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June 19.
1941
Jan. 4.

BETWEEN:

THE TRUSTEES OF THE ESTATE OF JAMES COSMAN, DECEASED } APPELLANTS;

AND

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

Revenue—Income—Income War Tax Act, R.S.C., 1927, c. 97, Secs. 2 (h), 4 (e), 11 (2) — Income accumulating in trust for the benefit of unascertained persons — Charitable institution — Charitable trust — "Person"—Appeal from the decision of the Minister of National Revenue dismissed.

James Cosman, resident in Nova Scotia, Canada, by his will provided that the executors thereof should pay over the residue of his estate to three trustees to be appointed by the Roman Catholic Archbishop of Halifax, N.S., to be held by them in trust and invested in certain securities. The income from these investments was to be applied to the payment of certain perpetual annuities and certain terminable annuities to definitely specified persons and institutions. Upon the termination of the personal annuities the accumulated funds of the estate were to be divided into two equal parts, one of which was to be paid over to trustees in Ireland. The other part was to be retained in Nova Scotia to be kept invested by the Nova Scotia trustees and one-half the income therefrom to be used "for the benefit of the poor and needy in Nova Scotia, at such times and in such manner as the said Nova Scotia trustees may deem best." The remaining half of the income was to be invested and allowed to accumulate for the term of one hundred years, or longer if necessary, to provide an amount sufficient "to establish hospitals or homes in Nova Scotia for the needy where they may end their days in comfort." The money paid over to the trustees in Ireland was to be used for similar purposes.

The Nova Scotia trustees were appointed as directed by the will and have acted in accordance with the terms of the trust imposed upon them. The personal annuities have not terminated and the total accumulated fund is in the hands of the Nova Scotia trustees. The income from the fund has been at all times greater than the amount required for the payment of the annuities and the surplus has been retained and invested by the Nova Scotia trustees.

The trustees were assessed for income tax in respect of the income of the invested fund retained and accumulated for the year 1931. This assessment was affirmed by the Minister of National Revenue from whose decision an appeal was taken to this Court.

Held: That the income is being accumulated in trust for the benefit of unascertained persons, and that it is not the income of any charitable institution within the meaning of the Income War Tax Act.

2. That the trusts declared by the will of the testator are not for the benefit of any persons who exist or may exist as individuals in the regard or intention of the testator.

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3. That the ultimate application of the income or how and by whom it shall later be applied or used is not presently of any consequence or relevant to the issue now before the Court.

4. That the Nova Scotia trustees do not constitute a charitable institution within the meaning of the Act.

5. That although a time was fixed for the division of the funds accumulated, namely, upon the termination of the personal annuities, the income is accumulating in the interval in trust for the benefit of unascertained persons.

APPEAL under the provisions of the Income War Tax Act from the decision of the Minister of National Revenue.

The appeal was heard before the Honourable Mr. Justice Maclean, President of the Court, at Halifax.

J. A. Walker, K.C. and *W. B. Murphy Jr.* for appellants.

B. W. Russell, K.C. and E. S. McLatchey for respondent.

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

THE PRESIDENT, now (January 4, 1941) delivered the following judgment:

This is an appeal from the decision of the Minister of National Revenue affirming an assessment, made under the Income War Tax Act, in respect of certain income received and accumulated by certain trustees pursuant to the terms of the last will and testament of James Cosman, late of Meteghan, in the County of Digby, in the Province of Nova Scotia. The said income was assessed on the ground that the same was accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests, within the meaning of s. 11, ss. (2) of the Income War Tax Act.

By his will, dated November 7, 1910, and a codicil thereto, dated June 29, 1911, the said Cosman made provision for certain bequests and legacies. He then provided that his executors, after settling the estate, should hand over the residue thereof to three trustees to be appointed by the Roman Catholic Archbishop of Halifax, Nova Scotia, to be held by them in trust and invested in such securities as may from time to time be authorized by law for trust investments. From the income of these investments the trustees were to pay certain terminable

annuities and certain perpetual annuities to certain specified persons and institutions. Upon the termination of the personal annuities the acumulated funds of the estate were to be divided into two equal parts, one of which was to be paid over by the trustees to three other trustees to be appointed by the Roman Catholic Bishop of Raphoe, County Donegal, Ireland, "to hold and manage the fund so paid over to them." The remaining half of the funds was to be retained in Nova Scotia, to be kept invested by the Nova Scotia trustees and one-half of the income arising therefrom was to be used by them "for the benefit of the poor and needy in Nova Scotia, at such times and in such manner as the said Nova Scotia trustees may deem best." The other half of the income arising from such funds was to be invested by the said Nova Scotia trustees in trust securities and allowed to accumulate for the term of one hundred years, or longer if necessary, to provide an amount sufficient in the opinion of such trustees "to establish hospitals or homes in Nova Scotia for the needy where they may end their days in comfort." The Archbishop of Halifax, Nova Scotia, and his successors in office, were to determine the number and location of such hospitals and homes to be established in Nova Scotia, and were to appoint a committee of three men to erect and manage such institutions.

The funds paid over to the Irish trustees by the Nova Scotia trustees were to be invested by the former trustees in trust securities and "one-half the income arising therefrom shall be used by the said Irish trustees for the benefit of the poor and needy in Ireland at such times and in such manner as the said Irish trustees may deem best," and the other half of the income was to be invested in trust securities and allowed to accumulate for one hundred years, or longer if necessary, to provide an amount sufficient in the opinion of such trustees "to establish hospitals or homes in Ireland for the needy where they may end their days in comfort." The Roman Catholic Bishop of Raphoe, and his successors in office were to determine the number and location of the hospitals and homes to be established in Ireland and were to appoint a committee of three men to erect and manage each of such institutions.

The amount of money required for the establishment and maintenance of each of the institutions to be estab-

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lished in Nova Scotia, is to be paid by the Nova Scotia trustees out of the funds under their control to the committee in charge of each institution at such times and in such sums as the Archbishop of Halifax and his successors in office may direct, and the similar provision was made in respect of each of the institutions to be established in Ireland, the amount required therefor is directed to be paid by the Irish trustees to the committee in charge of each institution, at such times and in such sums as the Roman Catholic Bishop of Raphoe and his successors in office may direct.

The Roman Catholic Archbishop of Halifax exercised the power vested in him by the will and appointed the three trustees as therein directed. One of these trustees died and another was appointed in his stead. These trustees, the appellants herein, have carried out the duties imposed on them and at the time with which we are concerned the personal terminable annuities have not all ceased and consequently the total accumulated fund is still in the hands of the Nova Scotia trustees. The income therefrom has at all times been greater than the amount required for the payment of the annuities and the surplus has been retained and invested by the Nova Scotia trustees in accordance with the provisions of the will and codicil.

To ensure a complete and accurate presentation of the facts material here I had better recite the following clauses of the will:

> When all the aforesaid personal terminable annuities shall cease through the death of the beneficiaries or otherwise the sum of the accumulated funds of my estate shall then be divided into two equal parts and one of such parts shall be paid and handed over by my said trustees to three other trustees who shall be appointed by the Roman Catholic Bishop of Raphoe, in the County of Donegal, Ireland, to hold and manage the fund so to be paid over to them.
>
> The remaining half of the funds then forming my estate shall be retained in Nova Scotia, and kept invested as aforesaid by the said Nova Scotia trustees and one half the income arising therefrom shall be used by said Nova Scotia trustees for the benefit of the poor and needy in Nova Scotia, at such times and in such manner as the said Nova Scotia trustees may deem best. The other half of the income arising therefrom shall be invested by said Nova Scotia trustees in trust securities and allowed to accumulate for the term of one hundred years or longer if necessary to provide an amount sufficient in the opinion of such trustees to establish hospitals or homes in Nova Scotia for the needy where they may end their days in comfort. In establishing such institutions in Nova Scotia, the County of Digby shall be first provided for, but with this limitation the Archbishop of Halifax, Nova Scotia, and

his successors in office shall decide the number and location of such hospitals and homes to be established in Nova Scotia, and he shall appoint a committee of three men to erect and manage each of such institutions . . . . . .

The funds paid over by the Nova Scotia trustees to the trustees to be appointed by the Bishop of Raphoe aforesaid, shall be invested by the latter trustees in trust securities and one half the income arising therefrom shall be used by the said Irish trustees for the benefit of the poor and needy in Ireland at such times and in such manner as the said Irish trustees may deem best. The other half of the income arising therefrom shall be invested by said Irish trustees in trust securities and allowed to accumulate for the term of one hundred years, or longer if necessary to provide an amount sufficient in the opinion of such trustees to establish hospitals or homes in Ireland for the needy where they may end their days in comfort. In establishing such institutions in Ireland, the place called Greencastle, in said County of Donegal, the birthplace of my mother, Mary Collins, shall be first provided for and secondly the village of Carandonah, in the said County of Donegal, the home of my late wife's parents, John Carlan and Ellen Calaghan, but with this limitation the said Roman Catholic Bishop of Raphoe and his successors in office shall decide the number and location of the hospitals and homes to be established in Ireland as aforesaid, and he shall appoint a committee of three men to erect and manage each of such institutions.

The amount of money required for the establishment and maintenance of each of the institutions to be established in Nova Scotia under this my will shall be paid by the said Nova Scotia trustees out of the funds under their control to the committee in charge of such institutions at such times and in such sums as the said Roman Catholic Archbishop of Halifax and his successors in office may direct, and the amount required for the establishment and maintenance of each of the said institutions in Ireland shall be paid by the said Irish trustees out of the funds under their control to the committee in charge of such institutions at such times and in such sums as the said Roman Catholic Bishop of Raphoe and his successors in office may direct.

Any trustee or member of a committee appointed by the Roman Catholic Archbishop of Halifax, Nova Scotia, and his successors in office under this my will may at any time be removed by such Archbishop and any trustee or member of a committee appointed by the aforesaid Bishop of Raphoe or his successors in office may be removed at any time by such Bishop for cause that he may think sufficient and such Archbishop or Bishop as the case may be shall appoint others in the place of those so removed.

By a notice of assessment dated June 14, 1932, a tax was levied to the amount of $1,479.53 in respect of the income of the invested fund retained and accumulated in the taxation period of 1931. The trustees appealed to the Minister of National Revenue who rendered a decision affirming the assessment, on the ground that the said assessment was made in respect of income accumulating in the hands of the appellants, the Nova Scotia trustees, in trust for the benefit of unascertained persons, or of

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persons with contingent interests, within the meaning of s. 11, ss. (2) of the Act. From that decision of the Minister an appeal was taken by the trustees to this Court. In their notice of appeal from the assessment in question the appellants gave as reasons therefor: (1) that no income has been accumulated for the benefit of any person as defined by s. 2, ss. (*h*) of the Income War Tax Act, whether ascertained or unascertained, and that at no time can there be any person, as so defined, having the right to sue for payment of the legacy contained in the will or entitled to enforce the trusts thereof; (2) that if there should ever be such a person it could be none other than a charitable institution such as is exempt from taxation under s. 4, ss. (*e*) of the Act; (3) that as to one half of the said accumulated income, being the portion which is to be paid to trustees to be appointed by the Bishop of Raphoe, the persons, if any, to benefit therefrom must be persons resident in Ireland and outside of Canada; and (4) that the whole of the said accumulated income is by the said will impressed with a trust for charitable purposes and accordingly upon a construction of the said Act in accordance with the spirit thereof the said income should not be held liable to taxation.

The argument of Mr. Walker in support of this appeal may be summarized thus: The income is not accumulating for the benefit of any person or persons, ascertained or otherwise, or any person having a claim therein, but, as to one half, for the purpose of establishing hospitals and homes, charitable institutions, in Ireland and Nova Scotia for the benefit of the poor and needy, and that the whole scheme of the testator contemplates a number of charitable institutions; that the income is in part accumulating in trust to provide the funds necessary for the establishment and maintenance of the charitable institutions just mentioned, and the same will never be distributed to persons ascertained or unascertained; that the Nova Scotia trustees constitute a charitable institution, and are presently functioning in that capacity, and that both bodies of trustees will be functioning in that capacity when the income from the other half of the accumulated funds becomes available for distribution for the benefit of the poor and needy in Ireland and Nova Scotia; and that the word "person" as defined by sec. 2 (*h*) of the Act, does not include trus-

tees and that therefore the income is accumulating for the benefit of a trust or trusts, or for the benefit of the Irish and Nova Scotia trustees, and not for persons. This will reveal substantially though perhaps not fully or precisely, or in the order of importance, the points urged by Mr. Walker in support of this appeal.

The case is not without its difficulties. However, it appears to me fairly clear that the income in question is being accumulated in trust for the benefit of unascertained persons, and that it is not the income of any charitable institution within the meaning of the taxing statute. I think the will is open only to the construction that from the time the residue of the estate is handed over to the Nova Scotia trustees the income here assessed for the tax is accumulating in trust for the benefit of unascertained persons. The will of Cosman makes it clear that from that time the income of his estate, less any income necessary for the payment of the terminable and perpetual annuities, was to accumulate in the hands of the Nova Scotia trustees, in trust, until the terminable annuities ceased, for the benefit of the poor and needy in Nova Scotia and Ireland. Such poor and needy are without question persons, and equally without question they are unascertained. Charitable trusts may and indeed must be for the benefit of an indefinite number of unascertained persons. That is one of their characteristics. The trusts here declared are not for the benefit of any persons who exist or may exist as individuals in the regard or intention of the testator. He designs them to be the objects of his bounty for no reason personal to them or himself. The income here assessed was, I think, plainly intended for the benefit of such unascertained persons, and it is now accumulating in trust for that purpose, and it seems to me that it was just this class of income that s. 11 (2) of the Act was intended to make liable for the tax. Its ultimate destination, and how and by whom it shall later be applied or used, is not, I think, presently of any consequence, or relevant to the question to be decided. The income will continue to accumulate for the benefit of the poor and needy until the terminable annuities shall cease, and when that time arrives the accumulated funds of the estate will be divided between the Nova Scotia and the Irish trustees, and the portion of the fund that goes to

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the Irish trustees, or any income therefrom, will no longer be of concern to the revenues of Canada. Up to that time we are only concerned with the income accumulating in Canada in trust, in the hands of the Nova Scotia trustees, for the benefit of unascertained persons. Thereafter, one half of the income arising from the balance of the accumulated funds remaining in Nova Scotia is directed to be used by the Nova Scotia trustees for the benefit of the poor and needy in that Province, and it may be assumed that this portion of the income will then be so expended and will no longer be accumulating; at any rate it does not now enter into a consideration of the income here assessed and in debate. The other half of that income is to be accumulated for one hundred years or more, at the end of which time it is to be used in establishing hospitals or homes for the poor and needy in Nova Scotia. How and by whom that income shall be applied is not presently, I think, of importance. All the income presently accumulating is for the benefit of the poor and needy in both Ireland and Nova Scotia. Therefore, at the time material, there was income accumulating in trust in the hands of the Nova Scotia trustees for the benefit of unascertained persons and therefore, I think, subject to the tax. That income seems to fall within the very words of s. 11 (2) of the Act. The case is not, I think, distinguishable in principle from the *Birtwistle* case (1).

I do not think it can be successfully contended that the Nova Scotia trustees constitute a charitable institution within the meaning of the Act. The Nova Scotia trustees were appointed to receive, invest and manage the residue of the estate handed over to them by the executors of Cosman, and to carry out the provisions of the will of the testator in pursuance of his directions. In the meantime the whole of such funds are accumulating in trust, and almost wholly for the benefit of unascertained persons, and it is a part of the income of such funds that has been assessed for the tax. When the funds accumulated are divided into two equal parts between the Irish trustees and the Nova Scotia trustees a new situation of course arises, as I have already explained. When the time arrives to establish and maintain hospitals or homes for the benefit of the poor and needy in Nova Scotia, the number and

(1) (1938) Ex. C.R. 95; (1940) A.C. 138.

location of such institutions is to be determined by the Archbishop of Halifax, and the trustees are then directed to pay out the sums required for such purposes to committees who are to erect and manage each of such institutions, in such sums as the Archbishop of Halifax may direct. It would seem that the expenditure of that portion of the income is to be under the control and direction of persons other than the trustees, but the unexpended trust funds are still to be in the hands of the trustees to invest and manage. In all this there is nothing purporting to give to the trustees the capacity or quality of a charitable institution. The testator does not seem to have contemplated such a situation. No institution of any kind has come into existence, and neither the corpus of the estate of Cosman, nor the revenue thereof, has passed nor is accruing due to any institution: in fact it is not clear that this can ever occur. It is not clear in whom will be vested the title to the hospitals and homes to be erected, and in any event it would not seem that they are to be administered or managed by the trustees. I see nothing in the will which indicates that the Nova Scotia trustees are to take on the status of a charitable institution, at any stage, in addition to their powers and duties as trustees under the will. The erection of hospitals or homes is but one form directed by the testator for applying a portion of the income of his charitable trust for the benefit of those who were the objects of his bounty. That does not, I think, constitute the trustees, or the hospitals or homes to be established, charitable institutions within the meaning of the Act, and it is to be doubted if the testator ever contemplated such a thing in the ordinary and practical sense. In the *Birtwistle* case their Lordships of the Privy Council used the following language which, I think, is quite applicable here. They said:

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

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

There is another feature of the case which I have considered, and which I should mention. It might be argued that from the time when the residue of the estate was handed over by the executors to the Nova Scotia trustees and until the time when the terminable annuities cease, the income is not specifically accumulating for the benefit of the poor and needy in Ireland and Nova Scotia, but for the purpose of creating a fund for the time when the terminable annuities cease, when the sum of the accumulated funds of the estate are to be divided between the Nova Scotia trustees and the Irish trustees. If such a view is of weight then it might be said that no income is presently accumulating in trust for the benefit of unascertained persons. But, the funds received from the executors were held thereafter by the trustees in trust. They were to be held in trust for whom? First, for the annuitants, and then for the poor and needy in Nova Scotia and Ireland, unascertained persons, and for no one else. The vulnerable point in such a view of the case is that in point of fact the portion of the income accumulating during that period in trust, and assessed, was for the benefit of unascertained persons, and it was that class of income that the Act intended to make liable for the tax. It does not follow, I think, that because a time was fixed for the division of the funds accumulated, when the terminable annuities ceased, that the income was not accumulating in the interval, in trust, for the benefit of unascertained persons. As I have already stated, after paying the annual annuities there was a surplus of income accumulating and there was no one for whose benefit it was accumulating except the poor and needy in Nova Scotia and Ireland, and, I think, that is what was intended by the testator. Accordingly, I find myself obliged to conclude that this view of the case cannot be sustained.

The conclusion I have reached is that the income in question falls within the very words of s. 11 (2) of the Act, and is liable for the tax. That the income is presently accumulating in trust, in Canada, in the hands of the appellant-trustees, would seem an undoubted fact. The income, that is, the portion with which we are here concerned, must be accumulating for the benefit of unascertained persons because it is not for persons designated or ascertained, and clearly, I think, it is not the income of a charitable institution, within the meaning of s. 4 (*e*) of the Act. It is, I think, income of the precise character that was intended by the statute to be made liable for the tax. I do not think that liability for the tax under s. 11 (2) of the Act can be avoided by intervening a body of trustees between the executor of a testator's will and the ultimate beneficiaries of a charitable trust created under that will, which would seem to be the result of the argument, if valid, advanced in support of the appeal against the assessment here. The appeal is therefore dismissed.

I think this is a case where I would be justified in declining to make any order as to costs.

Judgment accordingly.