....\$ 4,070.79
LESS—A DÉDUIRE:	
(D) Charitable Donations\$ Dons aux œuvres de charité	
(E) Taxable Income.....\$ 25,945.60 Revenu imposable	Surtax 669.71
LESS—A DÉDUIRE:	
(F) Statutory Exemption..\$ Exemption statutaire	
(G) Dependents.....\$ \$	6. Penalty—5% of item 5 (late filing) Amende: 5 p.c. de l'item 5 (retard à déclarer) ..\$
(H) NET TAXABLE INCOME\$ 25,945.60 REVENU NET IMPOSABLE	7. TOTAL TAX AND PENALTY\$ 4,740.50 TOTAL DES IMPÔT ET AMENDE

R: C	SUMMARY—RÉSUMÉ			
	Tax—Impôt	Penalty—Amende	Interest—Intérêt	TOTAL
8. Amount levied.....\$ 4,740.50 Total payable	\$	\$ 253.25	\$	\$ 4,993.75
Amount paid on account.....\$ Paieement partiel	\$	\$	\$	\$
Balance due\$ 4,740.50 Reliquat à payer	\$	\$ 253.25	\$	\$ 4,993.75
	(A)	(B)	(C)	

9. AMOUNT PAYABLE AS AT.....Mar. 21st, 193 6 \$ 4,993.75
SOMME DUE LE

INSTRUCTIONS AS TO PAYMENT—INDICATIONS CONCERNANT PAIEMENT

10. PREPAYMENT—PAIEMENT D'AVANCE:—
For each day that payment is made in advance of the date stated in item 9, the taxpayer may deduct
Un contribuable qui fait un paiement anticipé antérieurement à la date fixée à l'item 9 peut déduire pour chaque jour d'avance]..\$.77
11. ADDITIONAL INTEREST—INTÉRÊT ADDITIONNEL:—
One month from the date hereof, additional interest must be added at the rate of 10% per annum on balance of tax due (item 8A).
Après un mois de la présente date, il faut ajouter 10 p.c. par an sur le reliquat à payer, indiqué à l'item 8A.
12. REMITTANCE may be made by Postal Note, Postal Money Order, Marked Cheque, Express or Bank Money Order, TO THE INSPECTOR OF INCOME TAX at the district indicated in item 1, made payable to the Receiver General of Canada. Avoid sending currency in envelopes.
Faire le PAIEMENT au moyen d'un chèque certifié, bon postal ou mandat de poste, d'express ou de banque À L'INSPECTEUR DE L'IMPÔT SUR LE REVENU au bureau du district indiqué à l'item 1, et fait payable à l'ordre du Receveur Général du Canada. Ne pas envoyer d'argent par la poste.

Form prescribed and authorized by Minister of National Revenue.
Formule prescrite et autorisée par le ministre du Revenu national.

C. Frank Elliott
COMMISSIONER OF INCOME TAX
COMMISSAIRE DE L'IMPÔT SUR LE REVENU

PLEASE RETURN THIS NOTICE WITH YOUR REMITTANCE.—VEUILLEZ RETOURNER CET AVIS AVEC VOTRE VERSEMENT.

In the Privy Council.

No. 41 of 1939.

ON APPEAL FROM THE SUPREME COURT
OF CANADA.

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

BETWEEN

THE MINISTER OF NATIONAL REVENUE

Appellant

AND

THE TRUSTS AND GUARANTEE COM-
PANY LIMITED AS TRUSTEES OF
THE PETER BIRTWISTLE TRUST

Respondents.

RECORD OF PROCEEDINGS.

CHARLES RUSSELL & CO.,
37, Norfolk Street,
Strand, W.C.2.

For the Appellant

BLAKE & REDDEN,
17, Victoria Street, S.W.1.

For the Respondents