

[HIGH COURT OF AUSTRALIA.]

THE DIOCESAN TRUSTEES OF THE  
CHURCH OF ENGLAND IN } . APPELLANTS;  
WESTERN AUSTRALIA . . . }

AND

THE SOLICITOR-GENERAL . . . . . RESPONDENT.

THE HOME OF PEACE FOR THE  
DYING AND INCURABLE (INCOR- } . APPELLANT;  
PORATE) . . . . . }

AND

THE SOLICITOR-GENERAL . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF  
WESTERN AUSTRALIA.

*Will — Construction — Trustees — Falsa demonstratio — Lunatic asylums — Poor* H. C. OF A.  
*houses.* 1909.

PERTH,  
Oct. 19, 20,  
26.

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

Walter Padbury, by his will dated 29th May 1885, 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 portions 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 6th December 1897 in no way affected this portion of his will.

*Reporter's note.*—These two appeals were argued separately, but the Court considered them in the one judgment.

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*Held*, as to the second third, that although the Government Lunatic Asylum, which was the only one in existence, had no trustees, it was entitled to share *pari passu* with hospitals, as defined in *Home of Peace for the Dying and Incurable v. Solicitor-General*, 7 C.L.R., 680, the words "trustees of" being an erroneous addition to an adequate and sufficient description with convenient certainty of what was meant.

*Held*, as to the third third, that the words "Poor Houses" designated Government institutions of that name to the exclusion of private charities.

*Held*, therefore, as to both cases, that trustees should be appointed by the Court, and that the bequest, so far as it relates to the institutions now held to be benefited, should be dispensed under a scheme to be settled by a Judge, under which the moneys would be used for the benefit of the inmates, and not to help the Government in its ordinary expenditure.

Decision of the Supreme Court of Western Australia varied.

APPEALS from the Supreme Court of Western Australia.

The facts sufficiently appear in the judgments hereunder and in the report of the case of *Home of Peace for the Dying and Incurable v. Solicitor-General* (1).

*Draper* and *F. Burt*, for the Diocesan Trustees. The Government Poor House has no trustees, and must be wholly maintained at the public expense: *Poor Houses Discipline Act* 1882 (46 Vict. No. 8). All through his will the testator indicated that his property was to go to trustees *eo nomine*, or to managing bodies who could be treated as such, and not to a body against whom the trusts could not be enforced. There are other institutions in Western Australia, such as orphanages, which are governed by trustees and are covered by the description in the testator's will, and they should benefit. As to the meaning of "Alms Houses" and "Poor Houses" see *Mary Clark Home (Trustees of) v. Anderson* (2). [They referred to the *Home of Peace for the Dying and Incurable v. Solicitor-General* (1); *Chambers v. Brailsford* (3); *Attorney-General v. Wilkinson* (4); *Rustomjee v. The Queen* (5); *Clavering v. Ellerson* (6).]

*A. D. Stone*, for the respondent. The fact that this is a charit-

(1) 7 C.L.R., 680.  
(2) (1904) 2 K.B., 645.  
(3) 2 Mer., 25.

(4) 1 Beav., 370.  
(5) 1 Q.B.D., 487.  
(6) 3 Drew, 451.

able bequest must always be remembered, and the case dealt with from that point of view. A poor house is a dwelling house for a number of paupers maintained wholly at the public expense. The *Century Dictionary* draws the distinction between a *poor house* which is maintained at the public expense and an *alms house* which is supported by private charity. See also 46 Vict. No. 8, sec. 1. The Court should not give to the words *poor houses* a meaning which is not the usual and popular one. [He referred to: *Mills v. Farmer* (1); *Mayor of Lyons v. Advocate-General of Bengal* (2).]

*Draper*, for the Home of Peace for the Dying and Incurable. There is and was at the time of testator's death only one lunatic asylum in the State and it was the governmental one and had no trustees, and therefore should not benefit under the will. But even if it is entitled, it will only share *pari passu* with the hospitals.

*A. D. Stone*, for the respondent. It is not necessary to read the word "trustees" as qualifying "lunatic asylums"; but even if it is to be so read, there will be no failure on account of the Government lunatic asylum having none, and the Court will formulate a scheme for carrying out the testator's intention: *Wright v. Tugwell* (3). Even if the charitable gift fails, it does not go to augment other gifts but will be carried out *cy-près*: *Mayor of Lyons v. Advocate-General of Bengal* (2); *Attorney-General v. Ironmongers' Company* (4). The trust must not fail for want of trustees. "To be divided among them equally" means half of the third to the hospitals—physically weak—and half to the lunatic asylum—mentally weak.

*Draper*, in reply, referred to *Higgins v. Dawson* (5).

*Cur. adv. vult.*

The following judgments were read:—

GRIFFITH C.J. The provision of the will of the late Walter

October 26.

(1) 19 Ves., 483.

(2) 1 App. Cas., 91.

(3) (1892) 1 Ch. D., 95.

(4) 10 Cl. & F., 908.

(5) (1902) A.C. 1.

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Padbury which the Court is called upon to construe in these two cases was the subject of discussion, and, in part, of decision in the case of *Home of Peace for the Dying and Incurable v. Solicitor-General* (1). The clause in question is as follows: "And as to the balance of my real and personal estate not hereinbefore specially devised or bequeathed I direct that my said trustees shall sell and convert into money such portion thereof as shall 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." In the previous case the question for determination was as to what hospitals were entitled to share in the gift of the second third, and the Court held that certain hospitals in Western Australia, which are purely Government institutions managed by Government officials and not by persons who could in any sense be regarded as trustees, were not included in the gift. In the present case the questions to be determined are:—(1) whether the only lunatic asylum in the State, which is a State institution, and of which there are not and cannot be any trustees, is entitled to share with the hospitals under that gift, and if so in what proportion; and (2) whether two State institutions which are designated "Poor Houses" are within the gift of the third part of the residuary estate to the "Trustees of the Poor Houses in the said Colony."

In the case already decided, the basis of the decision of the Court was the fact that there were in Western Australia certain hospitals which were governed by trustees and others which were not so governed, and the Court thought that the testator had by the use of the word "trustees" differentiated between the two classes, and that the gift enured for the benefit of the former class only. All the members of the Court adverted in their judgments to the mention of the trustees of lunatic asylums, which had been mainly relied upon by the Supreme Court in coming to the conclusion that both classes of hospitals were

(1) 7 C.L.R., 680.

entitled to share in the gift, and used expressions tending to the conclusion that the same reasons which excluded hospitals of which there were no trustees might also exclude lunatic asylums. These observations, however, which were pressed upon us by Mr. *Draper*, were only *obiter*, I carefully guarded myself from being supposed to decide the point, which was, indeed, not before the Court for decision, and I am therefore able to approach the subject without any feeling of embarrassment arising from anything that I then said.

I will deal first with the case of the lunatic asylum.

At the date of the testator's will and codicil there was only one such asylum in Western Australia, which had been established under the Act 34 Vict. No. 9, passed in 1871. The official designation of the institution was "Lunatic Asylum." It was, as already said, a purely governmental institution, and under that Statute it was impossible for any other kind of asylum for the insane to be set up, for by sec. 90 of the Act it was made a misdemeanour for any person, except a relation or committee or guardian appointed by the Supreme Court, to undertake the custody of a lunatic without first having the order and certificate required on the admission of a lunatic into an asylum, or to receive or keep more than one lunatic in any house other than an asylum under the Act. The testator must, I think, be taken to have known this. When, therefore, he used in his will the words "Lunatic Asylums in the said Colony," he must be taken to have referred to that institution and any other of the same kind that might be established before his death. But, since there were not and could not be any trustees of such an asylum, the expression "trustees for the time being of the . . . Lunatic Asylums in the said Colony" was inaccurate as applied to such an institution, and did not properly designate any one. Under these circumstances the question to be determined is whether the words "trustees of the" should be rejected as *falsa demonstratio*, or whether those words should be taken as an essential part of the description of the legatees of the charitable gift. The rule applicable in such a case is laid down in the judgment of the Court of Common Pleas in *Webber v. Stanley* (1), delivered by

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(1) 16 C.B.N.S., 698, at p. 755.

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*Erle C.J.*:—"The principle was clearly explained and applied in *Morrell v. Fisher* (1) where the Court says:—"There are two rules, *falsa demonstratio non nocet* and *non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram*. The first rule means, that if there be an adequate and sufficient description, with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it. The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all; and so far as it is true, applies to one only. The other rule means, that, if it stand doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. If, therefore, there is some land wherein all the demonstrations are true, and some wherein part are true and part false, they shall be intended words of true limitation, to pass only those lands wherein the circumstances are true." The rule is again stated in *Smith v. Ridgway* (2), where *Willes J.*, delivering the judgment of the Court of Exchequer Chamber, said:—"It is unnecessary to enter into an examination of the authorities, for they are consistent, from the time of Lord *Bacon* to the decision in the case of *Webber v. Stanley* (3), where *Erle C.J.*, laid down the law with a clearness and authority which cannot be strengthened or added to. The rule which they establish is, that where words can be applied so as to operate on a subject matter, and limit the other terms employed in its description, or in other words, where there is a subject matter to which they all apply, it is not possible to reject any of those terms as a *falsa demonstratio*. This is expressed in Lord *Bacon's* maxim, *non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram*."

Applying this rule to the present case, there was in the case of hospitals a subject matter to which all the words in question applied, namely, hospitals which were governed by trustees; and this Court, applying the rule without expressly citing it, decided

(1) 4 Ex., 591, at p. 604; 19 L.J. Ex., 273, at p. 277.

(2) L.R. 1 Ex., 331, at p. 332.

(3) 16 C.B.N.S., 698, at p. 752; 33 L.J. C.P., 217.

the former case in accordance with it. But, when we come to lunatic asylums, we find a case in which "the description, so far as it is false, applies to no subject at all, and so far as it is true, applies to one only." This is, I think, a case of "an adequate and sufficient description with convenient certainty of what was meant" with an erroneous addition, *i.e.*, the words "the trustees of," which will not vitiate it.

For these reasons I think that the general intention of the testator to make a charitable gift for the benefit of the inmates of Government lunatic asylums must prevail over the erroneous detail in the description of the immediate legatees. It is objected that by so doing a different effect is given to the words "the trustees of" as used with regard to hospitals and as used with regard to lunatic asylums in the same sentence; and this is at first sight a formidable difficulty. For there is no doubt that the same words used in different parts of a will should, if possible, be read in the same sense, and especially should a word have a single meaning in the same sentence. But I think that there are two answers to the objection in the present case: (1) The rule is not a rule of law but merely a practical rule for discovering the intention of the testator, and must give way to the other more certain indications of that intention; and, (2) This is not a case of giving different meanings to the same words, but of rejecting words which appear to have been used inadvertently as words of description of a subject matter which is itself otherwise certain, and to which they are inapplicable.

But I do not think—and indeed it was not contended by Mr. Stone—that the share of the second third which falls to lunatic asylums is payable to the Government in aid of the Consolidated Revenue. Nor is the case, strictly speaking, one in which the doctrine of *cy-près* is applicable, since there is no doubt as to the object of the gift, that object is in existence, and the whole of the gift can be applied to it. It is rather a case in which a trust should not be allowed to fail for want of trustees. I think, therefore, that trustees should be appointed to receive and administer the fund which will be available for lunatic asylums, and that a scheme should be settled for its application.

It was contended for the respondent that the second third

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should be divided into two parts, one for hospitals and the other for lunatic asylums. But I do not think that the words "to be divided among them equally" are open to this construction. In my opinion the lunatic asylum, or, as it is now called, hospital for the insane, is entitled to share *pari passu* with the hospitals entitled to share in the distribution of this one-third.

I have dealt first with the gift to lunatic asylums, because the questions raised upon that part of the gift are common to both the appeals now before us, and the same arguments are applicable. They do not, however, conclude the matter so far as regards the questions raised by the appeal of the diocesan trustees. In case of the lunatic asylums there was no room for doubt as to the institution which the testator meant, but it is not quite so certain what he meant by "Poor Houses."

That term is not one in general use in Australia. It is defined in the English Dictionary as "a house in which poor people in receipt of public charity are lodged." An almshouse, on the other hand, is defined as "a place founded by private charity for the reception and support of the (usually aged) poor." Other dictionaries referred to agree in attributing the note of public charity to poor houses, and in the quotations given in Dr. Murray's great work the poor house seems to be used as synonymous with work-house, *i.e.*, a house established and maintained out of the poor rates.

This note of public charity is, I think, *prima facie* to be attributed to the word when used in an Australian will.

It appears, moreover, that at the date of the testator's will and codicil there were in existence in Western Australia two Government institutions officially designated "poor houses," which name is given to them by the Statute under which they were established. By that Act (46 Vict. No. 8) it is provided that the Governor in Council may declare "any institution wholly maintained at the public expense for the purpose of relieving the poor of the said colony" to be a poor house within the meaning of the Act, and power is given to make regulations for the maintenance of discipline in such poor houses.

This Act was amended by a later Act (52 Vict. No. 10) entitled: *The Poorhouses Discipline Act 1888*, which deals with the

"inmates of a poor house." These institutions were not vested in or governed by trustees. It appears, then, that at the date of the will and codicil the term "poor house" was in actual use in Western Australia, and denoted a Government institution for the relief of the poor, and I think it must be taken that the testator was aware of the fact. It appears, further, that at the testator's death there were two such institutions in existence. On these facts the respondent contends that the institutions intended by the testator are plainly designated, that the use of the words "the trustees of" is a mere *falsa demonstratio*, or erroneous addition which may be disregarded, as in the case of lunatic asylums. The appellants rely mainly on the use of those words, and on the effect which the Court attributed to them in the previous case; and they contend, further, that it is not necessary in this case to apply the principles which, in my opinion, govern the case of the lunatic asylums, since there were, they say, several institutions in Western Australia for the relief of poor persons which might properly be designated "poor houses," although that was not their formal or usual name, such as orphanages and other private charities, which are in fact vested in and governed by trustees, using that term in the wide sense in which the Court used it in the case of *Home of Peace for the Dying and Incurable v. Solicitor-General* (1), and they point out that the testator was a regular contributor to the funds of several such institutions. On the other hand it appears that they were never called "poor houses," but had some other name. The appellants contend, further, that the testator did not intend to give one-third of his residuary estate in relief of the Consolidated Revenue, as, they say, would result from accepting the respondent's contention; and they point out that it was a condition of the establishment of a poor house under the Statute of 1882 that it should be an institution maintained wholly at the public expense. On the other hand it was pointed out that a charitable gift for the benefit of the inmates of poor houses, as well as of lunatic asylums, might be applied in many ways for the amelioration of their condition and the increase of their comfort and pleasures of life, altogether

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(1) 7 C.L.R., 680.

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apart from the mere maintenance of the institutions, and that a gift for such a purpose would be a good charitable gift.

Upon the whole I think that the arguments for the respondent preponderate in weight, and that the testator must be taken, when he used the word "Poor Houses," to have intended to designate the Government institution of that name. I think, therefore, that in this case also there should be a direction for the appointment of trustees of the fund and for the settlement of a scheme, for its management.

Both appeals therefore substantially fail. I think, however, that the order of the Supreme Court should be varied so as to give effect to the views which I have expressed.

I think that one order should be made in both appeals to the effect that the order appealed from should be further varied by the addition of the following declarations and directions, and, as so varied, be affirmed.

Declare that the Fremantle Hospital for the Insane is entitled to share *pari passu* with other hospitals in the gift of the one-third part of the testator's residuary estate directed to be paid to the trustees of hospitals and lunatic asylums in Western Australia.

Declare that the poor houses established under the Act 46 Vict. No. 8, and existing at the date of the testator's death, are entitled to the benefit of the gift of one-third of the testator's residuary estate directed to be paid to the trustees of the poor houses in the said Colony.

Direct that trustees be appointed for the administration of the portions of the testator's estate available for the benefit of the said hospital for the insane and the said poor houses respectively, and that the said respective portions be paid to such trustees respectively when so appointed.

Direct that schemes for the regulation and management of the funds to be so paid to the said trustees and the application of the same and the income thereof, and the selection of fit objects of the charity, and for filling vacancies in the numbers of the trustees, be settled by the Judge, the Attorney-General to have notice of and to be at liberty to attend the proceedings relating to such schemes.

With these variations the case should be remitted to the Supreme Court with liberty to all parties to apply as they may be advised.

With regard to costs, the appellants, having failed, are not entitled to any costs of the appeals. The Solicitor-General should have his costs out of the respective thirds of the residuary estate with respect to which the appeals are brought.

BARTON J. I agree in the conclusions just expressed, for I cannot see my way to arrive at any other result. Our judgment in the first appeal under this will (1) was that under the second of the three branches of the residuary bequest those of the hospitals which had trustees either *eo nomine*, or in substance in the shape of committees or other governing bodies, entrusted with the funds subscribed, were the intended recipients of that part of the testator's bounty. That was a construction under which it was not necessary to reject any word of the gift. But in the case of the lunatic asylum now in debate, the question is whether the gift fails entirely by reason of the word "trustees," there being, as the testator must be taken to have known, only one lunatic asylum, and that without trustees, being the Government institution of that name. Under the Act there could not be any other than Government asylums. The case is very different from that of the hospitals, and I agree that to avoid frustrating the intention of the testator, so far as it can be gathered from his words, we must hold the gift applicable to the lunatic asylum *pari passu* with the hospitals that take, rejecting the word "trustees" in this case as mere *falsa demonstratio*.

In the case of the poor houses, the difficulty is practically the same, because it is not possible in reason to bring the orphanages, whose claim Mr. *Draper* has asserted, within that term. No definition can be found which does not place poor houses among public, as distinguished from private, charities, and when Mr. Padbury made his will, the term "Poor House" was known in this State as applicable to institutions for the relief of the poor, wholly maintained at the public expense. These institutions had been provided for by Statute, as we must take the testator to

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have known, and indeed, there were two of them when he died. On the other hand, there is nothing to show that the word had ever acquired in Western Australia a meaning which would include the two orphanages. The term "Poor Houses" as used in Western Australia, whether at the date of the will, or at the death of the testator, was in my judgment not applicable to those two private charities, and was, so far as our knowledge extends, applicable only to the two Government institutions. The question therefore arises in this case, equally with that of the lunatic asylum, whether the gift must fail or whether effect cannot be given to the testator's intention by rejecting the word "trustees" as *falsa demonstratio*, there being no other ascertainable object of the third branch of the residuary bequest than the two poor houses. I have come to the conclusion that this construction must be adopted, and the rules laid down by *Erle C.J.* in *Webber v. Stanley* (1), and adverted to by *Willes J.*, citing that case, in *Smith v. Ridgway* (2), are in my opinion applicable to these cases, and also to that which we decided in relation to the hospitals (3).

As the Chief Justice has pointed out, it is not necessary that the moneys which will thus come to the lunatic asylum and the poor houses should go to swell the Government revenue. If that were so, different considerations might arise as to the intention of the testator. Under the order proposed, in which I agree, these trusts will not be allowed to fail for want of a trustee, and the bequest, so far as it relates to the institutions now held to be benefited, will be dispensed under a scheme to be settled by the Supreme Court, under which care will be taken that the moneys will be used for the benefit of the inmates, and not for the ease of the Government in its expenditure. I agree also as to the costs.

O'CONNOR J. Both these cases involve the interpretation of the same portion of the will and the application of the same principles of construction. It will therefore be convenient to deal with them together. The bequests occur in the following passage: "And that the whole of such balance shall be divided into

(1) 16 C.B.N.S., 698.

(2) 1 L.R. 1 Ex., 331.

(3) 7 C.L.R., 680.

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." In *Padbury's Case* (1) this Court considered the meaning of the expression "hospitals in the said Colony." In the present appeals the expressions "the lunatic asylums in the said Colony," and "the Poor Houses in the said Colony," are to be interpreted. It is claimed by the appellants in both cases that the decision in *Padbury's Case* (1) is a conclusive authority in their favour. In my opinion it cannot be so regarded. In that case the question raised was whether all Government hospitals came within the gift to "hospitals." It appeared that there were three classes of Government hospitals; in two of which the management was vested in bodies or individuals who might be fairly said to come within the description "trustees." The third class was proved to be entirely under Government management and control. As to them, this Court held that an essential portion of the testator's description of the subject of his bounty was inapplicable, inasmuch as they were not managed by trustees, and that they could not therefore come within the class of hospitals which the testator had expressed an intention to benefit. The ground of the decision may be stated in a few words. The object of the testator's bounty was hospitals, not all hospitals, but such only as were managed by trustees. To those which had no trustees the testator's gift did not apply. To those which had it did apply. Full effect was thus given to every word in the will. The gift by no means failed, but the number of hospitals amongst which it was distributed became lessened by shutting out the class of hospitals to which the testator's description in its entirety was inapplicable. Beyond that the decision did not go, and each member of the Court expressly limited the operation of his judgment to the question in that case submitted for determination. In illustration of the position which the Court took up, reference was made to the bequests for lunatic asylums. In

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the portion of my judgment dealing with that topic, expressions were used which are, I think, fairly open to the interpretation which the appellants in these cases have placed upon them in their favour. However that may be, those observations were not necessary for the decision of the question then before the Court, and I should feel myself in no way bound by them if counsels' argument in the cases now under consideration should lead me to modify the views so expressed.

Turning now to the questions raised in the present appeals, I shall take them in the order in which they arise in the will. It is contended that lunatic asylums cannot be allowed to share in the bequest because they are not managed by trustees. The bequest, it is said, is not to all lunatic asylums, but to those only which have trustees to whom the gift may be handed over. Giving to the words which the testator has used their ordinary meaning, I cannot see any reason to doubt that he intended Government lunatic asylums to be the objects of his bounty. In Western Australia the sole care and control of lunatic asylums is by Statute vested in the Government. At the time when the will was executed it was impossible under the law that there could be in Western Australia any lunatic asylum other than those under the absolute control of Government. It must have been notorious, also, that the only lunatic asylum existing in the State was the Government lunatic asylum at Fremantle. There seems to be no ground for assuming that the testator was ignorant of that fact or of the law which vested in the Government exclusive control. Under these circumstances I find it impossible to avoid the conclusion that the testator in using apt words to describe Government asylums intended that the Government asylum or asylums, if there were more than one existing at the time of his death, should share in his bounty to the extent indicated. Having thus plainly expressed that intention, he unfortunately directed that the gift so conferred should be paid to the trustees of the lunatic asylums, and it is now urged that, because there is not and cannot be in this State any lunatic asylum governed by trustees, the gift must fail altogether. If that view is to be taken, it follows that the words of the will must have been from the time of its execution meaningless and of no effect. For there was not

then, nor could there be, any lunatic asylum in Western Australia answering in every particular to the testator's description. But the Court will never allow the plain intention of a testator to benefit so well defined an object of his charity to be defeated by misdescription of that kind. The rule of construction to be followed in such circumstances has long been settled and is well illustrated in the authorities referred to by my learned brother the Chief Justice in dealing with this part of the case. Once the object of the testator's bounty is ascertained, the Court will treat as *falsa demonstratio* and so disregard any words of description which he may have mistakenly applied to it. Where the object is charitable, the Court will see to it that his object is not defeated for want of trustees to carry it out. Giving fair effect to the language of the will, it is in my opinion plain that the testator intended to benefit the inmates of Government lunatic asylums. It is clear also that he intended his bounty to be administered by trustees who would be subject to control by the Court in the discharge of their trust. It is apparent now that this last named intention cannot be carried out in accordance with the testator's expressed direction because the Government cannot be made trustees subject to the control of the Court. But the Court can, and will in exercise of its charity jurisdiction, appoint trustees to administer the charitable gift under its control in such method as will be best fitted to give effect to the testator's expressed intention. I am therefore of opinion that the Government lunatic asylum has the right to share equally with each of the hospitals entitled in the fund allotted for their joint benefit, and that the Court should so declare. Further, I agree that trustees should be appointed and a scheme settled for the administration of the trust.

Coming now to the question of poor houses, the appellants contend that the will cannot be interpreted as applying to the Government poor houses. The objection rests on the same reasoning as that relied on in the case of the lunatic asylum, and must be answered in the same way. The expression "poor house" has in England acquired a well known meaning in the administration of the Poor Laws. It is a house where the poor are main-

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tained at the public expense, as distinguished from an Alms House, which is defined as a place in which poor persons are supported by private charity. The English meaning of the expression "poor house" has evidently been adopted and recognized by the Western Australian legislature in the *Poorhouses Discipline Act* 1882. That Statute applies the expression to institutions maintained at the public expense for the relief of the poor. It appears from the affidavits that there were at the time when the will was drawn, and there are now, two institutions in this State for the relief of the poor, maintained wholly at the public expense and known as poor houses. Under these circumstances it is I think beyond question that those institutions are indicated by the testator as the objects of his bounty. In calling them poor houses he has used exact and appropriate language to describe them. As in the case of a lunatic asylum that plain intention cannot be defeated because the testator has in regard to them also mistakenly directed the payment of his bounty to trustees who have no existence. For the reasons which I have stated at length in the case of the lunatic asylums I am of opinion that a similar declaration of right should be made in favour of the poor houses, and that the same directions should be given as to the appointment of trustees and the settlement of a scheme. In both cases I think the formulation of a scheme is required. Public lunatic asylums and poor houses cannot be expected to supply from public moneys much beyond reasonably comfortable maintenance and medical care. But there are many ways in which private charity sympathetically and wisely administered may render the daily lives of both classes of inmates brighter and happier than they can be under the ordinary routine of Government administration. Some such object was no doubt in the testator's mind, and I see no reason why it should not be successfully accomplished under a well thought out scheme settled under the direction of the Supreme Court. For these and other purposes incidental to the order of this Court it will be necessary to refer the case back to the Supreme Court. I may add that I have had the advantage of reading the judgment of my learned brother the Chief Justice. I entirely concur in what he has said, and I

agree as to the forms of declaration and order which he has mentioned, and as to the orders and directions with reference to costs and other matters which he has indicated.

*Decision of the Supreme Court varied.  
Case referred to Supreme Court with  
directions.*

Solicitors, for the Diocesan Trustees, *Stone & Burt.*

Solicitors, for the Home of Peace, *Parker & Parker.*

Solicitor, for the Solicitor-General, *Barker*, Crown Solicitor.

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Foll  
Cock v Aitken  
(1911) 13  
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Appl  
Andco  
Nominees Pty  
Ltd v Lestato  
Pty Ltd (1995)  
17 ACSR 239

Rev  
Smith v Cock  
(1911) 12  
CLR 30

[HIGH COURT OF AUSTRALIA.]

COCK (PLAINTIFF) . . . . . }  
AND HOWDEN (TRUSTEE OF COCK) } APPELLANTS ;

AND

SMITH AND OTHERS . . . . . RESPONDENTS.  
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF  
VICTORIA.

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1909.

*Trustee—Discretionary trust—Exercise of discretion—Maintenance of one person  
under two wills—Contribution—Trust estate entitled to interest in another trust  
estate—Right of action of beneficiary of first estate against trustees of second  
estate—Payments attributable to corpus or income.*

MELBOURNE,  
Sept. 9, 10,  
13, 14, 15,  
17, 27, 28,  
Oct. 11.

J.M.S., who died in 1898, by his will devised and bequeathed all his real and personal property to trustees upon trust for sale and getting in with power indefinitely to postpone such sale and getting in. After setting out

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