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UNIVERSITY OF LONDON
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INSTITUTE OF ADVANCED
LEGAL STUDIES

G.C.F.G.

Record.

In the Privy Council.

No. 20 of 1953.

**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*

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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 —

20 THE PUBLIC TRUSTEE FOR THE PROVINCE OF
ONTARIO (Respondents 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*

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— 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 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, 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*

10

— 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 and LIDA LOUISE SHEPARD *Respondents.*

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(Consolidated Appeals.)

**CASE for EDWIN G. BAKER,
Appellant in the Appeal first mentioned above and
Respondent in the Appeal secondly mentioned above.**

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1.—In these two Appeals the above named Appellants each appeal from two Judgments of the Supreme Court of Canada delivered on the 22nd day of December 1952 affirming by a majority (Kerwin, Taschereau, Kellock, Estey and Fauteux JJ, Rand and Cartwright JJ dissenting), subject to a variation thereof, two Judgments of the Court of Appeal for the Province of Ontario (Roach, Aylesworth and Bowlby JJ.A) delivered on the 16th day of February 1951 allowing unanimously appeals from two Judgments of the Honourable Mr. Justice Wells of the Supreme Court of Ontario delivered on the 27th day of January 1950 whereby certain bequests hereinafter mentioned respectively contained in the Wills of the above

pp. 26, 45;
72-96.

pp. 47-72.

pp. 13-17;
34-37; 46-61.

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mentioned Herbert Coplin Cox (hereinafter called "the Testator") and Louise Bogart Cox (hereinafter called "the Testatrix") were declared to constitute valid charitable bequests for the relief of poverty.

2.—(a) The Testator who died on the 17th day of September 1947 and Letters of Administration of whose Estate with Will and Codicil annexed were granted by the Surrogate Court of the County of Halton in the Province of Ontario on the 15th day of December 1947 to the Respondent National Trust Company Limited and one Alfred Herbert Cox, since deceased, nominees of the Testator's widow the Testatrix, provided by his Will dated 10 the 23rd day of June 1938 as follows :— pp. 100-107.
pp. 101-106.

" Subject as hereinbefore provided, and with respect to the balance of my residuary estate which may remain in my Trustees' possession, my said Trustees shall 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 dependents 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 20 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."

The other testamentary dispositions of the Testator (including a Codicil dated the 23rd day of June 1938 to his said Will) are immaterial for the present purpose. pp. 106-107.

(b) The Testatrix who died on 18th day of November 1948 and Probate 30 of whose Will dated the 2nd day of November 1948 was granted by the said Surrogate Court on the 22nd day of February 1949 to the Respondent National Trust Company Limited and the said Alfred Herbert Cox provided by clause 3 (F) of her said Will as follows :— pp. 111-112.
pp. 112-116.

" (F) to hold all the rest, residue and remainder of my estate upon trust as follows :—

(a) to use so much of the income and/or capital thereof as may be necessary for the upkeep and maintenance of the properties described in paragraph 3 (D) hereof

(b) to pay the income thereof, subject to (a) hereof, in perpetuity 40 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 dependents 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."

The other testamentary dispositions of the Testatrix are immaterial for the present purpose.

3.—(a) The persons who upon the death of the Testator became entitled to any part of his Estate as to which he died intestate were, according to the evidence of one John G. Hungerford, Assistant General Manager of the Respondent National Trust Company Limited on the information known to him, the Testatrix as the widow of the Testator and thirteen persons whose names are set out in paragraph 6 of an Affidavit of the said John G. Hungerford filed in support of the Originating Motion mentioned in paragraph 4 (a) of this Case, all of whom were duly served with Notice of the said Originating Motion, including the Respondent Margaret Jane Ardagh and two infants on whose behalf the Respondent Official Guardian for the Province of Ontario (hereinafter called "the Official Guardian") was so served. 10

(b) The persons who on the death of the Testatrix became entitled to any part of her Estate as to which she died intestate were, according to the evidence of the said John G. Hungerford on the information known to him, the Respondents Lida Louise Shepard and William Burt Shepard. 20

4.—In the month of March 1949 the Respondent National Trust Company Limited and the said Alfred Herbert Cox

(a) as Personal Representatives of the Testator applied to the Supreme Court of Ontario by Originating Notice of Motion entitled in the matters of the Testator's Estate and of the above-mentioned Act and Rules for the determination of the question whether or not the Testator's bequest referred to in paragraph 2 (a) hereof is a valid charitable bequest and for consequential relief, and directions and 30

(b) as Personal Representatives of the Testatrix applied to the said Supreme Court by Originating Notice of Motion entitled in the matters of the Testatrix's Estate and of the said Act and Rules for the determination of the question whether or not the Testatrix's bequest referred to in paragraph 2 (b) hereof is a valid charitable bequest and for consequential relief and directions.

5.—The evidence filed in support of each of the said Motions showed that as at the 5th day of April, 1949 there were 1,888 persons then employed on the executive, managerial, office and other staff (including the sales organisation) of the Canada Life Assurance Company (hereinafter called "the Company") and at least 13,576 persons who had formerly been so 40

employed, and that the Company operated and maintained offices in all the Provinces of the Dominion of Canada, in ten States of the United States of America, and also in London, Belfast, Dublin, Bermuda and Honolulu.

6.—The said Motions were heard together by the Honourable Mr. Justice Wells, who on the 27th day of January 1950 delivered a single Judgment on both Motions but made a separate Order on each. pp. 46-61.

7.—By his said Order on the Motion referred to in paragraph 4 (a) hereof the learned Judge— pp. 13-17.

10 (a) appointed the Respondent Margaret Jane Ardagh to represent for the purposes of that Motion any of the Testator's next of kin in the same interests as herself not specifically mentioned in his Will and Codicil and not served with Notice of the said Motion ;

(b) appointed the above-named Edwin G. Baker (hereinafter called "this Appellant") to represent for the purposes of that Motion the employees of the Company.

(c) appointed the Public Trustee for the Province of Ontario (hereinafter called "the Public Trustee") to represent those other persons who might benefit under the bequest referred to in paragraph 2 (a) hereof

20 (d) appointed the Official Guardian to represent for the purposes of that Motion any unascertained persons who might be interested in the residue of the Testator's Estate in the event of an intestacy thereof and not represented by the said Margaret Jane Ardagh ;

(e) declared the bequest referred to in paragraph 2 (a) hereof to be a valid charitable bequest for the relief of poverty, and

(f) gave certain further directions as to costs and otherwise.

8.—By his said Order on the Motion referred to in paragraph 4 (b) hereof the learned Judge— pp. 34-37.

30 (a) appointed this Appellant to represent for the purposes of that Motion the Employees of the Company ;

(b) appointed the Public Trustee to represent those other persons who might benefit under the bequest referred to in paragraph 2 (b) hereof ;

(c) appointed the Official Guardian to represent for the purposes of that Motion any unascertained persons who might be interested in the residue of the Estate of the Testatrix in the event of an intestacy thereof ;

(d) declared the bequest referred to in paragraph 2 (b) hereof to be a valid charitable bequest for the relief of poverty, and

(e) gave certain further directions as to costs and otherwise.

9.—Mr. Justice Wells in his said Judgment said—

(a) that a gift for charitable purposes only without more would clearly be valid ;

(b) that, assuming that the Testatrix by the phrase “ for charitable purposes only ” intended to include all four heads of charity enumerated by Lord Macnaghten in *Pemsel's Case* (1891 A.C. 531 at 583), a further enquiry was necessary whether the gift was one for the benefit of the public (*Verge v. Somerville* 1924 A.C. 496 at 499).

The learned Judge then reviewed *re Gosling* (48 W.R. 30) *re Drummond* (1914 2 Ch. 90) *re Rayner* (122 L.T.R. 577) *re Compton* (1945 Ch.123) 10
re Hobourn Aero Components Ltd.'s Air Raid Distress Fund (1946 Ch. 194) and *Gibson v. South American Stores (Gath and Chaves) Ltd.* (1950 Ch. 177) and arrived at the conclusions—

(c) that in many cases where gifts for the relief of poverty have been held to be valid charitable gifts the right to be included in the class benefiting from the gift was a right dependent upon a personal relationship to the testator or someone else selected by him and that in view of the decision in *Gibson v. South American Stores (Gath and Chaves) Ltd.* (*supra*) such cases must be treated as a body of decisions establishing good law, though perhaps anomalous ; 20

(d) that the Testatrix had unambiguously expressed a general charitable intent and that such intent included the division of charity described as the relief of poverty ;

(e) that the fact that the group intended to benefit is defined by and depends upon a personal relationship either at first or second hand to the Company did not preclude him from holding that there is a valid charitable bequest for the relief of poverty ;

(f) that he must hold the bequest to be limited to this head of charitable relief.

The learned Judge accordingly declared the bequests to be valid charitable 30
bequests for the relief of poverty.

10.—The Respondent Margaret Jane Ardagh appealed to the Court of Appeal of the Supreme Court of Ontario from the Order referred to in paragraph 7 hereof and the Respondent William Burt Shepard appealed to the said Court of Appeal from the Order referred to in paragraph 8 hereof. In respect of each of such appeals the Public Trustee gave Notice that upon the hearing of the same he would contend that the decision appealed against should be varied by declaring that the bequest in question in each case is a valid charitable bequest and is not restricted to the relief of poverty. 40

11.—The said appeals were heard together by the said Court of Appeal who on the 16th day of February 1951 delivered one Judgment on both Appeals but made a separate Order on each.

12.—The said Judgment of the Court of Appeal was delivered by Roach J.A. who said :— pp. 61-72.

(a) that the issue in the Appeal, which was one of first impression in Canada, was important and difficult ;

(b) that a trust cannot be a valid charitable trust within any of the four divisions described by Lord Macnaghten in *Pemsel's Case (supra)* unless it is for the benefit of the community or an appreciably important class of the community (*Verge v. Somerville (supra)* ; *Williams' Trustees v. I.R.C.* 1947 A.C. 447, 457 ; *National Antivivisection Society v. I.R.C.* 10 1948 A.C. 31, 42, 53) ;

(c) that the “ poor relations cases ” were an exception to the rule of public benefit (*re Compton supra* at pp.137 *et seq.*).

After reviewing *re Drummond (supra)*, *re Hobourn Aero Components Ltd.'s Air Raid Distress Fund (supra)*, *Spiller v. Maude* (32 Ch. D. 158), *re Gosling (supra)*, *Gibson v. South American Stores (Gath and Chaves) Ltd. (supra)* and *Oppenheim v. Tobacco Securities Trust Co. Ltd.* 1951 A.C. 297 the learned Judge pointed out—

(d) that the House of Lords in the last mentioned case (at pp. 35, 38) left undecided the question whether the rule that a class ascertained by reference to common employment does not constitute a section of the community for the relevant purpose should be applied to trusts for the relief of poverty ; and held—

(e) that the trust in the present case did not come within the “ poor relations cases ”, which constitute a class of anomalous decisions which in the Province of Ontario at least, and probably in England also, is a closed class into which no other case not entirely identical with the “ poor relations cases ” should be legally adopted ;

(f) that the Court should hold that in the Province of Ontario trusts for the relief of poverty among a group of private individuals selected by reference to their relationship as employees or dependants of employees of a named employer are not charitable ;

(g) that the Court should not follow such cases as *Spiller v. Maude (supra)* *re Gosling (supra)* and *Gibson v. South American Stores (Gath and Chaves) Ltd. (supra)* which diverge from the principle that the beneficiaries of a charitable trust must be the community or an appreciably important class of the community ;

(h) that in determining whether the gift is for the benefit of the public regard should be had not to the nature or quality of the gift, that is to say whether it is for the relief of poverty or for the advancement of education or for the advancement of religion, but to the description of the beneficiaries ;

(i) that the Appeals should be allowed because the trusts are not trusts for general public purposes but for a fluctuating body of private individuals

pp. 22-24
and 42-43.

13.—The said Court of Appeal accordingly made an Order upon each of the said Appeals allowing the same, declaring the bequest to which the same related not to be a valid charitable bequest but to be void for perpetuity, and referring the matter to the Master of the Supreme Court of Ontario at Toronto to determine and report the next of kin of the Testator and the Testatrix respectively.

14.—This Appellant appealed from each of the Orders of the Court of Appeal referred to in paragraph 8 hereof to the Supreme Court of Canada who heard such Appeals together and on the 22nd day of December 1952 delivered one Judgment on both Appeals but made a separate Order in each affirming the Order of the Court of Appeal appealed from subject to a variation (not presently material) of so much thereof as referred the matter to the said Master. 10

pp. 72-75.

15.—Kerwin and Taschereau JJ held—

(a) that upon the construction of the said bequests the persons to benefit under the trusts must be employees or dependants of employees of the Company, who must benefit directly, as a trust for indirect benefits would be too vague for the Court to enforce ;

(b) that the circumstance that the income is directed to be paid for charitable purposes only does not determine the matter if the only purposes to which the moneys may be applied are not charitable ; 20

(c) that the element of public benefit is essential for all charities save in the anomalous case of trusts for the relief of poverty ;

(d) that the trusts declared by the said bequests would permit the Board of Directors to choose employees and dependants who are not poor ;

(e) that the element of poverty does not enter into the present matter and *Oppenheim v. Tobacco Securities Trust Co. Ltd.* (*supra*) applies.

pp. 76-80.

16.—Kellock and Fauteux JJ held—

(a) that the expression “for charitable purposes only” in the said bequests comprised all four heads of charity and should be construed as though the Testator and Testatrix had set out *seriatim* all the said four heads ; 30

(b) that so construed, the said bequests empower the trustees to devote the subject matter of the same to non-charitable purposes and the trusts are therefore void (*Morice v. Bishop of Durham* 10 V. 521 541) ;

(c) that the Testator and Testatrix had no general charitable intention but an intention that the income should be used for charitable purposes for the benefit only of the persons of the specified class and no one else and that accordingly the Court could not apply the bequests in any other way upon the failure of the Testator’s or Testatrix’s gift.

17.—Estey J. held—

(a) that the language of the bequests included, without enumerating, all four heads of charity and that the present case is distinguishable on this ground from the class of case of which *Gibson v. South American Stores (Gath and Chaves) Ltd.* (*supra*) is an example, where the trusts were specifically for the relief of poverty and no other charitable purposes ;

(b) that the fact that the “ poor relations cases ” and the class of case mentioned in the last preceding sub-paragraph hereof are treated as exceptions to the general rule requiring public benefit indicates that that
10 rule is applicable to trusts for the relief of poverty (*Williams' Trustees v. I.R.C.* *supra* at p. 457 ; *National Antivivisection Society v. I.R.C.* *supra* at pp. 42, 53 ; Tudor on Charities 5th ed. p.11) ;

(c) that where the *cestuis que* trust are limited to persons who are employees or dependants of employees of a particular company, public benefit is negatived ;

(d) that the Testator and Testatrix intended that employees and their dependants might benefit not only in cases of financial need but in any manner that might be included within the phrase “ charitable purposes ” ;

(e) that the Testator and Testatrix disclosed no general charitable
20 intention.

18.—The five judges of the Supreme Court above referred to accordingly held that the Appellants said Appeals should be dismissed. Rand and Cartwright JJ however, dissented.

19.—Rand J. held—

(a) that the said bequests disclose a general charitable intention ;

(b) that the word “ directly ” therein restricts direct benefits to the class of beneficiaries mentioned but implies that there may be other applications conferring indirect benefits ;

(c) that as regards direct benefits the restriction to the specified class
30 violates the rule requiring public benefit ;

(d) that accordingly the funds can only be applied in ways conferring indirect benefits on individuals, as by grants to charitable agencies such as libraries, hospitals, schools or churches ;

(e) that the said clause constitutes a valid charitable gift.

20.—Cartwright J. held—

(a) that upon the construction of the said clause it is only in the case of direct benefits that the application of the income is confined to members of the specified class of beneficiaries ;

(b) that the exception from the rule requiring public benefit in the
40 case of trusts for the relief of poverty limited to a class of individuals ascertained by reference to some personal tie is restricted to trusts in which

the quality of poverty is an essential condition for eligibility for benefit and should not be extended to cases where the income can be applied under any of the four heads of charity ;

(c) nor should such extension be effected by construing words which are not restricted to the relief of poverty as if they were so restricted merely because of a direction that the income is to be used for charitable purposes only ;

(d) that in the present case the restriction in regard to direct benefits is invalid because the class to which such benefits are restricted does not amount to a section of the public ;

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(e) that the bequests indicate a paramount intention of giving the whole income to charity ;

(f) that what follows the words " charitable purposes only " in the bequests is a direction as to the manner in which such purposes are intended to be carried into effect ;

(g) that even if, contrary to his view, upon the construction of the bequests all benefits were intended to be confined to members of the defined class of beneficiaries, the wills read as a whole indicate a paramount intention to devote all the residue of the Testator's and Testatrix's Estates to charity ;

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(h) that such general charitable intention should not be allowed to fail and that a scheme should be directed.

pp. 97-99.

21.—This Appellant and the Public Trustee severally petitioned Her Majesty in Council for Special Leave to Appeal to Her Majesty in Council against the said two Orders of the Supreme Court of Canada and by an Order in Council dated the 19th day of June, 1953 upon such cross-undertakings as to costs as therein appear special leave was granted both to this Appellant and to the Public Trustee to appeal against the said Orders and it was ordered that the four Appeals should be consolidated and heard together upon two printed Cases on the side of the Appellants and one printed Case on the side of the Respondents Margaret Jane Ardagh, William Burt Shepard, The Official Guardian of the Province of Ontario and Lida Louise Shepard and one Printed Case on the side of the Respondents National Trust Company Limited (Administrator with the Will annexed of H. C. Cox), National Trust Company Limited (surviving Executor of L. B. Cox) and the Board of Directors of the Canada Life Assurance Company Limited.

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22.—This Appellant humbly submits that the said Judgment of the Supreme Court of Canada was wrong and ought to be reversed for the following amongst other

REASONS

- 1.—Because upon the true construction of each of the said bequests—
- (a) the income of the same is applicable for charitable purposes only ;
 - (b) the income of the same is applicable for charitable purposes directly benefiting persons who shall be or shall have been employees of the Company or dependants of such persons ;
 - (c) no part of such income could properly be applied for any purpose which is not charitable ;
 - (d) no part of such income could properly be applied for the benefit of any such employees or dependants as aforesaid otherwise than in a
10 charitable manner.
- 2.—Because the relief of poverty amongst such employees and dependants as aforesaid is a charitable purpose and does not lack a sufficient element of public benefit to qualify as a charitable purpose.
- 3.—Because the element of public benefit necessary to constitute a trust for the relief of poverty a charitable trust differs from that required in other classes of charitable trusts, such for instance as trusts for education, for the following (amongst other) reasons :—
- (a) poverty is liable to breed social evils adversely affecting the community ;
 - 20 (b) a poor man is unable to relieve his own poverty ;
 - (c) a poor man is, or is likely to become, a charge on the community ;
 - (d) the relief of poverty benefits not only the persons whose poverty is relieved but also the community of which such persons are members.
- 4.—Because this distinction between trusts for the relief of poverty and other kinds of charitable trusts has been recognised and acted upon by British Courts of Equity over a very long period as appears from many authorities including those mentioned in the Judgments referred to above of Wells J., the Court of Appeal for Ontario and the Supreme Court of Canada.
- 30 5.—Because in this respect the law in the Province of Ontario ought not to, and does not, differ from the general law administered elsewhere in the British Commonwealth and Empire where the doctrines of Equity derived from English law operate.
- 6.—Because the Judgments of the Supreme Court of Canada and the Court of Appeal for Ontario were wrong.
- 7.—Because the Judgment of Wells J. was right.

8.—Because, if the judgment of Wells J. was not right, then upon the true construction of the said bequests the restriction of the application of the income to the benefit of such employees and dependants as aforesaid only applies to modes of application directly benefiting individuals and not to the application of income to charitable purposes which benefit individuals only indirectly.

9.—Because, even if no application of the income of the bequests restricted to such employees and dependants as aforesaid could be charitable, the bequests are valid charitable bequests for purposes which benefit individuals only indirectly.

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10.—Because each of the said bequests discloses a general charitable intention, that is to say, an overriding intention that the income of the same shall be devoted in perpetuity to charitable purposes, and to such purposes only.

JOHN J. ROBINETTE.

DENYS B. BUCKLEY.

In the Privy Council

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BAKER

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NATIONAL TRUST COMPANY, LIMITED
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PROVINCE OF ONTARIO

v.

NATIONAL TRUST COMPANY, LIMITED
AND OTHERS.

CASE

OF

EDWIN G. BAKER.

SLAUGHTER AND MAY,
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London, E.C.2.

Solicitors for Edwin G. Baker.
