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[HIGH COURT OF AUSTRALIA.]

LEMM AND OTHERS

APPELLANTS ;

AND

THE FEDERAL COMMISSIONER OF TAXATION } RESPONDENT.

*Estate Duty—Exemption—Public benevolent institution—Pre-existence of institution* H. C. OF A.  
—“Home for aged women in straitened financial circumstances”—Periodical 1942.  
payment by inmates towards upkeep—Legacy and devise of shops on trust for  
upkeep and maintenance of home—Residuary estate—Capital and income— SYDNEY,  
Application by trustees—Any institution for relief of pain, suffering, physical Nov. 17, 18,  
disability, infirmity and/or financial distress—Estate Duty Assessment Act 26.  
1914-1940 (No. 22 of 1914—No. 12 of 1940), sec. 8 (5)\*.

Rich,  
McTiernan and  
Williams JJ.

A testator devised to the Presbyterian Church (N.S.W.) Property Trust, which accepted the gift, a residence and the land upon which it was erected upon trust for the purpose of a home for aged women in straitened financial circumstances who should be required to pay towards the upkeep of the home the sum of one pound per week. He bequeathed to the Trust a legacy of £500 to be applied for the upkeep and maintenance of the home and devised to it four shops upon trust to apply the income and profits arising therefrom for the same purpose. He devised and bequeathed to his trustees his residuary estate upon trust to stand possessed of the net income to pay certain annuities and such regular or occasional sums as his trustees in their absolute discretion should think fit for the benefit and maintenance of the above-mentioned home and for the benefit and maintenance of certain homes, hospitals and institutions referred to in a later provision by which he directed his trustees, on the death of the last survivor of the annuitants, to hold his residuary estate and any

\* Sec. 8 (5) of the *Estate Duty Assessment Act* 1914-1940 provides as follows :  
—“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.”



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accumulations of income upon trust to apply the income and capital as and whenever they should think fit to or for the benefit in New South Wales of any home, hospital or institution or any one or more of them, including the home first-mentioned above, established for or having as its object the relief of pain and suffering and/or physical disability and/or infirmity and/or financial distress.

*Held :—*

(1) That the home for aged women in straitened financial circumstances directed to be established by the will was a “public benevolent institution” within the meaning of sec. 8 (5) of the *Estate Duty Assessment Act 1914-1940*.

(2) That other than the part devised and bequeathed to pay annuities the residuary estate was devised and bequeathed “to a fund established and maintained for the purpose of providing money for use” for public hospitals and public benevolent institutions within the meaning of sec. 8 (5) of the *Estate Duty Assessment Act 1914-1940*.

It is no objection to the application of sec. 8 (5) of the *Estate Duty Assessment Act 1914-1940* that the public hospital, public benevolent institution or fund is established by the will itself, or that the trustees of the will are authorized to apply the fund to assist unnamed institutions, so long as their discretion does not allow them to apply it otherwise than for one or more of the purposes mentioned in the sub-section.

#### CASE STATED.

On the hearing of an appeal to the High Court by Charles Frederick Lemm, Duncan McDonald Crawford and Alfred Louis Brunet, as executors and trustees of the will of George Pitt Wood, deceased, from an assessment for estate duty made upon them in that capacity by the Federal Commissioner of Taxation under the *Estate Duty Assessment Act 1914-1940* in respect of the estate of the deceased, Williams J., pursuant to sec. 27 of the above-mentioned Act and sec. 18 of the *Judiciary Act 1903-1940*, stated for the opinion and consideration of the Full Court a case which was substantially as follows :—

1. By his will George Pitt Wood (hereinafter called “the testator”) late of Ashfield near Sydney in the State of New South Wales provided so far as material to the questions raised by this case and hereinafter appearing as follows :—

“4. I devise to the Presbyterian Church (N.S.W.) Property Trust my dwelling house and premises and all land belonging thereto known as 23 Charlotte Street Ashfield and the floor coverings in my said dwelling house and the Sideboards, Overmantels, Dining Tables, Wardrobes Linen Presses Five heavy chairs and Lounge in the Loungeroom Two large bedsteads and Mattresses contained therein or such of the said articles as the said the Presbyterian Church



(N.S.W.) Property Trust shall desire to accept and of such desire shall signify the same in writing to my Executors and Trustees to be held by the said Presbyterian Church (N.S.W.) Property Trust and to be known as 'The Eva Patience Wood and George Pitt Wood Memorial Home' and to be used for the purpose of a home for aged women in straitened financial circumstances and who shall be required to pay towards the upkeep of the home the sum of One pound (£1) per week And I direct that the said Presbyterian Church (N.S.W.) Property Trust shall not admit to the said Home any person suffering from any contagious or infectious disease.

5. I give to the Trustees of the Presbyterian Church (N.S.W.) Property Trust if it shall accept the devise and trust given to it under the immediately preceding clause the sum of Five hundred pounds (£500) to be applied for the upkeep and/or the maintenance and benefit of the said Home mentioned in the immediately preceding clause.

6. I devise to the Trustees of the Presbyterian Church (N.S.W.) Property Trust if it shall accept the devise and trust given to it under clause four hereof the land adjoining my premises No. 23 Charlotte Street Ashfield with the four shops erected thereon to retain use manage and control the same and apply the same and the income and profits arising therefrom for the upkeep maintenance and/or benefit of the Home to be known as 'The Eva Patience Wood and George Pitt Wood Memorial Home' referred to in clause four hereof.

7. If the Presbyterian Church (N.S.W.) Property Trust shall refuse to accept the devise and trust mentioned in clause four of this my Will then in such case I give to the Church of England Property Trust my said home with the right to the floor coverings and articles of furniture specified and the said legacy of Five hundred pounds (£500) and the land adjoining my premises No. 23 Charlotte Street Ashfield with the four shops erected thereon upon the same terms and conditions so that in such event clauses four five and six of this my Will shall be read and construed as if the words 'The Church of England Property Trust' were substituted for the words 'The Presbyterian (N.S.W.) Property Trust.'

8. If the Presbyterian Church (N.S.W.) Property Trust shall refuse to accept the trusts and provision given to it under clauses four five and six hereof and in such event the Church of England Property Trust shall in turn refuse to accept the same in pursuance of clause seven of this my Will or if by any objection at law or other reason whatsoever the trusts and provisions hereinbefore declared in clauses four five six and seven shall be void or be or become inoperative or ineffective in any such event my dwelling house and the contents thereof hereinbefore referred to and the legacy of Five hundred pounds and

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the land adjoining my premises at No. 23 Charlotte Street Ashfield and the four shops erected thereon and all other provisions the subject of the said trusts shall fall into and form part of my residuary estate. 11. I give devise and bequeath to my Trustees all the residue of my real and personal estate and effects whatsoever and wheresoever situate (hereinafter called my residuary estate) Upon trust in the discretion of my Trustees from time to time to manage direct and control the same respectively with power to grant leases of all or any part of my real estate for such periods at such rents and generally subject to such conditions as to my Trustees shall seem best and before pending or after such leasing or otherwise to sell and convert into money all or any part or parts of my residuary estate by auction or privately for cash or on credit in one lot or in several lots and to invest the proceeds And to hold my residuary estate or the investments representing the same Upon trust in the first place to pay my debts funeral and Testamentary expenses and all Federal and State Death Estate and Probate Duties and other debts charges and impositions and in the second place to hold the balance of my residuary estate (hereinafter called my residuary estate) Upon trust to stand possessed of the net income arising therefrom upon the following trusts—(a) To pay thereout to or for each of them my sister Katherine Mary Wood Lily Elizabeth Wood and Isabella Emma Booth during their respective lifetimes as from the date of my death such regular or occasional sum or sums not exceeding Fifty two pounds (£52) (each) per annum as my Trustees shall in their absolute discretion think necessary for their maintenance and/or wellbeing having regard in each particular case to any independent or other means that may be available for that purpose. (b) To pay thereout to my brother Alfred Sherwin Wood as from the date of my death such regular or occasional sum or sums not exceeding Two hundred pounds (£200) per annum as my Trustees shall in their absolute discretion think necessary for the maintenance and/or wellbeing of my said brother having regard to any independent or other means that may be available for that purpose. (c) To pay thereout such regular or occasional sums (if any) as my trustees shall in their absolute discretion think fit to or for the benefit and/or maintenance of 'The Eva Patience Wood and George Pitt Wood Memorial Home.' (d) To pay thereout such regular or occasional sums (if any) as my trustees in their absolute discretion think fit to or for the benefit and/or maintenance of such Home Hospitals and/or Institutions as are mentioned in the next succeeding clause of this my Will. 12. On the death of the last survivor of them my said sister and brother I direct my Trustees to hold my residuary



estate and any accumulation of income upon trust to apply the income and the capital at such times and in such manner and as they shall in their absolute discretion think fit to or for the benefit in the State of New South Wales of any Home Hospital or Institution or any one or more of them including ‘The Eva Patience Wood and George Pitt Wood Memorial Home’ established for or having as its object the relief of pain and suffering and/or physical disability and/or infirmity and/or financial distress.”

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2. The testator died on 29th May 1941 at Sydney in the said State without having altered or revoked his will.

3. Probate of the will was granted to the appellants the executors named in the will by the Supreme Court of New South Wales in its Probate Jurisdiction on 24th July 1941.

4. The Commissioner of Taxation, the respondent herein, on 17th November 1941 assessed estate duty under the *Estate Duty Assessment Act* 1914-1940 on the value of the estate of the testator as follows :—

Gross value of estate	..	..	£47,890
Less deductions	..	..	9,645
			—
Value of estate	..	..	£38,245
Less statutory exemptions	..		—
			—
Value for duty of estate	..	..	£38,245
			—
Duty at 8.73% thereon £3,338 15s. 9d.			
Total amount payable £3,338 15s. 9d.			

5. The appellants duly gave to the Commissioner of Taxation notice of objection to the assessment pursuant to sec. 24 of the Act and claimed that the dispositions contained in clauses four to eight inclusive and in clauses eleven (c) and eleven (d) and in clause twelve of the testator’s will set forth in par. 1 hereof were devises and/or bequests to public benevolent institutions in Australia.

6. On 6th January 1942 the duty assessed as aforesaid was paid under protest to the Commissioner of Taxation.

7. On 6th February 1942 the Commissioner of Taxation wholly disallowed the objection and on that day notified the appellants in writing of such disallowance.

8. On 6th March 1942 the appellants lodged a notice of appeal in the registry of this Court from the decision of the Commissioner of Taxation.

9. The Presbyterian Church (N.S.W.) Property Trust in the will mentioned is a body incorporated in that name and style by an Act



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of the Legislature of New South Wales entitled *The Presbyterian Church (New South Wales) Property Trust Act 1936* and the said Trust signified in writing to the appellants as executors and trustees of the will its desire to accept the devise and trust set forth in clause four of the will and the appellants have transferred and set over to the Trust the properties mentioned in clauses four and six of the will and have paid to the Trust the legacy mentioned in clause five of the will.

10. The Trust after making certain renovations additions and alterations to the property mentioned in clause four of the will has carried on and maintained at and on the property a Home where there is accommodation for twenty-six persons. In the month of July 1942 which month is typical of the period during which the Trust has been maintaining and carrying on the Home there were resident at the Home twenty-three women inmates of whom five only were under the age of seventy years; two of those five inmates were aged fifty-seven and fifty-four years respectively and three of the five inmates were over the age of sixty-two years. Thirteen of the twenty-three inmates were each in receipt of an old-age pension under the *Invalid and Old-Age Pensions Act 1908-1942*; of the said thirteen inmates, eleven had no other means of income, the remaining two of such inmates had some additional means of income. Three other of the twenty-three inmates each received an invalid pension under the last-mentioned Act including the inmate aged fifty-four years previously mentioned. One other of the twenty-three inmates had a British War Pension of eighteen shillings per week. The remaining six of the said twenty-three inmates received no pension but had incomes varying between forty pounds per annum and one hundred and fifty pounds per annum.

11. All the inmates have been charged the sum of one pound per week for their residence and maintenance in the Home and none of them has been required to give or in fact does give any service to the Home.

12. The income from the property mentioned in clause six of the will after expenses have been deducted therefrom has been exclusively used towards the maintenance of the Home.

13. The legacy of five hundred pounds mentioned in clause five of the will has been used for the maintenance and benefit of the Home.

14. The parties have appeared before me and agreed that the whole of the facts which can be relevant to this appeal are contained in the preceding paragraphs. The appellants contend that the whole



of the admissible evidence is contained in pars. 1 to 9, but the respondent contends that the evidence contained in pars. 10 to 13 is also admissible and I have agreed at his request to embody these paragraphs in the case stated.

The following questions were reserved for the opinion of the Full Court:—

- (1) Are the facts contained in pars. 10 to 13 admissible evidence on the appeal?
- (2) On the evidence contained in pars. 1 to 9, or, if the facts contained in pars. 10 to 13 are admissible, on the facts contained in pars. 1 to 13,
  - (a) Is estate duty under the *Estate Duty Assessment Act* 1914-1940 assessable or payable upon so much of the estate of the above-named George Pitt Wood deceased as was devised and bequeathed to the Presbyterian Church (N.S.W.) Property Trust by clauses four, five and six of the will of the deceased?
  - (b) Is estate duty under the *Estate Duty Assessment Act* 1914-1940 assessable or payable upon so much of the residuary estate of the above-named deceased as was devised and bequeathed to the above-named appellants as trustees upon trust as well as to income as to capital for the purposes set forth in clauses eleven (c), eleven (d) and twelve of the will of the deceased?

*Weston* K.C. (with him *Kerrigan*), for the appellants. The concluding words of sub-sec. 5 of sec. 8 of the *Estate Duty Assessment Act* 1914-1940 are in qualification of the words “as is devised or bequeathed” (*Teele v. Federal Commissioner of Taxation* (1); *Public Trustee (N.S.W.) v. Federal Commissioner of Taxation* (2); *Baker v. Federal Commissioner of Taxation* (3)). The proper construction of the sub-section is that “estate duty shall not be assessed or payable upon so much of the estate as is devised or bequeathed . . . to a public hospital or public benevolent institution . . . or to a fund established and maintained . . . for the relief of persons in necessitous circumstances in Australia.” The exemption extends to a case where the testator has for the first time constituted the fund or institution, provided, of course, that the fund or institution answers the proper description (*Dilworth v. Commissioner of Stamps* (4)). The testator, by clauses

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(1) (1940) 63 C.L.R. 201, at pp. 207, 208.

(2) (1934) 51 C.L.R. 75.

(3) (1932) 6 A.L.J. 111.

(4) (1899) A.C. 99.



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5 and 6 of his will, has created a fund for the relief of persons in necessitous circumstances within the meaning of sec. 8 (5) and, also, by clause 4 of his will, has created a "public benevolent institution" within the meaning of that sub-section. Where an annuity is given to a non-exempt person and corpus to an exempt person or *vice versa* the annuity can be valued in the ordinary actuarial way: See *Lilly v. West Australian Trustee Executor and Agency Co. Ltd.* (1). The institutions mentioned in clause 12 of the will are public benevolent institutions. The provisions of sec. 37D of the *Conveyancing Act* 1919-1938 (N.S.W.) apply to clause 12. The operation of that clause is limited to such homes or hospitals or institutions as are charitable, thus the requisite element is present to make such an institution a public benevolent institution. Exemptions in a taxing Act should be construed liberally (*Warrington v. Furber* (2); *Burt v. Commissioner of Taxation* (3); *Armytage v. Wilkinson* (4)). The phrase "aged women in straitened financial circumstances" in the will is referable to the words in sec. 8 (5) "persons in necessitous circumstances." It does not follow from the fact that persons are able to pay one pound per week towards the upkeep of the home that they are not in necessitous circumstances (*In re Clarke*; *Bracey v. Royal National Lifeboat Institution* (5)). The position is accepted that the Presbyterian Church (N.S.W.) Property Trust is not a charitable institution: See *Minister of National Revenue v. Trusts and Guarantee Co. Ltd.* (6).

*Hardwick* K.C. (with him *E. J. Hooke*), for the respondent. The devise under clauses 4, 5 and 6 of the will is to the Presbyterian Church (N.S.W.) Property Trust. That body does not come within any of the exemptions dealt with in sub-sec. 5 of sec. 8 of the Act. To obtain the construction of sub-sec. 5 contended for by the appellant it would be necessary to insert the words "for the purpose of"; the words "to be used" before the words "public hospital"; and the words "or to be established" after the word "established." Unless the institution or fund be a public benevolent institution or fund and be actually in existence the devise or bequest does not come within the exemption created by the sub-section (*Public Trustee (N.S.W.) v. Federal Commissioner of Taxation* (7); *Baker v. Federal Commissioner of Taxation* (8)). There is a significant distinction between the facts of this case and the facts in *Public Trustee (N.S.W.) v. Federal Commissioner of Taxation* (9), because

(1) (1911) 13 C.L.R. 416.

(2) (1807) 8 East. 242, at p. 245 [103 E.R. 334, at pp. 335, 336].

(3) (1912) 15 C.L.R. 469, at p. 482.

(4) (1878) 3 App. Cas. 355, at p. 370.

(5) (1923) 2 Ch. 407.

(6) (1940) A.C. 138, at p. 149.

(7) (1934) 51 C.L.R., at p. 96.

(8) (1932) 6 A.L.J. 111.

(9) (1934) 51 C.L.R. 75.



here there is a right in one or both of the organizations named to elect to disclaim, and the home sought to be created by the testator is not a public benevolent institution within the meaning of the sub-section. It is not a condition that the home shall be under public control (*Public Trustee (N.S.W.) v. Federal Commissioner of Taxation* (1)). The class of women catered for is a relatively small section of the community. What constitutes a public benevolent institution was considered in *Perpetual Trustee Co. Ltd. v. Federal Commissioner of Taxation* (2); *Fleming v. Randwick M.C.* (3); *O'Farrell v. Bathurst M.C.* (4); and *O'Connell v. Greater Newcastle M.C.* (5). Upon the question of necessitous circumstances and similar expressions, see *In re Estlin*; *Prichard v. Thomas* (6), *In re James*; *Grenfell v. Hamilton* (7), *In re Chaplin*; *Neame v. Attorney-General* (8), *Shaw v. Halifax Corporation* (9), and *Trustees of Mary Clark Home v. Anderson* (10). The distinction between those cases and this case is that in this case the women concerned are each required to pay towards the upkeep of the home the sum of one pound per week. Although the trust as a whole may be a charitable trust it does not necessarily follow that a public benevolent institution is thereby created (*Minister of National Revenue v. Trusts and Guarantee Co. Ltd.* (11)).

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*Cur. adv. vult.*

The following written judgments were delivered:—

RICH J. I agree with the judgment of my brother *Williams* and have nothing to add to it.

Nov. 26.

McTIERNAN J. I agree with the judgment of my brother *Williams* and that the questions should be answered: (1) No. (2) (a) No. (2) (b) No.

WILLIAMS J. By clause 4 of his will George Pitt Wood, who died on 29th May 1941, devised to the Presbyterian Church (N.S.W.) Property Trust (which accepted the gift) No. 23 Charlotte Street, Ashfield, upon trust for the purpose of a home for aged women in straitened financial circumstances who should be required to pay towards the upkeep of the home the sum of one pound per week, to be known as "The Eva Patience Wood and George Pitt Wood

(1) (1934) 51 C.L.R., at p. 100.

(2) (1931) 45 C.L.R. 224.

(3) (1928) 9 L.G.R. 61, at p. 64.

(4) (1923) 40 W.N. (N.S.W.) 78, at p. 80; 6 L.G.R. 108.

(5) (1941) 41 S.R. (N.S.W.) 190, at p. 193; 15 L.G.R. 18, at p. 20.

(6) (1903) 72 L.J. Ch. 687.

(7) (1932) 2 Ch. 25.

(8) (1933) Ch. 115.

(9) (1915) 2 K.B. 170.

(10) (1904) 2 K.B. 645.

(11) (1940) A.C. 138.



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Memorial Home.” He bequeathed to the Trust a legacy of £500 to be applied for the upkeep and maintenance of the home and devised to it four shops upon trust to apply the income and profits arising therefrom for the same purpose. By clause 11 he devised and bequeathed to his trustees his residuary real and personal estate upon trust to stand possessed of the net income to pay certain annuities to his sisters and brother, and to pay such regular or occasional sums as his trustees in their absolute discretion should think fit for the benefit and maintenance of the Memorial Home and for the benefit and maintenance of the homes, hospitals and institutions mentioned in clause 12. By clause 12 he directed his trustees, on the death of the last survivor of the annuitants, to hold his residuary estate and any accumulations of income upon trust to apply the income and capital at such times and in such manner as they should think fit to or for the benefit in the State of New South Wales of any home, hospital or institution or any one or more of them, including the Memorial Home, established for or having as its object the relief of pain and suffering and/or physical disability and/or infirmity and/or financial distress.

Apart from statute a gift to a class of objects to be selected by the trustees of the will, some of which are charitable and some non-charitable, fails for uncertainty (*Hunter v. Attorney-General* (1); *Houston v. Burns* (2); *Attorney-General v. National Provincial Bank* (3)). But it is unnecessary to decide whether the trusts of residue in the will of the testator, apart from those relating to the annuities, are wholly charitable, because by virtue of sec. 37 of the *Conveyancing Act* 1919-1938 (N.S.W.) inserted by the *Conveyancing, Trustee and Probate (Amendment) Act* 1938 (N.S.W.), sec. 3, the trusts must be construed and given effect to in the same manner in all respects as if no application of the trust funds or any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed. The *Estate Duty Assessment Act* 1914-1940, sec. 8 (5), provides:—“*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.*” I have italicized the words that are material to the present appeal.

(1) (1899) A.C. 309, at p. 323.

(2) (1918) A.C. 337.

(3) (1924) A.C. 262.



The case stated raises the following questions: 1. Are the facts contained in pars. 10 to 13 admissible evidence on the appeal? 2. (a) Is estate duty assessable or payable upon so much of the estate as was devised and bequeathed to the Presbyterian Church (N.S.W.) Property Trust by clauses four, five and six of the will? (b) Is estate duty assessable or payable upon so much of the residuary estate as was devised and bequeathed to the trustees upon trust as well as to income as to capital for the purposes set forth in clauses eleven (c), eleven (d) and twelve of the will?

It was not contested that the first question should be answered in the negative, but I think that evidence that the Memorial Home, subject to renovations, alterations and additions, was capable of accommodating twenty-six inmates would have been admissible.

It is to be noted that the property comprised in the devises and bequest contained in clauses 4, 5 and 6 is to be vested in the Presbyterian Church Property Trust, while the residuary gift is to establish a fund in the hands of the trustees of the will to be applied by them for the purposes mentioned. In *Public Trustee (N.S.W.) v. Federal Commissioner of Taxation* (1) *Gavan Duffy C.J.*, referring to sec. 8 (5), said: "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." But this statement, which was *obiter dictum*, is not supported by any other Justice. In *Teele v. Federal Commissioner of Taxation* (2) *Starke J.* said: "The deceased . . . did not by his will establish or provide for the maintenance of any such fund," from which it appears that my brother did not consider that the fund could not be established by the will itself. The dictum is in conflict with the decision of the Privy Council in *Dilworth v. Commissioner of Stamps* (3), where the point was not argued but could scarcely have been overlooked. It has the effect of placing too restricted a construction on the section, because it is common knowledge that testators in their wills often create the institution or fund, the activities or use of which confer similar benefits on the community to a devise or bequest to an existing institution or fund. The dictum would require a particular institution to be expressly named in every case. It seems

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(1) (1934) 51 C.L.R., at p. 96.

(2) (1940) 63 C.L.R., at p. 206.

(3) (1899) A.C. 99.



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clear that a testator could found and endow some institution or fund to effectuate a religious, scientific or public educational purpose, so that it is difficult to see why he should not be able to do the same thing in the case of a public hospital or public benevolent institution or establish and give directions for the maintenance of a fund which could only be applied by the trustees for one or more of the purposes specified. Charitable gifts often take the form of an investment of capital the income of which is to be applied in perpetuity for some charitable purpose, either from the date of death or after the cesser of a previous life or other estate, or, where the capital is initially insufficient for the purpose, after a period of accumulation, so that there would appear to be no reason for confining the sub-section to institutions or funds existing at the death. It is the character and not the pre-existence of the institution or fund, just as it is the quality of the purpose, which is important. The trusts in the will are intended to establish an institution and a fund the beneficial interests in which are not to be vested in any private person but are to belong inalienably to the public (*Dilworth v. Commissioner of Stamps* (1); *Girls' Public Day School Trust Ltd. v. Ercaut* (2)).

In my opinion it is no objection that the public hospital, public benevolent institution or fund is established by the will itself, or that the trustees of the will are authorized to apply the fund to assist unnamed institutions, so long as their discretion does not allow them to apply it otherwise than for one or more of the purposes mentioned in the sub-section.

In the case, therefore, of the specific devises and bequest to establish and maintain the Memorial Home, the only question is whether the devise of 23 Charlotte Street, is to establish a public benevolent institution, because in this event the bequest of £500 and the devise of the four shops must be to a fund established and maintained in order to provide money for its use. The control of the institution is vested in the Church Property Trust. This body, which is incorporated by Act of Parliament, is a public body in the sense that it represents an important section of the community (*Royal Masonic Institution for Boys (Trustees of) v. Parkes* (3)). The benefits of the institution are available to members of the class of aged women in straitened circumstances irrespective of their religion. A home for such women, even if they are able to pay one pound per week, is an institution organized for the relief of poverty. Poverty is a relative term. There are degrees of poverty less acute than abject poverty or destitution, but poverty nevertheless (*In re Clarke* (4);

(1) (1899) A.C., at p. 109.

(2) (1931) A.C. 12, at p. 35.

(3) (1912) 3 K.B. 212, at p. 217.

(4) (1923) 2 Ch. 407.



*In re de Carteret*; *Forster v. de Carteret* (1)). It is therefore a benevolent institution within the meaning of the sub-section (*Perpetual Trustee Co. Ltd. v. Federal Commissioner of Taxation* (2)). The purpose of the home is to confer benevolence upon an appreciable needy class in the community, so that it complies with the most important test of what is a public institution (*Shaw v. Halifax Corporation* (3); *Verge v. Somerville* (4))—See the cases collected in the judgment of my brother Rich in *The Little Company of Mary (S.A.) Incorporated v. The Commonwealth* (5). The conclusion is that the devise of 23 Charlotte Street is to a public benevolent institution in Australia and that the legacy of £500 is bequeathed and the four shops devised to a fund established and maintained for the purposes of providing money for its use within the meaning of the sub-section.

The devise and bequest of the residuary estate, other than the amounts required to pay the annuities, will be exempt under the sub-section if this balance is devised and bequeathed to a fund established and maintained for the purpose of providing money for public hospitals and public benevolent institutions in Australia. For the reasons already given I am of opinion that the trusts for the establishment and maintenance of the fund comply with the sub-section, so that the important question is whether the purpose of the fund is to provide money for the use of such institutions. Under the trusts payments can be made to any home, hospital, or institution having as one or more of its objects the relief of pain and suffering, physical disability, infirmity, or financial distress. These are benevolent objects within the meaning of the sub-section (*Perpetual Trustee Co. Ltd. v. Federal Commissioner of Taxation* (2)), so that the balance will be exempt if the will sufficiently indicates an intention that the homes, hospitals, or institutions must be public. It is plain that the testator was not contemplating private institutions whose object it is to make a profit out of providing such relief. Looking at the gift as a whole it appears to me that the testator must have had in mind homes, hospitals and institutions similar to the Memorial Home, which is specifically included in the class (*In re Dudgeon*; *Truman v. Pope* (6)), or, in other words, homes, hospitals and institutions organized to render services of a permanent eleemosynary character to appreciable deserving but needy sections of the community. Such institutions are public and not private in character. It follows, therefore, that, in my opinion, the only part of

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(1) (1933) Ch. 103, at pp. 108-113.

(2) (1931) 45 C.L.R. 224.

(3) (1915) 2 K.B. 170.

(4) (1924) A.C. 496, at p. 499.

(5) *Ante*, p. 368.

(6) (1896) 74 L.T. 613.



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the residuary estate which is dutiable is the part devised and bequeathed to pay the annuities and that the balance is non-dutiable. No difficulty arises in separating the non-dutiable from the dutiable part of the residue for the purposes of valuation such as occurred in *Baker v. Federal Commissioner of Taxation* (1). Whether the annuities should be valued on the basis that they are regularly payable in full or some allowance should be made because the trustees have a discretion as to regularity and amount does not arise on the present appeal. But the principles of valuation where an estate is devised and bequeathed to annuitants and exempt objects are explained in *Perpetual Trustee Co. Ltd. v. Shelley* (2).

The questions asked should, in my opinion, be answered as follows :  
—(1) No. (2) (a) No. (2) (b) No.

*Questions in the case stated answered as follows :*

—(1) No. (2) (a) No. (2) (b) No. Costs  
costs in the appeal. Case remitted to  
Williams J.

Solicitors for the appellants, *Salwey & Primrose*.

Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor  
for the Commonwealth.

J. B.

(1) (1932) 6 A.L.J. 111.

(2) (1921) 21 S.R. (N.S.W.) 426, at p. 444.