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THE HALIFAX SCHOOL FOR THE BLIND (PLAINTIFF) ..... APPELLANT;

AND

LEWIS CHIPMAN AND OTHERS, TRUSTEES UNDER THE WILL OF THOMAS E. KELLEY, DECEASED (DEFENDANTS)..... RESPONDENTS.

IN THE MATTER OF THE ESTATE OF THOMAS E. KELLEY, DECEASED

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Will—Construction—Direction to trustees to pay the "net annual interest and income" of fund to charitable institution—Latter claiming right, as sole beneficiary of income, to corpus of the fund.

A testator by his will appointed trustees, providing also for appointment of new trustees in place of those dying, etc., and gave them his residuary estate in trust to convert into money and stand possessed of all moneys in trust for certain uses and purposes, including, as to $20,000, to invest it and pay the net annual interest and income therefrom to his sister for life if remaining unmarried, and from and after her death or marriage to keep invested said sum and "pay and apply the net annual interest and income thereof," one-half to appellant, a charitable institution (incorporated by statute), "to be

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

used for the general purposes of that institution," and, as to another $20,000, to invest it and pay and apply the net annual interest and income thereof for the benefit of a certain church, and should (*inter alia*) said church cease to exist or change its adherence, "then and thereafter" to "annually pay over the whole of the net annual interest and income" of said sum to appellant "to be used for the general purposes of that institution." In events which occurred since the testator's death, appellant became entitled to said gifts in its favour. It claimed the right, as sole beneficiary of the income, to receive from the trustees the corpus (one-half and the whole respectively) of said sums.

Held: Appellant was not entitled to receive the corpus. Judgment of the Supreme Court of Nova Scotia *in banco,* 11 M.P.R. 65, affirming, on equal division, judgment of Mellish J., *ibid,* affirmed.

Per Duff C.J. and Davis J.: The testator's intention was plainly that the corpus should not be handed over to the beneficiary. *Wharton* v. *Masterman,* [1895] A.C. 186 (applying to charities the rule in *Saunders* v. *Vautier,* 4 Beav. 115, that where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge) discussed; that case does not cover the present one. Where, as here, a testator has clearly settled a fund for the benefit of a particular charitable institution, from which fund the annual income is to be paid over by the trustees, whose perpetual succession is expressly provided for, that fund is a capital endowment, or in the nature of a capital endowment, created and settled for the benefit of the particular charity so long as it lasts, but no longer. It cannot be treated as an absolute and presently vested gift of the corpus of the fund which the beneficiary at any time may lawfully demand to be paid over to it and the trust in respect thereof arrested and extinguished without reference to the contrary intention of the testator. In the present case it is income that is given and not capital, and to make the order sought would be to vary the trust (*In re Blake's Estate; Berry* v. *Geen,* 53 T.L.R. 411, cited and discussed).

Per Rinfret and Crocket JJ.: The rule that where there is an unlimited and unrestricted gift of income, the gift carries with it the corpus from which the income is derived, has no application where the will clearly shews, expressly or impliedly, that the testator intends that the gift should not absolutely vest the corpus in the beneficiary. It is not sufficient to carry the corpus that the annual payments of the income therefrom to the beneficiary are intended to continue in perpetuity (which they may be in the case of charitable gifts), if it clearly appears on a perusal of the entire will that, notwithstanding this fact, the testator intended that the beneficiary should not itself take possession of the corpus. (*Coward* v. *Larkman,* 56 L.T.R. 278; 57 L.T.R. 285; 60 L.T.R. 1, cited and discussed. *In re Morgan,* [1893] 3 Ch. 222, discussed). The rule laid down in *Saunders* v. *Vautier,* 4 Beav. 115, and the basis of its application in *Harbin* v. *Masterman,* [1894] 2 Ch. 184, and (on appeal therefrom) *Wharton* v. *Masterman,* [1895] A.C. 186, discussed. Construing, as a whole, the will now in question, it was the testator's intention to create a perpetual trust in the hands of his trustees, and not to have the trust extinguished and the capital funds taken out of their hands.

1937

HALIFAX SCHOOL FOR THE BLIND v. CHIPMAN ET AL.

Per Kerwin J.: If this were a case where the testator had made a gift of income indefinitely to an individual, the latter would be entitled absolutely to the corpus. *Wharton* v. *Masterman,* [1895] A.C. 186 (discussed) cannot be relied on as indicating that the same rule applies where the legatee is a charity; that case, on the questions there arising, does not cover the point now in question. The law is correctly stated in Tudor on Charities, 5th ed., at p. 76, as follows: "A charitable trust may be made to endure for any period which the author of the trust may desire. It may therefore be created for the application of the income in perpetuity to the charitable purpose * * *" (Reference also to the same work at p. 78 as to the true application of the rule in *Saunders* v. *Vautier* in the case of charities. Reference also to other authorities). The gift of the income in perpetuity to the charity in the present case was entirely valid and proper.

APPEAL by the plaintiff from the judgment of the Supreme Court of Nova Scotia *in banco* (1), which, on an equal division of the court, dismissed the plaintiff's appeal from the judgment of Mellish J. (2) holding against the plaintiff's claim (in proceedings begun by originating summons) for payment and transfer to it of the principal of a fund, and one half the principal of another fund, created and dealt with in the will of Thomas E. Kelley, deceased.

The plaintiff, appellant, The Halifax School for the Blind, is a charitable institution, incorporated by statute. The defendants, respondents, are the present trustees of the will of the said deceased, who died in 1904.

By his will the deceased appointed certain persons to be his executors and trustees of his will and declared that if and whenever any trustee for the time being should die or resign, etc., the surviving or continuing trustee or trustees should, with the approval of a Judge of the Supreme Court of Nova Scotia, in writing appoint a new trustee or new trustees in the place of the trustee or trustees so dying, etc.

Then, after providing for certain specific gifts, he gave, devised and bequeathed his residuary estate to his trustees in trust for conversion into money, and directed that his trustees should stand possessed of the moneys "in trust for the uses and purposes hereinafter declared and expressed."

Then followed a number of clauses, including the following:

"Third. In trust as to the sum of [$20,000] of the trust moneys to invest the same and pay the net annual

(1) 11 M.P.R. 65; [1934] 4 D.L.R. 309.
(2) 11 M.P.R. 65, at 66-69; [1934] 4 D.L.R. 309, at 309-312.

interest and income thereof" to the testator's sister for and during her life if she so long remained unmarried.

"Fourth. In trust as to the sum of [$20,000] of the trust moneys to invest the same and to pay and apply the net annual interest and income thereof for the benefit of the Congregational Church at Cheboque" in manner set out. This clause concluded as follows:

Should said Church * * * cease to exist or change its adherence then and thereafter my Trustees shall annually pay over the whole of the net annual interest and income of said sum of [$20,000] to [appellant] to be used for the general purposes of that institution.

The next clause read in part:

Fifth. Upon Trust that my Trustees from and after the death or marriage of my sister * * * do keep invested the sum of [$20,000] mentioned in the section or paragraph hereof numbered "Third" and do pay and apply the net annual interest and income thereof in the manner following, that is to say, one half thereof to [appellant] to be used for the general purposes of that institution, and the other half thereof in and towards the maintenance and support of a Free Public Library or Free Public Library and Museum at Yarmouth * * *

Among further provisions was one for investment of the residue of the trust moneys and annual division of the income and interest equally among his trustees as a recompense for their extra care and careful management, and to be in addition to the remuneration or commission thereinafter named, provided that any loss or depreciation happening to any of the trust moneys was to be made good out of said residue. Another provision was that the trustees should receive and retain for themselves from the interest and income of the trust moneys as remuneration in addition to the aforesaid recompense and to all costs, etc., a commission (to be divided according to labour bestowed or responsibility incurred) of 6% per annum on the gross annual interest and income of the trust moneys, but that they were to receive no commission on any portion of the principal. The provisions for remuneration were to be in full satisfaction of all claim for remuneration or compensation by the trustees whether as executors or trustees.

The said Congregational Church at Cheboque entered and became a part of the United Church of Canada in 1925. Subsequently, in proceedings in the Supreme Court of Nova Scotia, an order was made that, upon that church having become part of the United Church of Canada, the whole of the net annual interest and income of the sum of $20,000 bequeathed under clause 4 of the will, upon the

1937

HALIFAX SCHOOL FOR THE BLIND v. CHIPMAN ET AL.

conditions therein set out for the benefit of said church, became and was thereafter payable to the present appellant to be used for the general purposes of that institution.

The said sister of the deceased, mentioned in the aforesaid clause "Third" in the will, died in 1930.

The appellant claimed that the defendants should pay and transfer to it the fund created and dealt with by said clause "Fourth" in the will, and one-half of the fund created and dealt with by said clauses "Third" and "Fifth" in the will; together with the income accrued thereon in each case.

Mellish J. held that the present appellant was not entitled to the payment and transfer to it of the principal of said funds, and an appeal from his judgment was dismissed as aforesaid. The present appeal to this Court was (by the judgment now reported) dismissed.

T. W. Murphy K.C. for the appellant.

T. R. Robertson K.C. for the respondents.

The judgment of Duff C.J. and Davis J. was delivered by

DAVIS J.—In the happening of events which have occurred since the date of the death of the testator in 1904, two funds have become separated from the general estate and the net annual income from one of these funds and the net annual income from one half of the other of these funds is now payable by the provisions of the will of the testator

to The Halifax School for the Blind, a corporation incorporated by Act of the Legislature of the Province of Nova Scotia, to be used for the general purposes of that institution.

The Halifax School for the Blind applied to the court for an order directing the trustees of the will to hand over to it the corpus upon which the income is payable, upon the ground that, being the sole beneficiary of the income, it has in law the right to terminate the trust without reference either to the intention of the testator or to the wishes of the trustees of the will in this regard.

The testator, in making a gift for the benefit of the Congregational Church at Cheboque, contemplated the possibility that that church might "cease to exist or change its adherence" and specifically provided that "then and thereafter" the whole of the net annual income of the

fund set aside for the benefit of that church should be paid to The Halifax School for the Blind. The non-continuance at some future time of The Halifax School for the Blind was not apparently in contemplation of the testator. The result is that the gift of the income from that fund, as well as the gift of the income from one half of a fund that fell in on the death of a sister of the testator, is unlimited as to time and unqualified as to conditions. There is no gift over and there is no discretion left in the trustees of the will as to the giving or withholding, in whole or in part, in any year of the total net annual income. The beneficiary being a charitable institution, the rule against perpetuities does not apply. The intention of the testator, however, is plainly that the corpus should not be handed over to the beneficiary and the will expressly provides for a perpetual succession of trustees in whom the execution of the trust is to be vested.

On the construction of the will, the gift to The Halifax School for the Blind is a particular and special charitable bequest to which effect must be given so long as the institution lasts. But should it come to an end nothing beyond that is declared. In that event, by operation of law, the particular trust must fall into and be dealt with as part of the residuary personal estate unless the court can collect from this and the other specific trusts an over-riding general charitable intention, in which case the trust property would be applied *cy-près* to another charitable purpose *ejusdem generis* with that which has failed or approaching it in character. The specific gifts for the benefit of a particular church at a particular place and for the establishment of a free library in a particular place can scarcely be treated as indicating, with respect to the particular fund with which we are concerned, a general charitable intention. In view of the considerations about to be mentioned, it does not appear to be necessary to determine that question.

There is unquestionably a rule of law that where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge. That rule is sometimes called the rule in *Saunders*

1937

HALIFAX SCHOOL FOR THE BLIND v. CHIPMAN ET AL.

Davis J.

v. *Vautier* (1), where Lord Langdale said that that principle had been repeatedly acted upon. In that case, the testator by his will had bequeathed to his executors and trustees certain East India stock standing in his name at the time of his death, upon trust to accumulate the interest and dividends which should accrue due thereon, until his grand-nephew Daniel Wright Vautier should attain the age of twenty-five years, and then to pay or transfer to him the principal of such stock together with such accumulated interest and dividends. Upon the grand-nephew attaining twenty-one years of age, he presented a petition to have a transfer of the fund made to him. The cause stood over, with liberty to apply to the Lord Chancellor, when the Lord Chancellor held the legacy vested, and ordered the transfer (2).

The application of The Halifax School for the Blind is really founded upon the decision in *Wharton* v. *Masterman* (3), where the House of Lords applied the principle of *Saunders* v. *Vautier* (1) to charities. The testator had directed the surplus income of his residuary estate, after satisfying annuities which he had provided for, to be accumulated, and after the death of the surviving annuitant he bequeathed the capital and the accumulations upon trust for certain named public charities. Some of the annuitants were still living. The testator undoubtedly intended to postpone the enjoyment of his bounty by these charities until the death of the last annuitant. The courts below had, notwithstanding this intention, determined that the charities were entitled to the immediate enjoyment of all that was not made by the will subject to the payment of the annuities. Lord Herschell said that was to his mind the only point of any difficulty in the appeal. After setting out the language of Wood, V.C., in *Gosling* v. *Gosling* (4) (in expounding the doctrine acted upon in *Saunders* v. *Vautier* (5)), Lord Herschell concluded, at p. 193:

> Wickens, V.C., when this case came before him in 1871, intimated an opinion that the rule in *Saunders* v. *Vautier* (2) was inapplicable where the beneficiaries were charitable corporations or the trustees of charities. I have carefully considered the reasons which he adduced for this opinion with the respect due to any opinion of that learned Judge, and certainly

(1) (1841) 4 Beav. 115.

(2) See 1 Cr. & Ph. 240.

(3) [1895] A.C. 186.

(4) (1859) Johnson's Chy. Rep. 265, at 272.

(5) (1841) 4 Beav. 115; 1 Cr. & Ph. 240.

with no indisposition to give effect to the intention of the testator if I could see my way to do so. But I am unable to find any sound basis upon which a distinction can be rested in this respect between bequests to charities and those made in favour of individual beneficiaries.

Lord Macnaghten was of the same opinion. He said in part at p. 194:

* * * it is clear on the face of the will that the testator did not mean the residuary legatees to receive any part of what the will gives them until the death of the last annuitant.

Now if the residuary legatees were individuals, there could not be the slightest doubt that they would be entitled to call upon the trustees to hand over to them at the end of each year the surplus income of the testator's residuary estate. Does the fact that the residuary legatees are charities make any difference? Notwithstanding the doubt expressed by Wickens V.C., when the case was before him in 1871, I do not think that it does. The charities alone are interested in the surplus income accruing from year to year. Their interest is vested and indefeasible. And they may legally apply what they take under the bequest either as capital or as income. That being so, I agree with the reasoning of Stirling J. and the Court of Appeal. In regard to the questions which have arisen on this will, I am unable to see any substantial distinction between the case of an incorporated charity and a charity not incorporated, or between the case of a charity and an individual.

Lord Davey was also of the same opinion. After setting forth the doubt of Wickens, V.C., as to the application of the principle of *Saunders* v. *Vautier* (1) in the case of charities, Lord Davey proceeded to say at p. 199:

Your Lordships will, I am sure, regard any dictum, or even doubt, expressed by Wickens V.C. on a subject of this kind with the greatest respect and attention. But I must confess that I do not, on the fullest consideration, find sufficient grounds for the Vice-Chancellor's doubt.

Lord Davey specifically pointed out that there was no condition precedent to happen or to be performed in order to perfect the title of the legatees and that there was no other person who had any interest in the execution of the trust for accumulation or who could complain of its non-execution. He speaks of the gift as "an absolute vested interest."

It was plain in that case that the gift to the charities was an absolute vested gift made payable at a definite future event, the death of the last surviving annuitant, with a direction to accumulate the income in the meantime and pay it with the principal. Applying the principle of *Saunders* v. *Vautier* (1), the House of Lords declined to enforce the trust for accumulation in which no person had any interest but the charities.

But *Wharton* v. *Masterman* (2) does not cover this case

(1) (1841) 4 Beav. 115; 1 Cr. & Ph. 240.

(2) [1895] A.C. 186.

1937

HALIFAX SCHOOL FOR THE BLIND v. CHIPMAN ET AL.

Davis J.

unless by some rule of law which yields to no contrary intention the unqualified gift here of the income of the fund must be treated as a present absolute gift of the corpus. Lord Davey may have had such a problem in mind when in his judgment he made this guarded reservation, at p. 200:

> We have not to deal with a fund to be created by accumulations and settled as a capital endowment at a future time, as to which different considerations would arise.

The question we have to deal with here seems to me to have been left open. Now, there can be no doubt that a charitable trust may be made to last for any period, whether perpetual, indefinite or limited, and that the rule against perpetuities is not applicable to a charitable trust. But that relates to the question of remoteness and the validity of the trusts. In Ashburner's Principles of Equity, 2nd ed., (1933) it is said at p. 119:

> Gifts to charitable uses are, in one sense, not subject to the rule against perpetuities. This expression must not be misunderstood; a gift to a charity upon a remote event is (except in one case hereafter to be mentioned) incapable of taking effect just as if it had been to an individual, and so is a gift over from a charity to an individual on a remote event. But a gift to a charity is good, although the result of the gift is to fetter the free circulation of property, while a gift for a non-charitable purpose is void if the gift cannot be carried out without keeping the corpus intact for an indefinite period. Moreover, it has been held in several cases, that where property is given to one charity, it may be validly given over to another charity upon a remote event, e.g., if the first charitable donee neglects to maintain the donor's tomb.

Where, as here, a testator has clearly settled a fund for the benefit of a particular charitable institution, from which fund the annual income is to be paid over by the trustees of the will, whose perpetual succession is expressly provided for, that fund is a capital endowment, or in the nature of a capital endowment, created and settled for the benefit of the particular charity so long as it lasts, but no longer. It cannot, I think, be treated as an absolute and presently vested gift of the corpus of the fund which the beneficiary at any time may lawfully demand to be paid over to it and the trust in respect thereof arrested and extinguished without reference to the contrary intention of the settlor.

Since this appeal was argued, the English Court of Appeal has had to consider a somewhat similar case in which residuary legatees which were charities sought on an application to the court to put an end to certain trusts

and to obtain the transfer of the property. Judgment in that case was delivered on February 5th last—*In re Blake's Estate—Berry* v. *Geen and others* (1). The testator there, by his will, after disposing of certain specific property, devised the residue of his property, real and personal, to trustees on trust to pay out of income a large number of annuities, with surplus income to be accumulated during the lives of all the annuitants, and after the death of the last of the annuitants the testator gave the whole of his property, subject to the annuities, to the Congregational Union of England and Wales to be invested as capital and, as to one half of the net income thereof, on trust to pay the same to the Devon Congregational Union. Both charities were unincorporated bodies. The Secretary of the first of these charities, suing on behalf of the charity, had taken out an originating summons asking that the trust for accumulations under the will should be determined and that either the surplus income arising in each year from the estate, after the payment of the annuities directed by the will, should be paid to that body, or that proper provision should be made for payment of the legacies and annuities and that, subject thereto, the residuary estate should be transferred to that body. The matter came before Mr. Justice Bennett and it was by him declared (1) that the gift in the will to the Congregational Union of England and Wales of the whole of the testator's property included the accumulations of income and the income resulting therefrom, but (2) that the Congregational Union was not entitled to determine any future accumulations, and that in the event of any of the annuities continuing beyond January 1, 1946 (i.e., 21 years from the testator's death, when the accumulations will cease by virtue of section 164 of the *Law of Property Act,* 1925) the surplus income of the residuary estate and of the accumulations from that date until the cesser of the last annuity would be undisposed of and would devolve as on an intestacy.

The plaintiff appealed from the order so far as it declared that the charity was not entitled to have the accumulations determined. The unanimous considered judgment of the Court of Appeal (Slesser and Scott, L.JJ., and Farwell J.) was read by Mr. Justice Farwell. It was held that

(1) [1937] W.N., 85; 53 T.L.R. 411.

1937

HALIFAX SCHOOL FOR THE BLIND v. CHIPMAN ET AL.

Davis J.

in certain circumstances the heir-at-law and next-of-kin of the testator may become entitled to the enjoyment of the surplus income for a limited period. If any of the annuitants survive the period of 21 years from the testator's death, the accumulations will cease at that date by virtue of section 164 of the *Law of Property Act*, 1925, and the surplus income from that date down to the death of the last surviving annuitant will be undisposed of and pass as on an intestacy. In those circumstances the residuary legatees were held not entitled to the relief which they sought. The court, it was said, will never make such an order unless it is satisfied that the persons having any interest in the property consent, or, if they do not consent, that their interests are amply and fully protected. The persons seeking immediate enjoyment in such a case have no legal right to it and it is a matter for the court in each case to consider whether the order can properly be made. Apart from any question of the heir-at-law and next-of-kin, the annuitants who have a charge on the residue of the testator's estate were objecting, and, there being no legal right in the residuary legatees to possession, the court held it was not a case where it ought to make the order asked for.

Farwell J. concluded (1):

> The effect of any such order would be to prejudice and possibly defeat altogether the possible interests of the persons taking under an intestacy. Those persons do not take directly under the will, but as a result of its provisions and the operation of law they may become entitled to the enjoyment of a part of the income of the estate, and there is no means of preventing the possibility of those interests being prejudiced except by refusing to make the order.

The court referred to *In re Deliotte* (2) as a case where all the persons presently interested desired to obtain immediate enjoyment of the property, but, although the possibility of any other person ever coming into existence who would be entitled to participate was extremely remote, the order had been refused. Mr. Justice Farwell proceeded to say:

> The present case is in some respects a stronger one than that, because the possibility of the heir-at-law and next-of-kin becoming entitled to receive a part of the income of the estate is by no means very remote. Moreover, there is a further difficulty in the way of the appellant here which was not present in that case. Here the residue is given to the appellant on charitable trusts and there is no power to vary those trusts by treating as income that which by the trust is to be capital, or *vice*

(1) 53 T.L.R. at 413. (2) [1926] Ch. 56.

versa. The order sought would have that effect, and that alone is sufficient to disentitle the appellant to the order unless and until the necessary variation of the trust has been duly sanctioned.

In the case before us it is income that is given to the charity and not capital, and for us to make the order sought on this appeal would be to vary the trust.

The appeal should be dismissed. Each party will pay its own costs.

The judgment of Rinfret and Crocket JJ. was delivered by

CROCKET J.—This appeal arises out of an action which was brought in the Supreme Court of Nova Scotia by originating summons to determine the right of the appellant, as beneficiary of the whole of the net annual interest and income of one fund of $20,000, and one half of the net annual interest and income of a second fund of $20,000, to receive from the trustees under a will the whole capital of the one fund and half that of the other.

Mr. Justice Mellish, before whom the case was heard, refused to make the order asked for, holding in effect that on the true construction of the will the testator did not intend to vest the funds themselves in the appellant. An appeal from the learned trial Judge's decision to the Supreme Court of Nova Scotia *en banc* was dismissed on an equal division of the four Judges who heard it, Hall and Carroll, JJ., affirming the trial judgment, and Graham and Doull, JJ., dissenting.

Apart from the testator's directions to his trustees, in the events which happened, to annually pay to the appellant the whole of the net annual interest and income of the first fund of $20,000 and one half of the net annual interest and income of the second fund of $20,000, there was no indication in the will of any desire or intention that the appellant should at any time receive the capital moneys from which the income was derivable, and I think it may fairly be said that the appellant, in seeking to have these capital moneys paid and transferred to it, relied entirely upon these directions and the general principle that where there is an unlimited and unrestricted gift of rents and income of real or personal property, the gift carries the corpus as well as the rents and income of the property.

1937

HALIFAX SCHOOL FOR THE BLIND v. CHIPMAN ET AL.

Crocket J.

There is no doubt that such a rule has long been recognized. The respondents do not question it, but contend that it is a rule of construction only and that it is predicated upon the assumption, in the case of a devise or bequest, that there is no indication in the will of a contrary intention on the part of the testator.

Whatever else the rule may involve, it is plain, I think, from the leading cases in which it has been applied and considered, that it is one which has no application to a bequest of income which the will itself clearly shews, either expressly or impliedly, the testator intends should not absolutely vest the income-producing corpus or capital in the beneficiary to whom the income is directed to be paid. As I apprehend the rule as expounded in the various cases to which we have been referred, it is not sufficient to carry the corpus or capital that the annual payments of the income derivable therefrom, directed to be made to the beneficiary, are intended by the testator to continue in perpetuity, which they may be in the case of charitable gifts such as those now in question, if it clearly appears on a perusal of the entire will that, notwithstanding this fact, the testator intended that the beneficiary should not itself take possession of the corpus or capital. It will be noticed that the rule is seldom stated, either in text books or judicial dicta, without the addition of the proviso mentioned. See *Coward* v. *Larkman* (1), and the same case in the Court of Appeal (2), and the House of Lords (3). Kay, J., in his trial judgment said:

> The question is, what interest the widow takes in the testator's real and personal property. It is argued that she takes only a life interest, and that subject to this there is an intestacy. On the other hand, it is said that, in a will dealing as this does with all the testator's real and personal property, the court leans against an intestacy, and that a gift of the income of real or personal estate without any expressed limit is a gift of the absolute interest. This is no doubt so; but the rule as stated by the late Parker, V.C. in *Blann* v. *Bell* (4) is *one which will yield to expressions in the will indicating a contrary intention.* Such intention, however, should be very clearly shown to induce the court to decide that there is an intestacy.

Cotton, L.J., in the Court of Appeal, stated the rule as follows:

> Where there is an unlimited and unrestricted gift of rents and income of realty or personalty, that carries the absolute interest [in the property]

(1) (1887) 56 L.T.R. 278.
(2) 57 L.T.R. 285.
(3) (1888) 60 L.T.R. 1.
(4) (1852) 5 De G. & Sm. 658; affirmed 2 De G. M. & G. 775.

unless there is sufficient expression in the will to cut down and limit the effect of those words.

Bowen, L.J., said:

The first thing, as Cotton, L.J., says, is to clear one's mind about this rule of construction. There is, to my mind, a *prima facie* rule of construction that, when you have an unlimited gift of rents and income of real and personal property, *in the absence of a contrary intention appearing,* that is a gift of the absolute and entire interest in the real and personal property. It is a rule of construction—that is, only a *prima facie* rule—*which disappears at once if a contrary intention appears.*

Fry, L.J., said:

Having come to that conclusion with regard to his intention, the only point to be observed is this: Is the rule which has been so much discussed in this case one of construction, or is it, as Mr. Vaughan Hawkins insinuated rather than ventured to argue, a rule of law which operates in defiance of intention? In my opinion, it is a rule of construction; it is a rule, therefore, which may be overcome by evidence of an intention to the contrary. It is not like certain rules which operate, however clear the intention of the testator may be to the contrary. In my opinion, rules of construction and rules of law differ very broadly in this point of view; that one is a rule which points out what a court shall do *in the absence of express or implied intention to the contrary;* the other is one which takes effect when certain conditions are found, although the testator may have indicated an intention to the contrary. It is therefore in defiance of the intention of the testator. Mr. Vaughan Hawkins has argued that there is a rule that the words which repel the application of the presumption arising from an antecedent gift of the income must express the limitation to which the absolute estate is to be cut down and reduced. No authority can be cited for such a proposition, and I can find no reason for holding it. On the contrary, it appears to me to be one of those suggestions which from time to time are thrown out to the court, which only result in drawing the mind of the court away from the primary enquiry, what was the intention of the testator? If that intention is to be found, it is immaterial in what part of a will it is to be found, and I for one will be no party to introducing a fresh rule of construction which would fetter the simple enquiry in the case, what was the intention of the testator?

In *Coward* v. *Larkman* (*supra*) the question for decision was as to whether it was intended by the will that the testator's widow, his sole executrix, to whom the rents and income of all his freehold, copyhold and leasehold properties and all other the income of his estate and effects, real or personal, had been devised and bequeathed, was thereby entitled to an absolute interest in the whole estate or to a life interest only. Kay, J., while expounding the rule as to gifts of income as in the passage first above quoted, held that the widow took an absolute interest in all the property on the ground that the rule in question applied to all the property specified, as well as to the residuary estate, because there was no indication in the will sufficient to shew that the widow took only a life interest therein. He

1937

HALIFAX SCHOOL FOR THE BLIND v. CHIPMAN ET AL.

Crocket J.

accepted the argument that the presumption that an unlimited and unrestricted gift of income carries with it an absolute interest in the corpus or capital can be met only by an indication in the will sufficiently clear to enable the court to determine what interest the testator intended that the donee should take, whether for years or during widowhood or for life, and held that it was not enough that the court should consider merely that the testator did not intend an absolute interest.

As will be seen from the passages already quoted from the judgments of Cotton, Bowen and Fry, L.JJ., the Court of Appeal distinctly disapproved that view of the rule. There being nothing in the will to indicate a contrary intention with respect to two of the properties and the household furniture, they held that the widow was absolutely entitled to these; but that there was sufficient to indicate a contrary intention with respect to the gift of the income of another specified property (Elmsleigh) and with respect to the residuary and personal property, and varied the trial judgment accordingly.

In the House of Lords, Halsbury, L.C., and Lords Watson and Fitzgerald affirmed the judgment of the Court of Appeal, Halsbury, L.C., dissenting only as to the property at Elmsleigh. There is, I think, no suggestion in any of the reasons given for the judgment of the House of Lords that the exposition of the rule in the Court of Appeal, or by Kay, J., in the trial judgment, was erroneous in any particular except as to that passage in the trial judgment, to which I have already alluded and which was overruled in the Court of Appeal. Indeed, Lord Fitzgerald explicitly states that,

> there seems to be no disagreement about the rule referred to by Kay, J. or as stated in terms by Cotton, L.J.

as reproduced above. He refers to Sir Edward Sugden's explanation of the rule for treating a gift of the produce of a particular fund, whether it be interest or dividends, as a gift of the principal in perpetuity, because the interest or dividends represent the capital from which the produce is to flow, and adds himself:

> It is always, however, subject to this "unless a contrary intention shall appear by the will."

He then quotes the concluding portion of that passage from the trial judgment which I have already set out and which he describes as an accurate statement of the law.

In the course of his reasons Lord Halsbury said:

> Now, the testator in this case has undoubtedly given all the rents and income of his property in Herts, and in Gordon-Road, Peckham. There is no qualification or limit *in point of time*, and it is manifest, therefore, that the appellant is absolutely entitled to the properties in question.

The appellant relies upon this pronouncement as laying down the doctrine that, if the rents and income are given without any such qualification or limit as is spoken of, i.e., a qualification or limit in point of time, the gift of the rents and income without such a qualification entitles the donee of the income to the corpus of the property absolutely. The particular question which their Lordships were considering was as to whether there was anything in the will to indicate that the gift of the rents and income of the two properties mentioned was intended to be limited to the lifetime of the widow or to be in perpetuity, and naturally Lord Halsbury spoke of the qualification or limit contended for as a qualification or limit in point of time. I do not think he had any thought of laying down the principle that a gift of income without a qualification or limit in point of time entitles the donee to the corpus or capital, as well as to the income.

The appellant also stresses the following statement from Lord Watson's speech:

> It is necessary to read them [the bequests] in connection with the whole context of the will, with the view of ascertaining whether it was the testator's intention to give his widow an interest in perpetuity or for life only. If the gifts were meant to be in perpetuity, the rule must be followed; if for life only, there is no room for its application.

As in the case of the Lord Chancellor's dictum just referred to, this pronouncement of Lord Watson must also, I think, be looked at in the light of the particular question which their Lordships were considering, viz, whether upon an examination of the entire provisions of the will the testator's intention was to give his widow an interest in perpetuity or for life only. If the gifts were not meant to be for life only, the effect in that particular case would necessarily be that they would be in perpetuity, and consequently the application of the rule in that event, as Lord Watson so plainly indicates, could not be doubted. I cannot think that he at all thought of enunciating a principle that the application of the rule in question always depends upon whether the intention of a testator is to make a gift of rents and profits of real or personal property for life

1937

HALIFAX SCHOOL FOR THE BLIND v. CHIPMAN ET AL.

Crocket J.

only or in perpetuity, and that if the gift of the income be found to be intended to continue in perpetuity the rule must always apply, notwithstanding any intention on the part of the testator to the contrary.

If this argument in behalf of the appellant is accepted, it would mean the establishment of an entirely new principle, viz, that the gift of the income of a definite portion of any fund to a charitable institution for charitable purposes in perpetuity constitutes, as a matter of law, a gift of the capital from which the income accrues; and that a testator, who makes such a gift, cannot lawfully provide, even by the clearest and most express terms, that the trustees, to whom the capital moneys are directly bequeathed, shall retain the fund in their own hands, invest and reinvest its moneys and proceeds in a specified class of securities and pay only the income to the beneficiary. In other words, we should have a new rule which, in the case of a bequest of income in perpetuity to a charitable organization for charitable purposes, excludes all enquiry on the part of the courts into the basic question of what was the intention of the testator with regard to the corpus as indicated by the provisions of his will.

If such had been the view of either the Lord Chancellor or Lord Watson, so contrary to that expressed in all three judgments in the Court of Appeal, one would hardly expect that both these eminent law lords would have failed to express any disapproval whatever of the grounds upon which the Appeal Court judgment proceeded, viz, that the rule there in question was a rule of construction and not such a rule of law as always applies, no matter what the intention of the testator might be with respect to it.

The appellant also relies upon the case of *In re Morgan* (1), in which it is claimed that it was held that a gift of the income of the residue of an estate to certain charities in equal shares amounted to a gift of the corpus of the residue to the charities in the same proportions. Stress is laid particularly in this regard upon two isolated statements made in the course of the reasons of Lindley, L.J., and of Lopes, L.J. The first of these statements (that of Lindley, L.J.) is as follows:

(1) [1893] 3 Ch. 222.

I think the indications are that he [the testator] did not intend anybody to have the corpus, not even the charitable institutions. I think his own notion was that they should have the income.

In that case, the testator gave all his real and personal property upon trust to pay *out of the interest and rents arising from the same* certain sums of money per year to different named persons or (in the case of three of them) to their descendants. With regard to the residue of the interest and rents after the stated payments had been made, he gave it in tenths and twentieths to certain charitable purposes in England and the United States. In a suit for the administration of the testator's estate, Stirling, J., held that, according to the true construction of the will, the yearly sums given to the various named persons were not perpetual but were payable to them for their respective lives only, and that the gifts in favour of the charities included the corpus of the residuary estate. Two of the annuitants appealed against the first part of the decision and claimed that they were entitled to a capital sum which, if invested, would produce £250 a year, which was the amount required to be paid to each of them, so that when the case came before the Court of Appeal the only question with which it was really concerned was as to whether the yearly sums given to these annuitants were payable to them in perpetuity or for their respective lives only.

Lindley, L.J., in discussing this question, said:

Now, I confess that, applying our minds to the will, which is the first thing to look at, and without troubling ourselves at all with cases, I cannot find apparent in it any intention to give these persons anything more than an annuity. I cannot see any sign of an intention to give them a portion of the corpus of the testator's property. On the contrary, I think the indications are that he did not intend anybody to have the corpus, not even the charitable institutions. I think his own notion was that they should have the income. He never thought anything about the corpus, and was not dwelling upon the disposal of the corpus at all. He was giving these persons what he says is an annuity.

The words "*or* their descendants," relied upon as giving a perpetual interest, were held not to have the same effect as if they had been "*and* their descendants." "Then it is said," he continued,

that, inasmuch as the testator only disposed of property by reference to the interest and rents, that expression was used by him as equivalent to or as another mode of dealing with the securities. I do not so read it. It may be speculative; but I cannot help thinking that the scheme of his will is to leave all he has got to charity, subject to such provisions as he has made for his nephews and niece. He gave them £250 a year or their

1937

HALIFAX SCHOOL FOR THE BLIND v. CHIPMAN ET AL.

CROCKET J.

descendants, if they died. Except to that extent, the testator intends everything to go to the charities.

Lopes, L.J., said:

It is to my mind very difficult indeed to determine what the intention of the testator was; but I agree with what has already been said, that he intended in all probability not to dispose of the corpus, but to create a perpetual trust. I think that is what he contemplated. I am inclined to think it is very probable indeed that he would be more likely to desire to benefit his relations, such as the Morgans are, than the charities which are mentioned in the latter part of his will. It is also perfectly true that if his intention is such as I have stated, namely, to create a perpetual trust, we are defeating his intention with respect to the different charities, though I think, having regard to the strength of the language, we cannot put any other interpretation than that we have placed on the earlier part of the will.

Looking at these extracts from their judgments, I cannot see how it can be even so much as suggested that either Lindley, L.J., or Lopes, L.J., in determining the question as to whether the trust to pay the annual sums to the beneficiaries named amounted to gifts of any portions of the principal estate, disregarded the intention of the testator, as that intention was to be inferred from the provisions of the entire will, in respect of the disposition of the corpus or capital of the estate or any part thereof. The effect of the passages quoted, in my opinion, is quite the contrary, and certainly there is nothing in any part of either judgment, which in any manner extends or modifies the rule regarding testamentary gifts of income, as expounded in *Coward* v. *Larkman* (*supra*).

The basis of the judgment in the *Morgan* case (1) was that the trust was to pay the stated yearly sums "*out of the interest and rents*" of all the testator's property, and that this and other provisions of the will clearly indicated that they were not to be paid out of the corpus of the estate, which had been devised and bequeathed to the trustees, whereas with regard to the residuary estate, loosely described as consisting of "the residue of the interest and rents after the above payments have been made," that was expressly given to the charities in the proportion of one-tenth to each.

The question whether the rule regarding gifts of income carrying with it the estate or capital from which the income is derived is or is not applicable to any particular devise or bequest, whether to a charitable institution or to an

(1) [1893] 3 Ch. 222.

individual, is, in my opinion, always subject to the intention of the testator as disclosed in the will.

It is true that in *Saunders* v. *Vautier* (1); *Gosling* v. *Gosling* (2); *Wharton* v. *Masterman* (3), and other cases, to which we were referred by the appellant's counsel, where there were absolute vested gifts of real estate and capital funds, entitling the donees to complete ownership and possession at a future event, the courts disregarded express directions of the testators to accumulate the rents and income in the meantime. This doctrine, which is generally spoken of as the rule laid down in *Saunders* v. *Vautier* (1), has been so often recognized that, as Herschell, L.C., said in *Wharton* v. *Masterman* (3), it would not be proper now to question it.

Various reasons have been ascribed for its establishment. Lindley, L.J., in *Harbin* v. *Masterman* (4), which went to the House of Lords on appeal under the name of *Wharton* v. *Masterman* (3), above cited, described it as "a remarkable exception" to "the general principle that a donee or legatee can only take what is given him on the terms on which it is given." He explained it as follows:

> Conditions which are repugnant to the estate to which they are annexed are absolutely void, and may consequently be disregarded. This doctrine, I apprehend, underlies the rule laid down in *Saunders* v. *Vautier* (5) and enunciated with great clearness by Vice-Chancellor Wood in *Gosling* v. *Gosling* (2).

Herschell, L.C., said:

> The point seems, in the first instance, to have been rather assumed than decided. It was apparently regarded as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming *sui juris*, and could not be postponed until a later date unless the testator had made some other destination of the income during the intervening period.

Lord Davey said:

> The reason for the rule has been variously stated. It may be observed, however, that the Court of Chancery always leant against the postponement of vesting or possession, or the imposition of restrictions on the enjoyment of an absolute vested interest.

Whatever the origin or reason of this particular rule may be, it is clear, I think, that its application in *Harbin* v.

(1) (1841) 4 Beav. 115.
(2) (1859) Johnson's Chy. Rep. 265, at 272.
(3) [1895] A.C. 186.
(4) [1894] 2 Ch. 184, at 196-7.
(5) (1841) 4 Beav. 115; 1 Cr. & Ph. 240.

1937

HALIFAX SCHOOL FOR THE BLIND v. CHIPMAN ET AL.

CROCKET J.

Masterman (1) and *Wharton* v. *Masterman* (2) was based on the conclusion that the gifts of the residue of the personal property to the five charities named definitely included the surplus income remaining each year after the payment of certain specified annuities, and that neither the annuitants nor the next-of-kin had any interest whatever therein. So far as the conclusion itself, upon which the application of the rule proceeded, is concerned, viz, that the gift of the surplus income as it accrued was intended to vest and had actually vested in the charities, that conclusion was apparently reached upon a consideration of the provisions of the entire will, including the special direction for its accumulation. There is nothing, therefore, in the fact that the principle of *Saunders* v. *Vautier* (3) was applied in those cases, which necessarily conflicts with the view already expressed that the question of the applicability or non-applicability of the general rule regarding a gift of income carrying with it a gift of the capital from which the income is derived, depends always on the intention of the testator, as expounded in *Coward* v. *Larkman* (4) and other cases.

Wharton v. *Masterman* (2) does decide that, where it is concluded that an absolute gift of the residue of personal property includes the surplus income of a definite portion thereof, it makes no difference, so far as the futility of a repugnant direction for the accumulation of that income is concerned, whether the donee of the surplus income is a charitable corporation or an individual; but, as I read the case, it by no means decides that a gift of surplus income to a charitable corporation itself constitutes, as a matter of law, a gift of the property or capital from which it is derived, notwithstanding that the will clearly shews the testator's intention to be otherwise. As a matter of fact, the charities did not claim that they were entitled to the capital out of which the surplus income arose, before the death of the last annuitant—only that they were entitled to that income as it accrued each year and the accumulations thereon, for the reason that upon the true construction of the will the testator intended that it should vest

(1) [1894] 2 Ch. 184.
(2) [1895] A.C. 186.
(3) (1841) 4 Beav. 115.
(4) (1887) 56 L.T.R. 278; 57 L.T.R. 285; (1888) 60 L.T.R. 1.

absolutely in the charities as it was received, and that neither the annuitants nor the next-of-kin were given any charge on or interest in this income or its accumulations. Stirling, J., the trial Judge, thus construed the will as Wickens, J., had done in a previous administration suit, and this judgment was unanimously affirmed, both in the Court of Appeal and in the House of Lords.

Here there is no question as to the appellant being entitled to receive each year the net annual income of the two funds mentioned. The question is as to whether it is entitled to have the trust extinguished and the capital funds paid into its own hands by the trustees under the will. This depends, as I take the established law to be, upon whether or not the testator has clearly indicated by the provisions of his will that he intended that the appellant should not have the right to extinguish the trust and take the capital funds out of the hands of his own trustees.

After a careful consideration of the provisions of the entire will, I have concluded that they cannot be read consistently with any other hypothesis than that the testator intended that the appellant should not have that right, and that his real desire and intention was to create a perpetual trust in the hands of the three trustees he appointed to administer his estate, and their successors for whose appointment he provided. There are numerous provisions throughout the will indicating this intention. Among them I mention the following:

1. The appointment of three trustees with his provision for the filling of any vacancy occurring so that the triple trusteeship may continue indefinitely.

His directions for the raising of the two $20,000 trust funds, and another for the benefit of the trustees themselves, of which they are "to annually divide the income and interest equally" among them as "a recompense for their extra care and careful management" of the estate, in addition to a remuneration or commission of 6% per annum, which they are to retain for themselves from the interest and income of all the trust moneys, including the two $20,000 funds.

2. His direction that the trustees "shall stand possessed" of all "the trust moneys" so raised, "in trust for the uses and purposes hereinafter declared and expressed."

1937

HALIFAX SCHOOL FOR THE BLIND v. CHIPMAN ET AL.

CROCKET J.

3. The language in which the particular gift of income to the appellant of the first $20,000 fund is couched, viz, that upon the cessation of the antecedent trust, the trustees then and thereafter "shall *annually* pay over the whole of the *net* annual interest and income of said sum of twenty thousand dollars to said The Halifax School for the Blind *to be used for the general purposes of that institution.*"

4. His directions that the trustees "keep invested" the whole of the second fund of $20,000, and to divide the net annual interest and income of the whole—one half thereof to the appellant to be used for the general purposes of that institution, as in the case of the whole of the net annual interest and income of the first $20,000 fund,—and to pay and apply the other half "in and towards the maintenance and support of a Free Public Library or Free Public Library and Museum" to be otherwise established at Yarmouth to the satisfaction of the trustees.

5. The provision that any loss or depreciation resulting from time to time to any of the trust moneys shall be made good out of the residue of the trust moneys, the income and interest of which are directed to be divided equally among the trustees.

6. The empowering of the trustees to invest and re-invest the trust moneys in designated classes of securities and alter the investments without the consent and concurrence and without reference to the beneficiaries or any of them.

It seems to me, if there were nothing else in any of the other provisions to indicate that the trust funds themselves claimed by the appellant were not intended to vest in it, that, having regard to the annual charge of 6% imposed on the entire income of all the trust moneys, the language of the two gifts of income itself cannot properly be held to import an intention to vest the whole of the first $20,000 fund or the entire half of the second $20,000 absolutely in the appellant. The gifts are not of the whole income but of "the whole of the net annual income" and are expressly directed to be paid annually. In the light of the 6% annual charge upon the whole income of all the trust moneys, in favour of the trustees, and the gift to the trustees as well of the annual interest and income of the residuary trust, how can it possibly be said that no one else than the appellant has any interest in either of the two funds

claimed, and that the principle of *Saunders* v. *Vautier* (1), as confirmed by *Wharton* v. *Masterman* (2), is applicable to this case?

I think the appeal should be dismissed. Each party will pay its own costs.

KERWIN J.—If this were a case where the testator had made a gift of income indefinitely to an individual, the latter would be entitled absolutely to the corpus. Reliance was placed upon *Wharton* v. *Masterman* (2), as indicating that the same rule applies where the legatee is a charity, but in that case there was an absolute vested gift made payable at a future event with a direction to accumulate the income in the meantime and pay it with the principal, and it was decided that the court would not enforce the trust for accumulation in which no person had any interest but the legatee. In other words, it was held that the legatee might put an end to an accumulation which is exclusively for its benefit. It will be noticed, however, that the direction was "in trust to pay and divide," and part of the discussion arose because the testator had directed that this paying and dividing be according to certain amounts set after the respective names of the charities, and it was argued that the charities were to receive only such amounts. It was held that it was impossible to suppose that the testator intended to limit the rights of the charities to the specific sums mentioned, and that their claim to be residuary legatees was valid.

A further application was made in the same administration action, the report of which appears under the name of *Harbin* v. *Masterman* (3). This application was for payment out to the charities, in equal shares, of the fund, other than certain sums set apart to answer the annuities. The motion was granted by Stirling J., and his decision was affirmed by the Court of Appeal.

In view of the provision in the will in question "to pay and divide," these decisions do not touch the point.

In my opinion a correct statement of the law is set forth in Tudor on Charities, 5th ed., p. 76:—

> A charitable trust may be made to endure for any period which the author of the trust may desire. It may therefore be created for the application of the income in perpetuity to the charitable purpose, or it

(1) (1841) 4 Beav. 115.
(2) [1895] A.C. 186.
(3) [1896] 1 Ch. 351.

1937

HALIFAX SCHOOL FOR THE BLIND v. CHIPMAN ET AL.

Kerwin J.

may be so framed as to require the immediate distribution of the capital, or the exhaustion of capital and income, during a limited or indefinite period.

And at page 78, the author points out the true application of the rule in *Saunders* v. *Vautier* (1) where charities are concerned, as follows:

> There is no exception from the statutory provisions restricting accumulations in the case of charities. And if a charitable fund is directed to be accumulated beyond the limit allowed, a scheme may be settled by the Court for the proper application of the fund.
>
> Moreover, the rule in *Saunders* v. *Vautier* (1) applies in the case of charities, so that if an accumulation is directed, and the capital and accumulations are given absolutely to a particular charitable institution, whether corporate or unincorporate, the institution has the same right as an individual would have under similar circumstances to stop the accumulations and call for the immediate payment of the gift.

Jarman on Wills, 7th ed., p. 250, thus states the rule:

> Charitable gifts are an exception to the rule which forbids the creation of perpetuities in the primary sense of the word.

and Theobald on Wills, 8th ed., p. 406:

> A charitable gift does not necessarily involve a perpetuity. It may be a gift of a capital sum divisible at once. But more commonly it involves the investment of a fund and the application of the income in perpetuity to a charitable purpose. Such gifts, being for the public good, are not subject to the rule against perpetuity.

Of the various cases in which the rule is referred to, it is perhaps sufficient to refer to *Goodman* v. *Saltash* (2), where Lord Chancellor Selbourne, at p. 642, states that "no charitable trust can be void on the ground of perpetuity."

The gift of the income in perpetuity to the charity in the present case is, therefore, entirely valid and proper, and the appeal should be dismissed, but without costs.

Appeal dismissed.

Solicitor for the appellant: *T. W. Murphy.*

Solicitor for the respondents: *T. R. Robertson.*

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(1) (1841) 4 Beav. 115; 1 Cr. & Ph. 240.
(2) (1882) 7 App. Cas. 633.