[HIGH COURT OF AUSTRALIA.]

THE PUBLIC TRUSTEE OF NEW SOUTH WALES AND OTHERS . . . } APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1934.

SYDNEY, *April* 12, 13.

MELBOURNE, *May* 14.

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

Estate Duty—Exemption—Bequest to "charitable or benevolent objects benefiting in particular young children"—Certain denominational institutions indicated by testator—Power to trustees and widow to add other institutions—"Public benevolent institutions in Australia"—"Fund"—Bequest subject of other proceedings to which Commissioner not a party—Estate Duty Assessment Act 1914-1928 (*No.* 22 *of* 1914—*No.* 47 *of* 1928), *sec.* 8 (5).*

A testator directed his trustees to stand possessed of one-half of his residuary trust estate, and the income, less a one-tenth part, arising therefrom, "for charitable or benevolent objects benefiting in particular young children." He desired his trustees to confer with his widow as regards the distribution of the income between "such charitable or benevolent institutions," and after her death they were, as far as practicable, to respect her wishes with regard to those institutions, but, as an indication to his trustees and without restricting his widow's discretion to nominate other institutions in addition, he indicated, "as entitled to receive the income," four named Church of England Homes for Children "and any other homes for children founded by the Church of England having for its objects the care and control of children," with liberty to his trustees to add, at the request of his widow, "another or other institutions benefiting young children." On an originating summons taken out by the trustees, the Supreme Court of New South Wales declared that one-tenth of

Sec. 8 of the *Estate Duty Assessment Act* 1914-1928 provides:—"(5) Estate duty shall not be assessed or payable upon so much of the estate as is devised or bequeathed . . . for religious, scientific, or public educational purposes in Australia or to a public hospital or public benevolent institution in Australia or to a fund established and maintained for the purpose of providing money for use for such institutions or for the relief of persons in necessitous circumstances in Australia. . . . (8) In this Act, 'public educational purposes' includes the establishment or endowment of an educational institution for the benefit of the public or a section of the public."

H. C. OF A. 1934. PUBLIC TRUSTEE (N.S.W.) v. FEDERAL COMMISSIONER OF TAXATION.

the half share must be held in trust for two charitable institutions to which the testator had directed one-tenth of the income of the share to be paid, declared charitable trusts, in favour of the four named Homes and such others as might be admitted by the trustees under the terms of the will, as to half the remaining nine-tenths and an intestacy as to the other half. In assessing the estate to estate duty, the Federal Commissioner of Taxation included in the assessable value the value of the half share of residue less one-tenth thereof.

Held that, whether the will was interpreted in accordance with the order of the Supreme Court or independently of that order, the assessment was correct, and sec. 8 (5) of the *Estate Duty Assessment Act* 1914-1928 did not operate to exempt any part of the amount which the Commissioner had included in respect of the half share.

Per Starke J.: As the Church of England Homes named by the testator were not founded, organized or maintained by or under or in connection with any public authority or managed by its representatives, they were not "public" benevolent institutions within the meaning of sec. 8 (5) of the *Estate Duty Assessment Act*.

CASE STATED.

On an appeal to the High Court by the Public Trustee of New South Wales, William Beaumont Small and Annie Rebecca Small, executors and executrix of the will of William Paul Small deceased, from an assessment made by the Federal Commissioner of Taxation under the provisions of the *Estate Duty Assessment Act* 1914-1928 of estate duty payable by them in respect of the estate of the deceased, *Evatt* J., at the request of the parties, who admitted the facts set out therein, stated for the opinion of the Full Court, a case which was substantially as follows:—

1. William Paul Small died on 30th June 1929, having duly made his last will on 11th June 1928.

2. Probate of his will was on 3rd October 1929 granted to the Public Trustee of New South Wales, William Beaumont Small and Annie Rebecca Small, the executors and trustees therein named.

3. Clause sixteen of the will was in the words and figures following:—"Subject to the directions hereinbefore given to my trustees with regard to the disposition of moneys and annuities out of my residuary trust estate I direct my trustees after making due provision for all outgoings hereinbefore provided for to divide my residuary trust estate into two equal shares and with regard to one of such shares I direct my trustees to stand possessed of the same

and the income derived therefrom for charitable or benevolent objects benefiting in particular young children and I desire that my trustees shall confer with my wife during her lifetime from time to time as regards the distribution of income which is to be made between such charitable or benevolent institutions, and after her death shall as far as practicable respect her wishes and desires with regard to such institutions but as an indication to my trustees and without restricting my wife's discretion to nominate some one or more institution besides those hereinafter named to benefit in such manner in the residue I now indicate the following institutions as entitled to receive the income from one-half of my residuary estate viz.: The Burwood Children's Home, Weldon Street, Burwood, conducted by the Church of England; The Church of England Home for Children known as 'Havilah' near Wahroonga and the Church of England Home for Boys at Carlingford and also the Church of England Home for Girls now situate at Glebe but shortly to be removed to Carlingford and any other homes for children founded by the Church of England having for its [*sic*] objects the care and control of children with liberty nevertheless if my wife shall so direct and require my trustees to admit another or other institutions benefiting young children to the list of such institutions to share in such one-half of the income of the residue of my estate provided always that at least one-tenth of the income to be derived from such one-half residue shall at all times be divided equally by my trustees amongst the following institutions: The Home of Peace for the Dying, Addison Road, Petersham, and the Home for Incurables Ryde and I authorise and empower my trustees to accept the receipt of the matron trustees or superintendents for the time being of such homes as a good and effectual receipt and discharge for the income so to be paid for their benefit."

4. The testator left him surviving the following children and no more, namely, William Beaumont Small and Hilda Beaumont Moginie.

5. Annie Rebecca Small, widow of the testator, on 4th December 1930, by her attorney William Beaumont Small, wrote to the Public Trustee a letter which is, omitting formal parts, in the words and figures following:—"Dear Sir,—Tentative Only—Estate of W. P.

H. C. OF A. 1934.

PUBLIC TRUSTEE (N.S.W.) v. FEDERAL COMMISSIONER OF TAXATION.

Small (Decd.)—Regarding the sum of £700 of income for the year ended 30th June 1930 to be divided amongst the benevolent institutions indicated in the will, I now return you the correspondence herein. The will provides that at least one-tenth of the income is divided equally between the Home of Peace for the Dying, and Ryde Home for Incurables—that is, £35 to each institution. If it is within the ambit of the will, as I am personally very interested in, and am on the committee of The Home of Peace, I would like to allocate to them an extra £30. This means that £100 of the income would be set aside for purposes other than for the benefit of children, i.e., £65 to the Home of Peace for the Dying and £35 to the Home for Incurables. It is necessary, however, for you to advise me whether any distribution to these two institutions must be made in equal moieties. As to the remaining £600, I desire it should be allocated as follows:—The Church of England Home for Girls, formerly at Glebe, now at Carlingford: £150. The Church of England Home for Boys at Carlingford: £150. The Havilah Home for Children at Wahroonga: £150. The Burwood Children's Home, Weldon St., Burwood: £100. The Deaconess Children's Home, formerly at Marrickville, now at Albert Road, Strathfield: £12 10s. The Diocesan Church Home, Goulburn: £12 10s. The St. Christopher's Church Home for Children, Young: £12 10s. Millewa Church of England Home for Boys: £12 10s. I direct your attention, however, to the letter from the Goulburn people, which infers that they are entitled to receive (a share of) the income from that source. I have always believed, and still do, that the actual institutions that were to receive part of such annual sum should be determined by my late husband's trustees, after conferring with me. If this is clear, then I will confirm the tentative allocation indicated for the year ended 30th June 1930, but if there is going to be any fuss about it, then the matter had better be referred to the Court. In respect to the four Homes indicated above, but not specifically mentioned, in the will, I have very happy memories both of Goulburn and Young, in both of which towns I have spent some time—as to Millewa, this was the home of the late Mr. and Mrs. H. B. Pratten, with both of whom I was well acquainted; and the Deaconess' Home is under the control of the Committee who direct the Home of Peace for the

Dying. I have every sympathy for the objects of the Junior Red Cross Society, but in view of the small amount available this year, have decided not to go outside such relevant objects which are fostered directly by the Church of England. Next year, of course, I may entirely alter the scheme of distribution." The trustees of the will of the above-named testator have accordingly distributed the sum of £600 in the manner indicated in the letter, except that after consultation with Annie Rebecca Small the sum of £100 was divided equally between the Home of Peace for the Dying and the Home for Incurables instead of in the proportion of sixty-five pounds to thirty-five pounds as originally suggested by her.

5. (*a*) By an order of the Supreme Court of New South Wales in its equitable jurisdiction, dated 10th March 1933, made on an originating summons No. 1001 of 1932 in which the plaintiff was the Public Trustee of New South Wales and the defendants were William Beaumont Small, Hilda Beaumont Moginie, Annie Rebecca Small, Church of England Children's Homes Burwood, the Venerable Archdeacon William Apedale Charlton, Alfred Ernest Finch, Dorothy Mary Amiss, Mysie Margaret Amiss and His Majesty's Attorney-General in and for the State of New South Wales, the Court did, in so far as the same is material, order and declare as follows :— "And this Court doth appoint the defendant Alfred Ernest Finch to represent the Church of England Homes mentioned by name in paragraph sixteen of the said will other than the Church of England Children's Homes Burwood and the Venerable Archdeacon William Apedale Charlton to represent the Millewa Homes for Children Brunswick Parade Ashfield, St. Christopher's Church House Young, Deaconesses' Children's Home Albert Road Strathfield and St. Saviour's Children's Home Goulburn for the purposes of this Summons And this Court . . . . doth declare that one-tenth of the one-half of the residuary estate of the testator in paragraph sixteen of the said will mentioned must be held by the trustees in trust for the two charities named in the said paragraph the Home of Peace for the Dying Addison Road Petersham and the Home for Incurables Ryde and that one-half of the remaining nine-tenths of the said moiety will go as on an intestacy to the next-of-kin of the testator and that the other one-half of the said nine-tenths must

H. C. OF A. 1934. PUBLIC TRUSTEE (N.S.W.) v. FEDERAL COMMISSIONER OF TAXATION.

be held on trust for the four other charities named in the said paragraph of the said will and therein described as 'The Burwood Children's Home Weldon Street Burwood conducted by the Church of England' (being the defendant the Church of England Children's Homes Burwood) 'The Church of England Home for Children known as Havilah near Wahroonga the Church of England Home for Boys at Carlingford and the Church of England Home for Girls now situate at Glebe but shortly to be removed to Carlingford' and now situate at Carlingford and for such other charitable objects benefiting in particular young children as may from time to time be or have been admitted by the trustees as in the said clause of the said will mentioned . . . And this Court doth further order and declare . . . that the said four institutions mentioned in clause sixteen of the said will and those institutions which may be duly admitted from time to time in accordance with this order will be entitled to the income of the said shares of residue in such shares and proportions as the trustees for the time being of the said will may determine after consultation with the said defendant Annie Rebecca Small."

6. The Church of England Homes named in clause 16 of the will other than the Burwood Children's Home, Weldon Street, Burwood, are governed according to the constitution of the Church of England Homes Diocese of Sydney. The objects of the Homes as set forth in the constitution are 3 (*a*) (*b*) (*c*) and (*d*) hereinafter set forth, but the Homes are only used for the purpose of carrying out the object numbered 3 (*a*) (the provision for women having long since been discontinued). "3. (*a*) The establishment and maintenance of Homes and Hostels for, and the care education and training of orphans, neglected, necessitous or friendless children, and such other children as may be placed in the charge of the Society by parents, guardians or other persons having authority so to do. (*b*) The establishment and maintenance of Homes for aged women in necessitous circumstances. (*c*) To solicit collect and provide money for the above purposes and for grants or subsidies to other similar committees of the Church of England in the State of New South Wales. (*d*) Such other work for the benefit assistance or uplifting of women and children as the Committee of the Society may from time to time determine." The constitution came into force during

the year 1930. Prior to that date and at the date of the death of the testator, the Church of England Home for Children known as Havilah near Wahroonga was governed according to the constitution of the Church of England Committee for Homes and Hostels for Children. The objects of the committee include the following: To establish and carry on homes for orphans, neglected, necessitous or friendless children. Children of all denominations were admitted to the Homes and were given instruction in the principles of the Church of England. The Homes were founded by the Church of England Temperance Society in 1885 and are managed by an executive committee and officers who act in an honorary capacity. A superintendent and matron are in charge of the Boys' Home and a matron is in charge of the Home for Girls. These officers are paid. Portion of the income of the Homes and of all the Homes hereinafter mentioned consists of sums paid by way of family endowment in respect of those children whose parents do not contribute 5s. per week to their maintenance. During the last three years about £8,043 was received by the Homes from parents and about £7,729 from the Family Endowment Fund. The average weekly cost of upkeep of children in the said home is 10s. 8d. per child. Amounts received from parents and guardians during the last three years have in no year averaged more than 10s. per week in respect of any one child, but in respect of one child 15s. per week is being received from the Repatriation Department. In respect of one hundred and sixty-two children in the Homes payment is being made and in respect of one hundred and eighty-three children therein no payment is being made. At the Girls' Home there is a modern fully equipped school with three teachers. The school is inspected by Inspectors for the Education Department of New South Wales.

7. At "Havilah," Wahroonga, there is a Kindergarten with two teachers for the younger children. The older boys at the Homes attend the State schools. By or under the direction of the matron the children at the Home at "Havilah" are given at least ten hours per week on Bible stories, singing of hymns and short addresses on religious subjects which are given for terms of about twenty minutes morning and evening as well as other times. Those children over the age of six years attend the State schools. The remainder of the

H. C. OF A. 1934. PUBLIC TRUSTEE (N.S.W.) v. FEDERAL COMMISSIONER OF TAXATION.

children maintained at the Home, who constitute three-fourths of the whole, receive their education at the Kindergarten situated at the Home. No charge was, or is, made for admission except where a parent or some other person was in a position to make some payment. The Homes are supported mainly by subscriptions from the public, contributions from parents and family endowment and by the proceeds of entertainments given at the Homes and to some extent by the sale of flowers, by rent of tennis court and by the sale of live stock and with interest from investments. Such investments represent moneys bequeathed to the Homes from time to time and consist of Government stocks and bonds and Australian Gaslight shares.

8. The Burwood Children's Home, Weldon Street, Burwood, is and was at the date of the death of the testator incorporated as a company limited by guarantee. Children of all denominations are admitted to the Home; the children attend the State schools in the neighbourhood and the Sunday schools connected with the Parish Church and are taught the principles of the Church of England. At the Home the girls are trained in domestic duties and the boys gardening. The Home is maintained by public subscription, by family endowment, by income from investments, which investments represent moneys bequeathed to the Home from time to time, and consist of Commonwealth bonds, money on fixed deposit and Metropolitan Water Sewerage and Drainage Board debentures, and by contributions from parents or relatives of children who are in a position to make contributions; no charge is made as a rule but where a parent is living he or she makes such contribution as he or she is able, according to an agreement. For the twelve months period ending on 30th September 1931 maintenance contributions provided thirty-one per cent. of the total revenue and for the ensuing six months twenty per cent. The Home is open to children of all denominations who are in necessitous circumstances, and the children are given instruction in the principles of the Church of England. Before a child is admitted to the Home the parent thereof has to sign an application form accepting the condition that the child shall be brought up in the doctrines and practices of the Church of England and to state what sum weekly he or she will pay for the support of

the child. The objects of the Home are set out in the memorandum of association and include the following: "3. (*a*) To take over and carry on at Burwood near Sydney (and/or elsewhere) in the State of New South Wales for boys and girls of poor or destitute circumstances the establishments and homes formerly known as The Children's Home afterwards as The Children's Homes and as at present carried on in Burwood aforesaid under the style of the Church of England Children's Homes Burwood and the properties owned or used in connection therewith. (*b*) To provide board lodging and attendance and all necessaries and conveniences for children admitted to the said Homes. . . . (*e*) From time to time as it may be thought desirable to found or take over and carry on or amalgamate with any similar establishment for boys and girls and if thought desirable to affiliate the Homes with any others of a similar nature provided such establishment shall prohibit the distribution of its income and property among its members to an extent at least as great as is imposed on this association under or by virtue of clause 4 hereof. . . . (*h*) To undertake and execute any trusts the undertaking whereof may seem to be in the interest or for the benefit of the association or in furtherance of the objects thereof." Amounts received from parents and guardians of children for the support of any one child in the Homes ranged from nothing to 12s. 6d. per week during each of the years 1931 and 1932, and from nothing to 10s. during the year 1933. The number of children in the Home during those years was 39, 36 and 32 respectively, and in respect of those children payments were made by 24, 18 and 15 parents respectively. The average cost per week of the maintenance of each child in the Home during those years was 16s., 12s. 3d. and 15s. 4d. respectively and, in addition to the above, friends of the Home sent gifts of food and clothing of which no money value is recorded.

9. The Church of England Home for Boys and the Church of England Home for Girls, both of which are at Carlingford, are and were at the date of the death of the testator Homes for boys and girls in necessitous circumstances and carried on by the Church of England in accordance with the constitution of the Church of

H. C. OF A. 1934. PUBLIC TRUSTEE (N.S.W.) v. FEDERAL COMMISSIONER OF TAXATION.

England Homes Diocese of Sydney above mentioned. The superintendent is a licensed lay reader and religious instruction is given by him and the matron. The boys at the Homes attend the State schools in the neighbourhood, the girls receive their education at the Homes up to the qualifying-certificate standard, being taught by certified teachers. The boys and girls are educated in the principles of the Church of England but children of all denominations are admitted. The Homes are supported mainly by public subscription and by the proceeds of entertainments given in aid of the Homes, and by payments made by parents; also, recently, by income from a pig farm which has since been sold. The average cost of maintenance per child is £26 per annum. Each parent who places a child in the Homes is asked to contribute from 5s. to 7s. 6d. per week but in a suitable case, if a parent is without means, a child is accepted free.

10. Other than the Home at Burwood none of the Homes is incorporated. All are carried on under the supervision of the Church of England and a religious education is given to pupils.

11. The Lisgar Children's Home, which was established prior to the year 1897, was in that year taken over by the Council of the Deaconesses' Institution and has since then been carried on by it as the Deaconesses' Children's Home. The Deaconesses' Children's Home is vested in the trustees of the said Deaconesses' Institution in accordance with an order of the Supreme Court of New South Wales. It is a Home for girls, who are orphaned or who have only one parent living, that parent being unable to look after the child. Only destitute children are admitted. The Home is carried on in accordance with the constitution of the Deaconesses' Institution. The Deaconesses' Home is quite separate from the Children's Home and the funds thereof are kept separate. The objects of the Home are as follows: "4. (*a*) The training of women as Deaconesses and Missionaries of the Church of England to engage in religious and charitable work in Parishes in the Diocese of Sydney and elsewhere and for missionary work in Australia and elsewhere. (*b*) To visit minister to and relieve the sick and destitute. (*c*) To enter into arrangements for assisting and assist the proprietors of 'The Lisgar Children's Home' in carrying on managing controlling and directing

the said Home or any other Home for the care of children. (*d*) To assist the trustees in carrying on managing controlling and directing the Home of Peace for the Dying, Marrickville, or any other Home for the care of the sick and destitute. (*e*) To give secular and/or religious instruction or education wherever opportunity may offer. (*f*) Generally to undertake carry on or engage in all kinds of work of a religious or charitable nature." Children of any denomination are admitted, but while in the Home are brought up in the faith and taught the doctrine of the Church of England. The younger children in the Home have their education in the Home, the teaching being done by a certificated teacher, the girls of school age attend the State schools and the older children are given a specialised training in domestic work. There is no age limit except that infants in arms and children over fourteen years of age are not received and the children usually leave at fifteen years but occasionally remain in the Home until they are eighteen years of age. Ex-students are permitted to stay at the Home as a matter of grace when out of employment. The Home is controlled by a matron, who is an ordained deaconess of the Church of England, a sub-matron, children's nurse and a lady gardener who is also a kindergarten teacher. The rector is chaplain of the Home. The matron conducts prayers and bible and confirmation classes daily at the Home. The Home is maintained by public subscription and the subscribers elect the committee of management. The average weekly cost of upkeep is 11s. 9d. per child. The average number of children in the Home is between forty-nine and fifty. Contributions from parents are expected where possible but are not a condition of admission to the Home. Contributions by parents or guardians in respect of a child are rarely at as high a rate as 11s. 9d. per week but sometimes are at as high a rate as 12s. 6d. per week. In the year 1931 the average of the maximum contribution in respect of any one child was 10s. per week, and in 1932 and 1933, 7s. 6d. per week. In 1931, 1932 and 1933 respectively the parents of 25 children out of 48 inmates, of 18 children out of 43 inmates and of 12 children out of 39 inmates, contributed to the upkeep of their children in the Home. The principal sources of income are public subscriptions, payment from parents who can afford to make payments and

H. C. OF A. 1934.

PUBLIC TRUSTEE (N.S.W.) v. FEDERAL COMMISSIONER OF TAXATION.

payment by the State under the *Family Endowment Act*. The children are trained for domestic service. For the twelve months' period ended 30th June 1931 maintenance contributions provided thirty-seven per cent. of the total revenue.

12. The Millewa Church of England Home for Boys is a home for boys carried on at Brunswick Parade, Arthur Street, Ashfield. Boys eligible for admission are boys between the ages of five and fourteen years who have lost one or both parents and are in necessitous circumstances, that is, that the one parent living is unable to provide for the child or has left it not under parental control. Children of all denominations are admitted but religious training is the teaching of the Church of England. Before admission the person applying that a child be admitted to the Home is required to state the amount offered in payment, but payment is not made a condition of entry into the said Home. Four hours per week at the Home on week-days are devoted to prayers and talks on religious subjects by the matron, and the boys attend Sunday school. The Home is carried on by a matron and sub-matron. The matron is under the control of a committee of Church of England ladies who are elected at the annual meeting. The matron supervises the moral and religious training of the boys. The boys live at the Home but attend the State school. About 20 children is the average number housed in the Home. The sources of income of the Home are public subscriptions, payments under the *Family Endowment Act* and payments from the parents of boys who are able to contribute something to their support. During the last three years in respect of 14, 14 and 9 children respectively contributions were made, and in respect of 7, 7 and 9 respectively no payments were made. At the last annual balancing the proportion of contributions of parents or guardians to the total revenue of the Home was twenty-two and one-half per cent. No parent contributes more than the actual cost of maintenance of his child, some contribute much less and some nothing. The amounts received from parents during the fourteen years of the existence of the Home is £4,320, averaging £18 per boy annually. The cost of maintenance of the Homes for the same period was £10,054 or £35 per boy. During the last three years the cost of maintaining each child per week was 14s. 11d., 13s. 5d.

and 12s. 4d. respectively, exclusive of the cost of any building repairs. In respect of one child during that period 12s. 6d. per week was received at a time when that amount did not cover the cost of maintenance. In respect of no other child was as much paid. The Home is carried on in accordance with the constitution of the Anglican Home for Children. The objects are as follows :— "2. (*a*) To provide and carry on Homes and Hostels within the Diocese of Sydney in connection with the Church of England, for children of any denomination or religion, either temporarily or permanently without homes, or not under parental control, where they may be carefully trained morally and mentally and physically, and instructed in the faith and doctrines of the Church of England. To insure the requisite environment and family life and to avoid the character of an institution each Home and Hostel is not intended to accommodate, except in exceptional cases, more than twenty children. (*b*) To provide and carry on country or seaside Homes where children may be sent for change of air or convalescence or special treatment or training, or where sick or delicate children may be taken in for limited periods. (*c*) Should funds permit, to assist in the establishment and carrying on of Homes for Children on the above lines in any Diocese in the Province of New South Wales, other than in the Diocese of Sydney, subject to the approval of the Bishops of the respective Dioceses, by subsidising local efforts, or by help in other ways, such Homes to be considered as Associate Homes. While no financial responsibilities will be undertaken in connection with such Associate Homes, they will be helped when circumstances make it practicable or desirable. (*d*) To establish and carry on propaganda work for the purpose of arousing members of the Church of England to a sense of the importance of establishing Church Homes, Hostels and Schools, but so that such propaganda work shall be undertaken and carried on only by means of funds specially contributed for that purpose. (*e*) To solicit, collect and provide funds for the above purposes or any of them. (*f*) To acquire in the name of the trustees or trustee by purchase, lease, or otherwise lands and buildings or other property, real or personal, and to sell, mortgage, lease, underlease, surrender, exchange, partition or otherwise dispose of such real or personal property or any part

H. C. OF A. 1934.

PUBLIC TRUSTEE (N.S.W.) v. FEDERAL COMMISSIONER OF TAXATION.

thereof, and to erect, add to, alter or pull down any buildings upon such lands as the executive committee may direct. (*g*) To invest moneys, not immediately required for expenses, in such investments, and upon such securities (including fixed deposits in any bank or banks) and for such terms and times, and to vary any such investments as the executive committee may decide. (*h*) To promote in any way which the Association may think desirable the moral and material welfare of any children who are without suitable homes, or who are not under proper parental or other control, including their training in farming, market gardening, fruit growing and preserving, laundry work and/or other suitable industries, and with power to deal with or otherwise dispose of the produce of such industries." The Home is used for the purpose of carrying out the objects hereinbefore set forth, numbered 2 (*a*) to (*h*).

13. The Diocesan Children's Home, Goulburn, is more accurately described as "St. Saviour's Home for Children," Goulburn, in this State, and is and has been since January 1932 carried on under the control of the Cathedral Council of Goulburn by members of the order known as the Community of the Holy Name, which is an Order of the Church of England and is open to destitute children of any denomination, but it is not a condition of admission that the parents of children shall be unable to provide for them. The official visitor of the Home is the Right Reverend the Lord Bishop of Goulburn. Religious instruction consists of attendance at chapel night and morning and religious instruction for half an hour five evenings a week. It is in charge of a sister of a religious order of the Church of England who is appointed by mutual agreement between the sisterhood and the Cathedral Council. The children who are admitted to the Home attend State schools in Goulburn but receive religious education in the Home. The object of the Home is the care of children and the training of young women for work in the Church of England in Australia and Tasmania. The parents of children are not required to and do not sign any document on the admission of their children to St. Saviour's Home. It is not a condition of admission to the Home that payment will be made by their parents towards their upkeep. In 1931 contributions

towards the upkeep of 4 children out of 17 inmates were received, in 1932, for 3 out of 13 and in 1933, for 4 out of 12, the maximum weekly amount received in each year being 10s. in respect of any one child. The total sum received from parents during the year 1931 was £78 10s. and during the year 1932, £29 7s. The other sources of income of the Home are subscriptions and donations, Government subsidy and income from investments; the investments represent moneys bequeathed to the Home from time to time and consist of moneys on mortgage and stocks. The average weekly cost of maintenance of each child is 8s.

14. St. Christopher's Home, Young, is a home for young girls conducted by and under the direction of St. John's Parish Church of England, Young, and is and has been since 1st December 1930 vested in the Church of England Property Trust, Diocese of Goulburn, upon trust that the same shall be used and occupied as a Home for the care of children and for the training of young women for work in the Church of England in Australia and Tasmania. The Home was founded by Miss Alice Maria Kitchen about the year 1928, shortly prior to the death of the testator, and was managed by her until shortly before her decease about April 1932. Until her decease Alice Maria Kitchen resided at the Home and paid a part of the expenses of the Home, the balance thereof being covered by donations from the public and the parishes of the Diocese of Goulburn and subsidies under the *Family Endowment Act*. The Home is used to train young girls for the service of the Church and to care for homeless children who have insufficient parental care. Among the children admitted to the Home are girls whose parents live in the bush and are poor but not destitute and who desire such children to go to school. The maximum amount contributed by parents in respect of a child was £1 5s. per week in 1931 and 1932 and 15s. per week in 1933. The revenue of the Home is derived from public subscriptions and donations obtained from appeal to the public, principally from members of the Church of England in Young and other parishes and from payments made by parents. The annual cost of maintenance of the Home is between £500 and £600 and the estimated cost of maintenance of each child is £40. Parents are

H. C. OF A. 1934.

PUBLIC TRUSTEE (N.S.W.) v. FEDERAL COMMISSIONER OF TAXATION.

asked to contribute what they can afford but there is no fixed charge. Some parents contribute nothing, others very little. At present two parents only contribute anything and no parents contribute more than the actual cost of maintenance. A small sum is also received from the sale of articles made in the Home. The Home is for Church of England girls, but if space is available any child is taken in irrespective of their religion but all children are brought up in accordance with the rites of the Church of England.

15. The estate of the testator has been assessed for Federal estate duty by the Deputy Commissioner of Taxation at a net assessable value of £157,243, on which duty has been assessed at the rate of fifteen per cent.

16. The amount claimed for duty by the Deputy Commissioner is £17,987, that is £23,586 9s., less an amount of £5,599 9s. being a rebate allowed on the shares in the estate bequeathed to the widow and children of the testator.

17. Included in the assessable value is the sum of £33,770, being the value of one-half of the residuary estate of the testator less one-tenth of the one-half, which one-tenth is bequeathed by the will to the Home of Peace for the Dying, Addison Road, Petersham, and the Home for Incurables, Ryde.

18. The executors and executrix, being dissatisfied with the assessment, duly lodged with the Commissioner of Taxation an objection against the assessment. They claimed that the amount of £33,770, being one-half of the residuary estate less one-tenth of the said one-half, should not be included therein and that the assessment should be reduced by the amount of duty attributable to the said sum.

19. The Commissioner for Taxation considered the objection and disallowed the same.

The question stated for the opinion of the Full Court was :—

Whether estate duty is assessable or payable under the *Estate Duty Assessment Act* 1914-1928 upon the one-half of the residuary estate less one-tenth thereof in clause sixteen of the said will mentioned or any part thereof and if so what part ?

Bonney K.C. (with him *Nicholas*), for the appellants. The decision by *Long Innes* J. in the originating summons is not binding on this Court because the Crown, the respondent in this appeal, was not a party to the summons, which was brought to determine the rights of beneficiaries *inter se* (*In re Sassoon* (1)). For the purpose of determining the question of exemption under sec. 8 (5) of the *Estate Duty Assessment Act* 1914-1928, this Court can disregard the decision in the summons. Therefore, the question as to the true meaning and effect of the will is open for argument by the parties to this appeal. On the true construction of the will there is a gift to public benevolent institutions in Australia within the meaning of sec. 8 (5). That is one reason why the bequest as a whole is a good charitable bequest. In this connection, the expression " charitable or beneficial objects benefiting in particular young children " as used by the testator is very material. The words " in particular " show that the testator's intention was to confer a benefit upon children but, in particular, young children. It is apparent from the will construed as a whole that the testator used the word " objects " synonymously with the word " institutions," and *vice versa*. The provision in the will conferring a discretionary power upon the testator's wife and trustees was inserted as an aid to the interpretation of his wishes, and operates as an indication of the class to which they must, in exercising their discretion, confine themselves. Even if there were not any reference to children, the gift, being to charitable or benevolent institutions, would still be a good charitable gift. Although a gift for charitable or benevolent purposes is not a good charitable gift, a gift to charitable or benevolent institutions is a good charitable gift (*Perpetual Trustee Co.* v. *Federal Commissioner of Taxation* (2)). The benefits conferred by the institutions specifically named by the testator are exclusively for children, and to a large extent are confined to young children. All those institutions are situate within New South Wales and hence are " in Australia." All the features associated with the gift are local in character. A charitable gift which is not expressed to be for the benefit of persons or institutions in other countries should be limited, in its application,

(1) (1933) Ch. 858.
(2) (1931) 45 C.L.R. 224, at pp. 232, 233, 235, 238-241.

H. C. OF A. 1934.

PUBLIC TRUSTEE (N.S.W.) v. FEDERAL COMMISSIONER OF TAXATION.

to local objects (see *In re Mirrlees' Charity*; *Mitchell* v. *Attorney-General* (1) and *Glasgow and West of Scotland Society for the Prevention of Cruelty to Animals* v. *National Anti-Vivisection Society* (2)). For the purpose of exemption from duty it is sufficient if the institution to which the gift is given is substantially an institution as described in sec. 8 (5) (*Commissioners of Inland Revenue* v. *Forrest* (3); *Institution of Civil Engineers* v. *Inland Revenue Commissioners* (4); *Minahan* v. *Commissioner of Stamp Duties* (5)).

Sir *Thomas Bavin* K.C. (with him *A. M. Cohen*), for the respondent. The one question for the Court is whether there is, on the proper construction of the will, a definable part of the corpus of the estate which comes within the exemption provided by sec. 8 (5). The matter of the construction of the will has been finally dealt with, on the application of the appellants, the trustees of the will, by another Court of competent jurisdiction, and the decision by that Court has not been appealed from, but, on the contrary, has been acted upon. In these circumstances this Court should be reluctant, especially on the application of the appellants, to construe the will differently from the way in which it was construed by the other Court.

[DIXON J. referred to *In re Sassoon* (6).]

The appellants, who, other than the Public Trustee, are beneficiaries under the will, are bound by the decision of *Long Innes* J., and it is not now open to them to argue that the whole of the property bequeathed is a good charitable gift.

[DIXON J. referred to *Verschures Creameries Ltd.* v. *Hull and Netherlands Steamship Co.* (7).]

The mere interpretation of the word "objects," as used by the testator, as meaning "institutions," and *vice versa*, would not render the gift a good charitable gift (*Attorney-General for New Zealand* v. *Brown* (8)), as the trustees in their discretion might apply the whole of the funds, in those circumstances, to purposes

(1) (1910) 1 Ch. 163.
(2) (1915) S.C. 757.
(3) (1890) 15 App. Cas. 334.
(4) (1932) 1 K.B. 149.
(5) (1926) 26 S.R. (N.S.W.) 480.
(6) (1933) Ch., at p. 872.
(7) (1921) 2 K.B. 608, at p. 612.
(8) (1917) A.C. 393.

that were benevolent as distinguished from charitable (*In re Jarman's Estate*; *Leavers* v. *Clayton* (1); *Attorney-General for New South Wales* v. *Adams* (2)). A gift for charitable and benevolent purposes, or objects, as here, is bad. The addition of the words "benefiting in particular young children" does not make any difference so far as the question whether the object is charitable or not is concerned, as, under the terms of the bequest, it could be applied, in the discretion of the trustees, to a very limited class of children who need not necessarily be in necessitous circumstances (*In re Macduff*; *Macduff* v. *Macduff* (3); *Halsbury's Laws of England*, 2nd ed., vol. 4, p. 122). There are institutions which, although conducted for the benefit of children, cannot be classed as charitable institutions, because they do not cater for a substantial portion of the community; also some of those institutions do not cater for the education or religious training of the children.

[STARKE J. referred to *Grimond* (*or Macintyre*) v. *Grimond* (4).]

In effect the testator has allowed another person to make his will for him. A general charitable bequest cannot be read into the first words of the will merely because subsequent words indicate institutions to be assisted. Although there may be a valid charitable bequest to the four named institutions as to part of the residuary estate, as found by *Long Innes* J., such part of the residuary estate as is not covered by a valid bequest goes to the next of kin as on an intestacy (*In re Clarke*; *Bracey* v. *Royal National Lifeboat Institution* (5)). Whether the decision of *Long Innes* J. is right or wrong this Court should not depart from that construction, as it was made by a Court of competent jurisdiction and has been acted upon. The decision that a part of the residuary estate went as upon an intestacy cannot now be altered by a decision of this Court. The sum of £33,770 referred to in par. 17 of the case stated is wholly liable to tax. There is no definable part of the estate, as required by sec. 8 (5) of the Act, devised or bequeathed for "religious, scientific, or public educational purposes in Australia, or to a public benevolent institution in Australia" within the meaning of that sub-section, nor is there any bequest to a "fund" within the

(1) (1878) 8 Ch. D. 584.
(2) (1908) 7 C.L.R. 100.
(3) (1896) 2 Ch. 451.
(4) (1905) A.C. 124, at p. 126.
(5) (1923) 2 Ch. 407.

H. C. OF A. 1934.

PUBLIC TRUSTEE (N.S.W.) v. FEDERAL COMMISSIONER OF TAXATION.

meaning of the sub-section. The gift here was directed to institutions. The exemption in sec. 8 (5) applies only to existing institutions. The discretionary power conferred upon the trustees is wide enough to permit of the inclusion by them of institutions not necessarily public benevolent institutions, not necessarily in Australia, and whether now in existence or not. Even if the gift be good as regards the four named institutions, no definable part of the estate has been bequeathed to them either collectively or separately (*Baker* v. *Federal Commissioner of Taxation* (1)). A public benevolent institution is an institution for the relief of necessitous poverty (*Perpetual Trustee Co.* v. *Federal Commissioner of Taxation* (2)). The question before the Court in *In re Mirrlees' Charity*; *Mitchell* v. *Attorney-General* (3) was as to the construction of a scheme of the Court, and not as to the construction of a will; therefore that case is not applicable.

Bonney K.C., in reply. The order made by *Long Innes* J. in the originating summons has no effect in these proceedings. As between a taxing authority and the person or estate upon whom or which tax is assessed, that authority is not bound by an interpretation placed upon a will after the testator's death in proceedings to which it was not a party (*In re Sassoon* (4)).

[McTIERNAN J. referred to *Attorney-General and Humber Conservancy Commissioners* v. *Constable* (5).]

The question remains open for decision by this Court, which is a Court of much higher authority than the Court which heard the originating summons.

[McTIERNAN J. referred to *Jones* v. *Jones* (6).]

That is a case which comes within the accepted principles of *res judicata*.

[Sir *Thomas Bavin* K.C. referred to *Dexters Ltd.* v. *Hill Crest Oil Co. (Bradford) Ltd.* (7).]

In that case the rights of the Crown were not concerned. *Long Innes* J. was not asked to, nor did he, decide the question whether the gifts were gifts to "public benevolent institutions."

(1) (1932) Unreported. [Noted, 6 A.L.J. 111.]
(2) (1931) 45 C.L.R. 224.
(3) (1910) 1 Ch. 163.
(4) (1933) Ch., at pp. 880, 881, 893.
(5) (1879) 4 Ex. D. 172.
(6) (1928) 40 C.L.R. 315.
(7) (1926) 1 K.B. 348.

Attorney-General for New Zealand v. *Brown* (1) and *Attorney-General for New South Wales* v. *Adams* (2) show that the expression " benevolent institution " is an expression which has not a certain legal meaning but one which may have a meaning changing with localities or with the associations of the context in which it is found. The latter part of clause 16 of the will is a definite indication of an overriding charitable intention (*Hunter* v. *Attorney-General* (3)). Support for this proposition is found in *In re Christchurch Inclosure Act* (4) which shows also (at pp. 530 *et seqq.*) what is a sufficient " public " aspect. The children intended to be benefited constitute a sufficiently substantial section of the community. Where a general charitable intention is indicated, the words and expressions used by the testator should be construed so as to maintain that charitable intention (*In re Ludlow*; *Bence-Jones* v. *Attorney-General* (5); see also *In re Douglas*; *Obert* v. *Barrow* (6)). A gift, to be charitable, need not necessarily be for the benefit of the poor to the exclusion of others (*Verge* v. *Somerville* (7)).

[McTIERNAN J. referred to *In re Clarke*; *Bracey* v. *Royal National Lifeboat Institution* (8).]

The expression " necessitous circumstances " in sec. 8 (5) is not restricted to poverty; young children are of their very nature necessitous persons. Provision is made in sec. 8 (8) for " future " institutions; the requirement in this respect is that the institution must be established when the gift is made available to it. The absence of an express contrary intention from the will shows that the gift was to be applied for the benefit of " local " children, that is to say, children " in Australia " as required by sec. 8 (5) (*Tudor* on *Charities*, 5th ed. (1929), pp. 185, 186; *Tyssen's Law of Charitable Bequests*, 2nd ed. (1921), pp. 171-180).

Cur. adv. vult.

May 14.

GAVAN DUFFY C.J. William Paul Small by his will dated 11th June 1928 directed his trustees to stand possessed of one-half share of his residuary trust estate and the income derived therefrom on certain trusts. The question for our consideration is whether estate

(1) (1917) A.C. 393.
(2) (1908) 7 C.L.R. 100.
(3) (1899) A.C. 309.
(4) (1888) 38 Ch. D. 520.
(5) (1923) 93 L.J. Ch. 30.
(6) (1887) 35 Ch. D. 472.
(7) (1924) A.C. 496.
(8) (1923) 2 Ch. 407.

H. C. OF A. 1934.

PUBLIC TRUSTEE (N.S.W.) v. FEDERAL COMMISSIONER OF TAXATION.

Gavan Duffy C.J.

duty is assessable or payable under the *Estate Duty Assessment Act* 1914-1928 upon such one-half of the residuary estate, less one-tenth thereof in respect of which no duty is claimed. The solution of this question depends upon the interpretation of sec. 8 (5), which runs thus : " 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, or public educational purposes in Australia or to a public hospital or public benevolent institution in Australia or to a fund established and maintained for the purpose of providing money for use for such institutions or for the relief of persons in necessitous circumstances in Australia." Much argument was addressed to us on two points, (1) whether the parties were bound by a prior decision of *Long Innes* J. as to the meaning of the relevant portions of the will, and (2) what was the true interpretation of the will if they were not so bound. I think it is unnecessary to determine either of these questions. Whether the meaning attributed to the relevant portions of the will in the judgment of *Long Innes* J. or that contended for by the appellants be adopted, the trust which it creates is either entirely different from, or much larger than, those which are protected by the sub-section. It is said that the will contains a devise or bequest to public benevolent institutions in Australia or to a fund established and maintained for the purpose of providing money for use for such institutions within the meaning of the sub-section, or, in the alternative, a devise or bequest for the relief of persons in necessitous circumstances in Australia within the meaning of the sub-section. In my opinion, the words of the sub-section extend only to devises and bequests of specific sums of money or other ascertained or defined portions of the estate to public benevolent institutions in Australia actually in existence, and to devises and bequests to a fund which has been established and is maintained for the purpose of providing money for one or other of two objects, namely, (1) for use for the prescribed institutions, and (2) for the relief of persons in necessitous circumstances in Australia. In my opinion, on any interpretation of the trust continued in this will it is not within the exemption created by the sub-section.

The answer to the question submitted to us should be : Yes, to the whole, less one-tenth, of the half of the residuary estate.

RICH J. I have had the opportunity of reading the judgment of my brother *Dixon* and agree with it.

STARKE J. Case stated pursuant to the provisions of the *Estate Duty Assessment Act* 1914-1928. Estate duty is imposed upon the value of the estates of deceased persons dying after the commencement of the Act. But sec. 8 (5) provides: "Estate duty shall not be assessed or payable upon so much of the estate as is devised or bequeathed . . . for religious, scientific, or public educational purposes in Australia or to a public hospital or public benevolent institution in Australia or to a fund established and maintained for the purpose of providing money for use for such institutions or for the relief of persons in necessitous circumstances in Australia."

William Paul Small died in June 1928, and by his will made the following bequest: "16. Subject to the directions hereinbefore given to my trustees with regard to the disposition of moneys and annuities out of my residuary trust estate I direct my trustees after making due provision for all outgoings hereinbefore provided for to divide my residuary trust estate into two equal shares and with regard to one of such shares I direct my trustees to stand possessed of the same and the income derived therefrom for charitable or benevolent objects benefiting in particular young children And I desire that my trustees shall confer with my wife during her lifetime from time to time as regards the distribution of income which is to be made between such charitable or benevolent institutions, and after her death shall as far as practicable respect her wishes and desires with regard to such institutions but as an indication to my trustees and without restricting my wife's discretion to nominate some one or more institution besides those hereinafter named to benefit in such manner in the residue I now indicate the following institutions as entitled to receive the income from one-half of my residuary estate viz.: the Burwood Children's Home, Weldon Street, Burwood, conducted by the Church of England, the Church of England Home for Children known as Havilah near Wahroonga and the Church of England Home for Boys at Carlingford and also the Church of England Home for Girls now situate at Glebe but shortly to be removed to Carlingford and any other homes for

H. C. OF A. 1934.

PUBLIC TRUSTEE (N.S.W.) v. FEDERAL COMMISSIONER OF TAXATION.

Starke J.

children founded by the Church of England having for its objects the care and control of children with liberty nevertheless if my wife shall so direct and require my trustees to admit another or other institutions benefiting young children to the list of such institutions to share in such one-half of the income of the residue of my estate Provided always that at least one-tenth of the income to be derived from such one-half residue shall at all times be divided equally by my trustees amongst the following institutions : the Home of Peace for the Dying, Addison Road, Petersham, and the Home for Incurables Ryde." In proceedings instituted by originating summons in the Supreme Court of New South Wales between the trustees of the will and various parties interested under this bequest, the Court declared : " That one-tenth of the one-half of the residuary estate of the testator in paragraph sixteen of the said will mentioned must be held by the trustees in trust for the two charities named in the said paragraph the Home of Peace for the Dying Addison Road Petersham and the Home for Incurables Ryde and that one-half of the remaining nine-tenths of the said moiety will go as on an intestacy to the next of kin of the testator and that the other one-half of the said nine-tenths must be held on trust for the four other charities named in the said paragraph of the said will and therein described as ' The Burwood Children's Home Weldon Street Burwood conducted by the Church of England ' (being the defendant the Church of England Children's Homes Burwood) ' the Church of England Home for Children known as Havilah near Wahroonga the Church of England Home for Boys at Carlingford and the Church of England Home for Girls now situate at Glebe but shortly to be removed to Carlingford ' and now situate at Carlingford and for such other charitable objects benefiting in particular young children as may from time to time be or have been admitted by the trustees as in the said clause of the said will mentioned." And the Court further declared : " That the said four institutions mentioned in clause sixteen of the said will and those institutions which may be duly admitted from time to time in accordance with this order will be entitled to the income of the said shares of residue in such shares and proportions as the trustees for the time being of the said will

may determine after consultation with the said defendant Annie Rebecca Small."

The Federal Commissioner of Taxation assessed the estate of the deceased Small to estate duty, and included in the assessable value the sum of £33,700, being the value of one-half of the residuary estate of the testator less one-tenth of the said one-half bequeathed by the said will to the Home of Peace for the Dying, Addison Road, Petersham, and the Home for Incurables, Ryde. The question is whether estate duty is assessable or payable upon one-half of the residuary estate, less one-tenth thereof in clause 16 of the will mentioned, or any and what part thereof.

The executors of the will of the deceased insist in the first place that neither they nor the taxing authorities are bound in these proceedings by the decree of the Supreme Court (*Sassoon's Case* (1)); and, next, that the bequests in clause 16 of the will are valid in law and exempted from estate duty by reason of the provisions of sec. 8 (5) of the *Estate Duty Assessment Act* 1914-1928.

A trust to apply a particular fund for charitable or benevolent objects benefiting, in particular, young children, does not, I think, constitute a good charitable trust (*In re Macduff*; *Macduff* v. *Macduff* (2); *Attorney-General for New South Wales* v. *Adams* (3)). It may be that the words in the will following this trust constitute a gift to specific institutions and other unspecified institutions benefiting children. Specific institutions—the Burwood Children's Home, the Church of England Home for Children, and the Church of England Home for Girls—are named. But then the testator includes " any other homes for children founded by the Church of England," and such other institutions benefiting young children as the testator's wife directs his trustees to admit to share in the gift. It is not necessary in the present case to say whether these directions constitute a charitable trust, for the question is whether the bequest falls within the provisions of the *Estate Duty Assessment Act* 1914-1928, sec. 8 (5). It may be conceded that the institutions contemplated by the testator were homes for the care, education and training of children, and, in large measure, neglected, necessitous or friendless

(1) (1933) Ch. 858. (2) (1896) 2 Ch. 451.
(3) (1908) 7 C.L.R. 100.

H. C. OF A. 1934.

PUBLIC TRUSTEE (N.S.W.) v. FEDERAL COMMISSIONER OF TAXATION.

Starke J.

children. But the paramount or chief purpose of the gift is not a religious, or a scientific, or a public educational purpose. It is not religious, for, while religious instruction in the doctrines of the Church of England was no doubt intended, the gift might quite consistently with the will be applied to other purposes. It is not a public educational purpose (cf. Act, sec. 8 (8), and *Chesterman's Case* (1)), though education was no doubt intended ; in any case, the gift might, quite consistently with the will, be applied to other purposes. It is clearly not for scientific purposes, nor a gift to a public hospital. Nor is it, in my opinion, a gift to a public benevolent institution. This Court held, in *Perpetual Trustee Co.* v. *Federal Commissioner of Taxation* (2), that that expression referred to institutions organized for the relief of poverty, sickness, destitution or helplessness. The institutions named by the testator or those which may be admitted to share in the benefaction, do give relief to the needy, the sick, and the helpless. But they are private organizations conducted by or in connection with the Church of England in Australia, and are not founded, organized or maintained by or under or in connection with any public authority, or managed by its representatives. The expression " public benevolent institution " is not a term of art (see *Girls' Public Day School Trust Ltd.* v. *Ereaut* (3) ; *Perpetual Trustee Co.* v. *Federal Commissioner of Taxation*). The denominational homes mentioned in the testator's will or which may be admitted to share in his benefaction are not, in my opinion, within the expression. It is not unimportant to remember that the non-technical words " public benevolent institution " were inserted in the Act in consequence of the decision in *Chesterman's Case* (4). The history of the matter may be found in that case and in *Swinburne* v. *Federal Commissioner of Taxation* (5), *Young Men's Christian Association* v. *Federal Commissioner of Taxation* (6), and *Adamson* v. *Melbourne and Metropolitan Board of Works* (7).

Lastly, it was contended that the bequest of the testator was to a fund established and maintained " for the purpose of providing

(1) (1923) 32 C.L.R. 362, at pp. 385, 386.
(2) (1931) 45 C.L.R. 224.
(3) (1931) A.C. 12.
(4) (1926) A.C. 128 ; 37 C.L.R. 317.
(5) (1920) 27 C.L.R. 377, at pp. 384-386.
(6) (1926) 37 C.L.R. 351.
(7) (1929) A.C. 142.

money for use for such institutions or for the relief of persons in necessitous circumstances in Australia." The gift cannot be brought within this exemption. Even if the gift be treated as establishing a fund, then its purpose is not that of providing money for use for any public hospital or for any public benevolent institution within the meaning of the Act. Again, if the gift be treated as establishing a fund, the purpose is not necessarily, or in any way exclusively or chiefly, the relief of persons in necessitous circumstances in Australia, though such purposes are no doubt within its objects.

The question stated in the case should be answered in the affirmative.

Dixon J. The question for our decision is whether the will of William Paul Small so disposes of half the residue of his estate that it receives the benefit of the exemption from estate duty given by sec. 8 (5) of the *Estate Duty Assessment Act* 1914-1928. That subsection provides that " estate duty shall not be assessed or payable upon so much of the estate as is devised or bequeathed . . . for religious, scientific, or public educational purposes in Australia, or to a public hospital or public benevolent institution in Australia, or to a fund established and maintained for the purpose of providing money for use for such institutions or for the relief of persons in necessitous circumstances in Australia."

The trusts, upon which the half share of residue is given, are expressed with much circumlocution and redundancy. The first step in considering the application of the exemption is to determine the effect of this verbiage. As among the beneficiaries and the executors and trustees, the effect of the provision in the will has already been declared by an order of the Supreme Court made on originating summons by *Long Innes* J. But the appellants (the executors) contend, on the authority of *Sassoon's Case* (1), that in these proceedings neither the estate nor the Crown is bound by that order and that we must decide for ourselves what beneficial interests were created by the will independently of the Supreme Court's decision. The reason given is that liability to estate duty arose at the moment of death and all the facts and factors governing its

(1) (1933) Ch. 858.

H. C. OF A. 1934.

PUBLIC TRUSTEE (N.S.W.) v. FEDERAL COMMISSIONER OF TAXATION.

Dixon J.

ascertainment were then fixed: a judicial decision interpreting the will and declaring what beneficial interests devolved upon the testator's death operates as an estoppel *inter partes* and not otherwise, and the Crown in right of the Commonwealth was not a party to the proceeding in which the decision was given. In the present case, the order of the Supreme Court declared that the trusts of nine twentieth parts of the half share of the residue were void, with the result that the next of kin were entitled to that portion of the residue. It declared charitable trusts in respect of the remaining eleven twentieth parts of the half share of residue. It may be said that the order results in the actual devolution of property upon the next of kin, and that more is involved in it than mere estoppel by record or *per rem judicatam*. But, in my opinion, the claim for exemption fails, whether it is based upon the will unaffected by the order of *Long Innes* J., or as interpreted by that order. The provision of the will dealing with the half share of residue in question opens with a direction to the trustees to stand possessed of the same and the income derived therefrom for charitable or benevolent objects benefiting in particular young children. In dealing with this clause, *Long Innes* J. said:—"I am not prepared to hold that a trust to apply a particular fund for 'charitable or benevolent objects benefiting in particular young children' is necessarily limited to objects which benefit young children, nor that, even if it were so limited, it would constitute a good charitable trust." I entirely agree with this view; but, having regard to what follows this clause, I think it should be construed as a general introductory statement describing the nature of the trusts which the testator proceeds to declare. These trusts are much more limited, and I do not think their ambit is enlarged by the description with which they are introduced. On the other hand, if and in so far as the trusts particularly declared in what follows might otherwise be interpreted as going beyond objects which are charitable or benevolent, I think the preliminary statement should be treated as implying a restriction to things answering that description. The somewhat involved statement of trusts which follows this clause, when analyzed, amounts, in my opinion, to a direction to the trustees to pay one-tenth of the

income of one-half the residue to two named charities, and to pay the remaining nine-tenths to four named Church of England Homes for children and to such " other homes for children founded by the Church of England having for its [*sic*] objects the care and control of children," as the testator's widow during her life should direct, and, after her death, as the trustees should think fit, and to such additional institution or institutions benefiting young children as his widow during her life should direct and after her death as the trustees should think fit. I think a further limitation upon the description of institutions, which may be added to the four named by the will itself, should be implied from the introductory clause. They must, I think, come within the class indicated by the expression " charitable or benevolent objects." There is much obscurity as to the meaning of the clause relating to the discretion, after the widow's death, to add institutions, Church of England and others, to the number benefiting. But, I think, it should be interpreted as vesting such a discretion in them and as directing them in exercising it to consider any wishes she expresses in her lifetime. The Commissioner of Taxation concedes that the four named Church of England Homes for children may be " public benevolent institutions " within the meaning of those words in sec. 8 (5) of the *Estate Duty Assessment Act*. But he contends that " other homes for children founded by the Church of England having for its object the care and control of children " is a description capable of including homes which were not " public benevolent institutions " within the statute. He contends that, *a fortiori*, the category " other institutions benefiting young children," even when restricted by the expression in the introductory clause " charitable or benevolent objects," extends far beyond public benevolent institutions. The description " public benevolent institution " has received an interpretation by this Court (*Perpetual Trustee Co.* v. *Federal Commissioner of Taxation* (1)). It is to be treated as a compound expression referring to institutions " organized for the relief of poverty, sickness, destitution, or helplessness " (per *Starke* J., at p. 232). The phrase I used was " the relief of poverty, distress, suffering or misfortune " (p. 233). *Evatt*

(1) (1931) 45 C.L.R. 224.

H. C. OF A. 1934.

PUBLIC TRUSTEE (N.S.W.) v. FEDERAL COMMISSIONER OF TAXATION.

Dixon J.

J. said (at pp. 235, 236) :—" Such bodies vary greatly in scope and character. But they have one thing in common : they give relief freely to those who are in need of it and who are unable to care for themselves. Those who receive aid or comfort in this way are the poor, the sick, the aged, and the young. Their disability or distress arouses pity, and the institutions are designed to give them protection. They are very numerous—' the nobler a soul is the more objects of compassion it hath '—and they have come to be known as ' benevolent institutions.' " *McTiernan* J. dissented on the ground that this was too narrow a meaning. Conceding that a gift to an institution benefiting young children in a way which makes it a charitable or benevolent object may be a valid disposition for charitable purposes, I nevertheless do not think that the institutions it covers are confined to public benevolent institutions of the required description. Institutions connected with the health, upbringing, welfare, and education of young children coming within the legal conception of " charitable " may be imagined to which no one would apply the term " public benevolent institution." Nor would such institutions necessarily come within any other of the categories exempted by sec. 8 (5) from estate duty. They need not be religious. They need not be public educational. They need not be public hospitals. On another occasion I expressed the opinion that " to obtain an exemption upon the ground of relieving persons in necessitous circumstances in Australia there must be a devise or bequest to a fund established and maintained for, or for the purpose of providing money for, the relief of such persons. . . . This construction is, I think, to be preferred to one which attaches the words ' for the relief ' etc. to ' devised or bequeathed.' In arrangement the two expressions are separated by many alternative phrases ; in meaning the exemption would be surprisingly large ; and in policy it would depart widely from that disclosed by the definition of ' public charitable institution ' in sec. 14 of Act No. 32 of 1927 whence much of its phraseology is taken " (*Baker* v. *Federal Commissioner of Taxation* (1)). I adhere to this construction, which, in my opinion, makes it impossible to apply the last limb of the exempting provision to the trust. It follows that, besides the four named

(1) (1932) Unreported. [Noted, 6 A.L.J. 111.]

institutions, other institutions may share in the income which are outside the description exempted from duty. It may be true that the four named institutions will be entitled to receive some of the income and that it would be a breach of trust to apply all of it to the added institutions, or all of it but an illusory amount. But the trustees (subject to the widow's directions) have a wide discretion in the application of income among the various institutions and no definite sum is applicable to any of them. The whole income is devoted to all which from time to time are among the number benefiting, but no divisible or definable part of income or corpus is given to any one of them. (Cf. *Baker* v. *Federal Commissioner of Taxation* (1).) In my opinion there is no separable part of the estate of the testator contained in the disposition of the nine-tenths part of half the residue that is devised or bequeathed for the purposes or institutions described in sec. 8 (5). The same result follows if the question is decided upon the basis of the declaration made by *Long Innes* J. Clearly the nine twentieth parts of half the residue, which under that order devolve on the next of kin, could not be exempt. Of the remaining eleven twentieth parts two go, in any case, to charities for which an exemption has been conceded. The remaining nine-twentieths are declared to be held upon trusts for the four named institutions and " for such other charitable objects benefiting in particular young children as may from time to time be or have been admitted by the trustees as in the said clause of the said will mentioned." The order further declares " that the said four institutions mentioned in clause sixteen of the said will and those institutions which may be duly admitted from time to time in accordance with this order will be entitled to the income of the said shares of residue in such shares and proportions as the trustees for the time being of the said will may determine after consultation with the " widow. For the reasons already given, the discretion thus belonging to the trustees and the widow to add institutions and distribute income among them prevents the trust operating as a bequest and devise to or for " public benevolent institutions."

For these reasons I think the question in the special case should be answered in the affirmative.

(1) (1932) Unreported. [Noted, 6 A.L.J. 111.]

H. C. OF A. 1934.

PUBLIC TRUSTEE (N.S.W.) v. FEDERAL COMMISSIONER OF TAXATION.

McTIERNAN J. In my opinion the question in the special case should be answered in the affirmative.

Mr. *Bonney* contended, on the authority of *In re Sassoon* (1), that the decretal order was not binding, in these proceedings, on the appellant or the Crown. The appellant, the Public Trustee, was the plaintiff in the suit in which the decretal order was made, and the other appellants were some of the defendants. But the Crown in right of the Commonwealth was not a party. In the present case it is unnecessary to decide whether the appellant, notwithstanding that it was a party to the suit, is free in these proceedings to contend that the construction declared by the decretal order is erroneous. (Cf. *Templeton* v. *Leviathan Pty. Ltd.* (2); *Stuart* v. *Kingston* (3).)

If the present case should be decided on the basis of the decretal order, the appellants, in my opinion, fail. The decretal order declares that the part of the estate with which the appeal is concerned passes to the next of kin and the remainder must be held by the trustees upon the charitable trust therein set out. It is unnecessary to repeat the terms of this trust. Even if "charitable objects" should be limited to mean "charitable institutions," the trustees have a discretion to appropriate part of the trust property to institutions not answering the description of "public benevolent institutions" although they are charitable according to the legal meaning of the word. The essential characteristics of a "public benevolent institution" within the meaning of sec. 8 (5) are described in *Perpetual Trustee Co.* v. *Federal Commissioner of Taxation* (4). Furthermore, "no distinct and definable part" of this share is given under the will as construed by the decretal order, to the four named institutions (*Baker* v. *Federal Commissioner of Taxation* (5)). The part of the estate with which the question is concerned is, therefore, not exempt from estate duty on the ground that it is devised or bequeathed to a public benevolent institution, if the question falls for decision on the basis of the decretal order. Sec. 8 (5) of the *Estate Duty Assessment Act* also exempts from the estate duty "so much of the estate as is devised or bequeathed . . . to a fund

(1) (1933) Ch. 858.
(2) (1921) 30 C.L.R. 34, at pp. 57, 58, 77, 78.
(3) (1923) 32 C.L.R. 309, at pp. 324, 325, 337, 355.
(4) (1931) 45 C.L.R. 224.
(5) (1932) Unreported. [Noted, 6 A.L.J. 111.]

established and maintained for the purpose of providing money for use for such institutions or for the relief of persons in necessitous circumstances in Australia." In interpreting this part of the section, *Dixon* J. said in *Baker* v. *Federal Commissioner of Taxation* (1) :— "Moreover, if the proper construction of sec. 8 (5) is that to obtain an exemption upon the ground of relieving persons in necessitous circumstances in Australia there must be a devise or bequest to a fund established and maintained for, or for the purpose of providing money for, the relief of such persons, then the third trust altogether fails to comply with its requirements. This construction is, I think, to be preferred to one which attaches the words 'for the relief etc.' to 'devised or bequeathed.'" I agree with this interpretation. In the present case there is no devise or bequest to "a fund" as described in the section.

On the assumption that the appellants were free to contend that the decretal order was erroneous, Mr. *Bonney* contended that, upon the true construction of the will, the part of the estate with which the appeal was concerned was dedicated by the testator to valid charitable uses, and accordingly no part thereof passed to the next of kin and the whole of it was exempt as a devise or bequest to one or more "public benevolent institutions" or "for the relief of persons in necessitous circumstances" within the meaning of sec. 8 (5).

A devise or bequest for the last-mentioned object is not within this section (*Baker* v. *Federal Commissioner of Taxation* (1)). It would be otiose to refer again in detail to the language of clause 16 of the will. In order to test whether the appellant could succeed in establishing that there is a devise or bequest of part of the estate to one or more public benevolent institutions, if the question of what is the true construction of the will is *res integra*, it may be assumed, without deciding, that the material parts of clause 16 do confine the discretion of the trustees to charitable purposes, and do not fail to create a valid charitable trust because on their true construction the trustees are not vested with a discretion to select non-charitable as well as charitable purposes. But this construction would still leave trustees with a discretion to select charitable

(1) (1932) Unreported. [Noted, 6 A.L.J. 111.]

H. C. OF A. 1934.

PUBLIC TRUSTEE (N.S.W.) v. FEDERAL COMMISSIONER OF TAXATION.

institutions which are not "public benevolent institutions" within the meaning of sec. 8 (5). Furthermore, there would not be a devise or bequest of "a distinct and definable part of the estate" to the four named charitable institutions, each of which, it may be conceded, answers the description of a "public benevolent institution."

Order that the question in the special case be answered: Yes. Costs of case stated costs in the appeal.

Solicitors for the appellant, *McDonell & Moffitt.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

J. B.

[HIGH COURT OF AUSTRALIA.]

THE VACUUM OIL COMPANY PROPRIETARY LIMITED . . . . . } PLAINTIFF;

AND

THE STATE OF QUEENSLAND AND OTHERS DEFENDANTS.

H. C. OF A. 1934.

MELBOURNE, *Feb.* 28; *March* 1.

SYDNEY, *April* 23.

Constitutional Law—Validity of statute of State—Violation of Constitution of Commonwealth—Duties of customs and excise—Grant of bounty—Freedom of trade, commerce and intercourse—Vendors of motor spirit required to purchase power alcohol—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 90, 92—*Motor Spirit Vendors Act* 1933 (*Q.*) (24 *Geo. V. No.* 11), *secs.* 2*, 3*, 6.*

The *Motor Spirit Vendors Act* 1933 (Q.), by sec. 3, provided that no person should in Queensland sell for delivery in Queensland any motor spirit which was at the time of sale situate in Queensland unless he was the holder of a

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

* The *Motor Spirit Vendors Act* 1933 (Q.), which is entitled "An Act to provide for the regulation of the sale of motor spirit and for other purposes," by sec. 2 defines "Motor spirit" as meaning "Any petroleum fuel used or adapted or intended to be used for the propulsion of any motor vehicle," and "To sell" as meaning "To sell by wholesale or retail, and includes barter or exchange, supply for profit, dealing in, agreeing to sell, or offering or receiving or exposing for sale, or having in possession for sale, or sending, forwarding, or delivering for sale or on sale, or causing, suffering, or allowing to be

Disc'd *Rocklea Spinning Mills Pty Ltd (ACN 000 070 824)* v *Anti-Dumping Authority* 56 FCR 406

Cons *Aust Tape Manufacturers Assoc Ltd* v *Commonwealth* (1993) 176 CLR 480

Dist *Wragg* v *State of New South Wales* (1953) 88 CLR 353

Dist *Williams* v *Metropolitan & Export Abattoirs Board* (1953) 89 CLR 66

Appl *Rocklea Spinning Mills Pty Ltd* v *Anti-Dumping Authority & Fraser* (1995) 129 ALR 401

Cons *Rocklea Spinning Mills Pty Ltd (ACN 000 070 824)* v *Anti-Dumping Auth* (1995) 37 ALD 405