IN THE MATTER of the Estate of ALEXANDRA LOGGIE, deceased.

1954

*May 17, 18, 19

*Oct. 5

WINSTON C. BREWER AND HERMAN S. MURRAY, EXECUTORS UNDER THE LAST WILL OF THE SAID ALEXANDRA LOGGIE *(Plaintiffs)* ..... } APPELLANTS,

THE ATTORNEY GENERAL OF NEW BRUNSWICK *(Defendant)* . } APPELLANT;

AND

ELIZABETH FYFE McCAULEY AND OTHERS *(Defendants)* ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK CHANCERY DIVISION

Wills—Charity—Charitable bequest—"Charitable, religious, educational or philanthropic purposes"—Uncertainty.

A testatrix by her will directed her executors to apply the residue of her estate "for charitable, religious, educational or philanthropic purposes" and vested in them special powers of appointment but restricted the allocations to be made under the powers of appointment to the Province of New Brunswick. By a second paragraph, without restricting the powers of appointment, she expressed the wish that a special trust, scholarship or foundation be established and named the Robert Loggie and/or Alexandra Loggie Trust, Scholarship or Foundation.

*PRESENT: Rand, Kellock, Estey, Cartwright and Fauteux JJ.

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BREWER *et al* *v.* MCCAULEY *et al*

Held: that the whole of the purported trust was void for uncertainty as not confined to charitable purposes.

Decision of the Supreme Court of New Brunswick, Chancery Division (1953) 34 M.P.R. 66, varied.

APPEAL by plaintiffs with special leave of the Supreme Court of New Brunswick, Appeal Division, from that portion of the judgment of Harrison J. (1), a judge of the Supreme Court of New Brunswick, Chancery Division, whereby he determined that the trust of one half of the residue of the Estate of Alexandra Loggie set out in clause 10 of her last will was void for uncertainty and fell to be distributed as of an intestacy. The defendants by way of cross-appeal sought a declaration that the whole trust was void for uncertainty.

C. F. Inches, Q.C. and *Norwood Carter* for the appellant executors.

A. B. Gilbert, Q.C. and *D. M. Gillis* for the Attorney General of New Brunswick, appellant.

C. J. A. Hughes, Q.C. and *H. W. Sutherland* for the respondents.

RAND J.:—Notwithstanding the exhaustive argument of Mr. Carter, I have no doubt about what our judgment should be. I cannot accept the interpretation of the will urged upon us that by the second paragraph of the residual provision, the testatrix directed a trust for education. In addition to the fact that the opening words, "without restricting the generality of the foregoing special powers of appointments" which are simply powers to carry out the declared objects, provided *ex abundantia cautela,* expressly exclude such an interpretation, and that all that is expressed is a "wish" that a "Special Trust, Scholarship or Foundation" be established, the language "Trust, Scholarship or Foundation" are all recognized means of perpetuating the name of a donor who is desirous of creating a perpetual gift, and they express not an object, education, but three modes of achieving objects elsewhere specified.

We are then remitted to the words of the first paragraph by which the residue is to be given and applied "for charitable, religious, educational or philanthropic purposes"

(1) (1953) 34 M.P.R. 66.

which confer an unfettered discretion on the trustees to apply the residue to any of those four objects. In its relation to the scope of charity as delimited by the courts, the last word is indistinguishable from "benevolent" and admittedly the authorities in England have pronounced on both of them.

In *Chichester Diocesan Fund and Board of Finance (Incorp.)* v. *Simpson* (1), the word "benevolent" in the context of "such charitable institution or institutions or other charitable or benevolent object or objects in England" was held to be outside of the scope of the statute of Charities and that the purported bequest was invalid as being uncertain.

In *re Macduff* (2), the language of the bequest "for some one or more purposes charitable, philanthropic or (blank) " was held invalid because of the presence of the word "philanthropic". To the same effect was *In re Eades* (3). In *Wintle* v. *Diplock* (4), the Court of Appeal, consisting of Sir Wilfred Greene, M.R., Clauson L.J., and Goddard L.J. applied the same rule to the word "benevolent" in the context "apply the residue for such charitable institution or institutions or other charitable or benevolent object or objects in England." In the course of his reasons the Master of the Rolls dealt specifically with the two words 'benevolent" and "philanthropic" and his analysis of the law as laid down in the cases demonstrating there the impossibility of upholding the judgment of Farwell J. who, on the construction of the will, had found an overriding intention to benefit charitable objects only, equally clearly presents an insuperable obstacle to this appeal.

The appeal must, therefore, be dismissed, and the cross-appeal allowed; the judgment below should be varied so as to declare that the whole of the purported trust of the residue is void for uncertainty and the residue to be distributed as of an intestacy. Costs to all parties will be payable out of the estate, those of the executors of the testatrix as between solicitor and client.

(1) [1944] A.C. 341.
(2) [1896] 2 Ch.D. 451.
(3) [1920] 2 Ch. 353.
(4) [1941] 1 Ch. 253.

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The judgment of Kellock, Estey, Cartwright and Fauteux JJ. was delivered by:

KELLOCK J.:—This appeal and cross-appeal are brought *per saltum* from a judgment of the Supreme Court of New Brunswick, construing the terms of paragraph 10 of the will of the deceased Alexandra Loggie.

After appointing executors and directing payment of succession duties, the testatrix gave certain pecuniary legacies to relatives and to certain organizations and institutions, all of the latter being, as I shall assume, of a charitable nature. Thereupon follows paragraph 10, reading as follows:

> 10. All the rest, residue and remainder of my Estate I do direct shall be given and applied for charitable, religious, educational or philanthropic purposes. I do hereby devise and bequeath all the residue of my estate unto my Executors and Trustees in trust for the purposes as hereinafter more particularly set forth. And in addition to all powers conferred by law I do vest in my Executors and Trustees special Powers of Appointment to allocate the residue of my Estate with full power and discretion to them and restricted only in that any and all allocation made by my Executors and Trustees from the residue of my Estate under the special Powers of Appointment must be for charitable, religious, educational or philanthropic purposes within the Province of New Brunswick and further that they are not restricted to gifts to established institutions.
>
> Without restricting the generality of the foregoing special Powers of Appointment I express the wish that a special Trust, Scholarship or Foundation or more than one, if practicable to do so, be established and named and identified as the ROBERT LOGGIE and/or ALEXANDRA LOGGIE Trust, Scholarship or Foundation, etc., and the said newly established trust to be properly organized and Trustees in addition to my Executors and Trustees herein appointed. The charter members to be named and appointed by my Executors and they to make provision for appointment to fill vacancies and establish rules, regulations and conditions governing the administration of any such Trust, Scholarship or Foundation so established in compliance with the aforegoing expressed wish.
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> For further direction to Trustees of any trust that may be established I wish that total payments made each year be not necessarily confined or restricted to the income or revenue only but that total annual payments under any trust so established may at the discretion of the Trustees be made in part from principal but only in a degree from the principal that would permit the Trust so established to operate for an extended term of years but not of necessity in perpetuity.

Harrison J., in the court below held that while the provision contained in the first sub-paragraph was invalid by reason of the inclusion of "philanthropic" among the purposes enumerated by the testatrix, the second sub-paragraph was to be construed as constituting a trust for educational

purposes. The learned judge directed that one-half of the residue should be devoted to that end, the remaining one-half being undisposed of.

The appellants contend that all of the provisions of paragraph 10 are valid, while for the cross-appeal, it is argued that the paragraph is invalid *in toto*.

In support of the appeal, it is urged that the word "or" in the phrase "charitable, religious, educational or philanthropic purposes" in the first sub-paragraph, is used conjunctively; that all of the named purposes other than "charitable" take their colour from association with it, the other words being merely explanatory, "or" to be read as "id est". It was further contended that the court should apply a benignant interpretation so as to uphold the validity of the gift if at all possible and that by reason of the existence of the charitable pecuniary legacies, a general charitable intention appears upon the whole will, in the light of which the word "philanthropic" is to be read as synonymous with and governed by the word "charitable."

I do not think it necessary to discuss these arguments in detail. In my view, upon the language of this will it is impossible to read the word "or" as conjunctive. Accordingly, while the word "charitable" must receive its technical meaning, and there is no difficulty about the words "religious" and "educational", the presence of the word "philanthropic" vitiates the gift. In my view, the case at bar is governed by the principle of the decision in *Chichester Diocesan Fund* v. *Simpson* (1). The earlier decision in *Attorney-General for New Zealand* v. *Brown* (2), may also be usefully referred to. In this view the appeal fails.

The fundamental principle is that a testator must, by the terms of his will, himself dispose of the property with which the will proposes to deal. He may not depute that duty to his executors or trustees, save in the case of a gift for charitable purposes, when he may depute the selection of the charities. The courts in such case are able to determine whether or not a particular gift is charitable. But where the testator employs such words as "charitable or benevolent" or "charitable or philanthropic", it is impossible for the courts to be able to decide with accuracy the ambit of

(1) [1941] A.C. 341. (2) [1917] A.C. 393.

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these expressions as it is well settled that neither of them mean the same as "charitable". The result is that where a testator has left to his trustees a discretion to devote the whole of his property to one or the other, the gift fails.

Although in the *Chichester* case it was the word "benevolent" which rendered the particular provisions there in question invalid, while the word in question in the case at bar is "philanthropic", it is well settled that both words are tainted by the same vice, as is pointed out by Lord Porter in the *Chichester* case at p. 365, and Lord Simonds at p. 370. I refer also to the judgment of Lord Davey, with whom Lord Watson concurred, in *Hunter* v. *Attorney General* (1). *In re Macduff* (2); *In re Eades* (3); and to *re Poole* (4). In the *Chichester* case in the Court of Appeal, reported *sub nom. In re Diplock* (5), Sir Wilfred Greene M.R., as he then was, said at p. 259:

> The Crown has never assumed the right to come to the Court and ask for the execution of a philanthropic trust.

With respect to the view which found favour with Harrison J., namely, that the second sub-paragraph constitutes a valid precatory trust for the "furtherance of education by scholarships", I think it is impossible so to construe this will for two reasons. The sub-paragraph opens with the words:

> Without restricting the generality of the foregoing special Powers of Appointment.

The "foregoing special Powers of Appointment" are powers of appointment "to allocate" the residue of the estate, the discretion of the trustees being "restricted only" in that any and all allocation "must be" for "charitable, religious, educational or philanthropic purposes within the Province of New Brunswick."

It is clear, in my opinion, that the trustees' discretion under the terms of the first sub-paragraph, extends to the entire residue if they see fit to exercise it, in which event there would be nothing left upon which the second sub-paragraph could operate, assuming for the moment that the words "Trust, Scholarship or Foundation" may be construed as Harrison J. has construed them, with which view, in the second place I cannot, with respect, agree. In

(1) [1899] A.C. 309 at 323.
(2) [1896] 2 Ch.D. 451.
(3) [1920] 2 Ch. 353.
(4) (1931) 40 O.W.N. 558.
(5) [1941] 1 Ch. 253.

my opinion, the provision made by the second sub-paragraph is nothing more than one mode of carrying out the trust provided for by the first sub-paragraph, should the trustees see fit so to do.

An argument was addressed to us on behalf of the Attorney General for New Brunswick to the effect that as the testatrix had used, in the first sub-paragraph, a form of words which gives to her trustees a power of appointment for the purpose of allocating among the named purposes instead of simply constituting a trust for the purpose, the will was not open to the objection given effect to in the decisions to which I have referred. The argument may be disposed of by reference to the decision of Romer J., as he then was, in *In re Clarke* (1), at pages 419-20, with which I respectfully agree.

I would therefore dismiss the appeal and allow the cross-appeal, the costs of all parties in this court to be taxed and paid out of the residue of the estate, those of the trustees as between solicitor and client. The order below as to costs should stand.

Appeal dismissed and cross-appeal allowed, both with costs.

Solicitors for the appellant executors: *Inches & Hazen.*

Solicitors for the Attorney General of New Brunswick, appellant: *Gilbert, McGloan & Gillis.*

Solicitor for the respondents: *H. W. Sutherland.*