THE CANADIAN BAR REVIEW

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☞ Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 2, Ontario.

CASE AND COMMENT

WILLS—GIFT OF INCOME ENTITLING DONEE TO THE CORPUS —APPLICATION TO CHARITABLE CORPORATION.—Lord Watson in *Coward* v. *Larkman* [1] stated that "the rule of construction by which a general and unlimited gift of the income of real or personal estate is held to carry an absolute interest in the corpus, is established beyond dispute." The decision of the Supreme Court of Canada in *Halifax School for the Blind* v. *Chipman* [2] raises grave doubts as to the application of this rule in cases involving trusts for corporations, and in particular for corporations incorporated for charitable purposes only. In some aspects the case raises doubts as to the application of the rule in every case where a trust to pay income is used. It is the writer's opinion that the decision is unsupported by case law and that the result reached is not only unsettling, but in fact overrules several decisions in this country which had proceeded on the basis of *Coward* v. *Larkman*.

The facts are not involved. A testator, having appointed three trustees and having made provision for fulfilling vacancies so that the trusteeship would continue indefinitely, provided (under the circumstances which gave rise to the litigation) that the trustee should hold $20,000 in trust "to invest the same . . . . . and shall annually pay over the whole of the net annual interest and income of said sum to The Halifax School for the Blind, a corporation incorporated by Act of the Legislature of

[1] (1888), 60 L.T.R. 1 at p. 3.
[2] [1937] S.C.R. 196.

the Province of Nova Scotia, to be used for the general purposes of that institution". Other clauses of the will provided for remuneration of trustees by giving them a commission of six per cent on the gross annual interest of the trust money. The Halifax School for the Blind claimed to be entitled to the corpus, that is $20,000, on the ground that the will gave it a general and unlimited gift of income which was tantamount to a gift of the fund itself. The Supreme Court of Canada (Duff C.J., Rinfret, Crocket, Davis and Kerwin JJ.) unanimously held that the school was not entitled to the corpus. For some reason, therefore, the doctrine sometimes spoken of as an unlimited gift of the fruit being a gift of the tree itself,[3] was held inapplicable. The question that calls for careful consideration is what, if anything, was apparent in the present case which had not appeared in other cases where the rule had been held applicable. In other words, what limitation has the Supreme Court of Canada placed upon this doctrine.

Before a case can be made out calling for the application of the rule, it is elementary that there must be a gift of *all* benefits of the property. Was the entire income on $20,000 given to the Halifax School? This seems to have been taken for granted in all the judgments, saving possibly the judgment of Crocket J. in which Rinfret J. concurred. In the view of these two judges the gift was not of the whole income, because of the six per cent charge on the gross income in favour of the trustees. None of the other members of the court make this point, and it seems difficult to treat an administration expense, which would be deductible in every case from the income given by a will, as creating a beneficial interest in part of the income.[4] So to treat the trustees' fees or other administration expenses would be to defeat the rule in every case and we can therefore consider that in the present situation the testator made a gift of the entire income to the company.

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[3] *Re L'Herminier*, [1894] 1 Ch. 675, 676.

[4] It seems pertinent to inquire whether the testator intended to make a gift outright to the executors of part of the income on this fund or whether he merely treated it as remuneration for services which he fully expected would continue. If the latter, it seems impossible to say that the trustees would have any more interest in the fund for the purpose of considering this rule than, for example, any creditor who might have a contingent claim against the estate. See Lord Wrenbury in *Baker* v. *Archer-Shee*, [1927] A.C. 844 at pp. 865-6. "The trustees, of course, have a first charge upon the trust funds for their costs, charges and expenses . . . . . But this does not reduce the right of property of the beneficiary to a right only to a balance sum after deducting these . . . . . If a landowner employs an agent to collect his rents and authorizes him to deduct a commission he does not cease to be owner of the rents."

Of much more importance is the question whether any limitation or restriction with regard to time, was placed on the receipt of income by The Halifax School for the Blind. Clearly if there was any limitation the rule has no application. It is at this point that the writer finds difficulty in appreciating some of the conclusions of the court. Davis J., with whom Duff C.J. concurred, at the outset of his judgment stated: "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."[5] Further, in concluding his judgment, he stated that the fund was "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".[6] It is hard to understand why the gift of income should have been treated as limited in point of time. The interpretation appears to be assumed in the judgments. Regarded as a gift simply to a corporation for corporate purposes, it is true that if the corporation ceases to exist it is impossible to pay income to it. Is it, however, correct to say this prevents the application of the rule concerning unlimited gifts of income? The same thing can be said of a gift of income to an individual to whom trustees are directed to pay. In neither case can the beneficiary actually be the recipient of income after his death or termination of statutory existence as the case might be. This, however, has never prevented a gift to an individual from being construed as unlimited, and so to construe it is, in effect, to deny the rule of income carrying the corpus altogether. In this connection, the language of Orde J.A. in *Re Macdonald*[7] seems pertinent:

> Then has the testator effectively disposed of the corpus of his estate, or has he died intestate as to it? It is odd that nowhere is there any express gift of the corpus of the residue, but the authorities are quite clear that where there is no express gift of the corpus an unlimited gift of income will carry the corpus with it. . . . . The difficulty which many people seem to have in understanding this rule is based upon the conception that a gift of income must cease at the death of the donee. But there is no legal or logical justification for this idea. When a testator makes a gift of income unlimited as to time and with no gift over upon the death of the donee, he has in reality given the income to the donee in perpetuity, that is, for ever. That being the case, it is not from a mere desire to enlarge the estate of the donee because of the absence of a gift over, or to avoid an intestacy,

[5] [1937] S.C.R. 196 at p. 201.
[6] [1937] S.C.R. 196 at p. 204.
[7] [1931] O.R. 659 at p. 670.

> that the Courts have so construed unlimited gifts of income, but because the gifts are unlimited gift of income, by which is meant a gift not subject to any limitations and so not limited to the life of the donee or by any other period of time, must of necessity carry the corpus. If one is to enjoy the income for ever, one really owns the corpus.

Kerwin J. indicates that had this been a gift of "income indefinitely to an individual, the latter would be entitled absolutely to the corpus".[8] The decisions nowhere state why a gift to a corporation, should, for purposes of the rule, be treated in any way different from a gift to an individual and it is submitted that a gift of income to a corporation cannot, by itself, be treated as a gift only for the duration of corporate existence.

Does it make any difference then, that the corporation be a charity? Here again, we encounter difficulties. Davis J. speaks of the bequest in the present case as "a particular and charitable bequest", and he and other members of the court point out that the rule against perpetuities has no application to such a bequest. The rule against perpetuities is chiefly concerned with forbidding the postponement of "vesting" of a property interest in some definite beneficiary beyond the perpetuity period. On the other hand, when there is no definite beneficiary of a trust, and hence "vesting" is an inappropriate term, property may not be rendered inalienable beyond the perpetuity period and consequently, unless the objects to which a trustee may devote money under a "purpose trust" are charitable, the gift fails. This may be spoken of as the "tying up" aspect of the rule against perpetuities[8A]. But has this any bearing on the facts disclosed in the present case? Davis J. seems to admit (without determining the question) that the present case discloses no general charitable intention. It is, therefore, an unlimited gift of income *to a corporation* which is charitable in its objects. The question would then appear to be: What is the nature of the property interest which on the testator's death vested in the corporation? That the rule which passes the corpus by a gift of income has been applied in determining that interest is clearly seen from the Ontario decision of *Re Carter*,[9] where a testator left $30,000 to the Provincial Treasurer of Ontario to be invested by him in Ontario Government stock and the whole interest paid over by him in perpetuity

[8] [1937] S.C.R. 196 at p. 219.

[8A] See these problems discussed in Hart, *Some Reflections on Re Chardon* (1937), 53 L.Q.R. 24.

[9] (1918), 42 O.L.R. 57.

to The Hospital for Sick Children. The Hospital for Sick Children made an application similar to that of The Halifax School for the Blind, asking that the $30,000 be paid to it. The court so decreed. It is difficult to see in what respect these facts differ from those before the Supreme Court of Canada, unless it be argued that the words "in perpetuity", which were used in *Re Carter*, make a difference. It is submitted that they do not, and that a gift to any individual person or corporation without limiting the time and without a gift over, must be taken as a perpetual gift. Of course, if the words of gift state that the income is to be paid "so long as the company carries on certain charitable purposes", different considerations apply.[10]

It may be urged that in *The Halifax School for the Blind Case* there was a further difference from the facts in *Re Carter*, in as much as the will in the former case spoke of a gift of income to the corporation "for the general purposes of that institution". If the gift remains, however, as a gift to the corporation itself, it would appear that this distinction is only relevant to the question whether the corporation, when it receives the income or the corpus as the case might be, is to be treated as a trustee itself of the money for these purposes. This was the problem considered by Rose C.J.H.C. in the Ontario case of *Re Knight*,[11] the decision in which was almost contemporaneous with the decision of the Supreme Court of Canada in *The Halifax School for the Blind Case*. In that case a testator set aside two sums of money and directed his executors to pay the income on each sum to two Ontario corporations. One of these corporations was held to be a charity with charitable purposes. The purposes of the other corporation were held to be non-charitable. In both cases, however, the corporations were held entitled to the corpus of the fund on the ground that there was an unlimited gift of the income to each society. The court then discussed the separate and distinct question whether the non-charitable organization would be bound to deal

[10] See *Re Chambers* (1907), 16 O.L.R. 62, where a sum of money was to be invested and the income paid to a certain hospital "so long as the hospital shall be used for a hospital, and in the event of the hospital ceasing for a year to be used as a hospital, then the income was to be used for the poor". In this case it was held the hospital could not claim the corpus, because there was a gift over which involved the perpetuation of the trust. The interest of the hospital was akin to a determinable fee in land. If the gift over were to a non-charitable object, the possibility of such an interest would have to be dealt with. See 53 L.Q.R. at p. 59.

[11] [1937] O.R. 462, discussed in 15 Can. Bar Rev. 566, in connection with another point.

with the corpus as a trust for the purposes for which it was incorporated, and on this question followed the reasoning of Lord Parker in *Bowman* v. *Secular Society Ltd.*,[12] and held it was not bound by such a trust. It will be noticed that the reasoning in this case is directly opposed to that of the Supreme Court of Canada in *The Halifax School for the Blind* decision. It is arguable on the basis of the latter case, that if there is an unlimited gift of income to a corporation for the general purposes of the corporation, and these purposes are found to be non-charitable, then the entire gift would fail. It is submitted that such construction finds no support in the authorities.

The only way of supporting the judgment of the Supreme Court of Canada on this point is to construe the gift, not as a gift to the corporation at all, but as a gift devoted primarily to the charitable purposes set out in the charter of the company, and thus in reality treat the company as the agent of the trustees for the purpose of carrying out these objects. This view was apparently taken by the trial judge, Mellish J., who treated the trust as a fund "for the benefit of the blind", "to be expended by 'The School for the Blind' for the purposes for which that institution was incorporated".[13] The same view is taken by Hall J. in the Nova Scoria Court of Appeal.[14] That this is a possible view cannot be doubted. It is not, however, what the testator said. It is, moreover, opposed to the reasoning of the House of Lords in *Bowman* v. *Secular Society*. Further, it raises grave difficulties when the purposes of a company are, as they were in *Re Knight*, non-charitable, in which case the gift may be entirely void as infringing the rule against perpetuities. Further, if this be so, as companies always exist for stated corporate purposes, the result would seem to involve avoidance of gifts of income to *all* companies which were not charitable, whether the will stated the gifts to be for the purposes of the company or not. It is because of such sweeping implications that the decision of the Supreme Court in the present case merits careful consideration.

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[12] [1917] A.C. 406 at p. 440. Compare the statement that "no question of perpetuity arises, because the plaintiff is a limited company, and, in the view of the law, a person competent to dispose of what is given."

[13] 11 M.P.R. at p. 68.

[14] "The learned trial Judge has found that the real beneficiaries under the will are blind persons who, now or hereafter, are received, educated and maintained by the School for the Blind, and at present indeterminate. In other words, that it was the intent of the donor to establish a charitable trust in favour of blind people to be assisted through the agency of the School for the Blind."—11 M.P.R. at p. 78.

Of course, if a gift to a company is to be construed in every case as a gift for so long as it carries on its corporate existence, the question, at any rate in connection with charitable companies, is concluded, and the rule which involves a gift of income carrying the corpus, does not enter. The company would have an equitable interest which could be described as a determinable charitable trust.[15] In such a case there would be an interest in reversion, which would, of course, effectually prevent the termination of the trust on the principle that a trust can only be terminated when it is for the sole interest of the party seeking to determine it. It is this latter point with which the judgment of Davis J. is chiefly concerned, but as he commenced by premising that the gift was for the life of the company, it would seem to follow naturally that the company had no right to terminate the trust. On the other hand a gift of income to a non-charitable company might involve the elimination of any reversionary interests depending on the solution of the moot problem whether an interest in the nature of a determinable fee could be created. If it could be, then again there could be no termination of the trust by the non-charitable company. If it could not be, the non-charitable company might take the corpus.[16] It seems strange that on this view a gift of income to a company for non-charitable purposes may involve the possibility of that company obtaining the corpus, whereas in a like gift to a charitable company this would be impossible.

The judgment of Crocket J. raises questions of more general application concerning the rule of income carrying the corpus. His judgment is concerned chiefly with showing that the rule has always been spoken of as a rule of construction and as one which would apply in the absence of a contrary intention. The gist of his argument, in view of these many statements of the rule, is that the present case conclusively showed an intention that the testator did not wish The Halifax School for the Blind to have the corpus. With this finding regarding the testator's intention, there would seem to be no possible argument. It is expressed shortly in the following remark of Davis J.: "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 in this appeal would be to vary the trust."

While it is true that the rule is always referred to as a rule of construction subject to a contrary intention, to say that

[15] GRAY, RULE AGAINST PERPETUITIES, 3rd ed., sec. 603 [*i.*]
[16] See this problem discussed in 53 L.Q.R. at pp. 58 *ff.*

the intention of a testator that the beneficiary receive only income, prevents passing the corpus, would deny the very existence of rule, and certainly would do so in every case of the interposition of a trust. Why would a testator make elaborate provision for setting up a trust and give powers of investment if he did not wish the beneficiary to have only income? Yet, so far as the writer has been able to ascertain, the interposition of a trust has never been held to prevent passing the corpus[17]. Despite the fact that the statements in the cases are not altogether harmonious, it is submitted that the contrary intention spoken of concerns finding an intention to limit the gift in extent of time, and it is further submitted that no case can be found in which an unlimited gift of income has been made and in which the courts have refused to pass the corpus merely because the testator did not wish to do so. On the contrary there are cases exactly opposed. For example in *Re Hagerman*[18] a testator made a gift to a church of the interest on his money in the banks but "none of the principal, as the money is to remain in the banks in my name forever". This statement of intention was held to have no effect in preventing the church from obtaining the corpus. It would probably be better to call the rule a rule of law, in the same sense as the rule in *Shelley's Case*. That rule involves interpretation, for example, in ascertaining just what is meant by heirs etc., but once that intention is found, certain legal results follow, regardless of the testator's intention. This is shown in the judgment of an Ontario Court of Appeal in *Re Jones*,[18A] which involved the construction of a clause placing money in a bank "and my wife to receive the interest". The trial judge held that the intention of the testator was clearly manifested that he wanted his wife to take only for life and therefore she had no right to demand the corpus. This view was concurred in on appeal by Latchford C.J. The majority of the Court of Appeal, however, held that the wife was entitled to the corpus. For this purpose it does not matter whether the rule be called a rule of construction or not.[19] Middleton J.A. summed up the position as follows :

> It is said that this rule is a rule of construction, and not a rule of law: by this I understand that effect is to be given to what is said by the

[17] *Re Carter, supra; Re l'Herminier, supra.*
[18] (1918) 13 O.W.N. 406.
[18A] (1927), 60 O.L.R. 136.
[19] Lord Halsbury in *Coward* v. *Larkman, supra,* 60 L.T.R. 1 at p .2, seemed to have doubts whether the rule should be described as a rule of construction.

> testator without speculating as to his intention, unless it is made plain from the will itself that the testator does not mean the words he has used to have their ordinary and legal significance and effect. The situation is precisely similar to that arising when the testator gives property to A. for life and after the death of A. to the heirs of A. There the rule of construction known as the rule in Shelley's case gives an absolute title to the property quite independent of any question of intention, unless it is shewn that the will has given to the words used a significance they do not naturally bear.[20]

Whether it is happy to describe the rule in *Shelley's Case* as a rule of construction or not, is beside the point. What seems to be clear in all of the cases is an understanding that once an unlimited gift of income is made, whether through the interposition of a trust or not, or whether the testator indicates a desire that he does not wish the beneficiary to have the corpus or not, it is impossible to keep the beneficiary from having the corpus, because in law it has already been given to him, by what may be called an oblique description of the property itself. Crocket J.[21] stated that if The School for the Blind were allowed the corpus it would mean establishing a new principle, namely :

> 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 re-invest 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.

With respect, there seems no reason why this so-called new principle should be confined to a charitable institution for charitable purposes. If the rule were stated in the terms of a gift of income for any person or corporation, the writer submits that the principle which he describes as new is not novel, but has been applied in several cases.

In conclusion, the decision of the Supreme Court countenances some, if not all, of the following propositions :

(1) It denies the application of the rule of income passing the corpus to a company which is also a charity, because it treats

[20] (1927), 60 O.L.R. 136 at pp. 41-42.
[21] [1937] S.C.R. 196 at p. 212.

the gift as one devoted to the purposes of the company rather than the company itself.

(2) On this reasoning it follows that in a case of a gift of income to a company with non-charitable objects, the gift may conceivably fail altogether because it infringes the rule against perpetuities.

(3) It denies the application of the rule of income passing corpus to all corporations, because income can be given only so long as the corporation exists for the purpose of having corporate objects. This raises the troublesome question of determinable interests.

(4) By placing emphasis on the setting up of a perpetual trust and indicating that the testator did not intend the corpus to pass, it, in effect, denies the rule in all cases, and particularly those in which a trust of any kind is interposed, because it seems impossible to say that a testator who makes provision to give income, contemplates the possibility of that gift being construed as a gift of corpus.

In view of these uncertainties, it is to be hoped that some authoritative pronouncement may be made before too many estates have been drained of assets by what appears to be inevitable litigation following upon this decision.

C. A. W.

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INTERPRETATION OF STATUTES — INDUSTRIAL STANDARDS ACT.—It may be because he is impressed by the flexibility of the Common Law, but the average lawyer does not expect too much from legislation. At the most, he regards its purpose to be the laying down of a rule for a particular instance. That it should be construed as expressing a principle from which to reason by analogy would shock him. He has, as Sir Frederick Pollock said, "[a] theory that Parliament changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds".[1] Such a theory finds its fulfilment in strict and narrow interpretation, in holding a statute down, literally, to the case it covers. "A statute, "said Lord Shaw, "must be taken to mean what it says, and . . . . . there is much danger in allowing invasion of its terms followed by subsequent invasions succeeding the first until the virtue of the statute is emasculated."[2]

[1] ESSAYS IN JURISPRUDENCE AND ETHICS, 85.
[2] *Hyman* v. *Hyman*, [1929] A.C. 601, 616.

The danger which Lord Shaw fears is, however, merely a danger to a theory of interpretation which not only makes it easy to detect any interference with private rights but makes it correspondingly harder to find in a statute a general public benefit.

The strict construction of statutes appears to have its basis in the notion of the supremacy of Parliament and in the conception of individual rights to liberty and property. Courts considered they could best vindicate parliamentary sovereignty by a literal interpretation of the words of a statute without the aid of extrinsic evidence. Again, individualism would best be promoted by limiting any legislative encroachments thereon to their narrowest scope. The theory and practice of government which gave rise to the strict construction of statutes are, however, no longer with us. It can not now be said, that the legislature does not intend to interfere with private rights unless it clearly says so or that any such interference represents a departure not to be generalized rather than a principle to be followed.

Legislation today is drafted as carefully as court judgments. It is passed "in an attempt to realize a social purpose".[3] Indeed the only justification of a statute lies "in some help which the law brings towards reaching a social end which the governing power of the community has made up its mind that it wants."[4] In approaching the text of a statute, courts must be equipped with more than a dictionary and an abstract theory of interpretation. It would seem that a knowledge of the social conditions to which the statute is to be applied is indispensable to its interpretation. Likewise, the circumstances which led to its enactment. The words of a statute, standing alone, are awkward modes of expressing purposes, for words have no definite content nor any mathematical exactness. They are, accordingly, ill-suited to be the effective indicators of the legislative object. It is here that creative work by the courts is essential. "The meaning of a statute," it has been said, "is a judicial creation in the light of social demands."[5]

Industrial Standards Acts, in essentially similar terms, are in force in four of the Provinces of Canada.[6] They have

[3] Corry, *Administrative Law and the Interpretation of Statutes* (1936) 1 Univ. of Tor. L.J. 286, 292.

[4] HOLMES, COLLECTED LEGAL PAPERS, 225.

[5] COHEN, LAW AND THE SOCIAL ORDER, 131.

[6] 1935, c. 28; amended 1936, c. 29, 1937, c. 32, Statutes of Ontario; 1935, c. 47; amended 1936, c. 70, 1937, c. 69, Statutes of Alberta; 1936, c. 3; amended 1937, c. 63, Statutes of Nova Scotia; 1937, c. 90, Statutes of Saskatchewan.

attempted to chart a middle course between opposing theories respecting the regulation of working conditions. One theory maintains that conditions of labour are a matter for the state to fix; the other theory holds that the parties themselves, employers and employees, must determine conditions of labour in accordance with their social and economic bargaining powers. The Industrial Standards legislation provides for a conference of employers and employees in any industry within a defined territorial zone, for the purpose of drawing up a schedule of wages and hours of labour. If, in the opinion of the minister having the administration of the legislation, the schedule is agreed to by a proper and sufficient representation of employers and employees in the industry, he may approve it and recommend that an order-in-council be passed having the effect of making the schedule binding upon all employers and employees in the industry within the prescribed territorial zone, ten days after publication in the Official Gazette. *Rex* v. *Belyea Bros. Ltd.*[7] illustrates the approach of an Ontario court to this piece of social legislation. The accused, carrying on business as plumbers in Toronto, were charged with breach of a schedule under the Industrial Standards Act, Ontario,[8] applicable to the plumbing and heating trades in Toronto. The defence rested on the ground that the order-in-council approving the schedule and the schedule itself were *ultra vires* in exceeding the limits of the authorizing legislation. Because the schedule purported to "govern the employment of all persons working in the plumbing and heating trades",[9] it was argued that it would apply to any plumber who was employed by a private citizen, but that the Industrial Standards Act must be construed as applying only to employees of employers in the business or industry of plumbing. J. A. McEvoy J., accepting this very narrow construction, declared the order-in-council and schedule to be *ultra vires*.

The learned judge appears to have ignored the Ontario Interpretation Act,[10] which admonishes that "every Act shall be deemed remedial . . . . . and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, ... according to the true intent, meaning and spirit thereof". The Industrial Standards legislation in Ontario and Saskatchewan

[7] [1937] O.W.N. 231.
[8] 1935, c. 28; amended 1936, c. 29.
[9] [1937] O.W.N. 231, 234.
[10] R.S.O. 1927, c. 1, s. 9.

defines "employer" as "every person . . . . . directly or indirectly responsible for payment of wages to any person who comes within the provisions of any schedule promulgated by order-in-council. . . . ."[11] The definition in the equivalent enactments in Alberta and Nova Scotia is "every person . . . . . directly or indirectly responsible for the payment of wages to an employee."[12] On a reasonable view of the Industrial Standards legislation in the light of its social objective of compelling wage scale maintenance, a private citizen employing a plumber could be easily considered an employer within the meaning of the above definitions. He is in the industry *pro tempore* at any rate, and there is nothing in the statute to say this is not enough to give him any exemption. When the learned judge in the instant case held that a private citizen not ordinarily in the plumbing industry could not be bound by an Industrial Standards schedule, he limited the application of the legislation by importing into it extraneously a nineteenth century conception of the liberty of the subject.

A recent amendment to the Industrial Standards Act, Ontario, appears to overcome the result of *Rex* v. *Belyea Bros. Ltd.*[13] "For the purposes of this Act," it reads, "every person who is in any way engaged in any industry shall . . . . . insofar as he employs another person . . . . . be deemed an employer, and the provisions of this Act and the regulations and schedules hereto, shall, *mutatis mutandis*, be read and construed accordingly."[14]

The Saskatchewan statute has an identical provision.[15] Anything but a very strict construction of Industrial Standards legislation in the case at bar would have obviated the necessity of such an amendment. The danger now exists that piecemeal devitalization of the legislation, bringing in its wake corrective amendments, will involve it in such technicality as will obscure its social purpose.

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[11] 1936, c. 29, s. 2, Statutes of Ontario; 1937, c. 90, s. 2 (3), Statutes of Saskatchewan.

[12] 1935, c. 47, s. 1(e), Statutes of Alberta; 1936, c. 3, s. 2, Statutes of Nova Scotia.

[13] [1937] O.W.N. 231.

[14] 1937, c. 32, s. 9, Statutes of Ontario.

[15] 1937, c. 90, s. 13.

SUCCESSION DUTY—SITUS OF "PROPERTY" UNDER A TRUST FOR TAXATION PURPOSES. — The recent decision of the Nova Scotia Supreme Court in *Attorney-General of Nova Scotia* v. *Davis*,[1] is one that raises problems concerning double taxation that have not as yet received the attention their importance merits. In that case the deceased, who at one time was domiciled in Nova Scotia, but at the time of his death was domiciled in Bermuda, some years before his death created a trust fund with a Montreal trust company, and the trust instrument provided for payments to his daughters until the youngest attained 55, when the fund (subject to provisions for lapse) was to be distributed amongst them. The daughters had, prior to the death of their father, acquired a domicile outside Nova Scotia. Under amendments to the Nova Scotia Succession Duty Act [2] imposing a tax on property, including all *inter vivos* gifts no matter when made, the Province claimed duty as payable on the interests of the daughters in this fund. It will be noticed that neither the donor nor the donees were domiciled in Nova Scotia, and the trust *res* (bonds, stocks, etc.) was not in Nova Scotia. Indeed Graham J. admitted that the situs of most of the securities was outside Nova Scotia.[3]

Such a situation seems to call for a determination of the nature of the interest of a *cestui que trust*. If the *cestui* has a "property" or real interest in the subject matter of the trust, it would appear that there was nothing in Nova Scotia that could be taxed. Even on the view that a cestui's interest is a mere personal right of action against the trustee, if the trustee is resident out of the province, the principle that a chose in action is situate where the debtor resides would appear to make Quebec the situs of the property interest. In the present case the Montreal trust company had a branch office in Nova Scotia, and the trust agreement expressly provided that "matters . . . . . respecting . . . . . administration . . . . . and enforcement of the trusts . . . . . shall be deemed to be . . . . . performed within the Province of Nova Scotia, and shall be altogether within the jurisdiction of the Supreme Court of Nova Scotia". In view of this fact, as the *cestuis que trust* had a personal right of action to compel the trustees *in Nova Scotia* to administer for their benefit, it seems accurate to say, as Graham J. did, that "a trust fund is a chose in action," and the deceased (and the

[1] [1937] 3 D.L.R. 673.
[2] R.S.N.S. 1923, c. 18 as amended by 1936, N.S. Statutes, c. 13.
[3] P. 684.

trustees) had clearly made it a Nova Scotian chose in action. Hence there was an interest situated in Nova Scotia.

Such a finding, however, would seem to preclude a tax on property as such in any other province. Graham J., in the principal case,[4] mentioned the possibility of the deceased having exposed this trust fund to a double tax on property. It is not only conceivable but highly probable that the province in which the actual situs of the trust property is located would impose a tax on that property. As, however, "property, whether movable or immovable can, for the purpose of determining situs as among the different Provinces of Canada in relation to the incidence of a tax imposed by a Provincial law upon *property* transmitted owing to death, have only one local situation",[5] it would seem to be impossible to impose a tax *on property* in both jurisdictions. In order to solve this problem it would seem that a definite choice must be made by the courts between the conflicting views as to the nature of a *cestui's* interest.

Whether a *cestui* can be said to have a real as opposed to a personal right has long been a moot problem among theoretical writers. The problem has not been rendered easier of solution by the decisions and differences of opinion manifested in the cases of *Baker* v. *Archer-Shee*[6] and *Archer-Shee* v. *Garland*.[7] The traditional view of English law is undoubtedly that expressed in the dissenting judgments of Lords Sumner and Blanesburgh in *Baker* v. *Archer-Shee* to the effect that a beneficiary's interest in a trust fund is a mere personal right of action against the trustee. The majority decision, however, countenanced the notion that the beneficiaries had an actual interest in the trust *res* held by the trustee.[8]

It is, of course, well established that neither an individual nor a legislature can change the actual situs of property for taxation purposes. Does the decision of the Nova Scotia court permit the parties to change the *real* nature of a *cestui's* interest, or is the true nature of that interest a mere chose in action? As there was situate in Quebec bonds, etc., which the deceased had actually parted with by way of gifts in his lifetime, it is submitted that the courts might very well impose a tax on that

[4] P. 683.
[5] Duff C.J.C. in *The King* v. *National Trust Company*, [1933] 4 D.L.R. at p. 467.
[6] [1927] A.C. 844.
[7] [1931] A.C. 212. See Hanbury, *A Periodical Menace to Equitable Principles*, 44 L.Q.R. 471, 472.
[8] See Hanbury *op. cit.*, KEETON, TRUSTS, pp. 308 *ff*; HANBURY, EQUITY, 2nd ed., pp. 53 *ff*.

property without considering the questions raised. As, however, the rate on a property tax of this nature is regulated by the relationship, if any, of the beneficiaries or donees to the donor, it would seem impossible to ignore the question of the donees' rights in that property. Property involves ownership. The beneficiaries of a trust either own, in equity, the trust property or they do not. If they do, the property tax seems properly imposed by the province in which the trust property has its situs. If they do not, the actual situs of the trust property would seem immaterial. The deceased in the latter case would have given in his lifetime a mere chose in action and nothing more. It seems clear, however, that he has given more than a chose in action, because his estate has lost the actual bonds and stock. The realities of the situation would indicate that the province where the bonds and shares are situate can tax, and if this be so, then it would appear impossible to support the decision of the Nova Scotia court as a property tax unless there are two different properties: (1) the actual securities situate in Quebec, and (2) the right of action against trustees in Nova Scotia. The subject still awaits further elucidation.

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