

context which, to use the words of *Jessel M.R.*, is stronger or at least equally strong. Various other sections have been pointed out by *Mr. Starke*, and with great force, no doubt. This is a consolidating Act, and is a collection of enactments passed from time to time to answer various purposes, and it may very well be that *Mr. Starke* is right in saying that, if the language of sec. 106 is construed strictly, some things which it covers, or in some cases offences such as that now charged, are efficiently provided for in other parts of the Act. To my mind that is not a circumstance which should outweigh the unambiguous language of this Act. The words "enclosed or unenclosed land (not including houses and race-courses) within any municipal district which on the sixth day of March one thousand eight hundred and ninety-six was a city or town" are so clear as to be unmistakable, and it would take an extraordinarily strong context to show that they do not mean what they say. The circumstance that a consolidating Statute like this affords instances in which a thing which would be the result of a literal interpretation of this definition might also be made subject to prosecution by utilizing another part of the Act, cannot, to my mind, counter-vail the clear language of the section.

I am therefore of opinion that the information was erroneously dismissed, and that the appeal should be allowed.

I am at liberty to say that my brothers *Gavan Duffy* and *Powers* concur in this judgment.

Appeal allowed. Order appealed from discharged. Respondent convicted of the offence charged and fined £20, in default distress. Appellant to pay the costs of this appeal and of the proceedings below.

Solicitor for the appellant, *E. J. D. Guinness*, Crown Solicitor for Victoria.

Solicitors for the respondent, *Nolan & Nolan*.

H. C. OF A.
1917.

McCANN
v.
BUTCHER.

Barton J.

B. L.

[HIGH COURT OF AUSTRALIA.]

VAN KERKVOORDE AND ANOTHER . APPELLANTS;
 PLAINTIFF AND DEFENDANT,

AND

MORONEY RESPONDENT.
 DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
 NEW SOUTH WALES.

H. C. OF A. *Will—Construction—Uncertainty—Gift to executive committee of unincorporated association to be used in the interests of that association.*
 1917.

SYDNEY,
 Sept. 3, 7.

Barton, Isaacs
 and Rich JJ.

A testator by his will gave his real estate to his wife for life charged with the yearly payment of ten per centum of the net rents and profits to "the secretary for the time being in Sydney of the Socialist Labour Party of Australia . . . to be held by such secretary in trust for the said Socialist Labour Party of Australia"; and after the death of his wife to his daughter for life subject to a charge of twenty per centum of the net rents and profits in favour of the same beneficiary, to be held by him on the same trust; and after the death of his wife and daughter he gave his real estate to the general secretary for the time being of the same Party upon trust to sell and "pay the moneys arising from the said sale to the executive committee for the time being in Sydney of the said Party for such purposes and objects as the said executive may think fit in the interests of the said Party"; with a gift over in case the Party known at the date of the will as the Socialist Labour Party of Australia should amalgamate with any other party, body or society having objects substantially different from those formulated in the rules of the Socialist Labour Party of Australia and then in existence or should itself change its objects to objects substantially different. The Socialist Labour Party of Australia was an unincorporated association having upwards of one hundred members and a constitution setting forth the objects of the Party and providing for a general secretary and an executive council which should manage the affairs of the Party subject only to the control of an annual conference or a meeting of the financial members.

Held, that the gift of the corpus of the real estate after the death of the testator's widow and daughter was not uncertain, inasmuch as the Party was intended to be the real beneficiary, and, therefore, that the gift was valid.

Decision of the Supreme Court of New South Wales (*Harvey J.*): *Van Kerkvoorde v. Hedley*, 17 S.R. (N.S.W.), 265, affirmed.

H. C. OF A.
1917.

VAN KERK-
VOORDE
v.
MORONEY.

APPEAL from the Supreme Court of New South Wales.

Nicholas Van Kerkvoorde, deceased, left a will of which the following is the material portion :—" I appoint my said wife Amelia Van Kerkvoorde sole executrix and trustee of this my will during her lifetime and I devise the whole of my real estate to her upon trust to permit or empower her to receive the rents and profits of the whole of my said real estate for her sole and separate use for her life charged nevertheless with the payment each year to the Secretary for the time being in Sydney of the Socialist Labour Party of Australia out of the said rents and profits of the said real estate of an amount equal to ten pounds per centum per annum of the said rents and profits after payment of all rates taxes insurance premiums and outgoings whatever for the time being on the said real estate and after allowance made by my said trustee for painting and repairing all my house property every five years and also after allowance made for tarring each year all the paths and passages at present tarred inside the grounds of my different houses to be held by such Secretary in trust for the said Socialist Labour Party of Australia, and after the death of my said wife or in case she predeceases me then I devise the whole of my real estate to my daughter Ethel Hedley the wife of Joseph Hedley of Edna Street Lilyfield near Sydney painter whom I appoint sole executrix and trustee of my will during her lifetime upon trust to permit or empower her to receive the rents and profits of the whole of my said real estate for her sole and separate use for her life charged nevertheless with the payment each year to the Secretary for the time being in Sydney of the Socialist Labour Party of Australia out of the said rents and profits of the said real estate of an amount equal to twenty pounds per centum per annum of the said rents and profits after payment of all rates taxes insurance premiums and outgoings whatever for the time being of the said real estate and after allowance made by my said trustee for painting and repairing all my house property every five years and also after

H. C. OF A. 1917.
VAN KERK-
VOORDE
v.
MORONEY.

allowance made for tarring all the paths and passages at present tarred inside the grounds of my different houses to be held by such Secretary in trust for the said Socialist Labour Party of Australia. And after the death of my said daughter Ethel Hedley or in case she predeceases both myself and my said wife Amelia Van Kerkvoorde I devise the whole of my real estate to the General Secretary for the time being in Sydney of the said Socialist Labour Party of Australia upon trust to immediately sell the whole of my said real estate upon such terms and conditions as he may think fit and pay the moneys arising from the said sale to the Executive Committee for the time being in Sydney of the said Party for such purposes and objects as the said Executive may think fit in the interests of the said Party. And in case the Party known at the date of this my will as the Socialist Labour Party of Australia should amalgamate with any other party body or society having objects substantially different from the objects of the said Socialist Labour Party of Australia as formulated in the rules of the said Socialist Labour Party of Australia in existence at the time of making this my will or in case the Party known as the Socialist Labour Party of Australia should itself change the said objects to objects substantially different from the said present objects then I devise the whole of my said real estate after the death of my said wife and daughter respectively to Harry Kuhn for many years one of the National Secretaries of the Socialist Labour Party of the United States of America and Morris Reinstein formerly of Buffalo and of the National Executive of the Socialist Labour Party of America or the survivor of them in trust to sell the whole of the real estate upon such terms and conditions as they or the survivor of them may think fit and to pay the moneys arising from the said sale to the National Executive Committee of the Socialist Labour Party of America to be used by them for the purpose of the said Socialist Labour Party of America and in case both the said Harry Kuhn and the said Morris Reinstein should predecease me and there is a failure of the objects of the Socialist Labour Party of Australia as mentioned and provided for in the direction hereinbefore contained in this my will then I devise the whole of my said real estate to the General Secretary for the time being of the Socialist Labour Party of the United States of America in trust to sell the

whole of the said real estate upon such terms and conditions as he may think fit and to pay the moneys arising from the said sale to the National Executive Committee of the Socialist Labour Party of the United States of America for such purposes and objects as the said National Executive may think fit in the interests of the said Party and I direct that after the death of my said wife the Secretary for the time being of the Socialist Labour Party of Australia shall have the right of inspecting at any time he shall see fit the whole of my real estate and if he shall at any time be of the opinion that any part of my said real estate shall require to be repaired or renovated then he shall have the right to serve a written notice of what he requires done to the said real estate upon the tenant for life of the said real estate in the way of repairing or renovating the said real estate and if such repairs and renovations are not carried out within three months by the tenant for life after receipt of such written notice then the said Secretary shall have the right to have such repairs and renovations carried out and shall have the right to charge same to the said tenant for life."

H. C. OF A.
1917.

VAN KERK-
VOORDE
v.
MORONEY.

An originating summons was taken out by Mrs. Van Kerkvoorde for the determination of the following questions (*inter alia*):—

1. Is the gift in the said will of ten pounds per centum per annum of the rents and profits of the testator's real estate during the life of the said Amelia Van Kerkvoorde to the secretary for the time being in Sydney of the Socialist Labour Party of Australia void for uncertainty or otherwise?

2. Is the gift in the said will of twenty pounds per centum per annum of the rents and profits of the testator's real estate after the death of the said Amelia Van Kerkvoorde and during the life of the said Ethel Hedley to the secretary for the time being in Sydney of the Socialist Labour Party of Australia void for uncertainty or otherwise?

3. Is the gift in the above-named will of the proceeds of sale of the testator's real estate to the executive committee for the time being of the Socialist Labour Party of Australia for such purposes and objects as the said executive may think fit in the interests of the said party void for uncertainty, perpetuity or otherwise?

The defendants to the summons were the testator's daughter,

H. C. OF A. 1917.
 VAN KERK-
 VOORDE
 v.
 MORONEY.

Ethel Hedley, James O. Moroney, the general secretary of the Socialist Labour Party of Australia, and Morris Reinstein and Harry Kuhn. The Socialist Labour Party of Australia was an unincorporated association consisting of over a hundred members. It had a constitution which set out that the object of the association was "the establishment of a co-operative Commonwealth founded on the collective ownership of the land and means of production, distribution, and exchange," and that its methods were "the industrial and political organization of the workers, mental and manual, distribution of socialist literature, lectures on socialism, also social, political and industrial questions; and, to attain our object—a co-operative Commonwealth—the election of socialists to Parliament (Federal and State) and municipal councils." The constitution provided for a general executive committee which, subject to a reference vote of members, should exercise a supervising control over the work of the Party, should have a determining voice in the selection of candidates, and should deal with local disputes between branches and their members, and, subject to the determination of an annual conference or a vote of financial members, should interpret the constitution.

The originating summons was heard by *Harvey J.*, who answered each of the questions in the negative: *Van Kerkvoorde v. Hedley* (1).

From that decision Amelia Van Kerkvoorde and Ethel Hedley now appealed to the High Court.

Knox K.C. (with him *Edwards* and *Monahan*), for the appellants. Each of the three gifts is void on the ground of uncertainty of the trusts. As to the gift of the corpus it is a gift to the persons who at the time the money is to be paid over happen to be the members of the executive committee to be applied by them in any way they may think conducive to the interests of the body and free from the control of that body. The Court could not control the carrying out of the trust. The gift therefore fails for uncertainty (*In re Douglas*; *Obert v. Barrow* (2); *Byrne v. Dunne* (3); *In re Drummond*; *Ashworth v. Drummond* (4)). As to the gifts of income, if the direction that

(1) 17 S.R. (N.S.W.), 265.

(2) 35 Ch. D., 472, at p. 485.

(3) (1912) A.C., 407; 11 C.L.R., 637.

(4) (1914) 2 Ch., 90, at p. 97.

the money is to be "held" means that it is not to be parted with, the gifts are void as perpetuities. H. C. OF A.
1917.

[ISAACS J. referred to *Halsbury's Laws of England*, vol. XXVIII., VAN KERK-
VOORDE
v.
MORONEY.

Waddell, for the respondent, Moroney. The gift of the corpus is not uncertain. It is a gift to definite individuals who are bound to deal with it in a particular way. The members of the Socialist Labour Party are entitled to direct the executive committee what they shall do with the money. That Party is entitled to have the money handed to it by the executive committee and to deal with the money according to the constitution (*In re Drummond* (1); *In re Clarke*; *Clarke v. Clarke* (2)). The members of the executive committee take by virtue of their office and those who cease to be members cease to be trustees, the new members becoming trustees in their place. If that is not so the Party can at least control the executive committee and see that they exercise their discretion honestly.

Knox K.C., in reply.

Cur. adv. vult.

The following judgments were read :—

BARTON J. The appeal is from an order of Mr. Justice *Harvey*, in which he declared the validity of three gifts of the testator, Van Kerkvoorde, in answer to three several questions in the originating summons. As to the first two, which relate to a percentage of the rents and profits of the real estate during the lives of the testator's widow and daughter respectively, the appeal is not persisted in, but the passages making these two gifts must be considered in construing the third. The latter operates on the termination of the life estates to the widow and daughter. It is a devise of the real estate to the general secretary for the time being in Sydney of the Socialist Labour Party on trust to convert it into money and to pay the moneys so arising "to the executive committee for the time being

Sept. 7.

(1) (1914) 2 Ch., 90.

(2) (1901) 2 Ch., 110.

H. C. OF A.
1917.

VAN KERK-
VOORDE
v.
MORONEY.

Barton J.

in Sydney of the said Party for such purposes and objects as the said executive may think fit in the interests of the said Party."

As this gift of the corpus is not to a charity the question arose whether it is valid, regard being had to the rules that the Court will not frame a scheme for the disposal of testamentary gifts for purposes which are not charitable, and that funds not given to a charity will devolve as undisposed of unless they are to be devoted to some fairly defined object. The argument before us was limited to the question of uncertainty. If it stood alone, that is, unexplained by the context or otherwise, one would be disposed to agree with the argument on that point. But in applying the gift to its subject matter we must have regard not only to the context but to the constitution of the Socialist Labour Party, which no doubt was properly before us. In that document the "object" of the "organization" is described to be "the establishment of a co-operative Commonwealth founded on the collective ownership of the land and means of production, distribution, and exchange," and the "methods" are the industrial and political organization of the workers, mental and manual, the distribution of socialistic literature, lectures on socialism, also political and industrial questions, and, "to attain our object—a co-operative Commonwealth—the election of socialists to Parliament (Federal and State) and municipal councils." A person before becoming a member is to answer satisfactorily certain questions before being nominated. There is a monthly subscription, and the general executive can make levies when authorized by a vote of the members of the Party. The general executive committee is to be elected by "financial" members. It is, *inter alia*, to exercise a supervising control over the work of the Party, to have power to suspend any of its officers for disloyalty to the movement, &c., and may itself be removed by general vote. The Party may own newspapers to advocate its principles.

The above excerpts from the constitution are sufficient to show the general nature of the body and its management. It is governed by rules; it consists of qualified subscribers, and its aims are definite.

The two gifts of percentages upon income during the life estates are "in trust for the Socialist Labour Party of Australia," that is to say, the body described. Considered with the residuary gift,

they make clear the fact that the testator has built up his dispositions on a plan carefully thought out so as to provide for his widow and his daughter during their lives, to give assistance to the organized body year by year during the lives of those two relatives, and to give the corpus in remainder to the organized body, but only, as will be seen, while it pursues in substance the objects which have commended themselves to him in planning the future of his estate. It is those objects to which the fund is to be applied after the life estates, objects which must be adhered to if a gift over is to be avoided.

The gift of the corpus is to be paid to the executive committee really as agents for the Party, and the "purposes and objects" are defined by the constitution above quoted. The words "in the interests of the said Party" have not the effect of allowing the money to be spent otherwise than in accordance with its purposes and objects, but the manner in which it is to be applied to them is to be at the discretion of the general executive, so long as it keeps within them, and the general executive is responsible to the body of members.

That the testator was applying the proceeds of his property to well-defined purposes has become, I think, fairly clear. But there is more. The gift over to which I have referred is to take effect in the event of the Party as known at the date of the will amalgamating with any other body "having objects substantially different" from its objects "as formulated in the rules . . . in existence at the time" of the will; or in case the same Socialist Labour Party should itself change its objects to objects substantially different from those it then held.

The testator makes the rules, *i.e.*, the "constitution," his criterion, and thus puts beyond all doubt what is meant by "the purposes and objects" in the gift itself.

In the light of the rules and the context I think it is clear that the purposes of the gift are quite adequately defined, and that the body whom it is to advantage have so complete a beneficial interest that it would be in their power to exact the due performance of the trust. I think that there is a definite subject matter, and that there are beneficiaries who could legally demand enforcement. I am therefore

H. C. OF A.
1917.

VAN KERK-
VOORDE
v.
MORONEY.
Barton J.