
1948

Feb. 23, 24
June 25

IN THE MATTER OF THE ESTATE OF ALICE GRANT MACKAY, DECEASED

CONGREGATION OF ST. ANDREW'S-WESLEY CHURCH (DEFENDANTS).. } APPELLANTS;

AND

THE TORONTO GENERAL TRUSTS CORPORATION (PLAINTIFF)..... } RESPONDENT;

AND

WILLIAM HENRY OLIVER STOBIE (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Will—Construction—Charitable Trust—Bequest to Church "to be added to the Endowment Fund"—No Endowment Fund—Whether good charitable gift or void for uncertainty.

A testatrix made a residuary bequest—"To pay all the rest, residue and remainder of my estate to the St. Andrew and Wesley Church, Vancouver, B.C., to be added to the endowment fund."

*PRESENT: Kerwin, Taschereau, Rand, Kellock and Estey JJ.

Held: (Kerwin J. dissenting), that the gift was a good bequest, its purpose prima facie religious, and so charitable. (*Schoales* v. *Schoales* [1930] 2 Ch. 75; *White* v. *White* (1893) 2 Ch. 41 followed.)

Per, Kerwin J., dissenting, the gift failed because it did not fall within the preamble and intendment of the statute of Elizabeth since the absence of an endowment fund does not permit a court of equity to establish a fund with objects that could undoubtedly be charitable within the meaning of the rule. (Williams v. Inland Revenue Commissioners [1947] A.C., 447; *Dunn* v. *Byrne* [1912] A.C. 407; In re Lawton [1940] 1 Ch. 984, followed.)

Appeal allowed and judgment of the trial judge (1) restored.

APPEAL from the judgment of the Court of Appeal for British Columbia (2) allowing, O'Halloran and Bird JJ.A. dissenting, the appeal from the judgment of Wilson J. (1). The appeal to this Court was allowed (with costs of all parties to be paid out of the Estate) and the judgment of the trial judge restored. Kerwin J. dissented.

W. G. Currie K.C. for the appellant.

D. K. MacTavish K.C. for The Toronto General Trusts Corpn., Executors of the deceased's Estate.

T. G. Norris K.C. and *G. E. Beament* for William Henry Oliver Stobie, as representing all the next-of-kin and other persons interested.

KERWIN J. (dissenting)—The clause in the will of Mrs. McKay which has raised the difficulty in the present case is as follows: —

> 30. TO PAY OR TRANSFER all the rest, residue and remainder of my estate to the ST. ANDREW AND WESLEY CHURCH, Vancouver, B.C. to be added to the endowment fund.

The question is, has the testatrix by this clause evinced an intention that her trustees should convey the residue of her estate for charitable purposes. We have had the advantage of a very complete argument but, as Lord Simonds, speaking for a unanimous House of Lords, points out in the most recent case on the subject, *Williams Trustees* v. *Inland Revenue Commissioners* (3):—

> The cases in which the question of charity has come before the courts are legion and no one who is versed in them will pretend that all the decisions, even of the highest authority, are easy to reconcile.

(1) [1946] 2 W.W.R. 657.
(2) [1947] 1 W.W.R. 97.
(3) [1947] A.C. 447 at 455.

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Kerwin J.

It is not disputed here any more than it was in that case that "for charitable purposes" means "for charitable purposes only."

The Church did not have an endowment fund at the time of the making of the will, or at the time of the death of the testatrix, and for the purposes of this appeal the efforts since made to establish such a fund are unavailing. The testatrix apparently thought that there was an endowment fund in existence since the article "the" is used. If there had been such a fund, evidence as to its objects and the manner in which the interest therefor was to be used would have permitted the determination whether, the gift being localized and the nature of the benefit defined, the bequest could be regarded as falling within the spirit and intendment of the preamble to the statute of Elizabeth. (See the *William Case supra* pp. 459-460). While a gift to a church simpliciter has uniformally been held a good charitable gift, in *Dunne* v. *Byrne,* (1) the Judicial Committee determined that a residuary gift "to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may adjudge most conducive to the good of religion in this diocese" did not fall within the rule on the ground that the terms of bequest were not identical with religious purposes. Lord Macnaghten, who delivered the judgment and who had in *Commissioners of Income Tax* v. *Pemsel* (2) classified charity in its legal sense into four principal divisions, said that the language of the bequest to use Lord Langdale's words would be "open to such latitude of construction as to raise no trust which a court of equity could carry into execution." Lord Simonds, whose judgment in the *Williams Case,* it is generally considered, will be as much a *locus classicus* on the subject as has Lord Macnaghten's judgment in 1891, had decided in *Re Lawton* (3) as Simonds J. There a testator by his will gave all his residuary estate to the trustees of a parish church to be used by them at their discretion for any object or purpose permitted by the trust deed under which they operated. There never were any trustees and there never was any such trust deed. Simonds J. held that the bequest failed because there was no general

(1) [1912] A.C. 407 at 411.
(2) [1891] A.C. 531.
(3) [1940] 1 Ch. 984.

charitable intention, therein following the decision of Vice-Chancellor Sir George Giffard in *Aston* v. *Wood* (1). As Lord Simonds, he pointed out in the *Williams Case* that in *Farley* v. *Westminster Bank* (2) a testatrix had bequeathed the residue of her estate in equal parts to the respective vicars and church wardens of two named churches "for parish work", and that the bequest failed because it did not fall within the preamble and intendment of the statute of Elizabeth. Similarly, I am of opinion that here the gift failed and for the same reason since the absence of an endowment fund does not permit a court of equity to establish a fund with objects that could undoubtedly be charitable within the meaning of the rule.

The church authorities to whom the money would be paid, if the bequest were valid would, in the absence of an endowment fund, be obliged to constitute one, which on any interpretation of the words "endowment fund" would involve the retention of the corpus and use of the interest. In that event, such use could include, or indeed be restricted to, trusts that are not charitable within the legal definition of that term.

So far I have dealt with the only matters argued orally before us. However, at the suggestion of the Bench, written arguments were submitted on the point as to whether the words "to be added to the endowment fund" were words merely expressing a wish and not constituting a direction. We are obliged to counsel for the submissions subsequently made by them on this point but I need only say that after giving the matter consideration, I have come to the conclusion that there is no substance in it.

The appeal should be dismissed but under all the circumstances the costs of all parties may be paid out of the residuary estate, those of the executors as between solicitor and client.

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

RAND J.: This appeal raises the question of the construction of a clause in a will in these words:—

30. TO PAY OR TRANSFER all the rest, residue and remainder of my estate to the St. Andrew and Wesley Church, Vancouver, B.C., to be added to the endowment fund.

(1) (1868) L.R. 6 Eq. 419. (2) [1939] A.C. 430.

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Rand J.

The church, of which the testatrix was a member, did not have an endowment fund, but during her membership had received at least two bequests of substantial sums.

It is contended on behalf of the next of kin that the language of the concluding phrase shows the testatrix to have had in mind an endowment fund which so far as is known might have embraced any number of special purposes not charitable; and investing it with such purposes would render the bequest void for uncertainty of objects.

I take the clause to mean a bequest to the church by way of a general endowment. I do not treat the words "to be added to the endowment fund" as making the bequest conditional upon the existence of a fund so designated; and I construe them to imply the application of income for church purposes. The testatrix could not have intended any specific purposes because there was no constituted fund; and in the collocation of these words with the rest of the clause, the fair, and I think the only, inference to be drawn is that she had in mind the ordinary and usual purposes of a permanent fund for the benefit of a church. The use of the article "the" strengthens that view.

The word "endowment" is said in Stroud's Judicial Dictionary, 2nd Ed. at p. 619 by metaphorical transference to mean "the setting out or severing of a sufficient part or portion to a Vicar for his perpetual maintenance when the BENEFICE is appropriated."; and that is confirmed *In re Robinson.* (1) Here there is the addition of the significant word "fund".

What, then, is the prima facie meaning of church purposes? I take it to be religious purposes. In *Schoales* v. *Schoales* (2) a gift to "the Roman Catholic Church" was held prima facie to be a gift to the operative institution which ministers religion and gives spiritual edification to its members and for the purposes of religion. From such purposes it followed that the gift was a good charitable bequest. I see no distinction between that and the present gift, and the purposes here are therefore, prima facie, religious, and so charitable. In *White* v. *White* (3) the bequest was "to the following religious societies, viz: * * * to be divided

(1) [1892] 1 Ch. 95, 100.
(2) [1930] 2 Ch. 75.
(3) [1893] 2 Ch. 41.

in equal shares among them.", but the names were not inserted. The Court of Appeal held that prima facie religious societies meant societies with religious purposes and therefore charitable purposes, and the bequest was held not to have failed for uncertainty. While the inference of religious purposes from religious societies was questioned in *Dunne* v. *Byrne* (1) by Lord Macnaghten, as the object here is a church, the inference is warranted, and in the absence of evidence to the contrary, unassailable. In *Public Trustee* v. *Ross* (2) a bequest "unto the Vicar of St. Alban's Church—for such objects connected with the church as he shall think fit" was held to be valid as charitable; on the true construction of the concluding words, the discretion vested in the vicar was to be exercised within the scope of church and not parochial purposes.

I would, therefore, allow the appeal and restore the trial judgment. The costs of all parties should be paid out of the estate, those of the executor as between solicitor and client.

ESTEY J.: The late Alice Grant MacKay of Vancouver, B.C., by her will provided:

> To pay or transfer all the rest, residue and remainder of my estate to the St. Andrew and Wesley Church, Vancouver, B.C., to be added to the endowment fund.

In fact there was no endowment fund. There were, however, two funds bequeathed to the church which had not been set up in the accounts as an endowment fund nor had they been known as such. If, therefore, the testatrix, who was a member of that church, had any it was but a very imperfect knowledge of the existence of these bequests. The word "endowment" under these circumstances was of her own choosing. The provision when read in the light of these facts indicates an intention on the part of the testatrix to give the residue of her estate to that church as an endowment. "Endowment", it is pointed out in Halsbury, 2nd Ed., Vol. 4, p. 356, para. 620, and in the recognized dictionaries, may be used in different senses. It, however, generally imports the provision of a fund for the support of, over a long time or permanently, some institution or person. The adoption by the testatrix of this phrase "endowment fund" in this residuary clause im-

(1) [1912] A.C. 407. (2) [1930] 1 Ch. 224.

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Estey J.

ports that the fund would remain intact and the income therefrom should be used by the church. In other words, that the church would hold this fund in trust. Such appears to be the real intention of the testatrix. The fact that she was mistaken in thinking that an endowment fund really existed does not detract from the fact that she intended that her money should be an endowment for church purposes.

This gift by way of an endowment to St. Andrew's-Wesley Church constitutes in law a charitable trust. In *In re White* (1) the will provides:

> I do give and bequeath the whole of my property to the following religious societies, viz * * *

No such societies were in fact mentioned. It was held the gift was for religious purposes and that being for religious purposes it was a gift for a "charitable purpose, unless the contrary can be shewn." Lord Macnaghten, referring to *In re White, supra, in Dunne* v. *Byrne* (2) stated at p. 411:

> All they did was to hold, as had often been held before, that a bequest for religious purposes was a good charitable gift.

In *In re Bain* (3) the residuary clause read:

> I devise and bequeath all the residue of my estate whatsoever and wheresoever unto the Vicar of St. Alban's Church, Brooke Street, Holborn, E.C., for such objects connected with the Church as he shall think fit.

Lord Hanworth, M.R., at p. 232 states:

> It is because we have got the church as the centre of this bequest and not the parish that I think we are right in rejecting outside considerations and in saying that this is a good bequest to the Vicar as a trustee for the purposes of his church, that is, for the fabric and for the services which are conducted therein.

Lord Justice Lawrence at p. 233:

> The bequest in question is to the Vicar of St. Alban's Church as an ecclesiastical corporation, and it is therefore a gift to a religious institution. Prima facie, such a gift is a bequest for a charitable purpose * * *

The testatrix in making this gift has given it to the church prima facie for religious purposes. That appears to follow from the statement of Farwell, J.:

> It is only, in my judgment, in a case where the trust itself is not specified that the character of the trustees may be sufficient to indicate the purpose of the trust.

Re Ashton's Estate, Westminster Bank, Ltd. v. *Farley* (4)

(1) [1893] 2 Ch. 41.
(2) [1912] A.C. 407.
(3) [1930] 1 Ch. 224.
(4) [1938] 1 All E.R. 707 at 716.

His judgment was approved in the House of Lords: *Farley* v. *Westminster Bank* (1). See also *Gordon* v. *Craigie* (2).

Under all the circumstances of this case, the authorities warrant the conclusion that this residuary clause creates a valid charitable trust in favour of the church.

The appeal should be allowed and the judgment of the learned trial Judge restored. The costs of all parties in this Court and the Court of Appeal are to be paid out of the residuary estate; those of the executors as between solicitor and client.

Appeal allowed with costs.

Solicitor for the (Defendants) Appellants: *Dugald Donaghy.*

Solicitor for the (Plaintiff) Respondent: *Arthur J. Cowan.*

Solicitor for (Defendant) Respondent: *Norris & McLennan.*

Reporter's Note:

Following delivery of judgment, an application was made at the next session of the Court on behalf of the respondent Stobie for leave to re-hear the appeal solely with respect to the disposition of costs in this Court and the Court of Appeal for British Columbia. Leave having been granted and counsel heard, judgment was reserved, and on the 18th October, 1948 rendered as follows: The judgment is amended by providing that all parties are entitled to their costs in the Court of Appeal as between solicitor and client. There will be no costs of this motion.

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(1) [1939] A.C. 430; (1939) 3 All E.R. 491.
(2) [1907] 1 Ch. 382.