[HIGH COURT OF AUSTRALIA.]

THE HOBART SAVINGS BANK . . . APPELLANT;

AND

THE LAUNCESTON BANK FOR SAVINGS . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1930.

MELBOURNE, *March* 5.

SYDNEY, *April* 14.

Isaacs C.J., Gavan Duffy, Rich, Starke and Dixon JJ.

Income Tax (Cth.)—Exemption from taxation—"Charitable institution"—Trustee savings banks—Income Tax Assessment Act 1922-1928 (*No.* 37 *of* 1922—*No.* 46 *of* 1928), *sec.* 14 (1) (*d*)—*Savings Banks Act* 1848 (*Tas.*) (12 *Vict. No.* 1)*—*Savings Banks Act* 1917 (*Tas.*) (8 *Geo. V. No.* 59).

The Hobart Savings Bank and the Launceston Bank for Savings are not charitable institutions within the meaning of sec. 14 (1) (*d*) of the *Income Tax Assessment Act* 1922-1928, and are consequently not exempt from taxation under that section.

APPEAL from the Federal Commissioner of Taxation.

In each of these cases the respective appellants (the Hobart Savings Bank and the Launceston Bank for Savings) claimed the benefit of sec. 14 (1) (*d*) of the *Income Tax Assessment Act* 1922-1928, which exempts from income tax the income of a charitable institution.

* The *Savings Banks Act* 1848 (V.D.L.) (12 Vict. No. 1), entitled "An Act to encourage the Establishment of Banks for Savings in Van Diemen's Land," by its preamble, recited:—"Whereas certain Banks for Savings have been established in Van Diemen's Land for the safe custody and increase of small savings belonging to the industrious classes of Her Majesty's subjects and it is expedient to give protection to such institutions and the funds thereby established and to afford encouragement to others to form the like institutions—Be it therefore enacted by His Excellency Sir William Thomas Denison Knight Lieutenant-Governor of the Island of Van Diemen's Land and its Dependencies by and with the advice of the Legislative Council of the said Island that if any number of persons have formed or shall form any society in Van Diemen's Land or its Dependencies for the purpose of establishing and maintaining any institution in the

The Hobart Savings Bank was established in or about the year 1845. On 22nd September 1848 the *Savings Banks Act* 1848 (12 Vict. No. 1) was passed. The Hobart Savings Bank was a bank for savings within the meaning of the preamble and of sec. 1 of such Act, and it duly complied with all the provisions of the Act and obtained the benefit thereof. On 24th January 1849 certain Rules and Regulations were adopted by the managers of the Hobart Savings Bank and after being approved by a barrister-at-law were lodged with the Registrar of the Supreme Court of Tasmania as required by the Act. Among such rules was rule 4, complying with the provisions of sec. 11 of the Act. Such rules were subsequently modified or altered from time to time but always contained a rule similar to such rule till the passing of the *Savings Banks Act* 1917 (8 Geo. V. No. 59), which was passed on 22nd December 1917. On 31st January 1918 the Hobart Savings Bank was incorporated under sec. 3 of the *Savings Banks Act* 1917. On 3rd September 1929 the Hobart Savings Bank was assessed for tax under the *Income Tax Assessment Act* 1922-1928 at the sum of £165 1s. The Bank objected to such assessment, but the objection was disallowed by the Deputy Federal Commissioner for Taxation for Tasmania, and the Bank then requested that its objection should be treated as an appeal and forwarded to the High Court, which was accordingly done.

The Launceston Bank for Savings was established in or about the year 1835. Such Bank was a Bank for Savings within the meaning

nature of a Bank to receive deposits of money for the benefit of the persons depositing the same—to accumulate the produce of so much thereof as shall not be required by the depositors their executors or administrators at compound interest—and to return the whole or any part of such deposit and the produce thereof to the depositors their executors or administrators deducting out of such produce so much as shall be required for the necessary expenses attending the management of such institution but deriving no benefit whatsoever from any such deposit or the produce thereof and shall be desirous of having the benefit of the provisions of this Act such persons shall cause the rules and regulations established or to be established for the management of such institution to be deposited and filed in the office of the Registrar of the Supreme Court and thereupon shall be deemed to be entitled to and shall have the benefit of the provisions contained in this Act—Provided that no such institution to be hereafter formed shall have or be entitled to the benefits of the provisions in this Act contained unless the formation of the same shall have been sanctioned and approved of by the Justices assembled at the General Quarter Sessions of the Peace holden for the district in which or nearest to which such institution is intended to be established—Provided also that no such sanction or approval shall be deemed sufficient unless notice of the intention to establish such institution shall have been given by

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of the preamble and of the provisions of sec. 1 of the *Savings Banks Act* 1848, 12 Vict. No. 1, and it duly complied with all the provisions of such Act and obtained the benefit thereof. Certain Rules and Regulations were drawn up by the trustees of the Bank and after being approved by a barrister-at-law were deposited with the Registrar of the Supreme Court of Tasmania. Among such Rules was a rule numbered 4 complying with the provisions of sec. 11 of Act 12 Vict. No. 1. Such rules were afterwards from time to time modified or altered, but always contained a rule similar to such rule 4 up till the time of the passing of the *Savings Banks Act* 1917 (8 Geo. V. No. 59). On 21st February 1918 The Launceston Bank for Savings was incorporated under sec. 3 of the *Savings Banks Act* 1917. On 30th August 1929 the Bank was assessed for tax under the *Income Tax Assessment Act* 1922-1928 at the sum of £374 17s. The Bank objected to the assessment but the objection was disallowed by the Deputy Federal Commissioner of Taxation, and the Bank then requested that its objection should be treated as an appeal and be forwarded to the High Court, which was accordingly done.

Sir Edward Mitchell K.C., *Waterhouse* and *Pigott*, for the taxpayers. Each of these Banks was a charitable institution within the meaning

advertisement in the *Hobart Town Gazette* and in not less than one Hobart Town and one Launceston newspaper at least four weeks before the holding of the Session at which such sanction and approval shall be given." The Act then provided (*inter alia*) as follows:—By sec. 2: "And be it enacted that no such institution as aforesaid shall have the benefit of this Act unless the rules and regulations for the management thereof shall be entered in a book or books to be kept by an officer of such institution to be appointed for that purpose such book or books to be open at all reasonable times for the inspection of the persons making deposits in the funds of such institution." By secs. 3 and 4 for the alteration of the rules. By sec. 5 that the affairs of every such institution should be under the management of not less than ten nor more than thirty managers and of such trustees and other officers as might from time to time be elected or appointed by the managers of the institution pursuant to the rules and regulations thereof. By sec. 10 that the number of managers within the limits aforesaid should be fixed by the rules and regulations of the institution and that the trustees should be elected by the managers from among their own body. By sec. 11: "And be it enacted that no such institution as aforesaid shall have the benefit of this Act unless it shall be expressly provided by the rules and regulations for the management thereof that no person being manager trustee or treasurer or other officer of such institution or having any control in the management thereof shall derive any benefit from any deposit made in such institution save only and except in the case of such treasurer or other officer who shall respectively be entitled to such salary and allowances or other necessary expenses as shall according to such rules and regulations be provided for his remuneration—And it is hereby expressly declared and enacted

of the Statute of Elizabeth and as such was exempt from Federal income tax under sec. 14 (1) (*d*) of the *Income Tax Assessment Act* 1922-1928. Since 1853, when the *Charitable Trusts Act*, 16 & 17 Vict. c. 137, was passed, savings banks have been regarded as charities. Sec. 62 of that Act sets out a large number of exemptions from the operation of the Act including savings banks wholly maintained by voluntary contributions. (And see secs. 63 and 64 of that Act.) The same interpretation should be put on sec. 14 (1) (*d*) as was put on sec. 8 (5) of the *Estate Duty Assessment Act* in *Chesterman* v. *Federal Commissioner of Taxation* (1). [Counsel referred to *Adamson* v. *Melbourne and Metropolitan Board of Works* (2) and *Swinburne* v. *Federal Commissioner of Taxation* (3).] It was thought that it was for the benefit of the community that the industrious classes should be encouraged to accumulate their savings. These Banks complied with all the requirements in par. 1 of the Tasmanian Act 12 Vict. No. 1, and they obtained all the benefits conferred by the Act. The provisions in that Act ensure that no officials in the institution get any profits out of the institution. Under an amending Act officials can themselves become investors, and the Act provides that after paying expenses of management the profits must be distributed. Subject to some variations as to what the Bank may invest its money in and some other minor differences this Act is

that no manager or trustee shall directly or indirectly have any salary allowance profit or benefit whatsoever from such institution beyond his actual expenses or necessary charges for the purposes and management thereof." By sec. 22 that when a deposit and interest amounted to £150, interest should cease; and the section contained a provision limiting the amount of future deposits. By sec. 32: "And be it enacted that at every half-yearly general meeting . . . the managers of any such institution present at such meeting shall ascertain the amount of all interest moneys received by or accrued to such institution during the preceding half-year together with the amount of all interest paid or accrued to depositors and of all expenses incurred by or on account of such institution during such period—And it shall be lawful for the said managers to set apart from the balance which may remain in favour of the institution on such account any sum of money which they may think fit not exceeding one-tenth part of the amount of interest accrued to the institution during the said preceding half-year as and for a reserve fund to meet contingent losses and expenses and the remainder of such balance if any shall be carried to the credit of the several depositors in such institution in such proportions and manner as shall be provided by the rules and regulations of the same—Provided always that if at any time such reserve fund as aforesaid shall equal or exceed one-fourth part of the total amount of deposits for the time being held by such institution no further sum shall be set apart as aforesaid until such reserve fund shall again fall below one-fourth part of the amount of such deposits."

(1) (1923) 32 C.L.R. 362.
(2) (1929) A.C. 142, at p. 147.
(3) (1920) 27 C.L.R. 377.

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identical with the English Acts 57 Geo. III. c. 105, which relates to Ireland, and 57 Geo. III. c. 130, which relates to England, which were consolidated in 1828 by 9 Geo. IV. c. 92, which Act extended to both England and Ireland. At the time when the *Charities Act* 1853 (Eng.) was passed there were no other kinds of savings banks than trustee savings banks in existence. The purpose for which funds may be used is the test of whether the bank is charitable or not. Each case must be dealt with upon its own facts. In this case the encouragement of savings is for the benefit of the community, and because of this the Legislature has invested the institution with a great number of powers.

[ISAACS J. referred to *In re Grove-Grady*; *Plowden* v. *Lawrence* (1); *Adamson's Case* (2).

[STARKE J. referred to *In re Good*; *Harington* v. *Watts* (3); *Re Wedgwood*; *Allen* v. *Wedgwood* (4).]

When a body of persons associate themselves together and hold out encouragement to thrift on the part of the industrious classes that constitutes a charity.

[ISAACS J. referred to *In re Donald*; *Moore* v. *Somerset* (5).

[STARKE J. referred to *In re Clark's Trust* (6).]

That is a case where individuals formed a society for their own benefit, but here the institution collects interest and distributes all interest among the depositors. [Counsel referred to *Wedgwood's Case* (4).] It is not necessary that there should be a gift to constitute a charity (*In re St. Botolph Without Bishopsgate Parish Estates* (7)). In order to see whether the institution is charitable or not, the purposes of the fund in its hands have to be looked at (*Attorney-General* v. *Eastlake* (8)). This institution is charitable because it is for the benefit of the community that the industrious classes should be encouraged to accumulate their savings (*Attorney-General* v. *Heelis* (9)). [Counsel referred to *Goodman* v. *Mayor of Saltash* (10); *University of London* v. *Yarrow* (11); *In re Foveaux*; *Cross* v. *London Anti-Vivisection Society* (12).]

(1) (1929) 1 Ch. 557, at pp. 576, 583.
(2) (1929) A.C., at p. 148.
(3) (1905) 2 Ch. 60, at p. 66.
(4) (1915) 1 Ch. 113.
(5) (1909) 2 Ch. 410, at p. 422.
(6) (1875) 1 Ch. D. 497, at p. 500.
(7) (1887) 35 Ch. D. 142, at pp. 147, 150.
(8) (1853) 11 Ha. 205, at p. 215; 68 E.R. 1249.
(9) (1824) 2 Sim. & St. 76; 2 L.J. (O.S.) Ch. 189; 57 E.R. 270.
(10) (1882) 7 App. Cas. 633.
(11) (1857) 1 DeG. & J. 72; 44 E.R. 649.
(12) (1895) 2 Ch. 501.

[STARKE J. referred to *Swifte* v. *Attorney-General* (1).]

Waterhouse. These banks are charitable institutions within the meaning of that word in sec. 14 (1) (*d*) of the Act. [He referred to *In re Cranston*; *Webb* v. *Oldfield* (2); *University of London* v. *Yarrow* (3); *In re Scowcroft*; *Ormrod* v. *Wilkinson* (4); *In re Gray*; *Todd* v. *Taylor* (5).]

Pigott referred to *Tudor on Charities*, 5th ed., pp. 8, 17, 18; *Wedgwood's Case* (6).

Menzies K.C. (with him *Moore*), for the Commissioner of Taxation. These institutions are not charitable. All public purposes are not necessarily charitable. This case is, in effect, covered by the mutual benefit society class of case. In all mutual benefit societies there is an ordinary business-like arrangement between individuals (*Cunnack* v. *Edwards* (7)). The result of *Adamson's Case* (8) is only that a charitable institution means an institution for the purpose of carrying out a charity.

[STARKE J. referred to *In re Maguire* (9).]

The rights of depositors are to sue the Banks on contract for moneys deposited on the basis of creditor and debtor.

Sir Edward Mitchell K.C., in reply.

Cur. adv. vult.

April 14.

The following written judgments were delivered :—

ISAACS C.J. In *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society* (10) Lord *Hanworth* M.R. conveniently classifies the cases in which it has been decided whether a purpose is charitable or not. I take them to be put really as representative classes. One class is where the purpose, or the main purpose, is a general benefit to the community, and the other where the purpose,

(1) (1912) 1 I.R. 133.
(2) (1898) 1 I.R. 431.
(3) (1857) 1 DeG. & J. 72; 44 E.R. 649.
(4) (1898) 2 Ch. 638, at p. 642.
(5) (1925) Ch. 362.
(6) (1915) 1 Ch., at p. 123.
(7) (1896) 2 Ch. 679.
(8) (1929) A.C. 142.
(9) (1870) L.R. 9 Eq. 632.
(10) (1928) 1 K.B. 611, at pp. 622, 623.

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or the main purpose, is rather for the benefit of individuals than within the wider purview of purposes beneficial to the community. The question is one partly of fact and partly of law. One matter of law is that to be a charitable institution its income must be applied to charitable purposes only (see per *Atkin* L.J. (1)). In my opinion, though the institution is declared to exist for the safe custody and increase of small savings belonging to the industrious classes, it falls rather within the second class than the first. The savings are presumed to have been already made, and then to keep them safely and increase them when made by the ordinary process of investment, is an undertaking which, though laudable and benevolent, is still rather for the benefit of the individuals themselves, in profitably investing the savings made, than for the primary principle of thrift itself. Technically, no doubt, the depositors are not members, but they individually have, by sec. 32 of the Act, a legal interest in the income which could be enforced, and which brings them into close analogy with the illustrations in Lord *Hanworth's* second category. The institution might broadly, but not inaccurately, be described as the agent of the general body of depositors from time to time, receiving no remuneration, but being indemnified for expenses.

In my opinion the question should be answered in the negative.

GAVAN DUFFY J. I have read the written judgment to be delivered by my brother *Dixon*, and I agree with it.

RICH J. I have had the advantage of reading the judgment of my brother *Dixon* and agree with it. There is no doubt that in the early stages of the Savings Bank movement before the intervention of the Legislature it would have been difficult to find a legal basis other than the law of charitable trusts which would support the constitution of a trustees savings bank where the funds were held for the advantage of future depositors without any limitation of time or for the purposes of conducting the institution generally. Probably in the conditions which then obtained the Court of Chancery would have had little difficulty in arriving at the conclusion that the

(1) (1928) 1 K.B., at p. 633.

philanthropic gentlemen whose altruism led them to found institutions for the deposit of savings had in view a purpose so beneficial to the utilitarian ethics of the community as to warrant inclusion in the category of charitable trusts. But conditions have much changed. It is now possible for all classes of the community and all ages of man safely to accumulate sums of money and to deposit them in security without recourse to the devices and contrivances of domestic concealment once so common but now rarely heard of save in the incredible narratives related in bankruptcy proceedings. Doubtless the prime purpose of the establishment of banks for savings, namely, the promotion of thrift, is by no means fully accomplished, but the great change in social conditions includes complete and adequate provision of all reasonable facilities for enabling, if not inducing, all classes of the community securely to retain, accumulate and multiply the smallest sums of money which they do not feel either required or minded to spend. Although during the argument we had not the advantage of an historical survey of the subject, I had little doubt upon a consideration of the present state of things that the savings banks savoured too much of the established order of financial and business organization to allow their remoter but ultimate object to determine their legal character and render them charitable. This view appears to be well supported by the authorities collected by my brother *Dixon*, to which I would add that in Governor Macquarie's time was founded, at a meeting held in Sydney on 5th June 1819, the first savings bank in Australia. The Governor presided, and Mr. Justice Barron Field (the friend of Charles Lamb) was appointed one of the four trustees. The meeting recorded the fact that it had "long witnessed with sorrow the extravagance and improvidence which the poor settlers, mechanics, servants, and labourers of this Colony" had fallen into. "The little money that passes is quickly dissipated in spirituous liquors and gambling, a system which mainly tends to keep them poor, vicious, and unmarried, and is therefore of the deepest injury to the Colony." A collector was appointed in each of the towns of Sydney, Parramatta, Liverpool and Windsor to receive sums of not less than 2s. from poor persons, to repay the money on demand, and to pay interest at the rate of 1s. 6d. a £1 a year. This institution, which was

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popularly known as "Campbell's Bank," after the person appointed to collect deposits in Sydney, continued until 1833, when it was absorbed by the Savings Bank of New South Wales, which had been constituted by an Act passed in the previous year (2 Will. IV. No. 14, and see 5 Will. IV. No. 16). I am, therefore, of opinion that the appellant Banks are not charitable institutions within the meaning of sec. 14 (1) (*d*) of the *Income Tax Assessment Act* in spite of the fact that the word "charitable" must receive the same meaning as that given it in Courts of Chancery (*Adamson* v. *Melbourne and Metropolitan Board of Works* (1)). In concurring in the attempt made in *Swinburne's Case* (2) to discover the popular meaning of the word "charitable," I was not consciously engaged upon the enterprise of discriminating between an English and an Australian meaning of the term although Lord *Dunedin*, during the argument in *Adamson's Case*, seems to have thought that this Court found an Australian meaning at variance with the English meaning of the word "charitable." I would be sorry to think that a difference of opinion as to what ordinary people meant when they used such a vague and elastic term was attributable to an antipodean departure from English usage arising from the geographical separation of those who differ. "There are, it may be, so many kinds of voices in the world, and none of them is without signification. Therefore if I know not the meaning of the voice, I shall be unto him that speaketh a barbarian, and he that speaketh shall be a barbarian unto me."

The question in each case should be answered in the negative.

STARKE J. In these cases I concur in the opinion of the Chief Justice.

DIXON J. In these two cases, which were heard together, the appellants claim the benefit of sec. 14 (1) (*d*) of the *Income Tax Assessment Act* 1922-1928, which exempts from income tax the income of a charitable institution. "That according to the law of England a technical meaning is attached to the word 'charity,' and to the word 'charitable' in such expressions as 'charitable

(1) (1929) A.C. 142. (2) (1920) 27 C.L.R. 377.

uses,' 'charitable trusts,' or 'charitable purposes,' cannot, I think, be denied" (per Lord *Macnaghten*, *Commissioners of Income Tax* v. *Pemsel* (1)). But this Court considered that "no technical signification has attached itself, at all events in Australia, to the expression 'public charitable institution'"; and that in Australia it "is used both popularly and officially as denoting an institution which . . . is 'charitable' in the sense of affording relief to persons in necessitous or helpless circumstances, and in most instances, at all events if required, gratuitously" (*Swinburne's Case* (2)). This decision was overruled in *Adamson* v. *Melbourne and Metropolitan Board of Works* (3) upon the ground, as I understand the judgment, that the word "charitable" was itself a word of known legal import, and that no sufficient reason appeared in context, subject matter or otherwise, for giving it a secondary meaning. Further, in the course of the argument Lord *Dunedin* said:—"I must say that the learned Judges in the *Swinburne Case* (4) gave what they say is the common meaning of 'charitable' in Australia, a different meaning from what I should say was the common meaning of 'charitable' in England"; and, after counsel had expressed his concurrence in this view, he added: "But, of course, this is Australia" (Transcript of argument). One may be permitted to believe, or at least to hope, that this difference of opinion upon the common meaning of the phrase marks no linguistic divergence. Doubtless the truth is that nowhere is it possible really to know to what attributes the popular meaning of the word "charitable" is confined. "No doubt," says Lord *Macnaghten* (5), "the popular meaning of the words 'charity' and 'charitable' does not coincide with their legal meaning; and no doubt it is easy enough to collect from the books a few decisions which seem to push the doctrine of the Court to the extreme, and to present a contrast between the two meanings in an aspect almost ludicrous. But still it is difficult to fix the point of divergence, and no one as yet has succeeded in defining the popular meaning of the word 'charity.'" Lord *Watson* (6) was disposed to think that ordinary usage approximated more closely

(1) (1891) A.C. 531, at p. 580.
(2) (1920) 27 C.L.R., at p. 384.
(3) (1929) A.C. 142.
(4) (1920) 27 C.L.R. 377.
(5) (1891) A.C., at p. 583.
(6) (1891) A.C., at p. 558.

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to the legal meaning of the term. "I have been unable," he said, "to find that the word 'charitable' taken by itself, has any well-defined popular meaning in Scotland or elsewhere. It is a relative term, and takes its colour from the specific objects to which it is applied. Whilst it is applicable to acts and objects of a purely eleemosynary character, it may with equal propriety be used to designate acts and purposes which do not exclusively concern the poor, but are dictated by a spirit of charity or benevolence. In the latter sense the meaning of the term is practically, although not absolutely, coextensive with that which has been attributed to it by the Courts of Chancery." Yet in *Verge* v. *Sommerville* (1) Lord *Wrenbury*, in delivering the judgment of the Privy Council, said: "In fact, the legal meaning and the popular meaning of the word 'charitable' are so far apart that it is necessary almost to dismiss the popular meaning from the mind as misleading before setting out to determine whether a gift is charitable within the legal meaning." Striking as the contrast between these statements may be, the views which they express are not so completely at variance as would appear. Lord *Wrenbury* refers rather to the concrete cases which have been held to answer the description "charitable," a bewildering list which gives the term a large and multifarious denotation. Lord *Watson* is dealing with the qualities or attributes which the word connotes. Our system of case law often operates to determine the conventional intension or connotation of a term and also to fix by decision part of its denotation. Some of the latter process usually precedes the former, and even when it is otherwise, the lawyer more often than not finds himself required by authority to believe in a denotation which is not in fact strictly related to the connotation. Probably nowhere has this difficulty become more manifest, or more acute than in the application of the word "charitable."

The well known classification of Sir *Samuel Romilly* and Lord *Macnaghten* affords a guide but not a definition. "The method employed by the Court," said *Chitty* J. in *In re Foveaux* (2), "is to consider the enumeration of charities in the Statute of Elizabeth, bearing in mind that the enumeration is not exhaustive. Institutions whose objects are analogous to those mentioned in the

(1) (1924) A.C. 496, at p. 502.

(2) (1895) 2 Ch., at p. 504.

statute are admitted to be charities; and, again, institutions which are analogous to those already admitted by reported decisions are held to be charities. The pursuit of these analogies obviously requires caution and circumspection. After all, the best that can be done is to consider each case as it arises, upon its own special circumstances." This is a safe but unenlightening conclusion. But the Courts seem now to have ventured from its dark security so far as to risk the modest generality that when, from motives which are altruistic, benevolent or philanthropic, purposes are put in execution for the benefit of the community, or of a considerable section or class, which do in fact tend to the amelioration of mind, manners or morals, or the relief of misfortune and are of a nature allowed by law and consonant with the received notions of morality, then these objects will be considered "charitable" (*In re Cranston* (1); *In re Wedgwood* (2); *In re Grove Grady* (3); *In re Bruce*; *Simpson* v. *Bruce and Attorney-General* (4)). The occasion for determining what purposes are charitable has, of course, arisen in the administration of the law of property. But once the view is adopted that the word "charitable" has itself a legal meaning there seems little difficulty in transferring it from the description of the purposes to which property is devoted, and understanding it as a description of the objects for which an institution exists. (See *Commissioners of Inland Revenue* v. *Yorkshire Agricultural Society* (5).)

The claim of the appellants to exemption rests upon the contention that they are bodies established and carried on altruistically for the promotion of thrift by affording facilities and offering inducements for the accumulation and investment of savings. They are or were "trustee savings banks." Institutions of this character are no longer familiar in Australia because no doubt their functions are included in those performed by Post Office and State Savings Banks. "The trustee savings bank is the original type. It stands for an attempt on the part of members of the well-to-do to improve the conditions of the poorer classes and involves a self-sacrificing

(1) (1898) 1 I.R., at p. 446.
(2) (1915) 1 Ch., at p. 122.
(3) (1929) 1 Ch., at p. 573.
(4) (1918) N.Z.L.R. 16.
(5) (1928) 1 K.B. 611.

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service on the part of a few in the interests of the masses. The managing board of trustees is a body of men, who presumably have no other motive in giving their service than their devotion to the cause; at least they receive no pecuniary reward. . . . This was the characteristic type in England prior to the introduction of the principle of postal savings. They were first organized under a religious impulse, and were designed both to save people from degradation, and to save the parish from the burden of the poor rates. Hence the agitation for their adoption was extended from parish to parish and the parson was frequently the central figure in the organization. But in spite of these advantages, they failed to render a service adequate to the needs until finally the postal savings bank was introduced as a remedy" (*Savings and Savings Institutions*, by Dr. *J. H. Hamilton* (1902), pp. 180-182). At the close of the eighteenth century few or no practical means existed for investing and safeguarding small amounts of money, but many had come to think it a matter of social importance to surmount this obstacle to thrift, and to devise means of enabling and encouraging saving amongst the people. Indeed *Defoe* had propounded, in his *Giving Alms no Charity*, a scheme for compulsory saving from wages. In 1797 *Bentham*, in *Tracts on Poor Laws and Pauper Management*, addressed himself to the impediments to saving and the difficulties which attended any attempt by persons of small means to accumulate and dispose of any surplus from their earnings and put forward a plan for what he called "Frugality Banks." *Whitbread* formulated another proposal. In 1798 Mrs. *Priscilla Wakefield* founded a friendly society at Tottenham which began a bank for savings. In 1810, at Ruthwell in Dumfriesshire the Reverend *Henry Duncan* set up a bank according to a plan which he had elaborated in some detail. Its purpose was to receive deposits and invest them at interest for the ultimate benefit of the depositors, but it gave the depositors a voice in the administration. This was followed by the establishment in Edinburgh of a bank for savings organized in a somewhat different fashion. The depositors were given no control of the administration which was vested in trustees, who were in fact the bank. They dealt with the depositors as another bank would its customers. Their deposits were received

at interest, and they withdrew them when they chose. (*A History of Banks for Savings* by *William Lewins* (1866), pp. 29-43).

The movement spread rapidly, and similar institutions were set up by public-spirited people in many parts of the United Kingdom, following for the most part the plan of the Edinburgh Savings Bank. By 1817 it is said there were seventy such banks in England alone. In that year statutes were passed for the governance of such institutions in England and Ireland. The preamble of 57 Geo. III. c. 130 recited: "Whereas certain provident institutions or banks for savings have been established in England, for the safe custody and increase of small savings belonging to the industrious classes of His Majesty's subjects; and it is expedient to give protection to such institutions and the funds thereby established, and to afford encouragement to others to form the like institutions." The first section described the essential nature of the institution. In effect it provided that if any number of persons who form any society in England, for the purpose of establishing and maintaining any institution in the nature of a bank, to receive deposits of money for the benefit of the persons depositing the same, and to accumulate the produce of so much thereof as shall not be required by the depositors, to be paid in the nature of compound interest, and to return the whole or any part of such deposit and the produce thereof to the depositors, deducting only out of such produce so much as shall be required to be retained for the purpose of paying and discharging the necessary expenses attending the management of such institution, according to such rules as are established for that purpose, but deriving no benefit whatever from any such deposit or the produce thereof, shall be desirous of having the benefit of the provisions of this Act, such persons shall cause the rules for the management of such institution to be filed in manner directed, and thereupon shall be deemed to be entitled to and shall have the benefit of the provisions contained in the Act. The rules of the bank must be filed (sec. 2); the trustees and managers were forbidden any benefit from the funds (sec. 3); the officers must give security (sec. 7); the property of the bank must be vested in trustees; funds must be deposited in the Bank of England to be invested by the National Debt Commissioners in bank annuities (secs. 11 and 14).

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In the following year, by 58 Geo. III. c. 48, alterations were made in the mode of investment by the trustees, and the Justices at Sessions were empowered to veto rules deposited for enrolment. Further amendments were made by 1 Geo. IV. c. 83 and 5 Geo. IV. c. 62, and then by 9 Geo. IV. c. 92 the legislation was further amended and consolidated, but was again amended by 3 & 4 Will. IV. c. 14. These statutes were, in effect, copied by the Tasmanian Legislature in the *Savings Banks Act* 1848 (12 Vict. No. 1).

The amount of business done by banks for savings by 1828 was in fact very large, and had perhaps become so familiar as to seem an ordinary social provision. But the basis of their organization was still philanthropic endeavour. Mr. *Tidd Pratt*, barrister-at-law appointed to certify the Rules of Savings Banks and of Friendly Societies, concludes his brief history of savings banks, published in 1830, by saying: "To those noblemen, clergymen and others who have come forward and assisted by their donations as well as personal exertions, in the establishment and support of savings banks, the thanks of every well-wisher of the prosperity and happiness of his country are due, particularly when it is considered that from the establishment of these institutions to the present time, the whole management (with the exception of the office of secretary) is not only undertaken and conducted gratuitously, but in all cases has been, and in many instances is now attended with expense to the trustees and managers." The statute of 1828 (9 Geo. IV. c. 92) did no more than regulate a form of institution which was carried on voluntarily by trustees not merely in the interests of the depositors for the time being but for the purpose of multiplying their number for the general advantage.

In *Holmes* v. *Henty* (1), which came before the House of Lords in 1836, the question arose whether trustees of such an institution could dispose as they chose of the surplus over its requirements. The statute of 1828 (9 Geo. IV. c. 92, sec. 23) directed that any such surplus after it came into operation should be placed upon deposit with the National Debt Commissioners without interest, who upon a certificate were to repay it "for the purpose of the institution," but it also provided (sec. 22) that the trustees should ascertain

(1) (1836) 4 Cl. & F. 99; 10 Bli. (N.S.) 255; 7 E.R. 38.

whether any such surplus had arisen up to that date, and, if so, appropriate the same in manner required by the rules, and if there was no provision made by the rules, then in such manner as the majority of them should think fit and proper.

The trustees of the Arundel Provident Bank found they had a surplus accumulated before the Act and not required for the future management of the Bank, and, as they considered that a new bridge was needed over the river at Arundel, they devoted part of the surplus to the purpose of providing one. Some dissenting trustees and some depositors brought a suit as representative parties, without joining the Attorney-General, for a decree ordering restoration of the funds. Lord *Brougham* (1), upon an interlocutory motion in Chancery, expressed the opinion that the surplus must be applied for the purposes of the institution, and proceeded to remark upon the impossibility of treating the accumulations and surplus, whether past, present or future, as distributable in respect of the deposits which actually produced that fund, because depositors were a continually changing body, and he suggested that it was to be applied to the " corporate " purposes of the bank such as the supply of future deficits or other contingencies. The suit was heard by *Shadwell* V.C. (2), who held that the trustees had misapplied the surplus, and observed, after a consideration of the provisions of the Act, that it led him " to infer that the Legislature did contemplate nothing but an appropriation, which, in some manner or other, should be for the benefit of the general depositors " (3). From this decree those trustees held liable appealed to the House of Lords, which affirmed the decision. Lord *Cottenham* L.C. said (4) :—" Before the passing of the Act 9 Geo. IV. c. 92, no question could have arisen as to the discretionary application of such a fund ; under all former Acts, and on principle, the profits arising from deposits could only be applied for the benefit of the depositors, and nothing less than the authority of an Act of Parliament could warrant any other application against the will of the parties : no other persons could by possibility have any right to the fund, or could direct the application

(1) (1836) 4 Cl. & F., at p. 123 ; 7 E.R. 38.
(2) (1836) 4 Cl. & F., at p. 135 ; 7 E.R. 38.
(3) (1836) 4 Cl. & F., at p. 139 ; 7 E.R. 38.
(4) (1836) 4 Cl. & F., at p. 151 ; 7 E.R. 38.

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of it, except by contract between the parties and under their authority. There was no such contract as to this fund, and the trustees created by former Acts held in trust for the depositors all the moneys deposited, and all profits arising from the employment of the moneys." His Lordship went on to say that the policy of the statute was to regulate the investment of a surplus which accrued after it came into force, but not to divert a fund which had already accumulated. Both the frame of this suit and the observations of the Judges mark a tendency to regard the depositors for the time being as having beneficial interests in the funds of the Bank. Yet the constitution of the Bank and the provisions of the statute seem consistent with the view that the "purposes of the institution" which its funds were to answer were not the proprietary interests of the depositors for the time being, but the encouragement of thrift, and the promotion of social welfare by performing the gratuitous and benevolent service of receiving deposits of money from the public at large at interest, and affording a reasonable assurance that withdrawals would be met whenever required by depositors who dealt with the Bank as customers and therefore as creditors, and not beneficiaries. The question whether this was the true view of the matter did not arise for decision, but the fact that their Lordships did not advert to it is an important consideration to the contrary. Of course, it may well be that no clear distinction was generally made between banks modelled on the mutual principles of Ruthwell and those administered by independent trustees after the fashion set in Edinburgh. Moreover, the rapid spread of savings banks had gone far to supply the social need which inspired them, and they had begun to assume the appearance of business institutions. Indeed much of the development must have already taken place to which the learned authors of the article on Savings Banks in the 11th edition of the *Encyclopædia Britannica* refer when they say (vol. XXIV., p. 244):—"The promotion of thrift, at the end of the 18th century an experiment of a few far-seeing individuals, was by the 20th century almost universally adopted, and was regarded practically as an adjunct to the institutions of every civilized community. Friendly societies, co-operative societies, trade societies and other agencies are all based on this same principle." Such changes must

profoundly affect the purposes served by institutions and the motives from which they are administered, matters upon which the description of "charitable" greatly depends. But the development is uneven and uncertain. It should therefore perhaps not be surprising to find that in 1848 an infant child, who inherited a great name, was forthwith put in his ancestors' place as the president of such a savings bank, and that in 1869 on attaining full age he attended a meeting of trustees "considering the bank as a charity worthy of support" (*In re Cardiff Savings Bank* (1)). In 1862, however, the question was considered by the Judges. A fraudulent trustee of a savings bank was convicted under 20 & 21 Vict. c. 54, sec. 1, a provision which related only to trustees on some express trust created by deed, will, or instrument in writing, and made it a misdemeanour for any person being such a trustee "of any property for the benefit, either wholly or partially of some other person or for any public or charitable purpose" fraudulently to convert it to his own use. The prisoner was convicted upon the whole indictment, but one set of counts stated the trust as for a public purpose and another set as a trust "for the benefit of certain persons who had before then deposited the same" (i.e., the money misappropriated) "in a certain bank for savings." The conviction was considered by the Judges and after a second argument affirmed (*Reg.* v. *Fletcher* (2)). In the course of the argument prisoner's counsel said (3) that a public trust was synonymous with a charitable trust, but that here the object was not charitable, but merely the private benefit of the depositors, who were a definitely ascertained body, but he denied that they were cestuis que trustent and that they could "follow the trust property specifically, which they would be at liberty to do, if the defendant were really a trustee" (4). The counsel for the Crown contended for a public trust: "Savings banks are regulated by various public Acts, and it is obviously for the benefit of the State that habits of saving should be encouraged" (5). During the argument *Willes* J. referred to *Holmes* v. *Henty* (6) and said (7):

(1) (1892) 2 Ch. 100, at p. 102.
(2) (1862) Le. & Ca. 180; 31 L.J. M.C. 206; 169 E.R. 1353.
(3) (1862) Le. & Ca., at p. 194; 31 L.J. M.C., at p. 210; 169 E.R. 1353.
(4) (1862) Le. & Ca., at p. 196; 31 L.J. M.C., at p. 210; 169 E.R. 1353.
(5) (1862) Le. & Ca., at p. 200; 31 L.J. M.C., at p. 210; 169 E.R. 1353.
(6) (1836) 4 Cl. & F. 99; 7 E.R. 38.
(7) (1862) 31 L.J. M.C., at p. 210.

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"*Holmes*' v. *Henty* shows they are trustees under a trust for the benefit of the depositors." In delivering the opinion of the Judges *Cockburn* C.J. said (1):—"I am of opinion that the conviction . . . was right, and ought to be upheld. The first question is, was the defendant a trustee within the meaning of the 20 & 21 Vict. c. 54? It has been contended by Mr. *Mathews* that he was not; that, although he was called a trustee, yet the real relation existing between him and the depositors was that of debtor and creditor only; and that he was merely liable to an action at law, and to repay to each depositor the amount deposited by him with interest. I cannot concur in that view. I think that there was a trust here, namely, to receive the money and hold it for the benefit of the institution, and, so long as the money remained in his hands, to hold it entirely for the benefit of the depositors. I am disposed to think that it was not a trust for a public purpose. Although the institution is one of national concern, and it is for the public interest that the savings of depositors should be protected, yet it was not a public or charitable purpose. The word 'public' in the Act must be understood to mean such a purpose as would be recognized as public in a Court of law, such as are the purposes of such institutions as are exempted from liability to the poor-rate. The trust here was 'for other persons.' From the whole scope of the rules it is plain that the trustees do not hold the funds in their hands for their own individual benefit, but for the benefit of the depositors."

These observations, which provide strong authority for the conclusion that a trustee savings bank is not charitable, illustrate the difficulties which arise in determining the legal basis of such institutions. As the trustees have no beneficial interest in the funds vested in them, it seems natural to suppose that the alternatives are that, either they hold them upon a public trust, or upon a trust for beneficiaries ascertained or at least ascertainable within the time limited by the rule against perpetuities. The depositors, however, are a changing class. Not only is there no privity either of interest or of contract between them, but their rights which were originally defined by the rules alone, but later by the statute also, appear to arise rather out of obligation, than property. Surpluses

(1) (1862) Le. & Ca., at pp. 202-203; 169 E.R. 1353.

and reserve funds and the assets which represent them can scarcely be held upon trust for the depositors of the moment. Sec. 22 of 9 Geo. IV. c. 92, as interpreted by Lord *Brougham* in *Holmes* v. *Henty* (1), and sec. 23, on its terms, require that they should be held for the purposes of the institution. Sec. 32 of the Tasmanian Act speaks of a reserve fund to meet contingent losses and expenses. If the public purpose, for which the Bank is carried on were considered sufficiently beneficial in object and direct in operation to bring it within the doctrines which sustain charitable trusts there would be nothing unusual in the trust. The only other escape from the anomalous conclusion that the fund is *bona vacantia*, like that dealt with in *Cunnack* v. *Edwards* (2) and *Braithwaite* v. *Attorney-General* (3), is to interpret the statute as a special parliamentary authorization of a trust for a non-charitable public purpose. Since the Tasmanian *Savings Banks Act* 1917 incorporated the appellants, the difficulties which arise from the conclusion that their purposes are non-charitable have disappeared, but they supply considerations which should not be disregarded in deciding the question whether they are in fact charitable.

In the end, however, that question must depend upon the nature of the purpose which, in existing conditions, such an institution serves. In the conditions which obtained in 1862 *Cockburn* C.J. and, apparently, the other Judges, considered that they did not tend to the relief of social disabilities or the promotion of thrift to such a degree as the legal conception of a charity requires. The difficulties of determining the legal basis of trustee saving banks have been felt in America where their history and their organization have been very similar, save that they have for the most part been incorporated. In *Huntington* v. *Savings Bank* (4) *Strong* J., delivering the judgment of the Supreme Court, says of such a bank:—"It is not a commercial partnership, nor is it an artificial being the members of which have property interests in it, nor is it strictly eleemosynary. Its purpose is rather to furnish a safe depositary for the money of those members of the community disposed to entrust their property to its keeping. It is somewhat of

(1) (1836) 4 Cl. & F. 99; 7 E.R. 38.
(2) (1896) 2 Ch. 679.
(3) (1909) 1 Ch. 510.
(4) (1877) 96 U.S. 388, at pp. 394, 395; 24 Law. Ed. 777, at p. 779.

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the nature of such corporations as churchwardens for the conservation of the goods of a parish, the college of surgeons for the promotion of medical science, or the society . . . for . . . the study of antiquities. Its purpose is a public advantage, without any interest in its members. . . . It is, like many other savings institutions incorporated in England and in this country during the last sixty years, intended only for provident investment, in which the management and supervision are entirely out of the hands of the parties whose money is at stake, and which are *quasi* benevolent and most useful, because they hold out no encouragement to speculative dealing or commercial trading. This was the original idea of savings banks. *Scratchley, Treatise Savings Banks, passim*; *Grant, Law of Bankers*, p. 571, where, in defining Savings Banks, it is said the bank derives no benefit whatever from any deposit, or the produce thereof. Such are savings banks in England, under the statutes of 9 Geo. IV. c. 92, sec. 2, and 26 & 27 Vict. c. 87. Very many such exist in this country." See, too, *Lewis* v. *Lynn Institution for Savings* (1); *People* v. *Peck* (2). But when the question whether they were charitable arose for direct decision, the business character of the body and the degree to which it served the individual interests of the depositors prevailed over its remoter social objects, and it was held to be non-charitable (*West* v. *Pennsylvania Company of Insurance on Lives* (3)). The true view is expressed in a special report upon Savings Banks to the New York Legislature of 1868 by *E. W. Keyes*, a Deputy Superintendent of the Bank Department, although with a rhetorical emphasis to which in papers of such a nature we are not, even yet, accustomed. After summarizing the English and American history of savings banks he says :—" It will thus be seen that these institutions had their origin exclusively in a desire to ameliorate the condition of the poor, and hence the popular idea of savings banks is " (query " was ") " that they are a part of the charitable machinery of society, like asylums and homes for the indigent, whereby the poor, the weak, and the defenceless, are provided and cared for; and that as such, these enterprises are to be cherished and promoted. Whatever in the purposes of the

(1) (1889) 148 Mass. 235, at p. 243; 12 Am. St. Rep. 535, at p. 537.
(2) (1898) 157 N.Y. 51, at p. 57.
(3) (1870) 64 Penn. 195.

founders of savings banks and in the early character of these institutions may have justified this conception of them, in their results as a practical fact to-day, they have outgrown their early distinctive character as charitable institutions, and take their place proudly in the front rank among the great powers of the social State."

In this state of authoritative opinion, judicial and non-judicial, English and American, and in the conditions which now prevail, the proper conclusion appears to be that trustee savings banks organized for the purpose, and upon the plan, of the banks which are appealing in this case are not charitable institutions.

The question in each case should be answered : No.

Question answered in the negative.

Solicitors for the Hobart Savings Bank, *Malleson, Stewart, Stawell & Nankivell.*

Solicitors for the Launceston Bank for Savings, *Blake & Riggall.*

Solicitor for the Commissioner of Taxation, *W. H. Sharwood,* Crown Solicitor for the Commonwealth.

H. D. W.