H. C. OF A. 1908.

BURTON v. PRESIDENT, &C., OF THE SHIRE OF BAIRNSDALE.

Higgins J.

law that requires any serious discussion, it should be set down for argument: *Hubbuck* v. *Wilkinson* (1). The pleading must be "obviously frivolous or vexatious, or obviously unsustainable," if it is to be struck out (per *Lindley* L.J. in *Attorney-General of the Duchy of Lancaster* v. *London and North Western Railway Co.* (2)). The pleading must be "so clearly frivolous that to put it forward would be an abuse of the process of the Court": *Young* v. *Holloway* (3). I think it would serve no purpose for me to add to what has been already said by my colleagues on the other points argued.

Appeal allowed. Order appealed from discharged. Parties to abide their own costs of all proceedings.

Solicitors, for the appellant, *Secomb & Woodfull* for *C. H. Becher*, Sale.

Solicitors, for the respondents, *Hughes & Permezel* for *C. C. Greene & Son*, Bairnsdale.

B. L.

[HIGH COURT OF AUSTRALIA.]

THE ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES . } APPELLANT;

AND

H. C. OF A. 1908.

ADAMS AND OTHERS . . . . RESPONDENTS.

SYDNEY, *Aug.* 12, 13, 14, 17, 18, 27.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Will, construction of—Gift for charitable purposes—"Charitable benevolent or philanthropic institutions"—Power in trustees to apply to non-charitable purposes.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

(1) (1899) 1 Q.B., 86.

(2) (1892) 3 Ch., 274, at p. 277.

(3) (1895) P., 87, at p. 90.

Gifts of certain funds by a testator to trustees with absolute and uncontrolled discretion to apply them, either wholly or as to such part or parts of them as the trustees should think fit, between and among such "charitable benevolent or philanthropic institutions," and such persons "to whom a gift would be an assistance and benefit," and such of the "poor needy and suffering" and such "person or persons for the time being in needy or straitened circumstances" as the trustees should think deserving of assistance, and in making gifts to funds raised for the relief of the sick and afflicted, with a "free and unfettered hand" in the distribution thereof, and in endowing hospitals or buildings "to be used for charitable benevolent or philanthropic purposes," and in aiding or assisting any person or persons whatsoever to whom in the opinion of the trustees aid or assistance "would be a benefit and advantage in this life:"

Held, void for uncertainty, inasmuch as the trustees had power to apply the funds wholly or in part at their discretion to any of the purposes mentioned, some of which were not charitable.

Held, also that the repeated reference by the testator throughout the will to the "trusts in favour of charities contained in the will" was not a sufficiently strong indication of a general charitable intention to restrict the clear words of the gift in question to charitable purposes only.

Decision of *Street* J. affirmed.

APPEAL from a decision of *Street* J. on an originating summons for the determination of questions arising upon the construction of a will.

The testator, George Adams, by his will gave and devised the whole of his real and personal estate, with immaterial exceptions, to certain of the respondents, his trustees, subject to the trusts, directions and provisions contained in the will. He then proceeded to confer upon his trustees the fullest power to carry on his various businesses, and provided for numerous specific gifts out of the profits arising therefrom. He then made certain provisions as to which the question for decision in this appeal arose. The first, lettered "Q" for purposes of reference, was as follows:—"I direct my trustees to stand possessed" of a certain portion of the profits of the businesses mentioned, as well as of other funds "upon trust in their absolute and uncontrolled discretion as fully in all respects as if they were the absolute owners thereof to pay and distribute from time to time such part or parts of the aforesaid" funds "as my trustees shall think fit to between and amongst such charitable, benevolent or philan-

H. C. OF A. 1908.

ATTORNEY-GENERAL FOR N.S.W. v. ADAMS.

thropic institutions for the time being existing in each of the States of the Commonwealth of Australia and the Colony of New Zealand and such person or persons for the time being in any of the said States and Colony to whom a gift would be an assistance and benefit and such of the individual poor needy and suffering of such States and Colony and such other person or persons for the time being in needy or straitened circumstances as my trustees shall consider deserving of support and assistance, and in making gifts and donations to any fund for the time being being raised for the good of any cause which has for its object the amelioration of the lot of the unfortunate sick afflicted wounded or suffering. It being my wish that my trustees shall have an absolute free and unfettered hand in the distribution of the aforesaid charities gifts and donations and notwithstanding anything hereinafter contained I expressly authorize and empower my trustees for the purpose of perpetuating my name in connection with those charities and charitable benevolent and philanthropic institutions which I have endeavoured to assist and support during my lifetime with and out of the aforesaid" funds "or of any part or parts thereof respectively to build or assist in building or to endow or to assist in endowing in my name in all or any of the said States and New Zealand any hospital or building to be used or used for charitable benevolent or philanthropic purposes or a wing or other addition to any such hospital or building already in existence . . . and for all or any of the purposes aforesaid to exercise the full powers of owners as fully and effectually as I could do if living and personally acting therein and I declare that my trustees in erecting any such building or making any such endowment as aforesaid may vest such building or moneys in the names of the trustees or managing officers for the time being of every such hospital or building as aforesaid or may themselves appoint special and separate sets of trustees for the purpose and I declare that the receipt of the treasurer secretary or other responsible officer of any such charitable benevolent or philanthropic institution or of any such hospital or building as aforesaid shall be a good and sufficient release and discharge to my trustees for all moneys paid and distributed by them under all or any of the trusts for charities hereinbefore contained but that it shall

not be incumbent upon my trustees to obtain or keep receipts for any other moneys paid or distributed by them under the same trusts." Further on in a clause lettered "Z" the testator directed his trustees to stand possessed of certain other portions of the net profits "upon trust to accumulate the same, but without being bound to invest the same or any part thereof and from time to time with the full and absolute powers of owners thereof to use such accumulations or any part or parts thereof" for certain purposes, amongst which was "in aiding or assisting any person or persons whatsoever to whom in the opinion of my trustees aid or assistance at the particular time would be a benefit and advantage in this life." Then followed a clause "AA" "and in aiding or assisting any one or more of the persons institutions causes or funds that my trustees are directed to assist under trusts in favour of charities hereinbefore more fully set forth." Then followed "BB," "And as I am of opinion that it is frequently desirable that the name of the person or persons to be aided or assisted under the last preceding trust as well as under the said trusts in favour of charities should not be disclosed I hereby and again declare that it shall not be incumbent upon my trustees to obtain or keep any receipts for the moneys distributed under the lastly preceding trusts and I further declare that my trustees shall not be liable in any way to account to any person or persons whomsoever whether interested under this my will or not for all or any of the aforesaid moneys, and that whether they are used for the furtherance of the said business or for such aid or assistance as aforesaid." In several other passages in the will the testator directed his trustees to stand possessed of certain funds arising from the profits of particular businesses, lapsed legacies, or unapplied portions of incomes, "upon and subject to the trusts directions and provisions hereinafter (or hereinbefore) contained in favour of charities."

The trustees took out an originating summons for the determination of the following, amongst other questions, whether the charitable trusts or the trusts in favour of charities or for charitable, benevolent or philanthropic purposes or institutions contained in the will are, or are any of them, void for uncertainty or otherwise.

H. C. OF A. 1908.

ATTORNEY-GENERAL FOR N.S.W. v. ADAMS.

Street J., before whom the questions were argued, held that the gift was not a valid gift to charities, as it was too uncertain, and he answered the question accordingly.

From this decision the Attorney-General for New South Wales now appealed.

Several other appeals as to other questions that were involved in the originating summons were instituted by persons claiming under the will, but were withdrawn after the judgment in the present appeal.

Pilcher K.C. and *S. A. Thompson*, for the appellant. In order to decide whether the trusts are valid charitable trusts or not, the Court must consider not only the words of the particular gifts, but the general effect of the context. Even if some expressions in the particular trusts are wide enough to include objects which do not come within the legal definition of charities if those words stood alone, yet, if there is a general charitable intention expressed in the will, sufficiently strong to override defects in the particular gifts, the Court should give effect to that intention by restricting the gifts to charities properly so called, if the words of the gifts are capable of such a meaning. In this will there is a strong general indication of charitable intention, as shown, for instance, in the frequent reference to the "trusts in favour of charities" contained in the will. Clearly the testator intended his gifts to be gifts to charities, and the words of the gifts in question, though possibly in some cases wide enough to include purposes not strictly charitable, are certainly all capable of being applied to charitable purposes, and some of them include only purposes strictly charitable. The Court therefore should read the gifts in "Q," "Z," and "AA" as restricted to charitable purposes. [They referred to *Moule* v. *The Attorney-General for Victoria* (1); *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (2); *Morice* v. *Bishop of Durham* (3); *In re Macduff*; *Macduff* v. *Macduff* (4); *Weir* v. *Crum-Brown* (5); *In re Freeman*; *Shilton* v. *Freeman* (6); *Bruce* v. *Deer*

(1) 20 V.L.R., 314.
(2) (1891) A.C., 531.
(3) 9 Ves., 399; 10 Ves., 522, at p. 532.
(4) (1896) 2 Ch., 451.
(5) (1908) A.C., 162.
(6) (1908) 1 Ch., 720.

Presbytery (1); *Whicker* v. *Hume* (2); *In re Best*; *Jarvis* v. *Birmingham Corporation* (3); *In re Sutton*; *Stone* v. *Attorney-General* (4); *Amer. & Eng. Encyc. of Law*, 2nd ed., vol. v., p. 899; *Nash* v. *Morley* (5); *Hunter* v. *Attorney-General* (6); *In re Douglas*; *Obert* v. *Barrow* (7); *Salusbury* v. *Denton* (8); *Saltonstall* v. *Sanders* (9); *Chamberlain* v. *Stearns* (10); *Suter* v. *Hilliard* (11); *Jones* v. *Habersham* (12); *Tudor, Charitable Trusts*, 4th ed., p. 46.] As regards the direction to endow and assist institutions which the testator had assisted during his lifetime, the affidavit stating what the latter institutions were should be read in connection with the will.

[GRIFFITH C.J.—That cannot affect the construction of the will. The testator has not directed the trustees to endow or assist only the particular institutions which he had assisted in his lifetime.]

Generally the will only deals with the relief of poverty. The Court without reading anything into the will can limit the expressions used by the testator to such purposes as are charitable, and, *ut res magis valeat quam pereat*, will if possible adopt a construction which will made the gifts valid.

[ISAACS J. referred to *In re Allen*; *Hargreaves* v. *Taylor* (13); *In re Darling*; *Farquhar* v. *Darling* (14).

HIGGINS J. referred to *Wilson* v. *Attorney-General for Victoria* (15); *Williams* v. *Kershaw* (16).]

Knox K.C. (*Maughan* with him), for respondent Adams, a trustee and next of kin. The question is whether under the will the trustees have power to apply the funds in question to purposes which are not charitable; and if they have that power, the gift is bad: *In re Macduff*; *Macduff* v. *Macduff* (17). The test is whether if a trustee applied some part of the fund to a non-charitable purpose he would be guilty of a breach of trust: *In re Sidney*; *Hingeston* v. *Sidney* (18); *Attorney-General for New*

(1) L.R. 1 H.L. Sc., 96.
(2) 7 H.L.C., 124.
(3) (1904) 2 Ch., 354.
(4) 28 Ch. D., 464.
(5) 5 Beav., 177.
(6) (1899) A.C., 309.
(7) 35 Ch. D., 472.
(8) 3 Kay & J., 529.
(9) 11 Allen (Mass.), 446.
(10) 111 Mass., 267.
(11) 132 Mass., 412.
(12) 107 U.S., 174.
(13) (1905) 2 Ch., 400.
(14) (1896) 1 Ch., 50.
(15) 8 V.L.R. (E.), 215.
(16) 5 C. & F., 111.
(17) (1896) 2 Ch., 451, at p. 470.
(18) (1908) 1 Ch., 488.

H. C. OF A. 1908.

ATTORNEY-GENERAL FOR N.S.W. v. ADAMS.

South Wales v. *Metcalfe* (1). Under the words of this gift the trustees have full power given in the widest terms to apply the fund to any of the purposes mentioned, wholly or in part, and those purposes include some which are not charitable in the legal sense. A charitable intention must be expressed in order to be effectuated. An inferred intention cannot control clear words: *Hunter* v. *Attorney-General* (2). Benevolent purposes are not necessarily charitable: *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (3). There is no doubt about the meaning of the words of the gift. The objects are indicated clearly enough, but the discretion is too wide, and there is nothing in the context to control it within the limits of charitable purposes. The use of the word "charities" in other passages cannot make charitable objects which are not charitable. Moreover there is no certainty as to the portion which is to be devoted to the objects mentioned. The trustees might devote all or none of the fund to any of the objects. The first class of objects in "Q" includes institutions which may not be strictly charitable, as the enumeration is disjunctive, the second clearly includes persons who are not subjects of charity, the third is not a gift to general charity, but to individuals, the fourth is charitable, and the provision for endowment of institutions is open to the same objection as the first class, "Z" is clearly not charitable, and "AA" merely refers back to those which precede it. The Court will not follow the American authorities on a question of this kind if they are in conflict with English decisions.

[ISAACS J. referred to *Boyle* v. *Boyle* (4).]

As to costs, if the appeal fails the appellant should not be allowed costs out of the estate.

Gordon K.C. (*Harvey* with him), for one of the trustees and other respondents, referred to *In re Davidson*; *Minty* v. *Bourne* (5); *Ommanney* v. *Butcher* (6); *Tudor, Charitable Trusts*, 4th ed., p. 42; *In re Freeman*; *Shilton* v. *Freeman* (7); *Williams* v. *Kershaw* (8); *Blair* v. *Duncan* (9); *In re Nottage*; *Jones* v. *Palmer*

(1) 1 C.L.R., 421.
(2) (1899) A.C., 309, at pp. 315, 319.
(3) (1891) A.C., 531, at pp. 564, 565.
(4) I.R. 11 Eq., 433.
(5) 24 T.L.R., 760.
(6) Turn. & R., 260.
(7) (1908) 1 Ch., 720.
(8) 5 C. & F., 111.
(9) (1902) A.C., 37.

(1); *In re Good*; *Harington* v. *Watts* (2); *In re Sanderson's Trust* (3).

[ISAACS J. referred to *Cunnack* v. *Edwards* (4); *Gisborne* v. *Gisborne* (5).]

Cullen K.C. and *Rich*, for two of the trustees, respondents.

R. K. Manning and *Peden*, for other respondents.

Pilcher K.C., in reply. The whole fund is given to the objects mentioned. The expressions "part or parts" and "from time to time" refer only to the distribution, that is to say, the proportions are left to the trustees' discretion as well as the time for making the individual donations. The Court will lean towards the construction in favour of charities. [He referred to *Kendall* v. *Granger* (6); *Whicker* v. *Hume* (7).] None of the gifts are to private charities. The fact that in the result individuals are benefited cannot be an objection, as that must always be the case, and the discretion as to the recipients must be exercised by some person. Here the trustees are to exercise it. The extensiveness of the benefit makes the gift really public. [He referred to *Tudor, Charitable Trusts*, 4th ed., p. 37; *Nash* v. *Morley* (8); *Weir* v. *Crum-Brown* (9); *In re Douglas*; *Obert* v. *Barrow* (10); *In re Macduff*; *Macduff* v. *Macduff* (11); *In re White*; *White* v. *White* (12); *Oxford English Dictionary* (*Murray*), tit. "Needy."

Cur. adv. vult.

August 28.

GRIFFITH C.J. This is an appeal by the Attorney-General for New South Wales from so much of a judgment of *Street* J. in the Supreme Court of New South Wales as declares that the whole of the charitable trusts and trusts in favour of charities or for charitable, benevolent or philanthropic purposes or institutions contained in the will of George Adams deceased are void for

(1) (1895) 2 Ch., 649.
(2) (1905) 2 Ch., 60.
(3) 3 Kay & J., 497.
(4) (1896) 2 Ch., 679.
(5) 2 App. Cas., 300.
(6) 5 Beav., 300.
(7) 7 H.L.C., 124, at p. 153.
(8) 5 Beav., 177, at p. 183.
(9) (1908) A.C., 162.
(10) 35 Ch. D., 472, at p. 487.
(11) (1896) 2 Ch., 451.
(12) (1893) 2 Ch., 41.

H. C. OF A. 1908.

ATTORNEY-GENERAL FOR N.S.W. v. ADAMS.

Griffith C.J.

uncertainty. The law applicable to the case has been settled now for more than 100 years. I will refer to two passages in comparatively recent judgments in which it is laid down in very plain terms. The first is in the judgment of *Rigby* L.J. in *In re Macduff*; *Macduff* v. *Macduff* (1):—"What principles do we find that are applicable to the present case? First of all, a bequest upon trust must be sufficiently certain to enable the Court to superintend and give effect to the trust according to its terms. That is a general principle that applies to all bequests, whether charitable or not; they must be sufficiently definite to enable the Court to carry the trusts into effect. Then how do charity cases differ from general cases? As it appears to me, in this respect only—that when you get the idea of charity properly expressed in a will you have a standard to go by, and one that has been adopted now for centuries—that is to say, a standard afforded by the preamble to the *Statute of Elizabeth*, which deals with certains things specifically as instances of existing charities, and from which by analogy you can deduce that certain other matters are also to be treated as charitable. But before you can apply that rule you must find the idea of charity sufficiently expressed in the will, and it is not a good charitable gift if there is any alternative (I am now talking of substantial matters) allowed to trustees as to whether the purposes to which they apply the property which is devised to them are to be charitable or something else. If there is an alternative, the general rule comes in, that this is a matter too indefinite for the Court to give effect to it." The other is a passage in the judgment of *Buckley* L.J. in *In re Sidney*; *Hingeston* v. *Sidney* (2), delivered in February last:—"The question is whether under this will the trustee is bound to apply these funds to charitable purposes. If consistently with the will he could apply any part of it to purposes which are not charitable in the sense in which the word is understood in this Court, the gift must fail as being too indefinite for the Court to execute." That being the principle, the question that remains is to apply it to the circumstances of the particular case. That is, we must read the will to see whether the testator has authorized his

(1) (1896) 2 Ch., 451, at p. 469.

(2) (1908) 1 Ch., 488, at p. 492.

trustees to apply the money to purposes which are not charitable in the sense in which that term is understood in a Court of law. As I had occasion to say in a recent case, in construing a will the first thing to do is to ascertain the meaning of the testator, regardless of the consequences. What was his intention? What power did he intend to confer upon his trustees?

The principal material words of the will are contained in a clause which has been called "Q" for convenience of reference. By that clause the testator gave various funds consisting of the profits of a business and other property to his trustees "upon trust in their absolute and uncontrolled discretion as fully in all respects as if they were the absolute owners thereof to pay and distribute from time to time such part or parts of the aforesaid" funds "as my trustees shall think fit to between and amongst such charitable benevolent or philanthropic institutions for the time being existing in each of the said States of the Commonwealth of Australia and the Colony of New Zealand, and such person or persons for the time being in any of the said States and Colony and such other person or persons for the time being in needy or straitened circumstances as my trustees shall think deserving of support and assistance, and in making gifts and donations to any fund for the time being being raised for the good of any cause which has for its object the amelioration of the lot of the unfortunate sick afflicted wounded or suffering. It being my wish that my trustees shall have an absolute free and unfettered hand in the distribution of the aforesaid charities gifts and donations." He then authorized the same funds to be spent by the trustees for some other purposes as to which no question arises, as they are assumed to be purely charitable purposes, and then he declared that, with respect to certain gifts to institutions, the receipt of the treasurer, secretary, or other responsible officer of the charitable institution benefited should be sufficient acknowledgment and discharge of the trustees, and that it should not be incumbent upon the trustees to obtain or keep receipts for any other moneys paid or distributed by them under the same trusts.

Another clause in the will which contains a gift for charitable purpose is that which has been called "Z," and which refers to

H. C. OF A. 1908.

ATTORNEY-GENERAL FOR N.S.W. v. ADAMS.

Griffith C.J.

another fund to be raised from property in Tasmania. [His Honor then read the clause and continued.] And then he adds in a clause lettered "BB": [His Honor read the clause and continued.] The question then is whether under these trusts, applying the directions of the testator as expressed in that language, the trustees could apply any part of the fund to purposes that are not charitable in the sense in which the word is understood in a Court of law. A great number of the purposes, no doubt, are charitable, but the difficulty arises with respect to two or three words to which I will now call attention. The first gift, called "Q," is to four different objects, first, such charitable, benevolent or philanthropic institutions, and so on, as the trustees shall think deserving of support and assistance. I stop there. The words are disjunctive, "charitable, benevolent or philanthropic institutions." Now it was held more than 100 years ago that a gift to benevolent purposes was too vague and could not be supported as a charitable gift. And in *In re Macduff*; *Macduff* v. *Macduff* (1) it was held that a gift for philanthropic purposes was too vague and could not be supported. Under the clear words of this will the trustees could spend the whole of the money upon what they considered benevolent purposes or upon gifts to philanthropic institutions or benevolent institutions, neither of which is a charitable object in the strict legal sense of the term. They could spend all the money upon purely charitable purposes, or they could spend all or some of it upon the others, and no one could call them to account for doing so. An attempt was made to argue that the word "benevolent" might with the context afforded by the directions of the testator in the rest of the will be read as limited to objects that are purely charitable. But, much as I would like to accept that argument, I feel myself bound by authority to say that it cannot be accepted. I have tried to distinguish between philanthropic institutions and philanthropic purposes, but I do not think any such distinction can be drawn. Upon that ground alone, then, it would seem that the gift must fail, that is, from the use of these expressions in the disjunctive. Another of the gifts, in the second clause, is "to such person or persons for the time being

(1) (1896) 2 Ch., 451.

in any of the said States and Colony to whom a gift would be of assistance and benefit, and such of the individual poor needy and suffering of such States and Colony and such other person or persons for the time being in needy or straitened circumstances as my trustees shall consider deserving of support and assistance." I think that these words, coupled with the other words that I have read—particularly the words expressive of a wish that the trustees should have a free and unfettered hand in making donations, and that they are not to be liable to account or bound to ask for receipts from anyone—disclose that the testator intended to give them an absolute discretion to dispose of any part of the fund to private persons whether in distress or not; that is, a gift to distribute at their discretion amongst individuals. In *Ommanney* v. *Butcher* (1) it was held that a gift to private charities was too vague. That case turned upon the terms of the particular will. The words "private charities" were held by the Master of the Rolls to mean a gift among such individuals at large as the trustees should select; and, construed in that sense, it was bad, though it was not necessarily bad because it was called a gift to private charities, as appears from an Irish case: *Boyle* v. *Boyle* (2). But in this case it is quite clear that the testator intended to give his trustees power to dispose of the fund for the benefit of any private persons whatever in their discretion. That is plainer still in the case of the other charitable gift in clause "Z," which is given entirely for that purpose. It is to be applied "in aiding or assisting any person or persons whatsoever to whom in the opinion of my trustees aid or assistance at the particular time would be a benefit and advantage in this life." A most laudable purpose, no doubt, but not charitable in the sense in which the term is used in a Court of law.

For all these reasons I am compelled to come to the conclusion that the gift must fail and that the decision appealed from should be affirmed.

It was contended that the context of the will may control any particular words, however plain they may appear at first sight. I quite agree, and I have looked to see whether anything can be found in the context to limit the meaning of the

(1) Turn. & R., 260. (2) I.R. 11 Eq., 433.

H. C. OF A. 1908.

ATTORNEY-GENERAL FOR N.S.W. v. ADAMS.

Griffith C.J.

general words, so as to confine the powers of the trustees within the bounds of charitable purposes properly so called. But the only context that can possibly be suggested as having that effect is the use of the word "charitable," several times repeated, in the will. In several other parts of the will it is directed that any surplus that remains over after satisfying a particular object is to be given to the trustees upon and subject to the trusts, directions, and provisions thereinafter contained "in favour of charities" or "for the benefit of charities," or other similar expressions are used. But I cannot regard this use of the words "charitable" and "charities" as altering the meaning of the plain words in the two clauses called "Q" and "Z" which I have read. They seem to be used simply as a word of reference to the enumeration in clause "Q" of what the testator considered to be charities. When he spoke of charities in other parts of the will it was simply to make reference to certain purposes which he understood to be included within the term.

Another difficulty in the appellant's way was suggested. The direction is to apply in charities from time to time such part or parts of the fund as the trustees think fit, and it was contended that that was too vague, because it leaves the possibly undisposed of residue not subject to any trust, so that it would be impossible to say how much of the fund was impressed with a charitable trust and how much was not. If there were no other difficulty in the case, I should like to consider whether there might not be some way of getting over that one. But for the other reasons I have given I think the gift cannot be supported. I think that the Attorney-General should neither pay nor receive costs.

BARTON J. This matter turns almost wholly on the true construction of the clause marked "Q." It has seemed to me, from the beginning of the case, that this will has placed the trustees in the position of having a large fund which they may apply if they please between charitable and other institutions. It has been the endeavour of the testator—I think the learned Judge in the Court below put it as clearly as it could be put—to extend his benevolence to the utmost possible limits, and with this result, that he has gone beyond the purposes which the law recognizes

as charitable. The cases are numerous in which, the words "charitable institutions" or "charitable purposes" being separated by a disjunctive from other purposes benevolent or philanthropic, the Courts have read those purposes as distinct, and bequests to trustees with entire discretion to apply the fund to any of the purposes or partly to one and partly to another, or to apply the whole to one of the purposes, that not being a charitable purpose, have failed, the rule being that a trust, to be charitable, must bind the trustee to apply the fund to no purpose except that which is a charity in the eye of the law. Now the words giving the trustees power to distribute "between and amongst such charitable benevolent or philanthropic institutions for the time being existing in each of the States of the Commonwealth of Australia and the Colony of New Zealand"—and the words "as my trustees shall consider deserving of support and assistance" which are, I think, joined with the words I first quoted—give the trustees complete discretion to apply the fund for purposes charitable, benevolent or philanthropic, parts to each of them or all to any two or any one of them, and as that is a discretion to apply the fund to a purpose which is not charitable within the meaning of the preamble to the *Statute of Elizabeth*, and the analogous purposes which have been deduced from that Statute, such a bequest must fail.

That weakness is sufficient to end the case as far as the paragraph, for convenience called "Q," in the will is concerned; but I proceed a little further in that paragraph to point out another defect which seems to me to be fatal. That is the passage "and such person or persons for the time being in any of the said States and Colony to whom a gift would be an assistance and benefit, and such of the individual poor needy and suffering of such States and Colony and such other persons for the time being in needy or straitened circumstances as my trustees shall consider deserving of support and assistance." In that case, again, there is liberty to the trustees to use any portion of that fund to assist persons who, not being actually poor or needy, not being within the purposes of charity as ordinarily understood, are also not within the nature of the purposes included in the *Statute of Elizabeth* or those which are analogous, and *non constat*, that

H. C. OF A. 1908.

ATTORNEY-GENERAL FOR N.S.W. v. ADAMS.

Barton J.

any one of the recipients of the favour of the testator in accordance with these words would be actually poor and needy.

Then there is the third part of the trust in "Q," expressly authorizing the trustees to devote the fund to the purposes of perpetuating the testator's name in connection with those "charities and charitable and philanthropic institutions" which he had endeavoured to assist in his lifetime, to assist and support by building or assisting in building or endowing or assisting in endowing in his name any hospital or building to be used for "charitable benevolent or philanthropic purposes," &c. Upon the occurrence of the word "and" before "philanthropic institutions" in the earlier part of this section of the paragraph there has been founded an argument that that portion of the trust refers to charities and benevolent and philanthropic institutions in the conjunctive, so that, at all events, the object to which the fund is devoted in that direction is a charity both benevolent and philanthropic. But I do not think that construction applies at all. The part to which the conjunctive direction is intended to be applied is in a parenthesis, and relates to institutions assisted by the testator during his lifetime. But the discretion to apply in building or endowing and similar purposes is in the disjunctive as to the kind that may be built or endowed, and there is no necessary connection between that part of the limitation and the reference to institutions that the testator has assisted during his lifetime. Upon that, in my opinion, the bequest, however it is read, gives too wide a discretion to the trustees.

Of course the cases upon the subject of such trusts are very numerous. I will refer to a few of them. In the case of *Vezey* v. *Jamson* (1) *Sir John Leach* V.C. held, upon the words "charitable or public purposes," that no charitable trust was constituted, and that the next of kin were entitled to the fund, because there was a discretion vested in the trustees to apply the fund to purposes other than charitable. In *Ommanney* v. *Butcher* (2) the testator after making certain bequests said "in case there is any money remaining, I should wish it to be given in private charity." That was held to be bad as being too indefinite, and the fund went to the next of kin. In the case of *Williams* v. *Kershaw*

(1) 1 Sim. & St., 69.

(2) Turn. & R., 260.

(1) the words were "to and for such benevolent charitable and religious purposes as they in their discretion should think most advantageous and beneficial." That is an analogy to the cardinal portion of the trust now in question. That gift was held bad as being too indefinite, the purposes being read in the disjunctive. In *Ellis* v. *Selby* (2), a direction to distribute a sum to and for "such charitable or other purposes as they my said trustees . . . shall think fit, without being accountable to any person or persons whomsoever," was held bad as being too indefinite. In the case of *Nash* v. *Morley* (3), Lord *Langdale* M.R. held a bequest good which was to be divided "among poor pious persons male or female, old or infirm, as they see fit, not omitting large and sick families if of good character," for the reason that he held that the whole trust was coloured by the use of the word poor, which ran right through it and applied to every object of it, the absence of which feature I have remarked with regard to the portion of this will before us. In *Kendall* v. *Granger* (4) Lord *Langdale* M.R. held that a gift in the words "to be by them applied for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility" was void, inasmuch as every purpose of general utility was not necessarily charitable, though some of them are.

In *In re Douglas*; *Obert* v. *Barrow* (5) a bequest that would otherwise have been bad was held to be good because of the context, and that is a case upon which Mr. *Pilcher* strongly relied in his argument. The words were to "pay and distribute all the residue of that portion of my said personal estate which may by law be appropriated by will for such purposes among such charities, societies and institutions (including or excluding those hereinbefore mentioned as may be preferred) and in such shares or proportions as the said Earl of Shaftesbury shall by writing nominate," and the judgment of *Kay* J. (6) is an instance of resort to context controlling the apparent meaning of the words:—"In this case the Court must first determine the true construction of this will, and then, if necessary, apply the rules of law to it."

(1) 5 Cl. & F., 111 (*n*).
(2) 1 My. & C., 286.
(3) 5 Beav., 177.
(4) 5 Beav., 300.
(5) 35 Ch. D., 472.
(6) 35 Ch. D., 472, at p. 477.

H. C. OF A. 1908.

ATTORNEY-GENERAL FOR N.S.W. v. ADAMS.

Barton J.

He then read the clause and continued :—"*Primâ facie* the meaning of charities, societies, and institutions would seem to be charities, and then societies and institutions which might or might not be charities; because the will does not say charitable societies and institutions, but charities, societies, and institutions. Every one knows there are many societies and institutions which are not, properly speaking, charities; which are societies and institutions for purposes other than those which the law considers charitable. But of course I must look to the context of this will, and the immediate context is this." His Lordship then examined the context, and arguing from its terms, he deduced that the context so coloured the expression "charities, societies and institutions" as to show that the testatrix meant that the societies and institutions to which the personalty might be applied must themselves be such as the law recognizes as charitable bodies in construing gifts of this kind. That is not so with the word "charities" as used by the testator in the various gifts which precede and follow that marked "Q" in the copy of the will set out in the transcript.

Counsel for the Attorney-General laboured strenuously to show that the testator had there so used the word that in the connection in which it is found it became apparent that he had in his mind only charities in the legal sense when he spoke of benevolent and philanthropic institutions. I do not think there is here a context strong enough to control the clear meaning of the words used in the operative part of the gift "Q." There the testator showed his ability to distinguish between these classes of "institutions," only one of the classes being in truth charitable in the legal sense. In the separate parts of the will on which the Attorney-General relies there is nothing to show that he ever lost this distinctive perception, although he may possibly have imagined that each class of institution was in law charitable. Probably that is why in the separate parts he compendiously termed them all charities. But that would only go to show that he did not know how to distinguish institutions which in that sense were charitable from others that were not so. It would thus account for his mistakes, but it would not give efficacy to the trust. It is not to be compared with the strong context that

gave rise to the decision in *In re Douglas*; *Obert* v. *Barrow* (1). When that case came before the Court of Appeal *Lindley* L.J. said (2):—"When we come to look at the frame of the will, when we come to observe the care taken by this testatrix to divide the personal estate into that which can be given to charitable purposes and that which cannot, and when we look to the expressions 'charitable legacies' and 'charitable purposes,' and to the marshalling clause, it appears to me that the Court is almost forced to the conclusion that what she means by 'charities, societies and institutions' are such as can take only pure personal estate. It follows that what she means by 'charities, societies and institutions' are charitable societies and charitable institutions as well as what she calls charities. I do not see that there is any real doubt about that." Then his Lordship is reported to have said (3):—"It has been argued on the one side that there is such uncertainty in this gift as to bring the case within *Morice* v. *Bishop of Durham* (4), and on the other hand it has been contended that when you understand the testatrix to mean by charities, societies, and institutions, nothing but charitable societies and charitable institutions, the mere addition of one or two institutions which are named which may not be charitable does not introduce such an element of uncertainty as to make that part of her will void. It appears to me the contention of the respondents upon that point is right, and the passage in *Jarman on Wills*, 4th ed., vol. I., p. 217, to which we were referred by the Attorney-General, and the case of *Attorney-General* v. *Doyley* (5), which is there referred to, carry them through." These passages show that *In re Douglas*; *Obert* v. *Barrow* (1) was distinguished from the leading case of *Morice* v. *Bishop of Durham* (4) on grounds which have no application in the construction of the will of George Adams.

The words "charitable and deserving objects" were the point of dispute in *In re Sutton*; *Stone* v. *Attorney-General* (6), where *Pearson* J. held the bequest good, but that was because upon the whole scope and context of the will and upon the use of the

(1) 35 Ch. D., 472.
(2) 35 Ch. D., 472, at p. 486.
(3) 35 Ch. D., 472, at p. 487.
(4) 10 Ves., 522.
(5) 2 Eq. Ca. Abr., 194; 7 Ves., 58 (*n*).
(6) 28 Ch. D., 464.

H. C. OF A. 1908.

ATTORNEY-GENERAL FOR N.S.W. v. ADAMS.

Barton J.

conjunctive "and" he came to the conclusion that charitable and deserving objects meant in that instance charitable objects which were at the same time deserving. Then in the case of *In re Macduff*; *Macduff* v. *Macduff* (1) the words were "for some one or more purposes, charitable, philanthropic or ———," and there the testator left a blank. First it was held that the blank did not vitiate the gift, but that it must be read as for "purposes charitable or philanthropic." Using the words in that order it was found that the testator had made his bequest void for uncertainty, since there were purposes other than charitable, namely, philanthropic, upon which the Court could not exercise its superintending power so as to carry out the trust. In the case of *In re Sidney*; *Hingeston* v. *Sidney* (2), in the Court of Appeal, there was a bequest "for such charitable uses or for such emigration uses, or partly for such charitable uses and partly for such emigration uses as they shall . . . think fit." That was held void for uncertainty, because there was an additional purpose which was not shown to be charitable, separated from the charitable purpose, and in such a manner that the fund could be applied to either. In the same year we also have the case of *In re Freeman*; *Shilton* v. *Freeman* (3), where the testator, after making certain bequests, gave the residue to the treasurer of the Charity Organization Society to invest and to retain one-tenth of the annual income for the society and to "pay the residue of such annual income to such other society or societies as shall, in the opinion of the governing body of the Charity Organisation Society, be most in need of help." That is particularly like the trusts labelled "Z" in this case. It was there held that this gift of the nine-tenths residue of the annual income was not a valid charitable bequest, and *Fletcher Moulton* L.J., in concurring with *Cozens-Hardy* M.R., said (4):— "If he could legally have accomplished his object I think it would have been a very wise plan. Unfortunately such a limitation is far too wide to be supported as a charitable gift; it is too uncertain. The Charity Organization Society might under the powers so given have used this money for many

(1) (1896) 2 Ch., 451.
(2) (1908) 1 Ch., 488.
(3) (1908) 1 Ch., 720.
(4) (1908) 1 Ch., 720, at p. 724.

purposes of public utility, and in assisting many worthy societies whose purposes could not be called charitable in a legal sense."

The cases then establish this position, that where there is a limitation to charity or charitable purposes, and there are other purposes included in the gift which upon a fair construction of the will are segregated from charities, purposes not strictly charitable though probably beneficial, where the trustees have a discretion to apply the fund to those purposes which are not within the legal acceptation of charities, in such cases there is nothing upon which the Court can seize to administer, nothing upon which it can found a scheme or plan, and the trusts fail. *Sir Thomas Plumer* M.R. in *Ommanney* v. *Butcher* (1) thus summarized the case of *Morice* v. *Bishop of Durham* (2):—The question came to be considered, whether the purpose was sufficiently definite for the Court to execute. The Court held that it was not. The fund therefore belonged to the next of kin. It did not belong to the Crown because it was not charity, it did not belong to the Court because it was not sufficiently definite for the Court to execute, and a trust having been created it devolved to the next of kin. That was the principle laid down." That is the principle to be applied here. In *Morice* v. *Bishop of Durham* (3) *Sir Wm. Grant* M.R. stated the rule thus:—"The question is not whether he" (the trustee) "may not apply it upon purposes strictly charitable, but whether he is bound so to apply it." And in *James* v. *Allen* (4), he said:—"If it" (the property) "might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute." Without burdening my observations with quotations from intervening authorities, I apply a passage from the lucid judgment of *Rigby* L.J. in *In re Macduff*; *Macduff* v. *Macduff* (5), already cited:—"First of all, a bequest upon trust must be sufficiently certain to enable the Court to superintend and give effect to the trust according to its terms. That is a general principle that applies to all bequests, whether charitable or not; they must be sufficiently definite to enable the Court to

(1) Turn. & R., 260, at p. 271.
(2) 10 Ves., 522.
(3) 9 Ves., 399, at p. 406.
(4) 3 Mer., 17, at p. 19.
(5) (1896) 2 Ch., 451, at p. 469.

H. C. OF A. 1908.

ATTORNEY-GENERAL FOR N.S.W. v. ADAMS.

Barton J.

carry the trusts into effect. Then how do charity cases differ from general cases? As it appears to me, in this respect only—that when you get the idea of charity properly expressed in a will you have a standard to go by, and one that has been adopted now for centuries—that is to say, a standard afforded by the preamble to the *Statute of Elizabeth*, which deals with certain things specifically as instances of existing charities, and from which by analogy you can deduce that certain other matters are also to be treated as charitable. But before you can apply that rule you must find the idea of charity sufficiently expressed in the will, and it is not a good charitable gift if there is any alternative (I am now talking of substantial matters) allowed to trustees as to whether the purposes to which they apply the property which is devised to them are to be charitable or something else. If there is an alternative, the general rule comes in, that this is a matter too indefinite for the Court to give effect to it." The gift then in the present case fails to answer the tests which are absolutely accepted. In the words of Lord *Cottenham* L.C. in *Ellis* v. *Selby* (1) "the discretion is not so large, as to relieve the gift from being a trust, but . . . it is too indefinite to be carried into effect, and, consequently, . . . the gift fails." As it is still a trust, and as we must now read the gift as if the testator had originally left the purposes of the trust in blank, the trust is for the next of kin. See *per Cotton* L.J. in *In re Douglas*; *Obert* v. *Barrow* (2).

What I have said renders it in my view quite unnecessary to make more specific reference to the clauses marked "Z" and "A A" respectively.

For these reasons I am of opinion that the appeal must be dismissed, and I entirely agree with the judgment pronounced by *Street* J. in the Court below.

O'CONNOR J. read the following judgment:—

This will is drawn in plain and simple language, and the testator's intention is abundantly clear on the face of it. The only question raised is whether the law will give effect to the intended disposition of his property.

There is no doubt about the general principles of law applicable

(1) 1 My. & C., 286, at p. 299. (2) 35 Ch. D., 472, at p. 483.

to a case of this kind. They are very clearly stated in the judgment of *Rigby* L.J. in *In re Macduff* (1):—

"First of all, a bequest upon trust must be sufficiently certain to enable the Court to superintend and give effect to the trust according to its terms. That is a general principle that applies to all bequests, whether charitable or not; they must be sufficiently definite to enable the Court to carry the trusts into effect. Then how do charity cases differ from general cases? As it appears to me, in this respect only—that when you get the idea of charity properly expressed in a will you have a standard to go by, and one that has been adopted now for centuries—that is to say, a standard afforded by the preamble to the *Statute of Elizabeth*, which deals with certain things specifically as instances of existing charities, and from which by analogy you can deduce that certain other matters are also to be treated as charitable. But before you can apply that rule you must find the idea of charity sufficiently expressed in the will, and it is not a good charitable gift if there is any alternative (I am now talking of substantial matters) allowed to trustees as to whether the purposes to which they apply the property which is devised to them are to be charitable or something else. If there is an alternative, the general rule comes in, that this is a matter too indefinite for the Court to give effect to it."

The latter aspect of the matter is put more concisely by Lord *Halsbury* L.C. in *Hunter* v. *Attorney-General* (2). "It is," he says, "undoubtedly the law that, where a bequest is made for charitable purposes and also for an indefinite purpose not charitable and no apportionment is made by the will, so that the whole might be applied for either purpose, the whole bequest is void, and I do not understand any of the Judges of the Court of Appeal to question that doctrine."

It has not been disputed that the bequests under consideration must fail for uncertainty unless they can be supported as bequests for charitable purposes within the meaning of the law. There can be no doubt that the testator regarded all the purposes enumerated in "Q" as charitable, and they are so in the popular sense of that word. But the Courts have for centuries restricted the class of

(1) (1896) 2 Ch., 451, at p. 469. (2) (1899) A.C., 309, at p. 315.

H. C. OF A. 1908.

ATTORNEY-GENERAL FOR N.S.W. v. ADAMS.

O'Connor J.

purposes which are to be regarded as charitable. As *Langdale* M.R. says in *Kendall* v. *Granger* (1):—"This Court has adopted a very narrow construction in deciding what is to be deemed a charitable purpose. It must be either one of those purposes denominated charitable in the *Statute of Elizabeth*, or one of such purposes as the Court construes to be charitable, by analogy to those mentioned in that Statute." Most of the purposes enumerated in "Q" are charitable in the legal sense, and it would undoubtedly be within the power of the trustees to apply the whole fund to those purposes. But that is not the test of whether the bequest is good in favour of charities. As *Langdale* M.R. says in *Nash* v. *Morley* (2):—"The question in all such cases is, whether it is not only the duty of the trustee, but a duty, the performance of which will be enforced by this Court, to apply the whole fund to purposes which are here called charitable. If there be any option in the trustee to apply the funds to purposes, which, though liberal or benevolent, are not such as are in this Court understood to be charitable, the trust cannot be executed here."

The trustees have clearly an absolute discretion to apply the whole fund to any of the purposes enumerated, and if any of those purposes may include objects that are not charitable in the legal sense the whole bequest will be void. In the view that I take of the case it is not necessary to go beyond the first of the enumerated trusts. It is to pay and distribute, &c., such part of the net profits, residuary estate and income as my trustees may think fit "between and amongst such charitable benevolent or philanthropic institutions" for the time being existing in each of the States. The conjunction "or" is here used in its ordinary sense as a disjunctive, so that the words must be read "charitable or benevolent or philanthropic." The words "benevolent" and "philanthropic" have been under the consideration of the Courts in several cases, and it must now be taken as settled that bequests for these purposes, if the natural meaning of the words is not qualified by the context, are not charitable in the legal sense.

In *Morice* v. *Bishop of Durham* (3), and on appeal (4) the

(1) 5 Beav., 300, at p. 302.
(2) 5 Beav., 177, at p. 182.
(3) 9 Ves., 400.
(4) 10 Ves., 522.

words were :—"Such objects of benevolence and liberality as (the trustee) in his own discretion shall most approve of." The bequest was held not charitable. In *In re Macduff* (1) the words were :—"For some one or more purposes, charitable, philanthropic or ———." The Court, disregarding the blank, held that the words must be read as :—"For charitable or philanthropic purposes," and decided that "philanthropic purposes" were not charitable purposes within the meaning of the law.

With regard to these cases all I need say is that the reasoning in the judgments is unanswerable and exactly applicable to the words of the bequest now under consideration. Mr. *Pilcher* urged very strenously that all the purposes enumerated in "Q" are coloured by the words "charitable," "charities" or "charitable purposes" which are used in every part of the will which refers to "Q." That would be a strong argument if the testator had not in "Q" itself furnished his own interpretation of the word "charity." It is clear from the whole context in "Q" that he has used the word "charity" in the popular and not in the legal sense. The use, therefore, of the general expressions relied on by Mr. *Pilcher* does not modify the plain intention of the testator to dispose of his property to certain definite purposes, all, no doubt, "charitable" in his meaning of the word and in the popular sense, but not all "charitable" in the sense which the law has attached to the word by a long series of decisions.

I am of opinion, therefore, that the words "benevolent or philanthropic purposes," taken in connection with the wide discretion of the trustees, render the whole bequest for charities void. Under these circumstances it becomes unnecessary to consider the other portions of "Q" to which the argument has been directed.

With regard, however, to the bequests to charities out of the Tasmanian funds specially dealt with in paragraph "Z," the same principles must be applied, and I entirely concur in the reasoning of my learned brother the Chief Justice on that part of the case, and in the conclusion at which he has arrived. The testator's scheme of disposition of his property shows a broad-minded

(1) (1896) 2 Ch., 451.

H. C. OF A. 1908.

ATTORNEY-GENERAL FOR N.S.W. v. ADAMS.

O'Connor J.

intention to benefit the poor, the sick, the suffering, and the deserving, and I regret that the law compels me to hold that it cannot legally be carried out.

I agree, therefore, that the learned Judge in the Court below rightly interpreted this will, and that the appeal must be dismissed.

ISAACS J. read the following judgment:—Apart from any qualifying circumstances, the discretion given to the trustees to select as objects of bounty "such person or persons for the time being in any of the said States and Colony to whom a gift would be an assistance and benefit" would be fatal to the validity of the whole trust in "Q." So much is admitted, and properly so.

The similar discretionary clauses as to "benevolent or philanthropic institutions," and as to buildings used for "benevolent or philanthropic purposes," would, in the absence of any provision modifying the primary meaning of these clauses, be equally destructive of the whole trust.

What is there to alter this result? It was earnestly pressed by Mr. *Pilcher* and his learned junior that the will discloses a general charitable intention. This argument was not presented in the sense in which such an expression is usually understood.

It was not said that there was a gift to charity generally and a mode of carrying it into effect pointed out, which if it failed did not disturb the general intention. In such a case the dominant intention may be effectuated, and the particular mode being merely a subsidiary consideration disregarded. The detail intended to point the way to carry out the paramount will of a testator is not to be used as a means of destroying it. But although this precise contention was not urged, so much was said about a general charitable intention that in order to do justice to the argument it is desirable to state explicitly what is meant by that expression. There are many cases of high authority in which this phase of the subject has been dealt with, such as *Moggridge* v. *Thackwell* (1), but I do not think the doctrine is anywhere more clearly stated than by *Kay* J. in *Re Taylor*; *Martin* v. *Freeman* (2). His Lordship there said:—"If upon

(1) 7 Ves., 36, at p. 83.

(2) 58 L.T., 538, at p. 543.

the whole scope and intent of the will you discern the paramount object of the testator was to benefit not a particular institution, but to effect a particular form of charity independently of any special institution or mode, then, although he may have indicated the mode in which he desires that to be carried out, you are to regard the primary paramount intention chiefly, and if the particular mode for any reason fails, the Court, if it sees a sufficient expression of a general intention of charity, will, to use the phrase familiar to us, execute that *cy-près*, that is, carry out the general paramount intention in some way as nearly as possible the same as that which the testator has particularly indicated without which his intention itself cannot be effectuated."

Now, that is what is meant by a general intention of charity. It is opposed to an intention that the property shall be held for some particular charitable purpose or purposes. The phrase, however, was used in the present case by learned counsel for the Attorney-General for New South Wales not to establish a general intention in that sense, but to give the whole trust a complexion so distinctively charitable that the particular expressions already referred to must yield their primary and extensive signification, and be limited to such objects as were charitable in the legal sense.

This amounts to a mere suggested interpretation of those expressions and was not presented for the purpose of disregarding them as mere details or suggestions in case they are not sustainable, because the testator's evident intention was to effect the particular purposes as the end not as the means, but was relied on in order to support them as lawful objects of a perpetual bounty.

The references in other parts of the will to "charities" were urged as proof of the overriding charitable intention of the testator. But these references do not purport to substantively create the trust, or do more than direct the reader of the will to "Q," where the testator's real intention is embodied, and the whole question then is how far should the clauses in question be modified by construction after calling in aid the rest of the will so as to reduce their generality to purely charitable objects.

H. C. OF A. 1908.

ATTORNEY-GENERAL FOR N.S.W. v. ADAMS.

Isaacs J.

It is true that, if you once find the charitable purpose in the will, the Court will go far to overcome difficulties in the way of effectuating it: *Bruce* v. *Deer Presbytery* (1). The Lord Chancellor in that case quoted the language of Lord *Cranworth* in *Morgan* v. *Morris* (2). "There has always been a latitude allowed to charitable bequests, so that when the general intention is indicated, the Court will find means of carrying the details into execution."

But you have first to ascertain the intention by a fair interpretation of the will. See *Pearks* v. *Moseley* (3), *per Selborne* L.C. Lord *Davey* said in *Hunter* v. *Attorney-General* (4), at a page cited by *Street* J., "you are not . . . . to do violence to the language of any part of the will, or to import words which you do not find there to make the purposes charitable because of those prefatory dispositions which the testator has made."

Now, as to the gifts to persons to whom they would be an assistance and benefit—it was urged that they should be regarded as limited to poor persons. This, however, would introduce a word not expressed by the testator in that connection, but in marked contrast explicitly employed directly afterwards in another phrase, apparently to denote a different set of individuals. As the clause stands, it extends the testator's bounty to three distinct classes of persons: (1) those who are not necessarily poor, but are in such a situation that a pecuniary donation would mean assistance and benefit, as, for instance, to publish a work, or perfect an invention, to apprentice a son, or to enlarge a business; (2) those whose general condition in life is more or less one of poverty or distress; (3) those who by accident, misfortune, or otherwise, find themselves temporarily in necessitous circumstances.

If a person, answering any one of these three descriptions, is considered deserving by the trustees, they may assist him.

But to require a recipient of the first description to be also poor, would obliterate that branch as a distinct class, and would really reduce the classes to two, thus giving no force or effect whatever to the first division of individual bounty.

(1) L.R. 1 H.L. Sc., 96.
(2) 3 Macq. H.L. Cas., 134, at p. 166.
(3) 5 App. Cas., 714.
(4) (1899) A.C., 309, at p. 321.

I therefore see no reason to justify me in adding to or altering the words of the testator as suggested. That would be to make a will for him differing from that which he has made. His intention was of the most extensive and generous nature, and it would do violence to his language to cut it down in the way suggested. This, though undeniably laudable as a personal desire, is fatal to the whole trust, because the trustees are not bound to apply the fund wholly to purposes strictly charitable. See *Boyle* v. *Boyle* (1) and other cases cited in the preceding judgments. They might with perfect fidelity to the trust apply it all in their discretion to non-charitable purposes, namely, to persons of the first description mentioned. Unless the execution of the trust for charity is sufficiently definite as that it can be controlled by the Court, it fails: *Morice* v. *Bishop of Durham* (2) adopted by the Privy Council in *Runchordas Yanduawandas* v. *Parvatbhai* (3).

As to the words "benevolent or philanthropic," they cannot, so far as I can see, be fairly cut down by anything else the testator has said, and are therefore struck at by the authorities just mentioned. This is what the Privy Council said in the Indian case, speaking of vagueness and uncertainty:—"The reasons for the decisions of the English Courts upon devises or bequests of a similar nature are stated by Lord *Eldon* in his judgment in the leading case of *Morice* v. *Bishop of Durham* (2). He says (4):—'As it is a maxim that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control so that the administration of it can be reviewed by the Court, or if the trustee dies the Court itself can execute the trust—a trust therefore which in case of maladministration could be reformed and a due administration directed, and then, unless the subjects and objects can be ascertained upon principles familiar in other cases, it must be decided that the Court can neither reform maladministration nor direct a due administration.' *Lindley* L.J. refers to this judgment and says (*In re Macduff*) (5): 'That is the principle of that case, and has been enunciated or repeated from time to time.' In the latter

(1) I.R. 11 Eq., 433, at pp. 436, 437.
(2) 10 Ves., 522.
(3) L.R. 26 Ind. Ap., 71, at p. 80.
(4) 10 Ves., 522, at p. 539.
(5) (1896) 2 Ch., 451, at p. 463.

H. C. OF A. 1908.

ATTORNEY-GENERAL FOR N.S.W. v. ADAMS.

Isaacs J.

case the words of the bequest were 'purposes charitable or philanthropic'."

There is no doubt that the testator had to a considerable extent a charitable intention as strictly defined. But his bounty was not confined to that, and in the other portions of the will he used the word "charities" referentially, and as a short description of all the special objects he wished to benefit and more particularly described in "Q." The operative part, as I may term it, of the trust carries the matter altogether beyond the legal meaning of charities.

The testator's will extends clearly to generosity that runs in channels which the law does not recognize as charitable in the sense necessary to escape the rule as to perpetuities. I do not see any reason to doubt the accuracy of those decisions which have held invalid bequests in perpetuity to benevolent or philanthropic objects—but if I had any doubt the point is too firmly settled to question it now. See *In re Macduff*; *Macduff* v. *Macduff* (1) referred to approvingly by way of illustration by the Privy Council in the Indian case cited; *In re Jarman's Estate*; *Leavers* v. *Clayton* (2); *Hunter* v. *Attorney-General* (3). I therefore think the bequest cannot be supported, though personally I share the regret that an intention so generous and to so large an extent strictly charitable should fail; but the law is clear. It is not necessary to consider how far the subject of the trust, that is the fund for distribution, is sufficiently certain. If the necessity arose I also should require further time to consider it, in view of the unmeasured language of the clause which merely imposes on the trustees in their absolute and uncontrolled discretion, as fully in all respects as if they were the absolute owners thereof, the duty of paying and distributing from time to time, among the specified objects "such part or parts of the net profits . . . . as my trustees shall think fit."

It may be that on the principle of *Bruce* v. *Deer Presbytery* (4) the Court would endeavour to sustain the gift if that were the only difficulty in the way. But I prefer at present to express no opinion in the matter. I agree that the appeal should be dismissed.

(1) (1896) 2 Ch., 451.
(2) 8 Ch. D., 584.
(3) (1899) A.C., 309, at p. 323.
(4) L.R. 1 H.L. Sc., 96.

HIGGINS J. read the following judgment:—

The only matter that we have to deal with is the trust relating to the net profits of the testator's businesses and properties in New South Wales (or elsewhere than in Tasmania), and to the proceeds of the conversion thereof if converted, and to the income of such proceeds. No question has been raised as to the validity of a trust to carry on a business without limit of time.

There are no definite objects of the trust named directly or by description; and, as has been already amply explained, the trust would be void for uncertainty unless it can be shown that the trust admits of no objects other than those which are "charitable" in the sense recognized by the law. This is the only general principle of law involved; and it is not disputed by the appellant. The only questions left are questions of construction of this particular will. Now, in this case, the power as to distribution conferred on the trustees applies to the whole fund in question. It is impossible to point out one portion of the property as devoted to charity (in the legal sense), and another portion as not so devoted; and the whole gift must therefore fail unless all the possible objects are "charitable."

Moreover, I assume, in favour of the Attorney-General, that the trust contained in that paragraph of the will which is marked for convenience in the summons as "Q" exhausts the whole fund. It is true that the trust is merely to "pay and distribute from time to time such part or parts of the aforesaid net profits . . . as my trustees shall think fit" among the objects stated; and nothing is said as to any balance which the trustees do not so distribute. But if the trustees should leave any part undistributed, the trust to distribute still applies to that part; it may be exercised "from time to time" by the trustees who receive the money or by their successors; so that the next of kin could at no time put their hand on any part of the fund, and say that that part is no longer within the power of the trustees to distribute. The testator expressly declared, in paragraph "B," that all his property in New South Wales and elsewhere than in Tasmania shall be "subject to the several trusts directions and provisions hereinafter declared." That is to say, he treats the express trusts which follow as absorbing the whole property; and he makes no

H. C. OF A. 1908.

ATTORNEY-GENERAL FOR N.S.W. v. ADAMS.

Higgins J.

gift over of the part undistributed at any time. It is, therefore, in my opinion, the duty of the Court to treat the testator as not having died intestate with regard to any of the said property; to read the words referred to as if they were the same, in effect, as "to pay and distribute from time to time the net profits and my residuary estate and the income thereof *in such portions* as my trustees shall think fit to between and amongst," &c.

Now, are the objects of this trust purely charitable in the legal sense? The technical meaning of "charitable" is, in some respects wider, in some respects narrower, than the popular meaning. For instance, gifts in support of the spread of learning, or of religion, or of other purposes beneficial to the community, are "charitable"; but gifts for private charity—where the gift, in the mind of the testator, has some particular persons in contemplation, such as poor relations—are not charitable: *Attorney-General* v. *Pearce* (1); *Nash* v. *Morley* (2). As Lord *Hardwicke* L.C. said in *Attorney-General* v. *Pearce* (3):—"Where testators have not any particular person in their contemplation, but leave it to the discretion of a trustee to choose out the objects, though such person is private, and each particular object may be said to be private, yet in the extensiveness of the benefit accruing from them, they may very properly be called public charities. A sum to be disposed of by A.B. and his executors, at their discretion, among poor housekeepers is of this kind." This seems to indicate the meaning of "private charity," and I cannot say that this will offends by containing a gift to private charities, in this sense. But gifts to assist people who are not poor are not charitable, though they may well be benevolent or philanthropic. In this case the trustees may pay and distribute all or any part of the funds, or of the income, "to between and amongst such *charitable, benevolent or philanthropic institutions* for the time being existing in each of the States (of Australia) and the Colony of New Zealand" as they may think deserving of assistance. But are all benevolent institutions charitable? Are all philanthropic institutions charitable? As has been stated in the judgments of my learned colleagues "benevolent" purposes are not necessarily charitable. "Philanthropic" purposes are not all necessarily charitable. But

(1) 2 Atk., 87. (2) 5 Beav., 177. (3) 2 Atk., 87, at p. 88.

the word here is "institutions," not "purposes"; and due weight must be given to the distinction. Emigration even from the United Kingdom is not, it appears, necessarily a purpose beneficial to the community, and therefore not necessarily a charitable purpose in that aspect: *In re Sidney*; *Hingeston* v. *Sidney* (1); and an institution for giving persons, whether rich or poor, information, or encouragement, or even training, for the life in distant countries, British or non-British, would not be charitable. Again, a club for ex-militia officers, merely because they have been militia officers, and irrespective of their wealth and poverty, could hardly be called a charitable institution, though it may be benevolent. A gift to a friendly society in aid of its funds, if none but members can partake of its benefits, and if all members are to share in the advantage of the gift, whether poor or not, would not be charitable, though it may be philanthropic: *In re Clarke's Trust* (2). At all events, it is for the Attorney-General to satisfy the Court that, when the testator gives the option of "charitable benevolent or philanthropic institutions," the option applies only to institutions which are charitable in the legal sense; and, in my opinion, he cannot do so.

This conclusion, if correct, would be fatal to the case of the Attorney-General. But, to prevent any misapprehension, I should add that there are other purposes, within the option given to the trustees, which are not "charitable." The trustees have power to pay and distribute to and amongst "such person or persons for the time being in any of the said States or Colony to whom a gift would be an assistance or benefit . . . . as my trustees shall consider deserving of support and assistance." This would allow the trustees to give money to a wealthy banker to meet a sudden panic, or to D'Israeli's *Endymion*, who, though not within the class of the "poor," could be materially assisted by money in an attempt to win the favours of society. Again, the trustees can pay money to a man who is "for the time being in needy and straitened circumstances" if they consider him deserving of support and assistance. This also would enable the trustees to give money to a man of wealth whose assets are not readily realizable, and who is called on for immediate payment of

(1) (1908) 1 Ch., 488. (2) 1 Ch. D., 497.

H. C. OF A. 1908.

ATTORNEY-GENERAL FOR N.S.W. v. ADAMS.

Higgins J.

more money than he can at once pay without sacrifice of his assets.

It has been urged on us on behalf of the Attorney-General that the testator has manifested an over-riding intention in favour of charity, because in paragraphs "F," "I" and "P" he refers to the trusts in paragraph "Q" as "the trusts directions and provisions hereinafter contained in favour of *charities*." This argument means that the testator did not really intend to go beyond the boundary of charities as understood in law, that the word "charities" must be taken as meaning charities as technically understood in law. This argument might be good if the testator had used the word "charities" and no more. But here, in paragraph "Q," he has shown in detail what precisely he means to include under the word "charities," and I agree with what has been said by my learned brothers on this point. Mr. *Pilcher* has pointed us also to paragraphs "Z," "AA," and "BB," and has urged that in these paragraphs the testator draws a distinction between gifts made in favour of charities, and gifts made "in aiding or assisting any person or persons whatsoever to whom in the opinion of any trustees aid or assistance at the particular time would be a benefit and advantage in this life." But, on closer examination, it is apparent that the testator does not treat gifts of the latter class as non-charitable—he merely distinguishes such gifts from the gifts under the trust "in favour of charities hereinbefore more fully set forth," (i. e. in paragraph "Q"). Besides, even if in this part of the will, relating to his Tasmanian property, the testator did draw such a distinction as is contended, the fact remains that in paragraph "Q" he did include institutions and purposes which are not "charitable."

In my opinion, therefore, the trust of the funds referred to in paragraphs "Q" and "Z" is void for uncertainty; and the judgment of *Street* J. should be affirmed.

Appeal dismissed. Costs of respondents in this and other appeals (withdrawn) to be taxed and paid according to agreement between the parties.

Solicitor, for appellant, *The Crown Solicitor for New South Wales.*

Solicitors, for respondents, *Curtiss & Barry*; *Stephen, Jaques & Stephen*; *Macnamara & Smith*; *Sly & Russell*; *Villeneuve Smith & Dawes.*

H. C. OF A. 1908.

ATTORNEY-GENERAL FOR N.S.W. v. ADAMS.

C. A. W.

[HIGH COURT OF AUSTRALIA.]

HAYWOOD AND ANOTHER . . . APPELLANTS; DEFENDANTS,

AND

MUMFORD . . . . . RESPONDENT. INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1908.

MELBOURNE, *October* 5, 6.

Griffith C.J., Barton, O'Connor and Higgins JJ.

Highway—Obstruction—Standing or loitering in street and not moving on when requested—Collecting a crowd—Interference with traffic—By-law—Police Offences Act 1890 (*Vict.*), (*No.* 1126), *sec.* 6*.

The term "obstruction" as used in sec. 6 of the *Police Offences Act* 1890 (Vict.) includes any continuous physical occupation of portion of a street which appreciably diminishes the space available for passing and repassing, or which renders such passing and repassing less commodious, whether or not any person is in fact affected thereby, and the lawfulness or unlawfulness of the obstruction, considered apart from the Act, is immaterial.

The two defendants, at about half-past six on a summer's evening, stood in the carriage way of a street of Sale playing a drum and a concertina and

*Sec. 6 of the *Police Offences Act* 1890 (Vict.), so far as material, is as follows:—

"Any local authority may from time to time make regulations for the route to be observed by all carriages carts vehicles and persons and for keeping order in the carriage and foot ways and public places of any city town or borough and for preventing any obstruction thereof whether by the assemblage of persons or otherwise."