[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.

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SYDNEY, *Sept.* 3, 7.

Barton, Isaacs and Rich JJ.

Will—Construction—Uncertainty—Gift to executive committee of unincorporated association to be used in the interests of that association.

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.

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

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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."

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,

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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.

[ISAACS J. referred to *Halsbury's Laws of England*, vol. XXVIII., pp. 17, 18.]

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.

Sept. 7.

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

(1) (1914) 2 Ch., 90. (2) (1901) 2 Ch., 110.

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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

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of opinion that there is no uncertainty : see *Grimond* v. *Grimond* (1), Lord *Halsbury's* judgment ; *In re Clarke* (2), and cases there cited ; and *In re Conn* ; *Conn* v. *Burns* (3). It is in no sense the purport of the gift to commit to others the task of making his will for the testator.

Barton J.

I am of opinion that the appeal must be dismissed.

ISAACS AND RICH JJ. This appeal involves the validity of three testamentary gifts—two of income and the third of corpus. They are attacked for uncertainty. *Harvey* J. held them all good.

The objection as to the two gifts of income was not pressed, and they are not open to any real doubt. The question as to corpus is more difficult. The objection taken to it is that the discretion given to the executive committee is so wide as to be beyond the power of a Court to control and therefore you cannot class it as a trust. The will is so worded as to require careful consideration of all its parts, in order to see what the testator meant by the provision with which this case is immediately concerned.

The testator must be taken to have known the constitution and objects of the Socialist Labour Party of Australia. It has upwards of a hundred members, it has a secretary and an executive committee.

Reading the provision as to corpus in its setting—that is, with reference to the gifts of income, and the substitutionary gifts, and the direction as to inspection during the lives of the life tenants—it appears clearly that there is no uncertainty as to property, or as to objects in the sense of the persons to be benefited. The objects are what the testator calls the Socialist Labour Party of Australia. They are unincorporated, and the executive committee are official managers of the affairs of the Party, subject only to the control of the annual conference or a meeting of the financial members.

The only doubt that can arise is as to the " purposes and objects " to which the property is to be applied, and in the result the decision must turn on what the testator meant by the words " purposes and objects."

(1) (1905) A.C., 124. (2) (1901) 2 Ch., 110.
(3) (1898) 1 Ir. Rep., 337.

In *Bathurst* v. *Errington* (1) Lord *Cairns* said: "In construing the will of the testator . . . it is necessary that we should put ourselves, as far as we can, in the position of the testator, and interpret his expressions as to persons and things with reference to that degree of knowledge of those persons and things which, so far as we can discover, the testator possessed."

Applying this rule, the intention of the testator is sufficiently plain. He was well acquainted with the Socialist Labour Party, he knew its "objects," and therefore its constitution; he refers to the rules, and so he knew what are called in its constitution and rules its "methods," which, as set out, may not improperly be called its "purposes" so far as purposes are not included in "objects"; he knew it had a secretary and an executive committee, and the functions of that committee. He obviously intended to benefit that society, which is called a Party and consists of recognized members but unincorporated, and fluctuating in personnel.

His will beyond question indicates that if the declared "objects" of the Party as set out in its constitution were to be substantially altered at the time he died, his gift should go in another direction. Consequently, those were the "objects" he meant to promote, and he did not intend to promote, and expressly refused to promote, any object substantially differing. Therefore it cannot be supposed that he was so inconsistent as to alter his gift if the society altered its objects, and yet expressly permit the executive to apply the gift to altered objects for the same society.

Then, on the death of the life tenants, the real estate is devised to the general secretary for the time being, upon trust to sell and pay the proceeds to "the executive committee for the time being in Sydney of the said Party." That is, the trust (which is the only thing called by him a "trust" in relation to the corpus) was to pay to the executive committee, not for their own benefit, but clearly as the official representatives of the Party. He did not mean that they were to receive the moneys as private individuals; or that he personally selected them; he deliberately allowed the society to select whom they pleased; the payment was to be to persons in whom, not he, but the Party had confidence. They took as official

(1) 2 App. Cas., 698, at p. 706.

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representatives rather than trustees, unless their powers under the will were wider than their duties to the Party. He did not refer to them as trustees. No doubt in a sense they take as trustees, but that is because they are bound to account to the Party whose executive committee they are, for the moneys they receive.

It would have been practically impossible to hand the money to the Party, a fairly numerous body, not incorporated. We can therefore well understand why the committee were selected by the testator as the manual recipients on behalf of the society. Then what are they to do with it? The will says "for such purposes and objects as the said executive may think fit in the interests of the said Party."

Remembering that the "Party" is a definite society of which each member is identifiable, that the testator insisted on the substantial retention of its declared "objects," and that he knew the relation of the executive committee to the general body, we conclude that the "objects and purposes" from which he permitted the committee to select were the "objects and methods" in the constitution.

Thus the ambit of discretion is limited to the "objects and purposes" of the society itself. These are wide, but have some limits. At all events, the provision does not leave the executive committee for the time being to arbitrarily choose any "object or purpose" it likes.

The test of uncertainty which will vitiate in such a case is laid down in *Grimond* v. *Grimond* (1). There Lord *Halsbury* L.C. said the question was whether the testator had "left his directions so vague that it is in effect giving someone else power to make a will for him instead of making a will for himself." In saying that, the learned Lord was summarizing the effect of the previous authorities. In *Doe d. Winter* v. *Perrat* (2), in the House of Lords, Lord *Brougham* said: "The difficulty" (that is, the difficulty of construing the will so as to find sufficient certainty) "must be so great that it amounts to an impossibility." And in *In re Roberts*; *Reppington* v. *Roberts-Gawen* (3) *Jessel* M.R. said: "The modern doctrine is not to hold a will void for uncertainty unless it is utterly impossible to put a

(1) (1905) A.C., 124, at p. 126.
(2) 6 M. & G., 314, at p. 361.
(3) 19 Ch. D., 520, at p. 529.

meaning upon it. The duty of the Court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty."

On the whole, we do not think that can be said of the present will; and we come to the conclusion that, broadly phrased as this gift of corpus is, the testator has sufficiently indicated that the Party is the object of his bounty, first, as to part of the income and, next, as to corpus, and that the executive committee for the time being are to hold only as the official representatives of the Party who are to be regarded as the real beneficiaries and owners of the fund, and to whom the committee is always bound to account. The case of *In re Clarke*; *Clarke* v. *Clarke* (1)—as to which see particularly the comments at p. 117 on the case of *In re Clark's Trust* (2)—and *Conn's Case* (3) are greatly in favour of the respondent's contention.

The judgment of *Harvey* J. was therefore right, and this appeal should be dismissed.

Appeal dismissed. Plaintiff to be at liberty to retain her costs out of the estate and to pay the costs of the other parties of this appeal out of the estate as between solicitor and client.

Solicitors, *Crichton Smith & Waring.*

B. L.

(1) (1901) 2 Ch., 110.
(2) 1 Ch. D., 497.
(3) (1898) 1 Ir. R., 337.