[HIGH COURT OF AUSTRALIA.]

IN RE THE WILL AND CODICIL OF WALTER PADBURY, DECEASED

THE HOME OF PEACE FOR THE DYING AND INCURABLE . . . . APPELLANTS;

AND

THE SOLICITOR-GENERAL . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Nov.* 4, 5, 11.

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

Will — Construction — Trustees — Hospitals — Extrinsic evidence, admission of — Intention of testator.

Walter Padbury by his will dated 29th May 1895, after making a large number of specific devises and bequests, as to the balance of his real and personal estate, directed as follows :— "I direct that my said trustees shall sell and convert into money such portion thereof as shall not consist of money or securities for money. And that the whole of such balance shall be divided into three equal parts one of which shall be paid or transferred to the said Diocesan Trustees of the Church of England in Western Australia a second to the Trustees for the time being of the Hospitals and Lunatic Asylums in the said Colony to be divided among them equally and the third to the Trustees of the Poor Houses in the said Colony." A codicil of the 6th December 1897 in no way affected this portion of his will.

Held, that the word "hospitals" included public hospitals existing at the date of the testator's death which had been proclaimed under the *Hospitals Act* 1894, and hospitals then established which were governed by elected committees, whether assisted by contributions from the public revenue or not, but did not include hospitals which were wholly maintained at the public expense and were subject to the entire control of government officers.

The Full Court of Western Australia used certain affidavits to help them in ascertaining the objects of the gift.

Held, that this evidence was properly admitted, as in every case evidence is admissible for the purpose of identifying the object of a gift in a will, and if the words used to denote the object are capable of being applied to more than one object, evidence is admissible to show the surrounding circumstances in order to enable the Court to ascertain to which object the testator intended to refer.

Order of the Supreme Court of Western Australia, reversing decision of *Rooth* J., varied.

APPEAL from the Full Court of Western Australia.

The facts are fully set out in the judgment of *Griffith* C.J.

Draper and *Abbott*, for the appellants. At the time the testator made his will there were three classes of hospitals in existence. Hospitals of the third class have no committee of management, do not come within the *Hospitals Act* 1894, are wholly maintained at government expense, and are placed in the sole charge of a medical practitioner usually designated a district medical officer. In determining a question of this nature a Judge should look to the four corners of the will, but not beyond it.

[GRIFFITH C.J.—Evidence is always admissible to explain what the words of the testator meant and to determine the object of his bounty.]

It was the admission of this extrinsic evidence that caused difficulty, and no notice should have been taken of it unless the words of the will had been incapable of a legal interpretation without its aid: *In re Grainger*; *Dawson* v. *Higgins* (1); *Colpoys* v. *Colpoys* (2). Whether hospitals of the first class are entitled to share or not, certainly those belonging to the third class are not, as no government servant could comply with the definition of trustee as laid down by *Brett* L.J. in *Wilson* v. *Lord Bury* (3); see *Lewin on Trusts*, 10th ed., p. 29. [They also referred to *Hunter* v. *Attorney-General* (4); *Allgood* v. *Blake* (5); *Key* v. *Key* (6); *Towns* v. *Wentworth* (7); *Smidmore* v. *Smidmore* (8); *Stillusson* v. *Woodford* (9); *Hodgson* v. *Ambrose*

(1) (1900) 2 Ch., 756, at pp. 768 *et seq.*, *per Rigby* L.J.; (1902) A.C., 1.
(2) Jac., 451; 53 R.R., 42.
(3) 5 Q.B.D., 518, at p. 530.
(4) (1899) A.C., 309.
(5) L.R. 8 Ex., 160.
(6) 22 L.J. Ch., 641.
(7) 11 Moo. P.C.C., 526.
(8) 3 C.L.R., 344.
(9) 4 Ves., 227, at p. 329.

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(1); *Theobald on Wills*, 125; *Encyclopædia of the Laws of England*, vol. II., 469; 34 Vict. No. 9, sec. 4; No. 15 of 1903, sec. 33; 46 Vict., No. 8, sec. 1; 52 Vict. No. 10.]

A. D. Stone, for the respondent. The testator shows a general charitable intention, and the use of the word "trustees" is merely incidental and means persons who can give receipts. Nothing should be gathered from the fact that he refers to the managing body of St. George's Cathedral, because the testator was intimately associated with it. A hospital is a place carried on by voluntary contribution or at the public expense for those who, poor or otherwise, are sick or injured in body, and require medical and surgical aid.

[BARTON J.—Boards of management may be as much trustees under that name as under the name of "trustees" *eo nomine*.]

A Government is as much entitled to carry on a charity as any one else, and the Court will not allow a gift to fail for want of a trustee, so if necessary the Court will appoint a trustee here.

[He referred to the following:—*Newland* v. *Attorney-General* (2); *Nightingale* v. *Goulbourne* (3); *Moggridge* v. *Thackwell* (4); *Attorney-General* v. *Boultbee* (5); *Attorney-General* v. *Corporation of Exeter* (6).]

Draper, in reply, referred to *Rustomjee* v. *The Queen* (7) and *Burgess* v. *Wheate* (8).

Cur. adv. vult.

November 11.

GRIFFITH C.J. The testator was a resident of the Colony of Western Australia, in which he appears to have been possessed of large freehold and leasehold properties. By his will dated 29th May 1895 he made a large number of specific devises and bequests, amongst which were a gift in remainder of the rents and profits of a freehold property to "the treasurer of the vestry or other managing body of St. George's Cathedral Perth for the purposes of the said Cathedral," and a devise of freehold property in trust

(1) Doug., 337.
(2) 3 Mer., 684.
(3) 2 Ph., 594; 5 Ha., 484.
(4) 13 Ves., 416.
(5) 2 Ves., Jr., 380.
(6) 2 Russ., 47; 3 Russ., 396.
(7) 1 Q.B.D., 487; 2 Q.B.D., 69.
(8) 1 Eden. C.C., 177.

for the use of "the diocesan trustees of the Church of England in Western Australia," who are a corporation incorporated by that name by a local Statute. The will then proceeds:—"And as to the balance of my real and personal estate not hereinbefore specifically devised or bequeathed I direct that my said trustees shall sell and convert into money such portion thereof as shall not consist of money or securities for money And that the whole of such balance shall be divided into three equal parts one of which shall be paid or transferred to the said diocesan trustees of the Church of England in Western Australia a second to the trustees for the time being of the hospitals and lunatic asylums in the said Colony to be divided among them equally and the third to the trustees of the poor houses in the said Colony."

By a codicil dated 6th December 1897 the testator revoked a gift of a specific property and made a new disposition of it, and in all other respects confirmed the will.

The testator died in 1907.

The only question raised for determination on this appeal is whether certain institutions called in argument "government hospitals" are entitled to share in the gift for the benefit of hospitals and lunatic asylums. Upon an originating summons taken out for determining this and other questions *Rooth* J. held that none of these institutions were entitled to share, but that the word "hospitals" signified "an unsectarian public charitable building supported in the main by voluntary contributions for the reception of sick poor for treatment medically or quasi-medically medicinally or surgically combined with such possibilities of outdoor life as would be calculated to make that treatment more effective and which is not maintained for private gain."

From this order the Solicitor-General appealed to the Full Court. At the request of that Court evidence was given by affidavit as to the hospitals and lunatic asylums existing in Western Australia at the date of the will, from which it appears that at the date of the will, and also at the date of the codicil, there were in existence in Western Australia three classes of "hospitals" called by that name, besides a considerable number of charitable institutions which would fall within the wider meaning sometimes given to the word "hospital." These hos-

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pitals are thus described in the affidavit of Mr. F. J. Clark (par. 8):—"Hospitals of the first class were and are now those proclaimed and managed under and subject to the provisions of the *Hospitals Act* 1894. Hospitals of the second class were and are now those established and equipped by the residents of various townships in the State of Western Australia either with or without initial assistance from the Government, and subsequently managed exclusively by a committee of such residents, such committee being assisted yearly by the Government with a pound for pound subsidy with an additional annual payment of £100 towards the salary of the medical officer employed by the committee and twenty-five shillings per week towards the treatment of indigent patients. Hospitals of the third class were and are now hospitals established and governed by the government medical department at Perth according to regulations made by that department and approved by the Governor in Council. These hospitals have no committee of management, do not come within the purview of the *Hospitals Act* 1894, are wholly maintained at government expense, and are placed in the sole charge of a medical practitioner usually designated as 'District Medical Officer' who is accountable and subject alone to the direction and control of the said government medical department."

Hospitals under the *Hospitals Act* are established by proclamation, and are managed by a board of management, the members of which in the first instance are appointed by the Governor in Council. Where, however, voluntary contributions to a public hospital amount to not less than one-sixth of the annual expenses, the Governor in Council may allow the contributors to elect some or all of the members of the board. The board is charged with the administration of all funds voted by Parliament or contributed or left or given for the purposes of the hospital, and in the case of a prosecution with respect to any property under the management of the board the property may be laid in them by that name.

At the date of the will and codicil two hospitals of this class had been proclaimed and were in operation.

The constitution and management of hospitals of the second

class sufficiently appear from Mr. Clark's affidavit. At the date of the will four of such hospitals were in existence, and at the date of the codicil four others had been established. The number of hospitals of the third class at the same dates was seventeen and twenty-three respectively. The nature of their constitution and management also appears from Mr. Clark's affidavit. The Court is, I think, entitled to make use of its own knowledge of the conditions of a newly settled country like Australia, and of the practice of the Australian Governments, not confined to Western Australia, to make temporary provision for affording in various centres of a sparse and often fluctuating population such medical and surgical aid as is necessary, and is beyond the reach of individual colonists.

The Full Court were of opinion that all the institutions of all three classes which were in existence at the testator's death were entitled to share in the gift. The learned Judges seemed to have been largely influenced in coming to this conclusion by the fact that lunatic asylums were grouped with hospitals in the gift. Now in 1895 there was (and still is) only one lunatic asylum in the Colony, which was a purely government institution established and managed under the *Lunacy Act* 1871. That Act did not contemplate, and probably did not authorize, the establishment of any other kind of asylum. Unless, therefore, this institution were admitted to share in the gift in question it would have no operation for the benefit of lunatics. And, if a governmental institution of that kind were admitted to share in the gift, why not also other purely governmental institutions called hospitals ? There is much force in this argument, but I do not think that it is conclusive. Much depends, I think, upon the side from which the question is approached.

The appellants, who, as appears from their name, are an incorporated institution which, although not called a hospital, performs functions appropriate to hospitals, contend that the decision of *Rooth* J. was correct. They found their argument mainly upon the use of the word " trustees " in the gift. They say that the testator showed, by the two specific gifts to which I have already referred, that he knew the difference between the term " trustees " and the term " managing body," and that he intended the gift

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now in question to be confined to institutions whose property was vested in, and which were managed by, trustees called by that name. They also contend that the evidence as to the hospitals and asylums in existence at the date of the will and codicil was inadmissible for the purposes of construction.

In my opinion the evidence was properly admitted. In every case evidence is admissible for the purpose of identifying the object of a gift in a will, and if the words used to denote the object are capable of being applied to more than one object evidence is admissible to show the surrounding circumstances, in order to enable the Court to ascertain to which object the testator intended to refer.

The term "hospital" is not a term of art, and may have different meanings in different countries. In Australia it is commonly used to denote an institution for the medical or surgical treatment of persons suffering from bodily ailment or injury. Used without the adjective "private" prefixed, it commonly means a charitable institution of that kind, whether supported wholly, or in part, or not at all, by voluntary contributions. Other charitable institutions which are in some countries included in the term "hospital" are in Australia ordinarily called by other names. The evidence showed that in Western Australia, as the testator knew it, there were many institutions of the kind I have mentioned, some of which were managed by boards or committees of management, while others, although charitable institutions, were wholly maintained at the public expense and managed by government officers.

In view of these facts, knowledge of which must, I think, be imputed to him, what is the primary grammatical meaning of the words which he used? He directs the money to be "paid and transferred" to the "trustees for the time being of," &c. I infer that he intended his gift to be paid into the hands of bodies of persons who discharged the functions of trustees administering funds for the benefit of the respective institutions of which they were trustees, and in whose hands the funds would be impressed with the trusts of the will. In my opinion the Government of the State does not fall within the primary meaning of these words. If the gift would altogether fail unless the words were

construed as including hospitals of the third class, I should be disposed to agree with Mr. *Stone* that the general charitable intent of the will should prevail. But I think that hospitals of the first and second classes are within the plain meaning of the words. The appellants contend that the boards and committees of management are not trustees. But the word "trustee" is not a word of art. A man may be a trustee without being called by that name. In my opinion the boards of management of the public hospitals of the first class, and the committees of the hospitals of the second class, are in law trustees of the property and funds entrusted to them for administration, although they are called boards and committees. The fact that the testator used the word "trustees" in designating a corporate body of whose name that word formed part has in my opinion no weight as against these considerations. Nor do I attach any importance to the fact that he used the words "managing body" in referring to a gift to come into operation at some distant time when some other body might take the place of the vestry.

Approaching the matter from this point of view, I am unable to agree with the Full Court as to the inference to be drawn from the inclusion of lunatic asylums in the gift. I think that they attached too much weight to that circumstance, and too little to the words "trustees for the time being," which they practically disregarded, but to which some effect should be given.

I agree that the grouping of lunatic asylums with hospitals in the gift shows that the testator intended that the institutions which he meant to benefit were institutions of the same class, but I think that that class is limited by the introductory words already referred to. It seems to follow not that the government lunatic asylum is included, but that, like the purely government hospitals, it is excluded. No doubt the result is that no part of the gift is available for any lunatic asylum, but that is only because there is no lunatic asylum which comes within the words of the gift; just as if in the case of a gift of a fund to be divided equally between all the children of A. and B., A. should die without legitimate issue.

The asylum is now designated (under a Statute of 1904) a

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hospital for the insane, but this alteration in nomenclature is not material to the interpretation of the will.

We are not, however, called upon to decide on this appeal whether the asylum is or is not entitled to share in the gift; but, if the reasons which I have given for the exclusion of hospitals of the third class are sound, it is difficult to distinguish the case of the asylum, or, as it is now called, hospital for the insane, from other purely governmental institutions.

Nor are we concerned with the question of what (if any) other institutions not commonly called hospitals are entitled to share in the gift. That must be ascertained by inquiry in Chambers. Our decision is limited to the three classes of hospitals particularly referred to in Mr. Clark's affidavit.

In my opinion the order appealed from must be varied by substituting a declaration that the word "hospitals" in the will includes public hospitals existing at the date of the testator's death which had been proclaimed under the *Hospitals Act* 1894, and hospitals then established which were governed by elected committees whether assisted by contributions from the public revenue or not, but does not include hospitals which were wholly maintained at the public expense and were subject to the entire control of government officers.

BARTON J. The appeal in this matter is restricted to that part of the judgment of the Full Court setting aside so much of the judgment of *Rooth* J. as relates to hospitals. That learned Judge, upon a summons for advice and direction, decided *inter alia*, "that the word 'hospitals' contained in the residuary bequest . . . does not include government hospitals . . . but signifies any unsectarian public charitable building supported in the main by voluntary contributions for the reception of sick poor, for treatment medically or quasi-medically, medicinally or surgically, combined with such possibilities of outdoor life as would be calculated to make that treatment more effective, which is not maintained for private gain." The Full Court, reversing this part of the order of *Rooth* J., held that all government hospitals were entitled to participate. The question presented to us does not include the case of lunatic asylums or that of poor houses.

I need not repeat the terms of the gift upon which the question has arisen. The executors and trustees of the will have found it a difficulty to apply the gift to its subject matter by way of determining, not the property to be dealt with, but the classes of hospitals that are to be recipients of the testator's bounty. The gift is to trustees of hospitals, of course for the benefit of the hospitals. There are three constructions open—(1) The gift is perhaps limited to such hospitals as have trustees, *eo nomine*, of their funds; or (2) the word "trustees" is to be rejected altogether; or (3) the word "trustees" is to be interpreted as including such bodies as stand in a fiduciary relation to institutions of this kind or to the contributors to their funds, for the receipt and proper expenditure of those funds. Now the appellants contend, to begin with, that the Full Court were wrong in seeking and receiving evidence to show what hospitals existed in Western Australia at the dates of the will and the codicil respectively. I am of opinion that their Honors were right in taking that course. It is evident from the question raised in the summons for advice and directions that the difficulty has been encountered in applying the words of the gift to their subject matter so as to ascertain the persons or institutions to which they actually refer and extend. A document remains inoperative until applied to its subject matter. For instance, a conveyance of a described parcel of land avails nothing until the land is ascertained to which the description has reference: and, further, if the words of a gift in a will, obviously referring to a single object or class of objects, are found to be applicable to more than one object or class, the only resort, *ut res magis valeat quam pereat*, is for the Court to inform itself, by evidence, of the surrounding facts, so far as to place itself in a position to say what single object or what single class of objects the testator was indicating. To do so much is not to contradict or to vary the testator's will—his wish—but to ascertain and give to it its proper meaning and effect.

Now it appears by the affidavit of Mr. Fingal Clark that at the date of the will and of the codicil there were three classes of public hospitals in existence in this State, apart from those wholly constituted and maintained by trustees of the contributions and gifts of benevolent citizens. Those of the first class

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were and are those proclaimed and managed under and subject to the *Hospitals Act* 1894. Those of the second class were and are those established and equipped by the residents of various townships either with or without initial assistance from the Government, and afterwards managed exclusively by a committee of such residents, assisted yearly by the Government with a pound for pound subsidy, with an additional annual payment of £100 towards the salary of the medical officer employed by the committee, and 25/- per week towards the treatment of indigent patients. The third class were and are hospitals established and governed by the government medical department at Perth according to regulations made by executive authority. The hospitals of the third class have no committees of management, do not come within the purview of the *Hospitals Act* 1894, are maintained wholly at the expense of the Government, and are under the sole charge of a medical practitioner usually called the "District Medical Officer," accountable only to, and directed and controlled only by, the government department mentioned. There were two hospitals of the first class in operation at the dates of the will and the codicil, namely those of Perth and Fremantle. Being under the *Hospitals Act* 1894 they were proclaimed and gazetted. They are supported by voluntary subscriptions as well as by parliamentary votes. They are governed by boards of management, which receive and administer all funds voted by Parliament, and all funds "contributed, given, or left to such hospital by benevolent persons." In prosecuting for offences in respect of any property, money or goods under their management and control, the Statute makes it sufficient to lay the property in the board of management. Where a sum larger than one-sixth of the average annual expenditure arises from contributions, with 10 per cent. interest, the contributors are entitled to elect one-third of the members of the board. If the contributions exceed one-fourth of such expenditure, the elected members may be one-half of the board. If the amount contributed exceeds one-half, the contributors are to elect the whole board. Of the second class of hospitals four existed at the date of the will. At the date of the codicil there were eight. As to the third class hospitals, seventeen

of them were in being at the date of the will, and twenty-three at the date of the codicil.

The appellants are an incorporated body. The name of their institution, which according to the evidence was in existence before Mr. Padbury made his will, has been changed since 1902. The testator would know it as "The Home of the Good Shepherd," but I gather that its functions are unchanged, and that they are fairly described by its present name. It claims to be an hospital of the second class. In support of the appeal it is urged that the judgment of *Rooth* J. was right. That judgment rested mainly on the literal and technical sense in which his Honor took the word "trustees." He came to the conclusion that in using that word the testator "used a legal term having a well known legal meaning which is not controlled by the context, does not lead to any palpable absurdity, and does not violate any rule of law." He said that the word "must be construed in its strict legal sense, and that it is descriptive of the kind of institution which the testator desired to benefit." It would follow that no institution whose funds were received and administered by a "board of management" or a "committee of residents" would be entitled to share in the gift. He pointed out that the testator had included in his residuary gift as well as elsewhere in his will "The Diocesan Trustees of the Church of England in Western Australia" (their name of incorporation). The appellants, in aid of his Honor's interpretation, further pointed to the fact that the testator had made a disposition in favour of "the treasurer of the vestry or other managing body of St. George's Cathedral, Perth." It was urged that the testator had, if these instances and the residuary gift were considered together, shown that he used different expressions with a nice regard to their meaning, and that he appreciated the distinction between a trustee in the strict legal sense and a managing body or any other such authority controlling an institution and receiving and dispensing its funds. All this was very legitimately argued at the bar. But as to the first of the expressions relied on, I cannot see that any strong inference can be drawn from the correct quotation or copying of the corporate name of the diocesan trustees. And as to the second, in designating the treasurer of the

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Cathedral vestry, it was most natural for the testator to use a comprehensive alternative name, so as to provide for a change in the constitution of the vestry. That does not seem to me to help in showing that the word "trustees" in the residuary gift is to be understood in the strictest sense. My own view is that the testator was thinking of the substance and not the mere technical term. He was bestowing his bounty on these institutions by the medium of those whose duties and functions made them in fact and in law trustees. And if not in all or in most cases trustees of the lands, the boards of management of the hospitals of the first class, and the committees of residents of those of the second, are in truth trustees of their funds. Indeed some trusteeship is in their case essential, and I cannot see who has the right or the duty to perform the functions of trustees unless it be the persons or bodies upon whom the burdens of the receipt, the custody and the disbursement of the funds are both expressly and of necessity cast. They are responsible for the very life blood of the institutions. If the word is taken in the dry literal sense the gift will receive a narrow operation such as I feel sure was never in the testator's mind. But the construction which looks to the substance while giving full meaning to the words is the benign one, and other things being equal, as I think they are, it should be adopted. The boards of management in the one class, and the committees of residents in the other, hold the funds under an express duty to apply them to the use and for the benefit of the institutions. For the liberal construction I see many reasons; and I cannot see any real reason to suppose that the testator narrowed down the area of his benevolence in the way attributed to him.

It will be observed that I do not adopt any construction which would reject any word of the gift. It seems clear that to include the third class of hospitals we should have to do away altogether with the meaning of the word "trustees." This we have no right to do, since we are not dealing with words that are inexplicable or intractable as they stand. Giving effect, then, to the word in question, can we find that there is any body of fiduciary position which satisfies the substantial meaning of that word in the case of hospitals of the third class? They have neither managing

board nor committee, they are maintained wholly at the expense of Government, and unlike the two other classes they seem to exist quite apart from the idea of contributions or bequests; and they are in the charge and control of an officer responsible only to a government department by which he is directly controlled. They are in fact managed by the Government and only by the Government, and the only funds applied in their management are those supplied by Government. Here I can find no trusteeship in substance, and consequently, with great respect to the Full Court, I cannot come to the conclusion that they are included in the gift.

It is true that this conclusion may preclude the lunatic asylum, which is a purely government institution, from participating in the bequest. The resident or superintending medical officer is, by the *Lunacy Act* 1871, which regulates the institution, given the control and management of the asylum "in all matters connected with the internal routine and discipline thereof," and not any other matters, and apparently all funds applied to the maintenance of the institution are drawn from the State Treasury and dispensed by a State department.

On this head I say no more, because we are not, in the present case, to decide whether the lunatic asylum is entitled to a part of the gift. But the fear that it may not be included must not lead us to disregard the terms of the will, with the result of making participants not merely of one lunatic asylum but of the numerous government institutions comprised in the third class, which are destitute of any trustees in any fair and reasonable meaning of the word. It is clear to my mind that these cannot be included in the class benefited. If no lunatic asylum came into being which belonged to the class, I agree that the mere result is that the class is less numerous to that extent, and the available fund goes to that smaller number of recipients.

As to the word "hospital," I see no reason to doubt that the testator employed it also in its ordinary sense as understood in Australia. He distinguishes between hospitals, lunatic asylums and poor houses, so that he seems to have taken hospitals to be for the bodily and not the mentally sick, and for the sick and not the merely poor. The sense in which the word is generally understood is, I think, that of an institution for those who, being

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sick or injured in body, are in need of medical or surgical aid. In this sense no doubt the testator used it.

In the result I agree in the proposed variation of the order of the Full Court.

O'CONNOR J. The controversy in this case does not turn upon the general principles to be applied in the interpretation of a will. They are well established, and have been abundantly illustrated in the judgments quoted by the learned Judges in the Court below. I shall therefore address myself at once to the real difficulty in this case: that is, the ascertainment by application of these principles of the intention of the testator in the will now under consideration. Before adverting to the words of the bequest, it is worthy of remark that every devise of the testator for charitable purposes is so framed that trustees are in some form made responsible for its administration. The income to be paid for the support of a clergyman for Yatheroo and Dandaragon districts is under the control of the will trustees. Payments of income to the treasurer of the vestry or other managing body of St. George's Cathedral, Perth, for the purposes of the Cathedral, are under the same control, and the proceeds of the sale of certain furniture, effects, and personal property, are directed to be paid to the treasurer in such a way that he would necessarily hold it in trust for the purposes of the Cathedral. Padbury's paddock, Guildford, is devised to the will trustees in trust for the use of the diocesan trustees of the Church of England in Western Australia. In all these cases the aid of the Court may be at any time invoked to see that the testator's intentions in the distribution of his bounty are properly carried out.

Coming now to the devise which is the subject of this appeal, the testator has used words intended on the face of them to secure the same kind of supervision and control. The will trustees are directed to divide the moneys into three equal parts, and to pay and transfer one part to the diocesan trustees before referred to, a second to the trustees for the time being of the hospitals and lunatic asylums in the said Colony, and the third to the trustees of the poor houses in the said Colony. When the will

trustees have paid and transferred the prescribed portions in the terms of the will their responsibility ceases, and thereafter the diocesan trustees and the trustees for the time being of the hospitals, lunatic asylums, and poor houses respectively, become responsible as trustees for the proper administration of the charitable funds transferred to them. On the face of the will, therefore, the carrying out of the testator's expressed intention in respect of these devises is safeguarded in the same way as in the case of the other devises to which I have referred. No doubt the general object of the testator's bounty may be described in Mr. Justice *Rooth's* words as "the poor and sick in body, the poor and sick in mind, and the poor and infirm in body from age or some other disenabling cause," but by using the word "trustee" he expressly limits his gift to such groups of these classes as are represented by persons or bodies of persons whose administration can be brought within the supervision and control of the Equity Court. That limitation is, in my opinion, an essential element of the description, and cannot be treated as negligible. "Trustee," using the word in its ordinary sense, has been well defined by *Brett* L.J., afterwards Lord *Esher*, in *Wilson* v. *Lord Bury* (1), in these words:—"Trustee is a person holding the legal title to property under an express or implied agreement to apply it, and the income arising from it, to the use and for the benefit of another person, who is called the *cestui que trust*." A person or body of persons who undertakes to administer in the interests of a charity moneys received by them for that purpose are answerable to a Court of Equity for any diversion of the charitable fund from its purposes on the ground that they occupy in relation to the donors and the beneficiaries the position of trustees. In the broad sense of the term such persons and bodies of persons are trustees, and, having regard to the well known and generally recognized methods of managing charities supported by donations from the public, they must, in my opinion, be taken to be included within the expression "trustees" as used by the testator. Interpreting, therefore, the words of the will in their natural and ordinary sense, they disclose an intention on the part of the testator to confer his bounty upon such hospitals,

(1) 5 Q.B.D., 518, at p. 530.

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lunatic asylums, and poor houses, as were under the management either of trustees strictly so called or of committees or boards of management who had been appointed to perform, or who had taken on themselves to perform duties in relation to the funds of these charities, which constituted them in the eyes of a Court of Equity trustees in the broad sense which I have explained.

Such being the intention of the testator as expressed by the words he has used, it becomes necessary to apply the devise to the subject matter. Upon this aspect of the case much light has been thrown by the evidence on affidavit which was before the Supreme Court, but which Mr. Justice *Rooth* had not the advantage of considering. Although it may become necessary for the purposes of construction to examine the language of the gifts to each of these classes of charity, we are in this case directly concerned only with the devise to hospitals. Whether or not a particular institution is a hospital, and comes within the class to which the Court may declare the will to apply, is a matter for inquiry in Chambers. I gather from the evidence that the hospitals which claimed to be within the testator's bounty may be separated into two general divisions. Those initiated, managed, and maintained, by private benevolence, such for example as the Home of Peace for the Dying and Incurable, in many cases aided by subsidy from Government, and those which are described as public hospitals. The latter are divided into three classes. First: Hospitals proclaimed under the *Hospital Act* 1894, maintained partly by government moneys and partly by voluntary subscription, managed and controlled by boards of management in part appointed by the Government and in part by subscribers in terms of the Act. Second: Hospitals not under that Act but assisted and subsidised by Government, maintained partly by those subsidies and partly by voluntary subscription, and managed by committees or boards of management appointed by subscribers. Third: Hospitals instituted, maintained, and managed entirely by Government under direct departmental control. It follows from what I have said that, in my opinion, the hospitals privately managed and maintained such as the Home of Peace for the Dying and Incurable, whether subsidised by government subscription or not, are within the testator's gift

in all cases where the management responsible for application of the funds are trustees in the sense which I have explained. It follows also that the first and second classes of public hospitals are included. In respect of both classes the managing bodies or committees are trustees in the broad sense which I have explained. The third class of public hospitals, the purely departmental governmental hospitals, stands on a different footing. Clearly they do not come within the words which the testator has used. In respect of them no persons to whom the moneys devised could be paid and transferred in terms of the will are in any sense trustees, or could be made answerable for their administration of the funds to a Court of Equity. We need not determine in this case whether the Crown in its application of a gift for such a purpose could under any circumstances be made liable to a Court of Equity. Mr. *Stone* has properly admitted that it would be necessary if the will applied to such departmental hospitals for the Court to appoint a trustee which it could make responsible. In other words, the devise could be made applicable to such hospitals only by disregarding the use of the word "trustee" in the words of devise as a non-essential detail. That was the view which prevailed with the Supreme Court. The argument was this. The testator must be taken to have known that lunatic asylums under the law of Western Australia are entirely under public control, managed directly by the Government and not by trustees. If operation were given to the word "trustee" the gift would fail altogether. It is one of those cases in which a detail of the testator's description of the subject of his bounty should be disregarded in order that his clear general intention may not be permitted to fail. The same form of expression is used with regard to hospitals, and with regard to them also the use of the expression "trustee" may for the same reason be disregarded.

There are two answers to the contention. The argument that the gift to lunatic asylums would fail altogether unless the expression "trustees" in the devise is disregarded is an argument of necessity which has no application to the case of hospitals. Due weight may be given to the expression "trustees" in the devise to hospitals, and yet the gift will not fail because the

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majority of the hospitals come literally within its language. The other answer may well be based upon the words of Mr. Justice *Blackburn* in *Allgood* v. *Blake* (1):—"No doubt in many cases the testator has for the moment forgotton or overlooked material facts and circumstances which he well knew. And the consequence sometimes is that he uses words which express an intention which he would not have wished to express, and would have altered if he had been reminded of the facts and circumstances. But the Court is to construe the will as made by the testator, not to make a will for him; and therefore it is bound to execute his expressed intention, even if there is great reason to believe that he has, by blunder, expressed what he did not mean."

If the giving of full effect to the expression "trustees" in the devise to lunatic asylums causes the gift to fail it is because the testator has used words which, interpreted in their ordinary sense, cannot include lunatic asylums as they are at present constituted and managed. To my mind the true and sound method of interpretation is to permit it to fail as to some of the apparent objects of the testator's bounty, explaining his use of the expression "trustee" in respect of all such institutions on the ground of his ignorance or forgetfulness of the constitution and management of lunatic asylums as existing, rather than to disregard entirely the express limitation imposed by his use of that expression on the assumption that he intended that all lunatic asylums, whether represented by trustees or not, should be partakers of his bounty. To make the latter assumption of the testator's intention in the case of the devise to hospitals as the Supreme Court has done is a still wider departure from his expressed intention, because in that case, as I have pointed out, there did not exist even the *prima facie* justification which in some cases arises from the necessity of giving some effect to the testator's gift.

For these reasons I am of opinion that the order of the Supreme Court must be varied by declaring that public hospitals of the third class, that is government hospitals maintained and managed solely under departmental control, do not come within

(1) L.R. 8 Ex., 160, at p. 163.

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the will, but that hospitals privately managed and maintained, whether subsidised by government subscription or not, the funds of which are managed by trustees in the sense I have explained, and public hospitals of the first and second classes, are the hospitals within the meaning of the devise.

Appeal allowed. Order appealed from varied.

Solicitors, for the appellants, *Parker & Parker.*

Solicitor, for the respondent, *Solicitor-General for Western Australia.*

[HIGH COURT OF AUSTRALIA.]

MACNAMARA . . . . . APPELLANT;
PLAINTIFF.

AND

MARTIN . . . . . RESPONDENT
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, Dec. 16, 17, 18.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Principal and agent — Agent employed to find purchaser — Right of agent to remuneration — Commission or quantum meruit — Misconduct of agent after revocation of authority — Agent acting contrary to instructions.

Practice — Appeal — Application for new trial — Parties bound by course of trial — Appeal involving small amount — Costs.

If an agent employed on commission to find a purchaser for a property succeeds in introducing to the vendor a *bonâ fide* purchaser ready and willing