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COMMISSIONERS OF TAXATION (N.S.W.) *v.* ADAMS.

have now as full power as they ever had of requiring returns from time to time, of redressing injustice, and of relieving taxpayers from mistakes and overpayments.

Their Lordships will humbly advise His Majesty that the order of the High Court should be discharged except as to costs, and that the question proposed by the special case should be answered by saying that the income derived by the company during 1906 from the use of land in coal mining is not to be included in assessing the amount of taxable income of the company for the year 1907, but that the company is chargeable for income tax for the year 1907, under the provisions of sub-sec. VI. of sec. 27 of the Principal Act.

In accordance with their undertaking the appellants will pay the costs of the respondent as between solicitor and client.

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[PRIVY COUNCIL.]

THE MOST REVEREND ROBERT DUNNE AND ANOTHER . . . . . Defendants, } Appellants;

AND

JAMES BYRNE . . . . . Plaintiff, Respondent.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL.* 1912.

*Feb.* 22.

*Will—Construction—Charitable bequest—Gift for the good of religion—Uncertainty—Religious purposes—Over-riding trust.*

A testator left the residue of his estate 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."

* Present—Lord Macnaghten, Lord Shaw, Lord Mersey, and Lord Robson.

*Held*, that this was not a good charitable bequest and was void.

Decision of the High Court: *Bryne* v. *Dunne*, 11 C.L.R., 637, affirmed.

APPEAL from the High Court.

This was an appeal by the defendants from the decision of the High Court: *Byrne* v. *Dunne* (1).

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The Reverend Denis Joseph Byrne, a Roman Catholic clergyman in charge of the Roman Catholic Mission at Dalby, in the State of Queensland, disposed by will of the residue of his estate 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 may judge most conducive to the good of religion in this diocese."

Is that a good charitable bequest? In the Supreme Court of Queensland the Full Court unanimously held that it was. The High Court of Australia, by a majority of three Judges to two, declared the bequest void.

The case was argued very ably and concisely on both sides.

The learned counsel for the appellants began by insisting that inasmuch as according to the authorities a gift to a Roman Catholic Archbishop and his successors, without more, would be a good charitable gift, there is to be found in this will an overriding charitable intention sufficient to supply the lack of certainty—if lack of certainty there be—in the declared object of the bequest. Their Lordships have no hesitation in rejecting this argument. A similar argument was advanced and rejected in the Court of Appeal in England in the case of *In re Davidson* (2). It is difficult to see on what principle a trust expressed in plain language, whether the words used be sufficient or insufficient to satisfy the requirements of the law, can be modified or limited in its scope by reference to the position or character of the trustee.

On the other side it was contended that, even if the trust declared be a charitable trust, the words "wholly or in part"

(1) 11 C.L.R., 637. (2) (1909) 1 Ch., 567.

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leave it uncertain how much of the subject matter of the gift is impressed with the trust, because the trustee is authorized to apply part only of the residue to the purpose specified in the will. This argument was not accepted in the Supreme Court of Queensland. But it certainly found favour with some of the learned Judges in the High Court. It seems to their Lordships that on the true construction of the will the effect of the words in question is merely to give the trustee a discretionary authority to break in upon the capital of the trust fund. The fund is to be "used"—an expression which seems to imply that the capital is to be kept intact—and (if the trustee thinks fit) "expended in whole or part" in promoting the object of the trust.

Passing from these two points we come to the real difficulty of the case. The fund is to be applied in such manner as the "Archbishop may judge most conducive to the good of religion" in his diocese. It can hardly be disputed that a thing may be "conducive," and in particular circumstances "most conducive," to the good of religion in a particular diocese or in a particular district, without being charitable in the sense which the Court attaches to the word, and, indeed, without being in itself in any sense religious. In *Cocks* v. *Manners* (1), there is the well known instance of the dedication of a fund to a purpose which a devout Roman Catholic would no doubt consider "conducive to the good of religion," but which is certainly not charitable. In the present case the learned Chief Justice suggests, by way of example, several modes in which the fund now in question might be employed so as to be conducive to the good of religion, though the mode of application in itself might have nothing of a religious character about it. As to what may be considered most "conducive to the good of religion" in the diocese of Brisbane, the Archbishop is given an absolute and uncontrolled discretion. That being so, apart from a certain line of decisions cited at the Bar, there would be an end of the case. The language of the bequest (to use Lord *Langdale's* words) would be "open to such latitude of construction as to raise no trust which a Court of Equity could carry into execution": *Baker* v. *Sutton* (2). If the property, as Sir *William Grant* said in *James* v. *Allen* (3),

(1) L.R. 12 Eq., 574.
(2) 1 Keen, 224, at p. 233.
(3) 3 Mer., 17, at p. 19.

"might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute."

It was said:—This is a gift for religious purposes, and the Court has held over and over again that a gift for religious purposes is a good charitable gift. That is true. But the answer is:—This is not in terms a gift for religious purposes, nor are the words synonymous with that expression. Their Lordships agree with the opinion of the Chief Justice that the expression used by this testator is wider and more indefinite. On this part of the case, *In re White* (1) was referred to. There the gift was "to the following religious societies, viz.:—" Then there was a blank. The intended societies were not specified. *Kekewich* J. held that there was an intestacy. The Court of Appeal held that the gift was in substance a gift to "religious societies for religious purposes," and, so holding, they considered themselves bound by a long stream of authority to determine that the bequest was a good charitable gift. Whether they were right in so construing the unfinished sentence before them may perhaps be doubted, but it is perfectly clear that they did not mean to lay down any new law, or to extend the law as laid down in former decisions. All they did was to hold, as had often been held before, that a bequest for religious purposes was a good charitable gift. It was too late in their opinion to depart from long-established decisions, although the Master of the Rolls did observe that "a religious society may or may not be a charitable society, in the sense in which that expression is used."

In the present case their Lordships think that they are not bound to treat the expression used by the testator as identical with the expression "for religious purposes," and, therefore, not without reluctance, they are compelled to concur in the conclusion at which the High Court arrived.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. But, having regard to the great divergence of judicial opinion in this case, and the fact that the difficulty was occasioned by the testator himself, they think that the costs of both parties as between solicitor and client ought to be paid out of the estate.

(1) (1893) 2 Ch., 41.