[HIGH COURT OF AUSTRALIA.]

WILLIAM TAYLOR AND ANOTHER . APPELLANTS;
DEFENDANTS,

AND

MATHEW TAYLOR AND OTHERS . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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HOBART, *Feb.* 14, 15, 16.

MELBOURNE, *March* 16.

Griffith C.J. Barton and Isaacs JJ.

Charitable bequest—Scientific research—Scientific institutions—Private institutions for mentally afflicted—Private homes for sick or convalescent persons.

A testator gave his residuary estate in thirds upon the following trusts:—(1) Upon trust to apply the property "towards the advancement of scientific research generally and the founding endowing or assisting any existing scientific institutions or any scientific institution which may hereafter be founded." (2) Upon trust to apply the property "for the purpose of founding endowing or assisting private institutions or homes in Tasmania or Victoria for the care and treatment of mentally afflicted persons as my trustees may in their absolute discretion select and to be paid or applied to or for such objects or institutions or homes if more than one in such proportions as my trustees may think proper." (3) Upon trust to apply the property "for the purpose of founding endowing or assisting private homes for the treatment of sick or convalescent persons in cases where such persons cannot be treated in their own homes and it would not be advisable to send or place them in a public institution asylum or hospital and for the treatment of such persons who may be suffering from ill health or constitutional weakness and who may desire to avail themselves of such homes subject to the parties so applying being approved of and paying such fees as may be fixed by those having control and management of the said homes."

Held, that each of the gifts was a valid charitable gift.

Held, also, that if these gifts had otherwise been invalid a general charitable intention could not have been inferred from the fact, that all the estate was given for purposes which the testator erroneously supposed to be charitable.

Decision of the Supreme Court of Tasmania: *In re Ralston*, 5 Tas. L.R., 68, affirmed on different grounds.

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APPEAL from the Supreme Court of Tasmania.

John Ralston, deceased, by his will, after specifically devising his real estate and bequeathing certain legacies, directed his trustees, subject to the payment of his debts, funeral and testamentary expenses and legacies, to hold his residuary estate: "Upon trust to divide the same as nearly as possible into three parts and to apply one of such parts towards the advancement of scientific research generally and the founding endowing or assisting any existing scientific institutions or any scientific institution which may hereafter be founded And to apply another of such parts for the purpose of founding endowing or assisting private institutions or homes in Tasmania or Victoria for the care and treatment of mentally afflicted persons as my trustees may in their absolute discretion select and to be paid or applied to or for such objects or institutions or homes if more than one in such proportions as my trustees may think proper And to apply the remaining third part for the purpose of founding endowing or assisting private homes for the treatment of sick or convalescent persons in cases where such persons cannot be treated in their own homes and it would not be advisable to send or place them in a public institution asylum or hospital and for the treatment of such persons who may be suffering from ill health or constitutional weakness and who may desire to avail themselves of such homes subject to the parties so applying being approved of and paying such fees as may be fixed by those having control and management of the said homes I authorize my trustees in their absolute discretion to decide and determine what portion of the third part or share in the residuary estate to be set apart for the purposes as aforesaid shall be applied for the various objects selected by my trustees to answer the said trusts with full power for my trustees to apply the capital or part of the capital of any such share or invest the same or any part thereof and apply the income only or any part thereof for the benefit of the objects from time to time selected or chosen by my trustees to benefit under the aforesaid charitable trusts and directions I also authorize my trustees to postpone for such period as to

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them shall seem advisable the carrying out of any of the aforesaid charitable trusts and in the meantime to accumulate the income to be derived from the moneys set apart to answer the same I also authorize my trustees if they shall not deem it advisable to carry out all of the aforesaid charitable trusts or to expend the whole of the third part or share to be set apart as aforesaid for such trusts to apply the same share or the unexpended portion thereof for or towards any one or both of the other charitable trusts and in such proportions as to my trustees shall seem advisable And I declare that it is my wish that in dealing with the aforesaid three charitable trusts my trustees shall give the preference to the first trust for the benefit of present or future scientific institutions or scientific research generally And I further declare that my trustees shall have the fullest powers and discretion in carrying out the aforesaid charitable trusts I request my trustees in their discretion to carry out if it shall seem to them to be advisable any directions or instructions in writing with regard to the application of my said residuary estate for such charitable objects as aforesaid which I may leave with this my will amongst my papers but I declare that such directions or instructions are only given for the purpose of explaining and assisting my trustees in understanding my wishes and intentions with regard to the aforesaid charitable trusts and shall not in any way fetter or affect the discretion given to my trustees in carrying out the trusts relating to the aforesaid charitable bequests."

An originating summons was taken out in the Supreme Court of Tasmania by the trustees for the purpose of ascertaining the validity of the gifts contained in the portion of the will above set out.

The Attorney-General of Tasmania, the Attorney-General of Victoria and the present appellants were made defendants to the summons.

The Supreme Court found that the gifts taken *seriatim* would be bad, but that they could be supported on the ground of a general charitable intention: *In re Ralston* (1).

(1) 5 Tas. L.R., 68.

The representatives of the next-of-kin now appealed to the High Court.

Ewing and *Archer*, for the appellants. The first gift was for the "advancement of scientific research generally and forwarding endowing or assisting any existing scientific institutions which may hereafter be founded." It has been claimed that this comes under the second division of charitable bequests as classified by Lord *Macnaghten* in *Commissioners for Special Purposes of the Income Tax* v. *Pemsel* (1). But in order to come within that protection there must be *propagation* or *diffusion* of the knowledge: mere increase of the stock of knowledge without dissemination is not charitable.

In the second gift the discretion is too broad: it would be open to the trustees to give the money to a doctor who had established a private home for his own pecuniary benefit. So this gift does not fall within any of the heads of Lord *Macnaghten's* classification. As to Hospitals for Insane in Tasmania, see 22 Vict. No. 23, and *Charitable Institutions Act* (52 Vict. No. 8).

The objections to the second gift also apply to the third gift, which is also bad, as it provides for the treatment of persons "suffering from ill-health or constitutional weakness and who may desire to avail themselves of such homes subject to the parties so applying being approved of and paying such fees as may be fixed by those having control, &c." This was a class of home to which the poor could not resort.

[Counsel referred to the following:— *Attorney-General for New South Wales* v. *Adams* (2); *Morice* v. *Bishop of Durham* (3); *Whicker* v. *Hume* (4); *The President of United States* v. *Drummond* (5); *In re Macduff*; *Macduff* v. *Macduff* (6); *Beaumont* v. *Oliveira* (7); *Thomson* v. *Shakespear* (8); *In re Douglas*; *Obert* v. *Barrow* (9); *In re Nottage*; *Jones* v. *Palmer* (10); *Hunter* v. *Attorney-General* (11); *Hoare* v. *Hoare* (12); *In re Sin-*

(1) (1891) A.C., 531, at 583.
(2) 7 C.L.R., 100.
(3) 9 Ves., 399; 10 Ves., 522.
(4) 7 H.L.C., 124.
(5) At the Rolls, 12th May 1838 M.S. cited by Lord *Chelmsford* L.C. in *Whicker* v. *Hume*, 7 H.L.C., 124, at p. 155.
(6) (1896) 2 Ch., 451.
(7) L.R. 4 Ch., 309.
(8) 29 L.J. Ch., 276.
(9) 35 Ch. D., 472.
(10) (1895) 2 Ch., 649.
(11) (1899) A.C., 309.
(12) 56 L.T. 147.

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clair's Trust (1); *Ommanney* v. *Butcher* (2); *In re Burley*; *Alexander* v. *Burley* (3); *Re Dutton* (4); *Theobald*, 6th ed., 358; *Encyclopædia of Forms and Precedents*, vol. 3, p. 300.]

Dobbie (Solicitor-General) and *Lodge*, for the Attorney-General of Tasmania, in support of the will. There is no authority against the validity of the first gift, but the case of the *Smithsonian Institute* (*The President of United States* v. *Drummond*, referred to in *Whicker* v. *Hume* (5)) supports it. Knowledge gained is not now stored up as by the alchemists of old, but is given to the world. The word *research* implies the diffusion of the knowledge acquired by diligent inquiry.

As to the second gift the only objection is the word *private*. This merely means a place where some privacy can be obtained. The institution is still of a public character.

As to the third gift, the fact that fees are to be paid in certain cases does not necessarily deprive it of its charitable nature. "Such persons *who* may be suffering," &c., should be read, "such persons *as* may be suffering," &c. The use of the word "*such*," before "homes," shows that the real meaning is that people, though not poor, may use the homes founded for the poor on payment of certain fees. There is only to be one class of home under this gift.

[Counsel referred to *Dolan* v. *Macdermot* (6); *Bruce* v. *Presbytery of Deer* (7); *Weir* v. *Crum-Brown* (8); *Beaumont* v. *Oliveira* (9); *Mayor &c. of Manchester* v. *McAdam* (10); *University of London* v. *Yarrow* (11); *In re Davis*; *Hannen* v. *Hillyer* (12); *Nash* v. *Morley* (13); *In re Slevin*; *Slevin* v. *Hepburn* (14); *Ommanney* v. *Butcher* (2); *Waldo* v. *Caley* (15); *Commissioners for Special Purpose of the Income Tax Act* v. *Pemsel* (16); *In re Macduff*; *Macduff* v. *Macduff* (17); *In re Cranston*; *Webb* v. *Oldfield* (18); *In re Slatter*; *Howard* v. *Lewis* (19)].

(1) 13 L.R. Ir., 150.
(2) Turn. & R., 270; 24 R.R., 42.
(3) 26 T.L.R., 127.
(4) 4 Ex. D., 54.
(5) 7 H.L.C., 124.
(6) L.R. 5 Eq., 60; L.R. 3 Ch., 676.
(7) L.R. 1 H.L. (Sc.), 96.
(8) (1908) A.C., 162.
(9) L.R. 4 Ch., 309.
(10) (1896) A.C., 500.
(11) 1 DeG. & J., 72.
(12) (1902) 1 Ch., 876.
(13) 5 Beav., 177.
(14) (1891) 2 Ch., 236.
(15) 16 Ves., 206.
(16) (1891) A.C., 531.
(17) (1896) 2 Ch., 451.
(18) (1898) 1 I.R., 431.
(19) 21 T.L.R., 295.

[ISAACS J. referred to *Re Ogden*; *Taylor* v. *Sharp* (1)].

Waterhouse, for the respondent trustees, referred to *Salusbury* v. *Denton* (2); *In re Hunter*; *Hood* v. *Attorney-General* (3); following *In re Macduff*; *Macduff* v. *Macduff* (4); *Hunter* v. *Attorney-General* (5); *In re Douglas*; *Obert* v. *Barrow* (6); *In re Sinclair's Trust* (7); *Moggridge* v. *Thackwell* (8).

Ewing, in reply, referred to *In re Delaney*; *Conoley* v. *Quick* (9); *Cocks* v. *Manners* (10); *In re Sidney*; *Hingeston* v. *Sidney* (11).

Cur. adv. vult.

The following judgments were read :—

March 16.

GRIFFITH C.J. The testator gave the residue of his estate upon trust to divide it into three equal parts and apply them to certain purposes of a charitable nature. The question is whether the gifts or any of them are good charitable bequests.

The first trust is in these terms :—"Upon trust . . . to apply one of such parts towards the advancement of scientific research generally and the founding endowing or assisting any existing scientific institutions or any scientific institution which may hereafter be founded."

The appellants do not dispute that this gift is good so far as it relates to scientific institutions, but they contend that the advancement of scientific research is not an educational purpose within the recognized rules governing charitable bequests. They rely mainly upon the *dicta* of the learned Lords in *Whicker* v. *Hume* (12) which, they say, have been accepted as establishing a distinction between the acquisition and the diffusion of knowledge, with the result that, while a gift to be applied for the diffusion of knowledge is good, a gift to promote the mere acquisition of knowledge is bad. They referred to a statement in a text

(1) 25 T.L.R., 382.
(2) 3 K. & J., 529; 3 Jur. N.S., 740.
(3) (1897) 1 Ch., 518.
(4) (1896) 2 Ch., 451.
(5) (1899) A.C., 309.
(6) 35 Ch. D., 472.
(7) 13 L.R. Ir., 150.
(8) 7 Ves., 36.
(9) (1902) 2 Ch., 642.
(10) L.R., 12 Eq., 574; 40 L.J. Ch., 640.
(11) (1908) 1 Ch., 488.
(12) 7 H.L.C., 124.

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book edited by very learned persons to the effect that 'learning' as a charitable purpose means the propagation of learning but does not include the increasing of the stock of available knowledge. I confess my inability to apprehend how the stock of available knowledge can be increased without diffusion of the addition to the existing stock. Knowledge confined to the bosom of the discoverer is not to my mind 'available' in any rational sense of the term. But it is not, in my judgment, necessary to express an opinion on the point whether the doubts expressed by the learned Lords in the case cited would now be accepted as well founded. The first question to be determined is what is the meaning of the testator's language, "the advancement of scientific research generally." In these days scientific research is recognized as one of the most efficient means of adding to the knowledge of mankind. We are all familiar with the fact that research scholarships are granted by universities and other institutions for this purpose. It is true that the holder of such a scholarship may, in breach of the honorable obligations incumbent upon him, fail to disclose the result of his researches, but the existence of that necessary risk cannot alter the character of an endowment granted for such a purpose. The diffusion of knowledge is no longer dependent, as it once was, upon oral instruction or personal communication between the teacher and the taught. Scientific institutions are admittedly institutions for the propagation of learning. In *Beaumont* v. *Oliveira* (1), a gift to the Royal Society, which was founded for "improving natural knowledge," was held a good charitable gift, and in *President of the United States* v. *Drummond* (cited by Lord *Chelmsford* L.C. in *Whicker* v. *Hume* (2)), Lord *Langdale* M.R. held that a gift to found, under the name of the Smithsonian Institution, "an institution for the increase of knowledge amongst men" was a valid charity.

As a mere matter of construction I think that the term "the advancement of scientific research generally" imports in these days the disclosure of the results of the research to the public. The most that can be said against this view is that the words are capable of being read in a more limited sense; but this is not

(1) L.R. 4 Ch., 309.

(2) 7 H.L.C., 124.

sufficient. In the case of a charitable gift, if the words are capable of a meaning which will support the gift, that construction should be adopted: *Bruce* v. *Presbytery of Deer* (1). In my opinion, therefore, this gift is *ex facie* a good charitable gift.

The limits of the second trust are in these words: "To apply another of such parts for the purpose of founding endowing or assisting private institutions or homes in Tasmania or Victoria for the care and treatment of mentally afflicted persons as my trustees may in their absolute discretion select and to be paid or applied to or for such objects or institutions or homes if more than one in such proportions as my trustees may think proper."

The validity of this gift is impeached on two grounds; (1) that the purpose expressed does not fall within any of the four divisions of charities enumerated by Lord *Macnaghten* in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (2); and (2) that under the terms of the trust the whole or part of the fund might be paid over to persons carrying on a home or establishment for the treatment of mentally afflicted persons as a mere private speculation for the pecuniary advantage of the conductors.

In my opinion, the second ground of objection does not arise upon a fair construction of the language. The words "institutions or homes for the care &c." standing alone, might be susceptible of such a meaning. But the use of the word "founding," shows that such private institutions were not intended by the testator. The kind of institution which he contemplated was one which might be founded by his trustees. It is obvious that the expression "founding a home," used in such a context, imports an institution which is not to be carried on for the pecuniary benefit of either its founders or managers. It was suggested that the words "endowing and assisting" enlarged the scope of the trust. But it is a sufficient answer to say that when we have ascertained, from the use of the word "founding," the subject-matter dealt with, those other words must also be read as applicable to the same subject-matter.

The use of the word "private" does not raise any difficulty.

(1) L.R. 1 H.L. (Sc.), 96. (2) (1891) A.C., 531.

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When read with the context, I think it means that the institutions contemplated are institutions which would afford conditions more resembling the privacy of a home than are to be found in a public hospital for the insane as ordinarily conducted. The term "private charity" is a familiar one to denote institutions of such a kind.

The first objection, however, raises a question which seems to me not free from difficulty. The *primâ facie* impression that the words convey to my mind is that the testator intended the establishment of what may be called private lunatic asylums for the benefit of well-to-do persons who could pay for their treatment, or at any rate to include institutions for the exclusive benefit of such persons.

If this were the true construction I doubt very much whether the gift could be supported. I am disposed to accept the view put forward by *Rigby* L.J. in *In re Macduff*; *Macduff* v. *Macduff* (1) who, supposing a testator to say:—"The ordinary objects of charity are in my mind sufficiently provided for; but I regard the position of the well-to-do, or moderately well-to-do, classes as one also requiring consideration, and I leave my residue to trustees in order that they may in their discretion do something towards advancing the happiness and the position in life of those who are not really objects of charity, but who may be made happier, and in some sense better than they now are, with such incomes as they possess," went on "I doubt whether any one could say that that was not a philanthropic intention—a very wide desire to improve the position of a large class of persons. Philanthropic I should think it was — charitable I feel pretty certain it would not be."

In the same case *Lindley* L.J. said (2):—". . . Purposes indicating goodwill to rich men to the exclusion of poor men. Such purposes would be philanthropic in the ordinary acceptation of the word—that is to say, in the wide, loose sense of indicating goodwill towards mankind or a great portion of them; but I do not think they would be charitable. I am quite aware that a trust may be charitable though not confined to the poor; but I doubt

(1) (1896) 2 Ch., 451, at p. 471.

(2) (1896) 2 Ch., 451, at p. 464.

very much whether a trust would be declared to be charitable which excludes the poor."

The testator has, however, certainly not expressly excluded the poor from the benefit of this trust, and I do not think that this would be a safe ground for holding the gift bad. It is, at worst, possibly ambiguous, which is not sufficient.

I think that if the gift can be supported it must be on the analogy of a gift for a hospital. It is too late now to dispute the validity of gifts for the benefit of hospitals, on whatever ground they were first supported. I think it not unlikely that it was on the ground that they served a purpose of public utility analogous to the aid of the "aged impotent or poor." It appears from the case of *Cawse* v. *Committee of Nottingham Lunatic Hospital* (1) that a private hospital for the insane is a recognized form of charitable institution in England, although so far as I know no such institution has ever been established in the Commonwealth. And, although that case was decided on another Statute, I cannot doubt that a gift for such an institution would be held a good charitable gift, unless, perhaps, if the poor were excluded from its benefits.

Upon the whole, therefore, I think that this gift also is good.

The trusts of the third gift are in these words: "To apply the remaining third part for the purpose of founding endowing or assisting private homes for the treatment of sick or convalescent persons in cases where such persons cannot be treated in their own homes and it would not be advisable to send or place them in a public institution asylum or hospital and for the treatment of such persons who may be suffering from ill-health or constitutional weakness and who may desire to avail themselves of such homes subject to the parties so applying being approved of and paying such fees as may be fixed by those having control and management of the said homes."

This gift was attacked on the same grounds as the second, and what I have said with respect to that gift is equally applicable to these objections so far as they are the same. But it was also impeached on another ground arising upon the construction of the language. It was contended that, properly construed, the gift is

(1) (1891) 1 Q.B., 585.

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for the benefit of two classes of homes, namely, homes for the treatment of sick or convalescent persons needing privacy, and homes for the treatment of persons suffering from ill-health and constitutional weakness on the payment of fees to be prescribed by the managers, and that, as homes of the second class would in effect be homes from the benefits of which the poor would be excluded, that possible destination of the fund was bad, so that the whole gift failed.

The sentence is not quite grammatical. The second member should apparently be remoulded so as to read "for the treatment of such persons—suffering from ill-heath or constitutional weakness as may desire," &c.—It is contended that the words "private homes" ought to be read in before these words. Whether they are read in or not, the emendation just stated would appear to be equally necessary to secure grammatical accuracy. Why, then, should they be inserted? The two phrases introduced by the words "for the treatment of" are *primâ facie* adjectival phrases qualifying the single nominative "private homes," and the use of the word "such" before "homes" in the second member of the sentence points to something already mentioned and not to a word needing to be interpolated. In my opinion the trust is for a single class of homes or hospitals, established primarily for the benefit of the sick and convalescent, but to which persons suffering from ill-health or constitutional weakness, whom the testator regarded as a different class of persons, might be admitted on payment. It is not contended that a gift to a hospital which would otherwise be good is vitiated by a permission to admit paying patients.

For these reasons I think that the third gift also is valid.

I cannot accept the view taken by the Supreme Court that, if the gifts taken *seriatim* were bad, they would nevertheless be validated by the indication of a general charitable purpose. But, holding that taken *seriatim* they are all good, I think that the appeal must be dismissed.

Under the circumstances, and as the Attorney-General does not object, I think that the costs of appeal of all parties should be paid out of the residuary estate.

BARTON J. The attack on the residuary bequest of the first share centres on the words "advancement of scientific research." It is contended that the words do not connote the diffusion of scientific knowledge; that research may take place without any communication to the world of the discoveries which result from it, and that the trust is therefore not a charitable one in the legal sense (see Lord *Macnaghten's* classification in *Commissioners of Income Tax* v. *Pemsel* (1)), inasmuch as it does not fall under the head of "trusts for the advancement of education," nor is it a trust for the relief of poverty, the advancement of religion, or for "other purposes beneficial to the community" not falling under any of the preceding heads.

The first question is whether the words create a trust for the advancement of education. If they do not, the gift may probably be sustained on the fourth ground, that of public utility; but, in the view I take, it will not be necessary to consider that point.

In order that a trust may be construed as one for the advancement of education, and therefore good as a bequest for charitable purposes, it may be conceded that the terms used must connote the diffusion of knowledge as the object of the gift. In *Whicker* v. *Hume* (2), the trust was for "the benefit, advancement and propagation of education and learning in every part of the world." It was granted in argument that, if the bequest had ended with the word "education," the gift would have been good, that word being understood in the sense of imparting knowledge by instruction or teaching. The House allowed that the word "learning" was susceptible of more meanings than one, but from its association with the word "education" it was gathered that it too was used in the sense of the diffusion of knowledge. In *The President of the United States* v. *Drummond* (3), there was a gift of residue to found at Washington the Smithsonian Institution "for the increase of knowledge among men." This was held good by Lord *Langdale* M.R. This authority is clearly applicable to the second part of the bequest of the first share, the founding &c. of scientific institutions, but is it not also applic-

(1) (1891) A.C., 531, at p. 583. (2) 7 H.L.C., 124.
(3) At the Rolls, May 12, 1838, M.S.

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able to the first part, the advancement of scientific research generally? The question is not what the words may have meant a generation or two ago, but what they mean now. The meaning of words is modified or altered concurrently with habits of thought in process of time. In some cases it is enlarged, in others it contracts, and in others again it wholly changes. In times long past the meaning of scientific research was probably confined to the investigation of science problems by the student or scientist himself. But I do not think it remains thus confined. In some branches of knowledge the results of research were at one time kept to himself by the investigator. But in science, at any rate, a selfish secrecy is no longer tolerated. No one is ranked as a scientist who does not give the world the benefit of his labours. The investigator may delay until he has tested the new fact past all doubt, or subjected the hypothesis to every means of verification that co-existing knowledge affords. But that delay is for reasons of loyalty to truth, and modern habits of thought and standards of ethics do not allow other or longer delay. In these conditions the pursuit of science involves the diffusion of the knowledge gained. The object is the elucidation of truth. Is that end pursued for the investigator himself, or merely for those of his own school of thought? No, but for the world. The truth is sought, for its own sake if you will; but because the knowledge of it brings conviction, and without its diffusion the world cannot be convinced.

For many years, and particularly since the publication of "The Origin of Species" gave an impulse so extraordinary to inquiry in all branches of science, the research of scientists has usually carried as its meaning the discovery of truth as something to be diffused among mankind. The published works of scientists—often called their "researches"—have used the term chiefly, though not invariably, in that sense. For years too this use of it has ceased to be confined to the vocabulary of scientists and has been added to that of the people generally. Varying with the view that the speaker or the writer is putting, the meaning of scientific research may in one instance be merely investigation and discovery, and in another instance it may be both these things *plus* diffusion. From the context of this bequest, and the

close association of the term with the mention of institutions which exist for the purpose of the diffusion as well as the discovery of scientific knowledge, I gather that the testator used it in the latter of these two meanings. In my opinion, then, "scientific research," as the term is used in this will, stands for the increase and diffusion of knowledge among mankind. In that meaning it is within the cases of *Whicker* v. *Hume* (1) and *The President of the United States* v. *Drummond* (2). True, the bequest in the case at the Rolls was for an institution, but I do not think it can be successfully distinguished on that ground.

In the second part of the first branch, the words are "the founding, endowing or assisting any existing scientific institutions or any scientific institution which may hereafter be founded." I have no doubt that this portion of the gift is good. The case last cited is in point. Specified institutions having for their respective objects the "improving of natural knowledge" and "the improvement and diffusion of geographical knowledge" (the Royal Society and the Royal Geographical Society) were the subjects of legacies in *Beaumont* v. *Oliveira* (3), and it was held that they were charitable institutions within the meaning of the Act 9 Geo. 2 c. 36. It is I think to be presumed that the improvement and diffusion of scientific knowledge is the purpose of every scientific institution. The charitable uses mentioned in the Act of Geo. 2 have always been considered to include cases identical with or analogous to those specified by the preamble to the Act 43 Eliz. c. 4. As to the judicial treatment of that Act I quote some observations of *Chitty* J. in *In re Foveaux*; *Cross* v. *London Anti-Vivisection Society* (4), which put the position clearly. "The method," he says, "employed by the Court is to consider the enumeration of charities in the Statute of Elizabeth, bearing in mind that the enumeration is not exhaustive. Institutions whose objects are analogous to those mentioned in the Statute are admitted to be charities; and, again, institutions which are analogous to those already admitted by reported decisions are held to be charities." Scientific institutions, if they do not come exactly within the term "schools of learning," as used in the

(1) 7 H.L.C., 124.
(2) At the Rolls, May 12, 1838, M.S.
(3) L.R. 4 Ch., 309.
(4) (1895) 2 Ch., 501, at p. 504.

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Statute, are in my view for a clearly analogous purpose, for they are institutions the purpose of which is the advancement of valuable learning. If I am in error there, they are at any rate similar to those held to be the subjects of a charitable bequest in *Beaumont* v. *Oliveira* (1) and are thus "analogous to those already admitted by reported decisions." I am therefore of opinion that the first question stated in the originating summons must be answered in the affirmative.

Against the second gift, as against the first, it is urged that it is not included in any of the heads of Lord *Macnaghten's* classification, and also that under its terms it would be in the power of the trustees to apply the funds to the support of a hospital for the insane, established and conducted, for instance, by a medical man for gain. As to the first of these objections, I think there is no greater difficulty in treating a "home for the care and treatment of mentally afflicted persons" as a charity than there is in so treating an ordinary hospital. Dealing with the matter on the score of the first objection alone, and therefore putting the second aside for the moment, it seems to me that such institutions as proposed are of an eleemosynary character. For I do not infer from the words used, any more than I should have done had the word "hospital" been used instead of the term "homes for the mentally afflicted," that the thing intended is primarily for the benefit of persons well able to pay. I see no more reason for the inference in the one case than in the other. If the one would be a charity so would the other, and the gift is not endangered if it is admitted that the rich might be received in the homes as well as the poor, for clearly the poor are not excluded. The words may be open to the more restricted of two meanings, but we ought to read them in the broader sense if that will give effect to the trust.

Some light is thrown upon the testator's intention by the fact that when he really has in his mind a permission to charge fees in certain cases he uses clear language to show what he is thinking about; for in the second branch of the third gift he subjects the admission of a class ("persons who may be suffering from ill-health or constitutional weakness") to the condition

(1) L.R., 4 Ch., 309.

that they pay "such fees as may be fixed," &c. No such condition is attached to any other part of the residuary bequest.

I agree with the Chief Justice in thinking that it is probably on the ground of "purposes beneficial to the community," analogous to the "relief of aged impotent and poor people," that trusts for the benefit of hospitals have been supported, and, as Lord *Macnaghten* says in *Pemsel's Case* (1), trusts of such a kind "are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor." As to the second of Mr. *Ewing's* objections to this branch of the trust, it is to be observed that the trustees are authorized to apply the funds to the "founding" as well as the "endowing or assisting" of "private institutions or homes for the care and treatment of mentally afflicted persons." The private institutions or homes which may be endowed or assisted must be taken to be of the same kind as those which may be founded; the thing spoken of is presumably the same in each case in the absence of anything in the terms used to show a contrary intention. What sort of institution or home is it, then, that the trustees could found? The term "founding" clearly excludes the notion of an establishment conducted for pecuniary profit. People who "establish" or open such places may do so for personal gain; but the idea of a foundation by the bounty of a testator is quite foreign to the notion of profit on the part of the trustees. And, as we have seen, it is only institutions or homes of the same kind as those they may found that the trustees are empowered to assist. The word "private" is, in my opinion, used in this connection—and I apply this remark to the third bequest also—for the purpose of denoting that though the homes are public in the sense of being open to all of the public who come within the description given, they are to be distinguished by their privacy from the institutions known as "public" asylums or hospitals. The use of the term, then, does not militate against the conception of a charity as involved in this bequest.

I am therefore of opinion that the second question as well as the first must be answered in the affirmative.

The objections to the second gift were urged also against the

(1) (1891) A.C., 531, at p. 583.

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third, and what I have said as to the second may therefore be applied to it. But a further argument was adduced to show that in this case also funds of the trust could be applied to uses not charitable. This contention was that the third bequest contemplated the foundation, endowment or assistance of two classes of homes. One of them, for the treatment of "sick or convalescent persons," would, it was admitted, be the subject of a valid charity, but the other, for the treatment of persons "suffering from ill-health or constitutional weakness," was to be open to such persons only on the payment of fees fixed by those who were to control this class of homes. Hence there was to be a class of homes to which the poor could not resort, and the option to apply money for their creation or aid vitiated the bequest. This argument hangs entirely on an assumption which the testator's language does not warrant. The use of the word "such" in the phrase "and who may desire to avail themselves of *such* homes" is strong to show that the allusion is to the homes for the sick or convalescent. But the sense is clear, apart from that consideration. There is to be only one class of private homes under this branch of the bequest. It is to be for the treatment of sick or convalescent persons in certain cases. But it is not to be confined to that purpose, for it is also to admit as paying patients approved invalids, who, desiring to avail themselves of the homes for the other class—the sick or convalescent—may apply to be admitted. Any other construction can only be supported by inserting the words "private homes" before the second part of the passage. The sense does not require such an insertion, therefore there is no reason for it, especially as the effect of it is destructive to an otherwise clear charitable purpose. Given that there is only one class of homes, primarily for the poor, the admission to them of invalids able to pay does not affect the charitable intent. There is only one fault in this bequest, grammatically considered, and that is in the erroneous employment of the word "who" in the phrase "such persons *who* may be suffering from ill-health," &c. Had it read "such persons *as* may be suffering," &c., there would have been no fault to be found on the score of correctness, albeit the phrasing might have been improved to suit the taste of the over-nice.

I am of opinion that the third question must, like the first and second, be answered in the affirmative.

If these views are correct it is unnecessary to consider whether a general charitable intention is indicated by the repeated use of the word " charitable " as applied to these trusts. But I do not wish to be taken as concurring with the view expressed in the judgment of the Supreme Court, that such an over-riding intention on the part of the testator is evinced by the use of that adjective. I am not inclined to attribute to it any greater force than was allowed to the same word in the case of *Attorney-General for New South Wales* v. *Adams* (1).

I agree that the appeal should be dismissed, all parties to have their costs of the appeal out of the residue.

ISAACS J. If the primary view taken by the Supreme Court of Tasmania be correct that the bequests are not in themselves charitable, they cannot be sustained on the ground of a general intention of charity. That doctrine will not convert a non-charitable trust into a charitable trust. To the observations I made with respect to general charitable intention in *Attorney-General for New South Wales* v. *Adams* (2), I would add a reference to the jugdment of *Kennedy* L.J. in the recent case of *In re University of London Medical Sciences Institute Fund*; *Fowler* v. *Attorney-General* (3).

It therefore becomes necessary to consider the accuracy of the primary view taken by the Supreme Court as to the validity of the bequests.

The advancement of scientific research was said by learned counsel for the appellants not to be a charitable purpose, because it was not necessarily an educative, but might be a purely studious occupation. *Whicker* v. *Hume* (4) was cited as an authority in support of the contention. If " scientific research " is to be regarded in the same light as mere " learning " in the sense of personal study was regarded by the learned Lords in *Whicker* v. *Hume* (4), I should be constrained, by force of the opinions there expressed, to accede to the argument. The more especially is this

(1) 7 C.L.R., 100.
(2) 7 C.L.R. 100, at p. 125.
(3) (1909) 2 Ch., 1.
(4) 7 H.L.C., 123.

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so, in view of the judgment of *Farwell* J. in *In re Delany*; *Conoley* v. *Quick* (1), and the decision last year of the Court of Appeal in *Re Ogden*; *Taylor* v. *Sharp* (2), both of which follow those opinions. But scientific research has an implication which mere ordinary learning does not possess. The latter is nothing more than the personal acquisition of knowledge already provided by the previous labour of mankind, and open to everyone desirous of sharing it. It adds nothing new to the common stock, though the area of participation is enlarged. But the vital point is that it involves no idea of passing on information, and is confined to mere self-improvement. Scientific research on the other hand, as it is understood to-day, is the endeavour to bring to light some scientific truth, still unknown; to create original practical knowledge; to bring within the reach of mankind some fact which so far lies hidden in the breast of nature, and thereby to add to the forces available for the use and improvement of the whole human race. No one can reasonably conceive the successful results of scientific research being confined to the inquirer himself. Whether self-interest or the purest altruism animates him in his search, communication to the world at large of the outcome of his labours is, morally speaking, inevitable. That is the end aimed at. See *Harrison* v. *Corporation of Southampton* (3). The attempted analogy between "mere book-learning" and "scientific research" therefore fails.

But this bequest may be upheld upon another ground, namely, as coming within the fourth division of the objects stated by *Sir Samuel Romilly* in *Morice* v. *Bishop of Durham* (4), "the advancement of objects of public utility," which stands in Lord *Macnaghten's* classification in *Pemsel's Case* (5), in these words: —"trusts for other purposes beneficial to the community not falling under any of the preceding heads." It has been repeatedly pointed out that a trust may answer that description and yet not be a charitable trust, but, unless it answers that description, it cannot be a charitable trust, unless it falls within one of the three first heads.

(1) (1902) 2 Ch., 642, at p. 648.
(2) 25 T.L.R., 382.
(3) 2 Sm. & Giff., 387.
(4) 10 Ves., 522, at p. 532.
(5) (1891) A.C., 531, at p. 583.

What then is the test whether an object of public utility is within the scope, spirit, and intendment of the Statute of Elizabeth?

It is plain that mere public utility is not sufficient: *Kendall* v. *Granger*(1); *In re Nottage*; *Jones* v. *Palmer* (2); per Lord *Lindley* L.J. in *In re Macduff*: *Macduff* v. *Macduff* (3); *Langham* v. *Peterson* (4).

The reason of this was pointed out as early as 1847 by *Sir James Wigram* in *Nightingale* v. *Goulburn* (5) whose decision was affirmed by Lord *Cottenham* L.C. (6). The Vice-Chancellor said in a passage that seems to have escaped the attention it deserves:—"I agree with Lord *Langdale*, that many things of general utility may not fall within the definition of charity, as the term is understood in the Court; for many things of general utility may be strictly matters of *private right*, although the *public may indirectly derive a benefit* from them. The expenditure of money to promote the construction of railroads or canals (for example), which are private property, in no respect under the control of the Attorney-General, might often be an expenditure in the encouragement of things of general utility, but could not be said to be an expenditure for a *charitable purpose*." His Honor thought in the case before him that the funds could only be applied to *purposes so general and public* as to constitute a charitable use.

The general character of the donor's purpose is therefore the *discrimen*.

Thus Lord *Camden* L.C. in *Jones* v. *Williams* (7) defined charity as a gift to a *general public use*, which extends to the poor as well as the rich. In *Pemsel's Case* (8) Lord *Halsbury* L.C. quotes Lord *Camden*; but thinks it sufficient to end at the word "use," the rest being merely explanatory. Lord *Macnaghten* (9) refers to "those trusts of *a public nature*, which, according to the doctrine of the Court derived from the piety of early times, are considered to be charitable."

(1) 5 Beav., 300.
(2) (1895) 2 Ch., 649.
(3) (1896) 2 Ch., 451, at p. 466.
(4) 87 L.T., 744.
(5) 5 Ha., 484, at p. 490.
(6) 2 Ph., 594.
(7) Amb., 651.
(8) (1891) A.C., 531, at pp. 543, 544.
(9) (1891) A.C., 531, at p. 580.

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The test of the purpose being for general public benefit has been applied in many recent cases, as for instance *Dolan* v. *Macdermot* (1); *In re Vaughan*; *Vaughan* v. *Thomas* (2); *Wilson* v. *Barnes* (3); *The Queen* v. *Commissioners of Income Tax* (*Pemsel's Case*) (4); *In re Stephens*; *Giles* v. *Stephens* (5); *In re Foveaux*; *Cross* v. *London Anti-Vivisection Society* (6); *In re Nottage*; *Jones* v. *Palmer* (7); *In re Mann*; *Hardy* v. *Attorney-General* (8); *In re Good*; *Harington* v. *Watts* (9); *In re Allen*: *Hargreaves* v. *Taylor* (10).

What is a public general purpose must be ascertained from the conditions of the age in which the donor lives. An historical review of the growth of charitable trusts will disclose their ever widening scope. The earliest were religious, these were followed by educative, and gradually they increased until by the time of Elizabeth they were so numerous as to embrace the 21 enumerated in the Statute of that reign, besides others that can be collected from precedents anterior to the Act. The extension of the principle of charitable trusts to novel objects, is manifest by contrasting the exposition of *Sir Francis Moore*, the framer of the Statute, substantially reprinted in *Boyle on Charities*, p. 465, with the decided cases in recent years. Perhaps the most striking example is that of the promotion of vegetarianism: *In re Cranston*; *Webb* v. *Oldfield* (11), followed in England in *In re Slater*: *Howard* v. *Lewis* (12). If that be a public purpose and a good charitable object, it seems to me impossible to reject the advancement of scientific research generally as foreign to the scope and intendment of the Statute of Elizabeth. Judged by the spirit of the present time it is well within the principle.

The second branch of the residuary bequest is also attacked for invalidity. It is said that the class of "mentally afflicted persons" is so wide as to include those who are merely eccentric. As to this it is sufficient to observe that it means those who are more or less demented. "Men out of their wits" were included

(1) L.R. 5 Eq., 60, at p. 62.
(2) 33 Ch. D., 187, at p. 192.
(3) 38 Ch. D., 507.
(4) 22 Q.B.D., at p. 316, *per* Lopes L.J.
(5) 8 T.L.R., 792.
(6) (1895) 2 Ch., 501.
(7) (1895) 2 Ch., 649.
(8) (1903) 1 Ch., 232.
(9) (1905) 2 Ch., 60, at p. 66.
(10) (1905) 2 Ch., 400.
(11) (1898) 1 I.R., 431.
(12) 21 T.L.R., 295.

in so ancient a Statute as 2 Hen. V. stat. 1, c. 1, a Statute from which the Statute of Elizabeth may have been moulded as objects of charitable foundations, and I do not see how it can be maintained that the objects here mentioned are not charitable. It was also argued that inasmuch as the trust is to found, endow or assist private institutions or homes, the one-third applicable to this branch might be entirely bestowed on private homes conducted as speculative enterprises, and therefore on the principle of *Morice* v. *Bishop of Durham* (1) the trust is not charitable.

The first essential in dealing with this argument is to construe the will regardless of the doctrine of *Morice* v. *Bishop of Durham* (1).

I gather from the will construed in the ordinary way, that the testator intended that his trustees might, if they thought fit, found and endow an institution for the purpose of caring for and treating mentally afflicted persons, not as a mere business or money-making enterprise, though fees might be charged to better enable the desired benefits to continue, or as *Cotton* L.J. said in *Rolls* v. *Miller* (2), as "simply a payment to go towards the charity in order to aid the funds of the charity." If it were otherwise, the purpose would be private gain and not charity. But the funds available might not suffice, and for this and other reasons, foundation or endowment might be considered impracticable or inadvisable. So a third method is provided, namely, assistance to private homes. By "private," I do not understand select, or limited to a favoured class or to the rich, either by the caprice of the proprietor, or by reason of prohibitive charges. Such a home would not, I conceive, come within the generality of the terms of the will, "the care and treatment of mentally afflicted persons," or in Lord *Camden's* words, extending "to the poor as well as to the rich." But a home owned and managed privately, and conducted with a view to profit does not, in my opinion, as an effective *means* of attaining his object, necessarily stand outside the charitable intention of the donor. If the charges are such as are fair and reasonable and such as enable the public generally, rich and poor—that is the comparatively poor, not the very poorest—to avail themselves of the care and

(1) 10 Ves., 522. (2) 27 Ch. D., 71, at p. 85.

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treatment provided by the home, I do not think the Court should hold that assistance to such a home for the purpose of aiding the afflicted is a diversion from charity.

In Victoria and Tasmania there are no private institutions or homes of a purely philanthropic nature—at least, so far as is known to the Court or counsel—and to wait until such came into existence would, I fear, be equivalent to waiting for an indefinite period. That would be compelling one man's bounty to wait for another's. If the trust were to pay medical men or nursing attendants their ordinary fees for the care and treatment of the mentally afflicted it would be difficult to frame an objection; and the possession of a private home where comforts and curative methods are afforded cannot make any difference. The will looks to the benefit of the mentally afflicted, not to the profit of the owners of the homes; the former are objects of bounty, the latter the mere instruments. The end is unattainable without the means, and unless it be laid down that none but philanthropic channels are permissible to attain a charitable end, there seems to be no obstacle in the present case. A gift in perpetuity must be charitable. If it be a simple gift in perpetuity to an institution, without more, then you have to examine the nature and constitution of the donee to ascertain if the purpose of the gift be charitable. *Cocks* v. *Manners* (1) is an excellent example. The Selley Oak gift was good because the community of sisters there was a charitable association; but the Dominican was bad as a charitable gift because the convent was not charitable. See this distinction adverted to by *Farwell* L.J. in *In re Davidson*; *Minty* v. *Bourne* (2). But if the purpose is expressed, and it is charitable, the character of the intermediary, whether a person or an institution, seems to me immaterial. Said Lord *Westbury* in *Clephane* v. *The Lord Provost &c. of Edinburgh* (3) in another connection, but laying down a principle which has an excellent application to the present case :—" You look to the charity which is intended to be created; and you distinguish between it and the means which are directed for its accomplishment. Now the means necessary vary from age to age." And on p. 422 the

(1) L.R. 12 Eq., 574.
(2) (1909) 1 Ch., 567, at p. 572.
(3) L.R. 1 H.L. (Sc.,) 417, at p. 421.

learned Lord says:—"If the end of relieving the poor can be better accomplished now by hiring dwellings for them, . . . the substantial object will be accomplished." Lord *Westbury* certainly did not hold that the charitable intent would fail if the money were paid to persons who speculated in houses to let.

If there is a trust which is charitable, it matters not whether the necessary charitable element arises in consequence of the existing general nature of the distributing hand selected as the means, or of the special mandate of the donor. *Cozens-Hardy* M.R., in *In re Freeman*; *Shilton* v. *Freeman* (1), put it in this way: "The question is not what a trustee is, but what are the *cestuis que trustent*, and what are the beneficiaries?" In *Loscombe* v. *Wintringham* (2) a bequest to the governors of a society for the encouragement of good servants was held good because, as Lord *Langdale* said, the gift being for a charitable purpose, the governors were only the instruments for the application of the funds.

And I am of opinion that the funds being supplied for charitable purposes are within the control of the Court, and any attempted misapplication of them could be restrained or remedied. See *Attorney-General* v. *Heelis* (3) and *Andrews* v. *M'Guffog* (4).

The third branch of the residuary bequest stands on the same footing as the second, except for the latter portion of it. It was contended that the second part brought the gift within *Morice* v. *Bishop of Durham* (5) because it contemplated assisting private houses the admission to which might be restricted to the rich or the favoured few, and where fees of a prohibitive nature might be imposed so as to exclude the comparatively poor. But on a fair construction that is not so. The homes referred to are houses which in all cases receive the sick and convalescent—that is, those who are actually ill and suffering from active disease, or are recovering from such disease. These are to have the first consideration in the homes contemplated by the will. In addition to succouring those most necessitous cases, the homes may also,

(1) (1908) 1 Ch., 720, at p. 722.
(2) 13 Beav., 87.
(3) 2 Sim. & St., 67, at p. 76.
(4) 11 App. Cas., 313.
(5) 10 Ves., 522.

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but as a secondary consideration and only subject to the primary intention as shown by the requirement of approval and possible fees, receive those not actually ill or convalescent but only in ill-health, as generally understood—that is, not suffering from any definite malady—and those constitutionally weak. But the homes must be charitable in the sense already indicated as aiding the sick and convalescent generally, and on terms not unreasonable. If so, the additional facilities to be provided for those in ill-health and those constitutionally weak will not prevent the gift being charitable : see *In re Scowcroft* ; *Ormrod* v. *Wilkinson* (1).

I have therefore come to the opinion that the gifts are good in themselves as charitable bequests, and it is therefore unnecessary to answer any further question.

Appeal dismissed.

Solicitors, for the appellants, *Butler, McIntyre & Butler,* for *Law & Weston & Archer.*

Solicitor, for the Attorney-General, *Dobbie,* Crown Solicitor.

Solicitors, for the respondent trustees, *Ritchie & Parker.*

H. V. J.

(1) (1898) 2 Ch., 638, at p. 641.