THE JEWISH HOME FOR THE AGED OF BRITISH COLUMBIA (*Defendant*) .....APPELLANT;

1961

*Jan. 26, 27
Apr. 25

AND

THE TORONTO GENERAL TRUSTS CORPORATION (*Plaintiff*) .....RESPONDENT;

AND

THE NEXT-OF-KIN of the Estate of the late Louis Brier, Deceased, and the Residuary Legatees named in the Will of the late Rose L. Brier, Deceased (*Defendants*) .....RESPONDENTS;

AND

THE RESIDUARY LEGATEES in the Will of the late Louis Brier, Deceased (*Defendants*) ....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Wills—Direction to accumulate funds for charitable purposes—Immediate gift to charity—Accumulation not a condition precedent to existence of charitable trust—Rule against perpetuities—Cy-près doctrine—Accumulations Restraint Act, R.S.B.C. 1948, c. 5.

The testator, who died on July 7, 1936, left his property in trust to a corporate trustee. After making provision for certain bequests, he directed the accumulation out of residuary income of three funds, each of $20,000, the first for a Jewish hospital, the second for a Jewish orphan asylum and the third for a Jewish old men's home. No such institutions were in existence at the date of the testator's death. The appellant society, incorporated in 1950, claimed the third fund under a clause of the will which provided for the fund being paid out in the event that a Jewish old men's home of a minimum specified cost was built within fifty years of the testator's death, or such extended time as might be allowed, and on condition that admittance and care were on a non-sectarian basis. The will contained identical provisions with respect to the hospital and the orphan asylum. The appellant also claimed under the residuary clause which provided that the residue of the estate was to be divided equally among the three institutions and that if the institutions were not in existence within the specified period, everything that remained was to be distributed by the trustee among charitable objects.

The trustee applied for directions and submitted questions relative to the construction of the will. The Courts below rejected the appellant's claims on the ground that the dispositions in question offended the rule against perpetuities.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Judson JJ.

1961

JEWISH HOME FOR THE AGED OF B.C. v. TORONTO GENERAL TRUSTS CORPN. et al.

Held: The appellant was entitled to the fund and one-third of the residue as they existed on July 5, 1957. All surplus income after that date must be applied cy-près and a scheme settled by the Court.

(1) This was not a case where the gift for charitable purposes was contingent upon the happening of an event which may not happen within the perpetuity period, but rather one of an immediate unconditional gift to charity with a designation of certain particular modes of application of the property to charitable purposes. The validity of this charitable trust was not affected by the directions to accumulate the three funds out of residuary income. The accumulation was not a condition precedent to the existence of the charitable trust. *In re Lord Stratheden and Campbell,* [1894] 3 Ch. 265; *Kingham v. Kingham,* [1897] 1 I.R. 170; *Re Schjaastad Estate* (1920), 50 D.L.R. 445; *In re Wightwick's Will Trusts,* [1950] Ch. 260; *In re Mander,* [1950] Ch. 547, referred to; *Attorney-General v. Bishop of Chester* (1785), 1 Bro. C.C. 444; *Sinnett v. Herbert* (1872), 7 Ch. App. 232; *Chamberlayne v. Brockett* (1872), 8 Ch. App. 206; *Wallis v. Solicitor-General for New Zealand* [1903] A.C. 173; *In re Swain,* [1905] 1 Ch. 669; *Re Mountain* (1912), 26 O.L.R. 163, applied.

(2) Under the provisions of the *Accumulations Restraint Act* all accumulation must stop, both in the three funds and the residue, as of July 5, 1957, which was twenty-one years from the death of the testator.

(3) With respect to the surplus income after July 5, 1957, the testator had directed an accumulation to extend beyond the legal limit in the carrying out of a general charitable intention. In these circumstances the surplus income did not go to the next-of-kin but was to be applied cy-près. *In re Monk,* [1927] 2 Ch. 197; *In re Bradwell's Will Trusts,* [1952] 2 All E.R. 286; *Re Burns Estate* (1960), 32 W.W.R. 689, referred to.

(4) It made no difference that the appellant admitted men and women. The institution qualified as a Jewish old men's home.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Ruttan J. Appeal allowed.

Hon. J. W. de B. Farris, Q.C., and *D. A. Chertkow,* for the defendant, appellant.

C. W. Brazier, Q.C., for the plaintiff, respondent.

F. H. Bonnell, Q.C., and *W. D. Tuck,* for the defendants, respondents, the next-of-kin and the residuary legatees of the Estate of Rose L. Brier.

D. A. Freeman, for the defendants, respondents, the residuary legatees of the late Louis Brier.

The judgment of the Court was delivered by

[1] (1960), 23 D.L.R. (2d) 229.

JUDSON J.:—The appellant was incorporated in the year 1950 under the *Societies Act*, R.S.B.C. 1948, c. 311. It appeals against the rejection of its claims to an accumulated fund and a share of the residue under the will of the late Louis Brier. The British Columbia Courts[1] have rejected these claims on the ground that the dispositions in question offend the rule against perpetuities.

Louis Brier made his will in 1934 and died in 1936. He left all his property in trust to the Toronto General Trusts Corporation as executor and trustee. We are concerned on this appeal with his disposition of the residue of his estate. After making provision for his wife and certain distant relatives, he directed the consecutive accumulation out of residuary income of three funds each of $20,000. The first fund was for a Jewish Hospital, the second for a Jewish Orphan Asylum and the third for a Jewish Old Men's Home. No institutions answering these descriptions were in existence at the date of death. The appellant came into existence only in 1950 and is the claimant to the third of these funds, which have all been fully accumulated. The appellant claims the fund under clause (*p*) of the will, which, apart from the named beneficiary, is in precisely the same terms as the two preceding paragraphs which direct the prior accumulation of funds for the hospital and the orphan asylum. Clause (*p*) reads:

(*p*) As soon as the provisions of the preceding paragraph (*o*) of this my will have been complied with by my said executor and trustee in so far as having the sum of Twenty thousand ($20,000) dollars set aside by either deposit or investment in said paragraph herein provided and as soon as there is a further sum of Twenty thousand ($20,000) dollars available from the income of my estate, then I direct my said executor and trustee at its discretion to deposit in the Savings Department of some chartered bank in the City of Vancouver or to invest in either Dominion Government bonds or securities or any bonds or securities of any of the Provinces of the Dominion of Canada the further sum of Twenty thousand ($20,000) dollars which sum of Twenty thousand ($20,000) dollars with accumulated interest thereon from the date same is so deposited or invested to be paid out as follows:— In the event the Jewish people of British Columbia build a Jewish Old Men's Home within the Province of British Columbia that will cost the sum of One hundred thousand ($100,000) dollars or more at any time within fifty (50) years after my decease said sum of Twenty thousand ($20,000) and accumulated interest to be paid by my said executor and trustee to the proper officers of said Jewish Old Men's Home on condition, however, that the said Jewish Old Men's Home shall by its rules and regulations admit and care for Gentile

[1] (1960), 23 D.L.R. (2d) 229, affirming (1959), 28 W.W.R. 207, 18 D.L.R. (2d) 670.

1961

JEWISH HOME FOR THE AGED OF B.C. v. TORONTO GENERAL TRUSTS CORPN. et al.

Judson J.

patients on the same terms and conditions as Jewish patients are admitted and cared for but in the event the said condition is not complied with and in the further event that the said Jewish people of British Columbia do not build a Jewish Old Men's Home in the Province of British Columbia within fifty (50) years after my death then this bequest shall lapse and the said further sum of twenty thousand ($20,000) dollars so deposited and accumulated interest thereon shall at the end of fifty (50) years after my decease be given by my said executor and trustee to some other charitable institution in the Province of British Columbia that in the good judgment of my said executor and trustee it may deem worthy. Having in mind that I would prefer to give same to some Jewish Institution but my said preference not to bind my said executor and trustee in exercising its discretion in the event, however, the Jewish people of British Columbia express to my executor and trustee in writing their desire to build a Jewish Old Men's Home within British Columbia but are unable to so build same within the said Fifty (50) years then my executor and trustee shall have the right to extend the time for the completion of said Old Men's Home for such time beyond the said Fifty (50) years as my said executor and trustee shall deem just and this bequest shall upon completion of said Jewish Old Men's Home within the time so extended be paid as aforesaid. Otherwise this bequest to lapse.

Clause (*p*) must, however, be read in conjunction with the final residuary clause (clause (*s*)), which reads:

(*s*) All the rest and residue of my estate not hereinbefore disposed of by this my will including all lapsed legacies I direct my said executor and trustee to distribute same among the three institutions referred to in paragraphs (*n*), (*o*) and (*p*) of this my will, one third to each, such distribution to be made as hereinbefore provided to such three institutions. In the event only one or more of such institutions is in existence in the said fifty (50) years after my death or such extended period as hereinbefore provided then one third of said rest and residue of my estate shall be given to such of the three institutions as shall be in existence at the end of the said Fifty (50) years or such extended period if such period is extended as hereinbefore provided and in the event any one or more of said three Jewish Institutions is not in existence within the time as hereinbefore provided then I direct that the rest and residue that then remains undisposed of be distributed by my said executor and trustee to such worthy charitable object or objects, institution or institutions, person or persons in the Province of British Columbia that in the good judgment of my said executor and trustee it may deem best.

The British Columbia Courts have held that the gift to the charity could not arise until there was an accumulation of the specified fund and until the institution named came into existence and qualified under the will. This gift, therefore, offended the rule against perpetuities and the gift over of the residue failed for the same reason. In my respectful opinion, there is error in this construction. To me, the case is not one where the gift for charitable purposes is contingent upon the happening of an event which

may not happen within the perpetuity period but rather one of an immediate unconditional gift to charity with a designation of certain particular modes of application of the property to charitable purposes. The particular mode of application may be subject to a condition precedent which may not happen within the perpetuity period, but the charitable trust does not fail if the testator had a general unconditional intention to devote the property to charitable purposes. It is saved by the application of the *cy-près* doctrine.

The two principles which I have just summarized are clearly stated in the judgment of Lord Selborne in *Chamberlayne v. Brockett*[1], which is usually taken as a starting point in an inquiry of this kind. There the testatrix, after reciting her intention to give her estate to charity, directed her trustees to apply the residue of her estate to the building of alms-houses and the support of the inmates in three specified places as soon as land should be given (by others) on which the buildings could be erected. This was held to be an absolute immediate gift to charity with a mode of execution dependent on future events which might happen outside the perpetuity period. The mode of execution did not make the gift to charity conditional or contingent.

If one reads clauses (*n*), (*o*) and (*p*), directing the accumulation and application of the three funds, along with the residuary clause of this will, there is a clearly expressed general charitable intention. Nothing is left to inference or surmise. Once the testator began to deal with the residue of his estate, there is only one possible view and that is that his intention was a general charitable one. It is true that the ability of the particular institutions to qualify for the accumulations and share of residue is subject to the many contingencies mentioned. These have been taken, in the judgment under appeal, to be the determining factor. Such a view, in my opinion, ignores the expressed immediate general charitable intention and holds that there is only a particular charitable intention to be found in the particular mode of application. The concluding words of the residuary clause provide that if these three Jewish institutions are not in existence within the specified time

[1] (1872), 8 Ch. App. 206 at 211, 42 L.J. Ch. 368.

1961

JEWISH HOME FOR THE AGED OF B.C. v. TORONTO GENERAL TRUSTS CORPN. et al.

Judson J.

limits, everything that remains is to be distributed by the trustee among worthy charitable objects in British Columbia.

With respect, the error in the judgment under appeal is in its foundation upon the cases where the gift to a particular charity was in itself contingent upon the happening of a future uncertain event which might not happen within the perpetuity period. A mere listing of them is sufficient to give point to the distinction between them and the present case. Some of these cases are: *In re Lord Stratheden and Campbell*[1], where a gift to a regiment was postponed until the appointment of the next Lieutenant-Colonel; *Kingham v. Kingham*[2], where a gift to the General Assembly of a church was contingent upon the sale of certain premises not owned by the testator and the delivery of the proceeds of the sale to the trustees under the will; *Re Schjaastad Estate*[3], where the gift was to the first Norwegian Lutheran Orphans' Home to be built in Saskatchewan and Alberta; *In re Wightwick's Will Trusts*[4], where the gift was to a named charity when the practice of vivisection should be abolished; *In re Mander*[5], where there was a gift of a fund for the training of a candidate for the priesthood, the fund to be invested until such time as a candidate should come forward from a certain church.

The applicable line of authority is to be found, not in these cases dealing with a contingent gift to a particular charity but in those where there was the general charitable intention and an immediate unconditional gift to charity, with a term of postponement or a condition attached to the particular mode of execution. Such cases are: *Attorney-General v. Bishop of Chester*[6]; *Sinnett v. Herbert*[7]; *Chamberlayne v. Brockett*[8]; *Wallis v. Solicitor-General for New Zealand*[9]; In *re Swain*[10]; *Re Mountain*[11], per Boyd C.

The principle is stated in 4 Hals., 3rd ed., p. 286:

> A gift to charity is not allowed to fail merely because the application to the particular purpose is postponed, as by a direction to accumulate. An immediate gift to a charity is valid, although the particular application of the fund directed by the will may not of necessity take effect within any

[1] [1894] 3 Ch. 265.
[2] [1897] 1 I.R. 170.
[3] (1920), 50 D.L.R. 445.
[4] [1950] Ch. 260.
[5] [1950] Ch. 547.
[6] (1785), 1 Bro. C.C. 444.
[7] (1872), 7 Ch. App. 232.
[8] (1872), 8 Ch. App. 206.
[9] [1903] A.C. 173.
[10] [1905] 1 Ch. 669.
[11] (1912), 26 O.L.R. 163 at 173.

assignable limit of time, or may never take effect at all except on the occurrence of events in their essence contingent and uncertain. Accordingly, bequests for the erection of almshouses or schools when the necessary sites should be obtained, to endow a bishopric in a certain place in case a bishop should be appointed, or to endow any additional church which might be erected, or bequests the application of which is postponed until a licence in mortmain is obtained, have been supported.

A similar statement is to be found in Gray, The Rule Against Perpetuities, 4th ed., p. 581:

607. If the Court, however, can see an intention to make an unconditional gift to charity (and the Court is very keen-sighted to discover this intention), then the gift will be regarded as immediate, not subject to any condition precedent, and therefore not within the scope of the Rule against Perpetuities. The mode pointed out by the testator is only one way, though the preferable way, of carrying out the charitable purpose; and if it cannot, with regard to the general charitable intention, be carried out in that way, it will be carried out *cy pres*. Thus while the Court will allow the fund to be transferred to a corporation not in existence at the time of the gift, if such corporation is constituted in a reasonable time, it will not recognize the right of such non-existent corporation to keep the fund locked up until such time as it may please itself to be incorporated. The formation of the corporation is not a condition precedent to the charitable trust, and therefore the trust is not too remote. The cases where charitable gifts to non-existent corporations or societies have been sustained are numerous.

My conclusion therefore is that the validity of this charitable trust is not affected by the directions to accumulate these three funds out of residuary income. The accumulation is not a condition precedent to the existence of the charitable trust. Precisely the same point as to the effect of a direction to accumulate arose in *Re Swain, supra*. After the termination of a life interest in the residue of the estate, the trustees were directed to accumulate a reserve fund and then to begin paying three charitable annuities to poor inhabitants of a certain town. The direction to accumulate was not a condition precedent to the validity of the charitable bequest but a direction as to the particular application of the charitable fund.

I turn now to the validity of the provision for accumulation. In the absence of a statute a direction to accumulate in favour of a charity would be subject only to judicial supervision as to its duration. But the *Accumulations Restraint Act* of British Columbia has been in force during the relevant period. Its principles are those contained in the corresponding English legislation under which the statutory restriction has been held to be applicable to charitable

1961

JEWISH HOME FOR THE AGED OF B.C. v. TORONTO GENERAL TRUSTS CORPN. et al.

Judson J.

funds which are directed to be accumulated beyond the time permitted by the statute (4 Hals., 3rd ed., 302). The result is that on July 5, 1957, which is 21 years from the death of the testator, all accumulation must stop, both in the three funds and the residue itself. The appellant is therefore entitled now to the fund and one-third of the residue as they existed on that date.

The next question is the destination of the surplus income after July 5, 1957. All that has happened here is that the testator has directed an accumulation to extend beyond the legal limit in the carrying out of a general charitable intention. In these circumstances, the surplus income does not go to the next-of-kin but is to be applied *cy-près*. This was the result in *Re Monk*[1], and in *Re Bradwell's Will Trusts*[2]. The rule is stated in Gray, 4th ed., at p. 630, as follows:

> But where there is an unconditional gift to charity, the gift will be regarded as immediate and good, although the particular mode of carrying out the charity which the donor has indicated is too remote. Consequently in such a case if a direction for accumulation is invalid the only result is that the income is immediately distributable in charity; the heirs or next of kin are not let in.

The same principle is stated in 4 Hals., 3rd ed., 319. I notice a recent application of it in *Re Burns Estate*[3]. A scheme must therefore be settled by the Court for the *cy-près* application of all the surplus income after July 5, 1957.

The only remaining question is whether the appellant is a beneficiary answering the description contained in the will. The trustee raises this doubt because the testator spoke of a Jewish Old Men's Home whereas the appellant is a Jewish Home for the Aged and admits men and women. In all other respects the appellant qualifies under the will. In my opinion, it makes no difference that the appellant admits aged women. The institution qualifies as a Jewish Old Men's Home.

The questions submitted to the Court will therefore be answered in accordance with the following principles. The appellant is entitled now to the fund and one-third of the residue as they existed on July 5, 1957. All surplus income after July 5, 1957, must be applied *cy-près* and a scheme

[1] [1927] 2 Ch. 197, 96 L.J. Ch. 296.
[2] [1952] 2 All E.R. 286, [1952] Ch. 575.
[3] (1960), 32 W.W.R. 689, 25 D.L.R. (2d) 427.

settled by the Court. Further than that I would not go on this application but I do suggest that when the application is made for *cy-près* administration of the surplus income, the interested parties should at the same time consider joining with it an application for *cy-près* administration of the two remaining funds and the two-thirds of the residue. It is now nearly 25 years since the death of the testator.

The costs of all parties throughout these proceedings including the costs of the motion for leave to appeal should be taxed on a solicitor and client basis and paid out of the remaining two-thirds of the residue. I make this order because the appellant has carried the burden throughout and because counsel for the next-of-kin and for others potentially interested in the residue were appointed by the Court to represent these interests.

Appeal allowed.

Solicitor for the defendant, appellant: D. A. Chertkow, Vancouver.

Solicitors for the plaintiff, respondent, The Toronto General Trusts Corporation: Davis & Company, Vancouver.

Solicitors for the defendants, respondents, the next-of-kin of the estate of the late Louis Brier, and the residuary legatees named in the will of the late Rose L. Brier: Campney, Owen & Murphy, Vancouver.

Solicitors for the defendants, respondents, the residuary legatees in the will of the late Louis Brier: Freeman, Freeman, Silvers & Koffman, Vancouver.