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UNIVERSITY OF LONDON
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INSTITUTE OF GRADUATED
LEGAL STUDIES

In the Privy Council.

No. 20 of 1953.

43555

ON APPEAL FROM THE SUPREME COURT
OF CANADA

IN THE MATTER of the ESTATE of HERBERT COPLIN COX, deceased
AND

IN THE MATTER of the TRUSTEE ACT, R.S.O. Ch. 165, Sec. 59
AND

IN THE MATTER of the JUDICATURE ACT, R.S.O. Ch. 100, Sec. 106 and
Rule 600 of the Rules of Practice and Procedure passed pursuant
thereto.

BETWEEN

EDWIN G. BAKER (Respondent to Originating Motion) ... *Appellant*
AND

NATIONAL TRUST COMPANY, LIMITED (Applicant on
Originating Motion), THE BOARD OF DIRECTORS
OF THE CANADA LIFE ASSURANCE COMPANY,
MARGARET JANE ARDAGH, WILLIAM BURT
SHEPARD, THE OFFICIAL GUARDIAN FOR THE
PROVINCE OF ONTARIO and THE PUBLIC
TRUSTEE FOR THE PROVINCE OF ONTARIO
(Respondents to Originating Motion) *Respondents*

— AND BETWEEN —

THE PUBLIC TRUSTEE FOR THE PROVINCE OF
ONTARIO (Respondent to Originating Motion) ... *Appellant*
AND

NATIONAL TRUST COMPANY, LIMITED (Applicant on
Originating Motion), THE BOARD OF DIRECTORS
OF THE CANADA LIFE ASSURANCE COMPANY,
EDWIN G. BAKER, MARGARET JANE ARDAGH,
WILLIAM BURT SHEPARD, THE OFFICIAL
GUARDIAN FOR THE PROVINCE OF ONTARIO
(Respondents to Originating Motion) *Respondents.*

— AND —

IN THE MATTER of the ESTATE of LOUISE BOGART COX deceased.
AND

IN THE MATTER of the TRUSTEE ACT, R.S.O. Ch. 165, Sec. 59
AND

IN THE MATTER of the JUDICATURE ACT, R.S.O. Ch. 100, Sec. 106 and
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WILLIAM BURT SHEPARD, THE OFFICIAL
GUARDIAN FOR THE PROVINCE OF ONTARIO,
THE PUBLIC TRUSTEE FOR THE PROVINCE OF
ONTARIO and LIDA LOUISE SHEPARD
(Respondents to Originating Motion) *Respondents*

— AND BETWEEN —

THE PUBLIC TRUSTEE FOR THE PROVINCE OF
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AND

NATIONAL TRUST COMPANY, LIMITED (Applicant on
Originating Motion), THE BOARD OF DIRECTORS
OF THE CANADA LIFE ASSURANCE COMPANY,
EDWIN G. BAKER, WILLIAM BURT SHEPARD,
THE OFFICIAL GUARDIAN FOR THE PROVINCE
OF ONTARIO and LIDA LOUISE SHEPARD *Respondents*
(Consolidated Appeals.)

CASE FOR THE APPELLANT

THE PUBLIC TRUSTEE FOR THE PROVINCE OF ONTARIO.

RECORD

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1.—These are consolidated appeals by Special Leave from a Judgment of the supreme Court of Canada, dated 22nd December, 1952, in the matter of the estate of Herbert Coplin Cox deceased and from a similar Judgment of the Supreme Court of Canada, dated 22nd December, 1952, in the matter of the estate of Louise Bogart Cox deceased by a majority (Kerwin, Taschereau, Kellock, Fauteux and Estey, JJ., Rand and Cartwright, JJ.

dissenting) affirming, subject to a variation, two similar Judgments of the Court of Appeal for the Province of Ontario, dated 16th February, 1951, which allowed an appeal from two similar Judgments of the Supreme Court of Ontario, dated 27th January, 1950. By the latter Judgments it was declared that a bequest in the Will of Herbert Coplin Cox deceased and a bequest in similar terms in the Will of Louise Bogart Cox deceased were valid charitable bequests.

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2.—By his Will made the 23rd June, 1938, Herbert Coplin Cox, after making a number of specific and pecuniary bequests, directed that with respect to the balance of his residuary estate which might remain in his Trustees' possession his said Trustees should hold the same upon trust as follows :—

“ To pay the income thereof in perpetuity for charitable purposes only ; the persons to benefit directly in pursuance of such charitable purposes are to be only such as shall be or shall have been employees of The Canada Life Assurance Company and/or the dependants of such employees of said The Canada Life Assurance Company ; subject to the foregoing restrictions, the application of such income, including the amounts to be expended and the persons to benefit therefrom, shall be determined by the Board of Directors of the said The Canada Life Assurance Company, as they, the said Board of Directors, in their absolute discretion shall from time to time decide. The trust Fund is to be known as ‘ The Cox Foundation ’ in memory of the family whose name has been so long associated with the said Company.”

3.—By her Will made the 2nd November, 1948, Louise Bogart Cox, after making a number of specific and pecuniary bequests directed her trustees to hold all the rest residue and remainder of her estate upon trust as follows :

“ To pay the income thereof, subject to (a) hereof, in perpetuity for charitable purposes only ; the persons to benefit directly in pursuance of such charitable purposes are to be only such as shall be or shall have been employees of The Canada Life Assurance Company and/or the dependants of such employees of said The Canada Life Assurance Company ; subject to the foregoing restrictions, the application of such income, including the amounts to be expended and the persons to benefit therefrom, shall be determined by the Board of Directors of the said The Canada Life Assurance Company, as they, the said Board of Directors, in their absolute discretion shall from time to time decide. The Trust Fund is to be known as ‘ The Cox Foundation ’ in memory of the family whose name has been so long associated with the said Company.”

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4.—Herbert Coplin Cox died on 17th September, 1947, and Letters of Administration with his said Will annexed together with a Codicil not material on this Appeal were granted by the Surrogate Court of the County of Halton to Alfred Herbert Cox and National Trust Company Limited.

5.—Louise Bogart Cox died on 18th November, 1948, and Letters Probate of her said Will annexed were granted by the Surrogate Court of the County of Halton to National Trust Company Limited and Alfred Herbert Cox.

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6.—By an originating notice of motion issued in the Supreme Court of Ontario in March, 1949, in the matter of the estate of Herbert Coplin Cox, 10 the Administrators of his Will sought the determination of the Court whether the bequest of his residuary estate, set out in paragraph 2 of this case, was a valid charitable bequest and further sought certain consequential directions. The notice of motion was served upon a large number of persons, of whom the following appeared at the trial having the respective interests set opposite their names :

<i>Respondents</i>	<i>Interest</i>	
(a) National Trust Company Ltd. and Alfred H. Cox	Executors of Louise Bogart Cox deceased.	
(b) Fifteen persons who were Directors of The Canada Life Assurance Company	As set out in the bequest.	20
(c) Edwin G. Baker, a Director of The Canada Life Assurance Company	Appointed by Order, dated 27th January, 1950, to represent the employees of The Canada Life Assurance Company.	
(d) Louise L. Shepard otherwise Lida Louise Shepard	One of next of kin of Louise Bogart Cox.	
(e) Alfred H. Cox	Beneficiary under the Will and one of the next of kin of Herbert Coplin Cox.	
(f) Margaret Jane Ardagh	One of next of kin of Herbert Coplin Cox appointed by Order, dated 27th January, 1950, to represent all next of kin of Herbert Coplin Cox not individually represented.	30
(g) William Burt Shepard	One of next of kin of Louise Bogart Cox.	
(h) The Official Guardian of the Province of Ontario	On behalf of George Stewart Ames and Bruce Coleman Ames (infants) two of the next of kin of Herbert Coplin Cox.	
(i) The Public Trustee of the Province of Ontario	On behalf of charitable interests.	40

By Order dated 27th January, 1950, this Appellant was appointed to represent persons who might benefit under the bequest other than the

employees of The Canada Life Assurance Company. Upon being served with the Notice of Motion this Appellant intervened and took part in the proceedings under the provisions of Section 6 (4) of the Charities Accounting Act (R.S.O. 1950—C.50) which is as follows :—

10 “ (4) Where an action or other proceeding is brought to set
 “ aside, vary or construe any such will or other instrument,
 “ written notice thereof shall be served upon the Public Trustee,
 “ and if no one appears as representing the religious, educational,
 “ charitable or other public institution, or if there is no named
 “ beneficiary, or a discretion is given to the executor or trustee
 “ as to a choice of beneficiary, the Public Trustee may intervene
 “ in such proceedings and shall have the right to object or consent
 “ and to be heard upon any argument as a party to such action
 “ or proceeding.”

The “ will or other instrument ” referred to in the subsection is, under subsection (3), one “ whereby real or personal property . . . are given to or vested in any person as executor or administrator for any religious, educational, charitable or other purpose or are to be applied by him to or for any such purpose.”

20 7.—An originating motion in the matter of the estate of Louise Bogart Cox seeking similar relief was taken out by the Executors of Louise Bogart Cox in March, 1949. The persons who appeared thereon as Respondents at the trial were :— p. 27

	<i>Respondents</i>	<i>Interest</i>
	(a) Fifteen persons who were Directors of The Canada Life Assurance Company	As set out in the bequest.
30	(b) Edwin G. Baker, a Director of The Canada Life Assurance Company	Appointed by Order, dated 27th January, 1950, to represent the employees of The Canada Life Assurance Company.
	(c) Louise L. Shepard otherwise Lida Louise Shepard	One of next of kin of Louise Bogart Cox.
	(d) William Burt Shepard	One of next of kin of Louise Bogart Cox.
	(e) The Official Guardian of the Province of Ontario	Appointed by Order, dated 27th January, 1950, to represent any unascertained persons interested in the residue.
	(f) The Public Trustee of the Province of Ontario	On behalf of charitable interests.

40 Upon being served with the Notice of Motion this Appellant similarly intervened and was similarly appointed to represent persons who might benefit under the bequest other than the employees of The Canada Life Assurance Company.

8.—From evidence filed on the motions it appeared that the portions of the estates of Herbert Coplin Cox and Louise Bogart Cox affected by the bequest in question amounted respectively to \$500,000 and \$200,000.

- RECORD
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p. 11 It also appeared that the minimum number of employees, past and present, of The Canada Life Assurance Company who, or whose dependants might benefit from the bequests, exceeded 15,000.
- pp. 13, 34 9.—By Orders made on each motion dated 27th January, 1950, by the Supreme Court of Ontario it was declared that the bequest in each Will was a valid charitable bequest for the relief of poverty. The remaining questions raised by each motion were adjourned.
- p. 46 10.—In his reasons for judgment given in relation to both motions together Mr. Justice Wells said that the direction to pay income was expressed to be for charitable purposes only and held that there could be no question that the gifts must be deemed to be for any of the four purposes which the authorities (such as *Pemsel's* case 1891, A.C. 531) laid down as compendiously describing charitable trusts. He then considered whether the bequests could be interpreted as being for the particular head of charitable relief consisting in the relief of poverty and came to the conclusion that it could. It was impossible in his view to presume that in a group as large as that indicated there would not at some time or other be necessity for the relief of poverty. The fact that the group intended to be benefited was defined by and depended upon a personal relationship to a Company did not preclude him from holding under the English authorities (such as *re Gosling* (1900) 48 W.R. 30, and *Gibson v. South American Stores (Gath and Chaves) Ltd.*, 1950, Ch. 177) that there was a valid charitable bequest for the relief of poverty. The learned Judge therefore answered the first question raised before him by a declaration that the bequest made by each testator was a valid charitable bequest for the relief of poverty. 10 20
- p. 19 11.—The next of kin of Herbert Coplin Cox and of Louise Bogart Cox appealed from the decision of Wells, J. to the Court of Appeal of the Province of Ontario and the Official Guardian supported the appeal. This Appellant served notice that he intended to contend and he did contend upon the appeal that the Order of Wells, J. should be varied by declaring that the bequest in each case was a valid charitable bequest and was not restricted to the relief of poverty. 30
- p. 22 12.—The Court of Appeal gave Judgment on 16th February, 1951, allowing the appeal and declared that the gifts were void as infringing the rule against perpetuities.
- p. 62 13.—In his reasons for Judgment (with which Aylesworth, J.A. and Bowlby, J. A. concurred) Roach, J. A., after quoting from the speech of Lord Macnaughten in *Pemsel's* case (1891 A.C. at p. 583) said that a trust could not be a valid charitable trust within any of the four divisions described by Lord Macnaughten unless it was for a public purpose that is to say for the benefit of the community or an appreciably important class of the community. He then said that a recognised exception to the rule of public 40

benefit was provided by the cases of trusts for the benefit of "poor relations" and stated that the issue before the Court was whether the relief of poverty among a group of individuals defined by reference to a personal relationship to a designated propositus constituted a second exception to the rule. The learned Judge reviewed some of the English line of authorities which supported the contention that there was such an exception, namely *Spiller v. Maude* (1880) 32 Ch. D. 158; *re Gosling* (1900) 48 W.R. 30; *Gibson v. South American Stores (Gath and Chaves) Ltd.*, 1950, Ch. 177, together with the House of Lords' decision in *Oppenheim v. Tobacco Securities Trust Co. Ltd.*, 1951, A.C. 317, which left the question undecided, and came to the conclusion that the Courts of Ontario should hold that there was not such an exception. The test as laid down by the House of Lords in relation to an educational trust in *Oppenheim v. Tobacco Securities Trust Co. Ltd.* (1951, A.C. 317) should also be the test to be applied in a trust for the relief of poverty. The trusts in this case were not trusts for general public purposes, they were trusts for private individuals and not being for public purposes were void.

14.—The Appellant Edwin G. Baker (representing the employees of The Canada Life Assurance Company) appealed against the Judgment of the Court of Appeal of Ontario to the Supreme Court of Canada. This Appellant supported the appeal, and contended that the bequests were valid bequests for charitable purposes generally or were in any event valid bequests for the relief of poverty. On 22nd December, 1951, the Supreme Court by a majority dismissed the appeal.

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15.—In his reasons for Judgment (concurring in by Taschereau, J.) Kerwin, J. said that the first point to be determined was the proper construction of the bequests. In his opinion the charitable purposes for which the income was to be paid were the employees and dependants and they must benefit "directly". This was not a case of there being a clear intention with merely the particular mode of application failing for illegality or some other reason. The element of public benefit was essential and the trust could not be for the relief of poverty since the Directors could choose employees and dependants who were not poor. The employees of the Company could not constitute a class of the community.

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16.—Kellock, J. (in whose reasons Fauteux, J. concurred) held that the gifts could not be read as limited to one of the four heads of charity, namely poverty, but extended to all four as though they had been set out seriatim. He considered moreover that the income was, under the terms of the bequests, devoted for charitable purposes among the persons of the class described to the exclusion of all others. There was no general charitable intention but an intention that the income should be used for charitable purposes for the benefit only of the persons specified.

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17.—Estey, J., after referring to the “ poor relations ” cases and to the line of English authorities which held that a trust for the relief of poverty need not, as a condition of validity, contain an element of public benefit (*Spiller v. Maude* (1881) 32 Ch. D. 158 ; *In re Buck*, 1896, 2 Ch. 727 ; *Iner Gosling* (1900) 48 W.R. 301 and *Gibson v. South American Stores (Gath and Chaves) Ltd.*, 1950, 1 Ch. 177) held that this was not a trust for the relief of poverty but extended to all heads of charitable relief ; in view of the absence of the element of public benefit it could not be considered charitable. He then considered whether there was shown a general charitable intention and said that this involved a difficult question of construction. In his view the provision read as a whole did not disclose that the paramount object was to benefit charity generally but rather to benefit the employees and their dependants. 10

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18.—Cartwright, J. in a dissenting Judgment, referred to the opening words of the bequest “ to pay the income thereof in perpetuity “ for charitable purposes only ”. Pausing there, he could not think of any words more apt to indicate a general charitable intention. The clause proceeded to confer on the Directors of The Canada Life Assurance Company, subject only to two restrictions, an absolute discretion as to the application of the income. The restrictions were first that the income was to be paid for charitable purposes only and second that the persons to benefit directly were the employees of The Canada Life Assurance Company and/or the dependants of such employees. Poverty was not a necessary element to qualify for benefit. Moreover the Directors were free to devote all the income to charitable purposes which conferred only indirect benefits. 20

After considering English authorities, the learned Judge came to the conclusion that the restriction requiring the Directors to confer direct benefits only upon the employees of the Company and/or their dependants was invalid because the quality of poverty was not an essential condition for eligibility and because the class was not a section of the public. But as the Testator and Testatrix had shown a general charitable intention, effect could be given to it although the restriction failed. In his view the bequests should be carried out *cy-pres* by means of a scheme to be settled by the Court. 30

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19.—Rand, J. also dissented from the majority. He agreed with Cartwright, J. as to the construction of each bequest ; that it declared a general charitable intention, that the word “ directly ” was significant and that it restricted direct benefits to those mentioned and implied that there might be other benefits of an indirect character. He agreed finally that the benefit to the specified class violated the rules laid down requiring that public quality in the recipients which the authorities defined. He did not agree however that the appointment of the Board of Directors as the body to determine the distribution of the fund must be taken also to fail : their discretion extended over the whole charitable field and he found 40

nothing to indicate that had there not been the special provision for the employees, that discretion would have been placed elsewhere. He would therefore have declared the bequest in both testaments to be a valid gift to charity the income to be applied by the trustees to such charitable purposes with indirect personal benefits only as the Board in their discretion might think proper.

RECORD

20.—On the 19th June, 1953, this Appellant was granted special leave to appeal to Her Majesty in Council against the Judgments of the Supreme Court of Canada and an order was made consolidating these
10 appeals.

21.—This Appellant submits that the Judgment of the Supreme Court of Canada ought to be reversed and that in lieu thereof a declaration should be made that the bequest in each Will constitutes a valid charitable gift to be carried into effect *cy-pres* by means of a scheme to be settled by the Court or alternatively by the application of the Trust Funds by the Board of Directors of The Canada Life Assurance Company to such charitable purposes with indirect benefits only as the Board in their discretion think proper, and alternatively this Appellant will support the contention of the Appellant Edwin G. Baker that the bequests are valid
20 bequests for the relief of poverty for the following amongst other

REASONS

1. BECAUSE when a bequest is made, as it was made in each Will in this case, in terms "for charitable purposes only" such a gift should not be held to fail, on the grounds that it is not a charitable gift, unless there is the clearest indication that in fact the gift was intended to be applied for non-charitable purposes.
- 30 2. BECAUSE the interpretation placed upon the bequests by Cartwright, J. and Rand, J. was right, namely that the gifts in this case were for general charitable purposes followed by directions as to the particular mode in which the application of the trust fund for charitable purposes was to be carried out, the direction as to employees of The Canada Life Assurance Company being a direction which related to direct benefits only and which did not relate to other types of benefits which could be conferred.
3. BECAUSE even if it be held that the direction relating to employees of The Canada Life Assurance Company was invalid, effect ought to be given to the clearly expressed

general charitable intention, either *cy-pres* by means of a scheme or by permitting the Trustees or the Board of Directors of The Canada Life Assurance Company to carry it into effect.

4. BECAUSE even if the directions which followed the gift "for charitable purposes only" should be construed as confining all benefits (direct or indirect) to employees of The Canada Life Assurance Company, the bequests read as a whole still clearly indicated a paramount intention to devote the whole of each residuary estate to charity.
5. BECAUSE in any event the trusts should be considered to be charitable as being beneficial to the community since the employees and dependants of employees of The Canada Life Assurance Company form a substantial section of the community and the English decisions to the effect that a class defined by reference to common employment cannot form a section of the community for the purpose of a charitable trust (not being a trust for the relief of poverty) should not be regarded as forming part of the law of the Province of Ontario. 10
6. BECAUSE alternatively in any event, having regard to the class of persons involved and to the nature of the application directed, the trusts should be considered as being for the relief of poverty as being the only one of the recognised heads of charitable purposes to which effect can be given and as such, following a line of English authority, as valid, whether or not they were for the public benefit or beneficial to the community, and notwithstanding that the designated beneficiaries (namely the employees of The Canada Life Assurance Company and their dependants) were selected on the basis of employment by a particular company. 20 30
7. BECAUSE the Judgments of Cartwright, J. and Rand, J. were right.

GEOFFREY CROSS.

ARMAND RACINE.

R. O. WILBERFORCE.

In the Privy Council.

No. 20 of 1953.

ON APPEAL FROM THE SUPREME COURT OF
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AND
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(Respondent to Originating Motion)
Appellant

AND

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CASE FOR THE APPELLANT
THE PUBLIC TRUSTEE OF ONTARIO

LAWRENCE JONES & CO.,
Winchester House,
Old Broad Street,
London, E.C.2,
Solicitors for the Public Trustee of Ontario.