IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 74 of 1975

BETWEEN	BANK OF NOVA SCOTIA TRUST COMPANY OF JAMAICA LTD.	
AND	IRENE AMIDA SYLVESTER	PLAINTIFFS
AND	DISTRICT GRAND LODGE OF JAMAICA SCOTTISH CONSTITUTION (FOR MERLY DISTRICT GRAND LODGE OF SCOTLAND)	
AND	KATHLEEN SMART (ADMINISTRATRIX OF ESTATE ENID MADGE SYLVESTER; DECEASED)	
AND	LESLIE GARLAND FRANKLYN	DEFENDANTS

Mr. Scharschmidt for plaintiffs
Mr. D. Muirhead Q.C. for first defendant
Mr. W. B. Frankson for 2nd and 3rd defendants.

Hearing July 3, 1979, January 29, 30, 1980.

WRIGHT J.

By clause 6 of his will dated 16.1.65 (probate of which was granted to the plaintiffs, the executors and trustees named therein) the late Basil Cuthbert Sylvester, who died on the 14th day of February, 1965, made the following provision:

> "As to the remainder of my residuary trust fund I DIRECT my Trustees to pay therefrom to the Treasurer for the time being of the District Grand Lodge of Scotland in Jamaica the sum of SIX THOUSAND POUNDS for the purpose of founding an Educational Scholarship available to the children of members of Scottish Lodges in Jamaica AND I Direct that the said District Grand Lodge shall elect the child to whom the scholarship is to be awarded from time to time and I FURTHER DIRECT that the said Lodge shall in its own discretion expend the income derived from the capital in providing such a scholarship and as to the remainder of my Residuary Trust Fund I direct my Trustees to pay the same to Madge Enid Sylvester and Leslie Garland Franklyn share and share alike".

Madge Enid Sylvester survived the Testator but died intestate on the 27th October, 1972 predeceasing the testators widow. Letters of administration to the estate of Madge Enid Sylvester were granted to Kathleen Smart on the 13th September, 1973.

By Originating Summons dated 21st April, 1975 the executors of the estate of Basil Cuthbert Sylvester seek answers to the following questions.

1. Whether upon a true construction of the said will the bequest therein at Clause 6 (Supra) constitutes a valid charitable trust.

2. In the event of the gift to the District Grand Lodge of Jamaica-Scottish Constitution being invalid, who is entitled to receive same?

3. Whether or not the Estate of Madge Enid Sylvester is entitled to the bequest in the said will, she having died intestate and having predeceased the widow does her share lapse and if so, on whom does her share devolve?.

4. If the bequest to Madge Enid Sylvester does not lapse, would the administratrix of her estate, Kathleen Smart he entitled to receive the bequest on behalf of her estate?

5. If none of the questions asked above are relevant in the circumstances related herein, who is entitled to receive:

   (a) The bequest to the District Grand Lodge of Jamaica-Scottish Constitution if it is invalid.

   (b) The share to which Madge Enid Sylvester was entitled to receive under the will of the Testator.

If question 1 receives an affirmative answer then the need to answer question 2 and 5 (a) will not arise. Also if questions 3 and 4 are similarly answered question 5(b) will not require an answer.

The positions of the parties may be stated thus:

Mr. Scharschidt:

The gift to the District Grand Lodge of Jamaica-Scottish Constitution fails as a charitable trust and results in an intestacy.
The gift to Madge Enid Sylvester will go to her personal representatives.

Mr. Muirhead:

Considered ..... as
(a) a charitable trust
or
(b) an outright gift to the Lodge, it is valid.

Mr. Frankson:-

It fails as a charitable trust and cannot be considered as an outright gift. Hence an intestacy results to the benefit of persons qualifying on an intestacy including Madge Enid Sylvester and Leslie Garland Franklyn.

The question whether a valid charitable trust has been created by the bequest to the District Grand Lodge of Jamaica (hereinafter referred to as "The Lodge") has to be determined in relation to the classification of trusts for charitable purposes as set out in Pemsel's Case [1891] A. C. 531 and more particularly with reference to the second division viz, trusts for the advancement of education. It may be observed that the bequest is manifesly for the advancement of education. But that is not enough. There are three requirements which must all be met.

1. The trust must be of a charitable nature within the accepted meaning of the term charitable;
2. It must promote a public benefit;
3. It must be wholly and exclusively charitable

Advancement of education:

As stated above this requirement is obviously met.

Public benefit:

This is in, practice, the severest aspect of the test a charitable trust may confer a public benefit even though its nature is such that only a limited number of people are likely to avail themselves or are capable of availing themselves of its benefits.

There is a distinction

> "between a form of relief extended to the whole community yet by its very nature advantageous only to the few and a form of relief accorded to a selected few out of a larger number equally willing and able to take advantage of it" per Viscount Simonds

in I. R. C. vs. Baddeley [1955] A. C. 572 at 592

The former type does not lack the necessary element of public benefit whereas the latter type does. Against this background it will be necessary to assess the bequest to the Lodge.

Evidence of the size of the community from which the possible beneficiaries are to be chosen is supplied by the affidavit of Neville Gibbs the District Grand Secretary of the Lodge and so far as is relevant it states:

para 4 "That the membership of the Scottish Lodges in Jamaica is open to all male adults of the public who believe in Supreme Being, pursue truth and virtue, promote obedience to law and the peace and good order of the society and who are not remiss in allegiance due to the sovereign of their native land"

Para 5 "That there are 15 craft Lodges throughout Jamaica situated in 7 parishes.

Para 6 "That there are approximately 1100 members of Lodges under the Scottish constitution throughout Jamaica"

At first blush it may appear that the membership is broadbased but closer scrutiny reveals a rather stringent and not too definite test for acceptance. In actual fact as deposed the actual membership as against the possible membership is 1100 out of a population of some two million souls. Further criticism could corp at the fact that there are no means of ascertaining how many of this membership are fathers or indeed capable of producing children from whom the trustees will from time to time choose one child who will benefit. It is submitted also that in as much as it may benefit the rich as well as the poor it cannot be rescued as being a trust for the relief of poverty.

It is worthy of note that while Pemsel's case supplies the frame-work within which a trust must fall to qualify as charitable much judicial time and effort have been consumed by the exercise of determining whether any particular set of facts meets the criterion. Experience has shown the negative approach useful i.e. identifying those intended trusts which cannot make the grade. Among the disenabling conditions there stand prominently personal relationship to a single propositus or several propositi. In Re Compton (1945) Ch 123. This principle was approved in Oppenheim v. Tobacco Securities Trust Co. Ltd. (1951) A. C. 297. In this case a trust for the benefit of 110,000 persons failed to meet the test because of the fatal taint of a personal relationship. An extract from the judgment of Lord Simonds at page 306 emphasises the point at issue:

> "The difficulty arises where the trust is not for the benefit of any institution either then existing or by the terms of the trust to be brought into existence, but for the benefit of a class of persons at large. Then the question is whether that class of persons can be regarded as such a "section of the community" as to satisfy the test of public benefit. These words "section of the community" have no special sancity 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, of a number of families cannot be regarded as charitable. A group of persons may be members 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"

In opposition to the validity of the trust Re Koettgen (deceased) (1954) 1 All. E. R. 581 was cited for the proposition that members of a particular association do not constitute a sufficient number of the public for charitable purposes. Further support for this point is supplied by Caffoor (trustees of the above Caffoor Trusts) vs Commissioner of Income Tax,

Colombo (1961) 2 All E. R. 436 (a family trust which failed to qualify as charitable)

Viewed against this background it seems a foregone conclusion that this gift cannot pass the public benefit test on the ground that the possible beneficiaries are neumerically negligible. However Mr. Muirhead strenuously resists such a conclusion contending that the possible beneficiaries are drawn from a broadbased section of the community and are not tainted by being related to a single propositus. In addition he seeks aid from Ward v. Ward (1937) 81 Sol. J. 397 which held that a trust to provide an annual outing for children of members of an ex-service men's club was charitable as serving an educational purpose. That decision must necessarily stand on the facts of that particular case, I am guided by the decision of the House of Lords in the Oppenheim Case and cannot yeild to Mr. Muirhead's entreaves. The real iniquity afflicting this trust from which it can receive no absolution is that the possible beneficiaries, being a class within a class, is in fact miniscule selection from a number which is itself numerically negligible.

It fails as a charitable trust. What then is the fate of the bequest? Mr. Muirhead submits that if it fails as a charitable trust then the Court should by construction find that an outright gift has been made to the Lodge. In support he cites Re Turkington, Owen v. Benson (1937) 4 All E. R. 501 By Clause 7 of his will the testator provided:

> "I give the residue of my estate to the Stafford-Store Masonic Lodge No 726 as a fund to build a temple in Stafford".

This was held to be a gift to the members of the Lodge which they could deal with as they pleased and was accordingly a good gift whether it was charitable or not.

But the outstanding distinction between Turkington's Case and the instant case as Mr. Frankson was quick to point out, is that in the former the gift was to the members of the Lodge qua members whereas in the latter the gift is to the Lodge qua trustees of an intended educational trust the three certainities of which are clearly indicated viz:-

1. Charitable nature
2. Public benefit
3. wholly and exclusively charitable

In Turkingtons case the donees were intended to benefit whereas in the instant case they have been conferred no benefit whatsoever. The gift in Turkington's case was clearly intended for the benefit of the lodge. In the instant case the benefit is conferred on someone to be selected by the Lodge. To the contrary is Mr. Muirhead's contention that the gift ought to be construed as a gift to the Lodge with an indication as to how the gift should be used. He is comforted in his submission by the words following the statement of the purpose for which the gift is made viz, "And I direct that the said District Grand Lodge shall elect the child to whom the scholarship is to be awarded". But any such comfort could only come from a Job's comforter. What was crucial to the decision in Re Turkington is the fact that beneficiaries would have had to be trustees for themselves; so that the legal estate and the equitable estate became "equally and co-extensively united in the same person or entity, the equitable interest merging in the legal interest on the footing that a person cannot be a trustee for himself" (per Luxmore J. at page 504) That situation does not obtain here.

Question 2: It is not a direct gift to the Lodge
It was intended to constitute a trust for educational purposes but failed. What then is its destination?

This is a gift out of the residue and where such a gift fails in the absence of a clear expression of the testator as to how that part of residue is to be dealt with then an intestacy results to the benefits of those entitled to claim on an intestacy (Sykes v. Sykes Ch Appeals 1867-1868 p.30, In Re Forrest 1931 Ch 162, Re Watson 4 D.L.R 626.

Question 3

The gift of residue to Madge Enid Sylvester became vested at the date of the testator's death i.e. 14.2.65. All that was postponed for the period that she out-lived the testator i.e. up to 27.10.72 was the payment to her of the legacy and, consequently, her enjoyment of the bequest. It seems to be an elementary question that it forms part of her estate. There was no contingency which had not been fulfilled up to the time of her death. Packham vs. Gregory (1846) 4 Hares Rep. 396 is authority, if authority were required, that the gift to Madge Enid Sylvester forms part of her estate and passes to her personal representatives. See also Browne v Moody (1936) 2 All E. R. 1695

The questions posed are answered as follows:-

Question 1 A valid charitable trust is not constituted.

Question 2. An intestacy results to the benefit of all who are entitled to a share on an intestacy.

Question 3 Yes

Question 4 Yes

Question 5 Does not arise.

The costs of this action are to be met out of the estate.