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*Nov. 12 & 13.
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*May 12.

THE ATTORNEY GENERAL OF NOVA SCOTIA, AT AND BY THE RELATION OF DAVID M. DICKIE, JOHN M. STARR, ROBERT M. RAND, DAVID B. NEWCOMBE, PEREZ M. BRECKEN, MINARD ROSCOE, JAMES BLIGH AND GEORGE W. FISHER (PLAINTIFFS) ..... } APPELLANTS;

AND

FREDERIC J. AXFORD, WILLIAM SMITH, AND HENRY ZINCK (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT ON NOVA SCOTIA.

Grant to Township—Land for school—Charitable trust—Acceptance of by trustees—Discretion of trustees—Doctrine of Cy pres.

By the patent or grant of the Township of Cornwallis, in Kings Co., N. S., made in 1761, four hundred acres of land were declared to be "for the school." By a subsequent grant from the Crown

*PRESENT.—Sir J. W. Ritchie C.J. and Strong, Fournier, Henry, and Taschereau JJ.

in 1790, the said four hundred acres were declared to be vested in the Rector and Wardens by the name of the Church of Saint John, in the said Township, and the Rector and Wardens of the said Church for the time being "in special trust, to and for the use of one or more school or schools, as may be deemed necessary by the said Trustees, for the convenience and benefit of all the inhabitants of the said Township of Cornwallis, and in trust that all schools in said Township furnished or supplied with masters qualified, agreeably to the laws of this Province, and contracted with for a term not less than one whole year, shall be entitled to an equal share or proportion of the rents and profits arising from said school lands, provided the masters or teachers thereof shall receive and instruct, free of expense, such poor children as may be sent them by the said trustees."

The grantees took possession of the land mentioned in said grant, and they and their successors in office have ever since remained in possession of it, and until the year 1873 the rents and profits arising from such land were distributed among the schools of said Township, and poor children sent by the trustees to, and educated in, said schools according to the terms of the trust. In 1873, however, the then trustees discontinued such distribution and allowed the funds realized from said lands to accumulate, the reason alleged therefor being that the schools of the Township had become so numerous that the sum appropriated to each would be too small to be of use, and also, that under the free school system all the poor children of the township were educated free of expense and the object for which such funds had previously been supplied no longer existed.

The present defendants were invested with the said trust in 1879, when the revenue of the said lands had accumulated until they amounted to over $1,200. Shortly after they became such trustees it was determined to build a school house in a certain district in said Township with the money. A meeting of the vestry of the church was held and a resolution passed authorizing such school house to be built on land leased from the church; the school was to be non-sectarian, but after school hours any of the children that wished could receive instruction in the doctrines of the Church of England. On a suit to restrain the defendants from using the trust funds to build such school house and praying for an account,

Held, reversing the judgment of the Supreme Court of Nova Scotia,

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and restoring that of the court of first instance, that the trustees had no discretion as to the application of the trust funds, but were bound to distribute them among all the schools of the Township, which would be entitled to participate under the terms of the trust, however wanting in utility such a disposition of said funds might be.

Held also, that the Attorney General of the Province was the proper person to bring this suit.

Held, per Strong J. that in interpreting the trust, in order to explain the apparent repugnancy in the grant in providing that the rents were to be distributed among one or more schools, &c., and also among all the schools in the township, the probable condition of the township, in respect to the number of schools therein, at the time the grant was made, coupled with the long continued usage which has prevailed in the manner of administering the trust, could be considered as a rule of guidance for such interpretation.

Held also, per Strong J., that under the doctrine of *Cy-près*, a reference might be made to the master, to report a scheme for the future administration of the charity.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), reversing the judgment of the Judge in Equity (2) ordering an injunction to restrain the defendants from improperly using the trust funds in question in the suit and a reference to the master for an account of such funds.

By the patent or grant of the Township of Cornwallis in 1764, four hundred acres of land were declared to be set aside for school purposes; and by a subsequent grant in 1790, the said lot of four hundred acres was granted to William Twining, rector, and John Burbidge and Benjamin Belcher wardens, of the church of St. John, in said township, and to the rector and wardens of the said church for the time being, in special trust for the use of the school or schools in Cornwallis aforesaid. The habendum of the said grant is as follows:

To have and to hold the said parcels, lots or tracts of four hundred acres of land, and all and singular other the

(1) 5 Russ. & Gel. 107. (2) Russ. Eq. Reps. 429.

premises hereby granted unto the said William Twining, rector of the said Church of St. John, and John Burbidge and Benjamin Belcher, wardens thereof, during their continuances in the said offices respectively, and to the rector and wardens of said Church of St. John for the time being, in special trust to and for the use of one or more school and schools as may be deemed necessary by the said trustees for the convenience and benefit of all the inhabitants of the said township of Cornwallis, and in trust that all schools in said township, furnished or supplied with masters qualified agreeably to the laws of this province and contracted with for a term not less than one whole year, shall be entitled to an equal share or proportion of the rents and profits arising from said school lands, provided the masters or teachers thereof shall receive and instruct, free of expense, such poor children as may be sent them by the said trustees.

The said rector and wardens accepted the trust created by said grant, and from that time until the year 1873 the profits realized from the said lands were divided among all the schools in the township of Cornwallis. In 1873, however, the then trustees refused to make such distribution and allowed the trust funds to accumulate, and in 1879, when the present defendants became trustees, they received from their predecessors over $1,200 of trust funds. The reason alleged for not continuing to distribute the funds was, that under the free school system, which had been in operation since 1865, all poor children in the township were, by law, educated free of expense, and the primary object for the expenditure of the trust funds no longer existed; and also, that the schools had become so numerous that the amount received by each on the distribution would be too small to be of use.

The present defendants resolved to use the money in

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their hands to build a school house in a certain section of the township, and this suit was brought to restrain them from so using the funds. The Judge in Equity, before whom the case was heard, granted an injunction and ordered an account to be taken of the rents and profits of the school lands. His judgment is reported in Russell's Equity Reports, page 429. The majority of the Supreme Court of Nova Scotia agreed in reversing the judgment of the Judge in Equity, holding that the trustees had a discretion as to the manner of carrying out the trust, and under the altered state of circumstances since the trust was created they had not exercised that discretion unlawfully. The plaintiffs appealed to the Supreme Court of Canada.

Roscoe for appellants.

Henry Q.C. for respondents.

Sir W. J. RITCHIE C.J.—In this case I agree with every word of the judgment of the learned Equity Judge. His judgment, in my opinion, should not have been reversed.

Of course the learned Equity Judge only intended to say that the money is to be distributed among those schools which come within the words of the "trust," that is, in trust that all schools in said township, furnished or supplied with masters qualified agreeably to the laws of the province and contracted with for a term not less than one whole year, shall be entitled to an equal share or proportion of the rents and profits arising from said school lands, provided the masters or teachers thereof shall receive and instruct, free of expense, such poor as may be sent to them by the said trustees. This the learned judge has clearly indicated. I think the judgment of the Supreme Court reversing that judgment entirely wrong, and this appeal should be allowed and the judgment of the equity judge restored.

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STRONG J.—This appears to be a very plain case, and one which may be decided by the application of elementary principles of the law relating to charitable trusts.

In the first place, however, it will be well to dispose of an objection *in limine* to the maintenance of the suit as an information of the Attorney General of the Province of Nova Scotia. I entirely agree with the late Judge in Equity in what he has said upon this head. The Attorney General of the province is clearly the proper officer to sue in respect of all matters having locality in the province. This is a matter having such locality, and no reason has been, or could have been, suggested why the duty of suing in respect of a charitable trust of lands within the province, the objects of the charity being also entirely provincial, should be cast upon the Attorney General of the Dominion. The same point was raised before me in the *Attorney General* v. *Niagara Falls International Bridge Company* (1), and for the same reasons as those I there assigned, which apply with even greater force here, I now hold this point to be untenable.

It is said the defendants have not the legal estate in the trust lands, since the grant in the deed of the 31st December, 1790, having been to the then rector and church wardens, and the rectors and wardens for the time being, of the Church of St. John in the township of Cornwallis, the only estate which could have vested was a life estate in the immediate grantees, as the rector and church wardens were not a corporation, and that consequently the defendants are not accountable as trustees. Without stopping to enquire whether a grant by the Crown to named persons, described as and actually at the time holding certain offices, and their successors in those offices, does or does not create

(1) 20 Gr. 34.

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a corporation by implication—a question for an affirmative answer to which there is considerable authority—it is sufficient here to say, that the letters patent created a valid charitable trust, and that in any case, much more in the case of a charity, a Court of Equity will never allow a trust to fail for want of a trustee. The defendants have assumed to act as trustees, and are such *de facto* if not *de jure*, which is sufficient for all the purposes of the relief sought by this information—an injunction to restrain an improper diversion of the trust funds from the legitimate objects of the charity, and an account of the monies received by them from their predecessors and which have since come to their hands as rents.

As regards the proper construction of the trust, I also agree with the late Judge in Equity, though this is the most difficult question which the case presents. At first sight there might seem to be a repugnancy between the early and the latter part of the limitations of the trust, the former saying that the trust was to be "for "the use of one or more school or schools as might be "deemed necessary by the trustees," and the latter declaring a trust for all schools which should comply with the conditions named. This, I think, coupled with the long continued usage which has prevailed in the manner of administering the trust, is sufficiently explained by an observation in the judgment of Mr. Justice James, who very pertinently points out that there may have been, at the early day at which the grant was made, "only one school in the township, perhaps not one." But for the usage, however, I should have had some doubt as to this, in the absence of any evidence of what the circumstances actually were at the date of the grant. That this is a legitimate mode of interpreting a charitable trust, when there is any ambiguity in

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its terms, is well established by authority (1).

Then as regards the conditions imposed with reference to the contracts with the masters, and the free instruction of poor children, it appears that these conditions have been altogether superseded by the general school law of the Province, which makes all public schools free. It follows, that according to the strict terms of the trust, as applied to the existing state of things, the income is divisible amongst all the schools in the township, however wanting in utility such a disposition of the funds might be, and the trustees of their own motion, and without the authority of the court, had no right to make any other application of them; they were consequently guilty of a breach of trust in appropriating the charity funds in their hands to the erection of a school house, and more especially as the building was upon the land of other proprietors.

It appears, therefore, that such a decree as the late Judge in Equity proposed to make, and, as I assume, would have been drawn up for the purpose of carrying out his adjudication if an appeal to the full court had not been interposed, would have been perfectly correct so far as it would have enjoined the defendants from laying out any of the trust funds upon the building, and also so far as it would have directed an account of rents received, as well as of the monies handed over by the defendants' predecessors.

Agreeing, as I do, however, with Mr. Justice Weatherbe, that this is a proper case for the application of the doctrine of *cy-près*, and not feeling the difficulty which he felt in administering that relief, I think there may be superadded to the directions I have already mentioned a reference to the master to report a scheme for the future application of these funds.

(1) *Attorney General* v. *Smithies* 1 Keen 307; Tudor's Charitable Trusts, p. 243 (Ed 2) and cases there cited.

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It is said that there are some sixty schools in this township, and a division of the income amongst such a number would be carrying out the general intention of the charity in such a way as to make it useless. It is said by the text writer, already quoted (1):

The doctrine of *cy-pres* is applied by the Court of Chancery to cases not only where the terms of the gift in trust for charitable purposes are in themselves ambiguous or imperfect, but also where, being originally precise and complete by lapse of time or otherwise, they had become unsuited, under altered circumstances, to carry out the general intentions of the founders.

The law as thus laid down, and which is supported by a large number of decided cases, manifestly applies to the present case. The "altered circumstances" here require that some new scheme for applying the income of the charity to educational purposes, which was the general intention of the Crown in founding it, should be devised.

It is quite clear, on the authorities, that charity informations have always been regarded in courts of equity as exceptional cases, so far as the rules of pleading are concerned, and that in such cases the court will give any relief which may seem to it to be appropriate, although not specifically prayed for. I again refer to Mr. Tudor's book (2) as correctly summarising the law as to this point also. It is there said:

Many of the formalities of pleading, adopted in ordinary cases, have not been enforced in cases of charities, and it has been laid down by Lord Hardwicke that on an information by the Attorney General for the regulation of a charity it is the business of the court to give a proper direction to the charity without having regard at all to the propriety or impropriety of the prayer of the information. *Attorney General* v. *Jeanes* (3).

Thus, if the wrong relief or no relief at all, with regard to particular objects or a particular person, is prayed, the Court of Chancery will nevertheless give proper relief. And *a fortiori*, when there is a prayer for general relief, proper relief will be given upon an infor-

(1) Tudor's Charitable Trusts, p. 260.

(2) P. 163.

(3) 1 Atk. 355.

mation for a charity without any specific prayer; thus where an information was filed to set aside a lease of a charity estate, and for general relief, Lord Eldon said that it was perfectly settled that the information had prayed quite enough to authorize an account of the rents.

The authorities referred to by the writer will be found entirely to bear out this statement of the law.

The decree, therefore, in my opinion, besides ordering or continuing the injunction (as the case may be), and directing the accounts already mentioned, should have added to it a reference to the master to report a scheme for the future administration of the charity. There may also, if the Attorney General desires it, be a reference to appoint new trustees As to the costs, the defendants must pay all the costs both here and below up to the decree, but the future costs, as well as the further directions consequent on the master's report, must be reserved to be disposed of by the Supreme Court in Equity, when the cause comes before it on the report. The order of this court should direct that a decree to this effect be entered in the Supreme Court of Nova Scotia in equity.

FOURNIER, HENRY and TASCHEREAU JJ. concurred.

Appeal allowed with costs.

Solicitors for appellant: *J. N. & T. Ritchie.*

Solicitors for respondents: *Henry & Weston.*