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and for such relief against any trustee of the estate of any deceased trustee of the will of Sir George Kingston, as they may be advised. No order as to costs of the action in the Supreme Court or of this appeal except that plaintiffs are to have their costs out of the estate of Sir George Kingston deceased.

Solicitor for the appellants, *H. G. Alderman.*

Solicitors for the respondents, *Badger & Hicks*; *Isbister, Hayward, Magarey & Finlayson*; *Cleland, Holland & Teesdale Smith.*

B. L.

Cons *Comr of Taxation v Launceston Legacy* 15 FCR 327

Rev *Chesterman v Federal Commissioner of Taxation* (1925) 37 CLR 317

[HIGH COURT OF AUSTRALIA.]

CHESTERMAN AND OTHERS . . APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

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MELBOURNE, *Feb.* 20-23, 26; *June* 6.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Estate Duty—Exemption—Gifts for "religious, scientific, charitable or public educational purposes"—What are "charitable purposes"—Whether annuity given by will is taxable as part of estate—Assessment—Value of annuity—Regulation prescribing rate of interest—Ultra vires—Estate Duty Assessment Act 1914-1916 (*No.* 22 *of* 1914—*No.* 29 *of* 1916), *secs.* 8, 50—*Estate Duty Regulations* 1917 (*Statutory Rules* 1917, *No.* 267), *reg.* 33.

Sec. 8 of the *Estate Duty Assessment Act* 1914-1916 provides that "(1) Subject to this Act, estate duty shall be levied and paid upon the value, as assessed under this Act, of the estates of persons dying after the commencement of this

Act. . . . (5) Estate duty shall not be assessed or payable upon so much of the estate as is devised or bequeathed or passes by gift *inter vivos* or settlement for religious, scientific, charitable or public educational purposes."

Held, by *Isaacs*, *Rich* and *Starke* JJ. (*Knox* C.J. and *Higgins* J. dissenting), that in sub-sec. 5 the expression "charitable purposes" is not used in its technical legal sense, but in its popular sense as meaning the relief of wants occasioned by lack of pecuniary means, and covering the relief of any form of necessity, destitution or helplessness, including spiritual destitution or need, which excites the compassion or sympathy of men and appeals to their benevolence for relief; and, therefore, that a gift of a fund to provide prizes for competitions in physical, mental or moral excellence, without regard to the pecuniary means of the competitors, was not for charitable purposes within the meaning of the sub-section.

Held, also, by *Isaacs*, *Rich* and *Starke* JJ., that in that sub-section the expression "public educational purposes" connotes training or teaching either bodily or mental.

Held, further, by *Knox* C.J., *Isaacs*, *Higgins*, *Rich* and *Starke* JJ., that a gift of an annuity by a testator is a gift of part of his estate, and accordingly is taxable under sec. 8 in respect of its value according to a valuation, taking into account the fact, if it exists, that the annuity is defeasible.

Reg. 33 (1) of the *Estate Duty Regulations* 1917 provides that "(1) Whenever it is necessary for the purpose of the" *Estate Duty Assessment Act* "to calculate the value of a life interest or an interest for a period certain in an estate, the value shall be calculated in accordance with the appropriate value of one pound per annum shown in any standard set of tables for calculation of values on a four and a half per centum basis."

Held, by the whole Court, that the regulation is *ultra vires* the power conferred by sec. 50 of the *Estate Duty Assessment Act* to "make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act."

Held, also, by the whole Court, that the value of an annuity should, for the purposes of the *Estate Duty Assessment Act*, be ascertained as a matter of fact.

CASE STATED.

On an appeal to the High Court by Alfred Henry Chesterman, Walter George Henderson and James Stephen, executors of the will and codicils of Peter Stuckey Mitchell deceased, from an assessment made by the Federal Commissioner of Taxation under the provisions

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of the *Estate Duty Assessment Act* 1914-1916 of estate duty payable by them in respect of the estate of the deceased, *Starke* J. stated, for the opinion of the Full Court, a case which was substantially as follows :—

2. The said testator duly made his last will and testament and three codicils thereto dated respectively 23rd October 1916 and 25th May 1917, 15th December 1917 and 24th March 1920 ; and in and by such instruments he appointed the appellants the executors thereof.

3. The said testator died on 4th January 1921 without having altered or revoked his said will save as and by the codicils aforesaid, and he left his widow but no children surviving him.

4. On 17th March 1921 probate of such will and codicils was granted to the appellants by the Supreme Court of New South Wales in its probate jurisdiction.

5. The respondent caused an assessment dated 7th April 1922 to be made in respect of the estate of the said testator, and thereupon placed the net assessable value at the amount of £178,478. In calculating the value of the said estate for purposes of duty, the respondent included the property referred to in the said will as " the Peter Mitchell Trust " ; and also the annuity given by the said will and codicils to the wife of the said testator ; and for the purposes of the assessment and payment of duty in respect of such annuity he calculated the present value of the same in accordance with the appropriate value of one pound per annum shown in a standard set of tables for calculation on a four and a half per centum basis, and he thereby placed such present value at the amount of £73,280.

6. The appellants, being dissatisfied with the said assessment, duly and within the prescribed time lodged with the respondent an objection in writing against the same upon the following grounds :—

(1) That the Commissioner was wrong in assessing the value of the said estate for duty under the above Act at the amount of £178,478 for the following, amongst other, reasons : (a) that no part of the estate of the said deceased remaining after payment of the pecuniary legacies (other than any annuity) and debts and other charges is assessable for estate duty, the whole of the said estate so remaining being devised or bequeathed to religious, scientific, charitable or public educational purposes ; (b) that so much of the estate

of the said deceased as is (i.) included in, or (ii.) devoted to the formation of, or (iii.) necessary for carrying out the provisions of, the said will and codicils relating to the Peter Mitchell Trust is not assessable for estate duty, the said portion of the estate being devised or bequeathed to religious, scientific, charitable or public educational purposes.

(2) That if and so far as any sum of money which may be required or set apart or used for providing for the annuity of £5,000 bequeathed to the wife of the said deceased may be liable to be assessed for estate duty, the Commissioner was wrong in calculating (for the purposes of assessment and payment of duty on the amount thereof) the present value of the annuity in accordance with the appropriate value of one pound per annum shown in any standard set of tables for calculation on a four and a half per centum basis, and thereby placing such present value at the amount of £73,280. The Commissioner should have calculated the present value of such annuity upon the basis of the current rate of interest, and reg. 33 of the *Estate Duty Regulations* 1917 is *ultra vires*.

7 The respondent wholly disallowed the said objection and gave to the appellants written notice of his decision disallowing the same.

8. The appellants, being dissatisfied with the said decision, within the prescribed time duly appealed against such decision to the High Court of Australia and prayed the Court to make orders in accordance with the notice of objection set out in par. 6 hereof.

9. The appeal came on for hearing before me at Melbourne on 7th September 1922; and the Court, thinking fit, doth state this case in writing for the opinion of the Full Court of the High Court of Australia upon the following questions arising in such appeal which, in the opinion of this Court, are questions of law:—

(1) Is the part of the said estate which is subject to the Peter Mitchell Trust property devised or bequeathed to religious, scientific, charitable or public educational purposes within the meaning of the *Estate Duty Assessment Act* 1914-1916, sec. 8 (5)?

(2) Whether any and what part of the estate of the testator passes to his widow within the meaning of sec. 8, sub-sec.

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6, of the *Estate Duty Assessment Act* by virtue of the gift of the annuity of £5,000 contained in the said will and codicils.

(3) Is any estate duty payable in respect of the gift of the said annuity ?

(4) If question 3 be answered in the affirmative, is reg. 33 of Statutory Rules No. 267 of 1917 valid ?

(5) If question 4 be answered in the negative, should the value of the said annuity for the purpose of taxation under the said Act be ascertained by actuarial calculation based upon the prevailing rate of interest at the time of the death of the testator or by some other and what method ?

By his will, as altered by the codicils, the testator, after making certain bequests, gave his real and personal estate not otherwise disposed of to his trustees upon trust to sell and convert and to invest the proceeds and hold them upon certain trusts, including a trust to pay to his wife, who survived him, an annuity of £5,000, with provisions that she should not have power to anticipate the annuity or any part thereof, and that the annuity should continue only until she should attempt to dispose of it or become bankrupt or do or suffer any act or thing whereby the income, if belonging to her absolutely, would become payable to some other person.

The will contained the following provisions with regard to the Peter Mitchell Trust referred to in the case:—And upon further trust and subject to the trusts aforesaid to pay and apply the whole or all that remains of the said net income (all of which income payable under the trust next hereinafter mentioned is hereinafter referred to as the said income) in the manner and to and for the ends intents and purposes hereinafter set forth concerning the same And I desire that the said income and the moneys producing the same and the purposes hereafter set forth concerning the same shall be known as " the Peter Mitchell Trust " Now I consider that though gifts for the benefit of the weak failing and sick are highly praiseworthy and to be commended yet more lasting good is to be effected by providing means to encourage and help the capable

healthy and strong to develop and bring to fruition their natural advantages and which will act as an incentive to all sane normal and healthy persons of both sexes to improve so far as possible their natural mental moral and physical conditions and will enable the worthiest amongst them by a process of selection and by competitions whereby they shall earn the benefits hereby intended to still further better those conditions develop themselves broaden their outlook as citizens of the Empire and so provide a leaven of strong well balanced and self reliant individualities who mixing in daily intercourse with their fellows will tend by their example and by the magnetism of their bright and healthful personalities to benefit and assist those with whom they may so daily mix and will also in the natural course of events reproduce in future generations those qualities which they themselves possess I desire though without in any way fettering or interfering with the absolute discretion of my trustees that so far as possible the competitions of a military or partly military nature hereinafter referred to shall be shaped and carried out in such manner that while due consideration is given to intelligent combination and co-operation amongst competitors at least equal attention shall be given to cultivating the faculties of self reliance and initiative in each individual concerned and to the development of his self respect his personal cleanliness and his knowledge of such clean and sanitary conditions as are best calculated to keep a community of individuals or any army free from disease and that while careful attention shall be given to the development of the body mere muscularity and over training should be discouraged I also but again without fettering or interfering with the absolute discretion of my trustees desire that in considering the merits of competitors coming within the terms of the second schedule hereto the success of the candidate in open air sports and his capacity for leadership amongst his fellows shall have due consideration by my trustees I now direct that the said income shall be divided into twenty-one parts and that the purposes to which the same shall be applied shall be as follows namely As to seven of such parts to provide prizes for the persons and purposes and subject to the due fulfilment of the qualifications and conditions set forth in the

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first schedule hereto As to three of such parts to provide prizes (whether in cash or in trophies or partly in the one way and partly in the other) for such military competitions or competitions not strictly military but connected with or relating to military life or training as my trustees may decide upon such competitions to be confined to the military forces (including cadets) of the Commonwealth of Australia As to two of such parts to provide prizes as aforesaid for such naval competitions or competitions relating to naval training as my trustees may decide upon such competitions to be confined to the naval forces of the said Commonwealth As to three of such parts to provide prizes as aforesaid for such military competitions or competitions not strictly military but connected with or relating to military life or training as my trustees may decide upon such competitions to be open only to the military forces of the British Empire including the troops and cadets of the said Commonwealth As to three of such parts to provide prizes as aforesaid for such naval competitions or competitions relating to naval training as my trustees may decide upon such competitions to be open only to the naval forces of the British Empire including the naval forces of the said Commonwealth As to one of such parts to provide prizes as aforesaid for competitions amongst and to be confined to the members of the police force of the State of New South Wales And as to the remaining two parts of the said income to provide prizes for the persons and purposes and subject to the due fulfilment of the qualifications and conditions set forth in the second schedule hereto I declare that all competitions or examinations in this my will referred to shall be held at such times and in such place or places within the said Commonwealth and subject to such regulations terms and conditions in all respects as my trustees either with or without expert advice shall decide upon save only that until my trustees shall otherwise agree I desire that the said military or partly military competitions shall be held at Albury aforesaid And I empower my trustees to fix (subject nevertheless to any express direction in this behalf herein contained) the amount of value and nature of all prizes and to pay all expenses (not however including the travelling or other expenses of candidates) connected with or

incidental to all competitions herein referred to and of advertising the same by any means they may think fit out of the said income And in case the bequests trusts and dispositions hereinbefore contained or any of them shall for any reason wholly or partially fail or be declared by any Court incapable of taking effect or in case any portion of the corpus or income of my estate shall not by this my will or any codicil thereto be effectually disposed of otherwise then I give the property or funds so undisposed of to my trustees upon trust for such non-sectarian charitable uses purposes or institutions as my trustees shall in their absolute and uncontrolled discretion decide upon.

The first schedule referred to in the will was as follows:— The persons to whom this schedule refers shall be unmarried females not exceeding the age of thirty years British subjects and bona fide residents of the Commonwealth of Australia of a white race and not the offspring of first cousins. The purposes covered by this schedule shall be the providing each year of prizes or bonuses for fifteen of the fittest of such persons last aforesaid the fitness to be decided by my trustees or by any examiner or examiners they may choose to appoint or by my trustees assisted by such examiners. . . . In the deciding of the fitness of any candidate and her superiority to the others the following matters (in addition to the main test hereafter mentioned and hereafter called "the main test") shall be taken into consideration; and each candidate must reasonably comply with conform to or satisfy each of such matters according to a minimum standard required by my trustees before being admitted to the main test:—(1) Her physical excellence and the goodness of her general health; her freedom from any hereditary taint or disease, particularly of the intellect; her brightness and cheerfulness of disposition and the fact that she is a person who may be calculated generally to bear and rear healthy normal children. (2) Her knowledge and understanding of the main elements of the history of the British Empire apart from the mere memorizing of facts and dates. (3) Her general knowledge of the climates and geography of the Commonwealth of Australia and of its main natural products. (4) Her knowledge and understanding of standard

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English literature (as embraced in the books or parts of books set forth in the third schedule hereunder . . . and in particular a sound and appreciative knowledge of such parts of the Protestant Bible as are specially mentioned in such schedule. (5) Her knowledge of elementary anatomy and physiology and the main functions of the human body; her knowledge of first aid and her ability to ride on horseback and to swim. (6) The soundness of her knowledge of practical house-keeping and domestic economy and of the necessity at all times for clean and sanitary surroundings and conditions and the best practical means of attaining them under ordinary circumstances in the said Commonwealth. The main test to which the candidate must be subjected is as follows: Her practical and theoretic knowledge of the nursing (in sickness and health) handling management training care and rearing to perfect health and strength of babies and young children. The candidates (in their order of merit) who best satisfy the main test shall be entitled to succeed provided they shall have reached the mimimum standards prescribed by my trustees with regard to the preceding matters or tests but if the examiners shall be of opinion that any two or more candidates have equalled each other in the main test then the extent to which they shall have answered or satisfied the previous requirements or tests shall be taken into consideration and the best in order of merit chosen.

The second schedule referred to in the will was as follows:— The persons to whom this schedule refers shall be males under the age of twenty-one years British subjects and bona fide residents of the Commonwealth of Australia of a white race and not the offspring of first cousins; of good general health and free so far as my trustees may reasonably be able to ascertain from any hereditary taint or disease particularly of the intellect. They must have honourably fulfilled all military obligations imposed upon them by the laws of the Commonwealth of Australia. They must be able to swim to ride a horse and to shoot reasonably well with the rifle according to standards from time to time prescribed by my trustees. The purposes covered by this schedule shall be the providing each year or every second year of prizes or bonuses for such number as my

trustees may determine not exceeding ten of the fittest of the persons last aforesaid the question of fitness to be decided by my trustees or by such examiner or examiners as they may choose to appoint or by my trustees assisted by any such examiner or examiners. The amount of the first prize shall be thrice that of the second and the amount of the second twice that of each of the remaining prizes which shall all be equal. In deciding as to the merits of each candidate the following (in addition to the foregoing) shall be the matters to be considered namely :—(1) The excellence of his physique. (2) His knowledge and understanding of the main elements of the history of the British Empire and of the British Constitution also his knowledge and understanding of the Commonwealth of Australia and the Constitution of his own State. (3) His knowledge of the Geography of the Australian Commonwealth and of its climates and primary products. (4) His knowledge of elementary anatomy and physiology and the main functions of the human body and of "first aid." (5) His knowledge and understanding of standard English literature (as embraced in the books or parts of books set forth in the third schedule hereto . . . and in particular a sound and appreciative knowledge of such parts of the Protestant Bible as are specially mentioned in such schedule).

In the third schedule referred to in the will were specified a number of literary works, including the Protestant Bible and, in particular, certain books of it.

Latham K.C. and *D'Arcy Irvine*, for the appellants. The Peter Mitchell Trust being a gift in perpetuity either is for charitable purposes in the technical sense or is void; if it is void the gift over takes effect, and that gift is, without doubt, for charitable purposes in that sense.

[ISAACS J. referred to *In re Bowen*; *Lloyd Phillips* v. *Davis* (1); *In re Lord Stratheden and Campbell*; *Alt* v. *Lord Stratheden and Campbell* (2).]

The expression "charitable purposes" in sec. 8 (5) of the *Estate Duty Assessment Act* 1914-1916 should be interpreted in its technical legal sense, for that is its prima facie meaning and there is nothing in

(1) (1893) 2 Ch., 491, at p. 494. (2) (1894) 3 Ch., 265.

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the context which shows that it is not used with that meaning (*Commissioners of Special Purposes of the Income Tax* v. *Pemsel* (1); *Commissioners of Inland Revenue* v. *Scott* (2); *Jackson* v. *Federal Commissioner of Taxation* (3); *Trustees, Executors and Agency Co.* v. *Acting Federal Commissioner of Taxation* (4); *Dunne* v. *Byrne* (5); *Kelly* v. *Sydney Municipal Council* (6)). In *Swinburne* v. *Federal Commissioner of Taxation* (7) the expression interpreted was "public charitable institution," which, it was held, had not a technical meaning. The use of the other words "religious," "scientific" and "public educational purposes" do not limit the meaning of "charitable purposes," for there may be gifts for either religious, scientific or public educational purposes which are not for charitable purposes. The expression "public educational purposes" refers to the public educational system existing in the different States, and a gift for such purposes might be so limited as not to be for charitable purposes (see *In re Mellody*; *Brandwood* v. *Haden* (8); *Laverty* v. *Laverty* (9); *Dilworth* v. *Commissioner of Stamps* (10); *Clark* v. *Taylor* (11); *Thomson* v. *Shakespear* (12); *In re Pitt Rivers*; *Scott* v. *Pitt Rivers* (13); and, as to the meaning of "public," *In re Cranston*; *Webb* v. *Oldfield* (14); *In re Wedgwood*; *Allen* v. *Wedgwood* (15)). Interpreting "charitable purposes" in its technical sense, each of the purposes of the Peter Mitchell Trust falls within one or other of the purposes in sec. 8 (5).

[ISAACS J. referred to *R.* v. *Special Commissioners of Income Tax*; *Ex parte University College of North Wales* (16).]

Even if the words "charitable purposes" should not be given their technical meaning in sec. 8 (5), they should not be confined to eleemosynary purposes: they include all purposes which are altruistic and connote unselfish generosity for the benefit of the public. [Counsel also referred to *Re Stephens*; *Giles* v. *Stephens* (17); *Hunter*

(1) (1891) A.C., 531, at pp. 580, 583, 589.
(2) (1892) 2 Q.B., 152, at p. 165.
(3) (1920) 27 C.L.R., 503.
(4) (1917) 23 C.L.R., 576, at p. 585.
(5) (1912) A.C., 407.
(6) (1920) 28 C.L.R., 203.
(7) (1920) 27 C.L.R., 377.
(8) (1918) 1 Ch., 228.
(9) (1907) 1 I.R., 9.
(10) (1899) A.C., 99.
(11) (1853) 1 Drew., 642.
(12) (1860) 1 DeG. F. & J., 399.
(13) (1902) 1 Ch., 403.
(14) (1898) 1 I.R., 431.
(15) (1915) 1 Ch., 113.
(16) (1909) 100 L.T., 585.
(17) (1892) 8 T.L.R., 792.

v. *Attorney-General* (1); *Rooke* v. *Dawson* (2); *Thomson* v. *University of London* (3); *Tudor on Charities and Mortmain*, 4th ed., p. 95; *In re Scowcroft*; *Ormrod* v. *Wilkinson* (4); *Whicker* v. *Hume* (5); *Taylor* v. *Taylor* (6); *Governing Body of Westminster School* v. *Reith* (7); *In re Mariette*; *Mariette* v. *Governing Body of Aldenham School* (8); *In re Delany*; *Conoley* v. *Quick* (9); *Attorney-General for New Zealand* v. *Brown* (10)].

[KNOX C.J. referred to *Blair* v. *Duncan* (11).

[ISAACS J. referred to *Re Ogden*; *Taylor* v. *Sharp* (12).

[STARKE J. referred to *In re Barker*; *Sherrington* v. *Dean &c. of St. Paul's Cathedral* (13); *In re Good*; *Harington* v. *Watts* (14).]

The annuity to the testator's widow is not taxable under the Act for it is not part of his estate. Sec. 8 imposes taxation only upon the value of the estate which a testator leaves (see *National Trustees, Executors and Agency Co. of Australasia* v. *Federal Commissioner of Taxation* (15); *Jackson* v. *Federal Commissioner of Taxation* (16); *Osborne* v. *Federal Commissioner of Taxation* (17); *Hanson's Death Duties*, 6th ed., p. 75; *Earl Cowley* v. *Inland Revenue Commissioners* (18); *Emmerton* v. *Federal Commissioner of Land Tax* (19)). Reg. 33 of the *Estate Duty Regulations* 1917 is *ultra vires*, for it is not within the power conferred by sec. 50. The value which is found by applying that regulation is an artificial value and not the real value, which is the value upon which sec. 8 of the Act imposes taxation (cf. *Heydon* v. *Deputy Federal Commissioner of Land Tax (N.S.W.)* (20)).

Ham (with him *Herring*), for the respondent. It is not contended by the Commissioner that the Peter Mitchell Trust is not a good charitable gift within the Statute of Elizabeth, but the expression "charitable purposes" in sec. 8 (5) is used not in its technical sense

(1) (1899) A.C., 309, at p. 323.
(2) (1895) 1 Ch., 480.
(3) (1864) 33 L.J. Ch., 625.
(4) (1898) 2 Ch., 638.
(5) (1858) 7 H.L.C., 124.
(6) (1910) 10 C.L.R., 218.
(7) (1915) A.C., 259.
(8) (1915) 2 Ch., 284.
(9) (1902) 2 Ch., 642, at p. 648.
(10) (1917) A.C., 393.
(11) (1902) A.C., 37, at p. 43.
(12) (1909) 25 T.L.R., 382.
(13) (1909) 25 T.L.R., 753.
(14) (1905) 2 Ch., 60.
(15) (1916) 22 C.L.R., 367, at pp. 372, 377, 379.
(16) (1920) 27 C.L.R., 503, at p. 508.
(17) (1921) 29 C.L.R., 169, at p. 175.
(18) (1899) A.C., 198, at p. 213.
(19) (1916) 22 C.L.R., 40, at p. 51.
(20) (1914) 17 C.L.R., 727.

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but in its ordinary and popular sense, that is to say, as meaning purposes of benefiting the helpless or needy. The use of the words "religious," "scientific" and "public educational" shows that "charitable purposes" is not used in its technical sense, for most religious and scientific purposes and all educational purposes are "charitable purposes" in the technical sense of those words. If "charitable purposes" has its popular meaning in sec. 8 (5), none of the purposes of the Peter Mitchell Trust falls within the exemption conferred by that section. None of the purposes is religious, for a purpose to be religious must be for the spreading of religion. Nor do any of the purposes come within the term "public educational purposes," for that term imports teaching, and is not satisfied by providing prizes for those who attain a certain degree of education. None of the purposes is "scientific," which means for the promotion of science (see *In re Duty on Estate of Institution of Civil Engineers* (1); *Commissioners of Inland Revenue* v. *Forrest* (2)). The annuity to the testator's widow is taxable under sec. 8 as part of the estate of the testator. [Counsel was stopped on this point.] The Act having provided by sec. 8 that the tax is to be paid upon the value as assessed, it is consistent with the Act and convenient, within the meaning of sec. 50, that a regulation should be made prescribing how the value should be ascertained. The value as assessed is not necessarily the market value. The true value is the value assessed in the manner provided by the Act. Under sec. 22 (1) (*a*) the assessment made is conclusive before this Court. If it is not conclusive, reg. 33 is not *ultra vires* except so far as there is an appeal on the ground that the amount of duty assessed is excessive (cf. sec. 16).

Latham K.C., in reply, referred to *Thompson* v. *Thompson* (3); *Farrer* v. *St. Catharine's College, Cambridge* (4); *In re Dunstan*; *Dunstan* v. *Dunstan* (5); *In re Lowman*; *Devenish* v. *Pester* (6); *In re Tyler*; *Tyler* v. *Tyler* (7); *In re Piercy*; *Whitwham* v. *Piercy*

(1) (1887) 19 Q.B.D., 610, at p. 620.
(2) (1890) 15 App. Cas., 334.
(3) (1844) 1 Coll., 381, at pp. 392, 399.
(4) (1873) L.R. 16 Eq., 19, at pp. 20, 23.
(5) (1918) 2 Ch. 304.
(6) (1895) 2 Ch., 348.
(7) (1891) 3 Ch., 252.

(1); *In re Willis*; *Shaw* v. *Willis* (2); *Re Davidson*; *Perpetual Executors and Trustees Association of Australia* v. *Davidson* (3); *Perpetual Trustee Co.* v. *Shelley* (4).

Cur. adv. vult.

June 6.

The following written judgments were delivered :—

KNOX C.J. The first question submitted for the opinion of this Court is as follows : Is the part of the estate which is subject to the Peter Mitchell Trust property devised or bequeathed to religious, scientific, charitable or public educational purposes within the meaning of the *Estate Duty Assessment Act* 1914-1916, sec. 8 (5)? To answer this question it is necessary to consider two separate and distinct questions, namely, (*a*) What is the true meaning of the word " charitable " in sec. 8 (5) of the *Estate Duty Assessment Act* 1914-1916 ? and (*b*) reading the word " charitable " in that meaning, is the part of the testator's estate which is subject to the Peter Mitchell Trust within the exemption allowed ? The first question depends on the construction of the sub-section, the latter on the construction of the will. My reason for dealing separately with these questions will appear later.

1 (*a*). The contest as to the meaning to be given to the word " charitable " in the context in which it is found is, substantially, whether that word is to have its technical or legal meaning or, on the other hand, is to be construed in what has been referred to as its popular sense—a sense which has never been exactly defined but which is assumed to be less extensive than the technical or legal meaning. The appellants support the former view ; the respondent the latter. In *Pemsel's Case* (5) Lord *Macnaghten* said :—" In construing Acts of Parliament, it is a general rule . . . that words must be taken in their legal sense unless a contrary intention appears. . . . That according to the law of England a technical meaning is attached to the word ' charity,' and to the word ' charitable ' in such

(1) (1898) 1 Ch., 565.
(2) (1921) 1 Ch., 44.
(3) (1917) V.L.R., 748 ; 39 A.L.T., 40.
(4) (1921) 21 S.R. (N.S.W.), 426, at p. 444.
(5) (1891) A.C., at p. 580.

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expressions as 'charitable uses,' 'charitable trusts,' or 'charitable purposes,' cannot, I think, be denied." This passage was applied in this Court in *Swinburne* v. *Federal Commissioner of Taxation* (1), by my brothers *Isaacs*, *Gavan Duffy*, *Rich* and *Starke*, as leading to the conclusion that, in a statute where the phrase "charitable use," or its equivalent "charitable trust" or "charitable purpose," is used, the technical meaning is now the primary and, therefore, the natural meaning, requiring context to vary it. So much is clear. But what kind of context is required in order to justify a departure from the technical meaning of the words used? The rule to be applied is the same, whether the document to be construed be a will or a deed or a statute, and may, I think, be fairly stated thus: that technical words or words of known legal import shall have their proper legal meaning given to them unless by the express words of the document or by necessary implication therefrom it appears clearly that they were meant to be used in some other sense. There is no dispute as to the grammatical construction of the sub-section. It is agreed on all hands that the exemption extends to property given for either (a) religious purposes or (b) scientific purposes or (c) charitable purposes or (d) public educational purposes or (e) purposes wholly within the limits of one or more of the four purposes named. In other words, it is conceded that Parliament said, and must be taken to have meant, that, if a person gave property to be applied either wholly to one of the four classes of purposes named or partly to one and partly to another of such classes exclusively of any other purpose, that property should be exempt from payment of duty. But, if the contention of the respondent as to the meaning to be attributed to the word "charitable" in the sub-section be adopted, the extraordinary result follows that in the case of a gift expressed to be for "charitable purposes"—for instance, a gift of a fund on trust to apply the income in perpetuity to charitable purposes or to such charitable purposes as the trustees might select—the exemption could never operate, for the gift could only be valid if the word "charitable" in the will were given its technical meaning, and in that case it would be outside the protection of the sub-section, which is said to be confined to gifts for a different and more limited class

(1) (1920) 27 C.L.R., at p. 384.

of charitable purposes. A construction which leads to such a result and involves a departure from the primary meaning of the words used can, I think, only be justified by necessity. Does the context render such a construction necessary? As I understand the argument for the respondent in the present case, the only words relied on as modifying the primary meaning of the expression "*charitable purposes*" are the words "*religious, scientific, or public educational*" found in collocation with that expression. It is said that if "charitable" be given its legal meaning the other words are inappropriate or superfluous, because "charitable" in the legal sense covers the whole ground, and that therefore some other meaning must be given to it.

The assumption that "charitable purposes" include all religious, scientific and public educational purposes is, in my opinion, unwarranted. Instances of religious and scientific purposes which are not "charitable" in the legal sense are given by my brother *Higgins* in his opinion; which I have had the advantage of reading. I add two other instances. In *Commissioners of Inland Revenue* v. *Forrest* (1) it was held that the property of the Institution of Civil Engineers was within an exemption allowed in respect of property applied to the promotion of science, i.e., for a scientific purpose, but neither in the House of Lords nor in the Court of Appeal was it suggested that it was within the exemption allowed by the same statute in respect of property applied to charitable purposes. So, too, a trust for the endowment and maintenance of a private chapel is a trust for a religious purpose, but not charitable in the legal sense (*Hoare* v. *Hoare* (2)). It is true that charitable purposes in the legal sense include most religious, scientific and educational purposes, but this is not enough to support the argument, for, even if charitable be given its legal meaning, the exemption given in respect of religious, scientific and educational purposes will still operate on gifts for any of those three purposes which are not charitable. On the context of this sub-section it is impossible to treat "religious" or "scientific" purposes as confined to purposes of a public nature, having regard to the introduction of the word "public" to qualify "educational." The circumstance that exemptions given in a taxing Act may overlap

(1) (1890) 15 App. Cas., 334. (2) (1886) 56 L.T., 147.

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if construed in a particular way is of no great importance as an argument against construing it in that way, as is shown by the observations of Lord *Herschell* and Lord *Macnaghten* in *Pemsel's Case* (1).

Counsel for the respondent placed great reliance on the decision of the Court of Appeal in *Commissioners of Inland Revenue* v. *Scott* (2), as an authority in favour of his contention. In my opinion, the decision in that case is distinguishable. The exemptions given by the Act then under discussion (*Customs and Inland Revenue Act* 1885) were (a) property or the income thereof legally appropriated and applied for the benefit of the public at large, or of any county, shire, borough, or place, or the ratepayers or inhabitants thereof, or in any manner expressly prescribed by any Act of Parliament (sub-sec. 2 of sec. 11), and (b) property or the income thereof legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science or the fine arts, or in the manner expressly prescribed by any Act of Parliament (sub-sec. 3 of sec. 11). The Court held that "charitable" ought not to be given its technical meaning. But in that case Lord *Herschell*, with whom the Lords Justices concurred, said (3) that "if that extended meaning were given to the words 'charitable purpose' the whole of sub-sec. 2, except perhaps the exemption of property 'applied in the manner expressly prescribed by Act of Parliament,' would be wholly unnecessary, and the terms in which the exemption is provided for . . . appear to indicate that property described in sub-sec. 2 was not regarded as within the description contained in sub-sec. 3." It is true that he gave as an additional reason for the conclusion at which he arrived, that the words in sub-sec. 3 which immediately preceded and followed the words "for any charitable purpose" would be unnecessary if "charitable purpose" were given the extended meaning. It is, I think, by no means certain that the Court would have come to the same conclusion in the absence of the provision of sub-sec. 2. I am confirmed in this view by the fact that Lord *Herschell*, in discussing the decision in *Pemsel's Case* (4),

(1) (1891) A.C., at pp. 574, 589.
(2) (1892) 2 Q.B., 152.
(3) (1892) 2 Q.B., at pp. 164-165.
(4) (1891) A.C., 531.

said that it could scarcely be supposed that the exemptions contained in sub-sec. 2 were inserted *ex majori cautela.*

Counsel for the respondent relied also on the opinion of the Judicial Committee in *Attorney-General for New Zealand* v. *Brown* (1). It is true that the opinion was expressed in that case that the word "charitable" in the will then under discussion must be read in its eleemosynary, and not in its technical, meaning, because of the collocation with the words "religious" and "educational," but I do not think the decision can be taken as laying down a rule that the collocation of these three words in any document is of itself sufficient to show that "charitable" is used in its non-technical sense. It must be remembered that in that case the real obstacle to be overcome by the appellants was, as Lord *Buckmaster* pointed out, the use of the word "benevolent," and the contention was in effect that the words of the will should be read as if they were "charitable and benevolent, charitable and religious, charitable and educational." The real ground of the decision seems to me to have been that the context showed that "and" must be read as "or." This conclusion was sufficient to dispose of the case, having regard to the meaning given to "benevolent." In any event, as was said by Lord *Herschell* in *Scott's Case* (2), each statute must be looked to by itself for the purpose of ascertaining its meaning. In *Pemsel's Case* (3) Lord *Macnaghten* pointed out the difficulty which the adoption of the popular meaning of the word "charity" would cause in the administration of the Act; and these observations apply with equal force to the Act under discussion in the present case.

The conclusion at which I have arrived is that the context does not require that the expression "charitable purposes" in sec. 8 (5) of the Act shall not be given its technical or legal meaning.

1 (*b*). As the majority of the Court is of the opinion that the technical meaning should not be given to the expression "charitable purposes," no useful purpose can be served by discussing the question whether the Peter Mitchell Trust is a valid charitable gift in the technical sense. Any expression of opinion by me on that question is, I think, not only unnecessary but undesirable. It is unnecessary

(1) (1917) A.C., 393.
(2) (1892) 2 Q.B., at p. 165.
(3) (1891) A.C., at p. 587.

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because whichever way that question is decided the decision cannot affect the result in this case. Whether the Peter Mitchell Trust is a charitable trust in the technical sense or not, I think it cannot be disputed that the gift over, in the event of the failure wholly or in part of that Trust, "upon trust for such non-sectarian charitable uses purposes or institutions as my trustees shall in their absolute and uncontrolled discretion decide upon" is technically a good charitable gift. The Peter Mitchell Trust is either a good charitable gift in the technical sense, or it fails. In the latter event the gift over takes effect. It follows that, whether the Peter Mitchell Trust is a good charitable gift or not, the property comprised in it is devised or bequeathed to charitable purposes in the technical sense, and is therefore, in my opinion, within the exemption given by the Act. It is undesirable because the question has not been argued, counsel for the respondent having declined to argue it, and because the very question may hereafter come before this Court on appeal from the Supreme Court, and in that event the Court will have the advantage of having the matter fully argued on both sides.

In my opinion question 1 should be answered Yes.

2. I feel no doubt that part of the testator's estate equivalent in value to the annuity given to his widow must be regarded as passing to her within the meaning of sec. 8 (6) of the Act. There is a gift to the widow of £5,000 a year which can only be satisfied out of the estate and must therefore be treated as a gift of a corresponding part of the estate. The answer to question 2 should be Yes.

3. It follows from the answer given to question 2 that question 3 should be answered Yes.

4 and 5. In my opinion question 4 should be answered No. The regulation provides for the assessment of the value of an annuity on an arbitrary basis of four and a half per cent., without regard to circumstances which may affect the amount required to purchase at the relevant time an annuity corresponding to that given by the will. By the Act duty is to be levied on the "*value*," i.e., the true value of the estate. This must be ascertained in the ordinary way having regard to the circumstances existing at the relevant time and to the provisions of the will.

Isaacs J. The first question is whether the part of the estate subject to the Peter Mitchell Trust is exempt from duty under the 5th sub-section of sec. 8 of the *Estate Duty Assessment Act*.

In order to be exempt it must be devised or bequeathed for (a) religious or (b) scientific or (c) charitable or (d) public educational purposes, within the meaning of that sub-section. I would observe that it is sufficient if the purposes cover one or more of those enumerated, provided they do not extend beyond the limits of the sub-section. It is not suggested in the present case that the purpose was religious. Nor is the gift attempted to be supported on the basis of scientific purposes. It was strenuously urged, however, for the executors that it fell within the term "charitable," and also, with less vigour, that it came within the expression "public educational." As to "charitable," the whole stress of that contention was laid on the point that the word should, on sound construction, be given the sense called Elizabethan, so clearly and authoritatively expounded in *Pemsel's Case* (1). For the Commissioner it was contended that the word "charitable" as used in the sub-section was to be understood in its popular sense, that is, in the sense which in such a collocation it would be understood to bear in ordinary life. The question, therefore, as to "charitable" is whether, in the enactment referred to, that word is to be understood in what *Farwell* J. in *In re Best* (2) calls "the curiously technical meaning which has been given by the English Courts to the word 'charitable,'" or whether Parliament has indicated that it means the word to have the ordinary meaning given to it in daily life. *Pemsel's Case* is first and foremost an authoritative pronouncement that the phrase "trust for charitable purposes" is primarily a technical legal phrase with a well-known connotation, namely, as having reference to the Statute of Elizabeth. It also determines that, in the absence of sufficient indication to the contrary, the technical meaning of any phrase should prevail. For this there are many other authorities, some of the most important of which I collected in the case of *Gutheil* v. *Ballarat Trustees, Executors and Agency Co.* (3). But in the application of these rules minds easily differ. For instance, in *Pemsel's Case* Lord *Halsbury* and

(1) (1891) A.C., 531.
(2) (1904) 2 Ch., 354, at p. 356.
(3) (1922) 30 C.L.R., 293, at pp. 302-304.

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Lord *Bramwell* dissented. And one of the three eminent jurists who composed the majority, Lord *Herschell*, in the very next year—indeed within eight months afterwards—was led to a non-technical interpretation of the words "charitable purpose" in another Act, by the collocation (*Commissioners of Inland Revenue* v. *Scott* (1)). The words there closely approached the words in the present case. They were: "for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts." *Lindley* and *Kay* L.JJ. agreed with Lord *Herschell*. The guiding principle was stated (2) that "each statute must be looked to by itself for the purpose of ascertaining its meaning and the position in which the general words are found, and the nature of the specific exemptions cannot be lost sight of." That decision was referred to with emphatic assent by Lord *Cozens Hardy* M.R. in *R.* v. *Special Commissioners of Income Tax* (3). The Master of the Rolls said as to *Scott's Case* (1): "The generality of the term for 'charitable purposes' would have been meaningless if placed, as it was, before and after special charitable purposes of a particular kind." It is noteworthy that in 1887 the Supreme Court of New Zealand, on appeal, held that the words "public charitable purposes" in a Property Assessment Act being followed by the words "public educational purposes" were to be construed in a non-technical sense, as otherwise the same thing would have been provided for twice over. The case is *Sperry* v. *Church Property Trustees* (4); and the reasoning commends itself to me. Reference is there made to a decision of Lord *Cairns* in *Dolan* v. *Macdermot* (5), where the Lord Chancellor in construing a will containing the words "charities and other public purposes" gave weight in construing the word "charities" to the words following it, as showing that the testator did not mean private charities. In that case also a salutary reminder is given (6) that "in construing a will of this kind 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."

(1) (1892) 2 Q.B., 152.
(2) (1892) 2 Q.B., at p. 165.
(3) (1909) 100 L.T., at p. 586.
(4) (1887) 5 N.Z.L.R. (C.A.), 179.
(5) (1868) L.R. 3 Ch., 676.
(6) (1867) L.R. 3 Ch., at p. 678.

The latest and, as I consider, the most authoritative instance is *Attorney-General for New Zealand* v. *Brown* (1). There the will declared that a fund should be held on trust for such "charitable benevolent religious and educational institutions societies associations and objects" as his trustees should select. Some doubt was admitted as to whether the word "charitable" there covered and coloured the whole of the succeeding words. But there was an investment clause directing the trustees to deposit the funds "with any firm bank company or corporation or public body or institution commercial municipal religious charitable educational or otherwise." On this, Lord *Buckmaster*, speaking for Lord *Parker* and Lord *Phillimore* as well as himself, said (2): "In their Lordships' opinion this shows that the meaning of the word 'charitable' in the testator's mind was something that did not embrace religious or educational purposes, and that it ought rather to be regarded as eleemosynary, an interpretation which at once *prevents tautology and gives a sensible meaning to each of the words.*" I cannot conceive of a more apposite precedent. When I consider how true is the expression quoted from the judgment of *Farwell* J. in *Best's Case* (3) "as to the curiously technical meaning" of "charitable," and the observation of Lord *Cairns* in *Dolan* v. *Macdermot* (4) that "there is, perhaps, not one person in a thousand who knows what is the technical and the legal meaning of the term 'charity,'" I am assisted, in construing this taxation Act, in arriving at the conclusion that the respondent's contention is correct. If the word "charitable" were there to receive its "curiously technical meaning," there are decisions which show how far it would extend to relieve estates from the common contribution to taxation. For instance, the following have been held to be "charitable" in that sense: "Home for starving and forsaken cats" (*Swifte* v. *Attorney-General* (5)); the promotion of vegetarianism (*In re Cranston* (6)); for "the promulgation of . . . Conservative principles combined with mental and moral improvement, Socialism, anti-vivisection principles." (See *Halsbury's Laws of England*, vol. IV., sec. 182, and the cases there cited.) That would be

(1) (1917) A.C., 393.
(2) (1917) A.C., at pp. 396-397.
(3) (1904) 2 Ch., 354.
(4) (1868) L.R. 3 Ch., at p. 678.
(5) (1912) 1 I.R., 133.
(6) (1898) 1 I.R., 431.

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a strange intention to impute to the Federal Legislature. Following the words of Lord *Buckmaster* in *Brown's Case* (1), I am very distinctly of opinion that to prevent tautology and to give to each word a sensible meaning the word " charitable " in sec. 8 (5) of the *Estate Duty Assessment Act* has not the extensive Elizabethan meaning, but has what may be shortly, though perhaps incompletely, called its eleemosynary meaning. It must be remembered that " eleemosynary " is not confined to mere relief of poverty. Eleemosynary corporations, says *Blackstone* (vol. I., p. 471), " are such as are constituted for the perpetual distribution of the free alms, or bounty, of the founder of them to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick, and impotent; and all colleges, both in our universities and out of them: which colleges are founded for two purposes; 1. For the promotion of piety and learning by proper regulations and ordinances. 2. For imparting assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies with greater ease and assiduity." This, of course, is not exhaustive, but is illustrative.

" Charitable " must therefore, in the sub-section referred to, be understood in its " popular " sense. That does not admit of any rigid or undeviating connotation. It is flexible to an immeasurable degree, as can be seen by reference to the judgments of such eminent masters of law and language as the Judges who sat in *Pemsel's Case* (2). I am disposed to think Lord *Herschell* (3) (with whom Lord *Watson* concurred) stated the central truth when he said that " the popular conception of a charitable purpose covers the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief." He carefully explains that he intends that in no narrow sense, because he states that within his statement come spiritual needs quite as much as physical needs, and he says (4) as to charitable purposes " the proper course would be to prefer the broadest sense in which they are employed." I take " charitable " to cover all that Lord *Herschell* includes, and to comprise benevolent assistance in

(1) (1917) A.C., 393.
(2) (1888) 22 Q.B.D., 296; (1891) A.C., 531.
(3) (1891) A.C., at p. 572.
(4) (1891) A.C., at p. 573.

aid of physical, mental, and even spiritual, progress for the benefit of those whose means are otherwise insufficient for the purpose. But I exclude the idea that is involved in the technical meaning of "charity," that except in trusts directly for the relief of "poverty" the distinction between rich and poor has no relevance.

Judged by this standard, I cannot hold the gifts for the Peter Mitchell Fund to be "charitable." I think the testator distinctly meant to negative such a notion. He says:—"It is not for the purpose of a gift for the benefit of the weak, failing and sick, but to improve the sane, normal and healthy for the benefit of the Empire and future generations." No one can deny that such a purpose is laudable, but the question is this: "Is it charitable?" Nothing in the terms of the gift indicates charity. There are to be military and quasi-military competitions for soldiers, naval and quasi-naval competitions for sailors, there are to be undescribed competitions for police, and there are for young unmarried females to be physical examinations, and examinations as to knowledge theoretic and practical, historical and geographical; and prizes are to be provided. But again I am unable to apply to these competitions in any proper sense the term "charitable" as intended in the Act.

This brings me to the last term "public educational purposes." It is to be observed that by sub-sec. 8 of the same section it is enacted that that phrase includes "the establishment or endowment of an educational institution for the benefit of the public or a section of the public." That, in the first place, confirms my view of the meaning of the word "charitable," because under the technical meaning of "charitable" it would be no objection that a gift was for a section of the public (*Attorney-General* v. *Lawes* (1)). But if the non-technical construction be given to "charitable," and the phrase "public educational purposes" be, like "charitable," regarded from the standpoint of ordinary meaning, then the word "public" might give rise to some serious doubt if it were sought to apply it to a section of the public. Sub-sec. 8 is, therefore, doubly indicative of the ordinary meaning; and so I have to inquire as to the ordinary meaning of "public educational purpose" bearing in mind sub-sec. 8. I think, to begin with they must be "educational" in the sense that

(1) (1849) 8 Ha., 32, at p. 41.

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they provide for the giving or imparting of instruction. The reasoning in *Whicker* v. *Hume* (1) is important on this point. The parliamentary sense of "educational" as well as "charitable," as understood in Australia in 1914, can be seen by reference to the Appropriation Acts of the States—as, for instance, New South Wales Act No. 26 of 1914; New South Wales Act 43 Vict. No. 23 (*Public Instruction*); New South Wales Act No. 27 of 1901 (*Public Institutions Inspection*); Victorian *Education Act* No. 2644 (of which see especially sec. 17); Victorian *Appropriation Act* No. 3170 (Treasurer, Division No. 48, and Minister of Public Instruction); Western Australian Act No. 32 of 1909 (*Public Education Endowment*). Other Acts indicating the Australian sense of "charitable" include New South Wales Acts No. 35 of 1902 (sec. 110) and No. 16 of 1906 (sec. 12), and South Australian Act of 1912, No. 1078. These are instances, and I have made no exhaustive search. Such public legislative recognitions of the words "educational" and "public education" as I have mentioned are only confirmatory of the general understanding of these words as connoting the sense of imparting knowledge or assisting and guiding the development of body or mind. Within that orbit the field is wide, and extends from elementary instruction in primary schools to the highest technical scientific teaching in the Universities. But even this vast range will not embrace mere examination in proficiency already attained, without affording any means of increasing that proficiency. No doubt, an incentive to exertion is created, and that incentive may again be the exciting cause of obtaining educational help, but the "purposes" pointed to by the sub-section under consideration are intended to be primary and direct, not remote and accidental.

The result is that, in my opinion, none of the gifts for the Peter Mitchell Trust is within the exemptions of sub-sec. 5 of sec. 8 of the Act. I wish to say that I express no opinion as to whether these gifts or any of them are "charitable" in the Elizabethan sense. That is not before us, once the conclusion is arrived at that "charitable" in the sub-section is not to be read in that sense. Mr. *Ham* very properly said he neither admitted nor denied they were charitable in the technical sense, but urged that, even if it were conceded

(1) (1858) 7 H.L.C., 124.

that they were, still they were not within the statutory exemption. I therefore abstain from expressing any opinion on that subject.

Then there is a gift over, which is in these terms: "And in case the *bequests trusts and dispositions* hereinbefore contained or any of them shall for any reason wholly or partially fail or *be declared by any Court incapable of taking effect or in case any portion of the corpus or income of my estate shall not by this my will or any codicil* thereto be effectually disposed of otherwise then I give the property or funds so undisposed of to my trustees upon trust for such *non-sectarian charitable uses purposes or institutions as my trustees shall in their absolute and uncontrolled discretion decide upon.*" As to this, some difficult questions might arise as to whether the conditions of the gift over have arisen, or what the effect of such conditions would be. But the first question to be determined as to the gift over is whether it is to be understood in the statutory sense. If not, then again it is entirely outside our consideration, whatever its position may be in the technical sense. As to this I say nothing as to what the simple unqualified phrase "charitable institutions" might convey, particularly in this will where the word "charitable" occurs before. But the composite phrase is "upon trust for such non-sectarian charitable uses purposes or institutions," &c. Reading that phrase in a will and on the whole context of this will, I am of opinion, having regard to the principles of interpretation referred to, that the meaning to be ascribed to "charitable" in that connection must be the technical one. But as the provision is "such trusts &c. as my trustees shall in their absolute and uncontrolled discretion decide upon," it is plain to demonstration that the trustees have the whole range of technical "charity" to select from. It is consequently open to them to choose forms of "charity" quite outside the statutory exemptions, with the result that the appellants fail to show that the gift is confined to the four heads of exemption enumerated.

My answer to the first question is, for the reasons given, in the negative.

2. A trenchant argument on the second question was advanced on behalf of the appellants, namely, that no part of a testator's estate passes to an annuitant under the will. This cannot be sustained. It was submitted that the gift is out of future income that could not

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belong to the testator. But that is an impossible position. No testator as such can give anything except out of his estate. The will speaks as at his death, and an annuitant *simpliciter* is entitled to the annual sum to commence from the death (*Houghton* v. *Franklin* (1)). An annuity is a legacy (*Heath* v. *Weston* (2)). Then as to the part of the estate that passes. For assessment purposes that must be found by valuation (see *Wroughton* v. *Colquhoun* (3)), and here on the basis that the estate is sufficient to satisfy all legacies in full. But, as there is a defeasance, that must be taken into account (see *Gratrix* v. *Chambers* (4)).

3. The answer to this question is necessarily Yes; not because there is a gift of an annuity but because what is given is part of the estate. If it were not for the different rate provided by sub-sec. 6 of sec. 8 of the *Assessment Act*, it would not be necessary at this stage to have any reference to the annuity.

4. In my opinion reg. 33 of Statutory Rules No. 267 of 1917 is not valid. It is, in the circumstances, necessary for the purpose of the Act to calculate the value of the widow's life interest. That value, in the absence of contrary statutory direction, must mean the actual value. Actual value must have reference to all circumstances, and one very material circumstance is the defeasibility of the gift. I have referred to one authority, though it is hardly needed. The regulation referred to provides a cast-iron rule for all annuities (*inter alia*), whether indefeasible or not, or, if defeasible, whatever the nature of the condition, and whether the annuity is secured on corpus or income; in fact, irrespective of the terms of the gift so long as it is an annuity. The only suggested authority for that is sec. 50 of the Act, which enables the Governor-General to "make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act." It is said that under the words "necessary or convenient" the regulation is permissible. The answer is: the regulation is "inconsistent" with actual value, which is what is taxed by the *Estate Duty Act* (No. 25 of 1914) and is therefore

(1) (1823) 1 Sim. and St., 390.
(2) (1853) 3 DeG. M. & G., 601.
(3) (1847) 1 DeG. & Sm., 357.
(4) (1860) 2 Giff., 321.

aimed at in sub-sec. 6 of sec. 8, and inconsistent with "value" in sec. 35 of the Assessment Act, where it obviously means actual value.

HIGGINS J. It must be clearly understood that the first question in this case stated turns on the construction of the *Estate Duty Assessment Act* 1914, and on that only. Under sec. 8 the Commissioner proposes to levy the duty on the whole of the estate of the testator Mitchell; and the executors object to pay duty on so much of the residuary trust fund as is called in the will "the Peter Mitchell Trust," because, they say, it is "devised and bequeathed . . . for religious, scientific, charitable or public educational purposes," and is therefore exempted from duty by sec. 8 (5). Taxing Acts frequently contain exemptions in more or less similar terms. I suppose the theory at the root is that as the tax is for the benefit of the public anything given by the testator for the benefit of the public ought not itself to be taxed. But, whatever the theory, the appellants have to show that the trust—or, rather, each or some of the trusts, as there are several separable trusts in the Peter Mitchell Trust—are for religious purposes or scientific purposes or charitable purposes or public educational purposes.

The testator has introduced his Trust by a long sentence which is very important as showing his motive and his object:—"Now I consider that though gifts for the weak failing and sick are highly praiseworthy and to be commended yet more lasting good is to be effected by providing means to encourage and help the capable healthy and strong to develop and bring to fruition their natural advantages and which will act" (*sic*) "as an incentive to all sane normal and healthy persons of both sexes to improve so far as possible their natural mental moral and physical conditions and will enable the worthiest among them by a process of selection and by competitions whereby they shall earn the benefits hereby intended to still further better those conditions develop themselves broaden their outlook as citizens of the Empire and so provide a leaven of strong well balanced and self reliant individualities who mixing in daily intercourse with their fellows will tend by their example and by the magnetism of their bright and healthful personalities to benefit and assist those with whom they may

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so daily mix and will also in the natural course of events reproduce in future generations those qualities which they themselves possess." There is more to the purpose, especially as to the cultivating the faculties of self-reliance and initiative, self-respect, personal cleanliness, in the military or partly military competitions prescribed; but I must leave the full terms of this part of the will for the reports. For such ends the income is divided into twenty-one parts, of which (1) seven are to provide prizes for fifteen young women per annum—in addition to other qualifications to be considered, the "main test" is to be that of nursing and rearing babies and young children; then (2) three parts are to provide prizes for men of the Commonwealth military forces in military or quasi-military competitions; (3) two parts are to provide prizes for members of the Commonwealth naval forces in naval competitions; (4) three parts are to provide prizes for members of the military forces of the British Empire (including the Commonwealth) in military or quasi-military competitions; (5) three parts are to provide prizes for members of the naval forces of the British Empire (including the Commonwealth); (6) one part is to provide prizes "as aforesaid" for competitions among members of the police force of New South Wales; and (7) two parts are to provide prizes for (second schedule) males under twenty-one, if British subjects, &c., who have fulfilled all Commonwealth military obligations, and can swim, ride, shoot with a rifle, &c.

Some difficulty has been raised as to the trust for the police, on the ground that the nature of the competitions has not been specifically stated in the trust. But the trust is to provide prizes "as aforesaid" for military or quasi-military competitions, &c.; and the testator declares that *all* competitions referred to in his will shall be held "subject to such regulations terms and conditions in all respects as my trustees shall decide upon." In my opinion, the trust for the police is on the same level as the other trusts.

For trusts 1 and 7 certain educational and other tests are prescribed; and in the educational tests the testator includes certain books of the Bible (including I. and II. Kings and the Song of Solomon), certain plays of Shakespeare, Smiles' Self-help, Uncle Remus, Tam O'Shanter, &c. But, notwithstanding the references

to the Bible, I am of opinion that trusts 1 and 7 cannot be supported as gifts for "religious purposes." The purposes are not "religious"; the purpose is rather to encourage the *mens sana in corpore sano*, a certain knowledge of certain books of the Bible being treated as a means to the end. The direct purpose is not the promotion of any form of religion, but rather the promotion of all-round competency and efficiency.

For these same trusts the testator prescribes that there shall be knowledge of elementary anatomy and physiology, and the main functions of the human body. But, for similar reasons, I cannot treat the trusts as for "scientific purposes" within sec. 8 (5).

I shall assume, also, that none of the trusts can be fairly described as a trust for "public educational purposes." This point is, to my mind, more doubtful, as we may be justified in giving to education a broad sense as implying culture of body and mind and character in the sense of Plato, and not as confined to the book-learning of schools and colleges. But I am not prepared to say that the ordinary meaning of "public educational purposes" in current speech covers a sense so broad.

But are not the trusts for "charitable purposes"? They are not, if we have to read "charitable" as merely implying relief to the poor or needy; they are, if we have to read "charitable" in this legal document in its legal sense. It has not been contested that if we are to give "charitable purposes" this legal sense—the sense of the Statute of Elizabeth—the purposes of this trust are charitable. Learned counsel for the respondent expressed himself as prepared to concede that the trust constituted a good charitable gift in the sense of that statute. The purposes here are to benefit the public—the classes of competitors directly, the general public indirectly. Lord *Macnaghten*, in *Commissioners for Special Purposes of the Income Tax v. Pemsel* (1), says: "'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." The Peter Mitchell Trust—or rather seven trusts—seem to me to come

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

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under this fourth division. I shall not venture to make an exhaustive definition of "charitable" in the legal sense; but, prima facie at all events, it seems to cover any gift intended for the benefit of the public at large, or of any indefinite and considerable part of the public. It has been held that a gift is charitable which is for the increase and encouragement of good servants, or to distribute gratuities to female servants in Wales, selected in a certain manner (*Reeve* v. *Attorney-General* (1); *Loscombe* v. *Wintringham* (2)); also a gift to the National Rifle Association to be expended by the council for the teaching of shooting at moving objects so as to prevent a catastrophe similar to Majuba Hill (*Re Stephens* (3)); also a gift of an annuity to a volunteer corps (*In re Lord Stratheden and Campbell* (4)); also a gift upon trust for the officers' mess of a regiment, to be applied in maintaining a library, and any surplus in plate (*In re Good*; *Harington* v. *Watts* (5)); also a gift to establish an institute for investigating and removing the causes of the potato diseases, &c. (*University of London* v. *Yarrow* (6)); also a gift to a society for the total suppression of vivisection, whether the Court approves of the objects of the society or not (*In re Foveaux*; *Cross* v. *London Anti-vivisection Society* (7)). The real question is, ought we to give "charitable" its legal sense in sec. 8 (5)?

Now, the word "charitable" is a technical word, and a technical legal word used must be taken in its legal sense unless a contrary intention appears (per Lord *Macnaghten*, *Commissioners for Special Purposes of the Income Tax Act* v. *Pemsel* (8); *Stephenson* v. *Higginson* (9)). Where and how is the contrary intention disclosed in this Act? It is urged that "charitable purposes" cannot mean here charitable purposes in the legal sense of the words, because the words are associated with "religious," "scientific," "public educational," all of which (it is said) are included under "charitable" in the legal sense. The argument is that if the words were used in the legal sense the other words would not have been added. But not all religious purposes are charitable

(1) (1843) 3 Ha., 191.
(2) (1850) 13 Beav., 87.
(3) (1892) 8 T.L.R., 792.
(4) (1894) 3 Ch., 265.
(5) (1905) 2 Ch., 60.
(6) (1857) 1 DeG. & J., 72.
(7) (1895) 2 Ch., 501.
(8) (1891) A.C., at p. 580.
(9) (1852) 3 H.L.C., 638, at p. 686.

in the legal sense; for instance, a gift to an order of contemplative nuns, seeking to sanctify their own souls by religious exercises, is not a gift to a charitable purpose (*Cocks* v. *Manners* (1); *In re Delany*; *Conoley* v. *Quick* (2)). Nor are all scientific purposes charitable; a gift to one who keeps a private observatory for the upkeep thereof, would be a gift for scientific purposes, but not for charitable purposes. A gift to Edison to enable him to outdistance his competitors in research as to a certain subject would be in a similar position. A gift to the proprietors of a public school in aid of the funds of the school would come under the words "public educational purposes," but not under the words "charitable purposes." The most that can be alleged is that most religious purposes, most scientific purposes, most public educational purposes, are charitable. There is nothing in the form of the words used to indicate that they are meant to be mutually exclusive in meaning. If one speaks of conduct as "moral virtuous or unselfish," there is no implication that the word "unselfish" must be limited in meaning so as not to include either moral or virtuous conduct. In the *Income Tax Assessment Act* 1915-1918, sec. 11 (1), there are numerous exemptions from the tax, and one is (*j*) "the income of any society or association not carried on for the purposes of the profit or gain to the individual members thereof, established for the purpose of promoting the development of the agricultural, pastoral, horticultural, viticultural, stock-raising, manufacturing, or industrial resources of Australia." I cannot believe that "pastoral" is to be shorn of its full meaning because "stock-raising" is mentioned, or that "industrial" has to be limited in denotation because "manufacturing" is mentioned. The four classes of purposes mentioned in this section of the *Estate Duty Assessment Act* frequently overlap in their denotation; but the natural meaning of the words is that if the purposes of a gift fairly come within any one of the four classes, whether they come within any of the three others or not, the gift is to be free from duty. I can find nothing in the phraseology used to prevent us from treating the words as expanding the exemptions, so as to comprehend all purposes which can come within any one or more of the four classes.

(1) (1871) L.R. 12 Eq., 574, at p. 585. (2) (1902) 2 Ch., at p. 648.

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It is not sufficient to show that another meaning than the legal meaning is possible in the context—or even probable. This was put strongly by my brother *Isaacs* in *Gutheil* v. *Ballarat Trustees &c. Co.* (1); and I should accept his position, that the technical meaning must be accepted unless the instrument excludes the technical sense "beyond all doubt." As Lord *Redesdale* said, in *Jesson* v. *Wright* (2), "it is dangerous, where words have a fixed legal effect, to suffer them to be controlled without some *clear* expression, or *necessary* implication." This principle is applied even to wills; but surely it is applicable with double force to Acts of Parliament. Where a law-making body sets itself out to make a law for the community, it must be taken to use legal terms in a legal sense—unless it say to the contrary, "unless a contrary intention appears"; and the contrary intention does not "appear" if it be suspected to exist. Probably, this position would be freely accepted; but the difficulty lies, as usual, in the minor premiss, not in the major. The fallacy here—if I may be allowed to use the expression without meaning any offence—arises from the assumption that the word "charitable" in the Elizabethan sense includes *all* religious, *all* scientific, *all* public educational purposes, and it is then argued that the word "charitable" in sec. 8 (5) cannot be used in the Elizabethan sense. I think I have shown that this assumption is wrong. Moreover, even if the language of the Act were equally capable of the other interpretation, it would be our duty, as this is a taxing Act, to accept the construction which is in favour of the taxpayer (*Armytage* v. *Wilkinson* (3)).

There are, however, two decisions which seem to be worthy of special consideration. One is the case of *Swinburne* v. *Federal Commissioner of Taxation* (4), in this Court. That case arose under the Commonwealth *Income Tax Assessment Act*, which allowed a deduction from the assessable income of the taxpayer of "gifts exceeding five pounds each to public charitable institutions in Australia." The taxpayer had given £1,000 to a technical college where students paid for admission to the courses. It was held that the broad meaning of "charitable"—the meaning under the Statute of

(1) (1922) 30 C.L.R., at pp. 303-304.
(2) (1820) 2 Bli., 1, at p. 56.
(3) (1878) 3 App. Cas., 355.
(4) (1920) 27 C.L.R., 377.

Elizabeth—did not apply to the words "public charitable institutions"; but the decision was based on a finding of the Court that in Australia "charitable institution" has a distinctive meaning in current speech, and is restricted to institutions where the poor or needy are relieved. No such distinctive meaning can be attributed to "charitable *purposes*"; indeed, the judgment recognizes that the expression "charitable purposes" has the broad Elizabethan meaning, and that the Courts must apply that meaning unless the context forbid it. A similar distinction between "institution" and "purposes" seems, indeed, to be suggested by sec. 11 (1) of the same Act. For sub-sec. 1 (*d*) exempts "the income of a religious, scientific, charitable, or public educational *institution*," whereas sub-sec. 1 (*f*) exempts "the income of a fund established by any will or instrument of trust for *public charitable purposes*." There can surely be no doubt that the latter exemption applies to charitable purposes in the broad sense of the Statute of Elizabeth. The other case is that of *Inland Revenue Commissioners* v. *Scott* (1), which is more complex. As corporations and such bodies do not die, and are not liable to probate or succession duties, an Act of 1885 imposed a duty upon the annual value of property vested in such bodies, but made certain exemptions—sec. 11, sub-sec. 2, of property legally appropriated for the benefit of the *public at large*, &c., or in any manner expressly prescribed by Act of Parliament; sub-sec. 3, of property legally appropriated "*for any charitable purpose*, or for the promotion of education, literature, science, or the fine arts." Land called the "Intack," near York, was held in trust for the freemen of a ward of the city, and was under the control of pasture-masters, who applied the net profit to the benefit of poor freemen; but not under any Act. It was held by the Court of Appeal that in such a context the words "charitable purpose" could not mean a purpose charitable in the Elizabethan sense. The reason was that the whole of sub-sec. 2 as to property for the benefit of the "public at large" would be wholly unnecessary if "charitable" had the Elizabethan sense in sub-sec. 3; and the words "or for the promotion of education, literature, science, or the fine arts" would also be unnecessary. A trust "for the promotion of education" in that

(1) (1892) 2 Q.B., 152.

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general form is charitable under the Act, and the Court would settle a scheme for the public benefit. Lord *Herschell*, who gave the judgment of the Court, adhered to what he had said in *Commissioners for Special Purposes of the Income Tax* v. *Pemsel* (1), that little weight is to be attached to the mere fact that specific exemptions were found which would be covered by the wider general words; but each statute has to be considered by itself; and here the exemptions in sub-sec. 2 as to the "public at large," could not have been inserted *ex majori cautela*. But in the Act before us, the words "religious," "scientific," "public educational," could obviously have been inserted for greater caution, to prevent the boundaries of the exemption from being narrowed by the decisions under the Statute of Elizabeth. There is nothing in the Act now under discussion to prevent us from treating the words as having been inserted for greater caution so as to prevent a narrow construction.

It will be seen that I have expressed my opinion on both the points necessary to be decided in order to answer question 1 of the special case—(1) what is the meaning of "charitable" in sec. 8 (5); (2) if it means charitable in the technical sense, are these specific trusts charitable in that sense (the sense of the Statute of Elizabeth). I should like to adopt the course suggested by the Chief Justice—a course which has much to commend it, in some respects—and to refrain from deciding point 2, especially as we have been told that in February last an originating summons was taken out in the New South Wales Court to have it determined whether the trusts are charitable in the technical sense. If not, they are void for perpetuity; and apparently the next-of-kin would take the property under ordinary wills. But in this will the testator makes a special provision for the case of the specific trusts failing—provides that if they wholly or partially fail or be declared by any Court incapable of taking effect, then the trustees are to apply the property "upon trust for such non-sectarian charitable uses purposes or institutions as my trustees shall in their absolute and uncontrolled discretion decide upon." The arguments for the next-of-kin would, therefore, have chiefly to attack this gift over as not being charitable in the technical sense, in order to establish an intestacy. On the whole, it seems to

(1) (1891) A.C., 531.

me to be my proper course to simply answer question 1 fully as it stands on both points, and to let the answer stand for what it is worth. This course, also, relieves me of the necessity of considering the much more difficult question whether these specific trusts are comprehended within some non-technical, popular meaning of "charitable," as used in sec. 8 (5). As Lord *Macnaghten* said, in *Pemsel's Case* (1), "no one as yet has succeeded in defining the popular meaning of the word 'charity'."

2. In my opinion, under the gift of the annuity to the widow part of the estate of the testator passes to the widow, and duty is payable at two-thirds rate. In other words, the annuity is subtracted from and diminishes the value of the estate given to the residuary legatees; and the subtracted part is itself vendible property, part of the total estate.

3. Yes—Answer 2.

4. In my opinion, reg. 33 is invalid. The Act contemplates the true value for assessment of duty, and rule 33 errs in arbitrarily fixing a four and a half per cent. basis.

5. The *true* value of the annuity has to be ascertained by appropriate means. It is not a matter of law to say by what means; but usually an actuarial calculation is found necessary.

RICH J. The main argument centred on the meaning of the word "charitable" in sec. 8 (5) of the *Estate Duty Assessment Act*. In view of what has been already said, it is unnecessary for me to resume the cases discussed. They are familiar enough and have been applied in this Court more than once. There is no rigid rule of construction, and each statute where words occur similar to those in the sub-section under review has to be considered by itself. In *Swinburne* v. *Federal Commissioner of Taxation* (2) the result of the relevant cases was stated to be that, in a statute where the phrase "charitable purpose" or its equivalents are used, "a technical meaning is now the primary, and, therefore, the natural meaning, requiring context to vary it." In sec. 8 (5) of the *Estate Duty Assessment Act* the words which precede and follow the word "charitable" are not meaningless or unnecessary, and a separate meaning is properly attributable

(1) (1891) A.C., at p. 583. (2) (1920) 27 C.L.R., at p. 384.

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to them. It follows, then, that, as "charitable" is not an envelope containing the other words, there is context which controls the primary meaning and which shows that it is not to be interpreted in the technical or wide sense attributed to it in the Courts. I adopt the illustrative construction of the word given by my brother *Isaacs*. None, however, of the gifts in the Peter Mitchell Trust comes within that very flexible test, and they clearly do not fall within the other exemptions of the sub-section.

With regard to the terms of the gift over, assuming it falls to be decided, it is sufficient to say that the area of selection or "ambit of choice" given by the testator would confer upon the trustees a power of selection outside the scope of the exemptions in the sub-section.

2. For the purposes of the Act the value of the part of the estate which passes should be ascertained as a determinable annuity as at the date of the death of the testator according to ordinary actuarial principles (cf. *In re Cottrell*; *Buckland* v. *Bedingfield* (1)).

3. Yes, as part of the estate.

4. The regulation is invalid. The value is to be ascertained, having regard to all the circumstances, according to ordinary actuarial principles, and not by a rigid rule universally applicable, such as the regulation in question, without regard to limitations and incidents of the thing to be valued.

5. See answer to question 2.

STARKE J. "The difficulty in this case," to use the words of Lord *Buckmaster* in *Attorney-General for New Zealand* v. *Brown* (2), "lies in determining the exact values to be given to a series of words" in the *Estate Duty Assessment Act* 1914, No. 22, sec. 8, sub-sec. 5, providing that estate duty shall not be assessable or payable upon so much of the estates of persons dying after the commencement of the Act "as is devised or bequeathed or passes by gift *inter vivos* or settlement for religious, scientific, charitable or public educational purposes." The Peter Mitchell Trust is clearly not for a religious or a scientific purpose, and the case depends therefore upon the construction placed upon the words "charitable or public educational purposes." Charitable purposes and charitable trusts are well known

(1) (1910) 1 Ch., 402, at p. 408.

(2) (1917) A.C., at p. 395.

terms in English law. In *Pemsel's Case* (1) Lord *Macnaghten* classified the objects which in a legal sense fall within the terms "charity," "charitable purpose" or "trust." But, as Lord *Herschell* pointed out in *Scott's Case* (2), "each statute must be looked to by itself for the purpose of ascertaining its meaning." Exemptions from taxation, granted by this Act, of gifts, &c., for religious, scientific or public educational purposes, cover a large number of "charities" in the strict legal sense. Does this suggest an intention on the part of the Legislature to again include, for greater caution, in the words "charitable purposes" objects of charity which it had already provided for by other words? Or does it suggest that the intention was to provide for "something that did not embrace" those objects? It may be said that the words "religious" and "scientific" purposes embrace a great number of objects that are not charitable in the legal sense. But if this be so, then we have the case of a taxing Act, designed to raise money, creating exemptions based upon no principle of public policy, or indeed upon any rational principle whatever. Such exemptions would include not only "any gift which proceeds from a philanthropic or benevolent motive, and which is intended to benefit an appreciably important class of our fellow-creatures (including, under decided cases, animals), and which will confer the supposed benefit without contravening law or morals" (*In re Cranston* (3), approved in *In re Wedgwood* (4)), but also an indefinite range of objects covered by religious and scientific purposes that are not charitable in the legal sense, and would not necessarily serve any public purpose. In my opinion, the true meaning of the words "charitable purposes" in the statute now before the Court cannot be better put than in the words of Lord *Herschell* in *Pemsel's Case* (5). "I certainly cannot think," says the noble and learned Lord, "that they"—the words "charities" and "charitable purposes"—"are limited to the relief of wants occasioned by lack of pecuniary means. . . . I think . . . that the popular conception of a charitable purpose covers the relief of any form of necessity, destitution, or helplessness which excites the compassion or

(1) (1891) A.C., at p. 583.
(2) (1892) 2 Q.B., at p. 165.
(3) (1898) 1 I.R., at p. 446.
(4) (1915) 1 Ch., at p. 117.
(5) (1891) A.C., at pp. 571-572.

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sympathy of men, and so appeals to their benevolence for relief. Nor am I prepared to say that the relief of what is often termed spiritual destitution or need is excluded from this conception of charity." Tested by this standard, the Peter Mitchell Trust is not exempted from taxation under the *Estate Duty Assessment Act*. Nor, if it failed, is the trust for such non-sectarian charitable uses, purposes or institutions as his trustees should decide upon, in any better position, for that trust must be construed in the legal sense of a charity and is beyond the sense of the statute.

I entertain some doubt whether the "Peter Mitchell Trust," so far as the gifts to the persons and for the purposes mentioned in the second schedule of the testator's will, cannot properly be described as a gift for public educational purposes within the meaning of the Act. But the essential idea of education is training or teaching. The Peter Mitchell Trust lacks, in my opinion, this element. No provision is made for training or teaching the proposed recipients of his bounty, but prizes are given for those who have already reached the strange standard of fitness and education propounded by the testator.

The other questions in this case should be answered :—

2. Part of the estate of the testator passes to the widow, but it must be ascertained by valuation, and regard must be had to the fact that the annuity is defeasible.

3. Yes.

4. No.

5. The value of the annuity is a question of fact, and should be so determined.

Questions answered thus :—(1) *No.* (2) *Part of the estate of the testator equivalent to the value of the annuity.* (3) *Yes.* (4) *No.* (5) *The value of the annuity should be ascertained as a matter of fact.*

Solicitors for the appellants, *Fleming, Henderson & Stedman*, Albury, by *Snowball & Kaufmann*.

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth. B.L.