[HIGH COURT OF AUSTRALIA.]

BARBY AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

PERPETUAL TRUSTEE COMPANY (LIMITED) AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1937.

SYDNEY, *Nov.* 24, 25.

Latham C.J., Rich, Starke, Dixon and Evatt JJ.

Charities—Gift for returned soldiers, their widows and descendants—General charitable intention—Scheme propounded by testatrix—Impracticability—Cy-près.

The testatrix bequeathed her residuary estate to her trustee with a direction to apply the whole of the capital and income thereof "for the relief of necessitous returned soldiers and their widows children or grandchildren who may be in necessitous circumstances (that is those only earning the basic wage for the time being or under and not possessed of more than £200) in the manner and in accordance with the scheme following that is to say": then followed a definition of persons eligible to receive benefits under the scheme, and a detailed scheme under which the trustee was to expend the money in the purchase in its name of virgin land, unfenced and unenclosed, in the State of New South Wales and not less than fifty miles from the General Post Office at Sydney, and to let such land at a peppercorn rent to persons within the scheme, who were to covenant to reside upon and work the land. There was a provision by which the trustee was empowered to let the premises even to the great-grandchildren of returned soldiers and others eligible under the scheme and even though they were not in necessitous circumstances. Finally, the testatrix directed "my trustee to complete the distribution of the whole of my residuary estate both capital and income" at a certain date "by transferring in fee simple without consideration to each of the then occupant or occupants of the lands so to be purchased under the terms of this my will and

the remaining part of my estate (if any) to be converted into cash and such cash distributed between and amongst such then occupant or occupants."

Held that the gift was a valid charitable gift, and that the will contained a general charitable intention sufficient to justify the application *cy-près* of the fund in the event of the testatrix's scheme proving impracticable.

Decision of the Supreme Court of New South Wales (*Nicholas* J.) affirmed.

APPEAL from the Supreme Court of New South Wales.

By her will dated 3rd March 1933 the testatrix, Elizabeth Kirby, bequeathed her residuary estate to her trustee with a direction to apply the whole of the income and capital thereof " for the relief of necessitous returned soldiers and their widows children or grandchildren who may be in necessitous circumstances . . . in the manner and in accordance with the scheme following." Then there followed a scheme which, with other relevant facts, sufficiently appears from the judgment of *Latham* C.J. hereunder.

The trustee of the will, the Perpetual Trustee Co. (Ltd.), took out an originating summons for the determination of the following questions :—(1) Whether the trusts for the relief of necessitous returned soldiers and their widows, children or grandchildren were valid charitable trusts. (2) If so, whether it was practicable to carry them into effect. (3) If it was not so practicable, whether (*a*) the testatrix had died intestate as to her residuary estate, or (*b*) the residuary estate should be applied *cy-près*.

The defendants to the summons were the Attorney-General for New South Wales and persons interested upon the intestacy of the testatrix.

The summons was heard by *Nicholas* J., who held that the trusts were valid charitable trusts, declared that the testatrix had by her will shown a general charitable intention, and referred it to the Master in Equity " to ascertain whether it is practicable to carry out the scheme in relation to the income and capital of the residuary estate of the said testatrix referred to in the said will and, if not, to settle a scheme for the application *cy-près* of the said income and capital."

The persons interested upon an intestacy appealed to the High Court from the decision of *Nicholas* J.

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Mason K.C. (with him *Wallace*), for the appellants. The question is whether there is in the will a general or only a particular charitable intention. The introductory words, "for the relief of necessitous returned soldiers and their widows children or grandchildren," are qualified by the provision that they are to be benefited "in the manner and in accordance with the scheme following." This was not simply a scheme for settling returned soldiers on the land. The testatrix had two things of equal importance in her mind: (*a*) the settling of pioneers on virgin land in New South Wales; (*b*) obtaining suitable pioneers, the most suitable in her opinion being returned soldiers. It was to this extent only that she intended to assist returned soldiers.

[LATHAM C.J. Surely the introductory words show that her dominant idea was to benefit returned soldiers, rather than to settle virgin land?]

No, because then come the words "in the manner and in accordance with the scheme following," which are followed by an elaborate scheme, a feature of which is that the fee simple is not to be transferred to a returned soldier but will go to a descendant who need not be in necessitous circumstances at all. The returned soldiers get merely a right to occupy the land for life. The benefit to them does not arise from the gift but from the scheme only. The principle is clearly expressed in the judgments of *Parker* J. in *In re Wilson*; *Twentyman* v. *Simpson* (1) and *Kay* J. in *Biscoe* v. *Jackson* (2).

[LATHAM C.J. Is this not a typical example of the sort of case to which the *cy-près* doctrine can be applied? You find a general statement of intention together with an indication of the mode in which the testatrix desires that intention to be carried out. What are the tests for determining whether the mode is severable?]

You must read the will as a whole. You then see that the testatrix had a scheme, involving elaborate provisions and imperative trusts, which was the only scheme she wanted carried out to benefit returned soldiers. She has not directed that anything is to be given to returned soldiers, but has directed that the whole of her residuary estate is to be spent in purchasing virgin land. The introductory words do not differentiate this case from the supposition of *Cotton*

(1) (1913) 1 Ch. 314.

(2) (1887) 35 Ch. D. 460, at pp. 463, 464.

L.J. in *Biscoe* v. *Jackson* (1). (Cf. *In re Wilson* (2), per *Parker* J.)

[DIXON J. referred to *Re Connolly*; *Walton* v. *Connolly* (3); *In re White's Trusts* (4).]

The only qualifications required for persons benefiting under the ultimate gift are that they must be occupants and descended from returned soldiers. This is not a charitable gift (*Verge* v. *Somerville* (5); *In re Drummond*; *Ashworth* v. *Drummond* (6); *Re Ashton's Estate*; *Westminster Bank Ltd.* v. *Farley* (7)), and, therefore, if it is part of the scheme, there cannot be a general charitable intention. No *cy-près* scheme could be framed to cover the ultimate gift. Alternatively, if a general charitable intention is found, the ultimate gift stands apart and, if impracticable, fails because it is not charitable.

Maughan K.C. (with him *C. M. Collins*), for the Attorney-General for New South Wales. There are three classes of charitable intention: first, absolutely general, with no particularity at all; secondly, general, in favour of a limited class; thirdly, particular. This case falls into the second class; there is a general charitable intention to benefit the class consisting of necessitous returned soldiers, their widows, children and grandchildren. In construing such a will you can find the general charitable intention in the particular provisions themselves. This method of construction was apparently disapproved by *Parker* J. in *In re Wilson* (8), but was adopted by the Court of Appeal in *In re Monk*; *Giffen* v. *Wedd* (9) (See especially per *Sargant* L.J. (10)). (See also *Biscoe* v. *Jackson* (11); *Morton* v. *Attorney-General* (12); *Re Spence's Estate*; *Barclay's Bank Ltd.* v. *Stockton-on-Tees Corporation* (13).) This case is *a fortiori*, because of the introductory words, which clearly show the paramount intention to give assistance to necessitous returned soldiers and their descendants.

The use of the word "apply" constitutes an absolute dedication of the whole of the capital and income of the residuary estate for

(1) (1887) 35 Ch. D., at p. 468.
(2) (1913) 1 Ch., at p. 324.
(3) (1914) 110 L.T. 688, at p. 690.
(4) (1886) 33 Ch. D. 449.
(5) (1924) A.C. 496, at pp. 499, 500, 506.
(6) (1914) 2 Ch. 90.
(7) (1937) 3 All E.R. 279, at pp. 280, 281.
(8) (1913) 1 Ch., at p. 322.
(9) (1927) 2 Ch. 197.
(10) (1927) 2 Ch., at p. 210.
(11) (1887) 35 Ch. D. 460.
(12) (1911) 11 S.R. (N.S.W.) 473; 28 W.N. (N.S.W.) 131.
(13) (1937) 3 All E.R. 684.

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their relief. The words "in the manner and in accordance with the scheme following" are merely subsidiary, and to add to them the words "and in no other manner" would be contrary to the decisions cited.

Dudley Williams K.C. (with him *Kitto*), for the trustee. There is a general charitable intention to relieve necessitous returned soldiers &c. (*In re Wiseman's Trusts*; *Wiseman* v. *Equity Trustees Executors and Agency Co. Ltd.* (1); *Halsbury's Laws of England*, 2nd ed., vol. 4, pp. 126, 127, par. 167). This is a charitable trust, being for the relief of poverty. Poverty is a relative term (*In re Clarke*; *Bracey* v. *Royal National Lifeboat Institution* (2)). It is also a trust which falls within the fourth class enumerated in *Pemsel's Case* (3). (See *Verge* v. *Somerville* (4); *Halsbury's Laws of England*, 2nd ed., p. 110, par. 146, and cases there cited; *Shaw* v. *Halifax Corporation* (5).)

Mason K.C., in reply, referred to *Muir* v. *Archdall* (6).

The following judgments were delivered:—

LATHAM C.J. This is an appeal from an order of *Nicholas* J. made upon an originating summons by which the court was asked to determine whether or not the testatrix, Elizabeth Kirby, died intestate as to her residuary estate (subject to certain provisions made in favour of annuitants and of her son) or whether, on the other hand, the residuary estate (subject as aforesaid) should be applied *cy-près* in accordance with a scheme to be settled. *Nicholas* J. held that the provisions of the will created a valid charitable trust. The decision of his Honour was, in my opinion, in accordance with the decision in the leading case of *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (7), the trust falling within the fourth class of those set out by Lord *Macnaghten* as a trust beneficial to the community, as affecting a substantial class, and being of a public character. *Nicholas* J. referred to the case of *Verge* v. *Somerville* (8), which dealt with a not dissimilar trust and

(1) (1915) V.L.R. 439.
(2) (1923) 2 Ch. 407.
(3) (1891) A.C. 531, at pp. 583, 584.
(4) (1924) A.C. 496.
(5) (1915) 2 K.B. 170.
(6) (1918) 19 S.R. (N.S.W.) 10, at p. 14; 36 W.N. (N.S.W.) 4, at p. 6.
(7) (1891) A.C. 531.
(8) (1924) A.C. 496.

held that it was a valid charitable trust. The object of this proceeding is to determine whether there is a general charitable intention disclosed by the will to which effect can be given if the scheme provided in the will for carrying out the general intention shall prove to be impracticable, and the question therefore is whether the will discloses a general charitable intention so as to justify the formulation and application of a scheme *cy-près*. The will provides that the residue of the estate of the testatrix as to income and capital shall be applied for the relief of necessitous returned soldiers and their widows, children or grandchildren who may be in necessitous circumstances, that is, those only earning the basic wage for the time being or under and not possessed of more than £200, " in the manner and in accordance with the scheme following that is to say : " then follow a number of detailed provisions defining the returned soldiers and their descendants who are to be eligible to receive benefits under the scheme. These classes include members of the Australian Military Expeditionary Land or Air Forces who were personally actually in action during the war of 1914-1918, their widows, child or children, grandchild or grandchildren, born during their lifetime. The provision as to what is declared to be " necessitous circumstances " applies to all these classes of persons. A returned soldier must be a native-born Australian or else his father must have been born in Great Britain, Ireland or New South Wales. There is a direction that the trustees shall spend money in the purchase of virgin land unfenced and unenclosed in New South Wales and not less than fifty miles in an air line from the General Post Office at Sydney. The land is to be let at a peppercorn rent to persons within the scheme and the beneficiary must reside on and work the land. Further, there is a power to let and demise the premises even to the great-grandchildren of returned soldiers and of others who are let in under this scheme even though they are not in necessitous circumstances. The provision concludes by directing the trustee " to complete the distribution of the whole of my residuary estate both capital and income . . . by transferring in fee simple without consideration to each of the then occupant or occupants of the lands so to be purchased . . . and the remaining part of my estate to be converted into cash and such cash distributed

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between and amongst such then occupant or occupants." It will be seen that these provisions begin with a general statement of the intention of the testatrix and proceed with a set of detailed provisions as to the manner in which it is desired that the intention should be carried out. The principle of law applying to such a case as this is stated in *Biscoe* v. *Jackson* (1). After referring to cases where the testator has plainly limited the application of his money by a particular and specific direction, *Kay* J. proceeds: "On the other hand, if you do see a general intention of benefiting a certain class or number of people, who come within the ordinary definition of objects of charity, and you find that the particular mode the testator has contemplated of doing this cannot be carried out, and you are convinced that the mode is not so essential that you cannot separate the intention of charity from that particular mode, then the court says there is a general intention of charity, and as the mode has failed, the duty of the court is, favouring charity as the court always does, to provide another mode than that which the testator has pointed out, and which has failed." The subject was also examined and the law stated by *Parker* J., as he then was, in *In re Wilson* (2) and by the Court of Appeal in *In re Monk* (3). In the latter case *In re Wilson* (2) is considered, and it is pointed out that the *cy-près* doctrine was not applied there because the learned judge could not find any general and paramount charitable intention. I read from p. 204 of the report of *In re Monk* (3) a sentence which is important in relation to this case and which distinguishes *In re Wilson* (2) from other cases. The learned judge, it is said, "felt that it was not justifiable to infer a general intention from the particular directions, or to disregard the particularity of the gift, and to give effect to a general, as opposed to the particular intention, which latter was the only one expressed." If the only intention expressed is a particular intention from which a general intention cannot properly be inferred there is no room for the application of the *cy-près* doctrine. Here, however, there is a general intention expressed in the prefatory words which I have already read, that is, an intention of benefiting returned soldiers, their widows, children or grandchildren who may

(1) (1887) 35 Ch. D. 460, at pp. 463, 464.
(2) (1913) 1 Ch. 314.
(3) (1927) 2 Ch. 197.

be in necessitous circumstances, as defined in the will. Therefore I agree with the decision of *Nicholas* J. that there is in this will a statement of a general intention followed by a direction as to a specific method of giving effect to the intention. In my opinion this is just the kind of case for which the *cy-près* doctrine has been devised and to which it should be applied.

Some doubt has been raised as to whether the final clause of the provisions which I have outlined is part of the charitable scheme. In my opinion plainly it is such a part, and to make that clear I think that an amendment should be made in the order, and that the words "the whole of" should be inserted before the words "the income and the capital of the residuary estate of the testatrix," where those words appear in the order.

In my opinion the judgment of the learned judge should be affirmed.

RICH J. Charity has always been a favourite of equity. The rule against perpetuities is not applied, the doctrine of *cy-près* is adopted in certain cases and a benevolent construction seems to be applied to bequests which in essence are charitable. Decisions relating to gifts to institutions and persons cannot be compared with and may be laid out of consideration in dealing with this case in which the bequest is for a purpose. That purpose is the relief of necessitous soldiers and their issue and is a public purpose and in essence is charitable.

I agree that the appeal should be dismissed.

STARKE J. I agree. This gift is charitable because it is for the benefit of a class of persons selected from the public, namely, returned soldiers, their widows and descendants, and though it is restricted in some respects by their "necessity" and in other respects by the place in which they were born and so forth, that does not at all affect the main proposition that it is for the benefit of a class of persons selected from the public (*Shaw* v. *Halifax Corporation* (1)). The other question is whether the testatrix has directed this trust to be executed in a particular manner and in accordance with a scheme which she has outlined. Looking at the

(1) (1915) 2 K.B. 170, at pp. 180, 181.

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words of the will, it is clear, I think, that the dominant and paramount intention of the gift is to benefit returned soldiers, their widows and children, and the words dealing with the manner of carrying out the scheme indicate a method whereby her object could best be effected, but it is not the dominant or paramount intention of the gift. I think the learned judge was quite right.

DIXON J. I agree. It has been determined that the gift is charitable, and from that there is no appeal. But the question whether a general charitable intention appears cannot be considered independently of the reasons why the gift is charitable. It is of a kind falling within the fourth of the classes of objects stated by Sir *Samuel Romilly* in the course of his argument in *Morice* v. *Bishop of Durham* (1) and adopted by Lord *Macnaghten* in *Pemsel's Case* (2). Sir *Samuel Romilly* describes the class as being for the advancement of objects of general public utility and says it is the most difficult. In this now familiar classification of charitable gifts, the fourth class, as has often been pointed out, does not attempt to define a charitable object. It is no more than a final class into which various objects fall that are not comprised in the first three classes, but are nevertheless charitable. It has been found impossible to give an exhaustive definition of what amounts to a charitable purpose, but the authorities indicate the attributes that are to be looked for. The gift must proceed from altruistic motives or from benevolent or philanthropic motives. It must be directed to purposes that are for the benefit of the community or a considerable section or class of the community. The purposes must tend to the improvement of society from some point of view which may reasonably be adopted by the donor. The manner in which this tendency may be manifested is not defined by any closed category. It is capable of great, if not infinite, variation. It may be by the relief of misfortune ; by raising moral standards or outlook ; by arousing intellectual or aesthetic interests ; by general or special education ; by promoting religion ; or by aiming at some other betterment of the community. The purposes must be lawful and must be consonant with the received notions of morality and propriety.

(1) (1805) 10 Ves. Jun. 521, at p. 531 ; 32 E.R. 947, at p. 951.
(2) (1891) A.C., at p. 583.

In this particular case, the testatrix seems to me to have manifested a purpose of conferring a benefit upon returned soldiers by settling them upon the land. Apparently she combined two ideas. One was the desirability of settling people on the unoccupied lands of New South Wales. The other was the relief of returned soldiers from positions of insecurity or of insufficient income which they might occupy in the community. That is, I think, a charitable purpose; but the question is whether it is the dominant idea to which the particular directions she proceeds to give are subordinate and whether it has sufficient generality to amount to a general charitable purpose.

The will is expressed in a form which, although containing a general statement at the commencement of the provision, qualifies the gift by conditions in such a way that, for myself, I find some difficulty in extracting from the language, as a matter of verbal interpretation, any indication of an intention which is separable from the particular form in which she directs that her purpose shall be carried into execution. But that is considering the matter merely as one of verbal construction. In cases of this description the mode of interpretation differs widely from that required where gifts to individuals are concerned. In the case of a gift to an individual, the identity of the object of the gift, the identity of the subject matter and the conditions or contingencies upon which the gift is made, all go to the substance of the donation. In cases of charity, the subject matter given being ascertained, the identity of the donees and the conditions expressed are not considered as necessarily going to substance. The substance is the purpose. If you find in the matter of the gift and its general nature sufficient evidence of the existence of a purpose wider than the execution of the exact directions set out and that wider purpose is charitable, then I think the gift must be upheld. In *In re Monk* (1) *Sargant* L.J. points out that prefatory or separate words of charity are seldom found in the reported cases where a general charitable intention has been found, but, he says, the intention may be found from the nature of the dispositions themselves. I think that is the source whence, for the most part, courts of equity have discovered

(1) (1927) 2 Ch., at p. 210.

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a general charitable intention manifested by a testator. But it is necessary that, from the nature of the purpose expressed and from the character of the directions given, it shall appear by reasonable inference that the precise directions given amount to no more than the manner chosen by the testator for carrying into practical effect the purpose by which they are animated and do not constitute or describe the full or exclusive aim he sought to achieve. Further, the main purpose thus discoverable must in itself be of such a nature that the court would carry it into effect, if no more had been expressed, as showing a general charitable intent. If these conditions are satisfied, the failure of the testator's detailed scheme leaves a trust which must be effectuated by the court as a matter of administration.

In this particular case I am not prepared to say that the intention of the testatrix amounted to a very wide charitable purpose, but I think she possessed a paramount intention which the impracticable detailed provisions were devised to carry out. They represent only a means to an end, one means and not the end itself. Implicit is a broader purpose charitable in character and it should prevail. That purpose governs the entire scheme, including the ultimate transfer of the pieces of land to the occupiers for the time being. The direction to make the ultimate transfers is not, in my opinion, a gift to individuals. It is no more than a direction for effectuating the original purpose in favour of a section of the public.

I agree with the amendment suggested by the Chief Justice to be made in the decree.

EVATT J. Certainly in almost every other document but a will, and perhaps in almost every will except one into which questions of charitable gifts obtrude, the phrase " in the manner and in accordance with the scheme following that is to say " would at once be interpreted as excluding every other manner and every other scheme. But on the whole, and not without some doubt, I agree that the paramount intention, purpose and motive of the testatrix is sufficiently evidenced by the words which introduce the direction dealing with the residuary estate, viz., " for the relief of necessitous returned soldiers and their widows children or grandchildren who may be in necessitous circumstances (that is those only earning the basic wage

for the time being or under and not possessed of more than £200)." These words disclose an intent declared in general and comprehensive terms and point to a purpose which, having regard to the decision of the Privy Council in *Verge* v. *Somerville* (1), must be regarded as charitable.

The appeal should be dismissed subject to the variation of the decree suggested by the Chief Justice.

Appeal dismissed. Order of Supreme Court affirmed with a variation, the words "the whole of" to be inserted before the words "the income and capital of the residuary estate of the testatrix" where they appear in the order. The Attorney-General and the trustee to have their costs out of the estate as between solicitor and client, and the appellants to have their costs out of the estate as between party and party.

Solicitors for the appellants, *Baker & Baker.*

Solicitors for the respondent trustee, *Percy C. Law & Milne.*

Solicitor for the respondent Attorney-General, *J. E. Clark*, Crown Solicitor for New South Wales.

J. B.

(1) (1924) A.C. 496.