1952
*May 12, 13, 14
*Dec. 22

In re HERBERT COPLIN COX

AND

In re LOUISE BOGART COX

EDWIN G. BAKER ..... APPELLANT;

AND

NATIONAL TRUST COMPANY LIMITED AND OTHERS ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Charity—Charitable Trust—Income of trust fund payable to such employees and their dependents of an assurance company as determined by its Board of Directors—Validity.

By his will the testator directed his trustees to hold the residue of his estate 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; 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."

Held: (Rand and Cartwright JJ. dissenting)—That on its true construction the clause did not evidence a general charitable intent and the specific bequest to the employees did not satisfy the test of public benefit requisite to establish it as a charitable trust. *Oppenheim* v. *Tobacco Securities Trust Co. Ld.* [1951] A.C. 297; *In re* Compton [1945] Ch. 123; *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund* [1946] Ch. 194 and *In re Drummond* [1942] 2 Ch. 90.

Per: Rand and Cartwright JJ. (dissenting)—The residuary clause declares a general charitable intent and impresses upon the residue a trust for that purpose. The word "directly" restricts direct benefits to those mentioned and implies that all other benefits are to be indirect, but since the benefit to the specified class violates the rules laid down requiring that public quality in the recipients defined by the cases mentioned, it follows that only by indirect benefits to individuals as by grants to charitable agencies or objects are the funds to be dealt with by the trustees.

Rand J. was of opinion that failure of the benefits to the employees of the Assurance Company did not cause the appointment of the Board of Directors as the body to determine the distribution of the funds to also fail but rather that the absolute discretionary appropriation to charity of the property generally was conferred upon the Board.

Cartwright J. was of opinion that since the mode of carrying the testator's general charitable intention into effect could not be carried out, the matter should be referred back so that proper proceedings could be taken for the propounding and settlement of a scheme for the application *cy-près* of the residuary estate.

APPEALS by the representative of the employees of The Canada Life Assurance Co. from the judgment of the Court of Appeal for Ontario (1) construing the residuary clause in the wills of the late Herbert Coplin Cox and his widow the late Louise Bogart Cox. The clauses were substantially identical and by consent of the parties the two appeals were heard together. Wells J., the trial judge, construed the disposition as a valid charitable bequest for the relief of poverty confined to the class described (2). The Court of Appeal reversed his judgment, declared the clause did not constitute a valid charitable bequest and ordered a reference to determine the next-of-kin.

(1) [1951] O.R. 295; 2 D.L.R. 326. (2) [1950] O.R. 137; 2 D.L.R. 449.

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J. J. Robinette, Q.C. and *G. F. Hayden* for Edwin G. Baker, by order representative of the employees of The Canada Life Assurance Co., appellant.

L. H. Snider, Q.C. for the Public Trustee.

Beverley Mathews, Q.C. and *W. C. Terry, Q.C.* for the National Trust Co., Administrator of the estate of H. C. Cox, respondent.

Hon. S. A. Hayden, Q.C. for the National Trust Co., executor of the will of Louise Bogart Cox.

J. D. Arnup, Q.C. and *R. B. Robinson* for Margaret Jane Ardagh and all next-of-kin in the same interest, respondent.

H. C. Walker Q.C. for Lida Louise Shepard, respondent.

H. J. McLaughlin, Q.C. for W. B. Shepard, one of the next-of-kin of Louise Bogart Cox, respondent.

P. D. Wilson, Q.C. for the Official Guardian, respondent.

The judgment of Kerwin and Taschereau, JJ. was delivered by:—

KERWIN J.:—The will of the late Herbert Coplin Cox directs his trustees to hold the residue of his estate 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 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 first point to be determined is the proper construction of this clause. If it consisted merely of the opening words "To pay the income thereof in perpetuity for charitable purposes only" that would be a good charitable trust,

and it is therefore argued that while in the latter part of the clause the only persons to benefit "directly" from the application of the income are the present and former employees (and their dependants) of The Canada Life Assurance Company, there is an area of indirect benefit untouched by such latter part but which falls within the opening words. As against this it might be suggested that, if that were so and assuming the latter direction would not fall within the scope of legal charity, the funds could be applied for either purpose. It might be also suggested that, in that event, the present case could not be distinguished from those where the fund could be diverted in the trustees' discretion to an object totally uncharitable in the legal sense with the result that the whole bequest would be void: *Hunter* v. *A.G.* (1); *Chichester Diocesan Fund and Board of Finance* v. *Simpson* (2).

The point need not be determined on this appeal because the word "directly" does not operate in the manner suggested as I construe the clause to mean that the charitable purposes for which the income is to be paid in perpetuity are the employees and dependants. Members of that class must of necessity benefit directly as a trust for indirect benefits would be too vague for the Court to enforce. The word "directly" therefore adds nothing. On that construction it is not a case of there being a charitable intention with merely the particular mode of application failing for illegality or some other reason, and the cases cited on that branch of the matter have no application.

Upon a consideration of the numerous decisions, it is clear that, if the objects of a trust are not charitable in themselves, it is not a charitable trust, and the fact that the donor thought his gift charitable is not relevant to the issue: Tudor on Charities, 5th edition, page 8. The circumstance, therefore, that the testator directed his trustees to pay the income for charitable purposes only does not determine the matter when, as I believe, the only purposes to which the moneys may be applied are not charitable.

(1) [1899] A.C. 309. (2) [1944] A.C. 341.

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It has now been settled that the element of public benefit is essential for all charities no matter in which of Lord Macnaghten's classifications in *Income Tax Commissioners* v. *Pemsell* (1), they fall. The only exception is the anomalous case of trusts for the relief of poverty and, here, that condition does not exist. Mr. Robinette contended that, granted the words "to pay the income thereof in perpetuity for charitable purposes only" would, by themselves, establish a valid charitable trust, it should be held that the succeeding part of the clause applied only to indigent or necessitous persons. However, this succeeding part permits the Board of Directors to choose employees and dependants who are not poor and the argument fails.

As pointed out by Lord Simonds in *Oppenheim* v. *Tobacco Securities Trust Co. Ld.* (2), when the trust is for the benefit of a class of persons, the question is whether that class can be regarded as such a "section of the community" as to satisfy the test of public benefit. He points out that these words, "section of the community", have no special sanctity, "but they conveniently indicate first, that the possible (I emphasize the word "possible") beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual. It is for this reason that a trust for the education of members of a family or, as *In re Compton* (3), of a number of families cannot be regarded as charitable. A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes."

The House of Lords approved the judgments of Lord Greene as Master of the Rolls in *In re Compton* (3), and of Lord Greene and of Lord Justice Morton (as he then

(1) [1891] A.C. 531.
(2) [1951] A.C. 297 at 306.
(3) [1945] 1 Ch. 123; [1945] 1 All E.R. 198.

was) in *In re Hobourn Aero Components Ltd.'s Air-raid Distress Fund* (1). The decision in *In re Drummond* (2) was also approved. That decided that trusts for the benefit of employees past, present or future of an employer are not public charities. *In re Rayner* (3), was regarded as of doubtful authority. As pointed out by Lord Morton of Henryton, the Court of Appeal in *Gibson* v. *South American Stores (Gath and Chaves) Ld.* (4), felt obliged because of the rule of *stare decisis* to follow an unreported decision of its own in 1935, *In re Sir Robert Laidlaw,* and to hold that a trust was valid which was for all persons who in the opinion of a Board of Directors are, or should be necessitous and deserving, and who had been in the employ of the Company or a subsidiary thereof, and dependants thereof. The element of poverty was present and it was held to be a valid charitable trust notwithstanding the limited nature of the class of beneficiaries. I have already pointed out that the element of poverty does not enter into the present matter and, in my opinion, the decision in *Oppenheim* is decisive.

It is decisive notwithstanding that at the date of the application to Wells J. the persons who would answer the description of employees, past or present, of the Company, and dependants of such employees, were estimated to be in excess of thirty thousand, and that some of these were in such circumstances as to require financial aid. Even if those facts satisfied the first test of a "section of the community", the second requirement is a quality which does not depend on the relationship of the members thereof to a particular individual. When the *Hobourn* case came before the Court of Appeal, it was contended that the observations of that Court in *Compton* that a trust for the benefit of employees of a business was a purely private and personal trust were dicta only. At page 200, Lord Greene stated his belief in the correctness of those observations, and at page 208, Lord Justice Morton said quite

(1) [1946] 1 Ch. 194; [1946] 1 All E.R. 501.
(2) [1914] 2 Ch. 90.
(3) [1920] 89 L.J. Ch. 369; 122 L.T. 577.
(4) [1950] 1 Ch. 177.

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plainly that he entirely approved of the *Drummond* decision. In the *Hobourn* case the Court was not dealing with a fund put up by outside persons but, at page 200, Lord Greene stated that "even if we were, I should on the authority of *In re Compton* feel constrained to hold that such a fund would not be a good charity." Lord Justice Morton was of the same opinion and Lord Justice Somervell agreed. In view of the approval by the House of Lords of the decisions in *Compton and Hobourn,* the matter would appear to be concluded.

It was argued that the law should not be the same for Ontario but even if the decision in *Oppenheim* had never been given, I would hold that its basis, as found in the judgments of Lord Greene in *Compton* and of Lord Greene and of Lord Justice Morton in *Hobourn,* is a complete and satisfactory method of disposing of the present issue. I adopt, if I may, the words of Lord Simonds in *Oppenheim*: "It must not I think be forgotten that charitable institutions enjoy rare and increasing privileges and that the claim to come within that privileged class should be clearly established." Those privileges, it might be added, are, of course, not confined to the receipt of benefits in perpetuity under a will.

The appeal should be dismissed subject to a variation to which Mr. Snider drew our attention. The testator's widow survived her husband, and paragraph 5 of the judgment of Wells J., as inserted in the Court of Appeal order, should be stricken out and the following substituted therefor:—

> 5. And there therefore being an intestacy as to such balance of the testator's residuary estate, THIS COURT DOTH FURTHER ORDER that it be referred to the Master of this Court at Toronto to determine and report who were entitled thereto at the date of the death of the testator.

The costs of all parties should be paid out of the estate, those of the surviving administrator with the will annexed and trustee of the testator's will and codicil as between solicitor and client.

The residuary clause in the will of the testator's widow is the same as in her husband's and the same order should, therefore, go in the appeal in connection with her estate except that there is no necessity of any alteration in the order of the Court of Appeal.

RAND J. (dissenting):—I agree with the construction placed on the residuary clause by my brother Cartwright, that it declares a general charitable intent and impresses upon the residue a trust for that purpose; I agree, also, that the word "directly" is significant, that it restricts direct benefits to those mentioned and implies that all other benefits are to be indirect; I agree, finally, that the benefit to the specified class violates the rules laid down requiring that public quality in the recipients defined by the cases mentioned. It follows that only by indirect benefits to individuals, as by grants to charitable agencies or objects such as libraries, hospitals, schools, churches, works or institutions, are the funds to be dealt with by the Trustees.

But I am unable to concur in the view that by reason of the failure of the benefits to the employees of the Assurance Company, the appointment of the Board of Directors as the body to determine the distribution of the funds, must be taken also to fail. The absolute discretionary appropriation to charity of the property generally was conferred upon the Board; benefits might or might not be awarded to the employee group: they might from time to time be bestowed exclusively on other objects. The reasons leading the testator to select the Board would, from the evidence, seem to be obvious. He, himself, as well as others of the Cox family, had long been associated with the Company, and he had come to know and, undoubtedly, appreciate the competency and character of those who constituted its Board. It may be also that that long family connection had, directly or indirectly, in some degree, enabled the accumulation of the wealth of which he was disposing, and it was an easy step to associating the Company with its distribution as a public benefaction.

In these circumstances I cannot take the designation of the Board to have been bound up with the intended benefits to the employees. The discretion extended over the whole charitable field; and I find nothing to indicate that had there not been the special provision for the employees, that discretion would have been placed elsewhere. I should think, on the contrary, that, in his opinion, the perpetuation of the family name in the maintenance of a charitable Foundation would be uniquely served by such an intimate office on the part of the Board.

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I would therefore declare 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 think proper.

The costs of all parties should be paid out of the estates as proposed.

The judgment of Taschereau, Kellock and Fauteux, JJ. was delivered by:—

KELLOCK J.:—As the question arising in these appeals is common to both, it will be convenient to deal with the will of the male deceased. The relevant paragraph reads as follows: (As to which see page 96).

Wells J., the judge of first instance, construed this disposition as a good charitable bequest confined to the relief of poverty among the class described. The Court of Appeal appears to have entertained the same view with respect to the question of construction, but reversed the judgment of Wells J. on the ground that a trust for the relief of poverty confined to such a class was not a valid trust. In the view of Roach J., who delivered the judgment of the court, such a trust lacked the necessary public character.

The appellant, while adopting the construction of the will accepted in the courts below, contends that the Court of Appeal erred in its view of the law. Appellant contends further that, while the class defined by the testator comprises the only persons who are to benefit "directly" from the trust, the testator has expressed a general charitable intention and has left his gift to operate in the field of "indirect" benefit.

In its popular sense, "charity" does not coincide with its legal meaning but, as stated by Lord Macnaghten in *Pemsel's* case (1), adopting the argument of Sir Samuel Romilly in *Morice* v. *Bishop of Durham* (2),

> "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes, beneficial to the community, not falling under any of the preceding heads.

(1) [1891] A.C. 531. (2) (1805) 10 Ves. 521 at 531; 32 E.R. 947.

In *Verge* v. *Somerville* (1), Lord Wrenbury said at p. 499:

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

Lord Greene M.R. in *Compton's* case (2), said with reference to the above proposition that it is true with respect to all charitable gifts and is "not confined to the fourth class in Lord Macnaghten's well known statement in *Pemsel's* case."

In the submission of the appellant, any trust for the relief of poverty creates, per se, a public benefit. Accordingly, while admitting that the trust here in question cannot, on the law as stated by Lord Wrenbury, be upheld as applied to the last three heads of Lord Macnaghten's classification, the appellant submits that if the language here in question may be construed as the appellant seeks to construe it, the trust is valid with respect to the first head, namely, for the relief of poverty within the group defined by the testator.

The initial question, therefore, is as to the true construction of the language which the testator used. Appellant says that the words "for charitable purposes only" are to be construed as though the testator had said, "for such legal charitable purposes as the law recognizes" within the class of beneficiaries defined.

As I have said, this construction of the testator's language found acceptance in the courts below, but I am regretfully unable to come to that conclusion. The word "charitable," construed in its legal sense, comprises all of the four heads already mentioned, and I find nothing in the language used which permits me to eliminate therefrom any of them. To put the matter more plainly, I see no escape from reading the words used as though the testator had set out seriatim the said four heads. This being so, the testator has empowered his trustees, even on the appellant's thesis, to apply the subject matter of the trust for charitable and

(1) [1924] A.C. 496. (2) [1945] 1 All E.R. 199 at 201.

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non-charitable purposes, thereby empowering them to devote the whole, if they please, to the non-charitable. The "application of such income" is left entirely to the discretion of the directors of the company and the bequest is therefore void; *Morice* v. *Bishop of Durham* (1). In my view, therefore, the basis of the argument of the appellant fails on this branch of the case.

In 1938 when the will here in question was executed, a testator might not unreasonably have thought, in the state of the authorities at that time, that a valid trust for purposes embracing all of the four heads of charity could be created for the benefit of a class such as the employees of a particular company and their dependents. In 1881 the case of *Spiller* v. *Maude* (2), had come before Jessel M.R. That case dealt with a fund derived from subscriptions made by members of a company of actors and actresses for the benefit of the members and their dependents. The learned Master of the Rolls came to the conclusion that poverty was clearly an ingredient in the qualification of members who should receive benefits and that the fund was, accordingly, charitable. Again in 1896, in *In Re Buck* (3), Kekewich J. decided similarly with respect to the funds of a Friendly Society. In 1900, also, in *In Re Gosling* (4), Byrne J. upheld as a good charitable trust, a fund for the purpose of pensioning off old and worn-out clerks of a particular firm.

In 1914, the case of *In Re Drummond* (5), came before Eve J., who held that a trust for the purpose of providing holiday expenses for the employees of one department of a company was invalid as not being a trust for public purposes but for private individuals. But, in 1920 the same learned judge, in *Re Rayner* (6), had to consider the validity of a trust for the education of children of the employees of a particular company. Eve J. distinguished his decision in *Drummond's* case and held the trust then before him valid, being of opinion that the class of beneficiaries was sufficiently defined as a section of the public to support

(1) (1805) 10 Ves. 521 at 541.
(2) (1881) 32 Ch. 158 N.
(3) [1896] 2 Ch. 727.
(4) (1900) 48 W.R. 300.
(5) [1914] 2 Ch. 90.
(6) 122 L.T. 577.

the gift. Although Lord Wrenbury's judgment in *Verge* v. *Somerville* (1) was delivered in 1924, it was not until 1945 that the decsion in *Rayner's* case was over-ruled by the Court of Appeal in *In Re Compton, supra.* In the meantime, the will of the testator here in question was executed.

By 1948 when the will of the testatrix was executed, *In Re Hobourn* (2), had been decided, although *Gibson* v. *South American Stores* (3), and *Oppenheim* v. *Tobacco Securities Trust* (4), had not. However, whatever may have been the view of the professional advisers of either the testator or the testatrix when the respective wills now in question were executed, the appellant does not argue now that the trusts here in question can be supported in law except as trusts for the relief of poverty. For the reason already given, the necessary foundation for such an argument does not exist upon the construction of the language used by the testators which, in my view, is the proper construction.

With respect to the argument that there is a whole field of "indirect" benefit left open within which the trust may validly operate, we have not the benefit of the view of either of the courts below, as this contention was for the first time put forward in this court. This argument is, of course, founded upon the use of the word "directly".

It is contended that while the testator has prohibited the application of any part of the income for the *direct* benefit of an individual who does not fall within the specified class, the will permits the income to be applied to such objects as, for example, a hospital, as it is said, such a gift involves only indirect benefit, presumably, to the patients.

Had the testator stopped with the words "The Canada Life Assurance Company" where those words are used for the second time in the first limb of the paragraph, there might be considerable force in this contention. The testator, however, did not stop there, but went on to prescribe

(1) [1924] A.C. 496.
(2) [1946] 1 Ch. 194; [1946] 1 All E.R. 501.
(3) [1950] 1 Ch. 177.
(4) [1951] A.C. 297.

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in the second limb that, "subject to the foregoing restrictions", the application of the income, including

(*a*) "the amounts to be expended" and

(*b*) "the persons to benefit therefrom"

(and here the word "directly" does not occur)

should be determined by the Board of Directors.

It is to be observed that while it is the trustees who are to disburse the income, it is the directors who are to control the application of the payments. The word "persons" in (*b*) above certainly does not exclude individuals. It includes them. If, therefore, according to the appellant's contention, no individual may take a direct benefit, the directors could never, as the testator directs, determine the "persons" to benefit but only at best, the "classes of persons" who might be served by any particular institution or organization to which they might direct payments to be made. The Canada Life employees and their dependents are themselves a class but the testator has declared that even among that class, the selection of the actual beneficiaries is a matter for the directors.

Having imperatively prescribed that the "persons" to benefit *shall* be determined by the directors, the testator has made it clear, in my opinion, that it is individuals and not institutions or organizations that he had in mind. Accordingly, as a gift to or for the benefit of an individual must benefit that individual directly, I think that in prescribing in the second limb of the paragraph that "the persons to benefit therefrom" are to be determined by the directors, he has removed any ambiguity there might otherwise have arisen upon the phrase "the persons to benefit directly" in the earlier language. The testator had in mind I think, in the employment of the earlier language that while a gift to or for the benefit of a member of the specified class would involve direct benefit to him, it might, in many cases, also involve indirect benefit to others, e.g., relatives of the beneficiary. In making their selections from that class, however, the directors will be concerned only with persons to be directly benefited.

I therefore think that the testator has devoted the income for "charitable purposes" among the persons of the class which he has himself described, to the exclusion of all

others. Accordingly, while the opening language of the paragraph "to pay the income thereof in perpetuity for charitable purposes only", taken alone, could not well be broader for the purpose of expressing a general charitable intention, the language which follows makes it clear, in my opinion, that the testator had no general charitable intention but an intention that the income should be used for charitable purposes for the benefit only of the persons he specifies and for no one else. If this be the true view, the court is not in a position to apply the gift in any other way upon the failure of the testator's gift.

I think the case at bar is within the principle of *In Re Wilson* (1), rather than within *In Re Monk* (2). In *National Anti-vivisection Society* v. *Inland Revenue Commissioners* (3), Lord Simonds, in dealing with the doctrine of general charitable intention, said at p. 64:

> It would be very relevant, if the society, conceding that the campaign against vivisection was not a charitable purpose, argued that there was yet a general charitable intention and that its funds were applicable to some other charitable purpose. That is not the argument. If it were, I should not entertain it, though it might in an earlier age have succeeded.

I would use the same language in the present case, and would dispose of the appeal as proposed by my brother Kerwin.

ESTEY J.:—The late Herbert Coplin Cox provided in his will that the residue of his estate should be held by his trustees upon trust (As to which see p. 96).

His widow, the late Louise Bogart Cox, included an identical provision in her will and both have been considered in this litigation. As a matter of convenience only the will of Herbert Coplin Cox will be referred to hereafter.

The Court of Appeal for Ontario reversed the judgment of Mr. Justice Wells and held that the foregoing provision did not constitute a valid charitable trust or, as stated by Mr. Justice Roach, writing the judgment of the Court:

> . . . These trusts are not trusts for general public purposes; they are trusts for private individuals, a fluctuating body of private individuals but still private individuals. Because they are not for public purposes they are not charitable and are therefore void as offending the rule against perpetuities.

(1) [1913] 1 Ch. 314. (2) [1927] 2 Ch. 197. (3) [1948] A.C. 31.

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Estey J.

Counsel for the appellant contends that the judgment of Mr. Justice Wells should be restored, declaring that the foregoing provision of the will constitutes a valid charitable bequest for the relief of poverty and, with respect to public benefit, he submits:

> The rule is either that the element of public benefit must be present in every category of legal charity except in the case of trusts for relief of poverty; or that a trust for the relief of poverty of a class of persons *per se* creates a public benefit.

It is convenient first to consider how far public benefit is essential in the creation of a valid charitable trust. Charitable purposes and objects have been classified by Lord Macnaghten in *Pemsel's* case (1), under four headings. These are trusts for (*a*) the relief of poverty; (*b*) the advancement of education; (*c*) the advancement of religion and (*d*) other purposes beneficial to the community not falling under any of the preceding heads.

In *Oppenheim* v. *Tobacco Securities Trust Co. Ld.*, (2), securities were left upon trust to apply the income

> in providing for or assisting in providing for the education of children of employees or former employees of British-American Tobacco Co. Ld. . . . or any of its subsidiary or allied companies in such manner and according to such schemes or rules or regulations as the acting trustees shall in their absolute discretion from time to time think fit . . .

In the House of Lords it was held that this trust for educational purposes was invalid because the beneficiaries were limited to the children of employees of specified companies and, therefore, did not constitute a section of the community. Lord Simonds, at p. 306, stated:

> A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes.
>
> I come, then, to the present case where the class of beneficiaries is numerous but the difficulty arises in regard to their common and distinguishing quality. That quality is being children of employees of one or other of a group of companies. I can make no distinction between children of employees and the employees themselves. In both cases the common quality is found in employment by particular employers.

In the foregoing quotation Lord Simonds, with whom Lord Oaksey and Lord Morton of Henryton agree, makes it plain that it is not the number of beneficiaries that constitutes the test, but that however large the number, if

(1) [1891] A.C. 531. (2) [1951] A.C. 297.

the nexus between them is their personal relationship to a single propositus such as The Canada Life Assurance Company, they do not constitute a section of the community and, therefore, the trust is invalid, not being for a public benefit.

In *Gilmour* v. *Coats* (1), the House of Lords emphasized the same requirement of public benefit in order that a valid charitable trust for religious purposes may exist. The Privy Council emphasized the same requirement in relation to a trust falling under classification (*d*) (for other purposes beneficial to the community) in *Verge* v. *Somerville* (2), where Lord Wrenbury stated at p. 499:

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

The *Oppenheim, Gilmour and Verge* cases make it clear that public benefit must at least be found in charities classified under (*b*), (*c*) and (*d*) of Lord Macnaghten's classification; further that the *Oppenheim* case makes it equally plain that in specifying the employees of The Canada Life Assurance Company and their dependents the testator had not created a trust for public benefit.

Counsel for the appellant, however, contends that public benefit is not essential to the creation of a trust under Lord Macnaghten's classification (*a*) (for the relief of poverty).

Trusts for the relief of poor and needy relatives, usually described as the "poor relations" cases, have at least since 1754 (*Isaac* v. *de Friez* (3)), been held to be valid in courts of first instance and the Court of Appeal in England. These have been treated, in the Court of Appeal and in so far as they have been referred to in the House of Lords, as exceptions to the general rule that public benefit must be found in order that a charitable trust may be valid. (See Lord Simonds in the *Oppenheim* case, *supra,* at 308).

(1) [1949] A.C. 426; [1949] 1 All E.R. 848.
(2) [1924] A.C. 496.
(3) 2 Amb. 595.

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There is also, in the Court of Appeal in England, a second exception to this general rule, of which *Gibson* v. *South American Stores Ld.* (1), is an illustration. In that case the trust was for the benefit of those

> who are or shall be necessitous and deserving and who, for the time being, are or have been in the company's employ . . . and the wives, widows, husbands, widowers, children, parents, and other dependants of any person who, for the time being, is, or would if living have been, himself or herself a member of the class of beneficiaries.

The foregoing provision was held to be for the relief of poverty and the requirement of public benefit was raised by the Master of the Rolls at p. 191:

> Under the law as it has now been established, and in the light of its several recent decisions both in this court and in the House of Lords, is a trust for a class of poor persons defined by reference to the fact that they are employed by some person, firm or company, a good charitable trust, or does it fail of that qualification through the absence of the necessary public element?

The Master of the Rolls, after recognizing the "poor relations" cases as an exception or an anomaly, appeared to regard the decisions in *Spiller* v. *Maude* (2), *In re Buck,* (3), and *In re Gosling* (4), as constituting another exception to the rule requiring that in a valid trust public benefit must be found. In each of these cases the fund was held to have been created expressly for the benefit of poverty and the fact that the beneficiaries must be selected from an association or company did not prevent its being a valid charity. The learned Master of the Rolls, in appreciation of the fact that the issue in the foregoing cases had never been before the House of Lords, recognized the possibility that it might be otherwise decided in that House. He, however, without in any way discussing the principles involved, felt bound by the unreported judgment of the Court of Appeal in 1935, *Re Sir Robert Laidlaw* (5), of which no reasons were available. In his own words:

> I think that, so far as I am concerned, this question has been determined by *In re Sir Robert Laidlaw,* on grounds which are not apparent, and I loyally follow them without affirming or disaffirming any of the grounds relied on by Harman J.

He, therefore, held the trust valid and the same position was taken by that court in *Re Coulthurst* (6).

(1) [1950] 1 Ch. 177.
(2) (1881) 32 Ch. D. 158.
(3) [1896] 2 Ch. 727.
(4) (1900) 48 W.R. 300.
(5) Unreported.
(6) [1951] 1 Ch. 661.

The case at bar, however, does not come within either of the foregoing exceptions. It could not, nor has it been suggested that it falls within the "poor relations" group. Then, with respect to the second exception or group, illustrated by the *Gibson* case, *supra,* it must be observed that all of the cases that have been included thereunder were specifically created for the relief of poverty and no other charitable purpose. This is not such a case. The language here, without enumerating them, includes all the classifications as made by Lord Macnaghten, which, of course, would include poverty. Even if this exception should ultimately become established in the law, it ought not to be so far extended as to include a trust for all charitable purposes such as that here under consideration.

The fact that the "poor relations" cases and the group illustrated by the *Gibson* case, *supra,* have been treated as exceptions to the general rule that a charitable trust must be not only charitable in character but for a public benefit indicates that the general rule requiring public benefit is applicable to trusts for the relief of poverty. Moreover, that such is the correct view is strengthened by the statements to be found in the authorities and text books, of which the following may be noted:

Lord Simonds:

. . . the principle has been consistently maintained, that a trust in order to be charitable must be of a public character. It must not be merely for the benefit of particular private individuals: if it is, it will not be in law a charity though the benefit taken by those individuals is of the very character stated in the preamble. *Williams' Trustees* v. *Inland Revenue Commissioners* (1).

Lord Porter in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* (2), stated:

One must take it therefore that in whichever of the four classes the matter may fall, it cannot be a charity unless it is beneficial to the community or to some sufficiently defined portion of it.

See also Lord Wright at p. 42.

Then again the learned authors of Tudor on Charities, 5th Ed., p. 11, state:

In the first place it may be laid down as a universal rule that the law recognizes no purpose as charitable unless it is of a public character. That is to say, a purpose must, in order to be charitable, be directed to the benefit of the community or a section of the community.

(1) [1947] A.C. 447 at 457. (2) [1948] A.C. 31 at 53.

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Whether public benefit exists in a given case is a question of fact. In *National Anti-Vivisection Society* v. *Inland Revenue Commissioners, supra,* the House of Lords adopted the view expressed by Russell J. (as he then was) *in Re Hummeltenberg* (1). Lord Wright, at p. 44, adopts the language of Russell J.:

> In my opinion, the question whether a gift is or may be operative for the public benefit is a question to be answered by the court by forming an opinion upon the evidence before it.

and expressly approves of it. At p. 42 Lord Wright states:

> The test of benefit to the community goes through the whole of Lord Macnaghten's classification, though as regards the first three heads, it may be prima facie assumed unless the contrary appears.

Lord Simonds stated at p. 65:

> I will readily concede that, if the purpose is within one of the heads of charity forming the first three classes in the classification which Lord Macnaghten borrowed from Sir Samuel Romilly's argument in *Morice* v. *Bishop of Durham* (2), the court will easily conclude that it is a charitable purpose. But even here to give the purpose the name of "religious" or "education" is not to conclude the matter. It may yet not be charitable, if the religious purpose is illegal or the educational purpose is contrary to public policy. Still there remains the overriding question: Is it pro bono publico? It would be another strange misreading of Lord Macnaghten's speech in *Pemsel's* case (3), (one was pointed out in *In re Macduff* (4)), to suggest that he intended anything to the contrary. I would rather say that, when a purpose appears broadly to fall within one of the familiar categories of charity, the court will assume it to be for the benefit of the community and, therefore, charitable, unless the contrary is shown, and further that the court will not be astute in such a case to defeat on doubtful evidence the avowed benevolent intention of a donor.

If, therefore, upon the face of the document, the purpose or object of the trust is charitable in character, public benefit may be assumed or prima facie established, but where, as here, upon the face of the document it is clear that the cestuis que trust are limited to those who are employees of a particular company and their dependents, public benefit is negatived and, therefore, that element essential to a valid charitable trust is absent.

The appellant further contends that the provision of the will above quoted should be construed to mean that the employees and their dependents were to benefit to the extent that the trust might be declared valid, or, as otherwise stated, the testator discloses an intention that the

(1) [1923] 1 Ch. 237.
(2) 10 Ves. 521.
(3) [1891] A.C. 531.
(4) [1896] 2 Ch. 451.

fund should be used for such charitable purpose or purposes as are legal within the named group. If, therefore, the absence of public benefit made the trust invalid under headings (*b*), (*c*) and (*d*) of Lord Macnaghten's classification, it would still remain a valid charitable trust under (*a*) for the relief of poverty. This contention, if maintained, would involve a consideration of the *Gibson* case, *supra*. However, in my view, the provision does not admit of such a construction. It would appear that the testator, in providing that the directors might expend the income for charitable purposes, included the relief of poverty, in the same sense that all other purposes and objects are included, and made it abundantly clear that the employees and their dependents should benefit, not only in case of financial need, but in any manner that might be included within the phrase "charitable purposes." Moreover, it cannot be concluded that the testator would not have been mindful of the fact that the directors would probably find it difficult to expend the fund for the relief of poverty only among the employees and their dependents.

There remains the further contention that, though the trust for the employees and their dependents may be invalid, the testator has, in the foregoing provision, disclosed a general charitable intention which should be administered cy-près. This involves a difficult question of construction. As stated by Lord Davey in *Hunter* v. *Attorney-General* (1):

> You must construe the words of the will fairly, and if you can find a charitable purpose sufficiently clearly expressed the Court will give effect to it. If you do not find any such definite expression, you are not at liberty to supply it from more or less well-founded speculation of what the testator would probably have wished or intended if his attention had been drawn to the omission.

As Kay J. stated in *Re Taylor; Martin* v. *Freeman*, (2):

> I take the line to be a very clear one; perhaps sometimes it is difficult to say on which side of the line a particular case comes; but the line, which we all very well understand, is one of this nature: if upon the whole scope and intent of the will you discern the paramount object of the testator was to benefit not a particular institution, but to effect a particular form of charity independently of any special institution or mode, then, although he may have indicated the mode in which he desires that to be carried out, you are to regard the primary paramount intention chiefly, and if the particular mode for any reason fails, the court, if it sees a sufficient expression of a general intention of charity,

(1) [1899] A.C. 309 at 321. (2) (1888) 58 L.T. 538 at 543.

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will, to use the phrase familiar to us, execute that *cy-près*, that is, carry out the general paramount intention in some way as nearly as possible the same as that which the testator has particularly indicated without which his intention itself cannot be effectuated.

The testator, under his will, provided for relatives and friends by way of legacies and annuities and then set up the foregoing trust for the employees of the company over which he presided as president and their dependents. When read as a whole, the will rather supports the view that the testator intended to benefit only these groups.

It is, however, contended that in the paragraph creating this trust he discloses a general charitable intention. The opening words "To pay the income thereof in perpetuity for charitable purposes only," if they stood alone, would disclose a charitable intention. However, these words are but a part of the sentence creating the trust which must be read and construed as a whole. The phrase "subject to the foregoing restrictions" refers to both the limitation "for charitable purposes only" and the restriction of the benefit to the employees and their dependents. The testator appears here to place these two first portions of the provision upon an equal basis. Moreover, there is but one income and when, in that provision, he provides "the application of such income . . . shall be determined by the Board of Directors . . . in their absolute discretion" he uses the phrase "such income" to refer back to the word "income" as it is first used in this sentence. It would appear, therefore, that the testator contemplated the directors would expend the entire income upon charitable purposes, but for the benefit of the employees and their dependents.

The testator, throughout this paragraph, provides for the employees and their dependents in such a manner that they may benefit in any way that may be within the limits of charitable purposes. In a sentence so constructed it seems impossible to give to any part thereof a separate and distinct significance such as that here suggested.

The word "only" is twice used in this sentence and in both instances it adds nothing to the meaning except in so far as it may emphasize the intention of the testator. It is, however, stressed that the insertion of the word "directly" in the phrase "the persons to benefit directly in pursuance of such charitable purposes . . ." imports that

the testator had in mind that the employees and their dependents would benefit directly but that some others or other groups might benefit indirectly, which could only be accomplished by interpreting the provision as disclosing a general charitable intention. Even if a general charitable intention be found, it does not follow that the beneficiaries would benefit indirectly. The word "directly" is not a word of art and, while in another context it might well support such a contention, as here used it merely emphasizes the testator's intention to directly benefit the employees and their dependents.

While the word "general" is not essential to disclose a general charitable intention, its absence in a provision by a testator given to using words of emphasis is significant where, as here, in the same sentence he sets forth his purpose, object and the names of the cestuis que trust. Further, the disposition of this residue, having regard to the variety of benefits and the number of beneficiaries, does not suggest any surplus and it cannot be assumed that the testator had any doubt as to the validity of the trust he was creating. The provision read as a whole does not disclose that the testator's paramount object was to benefit charity generally, but rather to benefit the employees and their dependents. In other words, in the language here used one cannot, to use the language of Lord Davey, "find a charitable purpose sufficiently clearly expressed."

The variation in para. 5 of the judgment of Wells J., relative to the will of Herbert Coplin Cox, as inserted in the Court of Appeal order, should be altered as set out by my brother Kerwin. The appeals should be dismissed. The costs of all parties should be paid out of the estate, those of the surviving administrator with the will annexed and trustee of the testator's will and codicil as between solicitor and client.

CARTWRIGHT J. (dissenting):—These two appeals were argued together.

The late Herbert Coplin Cox died on September 17, 1947, leaving a will dated June 25, 1938. His widow, Louise Bogart Cox, died on November 18, 1948, leaving a will dated November 2, 1948. The questions to be determined arise out of the residuary clauses contained in these wills.

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These are substantially identical in wording and it was common ground that the result should be the same in both appeals. It will therefore be necessary to consider only the residuary clause contained in the will of Mr. Cox. It reads as follows:—

> 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 same upon trust as follows: (The trust is set out at p. 96).

The trustees moved on originating notice for the determination of a number of questions, but it was agreed when the motion came on for hearing before Wells J. that he should deal only with the question whether the disposition made in the residuary clause quoted above is a valid charitable bequest, and that upon the final determination of that question the matter should be referred back to the Weekly Court for further consideration.

Evidence was received of the following matters:—(i) that the number of persons in existence at the date of the hearing before Wells J. who would answer the description of employees, past or present, of the Canada Life Assurance Company and dependents of such employees was estimated to be somewhat in excess of thirty thousand, (ii) that a number of these were in such straitened circumstances as to need financial aid, (iii) that the known next-of-kin of Mr. Cox were of the fourth degree, and (iv) that the known next-of-kin of Mrs. Cox were of the fifth degree. It is stated in the reasons for judgment of the Court of Appeal that the residuary estate of Mr. Cox amounts to about $500,000 and that of Mrs. Cox to about $200,000.

Counsel appeared for the trustees of the wills, for the directors of the Canada Life Assurance Company, for the known next-of-kin, for the present appellant who was appointed in each case to represent the employees of the Canada Life Assurance Company, for the Public Trustee who was appointed to represent such other persons as might benefit under the residuary clause in question and for the Official Guardian who was appointed to represent any unascertained persons who might be interested in the residue in the event of an intestacy.

Wells J. decided that the clause in question "is a valid charitable bequest for the relief of poverty". The Court of

Appeal reversed the judgment of Wells J., declared that the clause does not constitute a valid charitable bequest and that it is therefore void as offending the rule against perpetuities and ordered a reference to the Master at Toronto to determine and report as to who are the next-of-kin of Mr. Cox and Mrs. Cox respectively.

On appeal to this Court, counsel for the appellant asked that the judgment of Wells J. should be restored and alternatively supported the argument of counsel for the Public Trustee. Counsel for the Board of Directors of The Canada Life Assurance Company adopted the argument of counsel for the appellant. Counsel for the trustees of the wills submitted the rights of the trustees to the Court but "suggested" that the judgment of Wells J. should be restored. For the Public Trustee it was contended that the clause is a valid charitable bequest as it stands and is not restricted to the relief of poverty but that if this is not accepted there is a valid bequest for charitable purposes generally and if the particular mode prescribed for carrying such purposes into effect fails, in whole or in part, the general charitable intention should be executed cy-près. Counsel for the next-of-kin and for the Official Guardian supported the judgment of the Court of Appeal.

It will be convenient first to summarize the reasons which brought Wells J. and the Court of Appeal to their respective conclusions.

Early in his reasons Wells J. says:—

> In the case at bar, however, the payment of income is limited "for charitable purposes only" and I think there can be no question that this gift must be deemed to be for any of the four purposes which the authorities have laid down as compendiously describing charitable trusts.

Later, after quoting from the judgment in *The Commissioners for Special Purposes of the Income Tax* v. *Pemsel* (1), where Lord Macnaghten speaks of the four principal divisions which "Charity" in its legal sense comprises, the learned judge continues:—

> As I have said, I must assume that all these four heads were intended to be included by these two testators in the phrase used by them to denote the purpose for which the residue of their assets was to be left, that is "for charitable purposes only".

(1) [1891] A.C. 531 at 583.

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He then proceeds to the inquiry whether the trust is public—whether it is for the benefit of the community or of an appreciably important class of the community. After an examination of numerous authorities, including *Gilmour* v. *Coats* (1), *In re Gosling* (2), *In re Drummond* (3), *In re Rayner* (4), *In re Compton* (5), *In re Hobourn Aero Components Limited's Air Raid Distress Fund* (6), and *Gibson* v. *South American Stores* (7), the learned judge concludes that it has been decided by the Court of Appeal in England that a trust for the relief of poverty amongst the employees and ex-employees of a company and their families is a valid charitable trust. He proceeds:—

> . . . The charitable objects which are roughly gathered together under the words "relief of poverty" and which include the various items originally set out in the statute of Elizabeth and those of a similar nature are included in my view in the general words used by the testators when they provided that the income from the residue of their estates was to be paid over for charitable purposes only. Despite the very cogent argument addressed to me on behalf of some of the next-of-kin I must find that these testators had a general charitable intent which they have expressed without any ambiguity and that included in this intent was the division of charitable trusts which has been described as trusts for the relief of poverty. Under the exception which I have noted in the decisions the fact that the group intended to be benefited is defined by and depends upon a personal relationship either at first or second hand to the Corporation in which both the testators have been interested in their lifetime, does not preclude me from holding as I think I should under the authorities that in each of the wills before me there is a valid charitable bequest for the relief of poverty. But I must hold that the bequest is limited to this head of charitable relief. I do so realizing that the result is not a satisfactory one in the particular circumstances of this case but I am bound by the decision of the Court of Appeal of England in a matter of this sort unless there are contrary decisions of our own Court of Appeal and none have been cited to me nor have I found any.

The unanimous decision of the Court of Appeal was delivered by Roach J.A. (8) who, after reviewing the authorities dealt with by Wells J. and the decision of the House of Lords in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* (9), decided after Wells J. had given judgment, says in part:—

> The trusts with which we are here concerned are "for charitable purposes only". That phrase necessarily includes all legal charities. The law is now definitely settled by as high authority as the House of

(1) [1949] A.C. 426.
(2) (1900) 48 W.R. 300.
(3) [1914] 2 Ch. 90.
(4) (1920) 122 L.T. 577.
(5) [1945] Ch. 123.
(6) [1946] Ch. 194.
(7) [1950] 1 Ch. 177.
(8) [1951] O.R. 205.
(9) [1951] A.C. 297.

Lords—the *Oppenheim* case—that to the extent that those purposes include the charities coming within the second, third and fourth divisions of charities as classified by Lord Macnaghten these trusts are not valid charitable trusts because the beneficiaries are limited to a group of individuals who are defined by reference to *propositi* named by the donor in each case. Wells J. reached that conclusion but he held that they were valid charitable trusts limited to the relief of poverty among the beneficiaries. In my opinion they are not legal charitable trusts even for that purpose.

Clearly they do not come within the "poor relations cases". Those cases constitute a class of anomalous decisions which are now regarded as good law only because of their respectable antiquity.

In the *Oppenheim* case Lord Morton of Henryton suggested that such a case as the *Gibson* case—the case at bar resembles it to the extent that the purposes of the trusts here in question include the relief of poverty—might be described as a descendant of the "poor relations cases". In this Province, at least, and I should think also in England the "poor relations cases" as a class constitute a closed class and no other case not entirely identical with the poor relation cases should be legally adopted into that class.

Since that class is closed then the trusts here in question can be valid charitable trusts only if there is a second exception to the general rule, namely, trusts for the relief of poverty among a group of private individuals who are chosen by the donor by reason of another type of personal relationship, namely, their relationship as employees or dependents of employees of a named employer.

In my opinion this Court should hold that in this Province there is not such an exception to the general rule. The test as laid down in *In re Compton* and approved and applied in the *Oppenheim* case to an educational trust should also be the test to be applied in a trust for the relief of poverty. I can see no reason why it should be applied in the one but not in the other.

While the learned Justice of Appeal points out the distinction between the case at bar and *Gibson* v. *South American Stores* (*supra*), that in the former the relief of poverty is included in the purposes of the trust while in the latter poverty was a necessary element to qualify a person for benefit (*vide Gibson* v. *South American Stores* (*supra*) at 187), it would appear from the quotation from his reasons above, and particularly the last paragraph thereof, that even had the facts of the two cases been identical he would have refused to follow the *Gibson* case.

Roach J.A. does not in his reasons examine the argument of the Public Trustee as to the application of the cy-près doctrine. Early in his reasons, after stating the facts, he says:—

If the trust in question in each estate is not a valid charitable trust, it is void as offending the rule against perpetuities and a partial intestacy will result.

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In my view, the first step to be taken in an endeavour to solve the problem presented to us is to construe the words of the clause in question, bearing in mind the rule that for the purpose of ascertaining the intention of the testator the will is read, in the first place, without reference to or regard to the consequences of any rule of law, the rules of law being applied to the intention thus collected in order to see whether the court is at liberty to carry the intention into effect (*vide* Halsbury 2nd Edition, Volume 34, page 189 and cases there cited). The clause first directs that the trustees shall hold the residue upon trust:—"To pay the income thereof in perpetuity for charitable purposes only;". Pausing here, I can not think of any words more apt to indicate a general charitable intention. The clause proceeds, not to prescribe in any detail the mode in which this charitable intention is to be carried into effect but to confer on the Board of Directors of the Canada Life Assurance Company, subject only to two restrictions, an absolute discretion as to the application of the income, "including the amounts to be expended and the persons to benefit therefrom". The absolute discretion so given is stated to be "subject to the foregoing restrictions". What then are these restrictions? They are, first, that the income is to be paid "for charitable purposes only" and, second, that "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". The usual and ordinary meaning of the words of the clause does not appear to me to differ from their literal meaning and I can find no ambiguity in the clause. It provides (i) that the income is to be used forever for charitable purposes only (ii) subject to this and to one further restriction an unfettered discretion is given to the Board of Directors of the Canada Life Assurance Company to direct the manner of its application (iii) the further restriction referred to is that the charitable purposes selected by the Board shall be such that direct benefits shall be conferred only upon members of a class made up of the present and past employees of the Canada Life Assurance Company and the dependents of such employees. I can find nothing in the words used to suggest that poverty is a necessary element

to qualify any member of the class mentioned for benefit. While the clause forbids the conferring of direct benefits upon persons outside the class it does not require that direct benefits shall be conferred upon any of its members. The Board is left free, if it sees fit, to devote all the income to charitable purposes which confer only indirect benefits. The discretion given to the Board is no doubt a fiduciary discretion which must be exercised bona fide (*vide* the observations of the Master of the Rolls in *Gibson* v. *South American Stores* (*supra*) at page 185) but apart from this it is subject only to the two restrictions above referred to.

The next, and, as it appears to me, more difficult question is whether the restriction referred to, i.e., "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", is valid.

A considerable portion of the full and able arguments addressed to us on this branch of the matter proceeded as if the question were whether a perpetual trust to use the income of the fund for charitable purposes only and for the benefit only of members of the class mentioned would be a valid charitable trust. That is not the precise point before us, as, if my view as to the construction of the clause is correct, it is only in the case of direct benefits that the application of the income is confined to members of the class, but a consideration of it may be of assistance. I do not propose to attempt a review of the numerous authorities so fully discussed in the judgments below and in the recent decisions in England, above referred to. With respect, it appears to me that the present state of the law in England on this point is accurately summarized by Jenkins L.J. in *In re Scarisbrick* (1), at page 648 et seq, as follows:

> . . . (i) It is a general rule that a trust or gift in order to be charitable in the legal sense must be for the benefit of the public or some section of the public; See *In re Compton* (2), *In re Hobourn Aero Components Ld.'s. Air Raid Distress Fund,* (3) and *Gilmour* v. *Coats* (4).
>
> (ii) An aggregate of individuals ascertained by reference to some personal tie (e.g. of blood or contract), such as the relations of a particular individual, the members of a particular family, the employees of a particular firm, the members of a particular association, does not amount

(1) [1951] 1 Ch. 622.
(2) [1945] Ch. 123.
(3) [1946] Ch. 194.
(4) [1949] A.C. 426.

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to the public or a section thereof for the purposes of the general rule: see *In re Drummond* (1), *In re Compton* (2), *In re Hobourn Aero Components Ltd.'s Air Raid Distress Fund* (3), and *Oppenheim* v. *Tobacco Securities Trust Co. Ld.* (4).

(iii) It follows that according to the general rule above stated a trust or gift under which the beneficiaries or potential beneficiaries are confined to some aggregate of individuals ascertained as above is not legally charitable even though its purposes are such that it would have been legally charitable if the range of potential beneficiaries had extended to the public at large or a section thereof (e.g., an educational trust confined as *In re Compton,* to the lawful descendants of three named persons, or, as in *Oppenheim* v. *Tobacco Securities Trust Co. Ld.* to the children of employees or former employees of a particular company).

(iv) There is, however, an exception to the general rule, in that trusts or gifts for the relief of poverty have been held to be charitable even though they are limited in their application to some aggregate of individuals ascertained as above, and are therefore not trusts or gifts for the benefit of the public or a section thereof. This exception operates whether the personal tie is one of blood (as in the numerous so-called "poor relations" cases, to some of which I will presently refer) or of contract (e.g., the relief of poverty amongst the members of a particular society, as in *Spiller* v. *Maude* (5), or amongst employees of a particular company or their dependants, as in *Gibson* v. *South American Stores (Gath and Chaves) Ld.* (6).

(v) This exception cannot be accounted for by reference to any principle, but is established by a series of authorities of long standing, and must at the present date be accepted as valid, at all events as far as this court is concerned (see *In re Compton* (2)) though doubtless open to review in the House of Lords (as appears from the observations of Lords Simonds and Morton of Henryton) in *Oppenheim* v. *Tobacco Securities Trust Co. Ld.* (4).

If, in the case at bar, the clause in question required the income to be used for the relief of poverty among the class described it would fall within the fourth proposition stated by Jenkins L.J. and it would be necessary for us to decide whether we should accept this proposition, as Wells J. did, or reject it, as the Court of Appeal did; but, as I have already indicated, I am unable to so construe the clause.

I should here mention one of Mr. Robinette's arguments in support of the view that the clause should be construed as limiting the application of the income to the relief of poverty. It is said that the clause imperatively requires the income to be devoted in perpetuity to charitable purposes, that this must mean charitable purposes in the legal sense, that the testator has not specified any particular

(1) [1914] 2 Ch. 90.
(2) [1945] Ch. 123.
(3) [1946] Ch. 194.
(4) [1951] A.C. 297.
(5) 32 Ch. D. 158N.
(6) [1950] Ch. 177.

charitable purposes but, insofar as direct benefits are concerned, has defined with precision the class for whose benefit the income is to be applied, and that it must therefore be taken that he intended the income to be used for such purposes only as the law recognizes as charitable in regard to the defined class. This argument is necessarily based on the assumption that we should accept and follow the decision in *Gibson* v. *South American Stores* (*supra*) and for the purpose of the argument I will assume, without deciding, that we should do so. The learned judge of first instance appears to have accepted this argument which provides a reconciliation of the passages first above quoted from his reasons, to the effect that all of the four principal divisions of charity were intended to be included by the testator in the purposes for which the income from the residue was to be applied, with the final conclusion, also quoted above, that the bequest is limited to the relief of poverty. Not without hesitation I have reached the conclusion that this argument should not prevail. In my opinion the exception to the general rule set out in the fourth proposition stated by Jenkins L.J. is restricted to trusts in which the quality of poverty is made an essential condition of eligibility for benefit and should not be extended to cases where the trust permits income to be applied to any of the four principal divisions of charity; nor should such an extension be effected by construing words in a trust instrument which in their ordinary and natural meaning in no way restrict the application of the income to the relief of poverty as if they imposed such a restriction merely by reason of the fact that there is a clear direction that the income is to be used for charitable purposes only.

In my opinion the restriction is invalid because the class to which direct benefits are restricted (in the words of Jenkins L.J., quoted above) "does not amount to the public or a section thereof". The restriction is therefore ineffective to either require or permit the trustees to confine the direct benefits of the trust to the class defined, that is, such persons "as shall be or shall have been employees of The Canada Life Assurance Company and/or the dependents of such employees".

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It is next necessary to consider the effect of holding the restriction ineffective. In his reasons already quoted the learned judge of first instance says: "I must find that these testators had a general charitable intent which they have expressed without any ambiguity." I have already indicated that I share this view. As is pointed out by Sargant L.J. in *In re Monk, Giffen* v. *Wedd* (1), it is now well settled that the question whether there is a general charitable intent is one depending on the construction of the particular will or other instrument. In the same case at page 204 Lord Hanworth M.R. says:—

> The authority of the judgment of Parker J. in *In re Wilson* (2) is invoked, where he defines broadly two categories into which the cases decided may be divided. The first where "it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect." In such cases, even though the precise directions cannot be carried out, the gift for the general charitable purposes will remain, and be perfectly good, and the doctrine of cy-près applied. The other category is, "where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in the form a particular gift—a gift for a particular purpose—and it being impossible to carry out that particular purpose, the whole gift is held to fail." Parker J. concludes with the statement of his opinion that the question whether a particular case falls within the one or the other of the above categories is simply a question of the construction of the particular instrument.

In the case of *In re Wilson,* referred to by Lord Hanworth, Parker J. says that in this class of cases "different minds may very well take different views". To my mind it seems plain that in the case at bar the testator has indicated the paramount intention of giving the whole income from the residue of his estate to charity. This is expressed in the opening words of the clause:—"To pay the income thereof in perpetuity for charitable purposes only." All that follows in the clause is, in my view, a direction as to the manner in which the testator intends "such charitable purposes" to be carried into effect. The question being one of the construction of this particular will, only limited assistance can be derived from an examination of what Sargant L.J. refers to as "the long bead-roll of cases on the subject" but I have not found a case in which a will contained an express direction that income should be used

(1) [1927] 2 Ch. 197 at 212. (2) [1913] 1 Ch. 314, 320, 321, 324.

for charitable purposes only in which it was held that there was not a general charitable intention. If the matter were doubtful it would be necessary to remember, as is pointed out by Lord Hanworth in *In re Monk* (1) at page 207, "that the Court leans in favour of a charitable purpose." I wish to make it clear that my view that the will indicates a general charitable intention is not dependent on the effect which I think must be given to the word "directly" in construing the clause in question. If, contrary to my view, the words of the clause following the words "To pay the income thereof in perpetuity for charitable purposes only" should be construed as confining all benefits from the trust to members of the defined class it would still be my opinion that the will read as a whole indicates a paramount intention to devote all the residue to charity. The impression which I gather from reading the whole of Mr. Cox's will (and the same is true as to the will of Mrs. Cox) is that the testator has, with care and in considerable detail, provided for all those persons whom he regarded as having a claim upon his bounty, that he has then addressed himself to the question of how he shall dispose of the considerable residue remaining, that he has decided to devote it in perpetuity to charitable purposes, that he has said so in the clearest terms, and then has gone on to direct the method of its application. That method failing, the general intention to devote the residue to charity remains.

Once it has been decided as a matter of construction that there is a general charitable intention it is clear that such intention will not be allowed to fail. The question arises, however, whether it should be left to the Trustees of the will to apply the income under the direction of the Board of Directors of The Canada Life Assurance Company in accordance with the clause with the invalid restriction deleted or whether the Court should direct the income to be applied *cy-près*. While I think that the intention of the testator to confer direct benefits on members of the class mentioned, to be selected by the Board, to the exclusion, so far as direct benefits are concerned, of all who are not members of the class cannot be given effect, there would remain numerous ways in which the trust could be fully executed by applying the income to charitable purposes which, while highly beneficial to the public, produce

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indirect benefits only, such as, for example, reduction of the National Debt, the support of schools, or contribution to what are commonly termed "Community Chests"; but, reading the will as a whole, I find no reason to suppose that the testator would have forbidden the conferring of direct benefits except in furtherance of his intention to afford them to members of the defined class, which last-mentioned intention cannot be given effect. I do not think it can safely be assumed that the testator would have provided as the manner of carrying out his general charitable intention what would remain of the clause after the deletion of the restriction held to be invalid; and I am therefore of opinion that the proper course is to direct a scheme.

I would allow the appeals, declare that each will discloses a general charitable intention as to the residuary estate but that the mode of carrying such intention into effect provided by the testator and testatrix respectively cannot be carried out, and direct that the matter be referred back to the Weekly Court so that the proper proceedings may be taken for the propounding and settlement of a scheme for the application *cy-près* of such residuary estate.

In the particular circumstances of this case I would direct that the costs of all parties appearing on each appeal be paid out of the fund in question in each estate, those of the trustees as between solicitor and client, and that the orders as to costs made in the courts below should stand.

Appeals dismissed.

Solicitor for the appellant: *J. J. Robinette.*

Solicitor for the Public Trustee: *Armand Racine.*

Solicitor for the respondent, National Trust Co. Ltd.: *Frank McCarthy.*

Solicitors for the respondent, The Board of Directors of The Canada Life Assurance Co.: *McCarthy & McCarthy.*

Solicitors for the respondent, W. B. Shepard: *McLaughlin, MacAulay, May & Soward.*

Solicitors for the respondent, Margaret Jane Ardagh: *Graham, Graham & Bowyer.*

Solicitor for the Official Guardian, respondent: *P. D. Wilson.*