[HIGH COURT OF AUSTRALIA.]

THE ATTORNEY-GENERAL FOR NEW SOUTH WALES . . . . . Defendant, } Appellant;

AND

THE PERPETUAL TRUSTEE COMPANY (LIMITED) AND OTHERS . . . Plaintiff and Defendants, } Respondents.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. of A. 1940.

Sydney, *April* 4, 5; *June* 28.

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

Charities—Training farm for Australian orphan lads—Specified property—Practicability—General charitable intention—Cy-près.

A testatrix, whose home was a property known as Milly Milly, made the following disposition in her will:—"I will and bequeath the whole of the Milly Milly property to be held by the Perpetual Trustee Co. for a training farm for orphan lads being Australians." The property consisted of three thousand eight hundred acres of land suitable for carrying sheep and in part for wheat growing. To use the property as a training farm was found to be impracticable. The homestead was too small, the plant was too old-fashioned, and the income produced would not suffice to support the staff and to meet the expenses thought necessary for the project.

Held, by *Rich*, *Dixon*, *Evatt* and *McTiernan* JJ. (*Latham* C.J. and *Starke* J. dissenting), that the intention that Milly Milly should be the actual place of training did not form an essential or indispensable condition of the gift, which was dominated by the more general charitable intention of providing for the training of Australian orphan lads in farming pursuits, a guiding purpose to the fulfilment of which the testator had devoted Milly Milly as a suitable means; therefore, as the property was unsuitable as a training farm, it should be applied *cy-près*.

Decision of the Supreme Court of New South Wales (*Roper* J.), on this point, reversed.

H. C. OF A. 1940.

ATTORNEY-GENERAL (N.S.W.) v. PERPETUAL TRUSTEE CO. (LTD.).

APPEAL from the Supreme Court of New South Wales.

By her will dated 5th October 1935, the testatrix, Annie Reid McDonell, widow, of Milly Milly, West Wyalong, made the following disposition: "I will and bequeath the whole of the Milly Milly property to be held by the Perpetual Trustee Co. for a training farm for orphan lads being Australians." She also gave the sum of £100 to each of five charitable organizations. Her estate was valued at about £18,520.

The property known as Milly Milly is situate about eighteen miles from West Wyalong and comprises an area of about three thousand seven hundred and eighty-two acres of land conditionally purchased from the Crown, and thirty-one acres road permit. Part only of the property was suitable for wheat growing but the whole of it was suitable for grazing, the carrying capacity of the property being two thousand five hundred and twenty-three sheep or one sheep to one and one-half acres. In the opinion of a pastoral inspector and valuer it was not practicable to use the property as a training farm. The accommodation upon the property was, in his opinion, insufficient. He estimated that the sum of at least £3,525 would have to be spent in capital outlay to provide proper accommodation for the trainees, plant and machinery, and the sheep necessary to stock the property. Upon figures, which he gave in detail, an estimated annual profit of £6 was shown, although provision had not been made therein for the cost and expenses of clothing, feeding and maintaining the trainees, or for any medical, dental or other incidental expenses, and when these expenses were taken into consideration the annual loss on the property in an average season would be heavy. The district in which the property is situate is subject to fairly frequent droughts and in bad seasons the loss which would be incurred in an average season would be increased considerably. In the opinion of the pastoral inspector and valuer the property was chiefly a grazing property and the resources for training trainees were too limited. A training farm for boys should comprise mixed farming lands where boys could be trained in a wider range of farming and grazing activities. Milly Milly would not provide the necessary facilities for instructing trainees in this manner. The property was suitable only for wheat growing and sheep farming

and consequently boys trained upon the property would be limited in their training to these two branches of farming.

The net result of the carrying on of farming and grazing operations on the property for the period from 29th December 1936, the date of the death of the testatrix, until 16th February 1939, was a loss of £1,069 19s. 1d.

Probate of the will was granted to the Perpetual Trustee Co. (Ltd.) and Thomas Edward Glentworth Armstrong, the executors named therein.

The Perpetual Trustee Co. (Ltd.) took out an originating summons for the determination of, *inter alia*, the following questions:—(1) Whether the disposition in the will of "the whole of the Milly Milly property" to be held by the plaintiff company "for a training farm for orphan lads being Australians" created a valid charitable trust. (2) If not, whether the property passed as on an intestacy. (3) If yes to (1), whether in making the disposition the testatrix had expressed a general charitable intention. (4) If yes to (1) and no to (3), and it was impracticable to give effect to the charitable trust, whether the property passed as on the intestacy of the testatrix. One of the orders asked for was that if the answers to (1) and (3) were each in the affirmative it be referred to the Master in Equity to settle a scheme for giving effect to the general charitable intention on the footing that it was impracticable to carry out the charitable trust for the establishment and maintenance of a training farm for orphan lads.

The defendants to the summons were Winsome Elizabeth Wilson representing certain pecuniary legatees, Leslie Maclean Wilson representing the next of kin of the testatrix, Thomas Edward Glentworth Armstrong, an executor of the will to whom probate had been granted, and the Attorney-General for the State of New South Wales.

The summons was heard by *Roper* J. who held (*a*) that the testatrix had not exhibited a general charitable intention in respect of the property; her real and paramount intention was that the property should be used for the purpose of establishing a training farm, and (*b*) that it was impracticable to give effect to the charitable trust and the property passed as on the intestacy of the testatrix.

H. C. OF A. 1940. ATTORNEY-GENERAL (N.S.W.) v. PERPETUAL TRUSTEE CO. (LTD.).

From that decision the Attorney-General for the State of New South Wales, by special leave, appealed to the High Court, on the ground only that the testatrix had expressed a general charitable intention and accordingly that the devise or bequest should be administered *cy-près*.

The respondents to the appeal were the plaintiff and the other respondents to the summons.

The court was informed that the respondent executor to the summons and to the appeal, who had entered a submitting appearance, did not propose to appear upon the hearing of the appeal.

Teece K.C. (with him *R. Le Gay Brereton*), for the appellant. A gift to train " orphan lads being Australians " is a good charitable gift (*Tudor* on *Charities and Mortmain*, 4th ed. (1906), pp. 36, 37). The paramount intention of the testatrix was to benefit " orphan lads being Australians." The purpose was the dominant motive; the use therefor of the property was subordinated to the main purpose. Where, as here, the mode contemplated by a testator cannot be carried out and such mode is not essential and can be separated from the intention of charity, it is the duty of the court to provide another mode (*Biscoe* v. *Jackson* (1); *Barby* v. *Perpetual Trustee Co. (Ltd.)* (2); *Royal North Shore Hospital of Sydney* v. *Attorney-General (N.S.W.)* (3); *Attorney-General for New South Wales* v. *Adams* (4); *Re Taylor*; *Martin* v. *Freeman* (5)). A general charitable intention on the part of the testatrix is shown by the nature of the disposition in the will (*In re Monk*; *Giffen* v. *Wedd* (6); *Barby* v. *Perpetual Trustee Co. (Ltd.)* (7)). Of two alternative constructions the court will adopt that one which upholds and renders effectual a charitable gift (*Wallis* v. *Solicitor-General for New Zealand* (8); *In re Bain*; *Public Trustee* v. *Ross* (9)). The way in which the court has found the general intention of the particular land for the particular purpose is shown in *In re Wiseman's*

(1) (1887) 35 Ch. D. 460, at pp. 463, 464.
(2) (1937) 58 C.L.R. 316, at pp. 322-325.
(3) (1938) 60 C.L.R. 396, at p. 414.
(4) (1908) 7 C.L.R. 100, at pp. 124, 125.
(5) (1885) 58 L.T. 538, at p. 543.
(6) (1927) 2 Ch. 197, at p. 210.
(7) (1937) 58 C.L.R., at p. 325.
(8) (1903) A.C. 173.
(9) (1930) 1 Ch. 224, at p. 230.

Trusts; Wiseman v. *The Equity Trustees Executors and Agency Co. Ltd.* (1). Even if unsuccessful the appellant should be allowed his costs. The question for decision arose owing to the ambiguity of the language used by the testatrix (*Maxwell* v. *Maxwell* (2)). The costs should be paid out of the estate, not out of the property (*In re Hall-Dare*; *Le Marchant* v. *Lee Warner* (3); *Daniell's Chancery Practice*, 8th ed. (1914), vol. 2, p. 1071).

David Wilson, for the respondent Perpetual Trustee Co. (Ltd.). This respondent adopts a neutral attitude on the questions in dispute. If the appellant succeeds the other respondents, although separately represented, being in the same interest, should be allowed only one set of costs between them. If the appellant fails the ordinary consequences should follow, that is, the appellant should pay the costs. If costs are allowed out of the estate then, as the ambiguity was caused by the language of the testatrix, the costs should be paid out of the estate in due course of administration: See *Moran* v. *House* (4).

O'Toole, for the respondent Winsome Elizabeth Wilson, representing the pecuniary legatees. The words used by the testatrix clearly show that the only purpose in her mind when she made her will was that the farm was to be held for one particular purpose. That has failed (*In re Wilson*; *Twentyman* v. *Simpson* (5)). The words should not be strained in order to find a general charitable intention. *Barby* v. *Perpetual Trustee Co. (Ltd.)* (6) and *Royal North Shore Hospital of Sydney* v. *Attorney-General (N.S.W.)* (7) on their facts are quite different from this case; they do not show that any general charitable intention is apparent in the testatrix's will. The fact that in *Wallis* v. *Solicitor-General for New Zealand* (8) and *In re Wiseman's Trusts* (1) the instrument under consideration was a deed and in each case was executed only for the charitable purpose made it easier to find a charitable intention than here where the property was, it is submitted, only dealt with incidentally. This case is

(1) (1915) V.L.R. 439.
(2) (1870) L.R. 4 H.L. 506, at pp. 517, 520.
(3) (1916) 1 Ch. 272.
(4) (1924) 35 C.L.R. 60.
(5) (1913) 1 Ch. 314.
(6) (1937) 58 C.L.R. 316.
(7) (1938) 60 C.L.R. 396.
(8) (1903) A.C. 173.

H. C. OF A. 1940. ATTORNEY-GENERAL (N.S.W.) v. PERPETUAL TRUSTEE CO. (LTD.).

indistinguishable from *In re Packe*; *Sanders* v. *Attorney-General* (1). A general charitable intent, apart from the particular object, has not been disclosed (*Muir* v. *Archdall* (2)). The dominant motive of the testatrix was that the property should be used as a training farm. The respondent pecuniary legatees and the respondent next of kin were entitled to separate representation (*Read* v. *Chown* (3)). There has not been any objection made to separate representation.

Weston K.C. (with him *Emerton*), for the respondent Leslie Maclean Wilson representing the next of kin. It is not enough to look at the essence of a gift or devise unless one does find, as a matter of construction, two intentions, a dominant intention and a subordinate intention; and it is essential that the dominant intention be also the general intention. The manner in which the general principle should be applied is shown in *In re Wilson*; *Twentyman* v. *Simpson* (4) and *Royal North Shore Hospital of Sydney* v. *Attorney-General* (*N.S.W.*) (5). The other provisions of the will do not assist on the question whether the intention of the testatrix was general charitable or partly charitable. The provision in the will, a "home-drawn" will, that the property is "to be held" does not create a trust; the word "held" as used means "retain." The elements are that this specific property (*a*) shall be retained, (*b*) not for training but for a training farm, (*c*) for orphan lads, and (*d*) being Australians. Three of these elements relate to the particular property in question. Decisions of the court on this matter are referred to in *Theobald* on *Wills*, 8th ed. (1927), p. 404, and *Halsbury's Laws of England*, 2nd ed., vol. 4, p. 182. The cases which come closest to this case are *Re Taylor*; *Martin* v. *Freeman* (6), *In re Packe*; *Sanders* v. *Attorney-General* (1), and *In re Wiseman's Trusts* (7). *Barby* v. *Perpetual Trustee Co.* (*Ltd.*) (8) and *Royal North Shore Hospital of Sydney* v. *Attorney-General* (*N.S.W.*) (9) proceed upon the footing that the court there found general prefatory words. In

(1) (1918) 1 Ch. 437.
(2) (1918) 19 S.R. (N.S.W.) 10, at p. 14; 36 W.N. (N.S.W.) 4, at p. 6.
(3) (1929) 46 W.N. (N.S.W.) 154.
(4) (1913) 1 Ch., at p. 321.
(5) (1938) 60 C.L.R., at pp. 428, 429.
(6) (1888) 58 L.T. 538.
(7) (1915) V.L.R. 439.
(8) (1937) 58 C.L.R. 316.
(9) (1938) 60 C.L.R. 396

In re White's Trusts (1) a gift to a specified class failed because even if a site for the proposed building could have been obtained, the income was insufficient for the endowment and maintenance of the project. *Wallis* v. *Solicitor-General for New Zealand* (2) is distinguishable. In the circumstances the respondents should not be limited to one set of costs (*Trustees, Executors and Agency Co. Ltd.* v. *Ramsay* (3)). The Attorney-General, like other litigants, appeals at his own risk as to costs (*Affleck* v. *The King* (4)).

Teece K.C., in reply. *In re Wilson* ; *Twentyman* v. *Simpson* (5) and *In re Packe* ; *Sanders* v. *Attorney-General* (6) were distinguished in *In re Monk* ; *Giffen* v. *Wedd* (7). Gifts to institutions, as in *Packe's Case* (6), are construed on quite different principles from gifts for purposes (*Barby* v. *Perpetual Trustee Co. (Ltd.)* (8)). Successful defendants or respondents in the same interest are allowed one set of costs only (*Richard Brady Franks Ltd.* v. *Price* (9)).

Cur. adv. vult.

June 28.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a decretal order of the Supreme Court of New South Wales (*Roper* J.) whereby it was declared that a gift contained in the will of Annie Reid McDonell created a valid charitable trust which it was impracticable to carry out according to its terms, that the testatrix had not expressed any general charitable intention, that the trust could therefore not be administered *cy-près*, and that, accordingly, the property in question passed as on the intestacy of the testatrix. The appellant, asking for a *cy-près* order, challenges only the part of the order which declares that the testatrix did not express a general charitable intention.

The testatrix, whose home was a property known as Milly Milly, made the following disposition in her will : " I will and bequeath the whole of the Milly Milly property to be held by the Perpetual Trustee Co. for a training farm for orphan lads being Australians."

(1) (1886) 33 Ch. D. 449.
(2) (1903) A.C. 173.
(3) (1920) 27 C.L.R. 279, at p. 285.
(4) (1906) 3 C.L.R. 608, at p. 630.
(5) (1913) 1 Ch. 314.
(6) (1918) 1 Ch. 437.
(7) (1927) 2 Ch., at pp. 204, 205.
(8) (1937) 58 C.L.R., at p. 323.
(9) (1936) 37 S.R. (N.S.W.) 37; 53 W.N. (N.S.W.) 238.

H. C. OF A. 1940. ATTORNEY-GENERAL (N.S.W.) v. PERPETUAL TRUSTEE CO. (LTD.). Latham C.J.

The question to be determined by the court was stated by *Parker* J. in *In re Wilson* (1) in the following terms :—" I have to determine whether the gift in this will, which is in form a particular gift, is a gift really for a particular charitable purpose, and for that purpose only, or whether there is a paramount intention to be gathered from the will that the money shall in any event be applied for some more general charitable purpose even if the particular mode of application which is prescribed cannot be carried into effect." The answer to this question is to be reached by construing the will as a whole. As *Parker* J. said in the case cited (1), " I simply have to consider what is the construction of the gift." See also *In re Monk* (2), per *Sargant* L.J. : " The question of general charitable intent " is " one depending on the construction of the particular will, or other instrument." In this case there are no other provisions in the will which can be used to assist in the construction of the charitable provision which is in question.

In every case of a charitable gift there is a charitable intention. By a process of abstraction it is always possible to disengage that intention in the case of any particular gift and then to argue that the intention so discovered is an intention which is general and not particular in character. A gift for the relief of poverty in a particular village subject to precise directions limiting the benefits to be taken by individuals and the manner in which those benefits are to be conferred or enjoyed can accurately, but not completely, be described as a gift for the relief of poverty. So also any gift for the establishment of a school in a particular place can be described, once again accurately but not completely, as a gift for the advancement of education. But it would be quite wrong to hold that therefore a general charitable intention was disclosed in the case of such gifts, so that the trusts could be administered *cy-près*. The contrary view would really involve the proposition that every charitable trust, showing as it does a charitable intention to benefit the poor or to advance education, religion, &c., is to be construed as a gift showing a general charitable intention.

Before the *cy-près* doctrine can be applied it is necessary to find an expression of a general charitable intention in addition to a

(1) (1913) 1 Ch., at p. 321. (2) (1927) 2 Ch., at p. 212.

particular charitable intention. It must be possible to hold that, notwithstanding the failure of the particular means mentioned in the will or other instrument for the effectuation of the charitable intention, there is an expression of a general charitable intention, even though it may be impracticable to give effect to the intention by such means. As *Dixon* J. said in *Royal North Shore Hospital of Sydney* v. *Attorney-General* (*N.S.W.*) (1), "it is not legitimate to infer from the fact that" the testator's "plan is a means to an end that the accomplishment of the end is his substantial purpose. The question is whether, independently of the means he has chosen, he had any charitable intention."

In the present case the testatrix was not content to refer merely to her "Milly Milly property." She expressly devised to a trustee "the whole of the Milly Milly property to be held" for a particular purpose. These words suggest that she regarded the property as a physical entity of which she intended to prescribe the use or application. The purpose mentioned is described in the words: "for a training farm for orphan lads being Australians." This gift cannot properly be described, in relation to the question which arises, as a gift for a general purpose such as the benefit of orphans, or of Australian orphans, or for educational (training) purposes, although the gift necessarily involves each of these elements. There is no indication, in my opinion, of any such general purpose. Such a purpose cannot be said to be declared in the will. Such a purpose cannot be extracted from the words of the will except by the irrelevant process of abstraction to which I have referred. In my opinion, the intention and the whole of the intention of the testatrix as disclosed by these words was to devote the whole of the Milly Milly property to a specified purpose in the sense that it was to be itself used for that purpose. She wished to found a training farm for Australian orphan lads on the Milly Milly property which had been her home and which as a farm was regarded by her as being suitable for that purpose. There is, in my opinion, no indication of a general charitable intention except in so far as such an intention may be said to be involved in each and every particular charitable intention.

(1) (1938) 60 C.L.R., at p. 428.

H. C. OF A. 1940. ATTORNEY-GENERAL (N.S.W.) v. PERPETUAL TRUSTEE CO. (LTD.). Latham C.J.

The cases relied upon by the appellant are, in my opinion, all distinguishable from the present case. In *Barby* v. *Perpetual Trustee Co. (Ltd.)* (1) there was an express general declaration of an intention to benefit necessitous returned soldiers or their necessitous relatives as well as a particular scheme for carrying that intention into effect. In *Royal North Shore Hospital of Sydney* v. *Attorney-General (N.S.W.)* (2) there were general prefatory words expressing a paramount general charitable intention. *Wallis* v. *Solicitor-General for New Zealand* (3) is also a case where the relevant dispositions contained general words as well as a particular provision for establishing a college: See per *Sargant* L.J. in *In re Monk* (4). In *In re Wiseman's Trusts* (5) attention was called to the fact that "no virtue can be ascribed to the particular locality provided for that home" which the testatrix desired to establish. In the present case the testatrix desired to establish a training farm at Milly Milly and she intended that the property should be devoted to that purpose because it was a farm which she regarded as suitable for a training farm.

I am therefore of opinion that the decision of the learned judge was right and should be affirmed.

Counsel for the appellant asked that even if the appeal failed the costs of the Attorney-General should be paid out of the estate. I can see no reason for charging the costs of this unsuccessful appeal upon the estate. In my opinion, the appellant should bear his own costs and should pay the respondents' costs of the appeal. The respondents Winsome Elizabeth Wilson and Leslie Maclean Wilson were separately represented upon the appeal and in the proceedings in the Supreme Court. As to some of the questions asked in the originating summons before the Supreme Court they had divergent interests. Upon this appeal, however, their interests are identical. There was, in my opinion, no reason for separate representation, and accordingly only one set of costs should be allowed to these respondents.

In my opinion the appeal should be dismissed with orders as to costs as above stated.

(1) (1937) 58 C.L.R. 316.
(2) (1938) 60 C.L.R., at pp. 414 et seq.
(3) (1903) A.C. 173.
(4) (1927) 2 Ch., at p. 210.
(5) (1915) V.L.R., at p. 443.

RICH J. This is an appeal from the judgment of *Roper* J., who held that the testatrix had not "exhibited a general charitable intention in respect of the property described as the whole of the Milly Milly property." As the intention of the testatrix is to be ascertained from the words used by her in her will I quote the relevant passage: "I will and bequeath the whole of the Milly Milly property to be held by the Perpetual Trustee Co. for a training farm for orphan lads being Australians." In *In re Monk* (1) Lord *Hanworth* M.R. quotes from the judgment of *Parker* J. in *In re Wilson* (2) where that learned judge defines broadly two categories into which cases of this nature may be divided, the first where "it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect." In such cases, even though the precise directions cannot be carried out, the gift for the general charitable purpose will remain, and be perfectly good, and the doctrine of *cy-près* applied. The other category is, "where on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift, —a gift for a particular purpose—and it being impossible to carry out that particular purpose, the whole gift is held to fail" (3). In my opinion the instant case falls within the first category. The language of the testatrix evidences the purpose of benefiting orphan children by aiding or promoting their farm training; that is the real substance of the gift. The property devised by her was to provide the means of carrying out this purpose. The testatrix did not give particular directions or indicate the exact method for carrying out her purpose. The general and paramount intention of the testatrix was to benefit the persons named by training them on a farm and fitting them for rural pursuits and the court may direct

(1) (1927) 2 Ch., at p. 204. (2) (1913) 1 Ch., at pp. 320, 321.
(3) (1913) 1 Ch., at p. 321.

H. C. OF A. 1940.

ATTORNEY-GENERAL (N.S.W.) v. PERPETUAL TRUSTEE CO. (LTD.).

Rich J.

a scheme to be settled for this purpose. I suggest for the consideration of the Master in Equity of the Supreme Court that if the property be sold and the proceeds invested the income therefrom might be applied towards the maintenance and support of an orphan or orphans at one of the New-South-Wales agricultural colleges. In my opinion the appeal should be allowed, a declaration made that the devise in question is a good and valid charitable bequest and a reference made to the Master in Equity to approve of a scheme for the general administration of the property, the application of the income or the proceeds of the sale thereof as the case may be for carrying out the general charitable intention appearing in the testatrix's will.

STARKE J. Annie Reid McDonell was possessed at the time of her death of an area of grazing and farming lands known as Milly Milly, consisting of about 4,000 acres near West Wyalong in New South Wales. She died in 1936 leaving a will whereby she made the following disposition of the Milly Milly property: "I will and bequeath the whole of the Milly Milly property to be held by the Perpetual Trustee Co. for a training farm for orphan lads being Australians." The Supreme Court of New South Wales has found and declared that it is impracticable to use the Milly Milly property as a training school for orphan lads and it also declared that in making the disposition the testatrix had not expressed a general charitable intention and that the property passed as on an intestacy of the testatrix. The declaration that it is impracticable to use the Milly Milly property as a training school for orphan lads has not been challenged, but the Attorney-General challenges the other declaration as to the property and contends that the disposition constitutes a good charitable devise or bequest which should be administered *cy-près*.

The law of the case is not in doubt, but its application in particular cases may lead to different judicial conclusions. It has been stated by *Parker* J. in *In re Wilson*; *Twentyman* v. *Simpson* (1), and I need do no more than refer to his judgment in that case. The question which we have to consider is whether the gift in the will of the testatrix "which is in form a particular gift, is a gift really

(1) (1913) 1 Ch., at pp. 320, 321.

for a particular charitable purpose, and for that purpose only, or whether there is a paramount intention to be gathered from the will that the " property " shall in any event be applied for some more general charitable purpose even if the particular mode of application which is prescribed cannot be carried into effect " (1).

I gather from the description of the testatrix in the will as the widow of Roderick Charles McDonell of Milly Milly, West Wyalong, that the Milly Milly property had been her home. At all events she apparently carried on farming and grazing operations on the property at the time of her death. Otherwise the question depends upon the intention of the testatrix gathered from the words of her will. In form it is a particular gift : the whole of the Milly Milly property to be held for a training farm for orphan lads being Australians. In my opinion there is nothing in this will which justifies the court, as a matter of construction, disregarding the particular direction of the testatrix to hold her Milly Milly property as a training school for orphan lads, and construing it as a general gift for the benefit of orphan lads. On the surrounding facts, such as they are, and on the precise words of the gift, the intention of the testatrix is that the training school should be located at her old home Milly Milly and there only.

In my opinion the decision of the Supreme Court was right and the appeal should be dismissed.

Held appeal

DIXON AND EVATT JJ. The question for decision is whether a charitable trust declared in respect of a country property fails completely or is to be applied *cy-près*. The property consists of three thousand eight hundred acres of land near West Wyalong in New South Wales, suitable for carrying sheep and in part for wheat growing. There is a small homestead upon the land, and the trust, as it has been construed, includes the plant used with the land and the live stock there depasturing. The place is named Milly Milly. The trust is declared by the will of the late Annie Reid McDonell, whom the probate describes as a " widow and grazier." The description " grazier " probably means no more than that she made her home at Milly Milly, and that she derived much of her income

(1) (1913) 1 Ch., at p. 321.

H. C. OF A. 1940.

ATTORNEY-GENERAL (N.S.W.) v. PERPETUAL TRUSTEE CO. (LTD.).

Dixon J. Evatt J.

from the farming and grazing pursuits carried on, there and elsewhere, by a manager, whom she employed at a wage. Her will, an inartificial document, disposes of the property by the following clause : " I will and bequeath the whole of the Milly Milly property to be held by The Perpetual Trustee Co. for a training farm for orphan lads being Australians."

To use the lands as a training farm has been held to be impracticable. The homestead is too small, the plant is too old-fashioned and the income produced would not suffice to support the staff and to meet the expenses thought necessary for the project. At all events these are the conclusions which provide the foundation for the declarations, not now attacked, contained in the decretal order under appeal. While declaring that the disposition created a valid charitable trust, the order also declared that to give effect to the expressed object is impracticable. It further declares that the testatrix has not expressed a general charitable intention and accordingly that the property passes as on an intestacy. From the last declarations the Attorney-General of New South Wales now appeals. He says that the intention of charity is sufficiently general to warrant a *cy-près* application of the Milly Milly lands, and that they should be sold and their proceeds applied in furtherance of the purpose of training Australian orphan lads in farming pursuits.

No one denies that to train orphans as farmers is a charitable purpose for which a trust may be validly created. The matter in question is whether, because it has been found impossible to use Milly Milly itself as a place of training, the trust declared in the will fails entirely, so that the property is undisposed of.

A charitable trust is a trust for a purpose, not for a person. The objects of ordinary trusts are individuals, either named or answering a description, whether presently or at some future time. To dispose of property for the fulfilment of ends considered beneficial to the community is an entirely different thing from creating equitable estates and interests and limiting them to beneficiaries. In this fundamental distinction sufficient reason may be found for many of the differences in treatment of charitable and ordinary trusts. As a matter of reason, if not of history, it explains the differences between the interpretation placed on declarations or statements of

charitable purposes and the construction and effect given to limitations of estates and interests. Estates and interests are limited with a view of creating precise and definite proprietary rights, to the intent that property shall devolve according to the form of the gift and not otherwise. Whatever conditions are expressed or implied in such limitations are therefore as a rule construed as essential to the creation or vesting of the estate or interest unless an intention to the contrary appears. But to interpret charitable trusts in the same manner would be to ignore the conceptions upon which such trusts depend.

In the first place, the law of trusts does not enable a testator or settlor to control and direct the future use of his property as an independent power but only as a means to an end. His directions are not enforced simply because he has given them by an instrument in proper form and independently of the nature and description of the remoter purposes they are found to subserve. If they do not concern the creation, devolution or enjoyment of estates or interests, they are enforced only when they answer some purpose of a defined class allowed by law as tending to the public benefit: See *Law Quarterly Review*, vol. 31, p. 361; *Law Quarterly Review*, vol. 53, pp. 26-35; *Law Quarterly Review*, vol. 54, p. 258, and *Hobart Savings Bank* v. *Federal Commissioner of Taxation* (1). The reason why the specific directions given by an instrument declaring a charitable trust receive effect is because they tend to a purpose falling within the legal description of charity. The existence of that purpose is, therefore, the foundation of a valid trust. In the next place, the very idea of a trust for a purpose beneficial to the community involves the distinction between ends and means. If property is devoted to an abstract end or purpose, the details of its application or use must be considered as a means to the end. Where the trust instrument does not leave such matters to the administration of the trust but formulates an elaborate plan or scheme or gives particular directions, there is reason in the view that the exact plan or directions are not of the essence of the disposition. In the third place, as the purpose of the trust need not, and, indeed, most usually does not, involve the expenditure or consumption of corpus, continuity and

(1) (1930) 43 C.L.R. 364, at p. 375.

H. C. OF A. 1940.

ATTORNEY-GENERAL (N.S.W.) v. PERPETUAL TRUSTEE CO. (LTD.).

Dixon J. Evatt J.

indefiniteness of duration form a common characteristic of charitable trusts. This characteristic would be lost or imperilled by a construction of specific directions making them essential to the operation of the trust, in spite of all the unforeseen changes which time brings.

The settled rule has therefore a foundation in reason as well as in historical considerations. That rule was expressed by Lord *Eldon* in words that have often been quoted. " I consider it now established," he said; " that although the mode, in which a legacy is to take effect, is in many cases with regard to an individual legatee considered as of the substance of the legacy, where a legacy is given so as to denote that charity is the legatee, the court does not hold that the mode is of the substance of the legacy; but will effectuate the gift to charity, as the substance; providing a mode for that legatee to take, which is not provided for any other legatee " (*Mills* v. *Farmer* (1)). " The principle on which the doctrine rests appears to be, that the court treats charity in the abstract as the substance of the gift, and the particular disposition as the mode, so that in the eye of the court the gift notwithstanding the particular disposition may not be capable of execution subsists as a legacy which never fails and cannot lapse " (per Sir *Montague E. Smith*, *Mayor of Lyons* v. *Advocate-General of Bengal* (2)).

The doctrine is said to have reached its full development before the principle of resulting trusts was understood. But at the close of the eighteenth century, greater regard was given to the interests of the heir at law. In *Attorney-General* v. *Whitechurch* (3) Lord *Alvanley* said :—" The doctrine of *cy-près*, which has been so much discussed in this court, and by which I understand the rule to execute the charitable intention as nearly as possible, however wildly and extravagantly it has been acted upon in former cases, is by late decisions, particularly since the *Statute* (*scil.* the Georgian *Mortmain Act*, 9 Geo. II. c. 36) administered in this way. The court will not administer a charity in a different manner from that pointed out, unless they see, that though it cannot be literally executed, another mode may be adopted, by which it may be carried into effect in substance without infringing upon the rules of law."

(1) (1815) 19 Ves. Jun. 483, at p. 486 [34 E.R. 595, at p. 596].
(2) (1876) 1 App. Cas. 91, at p. 113.
(3) (1796) 3 Ves. Jun. 141, at p. 144 [30 E.R. 937, at pp. 938, 939].

A distinction in trusts declared for charitable purposes has thus come to exist which, however clear in conception, has proved anything but easy of application. It is the distinction between, on the one hand, cases in which every element in the description of the trust is indispensable to the validity and operation of the disposition and, on the other hand, cases where a further and more general purpose is disclosed as the true and substantial object of the trust, which may therefore be carried into effect at the expense of some part of the particular directions given by the trust instrument.

If there are insuperable objections, either of fact or of law, to a literal execution of a charitable trust it at once becomes a question whether the desires or directions of the author of the trust, with which it is found impracticable to comply, are essential to his purpose. If a wider purpose forms his substantial object and the directions or desires which cannot be fulfilled are but a means chosen by him for the attainment of that object, the court will execute the trust by decreeing some other application of the trust property to the furtherance of the substantial purpose, some application which departs from the original plan in particulars held not essential and, otherwise, keeps as near thereto as may be. The question is often stated to be whether the trust instrument discloses a general intention of charity or a particular intention only. But, in its application to cases where some particular direction or directions have proved impracticable, the doctrine requires no more than a purpose wider than the execution of a specific plan involving the particular direction that has failed. In other words "general intention of charity" means only an intention which, while not going beyond the bounds of the legal conception of charity, is more general than a bare intention that the impracticable direction be carried into execution as an indispensable part of the trust declared.

Cases arising from illegality, impracticability or failure of some part of the express directions contained in a charitable trust are almost infinite in their variety. Sometimes the trust is expressed as a detailed scheme which the settlor or testator has elaborated. Such a scheme may be found entirely impracticable or on the other hand the impracticability may be confined to a small part, the failure of which would not defeat or change the operation of what

H. C. OF A. 1940.

ATTORNEY-GENERAL (N.S.W.) v. PERPETUAL TRUSTEE CO. (LTD.).

Dixon J. Evatt J.

is left. Sometimes the trust is expressed without any elaboration of detail and yet some particular element involved in the description of the purposes of the trust is found to be the source of an impracticability. The present case is one of this class. For it is the use of Milly Milly itself as a training farm which causes the difficulty, not the training of lads on a farm, nor the finding of Australian orphans who are both lads and are willing to be trained in farming. In applying the general doctrine to such varying cases it is inevitable that different considerations will govern the result and that the principle and the modes of reasoning will be stated in different forms. The problem will at times present itself as that of distinguishing between an immediate and a remoter purpose and of deciding whether the remoter is dominant or essential and the immediate subordinate or accidental. At other times it will appear as a question whether the existence of a main or paramount purpose is manifested notwithstanding that the declaration of the charitable trust takes the form of a direction to carry out a detailed plan. Upon some trusts the question may arise as one of severability, that is, whether so much of the provision as is impracticable is interdependent with or independent of and severable from the rest. Upon others, as a question whether a complete gift to an ultimate charitable purpose has not been made with directions superadded or annexed for the purpose of carrying it into effect, directions the failure of which leave the primary gift unaffected: See, per *Sargant* L.J., *In re Monk* (1), and, per *Parker* J., *In re Wilson* (2). Yet again the matter may wear the appearance of a question whether part of the description of the trust, or a specific direction, amounts to a condition precedent to the trust taking effect: Cf., per Lord *Hanworth* M.R., *In re Monk* (3).

The truth is that the time-honoured distinction between essential and accidental characteristics is at the root of the test provided by the modern law for ascertaining whether a trust for charitable purposes, found incapable of literal execution according to its tenor, is nevertheless to be administered *cy-près*. In other departments of the law, however, similar distinctions are in use. Analogies may

(1) (1927) 2 Ch., at p. 211. (2) (1913) 1 Ch., at pp. 320, 321.
(3) (1927) 2 Ch., at p. 205.

be seen in the question whether a contractual provision is of the essence; whether a term is a condition or a warranty; in the question whether invalid provisions of a statutory enactment or other instrument are severable or form part of an indivisible whole; in the question whether a law is mandatory or directory, and perhaps in the question whether the substantial purpose of creating a special power of appointment was to ensure a benefit to the objects so that they take in default of its exercise by the donee.

In determining whether a wider charitable intention is the substantial purpose of the express directions by which the trust is constituted, the court is guided by the trust instrument and the conclusion is commonly said to depend on a question of construction. No doubt the terms of the document, together with any extrinsic circumstances admissible in aid of construction, form the materials for ascertaining whether the specific directions were animated by a wider charitable purpose which amounted to the true or substantial object of the trust. The process of extracting from such materials an intention implicit in the transaction which they evidence is properly called interpretation. But the construction of the language in which the trust is expressed seldom contributes much towards a solution. More is to be gained by an examination of the nature of the charitable trust itself and what is involved in the author's plan or project. In distinguishing between means and ends, between the dominant and the subsidiary, between the substance and the form, an understanding of the relative importance in fact of the component parts of the plan or purpose expressed in the trust is a first step towards forming an opinion of the respective values they possessed in the view of the testator or settlor. His forms of expression are by no means to be neglected. In the arrangement of his ideas and his use of terms the importance which he attached to the particular and to the general respectively may appear. The decided cases show that slight indications have at times been treated as enough to warrant a conclusion in favour of a wider charitable intention.

Almost all charitable trusts expressed with any particularity must tend towards some more general purpose. But to find that the trust as expressed is designed to achieve some further and

H. C. OF A. 1940.

ATTORNEY-GENERAL (N.S.W.) v. PERPETUAL TRUSTEE CO. (LTD.).

Dixon J. Evatt J.

wider end of a charitable nature is one thing. To find that the secondary and wider end is the dominant object to which the property is devoted is another and a further step. This step cannot be taken unless, from the nature of the trust, the provisions of the instrument and any circumstances which may legitimately be taken into account, the existence of such an intention may reasonably be inferred. For no definite presumption has been established in favour of a general charitable intention. At the same time the court leans, it is said, in favour of charity and is ready to infer a general intention. But little is therefore required as a ground for treating a wider purpose as the essential object of the trust.

The precise question raised by the present case is perhaps somewhat out of the common run. For it depends, not upon the impracticability of particular directions formulated by a testator as part of a scheme or plan which he has elaborated, but on the unsuitability of the specific property devised and bequeathed for purposes which are otherwise quite practicable and, though well defined, are stated with an avoidance of embarrassing particularity.

The testatrix in her disposition of Milly Milly has sufficiently stated her intention of advancing a charitable purpose, a purpose which may be said to consist in four ingredients or elements, viz., (*a*) the training (*b*) of orphan (*c*) lads (*d*) in farming. But she has stated that intention in a direction that her Milly Milly property shall be held by her trustees for a training farm for orphan lads (being Australians). It is of course clear that she regarded Milly Milly as suitable for such a purpose. But the question is whether this consideration is of the essence or is to be treated as subsidiary to the main purpose to which she devoted the land. Ought she to be regarded as meaning that the actual use of Milly Milly as the place where the boys were to be trained was an indispensable condition of her disposition? Or is the guiding purpose the training of Australian orphan lads in farming pursuits and did her choice fall on Milly Milly as an appropriate means? In other words was she devoting Milly Milly to the furtherance of the beneficial purpose or was her real object a solicitude for the retention and utilization of Milly Milly? It must be borne in mind that although the form of the gift shows that the testatrix regarded Milly Milly as suitable

for the purpose of a training farm, yet it is clear that it possessed no features giving it any special suitability and distinguishing it from other grazing or farming lands; and there is nothing either in the language of the will or in the surrounding circumstances to suggest that the testatrix chose Milly Milly for any better reason than that, of the assets of which she was disposing by will, Milly Milly provided the most suitable means of giving effect to her intentions. The failure of her issue and the presence in her will of other charitable bequests form a sufficient foundation for the inference that her testamentary dispositions were based on a desire to devote much of her property to the general benefit of the community and to negative any idea that she may have been actuated less by a wish to advance the useful end to which she devoted the property, than by some desire to conserve Milly Milly intact, a desire, to suppose a possible example, that it might continue as an enduring memorial to herself or her husband. Again she was not the framer of any particular scheme of training centering on Milly Milly. She left the means of carrying out her general purpose at large. Nevertheless she devoted the land unconditionally and once for all to the purpose. Suppose that it had been found practicable at first to use the lands as a training farm but after some time, perhaps many years, changing conditions had made it no longer feasible. Could she be taken to intend that a trust should in that event result in favour of her next of kin? Then after all Milly Milly is the subject of the trust and the purpose is the object for which it is held in trust. When property is made the subject of interminable trusts for purposes, an intention is not lightly to be inferred that in no contingencies is its form to be changed.

In questions of this kind the significance and application of rules and doctrines necessarily expressed in abstract and general terms is, we think, evidenced by the course of judicial decisions. It is true that it is not easy to find cases like the present. *In re Packe* (1), which was relied upon for the next of kin, does not appear to us at all like it. For there the will made it clear that the executors were to look for a society which would undertake the conduct of the "retreat" with the money which the testatrix appropriated

(1) (1918) 1 Ch. 437.

H. C. OF A. 1940.

ATTORNEY-GENERAL (N.S.W.) v. PERPETUAL TRUSTEE CO. (LTD.).

Dixon J. Evatt J.

for that purpose. Nor does *In re Taylor* (1) resemble it, where the testamentary gift was obviously inspired by no other intention than to advance a plan which in his lifetime the testator thought he had put into execution but which was entirely invalid. On the other hand, the Victorian case of *Re Wiseman's Trusts* (2) is more in point. The ground of the decision of *Hood* J. in favour of a *cy-près* application of the property is summarized in two sentences relevant to the present case. "The declared design of the deed is to provide a home for neglected children. No virtue can be ascribed to the particular locality provided for that home, nor to any special rules and regulations relating thereto (3)."

But the general trend of the case law over a long period of time appears to us to be against holding that the use of Milly Milly in specie formed an indispensable part of the gift. The gift, in our opinion, ought to be regarded as dominated by a more general charitable purpose.

We think the appeal should be allowed. The decree appealed against should be varied by omitting therefrom the declarations that in making the disposition of Milly Milly the testatrix has not expressed a general charitable intention and that the said property passes as on an intestacy of the testatrix and by substituting therefor a declaration that the trusts declared in respect of Milly Milly should be executed *cy-près* and that a scheme ought to be settled. With that declaration the cause should be remitted to the Supreme Court to be dealt with according to law.

Costs of the appeal of all parties out of the estate, those of the trustee as between solicitor and client.

Appeal

McTIERNAN J. In my opinion the appeal should be allowed.

The words in which the testatrix framed the devise of the Milly Milly property clearly show that it was her intention to devote the property to a charitable object. As it has been found impracticable to apply the property in accordance with the expressed intention of the testatrix, the question is whether the devise evinces a general or a particular charitable intention. The inference which I draw from the language of the testatrix is that the devise was made with the intention of providing a training farm for Australian orphan lads and of making the Milly Milly property available for that purpose. If

(1) (1888) 58 L.T. 538; 4 T.L.R. 302. (2) (1915) V.L.R. 439.
(3) (1915) V.L.R., at p. 443.

that inference is the correct one, it follows that the paramount intention was to provide that kind of facility for the training of the class she desired to assist, and her direction about the Milly Milly property may be regarded as the mode in which she desired that intention to be fullfilled. The words of the gift do not, in my opinion, show that her intention was confined to the particular object of having Milly Milly turned into a training farm for orphan lads. The present case, I think, more naturally falls on the side of the line on which *Biscoe* v. *Jackson* (1) stands rather than on the side on which *In re Rymer*; *Rymer* v. *Stanfield* (2) stands: See especially the observations of Lord *Herschell* L.C. in the latter case (3).

The property, the subject of the devise, should, therefore, be applied *cy-près*.

Appeal allowed. Decree varied by omitting therefrom declarations: (1) *that testatrix has not expressed a general charitable intention in the devise of the property Milly Milly*; *and* (2) *that the said property passes as upon an intestacy of the testatrix*; *and by substituting therefor declarations*: (1) *that in making the said devise the testatrix expressed a general charitable intention to benefit orphan lads being Australians by training them in farming pursuits*; *and* (2) *that the trusts declared in respect of the said property should be executed cy-près. Order that it be referred to the Master in Equity to settle a scheme for the regulation and management of the said charitable trust. Cause remitted to Supreme Court. Costs of appeal of all parties out of estate of testatrix those of trustee as between solicitor and client, but only one set of costs to be allowed between Winsome Elizabeth Wilson and Leslie Maclean Wilson.*

Solicitor for the appellant, *J. E. Clark*, Crown Solicitor for New South Wales.

Solicitors for the various respondents, *G. P. Evans & Englert*, West Wyalong, by *H. E. Hoare*; *G. D. Barr*; *A. I. Ormsby*; *A. J. Taylor, William Arnott & Co.*

J. B.

(1) (1887) 35 Ch. D. 460.
(2) (1895) 1 Ch. 19.
(3) (1895) 1 Ch., at p. 28.