tiff's conduct. The jury had an opportunity to put their construction upon the facts. I have also looked at the letters dated 13th and 15th, and can well understand that the jury might have been of the opinion that they were written on the same day.

Judgment appealed from varied by omitting direction to enter a verdict for plaintiff on the seventh plea, and as so varied affirmed. Appellant to pay costs of appeal.

Solicitor, for appellant, *G. Crichton Smith.*
Solicitor, for respondents, *W. A. Windeyer.*

[HIGH COURT OF AUSTRALIA.]

JAMES BYRNE . . . . . APPELLANT;
PLAINTIFF.

AND

THE MOST REVEREND ROBERT DUNNE AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Will—Construction—Charitable trust—Gift for religious purposes—Uncertainty—Overriding trust—Gift of residue to Roman Catholic Archbishop and his successors—Gift to be used and expended wholly or in part as donee may judge most conducive to the good of religion—Presumption against intestacy.

A testator, a Roman Catholic priest, left the residue of his estate to the Archbishop of his diocese and his successors to be used and expended, wholly or in part, as the Archbishop should judge most conducive to the good of religion in the diocese.

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Held, *per tot. cur.*, that the gift of the residue was not a personal gift, but a gift upon trust.

Held, by *Griffith* C.J., *Barton* J. and *Isaacs* J. (*O'Connor* J. and *Higgins* J. dissenting), that the gift was uncertain both as to its object, and as to the amount to be expended by the donee, and that there being no general overriding charitable trust, the gift failed.

Per Griffith C.J.—The presumption against intestacy cannot be called in aid for the purpose of supporting a gift in trust which is impeached on the ground that the trusts are too indefinite for the Court to execute.

Per Higgins J.—There is a presumption that when a man sits down to make a will he intends to dispose of all his property; and this presumption is especially applicable where the difficulty arises in a gift of residue.

Decision of the Supreme Court: *Byrne* v. *Dunne*, 1910 St. R. Qd., 265, reversed.

APPEAL by the plaintiff from the decision of the Supreme Court of Queensland upon the hearing of a special case stated by the consent of the parties. The plaintiff claimed, as one of the next of kin of Denis Joseph Byrne, of Dalby in the State of Queensland, a Roman Catholic clergyman, that on the true construction of the will he was entitled to a share in the residue. The defendants were the executors of the will. The testator died on 6th November 1907, and probate of his will was granted to the defendants on 26th March 1908. Dalby is in the diocese of Brisbane.

The testator by his will gave certain legacies to various beneficiaries, and the will then proceeded: "And I will and bequeath all the aforesaid legacies free of probate duty and all other expenses, and that the residue of my estate should be handed to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese."

The testator's estate consisted of personal property situated in Queensland. The defendant, the Most Reverend Robert Dunne, is the Roman Catholic Archbishop of Brisbane.

The question submitted for the opinion of the Supreme Court, so far as material to this report, was whether the bequest in the will of the residue was a good charitable gift.

The Supreme Court held that it was a good charitable gift (1).

(1) 1910 St. R. Qd., 265.

The plaintiff appealed. The appeal was first argued at Brisbane before three Justices, and was subsequently re-argued in Sydney before the Full Bench of Justices.

Woolcock, for the appellant. The gift of the residue is not a personal gift, but a gift upon trust. The fact that the donees are the Archbishop and his successors does not constitute proof of a general charitable intention so as to create an overriding trust for charitable purposes. It is nothing more than an element to be considered in the construction of the will as a whole. A gift to the holders of an ecclesiastical office may import a gift to a charitable purpose, as in *In re Garrard*; *Gordon* v. *Craigie* (1). But there the gift was to the vicar and churchwardens, who could not use the money for other than church purposes. The fact that the trustee is a charitable society will not make the bequest valid as a charitable trust where discretion is given to the trustee to decide as to the application of the fund: *In re Freeman*; *Shilton* v. *Freeman* (2). And see also *In re Davidson*; *Minty* v. *Bourne* (3), where *In re Garrard* (1) is adversely criticized by *Farwell* L.J. Secondly, the words "wholly or in part" give an absolute discretion to the Archbishop as to the expenditure of the whole or part of the capital or corpus on charitable objects. His discretion being unfettered he would not be liable to account for his disposition of any part of it. Such a gift is void for uncertainty: *In re Friends' Free School*; *Clibborn* v. *O'Brien* (4); *In re Davidson* (3); *Smith* v. *Kearney* (5); *Laws of England*, vol. IV., p. 147; *Chapman* v. *Brown* (6); *Theobald on Wills*, 7th ed., p. 370. The test is, is the trustee bound to devote any definite sum to the charitable purpose? *Hunter* v. *Attorney-General* (7). *Dick* v. *Audsley* (8) is not applicable. There there were various definite objects amongst which the fund could be distributed.

Thirdly, it is left entirely to the discretion of the trustee to decide what is most conducive to the good of religion. He is the

(1) (1907) 1 Ch., 382.
(2) (1908) 1 Ch., 720.
(3) (1909) 1 Ch., 567.
(4) (1909) 2 Ch., 675.
(5) 2 N.S.W. L.R. (Eq.), 49.
(6) 6 Ves., 404.
(7) (1899) A.C., 309, at p. 323, *per* Lord *Davey*.
(8) (1908) A.C., 347.

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sole arbiter to define the area of selection, as well as to select what within that area when so defined is "most conducive."

[ISAACS J.—Would he not be bound to select only from among objects really conducive to the good of religion?]

He might found a Dominican Monastery if he believed this would be conducive to the good of religion, though this would not be a public charity, and would not be legally recognized as a charity. A teetotal campaign, the immigration of Irish catholics, or political propaganda with the object of securing the election of Roman Catholic members of Parliament, are other illustrations of objects that might well be considered conducive to the Roman Catholic religion, and yet would not constitute an expenditure of the fund for charitable purposes. This cannot be construed as a gift to religious purposes, with power to the trustee to select which of these purposes are "most conducive." The trustee is given power to decide what purposes are to be considered religious. There is here no distinct indication that the selection is to be made from a particular class as in *In re Pardoe*; *McLaughlin* v. *Attorney-General* (1). A gift "to such objects as my trustee may consider to be charitable," cannot stand. The trust, to be charitable, must bind the trustee to apply the fund to no purpose except that which is a charity in the eye of the law: *Attorney-General for New South Wales* v. *Adams* (2). There must be a definite *cestui que trust* who can invoke the Court. The testator must point out the class from which the trustees have to make their choice. The genus must be definite, though the species may be selected by the trustees. Religious purposes are not necessarily charitable purposes: *Grimond* v. *Grimond* (3); *McLaughlin* v. *Campbell* (4); *Arnott* v. *Arnott* (5). In *Theobald on Wills*, 7th ed., at p. 536, it is pointed out that *In re White*; *White* v. *White* (6), to the contrary effect, is opposed to the later authorities. *In re Allen*; *Hargreaves* v. *Taylor* (7), shows that the dicta in *Grimond* v. *Grimond* (3) are not confined to Scotch law. Religious services are only charitable so far as they tend towards

(1) (1906) 2 Ch., 184.
(2) 7 C.L.R., 100, at p. 113, *per Barton* J.
(3) (1905) A.C., 124.
(4) (1906) 1 Ir. R., 588.
(5) (1906) 1 Ir. R., 127.
(6) (1893) 2 Ch., 41.
(7) (1905) 2 Ch., 400.

the edification or instruction of the public: *Cocks* v. *Manners* (1); *In re Delany*; *Conoley* v. *Quick* (2). Here the trustee has power to apply the fund to purposes which, though religious and Roman Catholic purposes, are not necessarily charitable purposes. Therefore the whole fund is not necessarily allocated to charitable purposes. The intention of the testator obviously was to give the widest possible discretion to the Archbishop. The gift is therefore void for uncertainty: *In re Macduff* (3); *Attorney-General for New South Wales* v. *Metcalfe* (4). In *In re Douglas*; *Obert* v. *Barrow* (5) there was an overriding charitable trust which bound the whole fund.

Feez K.C. and *Real*, for the respondents. If a charitable bequest is capable of two constructions, that which would render it effectual must be adopted: *Bruce* v. *Presbytery of Deer* (6). Here there is a clear over-riding charitable intention. The testator intended that the residue of his estate should go to the head of his church for the good of religion in his diocese. The words "most conducive" merely give a right of choice of methods which are conducive to the charitable purpose. "To be used or expended wholly or in part" means that the trustee may use all the capital and income or leave part of it to be expended by his successor. But he cannot apply any of it otherwise than to the charitable purpose. This is analogous to the gift "to the vicar and churchwardens of K. to be applied by them in such manner as they shall in their sole discretion think fit" which was held a good charitable gift in *In re Garrard* (7).

[GRIFFITH C.J.—The Court would take judicial notice of the powers of a vicar and churchwardens of a parish. That is part of the common law of England.]

The trust is to be implied in this case from the description of the donees and the nature of their office, and the wide power of discretion as to the objects of the trust is not inconsistent with its constitution: *West* v. *Shuttleworth* (8). In that case the words were wider than they are in the present case. This comes within

(1) L.R., 12 Eq., 574.
(2) (1902) 2 Ch., 642.
(3) (1896) 2 Ch. 451.
(4) 1 C.L.R., 421.
(5) 35 Ch. D., 472.
(6) L.R. 1 H.L. Sc., 96.
(7) (1907) 1 Ch., 382.
(8) 2 Myl. & K., 684.

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the third class of cases referred to by Lord *Davey* in *Hunter* v. *Attorney-General* (1), where there is a general over-riding trust for charitable purposes, though some alternative modes of application of the fund may not be strictly charitable. In such a case the Court will give effect to the trust, but will control the trustees in the application of the fund. The most that can be suggested is that the fund might be disposed of for an object not legally charitable. This is dealt with in *Townshend* v. *Carus* (2). Religious purposes *primâ facie* means such religious purposes as are charitable: *In re White* (3). The meaning of the gift is that the money must be applied to purposes which are conducive to the good of religion. The trustee has power to decide what will most promote this object. But his choice is limited to what is conducive, and he can be restrained by the Court from devoting the money to any other object. He has not an unfettered discretion in deciding what is conducive. In considering the nature of the trust the Court will have regard to the position occupied by the trustee: *In re Kenny*; *Clode* v. *Andrews* (4); *In re Redish*; *Armfield-Marrow* v. *Bennet* (5). The words "wholly or in part" are used to emphasize the discretion given to the trustee as to the amount, and the times at which the money may be used and applied for the charitable purpose already indicated. They may be restricted by the words "as such Archbishop may judge," or they may be read as meaning "wholly or in parts." They do not give power to use any of the residue for any other purpose. In case of doubt the Court will give effect to the presumption against intestacy.

[They also referred to *In re Delany* (6); *Thornber* v. *Wilson* (7); *In re Davidson* (8); *Brown* v. *Whitty* (9); *Powerscourt* v. *Powerscourt* (10); *In re Lea*; *Lea* v. *Cooke* (11); *Leake* v. *Robinson* (12); *The Pacific* (13); *Robb* v. *Dorrian* (14); *In re Slatter*; *Howard* v. *Lewis* (15); *In re Charlesworth*; *Robinson v. Cleveland* (16).]

(1) (1899) A.C., 309, at p. 324.
(2) 3 Ha., 257.
(3) (1893) 2 Ch., 41.
(4) 97 L.T., 130.
(5) 26 T.L.R., 42.
(6) (1902) 2 Ch., 642.
(7) 4 Drew, 350.
(8) (1909) 1 Ch., 567.
(9) 11 Q.L.J., 133.
(10) 1 Mol., 616.
(11) 34 Ch. D., 528.
(12) 2 Mer., 363, at p. 386.
(13) (1898) P. 170.
(14) 11 Ir. R. C.L., 292.
(15) 21 T.L.R., 295.
(16) (1910) W.N., 18.

Woodlock, in reply, referred to *In re Ogden*; *Taylor* v *Sharp* (1).

Cur. adv. vult.

Dec. 16.

The following judgments were read:—

GRIFFITH C.J. The question for determination in this case, which has been extremely well argued, depends entirely upon the construction of a few words in a short will. Numerous decisions were referred to upon the construction of wills the words of which presented more or less analogy to those of the will before us, but I have been able to derive little or no assistance from them. As *Lindley* L.J. said in *In re Palmer* (2):—"Rules of law must be attended to; but if in any case the intention of a testator is expressed with sufficient clearness to enable the Court to ascertain it, the Court ought to give effect to it in that case, unless there is some law which compels the Court to ignore it; and the mere fact that in other wills more or less like it other Judges have not been satisfied as to the intentions expressed in them, is not sufficient ground for defeating an intention where the Court holds it to be sufficiently expressed in the particular will which it is called upon to construe."

The words which we are called upon to construe are as follows:—After giving various legacies the testator proceeded: "And I will and bequeath all the aforesaid legacies free of probate duty and all other expenses; and that the residue of my estate should be handed to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese."

The question is whether these words constitute a good charitable bequest. The test is, in the words of *Buckley* L.J. in *In re Sidney* (3), "whether under this will the trustee is bound to apply these funds to charitable purposes. If consistently with the will he could apply any part of it to purposes which are not charitable in the sense in which the word is understood in this Court, the gift must fail as being too indefinite for the Court to execute."

(1) 25 T.L.R., 382.

(2) (1893) 3 Ch., 369, at p. 373.

(3) (1908) 1 Ch., 488, at p. 492.

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The appellant contends that the gift fails when this test is applied, by reason both of the words "wholly or in part," and of the words "to be used and expended . . . as such Archbishop may judge most conducive to the good of religion in this diocese." If either contention can be maintained the doctrine stated by *Cotton* L.J. in *In re Douglas* (1) must govern the case:—"Where there is a gift without any definite object pointed out, but merely a description of the character of the object to which the gift is to be applied, and if that character is not charity, then the Court will not execute such an indefinite purpose, and it must be considered as if the legacy had been left to the legatee as a trustee, and with no trust declared, in which case he would hold it as a trustee for the next of kin." The same principle of course applies when the only trusts declared are of an undefined part of a whole fund. It is common ground that the Archbishop takes as a trustee and not beneficially for himself.

I will first deal with the second point. The respondents' argument is, in effect, as follows: A gift for religious purposes is *primâ facie* a good charitable gift, and should be construed as a gift for such religious purposes as the Court holds charitable; a gift for the good of religion is the same thing as a gift for religious purposes; a gift for purposes conducive to the good of religion is the same thing as a gift for the good of religion; a gift for such purposes as the Archbishop may judge most conducive to the good of religion is the same thing as a gift for purposes conducive to the good of religion; therefore, a gift for such purposes as the Archbishop judges most conducive to the good of religion is a gift for such religious purposes as the Court regards as charitable. They urge, finally, that if there were any ambiguity there is an over-riding charitable intention apparent in the will which should compel the Court to that conclusion. I fear that there is a fallacy lurking in every step of this argument except the first postulate.

It may, and I think must, be conceded, on the present state of the authorities, that a gift for religious purposes is *primâ facie* a gift for charitable purposes; *In re White* (2); *In re Macduff* (3).

(1) 35 Ch. D., 472, at pp. 482-3. (2) (1893) 2 Ch., 41.
(3) [1896] 2 Ch., 451.

Before dealing with the succeeding steps in the argument it is well to bear in mind the caution conveyed in the judgment of *Jessel* M.R. in the case of *Aspden* v. *Seddon* (1): "There is, first document A., and a Judge formed an opinion as to its construction. Then came document B., and some other Judge has said that it differs very little from document A.—not sufficiently to alter the construction—therefore he construes it in the same way. Then comes document C., and the Judge there compares it with document B., and says it differs very little, and therefore he shall construe it in the same way. And so the construction has gone on until we find a document which is in totally different terms from the first, and which no human being would think of construing in the same manner, but which has by this process come to be construed in the same manner."

The decision in *In re White* (2) as explained in *In re Macduff* (3) was based on previous decisions, and does not profess to lay down any new or larger rule. It may be taken to be settled law that religious services or institutions, all of which are no doubt in one sense religious purposes, can only be considered charitable so far as they tend to the edification or instruction of the public: *Cocks* v. *Manners* (4); *In re Davidson* (5). It seems to me at least doubtful whether purposes may not be for the good of religion although they do not directly tend to such edification or instruction. Again, it seems to me that purposes may reasonably be called conducive to the good of religion although they have no such direct tendency. For instance, it might well be said that a political propaganda for the purpose of procuring State endowment of churches or denominational schools, or the establishment of a newspaper conducted on religious or high moral principles, or the establishment of a contemplative order of nuns, would be purposes conducive to the good of religion. Certainly the Archbishop might reasonably think so. I do not at present see my way to deny such a proposition. But I do not think that either purpose would be a charitable purpose.

Passing to the next step in the argument, I am disposed

(1) L.R. 10 Ch., 394, 398n.
(2) (1893) 2 Ch., 41.
(3) (1896) 2 Ch., 451.
(4) L.R. 12 Eq., 574.
(5) (1909) 1 Ch., 567.

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to think that the words "as the Archbishop may judge most conducive" give a still wider scope to the permitted purposes. It is said, and I think rightly, that the word "most" imports a comparison or choice. Between what objects? Either such objects as are in fact conducive &c., or as he thinks conducive &c., or as the Court thinks charitable. I see great difficulty in adopting the third alternative.

But then, it is said, there is a general over-riding trust for charitable purposes, which is sufficient to confine the possibly ambiguous words within a legal limit. The argument as to the over-riding trust is based on the gift being to the Archbishop and his successors, admittedly on trust, and upon the other words denoting that trust. But here there seems to be a *petitio principii*. What is the trust? I feel myself confronted with the difficulty expressed by *Farwell* L.J. in *In re Davidson* (1) that "the argument fails in its initial stage, because the gift is not to the Archbishop for the time being for the religious purposes of his archbishopric, but it is for what is actually specified immediately afterwards." In that case the succeeding words were for distribution "between such charitable religious or other societies institutions persons or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit," which in the opinion of the Court drew a distinction between charitable and religious purposes. The difficulty in the present case arises upon different words, but is the same in principle. I do not see any satisfactory answer to these objections.

Assuming, however, that they are not insuperable, I turn to the question of the construction of the words "wholly or in part as," &c. The appellant contends that these are ordinary English words, and that their plain meaning is that the Archbishop has full discretion to use and expend either the whole of the fund or part of it for the purposes stated, but is not bound to use and expend upon them any part of it which he does not think fit. It is not disputed that the word "as" of itself connotes a full discretion as to time, amount, manner and purpose, within, of course, the prescribed limits. It is synonymous with "to such purposes

(1) (1909) 1 Ch., 567, at p. 572.

and in such proportions and at such times as." The respondents contend, and the Supreme Court adopted the contention, that the words "wholly or in part" refer only to time and amount. But that gives them no effect, since the meaning would be the same without them. Before us a further contention was made that the words "wholly or in part" are governed, and their operation is limited, by the words "as such Archbishop may judge," &c., so that they apply only to the amount to be applied for any particular purpose. This argument is open to the same objection of giving no real effect to the words. We are, in substance, asked to construe the will as if it said "to be wholly used and expended, at such times and in such proportions as the Archbishop may think fit, as such Archbishop may judge most conducive," &c.

Another suggested construction was that the words "wholly or in part" should be read as merely parenthetical, the word "entirely" or some equivalent word being first implied. A third was that the words might be read "wholly or in parts."

With every desire to apply the rule enunciated by Lord *Chelmsford* in *Bruce* v. *Presbytery of Deer* (1), I am compelled to the conclusion that to adopt either construction would be to do violence to the actual language of the testator. The words "wholly or in part" are interposed between the direction to apply and the statement of the objects of application, and are an essential part of the definition of the trust.

Reading the whole disposition together, without separating the two phrases upon which the debate has turned, I cannot help being impressed with the view that the testator, who was a Roman Catholic priest (if that is material), implicitly trusted his Archbishop, and desired to give him an absolute discretion as to the disposition of the fund, not presuming to dictate either what part should be applied to the objects more particularly specified, or how the part applied to them should be distributed, and that he did not intend that the Archbishop's judgment as to what would be most conducive to the good of religion should be subject to any control whatever. The only argument in opposition to this view is the notion of the over-riding trust to be implied from

(1) L.R. 1 H.L., Sc., 96.

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the fact that the gift was to the Archbishop and his successors in trust. But such a gift, as I have tried to show, although it may suffice in some cases, is not sufficient in this. The over-riding trust must appear *aliunde*, and cannot be inferred from the debatable words of the particular trust itself.

I should add that, in my opinion, the presumption against intestacy cannot be called in aid for the purpose of supporting a gift in trust which is impeached on the ground that the trusts are too indefinite for the Court to execute.

In my opinion, therefore, the appeal must be allowed.

BARTON J. The sole question of law remaining for decision arises on the residuary bequest, which is in the following words: —"I will and bequeath . . . that the residue of my estate should be handed to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop shall judge most conducive to the good of religion in this diocese."

The plaintiff, now appellant, claims as one of the testator's next of kin, as against the respondents, the executors, a declaration that on the true construction of the will he is entitled to a share in the residue. He contends that the residuary bequest is not a good charitable disposition, and is void for uncertainty. He also claims an account and an injunction. The Supreme Court of Queensland has unanimously held (1) that "the residuary estate is bequeathed upon a good charitable trust, which cannot fail as a violation of the rule against perpetuities, and which does not fail for uncertainty or for any other reason." The testator's estate consists exclusively of personalty. The case has been twice argued very ably in this Court, on the second occasion before a Full Bench. It is common ground to the parties that the Archbishop takes only as a trustee.

Where there is a trust of personalty, but for uncertain objects, the subject of it results to the next of kin, unless a charitable purpose is expressed, and unless the trustee is bound by the terms of the gift to apply the subject to charity. If he has a discretion to apply it to purposes not charitable, it is not a good charitable

(1) 1910 St. R. Qd., 265, at p. 275.

gift. "The question is, not whether he may not apply it upon purposes strictly charitable, but whether he is bound so to apply it": *Per Sir William Grant*, M.R., *Morice* v. *Bishop of Durham* (1). That test is settled law, and is constantly applied. I feel bound to express, though reluctantly, my opinion that this bequest does not answer to the test. Assuming, but not deciding, that, if we left out the words "wholly or in part," the charitable objects of the trust would be sufficiently defined by the words "to be used and expended . . . . as such Archbishop shall judge most conducive to the good of religion in this diocese," I cannot escape from the conclusion that the bequest, if we read it without leaving out any of its words, gives the trustee an option to use or expend the subject or some of it on purposes not defined. There can be no separation, because there is no indication how much must or how much need not be applied to charity, or on what non-charitable objects part may be expended. I take the expression "wholly or in part" to be used in its natural and ordinary sense. Before applying any rules of law the Court must first construe the gift as it stands, and we must construe it in the ordinary sense unless we find a context requiring a different construction. The trustee has a discretion not merely between such objects as are all charitable, but between charitable and non-charitable objects. However laudable the application of any part may be, if its purpose need not be charitable in the legal meaning of that word, the grant of such a discretion is fatal to the bequest as one claimed for charity. Alternative suggestions have been offered, involving more or less departure from the ordinary and grammatical sense of the terms used. If they were ambiguous as they stand one or another of these suggested constructions might be adopted. But there is no ambiguity. There is nothing in the context to control the ordinary meaning or to suggest that it was not the testator's meaning; and therefore we ought not to depart from it. I think the terms used bring the gift within the principle laid down by *Sir William Grant* M.R. in *James* v. *Allen* (2) where he says:—"The whole property might, consistently with the words of the will, have been applied to purposes strictly charitable. But the question is, what

(1) 9 Ves., 399, at p. 406.

(2) 3 Mer., 17, at p. 19.

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authority would this Court have to say that the property must not be applied to purposes however benevolent, unless they also come within the technical denomination of charitable purposes? If it might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute."

In *In re Davidson* (1) there was a residuary bequest in trust for the Roman Catholic Archbishop of Westminster for the time being, to be distributed by him "at his absolute discretion between such charitable religious or other societies institutions persons or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit." This was held by the Court of Appeal not to be a good charitable bequest, but void for uncertainty. There was a discretion to apply the gift either to charitable purposes or to others not charitable. There is such a discretion here, and I do not see how the Court could compel the trustee to refrain from exercising it. I think the following words of *Cozens-Hardy* M.R. are fully applicable: —"The law is perfectly established that the Court cannot recognize a trust which is so uncertain that there is no known means by which the trustee can be compelled to distribute the fund."

It was argued that the direction that the estate should be handed to the Archbishop and his successors rendered the bequest a good charitable gift, on the authority of *In re Delany* (2). There were there two bequests, one to A., B., and C., Nazareth House, Hammersmith, or their successors, the other to D. and E., of the Convent of the Assumption, Bromley-by-Bow, or their successors. The persons named were in each case officials of a religious community. *Farwell* J. held that the bequests, having regard to the words "or their successors," were to the named individuals, not for their own personal benefit, but as holders of offices and for the benefit of the associations in which they respectively held office; and that, as the objects of the associations were charitable, the gifts were void under the *Mortmain Act*. He considered that a charitable purpose was implied in each gift. That case would be an authority for holding similar bequests good as charitable gifts in this country, where no *Mortmain Act*

(1) (1909) 1 Ch., 567, at p. 571. (2) (1902) 2 Ch., 642.

applies. But it is not an authority for the respondents in this case, for here the bequest does not stop at the words "Archbishop of Brisbane and his successors," but goes on to use expressions which appear to be destructive or preventive of its efficacy as a charitable gift. The testator has described his purpose. In the case cited he had left it to be clearly implied. Endeavour was made to sustain the gift on the ground of a general charitable intent gathered by reference to other parts of the will. Here it must be a general intention to apply the residuary estate to charity. But as the words "the Archbishop and his successors" must be read with what follows them, and the part that follows gives a discretion to apply as much as the trustee pleases to purposes not charitable, I cannot think that a general intent of the kind contended for is established. That cannot be done by substituting for the words "wholly or in part" other words said to be equivalent. We must construe the words themselves, and I think their meaning is clear. No doubt if the will showed a general intention to give the residue to charity, such an intention would not be frustrated because the donor has not expressed the particular objects of charity. But to that proposition, as urged for the respondents, the answer is that the residue may, according to the testator's words, be applied partly to charitable and partly to other purposes; in other words, that the bequest is not attacked for failure to designate particular objects where all are charitable, but for including with charitable objects—if they are clearly such—the option of others which are not charitable. In the judgment of Lord *Halsbury*, then Lord Chancellor, in *Hunter* v. *The Attorney-General* (1), already cited, there is a passage which seems applicable to the terms of this will, and to the assertion that it expresses a general charitable intent:—"Now, the process of reasoning by which the Court of Appeal has come to the conclusion that they have the right to read the testator's will as establishing a charitable trust on the words to which I have referred is this: they say that they are sufficiently satisfied of the testator's intention by referring to other parts of his will; and I so far agree that, judging of his religious views by what he has said in other parts of his will, I have no doubt whatever that

(1) (1899) A.C., 309, at p. 315.

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his general intention was to aid the particular school of religious thought in the Church of England to which he was himself attached; but it would be a strange canon of construction for a will to say that wherever you can discover what a testator's desires and wishes were, although you cannot find express words in the will which give the authority sought for, nevertheless you can supply words and declare trusts which are not to be found in the will itself—that, to put it plainly, the testator's intention is to be judged by the general desire that he has expressed to have his money devoted to such a purpose. To create a trust by such a process of argumentation as that appears to my mind to be not interpreting the will, but making a will for the testator."

Although the bequests differ, these remarks are of equal point here. To my mind, no trust which the Court can control is in this case, any more than in that, annexed to the purposes to which, apart from charities, the trustee is given power to apply trust funds, and there is no general trust for charity binding the whole fund. If we could find a general over-riding trust for charitable purposes, cases like *In re Douglas* (1) could be applied to give effect to it, at the same time restraining the trustee from applying the fund to any purpose held to be objectionable. See Lord *Davey's* judgment in *Hunter* v. *Attorney-General* (2). But here I find no trace of such an over-riding trust, nor has Mr. *Feez* shown any such thing. Again, it is true, as remarked by Lord *Davey* in that case, "that where the trustees have a discretion to apportion between charitable objects and definite and ascertainable objects non-charitable the trust does not fail; but in default of apportionment by the trustees the Court will divide the fund between the objects charitable and non-charitable equally." But no one looking at this bequest can say that the present is such a case. What are the "definite and ascertainable objects non-charitable" to which we could apportion half of this fund? For the reasons given, I am of opinion that the whole bequest fails and the trust results in favour of the next of kin and I agree that the appeal must be allowed.

O'CONNOR J. Two passages in the testator's will were sub-

(1) 35 Ch.D., 472.

(2) (1899) A.C., 309, at p. 324.

mitted for the consideration of the Queensland Supreme Court. In the notice of appeal the correctness of the judgment as to both passages was questioned. As to the first, the decision of the learned Judges is so obviously right that the appellant's counsel very properly in the argument did not further press his objection. The only part of the judgment, therefore, with which we are now concerned, is that relating to the second passage, which is as follows:—"And I will and bequeath all the aforesaid legacies free of probate duty and all other expenses, and that the residue of my estate should be handed to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese."

There can be no contest as to the general principles of law applicable in the construction of the testator's language. If this is not in the eyes of the law a charitable bequest, and it is in that sense that I use the expression "charitable," it is admittedly void for uncertainty. Assuming the object of the gift to be charitable, the trustee must be bound to apply the whole or some definite portion of it to the charity. If he is allowed a discretion to apply it to the charity or not as he pleases, or to apply to the charity only such portion of it as he may think fit, then the bequest to the charity is void, and the Archbishop will hold as trustee for the next of kin: *Hunter* v. *The Attorney-General* (1); *In re Davidson* (2). These principles being clear, the real questions for determination may be stated in a very few words: Is the object of the bequest in itself charitable? If it is, has the testator imposed on his trustee an obligation to expend the whole gift on the charitable purpose, or has he allowed him a discretion to apply the whole or an indefinite part of it to some other purpose? The answer to these questions must in the end depend upon the meaning of the testator's words construed in their plain ordinary signification. Taking the bequest as a whole, the intention is, in my opinion, clearly expressed that the gift is not to the Archbishop for the time being as an individual and for his personal benefit, but to the Archbishop and his successors as representing the Catholic Church. There is abundant authority

(1) (1899) A.C., 309. (2) (1909) 1 Ch., 567.

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to show that a bequest to the representative of a church as such is a bequest for the benefit of religion. *Thornber* v. *Wilson* (1) was a case under the *Mortmain Act*. The bequest was in these terms—"and as to the surplus, on trust to pay it to the then minister of the Roman Catholic Chapel at Kendal." In holding the gift to be charitable and void under the *Mortmain Act*, Vice-Chancellor *Kindersley* says:—"After referring to the will, I cannot entertain any doubt that the intention was to benefit the minister as such, that is, the chapel. The question whether there is a charitable gift does not depend on the fact that there is a gift to an individual describing him as minister; but on this, whether the testator designates the individual as such, or as being the person who happens to fill the office. A gift to a minister as such is a charitable bequest. I think here the intention was clearly, to benefit the minister and chapel; it was not a personal bequest, with a description of the person to be benefited. A gift to the person *now* minister would have been different; the testator might be unacquainted with his name, and so only be capable of describing him by his office." That decision was quoted with approval and followed by Mr. Justice *Farwell* in *In re Delany*; *Conoley* v. *Quick* (2). The same principle was adopted in *In re Garrard* (3). The bequest there was "to the vicar and churchwardens for the time being of Kington to be applied by them in such manner as they shall in their sole discretion think fit." In delivering judgment, Mr. Justice *Joyce*, after stating the bequest, says:—"Having regard to the decision of *Kindersley* V.C. in *Thornber* v. *Wilson* (4), and see *In re Delany* (2), it is clear that a legacy to the vicar for the time being of a parish is a charitable gift for the benefit of the parish for ecclesiastical purposes. The churchwardens are the officers of the parish in ecclesiastical matters, so that a mere gift or legacy to the vicar and churchwardens for the time being of a parish, without more, is a gift or charitable legacy to them for ecclesiastical purposes in the parish. It was suggested that the words in the latter part of the gift were inconsistent with its being a charitable gift, and that they implied

(1) 4 Drew., 350, at p. 351.
(2) (1902) 2 Ch., 642.
(3) (1907) 1 Ch., 382, at p. 384.
(4) 4 Drew., 350.

that the vicar and churchwardens were to take beneficially. In my opinion there is no contradiction or inconsistency in the will whatever. The words 'to be applied by them in such manner as they shall in their sole discretion think fit,' to my mind merely direct that the particular mode of application within the charitable purposes of the legacy is to be settled by those individuals, or rather that there is a power given to them to do it, subject always, of course, to the jurisdiction of the Court. Therefore I declare this to be a good charitable legacy for the benefit of the parish of Kington for ecclesiastical purposes."

I do not regard these cases as laying down a hard and fast rule that, whenever a bequest is to the head of a church and his successors, the gift is necessarily to be regarded as a gift to religion. There may be words in the bequest which indicate a contrary intention on the part of the testator. But the cases certainly establish this position, that a gift to the head of a church and his successors as representing the church will be construed as a gift for the benefit of religion unless there are words in the bequest which can be fairly interpreted as expressing a contrary intention. Looking again at the words of the will I can see nothing in the testator's direction as to the use and expenditure of the moneys handed over which can be fairly construed as cutting down the *primâ facie* effect of the gift to the Archbishop and his successors as a bequest to religion. Mr. Justice *Joyce's* observations on the effect of a direction of the same kind in *Garrard's Case* (1) strongly support this view. Now, a bequest to a religious institution or for a religious purpose is, *primâ facie*, a bequest for a charitable purpose, and when once it appears that a gift is for religious purposes it must be treated as a gift for charitable purposes unless the contrary can be shown. That proposition is established by *White's Case* (2), has been adopted and approved in subsequent decisions, and must now be taken to be a correct statement of the law. Mr. *Woolcock* endeavoured to throw doubt on the authority of *White's Case* (2) by quoting some comments of the learned author of *Theobald on Wills*. But the comments are not, in my opinion, justified by the cases to which the learned author refers. It was further contended, assuming the true

(1) (1907) 1 Ch., 382, at p. 384. (2) (1893) 2 Ch., 41.

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principle of construction to be that laid down in *White's Case* (1), that there may be purposes of the Catholic religion which are not charitable in the eyes of the law, and that the trustee in applying the gift for the benefit of the Catholic religion would have a discretion to apply it to some of those purposes. It may be conceded that there are such purposes in connection with the Catholic religion and that that circumstance has been recognized in several cases. Take, for instance, the bequests to the two Communities of Nuns which were the subject of separate gifts in *Cocks* v. *Manners* (2). One of the communities, the Sisters of Charity of St. Paul, by their constitution set before themselves the duty of serving the sick poor as well as the duty of prayer and contemplation for their own salvation. The constitution of the other community, a Dominican Convent, was the same in respect to the duty of prayer and contemplation, but it was wanting in the element of service to the public in ministering to the sick poor. On the ground of that distinction Vice-Chancellor *Wickens* held that the bequest to the Sisters of Charity was charitable and that the gift to the Dominican Convent was not. But the circumstance that there may be purposes of the Catholic religion which are not charitable does not in itself prevent a bequest for the benefit of the Catholic religion from being a good charitable bequest. *White's Case* (1) lays down the principle that *primâ facie* such a bequest is charitable, and it was on that ground that the bequests in *Thornber* v. *Wilson* (3) and *In re Garrard* (4), referred to earlier in this judgment, were held to be good. On the other hand, the gift to the Dominican Convent in *Cocks* v. *Manners* (2) was held to be not charitable, because the facts were such as to prevent the *primâ facie* inference from arising.

For these reasons I take it to be established that the gift to the Archbishop of Brisbane and his successors was a gift for the benefit of the Catholic religion, and that that is *primâ facie* a good charitable bequest.

I shall now consider whether there is anything in the rest of the bequest which will prevent that *primâ facie* inference from being drawn. The remaining words are as follows:—

(1) (1893) 2 Ch., 41.
(2) L.R. 12 Eq., 574.
(3) 4 Drew, 350.
(4) (1907) 1 Ch., 382.

" . . . to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion." Mr. *Woolcock* contended that these words allow the Archbishop a discretion to apply the whole or any part of the gift to purposes other than religious purposes, or to apply it to purposes which he may consider conducive to the good of religion, whether they are in fact religious purposes or not. I do not think it necessary to follow in detail the reasoning by which the argument was supported. It may well be conceded that the language used by the testator is grammatically capable of that construction. But it is in my opinion at least equally capable of another meaning, and one which is more in harmony with the language of the bequest as a whole. The purpose of the gift is stated clearly and definitely in the opening words, and those words must in my opinion be read, for the reasons I have before stated, as a gift to the Archbishop for the benefit of the Catholic religion of the diocese. If there were nothing more, that would be a good charitable gift, imposing on the Archbishop, as trustee, the obligation of applying it to that charitable purpose; he could apply it to no other without breach of trust. The words that follow are merely directions as to the selection of objects within the ambit of the charity and as to the manner of expenditure. The trustee is to use and expend the gifts on such objects "as he may judge most conducive to the good of religion in the diocese." The latter phrase naturally implies a comparison of different objects conducive "to the good of religion in the diocese." On what ground can it be assumed that the trustee is authorized to include in the comparison objects outside the charitable purpose, so definitely stated in the first words of the bequest? Further, the gift is to be used and expended in whole or in part, at the trustee's discretion, on those objects within the ambit of the trust which he may select as being most conducive to the good of religion in the diocese, after having made the comparison which the testator directs him to make. That interpretation of the latter part of the bequest does no violence to the language used, is in harmony with the earlier part, and makes the bequest a consistent whole. On the other hand, the meaning which the appellant seeks to attach to the latter part is entirely inconsistent

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with the language of the earlier part. Having used expressions, in the first part of the bequest, which plainly constituted the Archbishop and his successors trustees for the benefit of religion, it would seem to be highly improbable that, in the next sentence, he should have expressed the intention to permit the present or any other Archbishop, who might for the time being occupy the See of Brisbane, to apply the whole gift or any part of it to his own personal purposes. Again, as it is pointed out in the judgment of the Supreme Court, the appellant's interpretation gives no force to the word "most." It would certainly appear to be somewhat futile to direct a trustee to expend and use the gift on objects selected by him as most conducive to the good of religion out of all the religious purposes of the diocese, if he is by the next few words allowed a discretion to disregard the comparison, the selection, the whole charitable purpose of the gift and apply it, if he thinks fit, to his own personal uses. The language of that part of the bequest to which I have been referring is grammatically capable of either of these contending interpretations. It is the duty of the Court to adopt that which is the more likely to represent the real intention of the testator, as it is to be gathered from the bequest as a whole. On that principle I hold that the interpretation which I have suggested is that which ought to be adopted. It gives effect to every word the testator has used, makes every part of the bequest consistent in itself, and is entirely in accord with the general purpose of the testator, which is to be gathered from the bequest as a whole. I have come to this conclusion after careful consideration, much aided by the reasoning of the learned Judges of the Supreme Court in whose conclusions I entirely concur, and by the very able arguments of counsel on both sides.

It follows that in my opinion the bequest is a good charitable gift, the judgment of the Supreme Court of Queensland should be upheld, and the appeal dismissed.

ISAACS J. The validity of the bequest of the residue depends upon whether it has all been given to charity. It has not been so given unless the trust is such that the money constituting the residue must all be applied to that object. The question then is,

has the testator said so, in other words, has he imposed upon the trustee an imperative duty to devote every penny of the residue to charity. A good deal of argument has been expended, as is usual in such cases, upon what the testator must have meant. But I would quote again a passage I have previously referred to, because it is at once a warning and a guide in all cases. Lord *Watson* in *Scalé* v. *Rawlins* (1) said: "We are not at liberty to speculate upon what the testator may have intended to do, or may have thought that he had actually done. We cannot give effect to any intention which is not expressed or plainly implied in the language of the will."

And in finding what is expressed or implied you have to proceed by a fair method of interpretation. "You are not . . . . " said Lord *Davey* in *Hunter's Case* (2) "to do violence to the language of any part of the will, or to import words which you do not find there to make the purposes charitable because of those prefatory dispositions which the testater has made." We have to remember, as Lord *Cairns* L.C. said in *Dolan* v. *Macdermot* (3), that in construing a will of that kind, that is to ascertain in the first place whether the intention is strictly charitable or not, "the Court must not lean to the side of avoiding the will in order to gain money for the family, nor, on the other hand, strain to support the will to gain money for the charity."

Approaching the bequest therefore with the desire to learn accurately from the testator's own words what his will was in this respect, I am unable to see any intention to fasten on the Archbishop for the time being the obligation to devote the whole of the residue to charity.

He directs that the "residue," which means the whole residue, shall be handed to the Roman Catholic Archbishop of Brisbane and his successors, but for what purpose?

Undoubtedly the mention of successors indicates a trust of some kind, and if the bequest had stopped at that point I should have been disposed to hold that a valid charitable trust had been created, because it would have been implied that the bequest was for the promotion of archiepiscopal functions. Nothing

(1) (1892) A.C., 342, at p. 344. (2) (1899) A.C., 309, at p. 321.
(3) L.R. 3 Ch., 676, at p. 678.

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further being said, no other intention could be imagined. The Supreme Court has halted at that point, and regarded the testator as having by implication made, up to that point, what has been termed an original gift to charity. The Court then proceeds to treat the succeeding words as merely modifying that gift, and to the extent that they fail to modify it holds that it stands as originally created. The original gift, it is said, though a gift to charity, was only a gift of the income—the corpus not being applicable to the purpose except as an income-producing fund. In other words, the residue—that is the principal—had to be handed down from Archbishop to Archbishop intact. That interpretation is self-destructive. If residue means corpus, and nothing but corpus, and that is to be handed down intact, where is there any room for a trust to distribute income? There is nothing but the word "residue" for the implication to operate upon, and if "residue" does not include the income, then there could be no implied trust to deal with and distribute the income.

But in truth the whole assumption of an original gift is an error. The testator did not leave his intention to rest upon any implication. He excluded implication entirely, and none can be made at any stage. He expressed what he wanted; and the rule is clear: *Expressum facit cessare tacitum.* He stated in his own language the trust to be attached to the residue so handed down in these words:—"To be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese." That and that only is the trust discoverable from all that he has said.

There has been very able argument on both sides, and as to the effect of the latter words from "as" to the end I have had some hesitation.

With regard to the words "wholly or in part" I am unable to see any room whatever for doubt. The whole of the residue is "handed" to the trustee; but he is directed that, for the purpose to be there presently mentioned, it is "to be used and expended wholly or in part"—that is as much of it or as little of it as the trustee pleases. He is left uncontrolled by any express direction as to time, and there is nothing to which the words "wholly or in part" can be applied except "used and expended."

It was urged that they are attachable to the words which follow. But apart from other difficulties, there is this, that it is nonsense to say "a part" of the residue could be more conducive to the good of religion than the whole, and therefore to give any sensible meaning to the phrase the words must be altered. And the principle contained in the words of Lord *Davey* already cited forbids our doing violence to the language of the will or importing words into it to make the purpose legally charitable, merely because the testator tried to do something which he considered laudable, but which the law declares impossible, or because he may have thought he had actually done what the law permits. These words must therefore have their primary meaning, and to alter that meaning by placing compulsion on the Archbishop for the time being and his successors to use the whole fund for the purpose would be creating an intention that the testator, judging him by the manifest import of his words, never for a moment entertained. This is sufficient to determine the case. But I may express my considered opinion as to the rest. Finding the unlimited discretion as to amount very materially influences my mind as to the meaning to be placed on the succeeding words. These words might, by a somewhat strained construction, possibly be capable of sustaining the interpretation suggested by the respondents. At best it would be strained, and to justify it at all at least no other part of the bequest should be opposed to it. But once the true effect of "wholly or in part" is ascertained, it helps to elucidate what follows. If the testator was prepared to leave to the trustee's discretion the amount he would choose to expend for the purpose desired, he would certainly be prepared to leave him the same unfettered discretion as to the methods to be employed, piously indicating the indefinite goal he desired to keep in sight—the good of religion in the diocese. No one could know better than the Archbishop what was calculated to promote that end—so evidently reasoned the testator looking at his language as a whole—and he was apparently prepared to accept the judgment of the Archbishop as to the proper means of attaining the good of religion in that diocese, and therefore as to what objects would be most conducive to secure it—meaning by "most conducive" the most conducive among all possible means

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of contributing to "the good of religion in this diocese," according to the understanding of the Archbishop for the time being. It is quite clear that, leaving the trustee at large in that manner, no trust for charity controllable by the Court has been constituted, even supposing the fatal defect previously mentioned did not exist.

Neither the subject nor the objects are definitely ascertained, and on the principles enunciated in *Morrice* v. *Bishop of Durham* (1) approved by the Privy Council in *Runchordas* v. *Parvatbhai* (2) the bequest fails.

I am therefore bound to express my opinion—though as reluctantly as a Judge is permitted to express it—that the appeal should be allowed.

HIGGINS J. In my opinion, the bequest of the residue is valid; and the appeal from the Supreme Court of Queensland ought to be dismissed.

The meaning of the words used has first to be ascertained without regard to consequences, without regard to the law as to charitable gifts; and then, if, according to the true meaning, any part of this fund may be applied to any purpose other than charitable—charitable as recognized by the law—the whole gift of the residue is void, as to the beneficial interest. I do not understand that anyone here disputes this position. Ordinarily, a gift involves a thing given—the subject; and a person to whom it is given—the object. If subject and object are not clear, the Courts cannot enforce the alleged gift—they do not know what is given, or else they do not know who is to get it; and the gift is said to be "void for uncertainty." But in the case of a charitable object, the rule of certainty as to the object is relaxed; for the Courts will find suitable recipients. The questions here are (1) is the object charitable; (2) was the whole residue meant to be applied to that object? If either question be answered in the negative, the gift is void.

Now, to urge, as the respondents have urged, that there is an over-riding trust for charity, seems to me rather to beg the question. It is true that the whole framework of the will favours

(1) 10 Ves., 522. (2) L.R. 26 Ind. App., 71, at p. 80.

the conjecture that the testator meant all the residue for his church. He gives his furniture, library, &c. to be used by his successors in the Roman Catholic mission at Dalby; £200 for masses; £50 for a monument; £300 for the Magdalen asylum; £100 for the Dalby hospital; £1,000 for a bursary in a Roman Catholic Ecclesiastical College; £3,500 to relatives; £500 to Sisters of Mercy to be expended in the convent and school at Dalby; £100 for a bell for the Dalby Roman Catholic Church; £50 to his housekeeper; and then he directs that the "residue" of his estate (admitted to be over £30,000) "should be handed to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended *wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese.*" But we must not yield to the temptation of acting on conjecture, however strong. The probability that the testator intended the whole fund to be expended for the purposes of his church is not sufficient in itself to settle the matter. The respondents have to satisfy us that the words used in the will are sufficient, on their true interpretation, on ordinary principles, and apart from the question of charity, to devote the whole of the residue to some charitable object.

The main difficulty arises from the words "wholly or in part." Assuming for the present that the object indicated is charitable, is the beneficial interest in the whole of the residue devoted to that object? The appellant says that it is not—that the words are equivalent to saying that the Archbishop is free to apply only so much as he thinks fit to the haritable object, and that the destiny of the rest is left blank. The appellant would treat the words "wholly or in part" as referring to the total *amount* of expenditure for the charitable object named, and not to the *mode* of expending the money—"wholly or in part." If the words were "wholly or in *parts*," I suppose that no one would seriously support the appellant's view, yet "in part" (the singular) would seem to be appropriate if each successive expenditure be regarded. However, the words—taken by themselves—are, *perhaps*, capable of two meanings—either that the Archbishop may, if he choose, expend only part of the fund for the charitable object named; or that each successive Archbishop, so long as the fund, or any part

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of it, remains, may apply it, either wholly or in part to the charitable object; leaving (in the latter case) a balance to be afterwards applied, either by himself or by his successors. This much, at all events, is clear, that the Archbishop is meant to be a trustee of the whole residue, not to take it for his personal use or benefit. For the residue is to be "handed" (not given) to him and his "successors." These latter words cannot here have force as words of limitation, but they may fairly be weighed in considering what the testator had in his mind. They imply a possible succession of holdings, and a possible succession of expenditures. All this tends to favour the view that the words in question refer to the *mode* of expenditure for the object named, rather than to the *amount* which may be expended on that object. Moreover, if the contrary view is to be accepted—if the successive Archbishops were meant by the testator to be free to spend as much as they liked for the good of religion, and to spend the balance for any other purposes—there is no force in the reference to the good of religion. Where was the use of allowing them to spend as much as they chose for the good of religion, if they were to be free to spend as much as they chose for that purpose or any other purpose? If the appellant is right, the testator has not only used words of qualification which do not qualify the gift, but he has also left a gap in his will. He has said to what object the Archbishop may apply all or part of the residue; but he has omitted to say what was to be done with any balance not so applied; and yet if anything is clear, it is clear that the Archbishop was to be a mere trustee—not to be the beneficiary as to any part of the fund. Who was to be the beneficiary? There is a time-honoured presumption that a man who sits down to make a will intends to dispose of all his property—to say who is to get the benefit of it: and this presumption against a chasm is especially applicable to a gift of residue, such as this gift (*Ibbetson* v. *Beckwith* (1); *Leake* v. *Robinson* (2). This presumption is, of course, of no avail against clear words, or lack of words; but it may well be applied where there are two interpretations equally possible, and where one interpretation involves an inexplicable hiatus in the will, and the other does

(1) Cas.t.T., 157. (2) 2 Mer., 363.

not; where one interpretation gives effect to all the words of the will, and the other makes some words foolish and unnecessary. I am referring, of course, to the hiatus *as to the beneficial interest*, not as to the trust; for there is no doubt as to the trustee taking the whole, and only as trustee; and I am referring to the hiatus left (as alleged) *by the words of the will*, not to any intestacy created by any rule of law as to charities. For this would be to beg the question. For my part, I can see nothing to prevent us from treating the word "as" in the phrase "as such Archbishop may judge," in the widest possible sense as to manner and time or times—as meaning (with the words "wholly or in part") that the successive Archbishops may spend the residue either at one time or for one institution, or at several times or for several institutions—at their discretion—a discretion bounded by "the good of religion in this diocese." There is really nothing to indicate that the discretion of the Archbishop is to determine the total *amount* that is to go to the good of religion.

But even if I could accept the position that the will enables the Archbishop to determine the total amount that should be expended for religion, I am by no means satisfied that the whole residue is not bound by the trust for religion. Admittedly, it is meant by the will that the Archbishop *may* expend the whole for religion. That is to say, the Roman Catholic Church is empowered to take, by its official, what it thinks fit, for the good of its distinctive form of religion, in the diocese. If a beneficiary be given a power to take any articles of furniture that she thinks fit, she may take the whole: *Arthur* v. *Mackinnon* (1); *In re Sharland*; *Kemp* v. *Rozey* (2); here *ex concessis*, the residue *may* be expended for the good of religion; and what, after all, is a church's property in an asset if it is not a right to expend it all for its objects? In all the cases in which it has been held that a charitable object does not cover the whole of the gift, there has been some object or purpose mentioned which is not charitable—there has been no power to apply the whole to a charitable object. If the Archbishop can be treated as identified with the church, the position seems to be clear. But no evidence has been submitted, and there is no statement in the special case, as to the

(1) 11 Ch. D., 385. (2) 74 L.T., 664.

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relations of an Archbishop to his church, or as to his duty where he has a general and absolute power which he may exercise for its benefit. Under these circumstances, I prefer to rest my judgment on the more obvious ground which I have already stated.

But it is contended also that, even if the subject of the gift is certain, the object is not a charitable object. The successive Archbishops are to use and expend the residue "as such Archbishop may judge most conducive to the good of religion in this diocese." Now, it is true that there are certain religious objects which the law does not regard as charitable; as where there is a community of persons associated merely for the salvation of their own souls (*Cocks* v. *Manners* (1)). In such an association, it is said, there is nothing tending to the instruction or the edification or the benefit of others—nothing altruistic; and this characteristic is essential for a charity in the eyes of the law. But by far the greater number of religious objects are altruistic in aim; and the case of *In re White* (2) is an authority for the proposition that, *primâ facie*, a religious object is to be treated as a charitable object, that those who allege the gift to be not charitable must show that there is something in the words of the will to show that a non-charitable object was contemplated by the testator. No such words can be found in this will, and, on the contrary, the words "in this diocese" point to the benefit of the public within the area of the diocese. Then, looking again at the will, we find that the Archbishop is not empowered to decide what is religious, what conduces to the good of religion in the diocese; he has merely power to select what he thinks to be "most conducive" thereto. If he were to apply one pound of the money to any purpose outside the bounds of religion, outside the bounds of charitable-religious objects, outside the purposes of the ecclesiastical diocese, the Courts would hold him liable. So the destination of the fund to charitable objects is, to my mind, perfectly clear.

I think that this appeal should be dismissed with costs.

Appeal allowed.

Solicitors, for the appellant, *J. F. Fitzgerald & Power.*

Solicitors, for the respondents, *Thynne & Macartney.*

C. E. W.

(1) L.R. 12 Eq., 574.

(2) (1893) 2 Ch., 41.