IN RE WILL OF ALEXANDRA LOGGIE[1]

Will – Trust for Charitable, Religious, Educational or Philanthropic Purposes – Precatory Trust – Apportionment

In this case a problem, both interesting and unique in the case law of New Brunswick, was dealt with by Mr. Justice Harrison of the Chancery Division. The testatrix, after making a number of specific legacies, left the residue of her estate (amounting to more than one-half million dollars) in the following manner: "All the rest, residue and remainder of my Estate I do direct shall be given and applied for charitable, religious, educational or philanthropic purposes." The clause then went on to leave this money to trustees with "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 . . . must be for charitable, religious, educational or philanthropic purposes within the Province of New Brunswick. . . . . "

In construing this direction (clause 10 of the will), Harrison J. quite rightly considered himself bound by the decision of the House of Lords in **Chichester Diocesan Fund v. Simpson**[2] and held it to be void for uncertainty. The principle underlying the law on this point is that the trustees would be within their rights in applying the whole of the trust moneys for philanthropic purposes, a description which does not fall within the legal meaning of "charity". Argument was directed to the meaning of the word "or", and submissions were made that the testatrix merely used the three more particular words as explanatory of "charitable". To be more specific, it was argued that the direction should be read "charitable, that is, religious, educational or philanthropic". This argument, however, was dismissed by Harrison J., who construed the "or" as disjunctive and found, as in the **Chichester** case[2], that the four words have each a distinct meaning.

There was here a strong presumption against intestacy, more particularly since the testatrix had provided by specific bequests for all of her next-of-kin. With this in mind, the Court considered a further contention that a precatory trust was created by the second paragraph of the clause in question. This paragraph reads in part: "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." Harrison J. agreed with this contention and found a precatory trust applicable to part of the residue and which was clearly a charitable bequest. His Lordship then employed the Court's discretion in apportioning the residue, allowing one-half for the establishment of the educational foundation and one-half for non-charitable objects, which, failing for uncertainty, fell to be distributed as in the case of intestacy.

1. Supreme Court of New Brunswick, Chancery Division, Harrison J. January, 1954. Leave to appeal to the Supreme Court of Canada granted by the N. B. Supreme Court, Appellate Division.
2. [1944] A.C. 341.

In apportioning the fund, the judgment cited as authority 4 Halsbury, 2nd Ed., p. 170, and **In re Clarke.**[3] On this subject the learned editor of **Jarman on Wills**[4] makes some remarks in point. Quoting from **In re Coxen**[5]:

> Where the amount applicable to the non-charitable purpose cannot be quantified the trusts, both charitable and non-charitable, wholly fail because it cannot in such a case be held that any ascertainable part of the fund or the income thereof is devoted to charity.

This statement, however, was dictum; and **In re Clarke**[3] would seem to be the more satisfactory law.

With due respect to Mr. Justice Harrison, it is submitted that the Court, in giving effect to the testatrix's obvious intention to benefit charity, went to the very verge in finding a precatory trust in the words used in the will. There is really no such thing as a "precatory trust". As Harrison J. himself, said: "It is for the Court to determine whether the testatrix has expressed her wish in such terms as to impose a binding trust." In view of the use of the words "without restricting the generality of the foregoing special Powers of Appointment", it is difficult to construe the direction as one which the testatrix intended to be binding upon her trustees. Clearly, she left a discretion in them as to whether or not they should expend the moneys in the establishment of an educational foundation.

The law on precatory trusts has been laid down in many cases of the highest authority and has been succinctly summed up in **In re Walls**[6]:

> There is really no such thing as a 'precatory trust'. The language used by the testator creates a trust or it does not. Whether it does so or not depends upon the existence of three certainties, viz.:
>
> (1) That the settlor intended to constitute a trust binding by law on himself or on the person to whom the property was given;
>
> (2) That he intended to bind definite property by the trust;
>
> (3) That he intended to bind definite persons in a definite way . . . When words of request or desire can be construed by reference to the whole instrument as imperative a trust is constituted if the other certainties are present. If the words cannot be construed as imperative, there is no trust.

It is suggested that the reference to an educational foundation was not something which the testatrix intended the trustees should not fail in doing. She left them a clear discretion to deal with the residue as they wished (so long as it was expended for charitable, religious, educational or philanthropic purposes), and they were in no way bound in the exercise of their discretion to expend any of the moneys in any particular way. The next paragraph of the clause in question adds

3. [1923] 2 Ch. 407.
4. 8th Ed., Vol. I, p. 485.
5. [1948] Ch. 747, at p. 752.
6. (1935), 9 M.P.R. 580, at p. 582 (Baxter C. J.).

strength to this view. It reads: "For further direction to Trustees of any trust that **may** be established . . . ." If the testatrix had intended her wish for the establishment of an educational foundation to be imperative, she would not have used the word "may" here. Rather, she would have said, "any of the trusts that are established", or some such phraseology.

The whole question might have been resolved by a consideration of the effect of the opening sentence of clause 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." This direction is obviously void for uncertainty, which means that **all** the residue must fall to be distributed as on intestacy. Any consideration of the further provisions, dealing with the administration of this trust, cannot affect the overriding intention of the testatrix as evidenced in the above-quoted passage. The result of this view would be that all the residue would go to the next-of-kin, notwithstanding the true intention of Mrs. Loggie to have the bulk of her property devoted to charity. It is submitted, however, that the rules which guide the courts in cases of this nature have been formulated for a purpose, and much mischief could result from a relaxation of them.

T. B. Drummie, III Law U. N. B.

MUNICIPALITY OF THE CITY AND COUNTY OF SAINT JOHN v. TAYLOR[1]

Landlord and Tenant Act – Summary Proceedings for Non-Payment of Rent – Receipt of Rent After Demand Served on Tenant – Effect on Proceedings

The Municipality of the City and County of Saint John let premises to a tenant who failed to pay the monthly rental of $37 required by the lease. He did make sporadic payments. Landlord commenced summary proceedings for non-payment of rent under s. 65 of the Landlord and Tenant Act[2] by serving upon the tenant a demand for payment of the rent amounting to $588 or delivery of possession. The Court found that the landlord had met all the requirements of s. 65(1).

1. Saint John County Court (Keirstead Co. Ct. J.) Unreported. August 24, 1953.
2. R.S.N.B., 1952, c. 126. In 1937 the twentieth annual meeting of the Conference of Commissioners on Uniformity of Legislation in Canada approved a revised Landlord and Tenant Act. (Report, Proceedings of the Twentieth Annual Meeting, p. 16. The revised draft appears at pp. 72-101.) The statute was passed by the Legislative Assembly of New Brunswick in 1938 with certain modifications in s. 35 respecting property liable to distress. (Stats. of N. B., 1938, c. 42) Parts II and III of the Uniform Act received only minor alterations before enactment in this Province and appear in the latest revision. (Report, Proceedings of the Twentieth Annual Meeting, at pp. 94-98) Parts II and III respectively of the Landlord and Tenant Act provide summary methods for a landlord to obtain redress against an overholding tenant and one whose rent is in arrears. Part III of the Uniform Act is substantially the same as ss. 65 to 67 of the New Brunswick Act (**Ibid.**, at p. 97; R.S.N.B., 1952, c. 126) and its source was ss. 78 and 79 of the Manitoba Landlord and Tenant Act of 1931 (Report, Proceedings of the Seventeenth Annual Meeting, p. 64. See R.S.M., 1940, c. 112, ss. 78-79. Similar procedure enacted in British Columbia by the Overholding Tenants Act, 1895, c. 53, s. 13. See R.S.B.C., 1948, c. 174, ss. 29-30).