[HIGH COURT OF AUSTRALIA.]

MONDS . . . . . APPELLANT;
DEFENDANT,

AND

STACKHOUSE AND OTHERS . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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HOBART, *Nov.* 4, 5.

MELBOURNE, *Dec.* 23.

Latham C.J., Dixon and McTiernan JJ.

Charities—Particular charitable intention—Purpose beneficial to the community—Residuary bequest to municipal Corporation—"As a nucleus of a fund to provide a hall . . ."—Corporation sole judge of proper application of bequest—Ousting jurisdiction of Court—Rule against perpetuities—Condition precedent.

By his will the testator bequeathed his residuary estate to the Corporation of the City of Launceston "to be held by the Corporation as a nucleus of a fund to provide a suitable hall or theatre for the holding of concerts to provide music for the citizens of the City and for the production of drama entertainments and the holding of meetings of a cultural or educational value." The will further directed that the Corporation "in disposing of the said moneys shall be the sole judge as to whether the objects to which they are applying this bequest are within the terms of the gift."

Held that the bequest was a bequest to enable the Corporation to provide a public hall and was charitable; that the use of the expression "nucleus" did not import into the gift a condition precedent suspending the operation of the gift indefinitely so as to infringe the rule against perpetuities; that the provision directing that the Corporation should be the sole judge of the proper application of the moneys was invalid as ousting the jurisdiction of the Court and so contrary to public policy.

Decision of the Supreme Court of Tasmania (*Morris* C.J.) varied.

APPEAL from the Supreme Court of Tasmania.

Albert William Monds, formerly a Mayor of the City of Launceston, by his will dated the 26th January 1945, appointed Harold Bushby and Cecil Karl Rashleigh Stackhouse to be trustees of the will.

After certain specific and pecuniary legacies, the will provided as follows: "I give devise and bequeath all the residue of my real and personal estate whatsoever and wheresoever to my trustees upon trust to convert the same into money and to pay thereout my just debts funeral and testamentary expenses and the deceased persons estates duties both State and Federal on the whole of my estate to the exoneration of the gifts hereinbefore made by me and after payment thereof to pay the net residue of the proceeds of such conversion to the Corporation of the City of Launceston to be held by the said Corporation as a nucleus of a fund to provide a suitable hall or theatre for the holding of concerts to provide music for the citizens of the city and for the production of drama entertainments and the holdings of meetings of a cultural or educational value and I direct that the Corporation of the said City of Launceston in disposing of the said moneys shall be the sole judge as to whether the objects to which they are applying this bequest are within the terms of the gift I being confident that the Corporation will use this money to the best advantage and apply the same in accordance with my wishes so far as the circumstances at the time enable them and I further declare that in my opinion the best place for the erection of such hall or theatre is, the King's Park Paterson Street Launceston aforesaid and it is my desire without fettering the discretion of the Corporation that any such theatre or hall should be erected thereon."

The testator died on 10th February 1945. The residuary estate was valued at approximately £15,000.

The trustees took out an originating summons in the Supreme Court of Tasmania for the determination, without an administration of the estate, of the following questions: 1. Whether the gift contained in the will of the said Testator of the net residue of the proceeds of conversion of his real and personal estate to the Corporation of the City of Launceston to be held by it as a nucleus of a fund to provide a suitable hall or theatre for the holding of concerts to provide music for the citizens of the City and for the production of drama entertainments and the holding of meetings of a cultural or educational value is a good charitable gift. 2. If the answer to Question 1 is "Yes," then for what purposes and in what manner is the Corporation bound and entitled to hold and apply the property the subject of the said gift having regard in particular to the direction in the said will that the Corporation in disposing of the said property, shall be the sole judge as to whether the objects are within the terms of the gift. 3. If the answer to Question 1 is "No," then whether the said gift, read with the direction that the

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Corporation shall be the sole judge as aforesaid constitutes an absolute immediate gift to the Corporation. 4. If the answer to Question 3 is "Yes," then whether the Corporation is bound to hold and apply the property the subject of the said gift upon any and what trust for any and what purposes. 5. Whether the plaintiffs are bound or entitled to pay or transfer to the Corporation the property the subject of the said gift or how otherwise the plaintiffs should deal with and dispose of such property. 6. Whether the defendants Thomas Bertrand Anthony Monds and Winifred Hallam Monds are entitled to the net residue of the said estate as the next of kin of the said deceased.

Morris C.J. answered these questions as follows:—1. Yes. 2. The defendant Corporation the Mayor Aldermen and Citizens of the City of Launceston may apply the property the subject of the gift forthwith to the provision of such a hall or theatre as may be obtained for the amount of the gift or it may hold the same as a nucleus of a fund to provide a more costly one. The said defendant may at any future time decide when the then amount of the fund is sufficient for the provision of a hall or theatre and may thereupon apply the fund for that purpose. In doing so the said Corporation shall be the sole judge as to the suitability of the hall or theatre for the testator's purposes from the point of view of location, design, cost, size, the material of which it is to be built and any other matters of a similar character. 3. Answer not necessary. 4. Answer not necessary. 5. The Trustees are bound to transfer the property the subject of the gift to the said Corporation. 6. No.

From this decision the testator's son Thomas Bertrand Anthony Monds appealed to the High Court.

N. L. Campbell, for the appellant. The Court must go back to the preamble of the Statute of Elizabeth (43 Eliz. c. 4) for a true guide as to what are charitable gifts. If the testator's gift is for the purpose of providing music for the citizens, dramatic entertainment and meetings of an educational or cultural value, it is not a gift for educational purposes. (He referred to *Williams' Trustees* v. *Inland Revenue Commissioners* (1); *In re Macduff*; *Macduff* v. *Macduff* (2); *In re Allsop*; *Gell* v. *Carver* (3); *In re Ogden*; *Taylor* v. *Sharp* (4); *In re Patten*; *Westminster Bank Ltd.* v. *Carlyon* (5)). It is not sufficient that the gift should be merely

(1) (1947) A.C. 447.
(2) (1896) 2 Ch. 451.
(3) (1884) 1 T.L.R. 4.
(4) (1909) 25 T.L.R. 382.
(5) (1929) 2 Ch. 276.

beneficial to the community to bring it within the fourth classification of Lord *Macnaghten* in *Income Tax Special Purposes Commissioner* v. *Pemsel* (1). If some only of the objects are outside the permitted purposes the whole gift is invalid. There is no general charitable intent. By the use of the word " nucleus " the testator imposes a condition that other moneys shall be available for the same purpose. (He referred to *Wallis* v. *Solicitor-General for New Zealand* (2); *Roman Catholic Archbishop of Melbourne* v. *Lawlor* (3)).

M. P. Crisp (with him *Everett*), for the Attorney-General of Tasmania. There is no absolute gift to the corporation—there is a trust (*In re Hamilton* ; *Trench* v. *Hamilton* (4) ; *In re Williams* ; *Williams* v. *Williams* (5)). The fact that it is a gift to a municipal corporation makes it easier to imply a fiduciary obligation than it would be in the case of a private individual. [He referred to the *Launceston Corporation Act* 1941, ss. 5, 90, 297 and 313 ; *In re Spence* ; *Barclays Bank Ltd.* v. *Mayor, &c., of Stockton-on-Tees* (6) ; *Petone Borough* v. *Lower Hutt Borough* (7) ; *Lysons* v. *Commissioner of Stamp Duties* (8).] There are two possible ways of construing the trust. The first, which is preferred, is that it is to provide a hall which is to be suitable for the purposes mentioned in the will, but not that it is a trust for the provision of concerts and drama, &c. [He referred to *James* v. *Staines Urban District Council* (9) ; *Johnston* v. *Swann* (10) ; *Cantwell* v. *Baker* (11).] A gift of a hall for the benefit of the citizens of Launceston is a valid charitable trust : *Houston* v. *Burns* (12) ; *Goodman* v. *Mayor of Saltash* (13) ; *Tudor, Law of Charities and Mortmain*, 5th ed. (1929), p. 45 ; *Williams' Trustees* v. *Inland Revenue Commissioners* (14) ; *In re Spence* (15) ; *In re Mann* ; *Hardy* v. *Attorney-General* (16) ; *Murray* v. *Thomas* (17) ; *In re Jones* ; *Williams* v. *Rowlands* (18). Alternatively, if it is a trust both to provide a hall and to provide music and drama, &c., *Houston* v. *Burns* (12) is still distinguishable, because all purposes mentioned in the will are good charitable purposes, either under the second or fourth classes established in *Pemsel's Case* (1). They are comprised under the general head of aesthetic education which is recognized by the Court of Appeal and the House of Lords as being included in the term educational :

(1) (1891) A.C. 531.
(2) (1903) A.C. 173.
(3) (1934) 51 C.L.R. 1.
(4) (1895) 2 Ch. 370, at p. 374.
(5) (1897) 2 Ch. 12.
(6) (1938) Ch. 96.
(7) (1918) N.Z.L.R. 844.
(8) (1945) N.Z.L.R. 738.
(9) (1900) 83 L.T. 426.
(10) (1818) 3 Madd. 457 [56 E.R. 573].
(11) (1747) (Unreported), noted in 2 Ves. Senr. 185 [28 E.R. 120].
(12) (1918) A.C. 337.
(13) (1882) 7 App. Cas. 633.
(14) (1947) A.C. 447.
(15) (1938) Ch. 96.
(16) (1903) 1 Ch. 232.
(17) (1937) 4 All E.R. 545.
(18) (1947) 2 All E.R. 716.

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The Royal Choral Society v. *Inland Revenue Commissioners* (1); *Tennant Plays Ltd.* v. *Inland Revenue Commissioners* (2); *Williams' Trustees* v. *Inland Revenue Commissioners* (3). Alternatively, they are " purposes . . . which do in fact tend to the amelioration of mind, manners or morals," to adopt the words of *Dixon* J. in *Hobart Savings Bank and Launceston Bank for Savings* v. *Federal Commissioner of Taxation* (4). Specifically in relation to each particular purpose mentioned, the encouragement of music is a good charitable purpose (*Inland Revenue Commissioners* v. *Glasgow Musical Festival Association* (5); *Shillington* v. *Portadown Urban District Council* (6); *In re Allsop*; *Gell* v. *Carver* (7)). The statement in *Tudor, Laws of Charities and Mortmain*, 5th ed. (1929), p. 39, to the effect that the fine arts are probably not regarded as objects of charity was expressly disapproved in the *Royal Choral Society* v. *Inland Revenue Commissioners* (8). The direction in the will " to hold as a nucleus " is not to be construed as a condition either precedent or subsequent. The language is appropriate to the anticipation that additions will be made from time to time. There is here a general as opposed to a particular charitable intention. This is a case within the first category established by *Parker* J. in *Re Wilson* (9); cf. per *Dixon* and *Evatt* JJ. in *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.* (10). [He also referred to *Royal North Shore Hospital of Sydney* v. *Attorney-General (N.S.W.)* (11); *Barby* v. *Perpetual Trustee Co. Ltd.* (12); *Tyssen's Law of Charitable Bequests*, 2nd ed. (1921), p. 195.]

Barton, for the trustees.

Sholl K.C. (with him *R. K. Green*), for the Corporation of the City of Launceston. On its proper construction the gift is one for the provision of a hall (which is suitable for certain purposes) but no part of the moneys of the testator is directed to be used for the provision of music &c. On this construction the gift is a valid gift to charity. (He referred to *In re Spence*; *Barclays Bank Ltd.* v. *Mayor, &c., of Stockton-on-Tees* (13); *In re Mann*; *Hardy* v. *Attorney-General* (14); *Murray* v. *Thomas* (15); *In re Bones*; *Goltz* v. *Ballarat Trustees Executors & Agency Co. Ltd.* (16); *In re Jones*;

(1) (1943) 2 All E.R. 101.
(2) (1948) 1 All E.R. 506.
(3) (1947) A.C. 447.
(4) (1930) 43 C.L.R. 364, at p. 375.
(5) (1926) S.C. 920.
(6) (1911) 1 I.R. 247.
(7) (1884) 1 T.L.R. 4.
(8) (1943) 2 All E.R. 101, at p. 106.
(9) (1913) 1 Ch. 314.
(10) (1940) 63 C.L.R. 209, at pp. 227, 228.
(11) (1938) 60 C.L.R. 396, at p. 428.
(12) (1937) 58 C.L.R. 316.
(13) (1938) Ch. 96.
(14) (1903) 1 Ch. 232.
(15) (1937) 4 All E.R. 545.
(16) (1930) V.L.R. 346.

Williams v. *Rowlands* (1)). If however it is a gift which requires the Corporation to provide the hall and to see also to its use for the matters mentioned in the will it is still a good charitable gift within the fourth class of charitable gifts specified in *Pemsel's Case* (2). The use of the word " nucleus " does not create a condition precedent. The will does not purport to confer on the Corporation power to direct the use of money so as to exclude the jurisdiction of the Court. It means merely that the judgment of the corporation as distinct from that of the trustees or the public or an individual ratepayer is to decide as to the site, size, cost and design of the hall.

N. L. Campbell, in reply.

Cur. adv. vult.

Dec. 23.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a decision of the Supreme Court of Tasmania (*Morris* C.J.) in proceedings by originating summons in which it was held that the following disposition contained in the will of the late Albert William Monds was a good charitable gift :—" I give devise and bequeath all the residue of my real and personal estate whatsoever and wheresoever to my trustees upon trust to convert the same into money and to pay thereout my just debts funeral and testamentary expenses and the deceased persons estate duties both State and Federal on the whole of my estate to the exoneration of the gifts hereinbefore made by me and after payment thereof to pay the net residue of the proceeds of such conversion to the Corporation of the City of Launceston to be held by the said Corporation as a nucleus of a fund to provide a suitable hall or theatre for the holding of concerts to provide music for the citizens of the City and for the production of drama entertainments and the holdings of meetings of a cultural or educational value and I direct that the Corporation of the said City of Launceston in disposing of the said moneys shall be the sole judge as to whether the objects to which they are applying this bequest are within the terms of the gift I being confident that the Corporation will use this money to the best advantage and apply the same in accordance with my wishes so far as the circumstances at the time enable them and I further declare that in my opinion the best place for the erection of such a hall or theatre is the King's Park Paterson Street Launceston aforesaid and it is my desire without fettering the discretion of the Corporation that any such theatre or hall should be erected thereon."

(1) (1947) 2 All E.R. 716. (2) (1891) A.C. 531.

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The following answer was given to the second question asked in the summons :—" The Corporation may apply the property, the subject of the gift, forthwith to the provision of such a hall or theatre as may be obtained for the amount of the gift, or it may hold the same as a nucleus of a fund to provide a more costly one. The Corporation may at any future time decide that the then amount of the fund is sufficient for the provision of a hall or theatre and may thereupon apply the fund for the purpose. In doing so, the Corporation shall be the sole judge as to the suitability of the hall or theatre for the testator's purposes from the point of view of location, design, cost, size, the material of which it is to be built and any other matters of a similar character."

The learned Chief Justice held that there was only one object to which the bequest was to be applied, namely, the provision of a hall or theatre, and that the direction that the corporation should be the sole judge as to whether the objects to which it was applying the bequest were within the terms of the gift had only the effect of enabling the corporation to determine the question of the comparative suitability of halls or theatres of different types or locations. His Honour rejected the contention that the gift was an absolute gift to the corporation, holding that it was upon trust and for the object stated. He held that the gift was an immediate gift and was not rendered void by the rule against perpetuities, rejecting an argument based upon the word " nucleus " to the effect that as the fund was to be held as a nucleus it could not be applied in accordance with the terms of the trust until additions had been made to it which were sufficiently large to enable a hall to be erected, and that such additions might not be made within the period limited by the rule. His Honour pointed out that the residue was worth between £15,000 and £20,000, and that it was a sufficient sum to provide a hall for the purpose which the testator specified in his will. Accordingly his Honour did not order any inquiry as to the possibility of carrying out the trust. His Honour also was of opinion that what the testator wanted to secure were the concerts, the drama, entertainments and the meetings in Launceston to which he refers in his gift. It was held that the encouragement of music and drama and educational meetings were educational purposes, and that for this reason the gift was a charitable gift. It was also held that the gift was a good charitable gift as falling within the fourth class of charitable gifts described by Lord *Macnaghten* in *Income Tax Special Purposes Commissioner* v. *Pemsel* (1). In that case (2) Lord *Macnaghten*

(1) (1891) A.C. 531.

(2) (1891) A.C., at p. 583.

specified four classes of charitable trusts—trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads. His Honour held that the trust was a trust for a purpose beneficial to the community, citing *Royal Choral Society* v. *Inland Revenue Commissioners* (1), a trust for the encouragement and advancement of choral singing and improving the appreciation of music by the general public; and *In re Shakespeare Memorial Trust*; *Lytton* v. *Attorney-General* (2), a trust for the object of performing Shakespeare's plays, reviving English classical drama, and stimulating the art of acting.

The appellant is the son of the testator, and he and his sister are the testator's next of kin. The son appeals from the decision, contending that it was wrongly held that the gift was a charitable trust, that there should have been a declaration that the gift was void, so that the amount of the residue would not be disposed of by the will and would go as upon an intestacy.

The gift is a gift for the purpose of providing a hall. It was not, in my opinion, the intention of the testator to provide money for the holding of concerts, drama, entertainments and meetings. The provisions of the will are in my opinion quite precise and particular in this respect. The residue is to be paid to the corporation of the City of Launceston to be held by the corporation as the nucleus of a fund to provide a hall or theatre and for no other purpose. That hall or theatre is to be suitable for the holding of concerts &c. There is a direction purporting to give the corporation power to determine whether the objects to which the corporation is applying the bequest are within the terms of the gift, and there is a declaration as to the place which in the opinion of the testator is the best place for the erection of such a hall or theatre as he desires. These provisions show in the first place that the gift is not a gift to the corporation to be used as the corporation chooses. It is a gift to enable the corporation to provide a hall and for no other purpose. They show, secondly, that the purpose is the provision of a hall, and not the provision of concerts &c. The attempt of the testator to enable the corporation to determine whether any particular application of the moneys is within the terms of the gift is, in my opinion, more than a declaration that the corporation is to judge of the comparative suitability of different proposed halls. It purports to enable the corporation to interpret the will and to prevent any claimants against the corporation (e.g., the next of

(1) (1943) 2 All E.R. 101. (2) (1923) 2 Ch. 398.

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kin) from challenging the acts of the corporation. In my opinion such a provision is invalid on the ground of repugnancy to the words of the gift and also as ousting the jurisdiction of the court and so being contrary to public policy: *In re Raven*; *Spencer* v. *National Association for the Prevention of Consumption* (1). I would therefore omit the concluding sentence of the reply to the second question in the summons.

It was strongly contended for the appellant that the gift was not a gift for educational purposes. As I have said, in my opinion the gift is a gift for the purpose of a hall or theatre suitable for certain uses and not for the promotion of concerts &c. If those uses were educational the gift of a hall in order to accomplish those purposes and only those purposes would fall under the head of educational charitable trusts. But if, contrary to my opinion, the objects of the gift are to be found in the purposes for which, in accordance with the terms of the will, the hall will be suitable, I am of the opinion that the gift should not be held to be a gift for educational purposes. There are concerts which are educational, but concerts as such are not educational. Drama and entertainments may be of an educational character, but there is here no requirement that the drama and entertainments for which the hall may be used are to be of that nature. The meetings referred to in the will are meetings "of a cultural or educational value." If these words are interpreted in a strict disjunctive sense so as to refer to classes which are mutually exclusive, then it is clear that not all the meetings would be educational. If, on the other hand, the word "cultural" is regarded as merely the equivalent of "educational," so that there is no disjunction, this difficulty, it is true, disappears, but only in respect of meetings. But, in addition to these considerations, it should be remembered that the bequest is for the provision of a hall "suitable" for the concerts &c. mentioned. There is no provision in the will that the use of the hall is to be limited to the purposes mentioned. If the hall were suitable, for example, for holding educational meetings, the trust would be performed, and there would be no breach of trust in permitting the hall to be used for meetings which could not be described as educational. Thus if the purposes for which the hall can be legitimately used are to afford the criteria for determining whether this is a charitable trust, those purposes include non-educational purposes and therefore the trust cannot be upheld as a charitable educational trust. Upon the view which I have expressed, namely that the trust is simply a trust to provide a hall or theatre suitable for certain

(1) (1915) 1 Ch. 673.

purposes, these considerations become irrelevant. Accordingly, in considering the validity of the bequest I leave out of account the purposes for which the hall is to be used.

In my opinion this gift falls within Lord *Macnaghten's* fourth class—" purposes beneficial to the community not being the relief of poverty or the advancement of education or religion " (1).

Under this head many purposes of widely different character have been held to be charitable, and it has proved impossible to establish any definition which would comprehend all of them. This is apparent from the conclusion of the judgment of Lord *Simonds* in *Williams' Trustees* v. *Inland Revenue Commissioners* (2). In that case, however, it was emphasized that the mere fact that a trust related to an object of public general utility did not in itself show that it was a charitable trust :—" a trust is not charitable and entitled to the privileges which charity confers, unless it is within the spirit and intendment of the preamble to the statute of Elizabeth (43 Eliz. c. 4) " (3). I go therefore to the preamble of this statute. The preamble sets out certain objects which have ever since been held to be charitable.

They are as follows :—" (1.) The relief of aged, impotent and poor people. (2.) The maintenance of sick and maimed soldiers and mariners. (3.) The maintenance of schools of learning, free schools, and scholars in universities. (4.) The repair of bridges, ports, havens, causeways, churches, sea-banks, and highways. (5.) The education and preferment of orphans. (6.) The relief, stock, or maintenance for houses of correction. (7.) Marriages of poor maids. (8.) The supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed. (9.) The relief or redemption of prisoners or captives. (10.) The aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes." Heads (1), (2), (5), (6), (7), (8), (9) and (10) relate to relief of or assistance to poor or otherwise relatively helpless persons, by reason of age, sickness, childhood, or imprisonment. Heads (3) and (5) and possibly (8) relate to education. Head (4) in part relates to churches and therefore to religion.

In my opinion heads (4) and (10) afford assistance in determining the present case. Head (10) expressly relates to relief from the burdens of taxation. It has been held that gifts in aid of rates or taxes, though they benefit rich as well as poor, are charitable : *In re St. Botolph without Bishopsgate Parish Estates* (4) ; *Attorney-*

(1) (1891) A.C., at p. 583.
(2) (1947) A.C. 447.
(3) (1947) A.C., at p. 455.
(4) (1887) 35 Ch. D. 142.

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General v. *Bushby* (1). Head (4) relates to the repair of bridges, ports, havens, highways &c., charges in respect of which would normally fall upon the public. Accordingly if a gift is made for a public purpose analogous to any of these purposes so that it is not a gift for the benefit of a limited number of individuals, but is really in relief of the public, it is prima facie a good charitable gift. The provision of a public hall is such a purpose. Such a hall, maintained under public management, such as that of a municipality, is available for the general use of the community, and, if it is provided by private benevolence, brings about a reduction of the burden of rates and taxes on the community. In *In re Spence*; *Barclays Bank Ltd.* v. *Mayor, &c. of Stockton-on-Tees* (2) a gift upon trust to apply moneys in the purchase of a suitable site in a certain town and "in or towards" the erection on such site of a public hall, the hall to be vested in the corporation, was held to be a valid charitable trust. In *Murray* v. *Thomas* (3) a fund was formed for a soldiers' memorial which was to be "of a useful character possibly in the nature of a memorial hall." Here the object was held to be the public betterment and a good charitable object. See also *In re Jones*; *Williams* v. *Rowlands* (4).

In the present case there are special features which, independently of such decisions as those last cited, can be relied upon to support the gift. The gift is to the municipal corporation of Launceston. Under the *Launceston Corporation Act* 1941 (Tas.) the corporation has power to take and hold real and personal property (s. 4). The municipal fund may be applied to (*inter alia*) erecting, purchasing and maintaining buildings belonging to the corporation, the construction, maintenance and management of halls (s. 91 (v) and (x)). Accordingly, the gift in this case is a gift to a municipal corporation for a public purpose which is specifically declared by statute to be one of the purposes in relation to which the corporation may act and expend money. These provisions in my opinion make it clear that the gift in this case is a gift for a beneficial public purpose which is of the same type as the trusts with respect to bridges, ports, havens, highways &c., mentioned in the preamble to 43 Eliz. c. 4. Accordingly, on this ground also I am of opinion that the gift falls within head (4) of Lord *Macnaghten's* classification (5).

It is objected, however, that the gift is a gift of the residue only as the "nucleus" of a fund to provide a hall, and that accordingly it cannot take effect in the actual provision of a hall unless an addition is made to the fund provided by the testator, so that there is

(1) (1857) 24 Beav. 299 [53 E.R. 373].
(2) (1938) Ch. 96.
(3) (1937) 4 All E.R. 545.
(4) (1947) 2 All E.R. 716.
(5) (1891) A.C., at p. 583.

no longer merely a "nucleus." Such an addition might not be made within the period prescribed by the rule against perpetuities—lives in being and twenty-one years. Accordingly, it is said that the trust might not attach to the residue of the estate until after the expiration of the period prescribed by the rule, so that the trust would be void: *Chamberlayne* v. *Brockett* (1); *In re Lord Stratheden & Campbell*; *Alt* v. *Lord Stratheden & Campbell* (2). Where there is a good charitable gift the money may be held in perpetuity for charitable purposes, but the gift itself must satisfy, in relation to the time of its inception, the rule against perpetuities. Thus in the case of *In re Dyer*; *Dyer* v. *Trustees, Executors & Agency Co. Ltd.* (3) a gift of £10,000 was made upon trust to apply the income in or towards the maintenance of a metropolitan permanent orchestra. There was no such orchestra and the income of £10,000 was insufficient to provide it, and it was held that the gift was not an immediate gift, but was subject to a condition precedent which might not be fulfilled, if at all, until a time beyond the period prescribed by the rule against perpetuities. Accordingly, it was held that the trust was not a good charitable trust. In the present case, however, the gift is in my opinion an immediate gift to the corporation. There is nothing to show that it is not sufficient in amount to achieve the purpose desired by the testator as soon as a hall can be built. But, further, the fact that the gift is referred to as intended to constitute the nucleus of a fund does not show that the gift is not an immediate contribution to a fund. It is not necessary, in order that a gift should be a good charitable gift, to show that it will in itself immediately and completely accomplish the purpose to which it is to be devoted. It may be observed that in the case of *In re Spence*; *Barclays Bank Ltd.* v. *Mayor, &c., of Stockton-on-Tees* (4) the gift was a gift of moneys to be applied "in or towards the erection" of a public hall. It was not suggested in that case that the gift was invalid because it was not shown that the moneys bequeathed by the testator were sufficient in themselves to provide the hall and because he expressly contemplated that other moneys might be added to them. See also *Sinnett* v. *Herbert* (5) where the gift held to be valid was a gift of the residue of an estate to be directed or applied "in aid of" erecting or endowing an additional church.

In *Mayor of Lyons* v. *East India Co.* (6) Lord *Brougham* said with respect to a gift to establish a bishop in His Majesty's Dominions

(1) (1872) 8 Ch. App. 206.
(2) (1894) 3 Ch. 265.
(3) (1935) V.L.R. 273.
(4) (1938) Ch. 96.
(5) (1872) 7 Ch. App. 232.
(6) (1836) 1 Moo. P.C. 175, at p. 295 [12 E.R. 782, at p. 826].

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in America :—" The case of *Attorney-General* v. *Bishop of Chester* (1) furnishes a direct authority for not declaring a legacy void because it was for an object which could not at the time be accomplished, and for retaining the fund in court until it should be possible to apply it. No doubt if, in that case, some years had elapsed, and no prospect appeared of an Episcopal establishment in Canada, the court would then have declared the legacy void, and distributed the fund to the parties entitled. So here, if it shall be found, either at first that there can be no application of the fund in the manner directed by the will, or that the trustees, after making the attempt, fail in it, the court will then direct the same application to be made of it, which they would have done had the bequest been at first declared void." If it should hereafter be shown that the residue of the estate is insufficient for the erection of a hall or theatre suitable for the purposes mentioned in the will or if it is more than sufficient, the next of kin may apply for a declaration in the former alternative that the gift had failed as it would be shown to be a gift for a particular purpose which cannot be administered *cy-près*, so that they would take the whole of the residue, and in the latter alternative for a declaration that they are entitled to the unexpended surplus of the residue.

I am of opinion that the decision of the learned judge was right and should be affirmed, but that the answer to the second question should be varied by omitting the concluding sentence therein and that the rights of the next of kin to which I have just referred should be protected by a suitable variation in the order. A consequence of this view is that the residue should not now be paid to the corporation but that it should be retained by the trustees, with liberty to all parties to apply : see *Sinnett* v. *Herbert* (2). The Supreme Court will thus be able to superintend the administration of the fund. The answer to the fifth question in the originating summons stated that " the trustees are bound to transfer the property the subject of the gift to the corporation." This answer should be amended so as to declare that the trustees are neither bound nor entitled so to pay or transfer the property until further order.

The proceedings were brought about by the manner in which the testator expressed his intentions. The appellant has succeeded in obtaining a not insubstantial variation of the order of the Supreme Court. In the circumstances of this particular case it is reasonable to order that the costs of all parties of the appeal should be paid out of the residue, those of the trustees as between solicitor and client.

(1) (1785) 1 Bro.C.C. 444 [28 E.R. 1229].

(2) (1872) 7 Ch. App. 232, at pp. 240, 241.

DIXON J. This appeal is concerned with the validity of a residuary bequest to the Corporation of the City of Launceston. The testator, who had been a mayor of the city, devised and bequeathed his residuary real and personal property to trustees upon trust for conversion. The trustees were directed to hold the net residue of the proceeds upon trust to pay them to the corporation to be held by it as a nucleus of a fund to provide a suitable hall or theatre for the holding of concerts to provide music for the citizens of the city for the production of drama (*sic*), entertainments and the holding of meetings of a cultural or educational value. The will proceeded to direct that the corporation in disposing of the moneys should be the sole judge as to whether the objects to which they are applying the bequest are within the terms of the gift. This is followed by an expression of the testator's confidence in their judgment and an indication of the testator's own views as to the most eligible site.

I think that the trust should be read as meaning that the hall or theatre shall be suitable for the holding of concerts &c. It should not be read as intending not only to state for what purposes the hall is to be suitable, but also to describe the purposes to which its use must be confined. The trust is concerned with the description of "hall." It must be of a description lending itself to the holding of concerts, the purpose of which is to provide music for the citizens, and to the production of dramatic entertainments and to the holding of meetings of a cultural or educational value. The trust does not assume to impose a duty on the corporation to hold such concerts, entertainments or meetings. It does not assume to fetter the power of the corporation to control, deal with, or even dispose of the hall, once it is provided. The purpose of the trust is to make a subvention to a fund enabling the council, in the exercise of its functions, to provide a hall or theatre of a particular description, or perhaps it would be better to say, adapted for particular purposes.

The clause making the corporation the sole judge as to whether the objects to which they are applying the bequest are within the terms of the will, may enlarge its discretion in deciding whether a building will be or is adapted to the designated purposes but if it is pressed to the full extent of excluding an examination of the manner in which the money is spent the clause is repugnant and void: see *In re Raven*; *Spencer* v. *The National Association for the Prevention of Consumption* (1); cf. *Wallace* v. *Wallace* (2). The gift is not to the corporation for its general purposes accompanied by an indication only of the testator's desires. The corporation must

(1) (1915) 1 Ch. 673.

(2) (1898) 24 V.L.R. 859.

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apply it as part of a fund in providing a hall or theatre. But the provision of a hall (and after all a theatre is only a type of hall) is a function of a municipal corporation. There is no restriction on the materials of which the hall is to be built, on its size, or on the course taken to provide it, i.e. by building, acquiring an existing hall or even leasing one. The residue is said to amount to some £15,000. It is evident that the corporation would, if the gift is valid, possess a wide discretion as to how it will proceed, with such a sum of money in hand.

Trusts for the public improvement of a town or locality for the benefit of the inhabitants at large have long been considered charitable. In *In re Mann*; *Hardy* v. *Attorney-General* (1) *Farwell* J. applied this principle in upholding as charitable a gift to the Mann Institute, which consisted in a building provided in her lifetime by the testatrix, containing a reading room, billiard room and a hall for concerts, lectures and religious and other meetings. His Lordship said that he thought the gift was for the purpose for which the Mann Institute was founded, namely the benefit of the inhabitants. In *Murray* v. *Thomas* (2) *Clauson* J. held that a fund collected for a war memorial, in a particular district, intended to be of a useful character, possibly in the nature of a memorial hall, was held upon a charitable trust. In *In re Spence*; *Barclays Bank Ltd.* v. *Mayor, &c., of Stockton-on-Tees* (3) *Luxmoore* J. held charitable a bequest to be applied in the purchase of a site at Stockton-on-Tees and in or towards the erection thereon of a public hall to be presented to the corporation and used by it for such purposes as it might think desirable. *In re Jones*; *Williams* v. *Rowlands* (4) is to the like effect.

A bequest to a municipal corporation for the purpose of enabling it to provide a hall or towards doing so is clearly charitable. Indeed any bequest to be applied in the improvement of a city in accordance with the powers of the municipal corporation for the benefit of the inhabitants appears to be charitable: see *In re Bones*; *Goltz* v. *Ballarat Trustees Executors & Agency Co. Ltd.* (5). Here the bequest is to the municipal corporation itself, and it is made in reliance upon the exercise of appropriate powers by that authority. The City of Launceston is in fact armed with sufficient power. The *Launceston Corporation Act* 1941 (4 and 5 Geo. VI., No. 91) governs the capacity of the Mayor, Aldermen and Citizens of the City of Launceston, which is the full name of the corporate body mentioned

(1) (1903) 1 Ch. 232.
(2) (1937) 4 All E.R. 545.
(3) (1938) Ch. 96.
(4) (1947) 2 All E.R. 716.
(5) (1930) V.L.R. 346.

in the will. It has power to take, purchase, hold, demise and dispose of real and personal property, and generally to do and suffer all such things as bodies corporate may by law do and suffer (s. 4). Among the descriptions of money which are to form part of the municipal fund are "endowments and gifts of money" (s. 90 (1) (xv)). The purposes to which moneys may be applied include erecting, purchasing and maintaining buildings belonging to the corporation and the construction, maintenance and management of halls (s. 91 (v) and (x)). As might be expected, the corporate powers are expressed to cover the establishment, maintenance, improvement and extension of halls (ss. 297 and 299 (1) (I)). The powers of purchase and of compulsory acquisition of land include such purposes (s. 313). Under the construction which I place upon the gift in the will the corporation is to take the residue as a nucleus of a fund to be applied by it to provide a hall of the required description.

For the reasons I have given, the provision of such a hall is a charitable purpose, and it is within the corporate powers of the body to carry it into execution. But the question remains whether the use of the word "nucleus" does not import into the gift a condition to the effect that before the trust for the charitable object takes effect the nucleus shall have been augumented to some undefined extent by additions of moneys from other sources and if so whether that makes the gift bad for remoteness of limitation. If there is a gift for a charitable purpose to arise only on a future contingent event which may or may not occur within the period allowed by the rule against perpetuities and the subject of the gift is not impressed with an immediate trust for charity, the gift is void for remoteness.

There is therefore a question whether in the use of the word "nucleus" there is to be discovered an intention to make the charitable purpose depend upon a contingency or condition that before the trust attaches there must arise by additions to the moneys paid by the trustees of the will to the corporation a larger fund sufficient for the purpose. If the true meaning of the will is that the gift to charity is to be suspended until the happening of such a contingency or the fulfilment of such a condition without any restriction of time, so that there is a condition precedent to the gift which may occur at any time in the indefinite future, in that case doubtless the gift would be void. But even if there is a condition of like character but the intention is that unless the event occurs within a reasonable time the gift shall not take effect that might be enough to save its validity. To say this assumes, of

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course, that a reasonable time could not exceed the period of twenty-one years limited by the rule against perpetuities.

If it were implied that the " nucleus " must grow into a sufficient fund within a reasonable time the effect would be in substance to impose a condition that if after a reasonable time had elapsed the fund was still insufficient the gift should fail and there should be a resulting trust to the trustees of the will of the moneys in the hands of the corporation. But apart altogether from the possibility of making such an implication I think that there is no sound foundation for the contention that the gift offends the rule against perpetuities.

The principle by which the question is governed involves what may seem to be a refined distinction, but it is a clear distinction.

If there is a gift impressed with an immediate trust for a charitable purpose it is good, notwithstanding that the actual application of the fund in carrying the purpose into execution must await an event that may or may not happen within the period prescribed by the rule against perpetuities. But if such an event is made the occasion, not of the application or expenditure of the fund, but of the subjection of the fund to the charitable trust itself, that is another matter. A trust which only arises or becomes operative upon a condition which may not occur within the period allowed by the rule against perpetuities is bad for remoteness notwithstanding that it is a charitable trust. Where the trust has a particular charitable object in view, to which the fund cannot be applied until the happening of a future contingent event, it may appear that the gift to charity is subject to a condition precedent, so that if it is capable of fulfilment outside the period allowed by the rule the trust will be void. But consistently with the selection of a particular charitable object as a means of effecting his charitable aims, a testator may manifest a more general charitable intention: cf. *Attorney-General (N.S.W.)* v. *Perpetual Trustee Co. Ltd.* (1). If the general charitable intention is impressed upon the fund from the beginning it is immaterial that the particular means chosen for effectuating the intention may await an uncertain event capable of occurring outside the prescribed period. For there is a gift to charity operative at once and only the particular application is suspended.

I shall not discuss the authorities which support the foregoing statement. It is enough, I think, to give the following references: *Sinnett* v. *Herbert* (2); *Chamberlayne* v. *Brockett* (3); *In re Lord*

(1) (1940) 63 C.L.R. 209, at pp. 219, 223-225.

(2) (1872) 7 Ch. App. 232.

(3) (1872) 8 Ch. App. 206.

Stratheden & Campbell; *Alt* v. *Lord Stratheden & Campbell* (1); *In re Gyde*; *Ward* v. *Little* before *North* J. (2), and in the Court of Appeal (3) (adopting a different view of the will); *In re Swain*; *Monckton* v. *Hands* (4); *In re Finkelstein*; *National Trustees Executors & Agency Co. of Australasia Ltd.* v. *Michael* (5); *In re Monk*; *Giffen* v. *Wedd* (6); *In re Dyer*; *Dyer* v. *Trustees, Executors & Agency Co. Ltd.* (7) and the discussion in *Tyssen, Charitable Bequests*, 2nd ed. (1921), p. 154, *et seq.* The decided cases show that before adopting a construction which makes the gift to charity depend upon a condition precedent consisting in an uncertain future event, it is necessary to be satisfied that such is the true meaning of the will. If no overriding and more general intention in favour of charity operating from the beginning is discoverable, it may be found that what looks like a condition precedent is in truth a condition subsequent. In some cases it has been tacitly assumed, as it would seem, that the given trust is such that either it must be carried into execution or its failure must appear within the period allowed.

In the present case I do not think that a more general charitable intention than to provide, or assist in providing, a public hall in Launceston can be ascribed to the testator. But I do not think the use of the word "nucleus" ought to be treated as importing into the gift a condition precedent suspending the operation of the gift indefinitely. It means no more than the words "as a contribution towards" would have meant if the will had been written "as a contribution towards the provision of a suitable hall."

The corporation is chosen as the donee because it is the authority whose responsibility it would be to build such a hall. It might do so out of funds it decided to raise for the purpose. If the corporation accepts the gift, the questions must be determined by the corporation what kind of hall it will erect or provide and where. I do not think that the will means that the corporation may simply invest the money until at some future date, if ever, that body is minded to build a hall. No positive duty to proceed in the matter is laid upon the corporation, at all events expressly. But an abandonment of the project for which the testator gave his money would mean a failure of the purpose of the gift and a consequent resulting trust to the trustees of the will. To relinquish all consideration of the question, take no active steps and simply invest the money, would be to authorize the court to conclude that the purpose of the

(1) (1894) 3 Ch. 265.
(2) (1898) 78 L.T. 449.
(3) (1898) 79 L.T. 261.
(4) (1905) 1 Ch. 669.
(5) (1926) V.L.R. 240.
(6) (1927) 2 Ch. 197.
(7) (1935) V.L.R. 273.

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gift has failed. The gift is to an administrative body in aid of the exercise of one of its powers for the public benefit. It is for the donee to decide whether and when and how it will exercise its power. The only event upon which the application of the money in providing a hall depends is the exercise of the donee's authority or discretion. There is no external contingency but only the action of the donee-trustee itself. The case is peculiar because the power it must exercise is a public administrative authority and not one conferred by the trust. It is moreover a power involving or possibly involving it in a liability, as for instance if it uses its borrowing powers. But from the beginning the money is in its hands impressed with a trust for a public purpose. A trust for the building of a public municipal hall is charitable. But I think it is possible to go further and say that a trust to enable or help a public authority to build or otherwise provide such a hall is charitable. To contribute to the funds of a municipal corporation for the purpose is to impress a fund immediately with a charitable trust taking effect at once. If the corporation fails to exercise its powers the gift fails. But otherwise it is a good charitable bequest.

In my opinion the residuary bequest in the present case is not bad for remoteness of limitation.

The appeal, I think, fails in substance. But I think that the appellant is right in his complaint that the actual order made on the originating summons may operate to his prejudice if it should turn out that the testator's purpose is impracticable and for that reason the trust fails, or if, at the other extreme, a surplus remains after the purpose is fulfilled. To prevent this I think that it is desirable to vary the order. It might be enough to substitute for the answer "Yes" to the first question the answer "It is a valid charitable gift," and to substitute for the answer "No" to the sixth question the answer "Not unless it is found impracticable to carry into execution the trust expressed in the gift mentioned in question 1, or unless it is found that a surplus of such proceeds remains in the hands of the said corporation after such trust has been fully executed."

But as a matter of administration the Court may go further in protecting the fund, and I see no objection to the order proposed.

Subject to this variation I think that the appeal should be dismissed.

McTIERNAN J. The question is whether the gift to the corporation of the money constituting the residue of the estate is charitable. It is a gift made with the intent that the corporation should carry

out the directions in the will. The money is given to the corporation upon trust. If the trust is charitable, the corporation has power under the Act establishing it to carry out the trust. The purpose of the gift is of a municipal or public character: it aims at assisting the citizens of Launceston by providing a public hall. This is an object analogous to those mentioned in the Statute of Elizabeth. The decisions cited in *Halsbury's Laws of England*, 2nd ed., vol. 4, pp. 123, 124, fully warrant this conclusion. The purpose of the gift is charitable.

I do not find in the will a general charitable intention. I think that the only purpose of the gift is the intended hall or theatre. There is therefore a gift to the corporation for the particular purpose of providing a hall or theatre suitable for the activities mentioned by the testator. The discretion given to the corporation in disposing of the said money is not in harmony with the words creating the trust with which the will impresses the money; the grant of the discretion is open to attack as an attempt to deprive the court of jurisdiction to keep the application of the money within the scope of the trust.

The moneys, the subject of the trust, are given as the "nucleus of a fund to provide" the intended hall or theatre. The trust to which the moneys are subject arises immediately upon the testator's death. Hence the gift does not contravene the rule against perpetuities. It is true that the application of the money to the provision of the intended hall may be postponed indefinitely or may not take place at all. But nevertheless there is an immediate gift of the money to the corporation subject to the trust declared by the testator. If it turns out to be impracticable to provide the intended hall or theatre, there would be a resulting trust of the money the subject of the gift to the next of kin. It would be otherwise if the will manifests a general charitable intention.

The order made by the Supreme Court contains no provision protecting the next of kin in the event of the failure of the purpose of the gift. I think that the order should be amended by adding such a provision.

I agree with the order proposed by the Chief Justice of this Court.

Order of Supreme Court varied by omitting from the answer to the second question the words "In doing so" to the words "similar character" inclusive, by omitting the answer to the fifth question and answering the said question as follows:—"No: the plaintiff should hold and retain the said property until further order of the Supreme Court,"

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by omitting the answer to the sixth question and answering the said question as follows:—"Not unless it is found impracticable to carry into execution the trust expressed in the gift mentioned in question 1, *or unless it is found that a surplus of such proceeds remains in the hands of the said corporation after such trust has been fully executed," and by adding that all parties shall be at liberty to apply. Appeal otherwise dismissed. Costs of all parties of appeal to be paid out of residue, those of trustees as between solicitor and client.*

Solicitors for the appellant: *Archer, Hall & Campbell* (Launceston) by *Johnson, Mitchell & Laughton.*

Solicitor for the respondent the Attorney-General for Tasmania: *M. P. Crisp*, Crown Solicitor for Tasmania.

Solicitors for the respondent the Corporation of the City of Launceston: *Ritchie & Parker, Alfred Green & Co.* (Launceston).

Solicitors for the respondent trustees: *Shields, Heritage, Stackhouse & Martin* (Launceston), by *Simmons, Wolfhagen, Simmons & Walch.*

R. C. W.