

17, 1955

~~ACT. G. 16~~

No. 20 of 1953.

In the Privy Council.

UNIVERSITY OF LONDON
W.C.1

-4 JUL 1956

ON APPEAL
FROM THE SUPREME COURT OF CANADA.

INSTITUTE OF ADVANCED
LEGAL STUDIES

43557

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

and

IN THE MATTER of the ESTATE of LOUISE BOGART COX,
deceased,

10

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

20 NATIONAL TRUST COMPANY LIMITED and
Others *Respondents*

AND BETWEEN

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

AND

NATIONAL TRUST COMPANY LIMITED and
Others *Respondents.*

(Consolidated Appeals)

30

Case

for the Respondents MARGARET JANE ARDAGH, WILLIAM BURT SHEPARD,
THE OFFICIAL GUARDIAN FOR THE PROVINCE OF ONTARIO, and LIDA
LOUISE SHEPARD.

p. 97.
pp. 26, 45.
pp. 22, 42.
pp. 13, 34.

1. This is an appeal by special leave of Her Majesty in Council granted 19th June 1953 from two orders of the Supreme Court of Canada, dated 22nd December 1952 dismissing an appeal by the present Appellant Edwin G. Baker from two orders of the Court of Appeal for Ontario, dated 16th February 1951 which orders reversed the orders of Wells, J., dated 27th January 1950. The question which arises for decision is whether two gifts of residue in the same form in the Wills of Herbert Coplin Cox and his widow Louise Bogart Cox effectively dispose of the same on charitable trusts or (since they involve perpetual trusts) fail with resultant intestacy. These Respondents support the decision 10 appealed from that in each case there is an intestacy as to residue.

p. 2.
p. 27.
p. 105, l. 11.
p. 115, l. 28.

2. The Respondent National Trust Company, Limited moved by originating motion in the estate of Herbert Coplin Cox, deceased, and also in the estate of his wife Louise Bogart Cox, deceased, for the advice of the Court with respect to the following clause in each of their wills:—

“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 20
“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 30
“to be known as ‘The Cox Foundation’ in memory of the family
“whose name has been so long associated with the said Company.”

p. 16, l. 12.

3. In the Court of first instance the Respondent, Margaret Jane Ardagh, was appointed to represent other next-of-kin of Herbert Coplin Cox in the same interest as herself, not specifically mentioned in his will, and not served with notice of the motion.

p. 16, l. 19.
p. 36, l. 15.
p. 16, l. 23.
p. 36, l. 19.

4. The Appellant, Edwin G. Baker, was appointed in each estate to represent the employees of The Canada Life Assurance Company and the Public Trustee was appointed to represent other persons who might benefit under the bequest in question (dependents of employees, 40 past employees and charitable purposes generally).

p. 16, l. 27.
p. 36, l. 22.

5. The Official Guardian was appointed to represent any unascertained persons interested in the event of an intestacy and not represented by Margaret Jane Ardagh.

6. The Appellant Baker contends that the trusts are valid on the ground that they are to be construed as being for the relief of poverty

and hence are valid charitable trusts even if confined in their application to a class composed of employees, past employees and dependents of employees of The Canada Life Assurance Company. In the estate of Herbert Coplin Cox, Baker's contention is supported by National Trust Company Limited as executor of the estate of Louise Bogart Cox. Since she died subsequent to her husband, she would be one of his next-of-kin.

7. The Appellant, the Public Trustee, takes a broader position and asserts that the trust is charitable under all of the four headings of charitable trust and asserts further that in any event there is a general charitable intention expressed by the terms of the trust and that if the particular purpose fails, the trust is to be administered cy-pres. He further maintains that it is only direct benefits which must be confined to the delineated class and that indirect benefits may be conferred at large so long as they are for a charitable purpose.

8. In the Court of first instance Wells, J., after considering various authorities concluded that the trust was for the benefit of the limited class indicated but (A) that the relief of poverty of such limited class was charitable (*Gibson v. S.A. Stores* (1950), 1 Ch. 177); (B) that the trust must on construction be confined to valid charitable trusts, viz., for the relief of poverty, and (C) the trust was therefore valid. It is submitted that there is no justification for limiting the reference to charitable purposes to poverty on the ground that it would be otherwise invalid. Moreover even if so restricted the trust would it is submitted not fulfil the requirement of public benefit.

9. The Respondents, Margaret Jane Ardagh and William Burt Shepard, appealed to the Court of Appeal for Ontario. The Public Trustee gave notice of intention on such appeal to contend that the trust was a valid charitable bequest not restricted to the relief of poverty.

10. The Court of Appeal for Ontario (Roach, Aylesworth and Bowlby, JJ.A.) in a unanimous judgment reversed the judgment of Wells, J., and held that the trusts were not valid charitable trusts because (A) the class to be benefited was restricted and not to be regarded as a section of the public, that (B) the trust was not valid even if (which they did not hold) it was limited to the relief of poverty among the beneficiaries since no exception to the general requirement of public benefit existed in poverty cases.

11. The Appellant Baker appealed to the Supreme Court of Canada and his appeal was supported by the Public Trustee and by National Trust Company Limited as surviving executor of the estate of Louise Bogart Cox. That Court (Rand and Cartwright, JJ., dissenting) dismissed the appeal. Kerwin and Taschereau, JJ., construed the clause as confining the class of beneficiaries to those referred to; they rejected an argument that the word "directly" showed that the trust was not so confined. They also held that the trust was not confined to the relief of poverty and accordingly the decision in *Oppenheim v. Tobacco Securities Trust Co., Ltd.* [1951] A.C. 297 was decisive. This was so notwithstanding that the class was large and some of its members might require financial aid.

p. 78, l. 4. 12. Kellock, J., delivered a judgment concurred in by Taschereau and Fauteux, JJ. He construed the trust as including all of the four heads of charitable purposes and not confined to the relief of poverty, and accordingly held that the decisions in *In re Compton* [1945] Ch. 123 and *In re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund* [1946] Ch. 194 as well as the *Oppenheim* case were applicable, and a gift to the prescribed class was clearly not charitable under the other three heads of charity even if it might be charitable if confined to the relief of poverty. Since the directors of the Company could apply the income in their discretion to any of the four heads, the bequest was void. 10

p. 79, l. 9. Kellock, J., rejected the contention that there was a field of "indirect" benefit left open within which the trust might validly operate, even if it were invalid in its application of direct benefits. He held that the testator intended benefits to individuals and not to institutions or organisations and such individuals were intended to be chosen only from the prescribed class. The testator had no general charitable intention.

p. 79, l. 40.

p. 82, l. 38. 13. Estey, J., referred to the development of the anomalous exception from the requirement of public benefit in the case of trusts for poor relations, and to the more recently developed second exception illustrated by *Gibson v. South American Stores*, supra. He held that the present trust was not one specifically created for the relief of poverty and no other charitable purpose, as was the case in *Gibson's* case. He further held that the general rule requiring public benefit was applicable to trusts for the relief of poverty. The testator intended that the defined class should benefit not only in case of financial need but in any manner that might be included with the phrase "charitable purposes." He also was of the opinion that the trust disclosed no general charitable intention and that there was to be found no valid field of "indirect" benefits. The paramount intention was not to benefit charity generally but to benefit the employees and their dependents. 20

p. 83, l. 1.

p. 83, l. 42.

p. 84, l. 5.

p. 85, l. 38.

p. 86, l. 26.

p. 87, l. 26. 30

p. 92, l. 15. 14. Cartwright, J. (dissenting), agreed with the majority of the Court in finding that poverty was not a necessary element to qualify a member of the class for benefit but held that it was only in the case of direct benefits that the application of the income was confined to members of the class. With some hesitation he rejected the argument that the testator intended the income to be used for such purposes only as the law recognises as charitable in regard to the defined class. Accordingly, he did not find it necessary to decide whether the exception as to trusts for the relief of poverty, based on *Gibson's* case and the judgment of Jenkins, L.J., in *In re Scarisbrick* [1951] 1 Ch. 622 at 648, was to be regarded as established law. 40

p. 93, l. 42-

p. 94, l. 33.

p. 93, l. 38.

p. 94, l. 33. He found, however, that there was a general charitable intention expressed and that while the testators' direction as to the conferring of "direct" benefits could not legally be carried out, the Board of Directors of the Company could apply the income to charitable purposes which produced indirect benefits only, such as reduction of the National Debt, the support of schools, or "Community Chests," and he would have

p. 96, l. 7.

directed that the matter be referred back to the Court of first instance to propound a scheme for the application of cy-pres of the residuary estates.

15. Rand, J. (dissenting) agreed with Cartwright, J., that the trusts declared a general charitable intent, that direct benefits were restricted to the defined class but that this implied that all other benefits were to be indirect; and that the benefits to the specified class could not validly be carried out. He would, however, have left the carrying out of indirect benefits to the discretion of the Board of Directors of the Company. He would therefore have declared the trusts to be valid gifts to charity, the income to be applied by the trustees "to such charitable purposes with indirect personal benefits only" as the Board of Directors in their discretion thought proper.

p. 75, l. 33.

p. 76, l. 23

16. These respondents respectfully submit that these appeals should be dismissed for the following (among other)

REASONS

- (1) BECAUSE the testators' manifest intention was to benefit only the members of the defined class of beneficiaries.
- 20 (2) BECAUSE the charitable purpose intended by the testators was not in terms confined to any one or more of the four classes of charitable purposes known to the law and the Board of Directors of the Company could therefore apply the fund to any of such four purposes.
- (3) BECAUSE a trust for the benefit of such a class, capable of application among any of such four purposes, is not a valid charitable trust but a trust for private individuals.
- (4) BECAUSE the trusts cannot be construed as being confined to the relief of poverty among the defined class.
- 30 (5) BECAUSE such a trust, even if expressed to be for the relief of poverty among the defined class, is not a valid charitable trust. *Gibson v. South American Stores (Gath & Chaves) Ltd.* [1949] Ch. 572; [1950] 1 Ch. 177 was wrongly decided.
- (6) BECAUSE the trusts are not charitable if direct benefits to the members of the defined class were one of the authorised modes of application of the fund, since such mode is not a charitable purpose.
- 40 (7) BECAUSE the trusts cannot be construed as showing a general charitable intention if the gift to the members of the defined class cannot take effect.
- (8) BECAUSE the trusts cannot be construed as showing an intention that indirect benefits may be conferred

for charitable purposes generally even though direct benefits cannot be conferred except upon the members of the defined class.

- (9) BECAUSE the decisions of the Court of Appeal and the Supreme Court of Canada were right and the decision of Wells, J., and the opinions of Cartwright, J., and Rand, J., were wrong.

CHARLES RUSSELL.

J. D. ARNUP.

T. A. C. BURGESS. 10

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FOR ONTARIO and LIDA LOUISE SHEPARD.

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