

[HIGH COURT OF AUSTRALIA.]

BALLARAT TRUSTEES EXECUTORS AND } APPELLANT ;
AGENCY COMPANY LIMITED . . . }

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

H. C. OF A. *Estate Duty (Cth.)—Assessment—Exemptions—“ Fund . . . for the relief of
1950. persons in necessitous circumstances ”—Bequest of fund to intermediate hospital
{ to provide free accommodation for persons unable to pay any fees or such fees
as private patients in the hospital usually required to pay—Estate Duty Assess-
ment Act 1914-1942 (No. 22 of 1914—No. 18 of 1942), s. 8 (1), (5).*

MELBOURNE,
June 9 ;
BRISBANE,
June 20.
Kitto J.

By his will the deceased directed his trustee to pay to a named hospital a sum of money to be invested and the income thereof to be used to provide free accommodation at the hospital to persons who in the opinion of the board of management were deserving people who were unable to pay any fees or such fees as private patients in the hospital were usually required to pay. The hospital, which was not conducted as a profit-making institution, was governed by rules which empowered it to receive as patients persons able to pay for private or intermediate accommodation. Patients were charged from £11 to £17 per week according to the type of accommodation provided.

Held (i) that on the construction of the will the income of the fund might be applied wholly for the relief of persons able to pay some, though not all, of the fees charged by the hospital ; (ii) that such persons included many who were not in necessitous circumstances within the meaning of sub-s. (5) of s. 8 of the *Estate Duty Assessment Act 1914-1942* ; (iii) that therefore the fund was not exempt from estate duty under that sub-section.

APPEAL from assessment to estate duty.

This was an appeal by the executor and trustee of the will and estate of Henry Angus Cameron, deceased, from the assessment of the estate to Federal estate duty. The facts appear in the judgment hereunder.

J. B. Tait K.C. and *H. U. Best*, for the appellant.

A. D. G. Adam K.C. and *G. A. Pape*, for the respondent.

Cur. adv. vult.

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KIRTO J. delivered the following written judgment:—

This is an appeal from the assessment by the Acting Deputy Commissioner of Taxation, Melbourne, of the estate duty payable in respect of the estate of Henry Angus Cameron, deceased.

By clause 10 of his will the deceased directed his trustee:—"To pay to the Treasurer (or person or persons for the time being authorized to receive monies) of St. Andrew's Presbyterian Hospital Cathedral Place Melbourne the sum of TWENTY THOUSAND POUNDS for the following purposes:—(a) to invest the same in securities authorized as trustee securities by Act of Parliament; (b) to use the income derived therefrom to provide free accommodation and where practicable medical and surgical services at the said Hospital for persons male or female living in the State of Victoria who are in the opinion of the Board of Management of the said Hospital deserving people who are unable to pay any fees or such fees as private patients in the said Hospital are usually required to pay for the foregoing preference to be given to persons answering above description who possess a good standard of education." The will also contained a direction to the trustee to divide the ultimate residue of the estate into four equal parts of which two were directed to be given to St. Andrew's Hospital for the purposes provided for in clause 10.

The appellant, being the executor and trustee of the will, objected to the assessment of estate duty on the ground that it was excessive in that the bequests of £20,000 and one-half of the residue had not been treated as exempt from duty under s. 8 (5) of the *Estate Duty Assessment Act* 1914-1942, the appellant claiming that those bequests were so exempt as being bequests as a fund established and maintained for the purpose of providing money for the relief of persons in necessitous circumstances in Australia. The objection was disallowed and the appellant requested the Acting Deputy Commissioner to treat the objection as an appeal and to forward it to this Court. Section 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 as or to a

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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.”

St. Andrew’s Hospital is a hospital in Melbourne controlled by the Hospital Board of the Presbyterian Church of Victoria. It is the subject of certain rules constituting chapter XX. of the rules of the Church. By rule 547, included in that chapter, the Hospital Board, referred to as the Board, is empowered by the assembly of the Church :—(a) to receive as patients persons able to pay for private or intermediate accommodation ; (b) to provide facilities for a training school for nurses ; (c) to determine all questions relating to the admission and removal of patients. By rule 548 the Board is constituted the governing body of the hospital with power, *inter alia* : (a) to take all measures necessary for the efficient conduct of the hospital ; and (b) to control the finances and provide all requisites for the hospital ; appoint and discharge officers and servants, and generally regulate the internal management of the institution and the care and control of buildings and grounds.

The Board thus answers the description of the “ Board of Management of the said Hospital ” in clause 10 of the will.

The evidence given by Mr. W. R. McFerran, the Honorary Treasurer of the Hospital and the Chairman of its Finance Committee, establishes that patients are charged for accommodation in the hospital on a sliding scale according to the type of accommodation provided. There are 123 beds, about one-third of them being in single rooms and the others being in wards containing two, three or four beds. The present scale of charges is £15 to £17 per week for single rooms, £13 per week for a bed in a two-bed ward and £11 per week for a bed in a three-bed or four-bed ward. For operating theatre facilities an extra charge is made.

The hospital has no medical or surgical staff as distinguished from nursing staff, patients making their own arrangements for attention by physicians or surgeons. There is no provision for casualty patients or out-patients.

The hospital is not conducted as a profit-making institution and although there is no interest charge to be met in respect of the land or buildings, the hospital is at present being conducted at a loss. In the year ended 31st December 1949, in which there was a revenue of £74,399 from patients’ fees alone (including, as I understand, a government allowance of about £2 per bed per week), there was a loss of £2,918.

The hospital is of a class often referred to as intermediate hospitals to distinguish them from two other classes, namely, public hospitals

which make no charge for accommodation and provide free medical and surgical attention, and hospitals usually called private hospitals which are conducted for profit and in general charge higher fees than those charged by intermediate hospitals. Of the intermediate hospitals, other than St. Andrew's, which were mentioned in the evidence, the Freemasons' Hospital charges fees slightly higher than those charged at St. Andrew's; the Mercy Hospital charges higher fees for some wards and lower fees for other wards; the St. George's Hospital charges higher fees; and the Bethesda Hospital charges slightly lower fees.

I turn now to the construction of s. 8 (5). It was conceded on behalf of the appellant that the bequests under consideration were not gifts to a public hospital or to a public benevolent institution within the meaning of the sub-section. Both the legacies to which I have referred were plainly bequeathed "as a fund" and not "to a fund." The words "established and maintained," though apt to describe an existing fund, must be given a modified meaning as applied to a bequest of part of an estate "as a fund," and, in my opinion, as so applied they refer to a fund which, according to the terms of the gift, is to be established and maintained for the purpose stated in the sub-section. The question I have to consider, therefore, is whether the trust fund (by which I mean the £20,000 and one-half of the ultimate residue) is bequeathed as a fund to be established and maintained for the provision of money for the relief of persons in necessitous circumstances in Australia.

It was contended at one stage of the argument for the appellant that the expression "necessitous circumstances" in the sub-section includes any circumstances of need, such as the need for hospital attention, and is not confined to circumstances of financial necessity. In my opinion so wide a construction of the expression should not be adopted, having regard to ordinary usage, the context in which the words appear and the history of the sub-section. I construe the expression as referring to circumstances characterized by some degree of financial necessity.

I do not think that a fund satisfies the terms of s. 8 (5) if the persons for whose relief it is to be established and maintained are so described that relief may be given indifferently to persons who are and to persons who are not in necessitous circumstances in the sense I have mentioned. In other words, I am of opinion that the sub-section must be read as if the word "exclusively," or perhaps "chiefly," appeared after the words "established and maintained": cf. *Public Trustee (N.S.W.) v. Federal Commissioner of Taxation* (1), per *Starke J.*

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There are two classes of persons for whose relief the trust fund in this case is to be established and maintained, namely: (1) persons who are, in the opinion of the Board, deserving people who are unable to pay any fees; and (2) persons who are, in the opinion of the Board, deserving people who are unable to pay such fees as private patients in St. Andrew's Hospital are usually required to pay. The income of the trust fund may be applied, consistently with the will, for the benefit of either or both of these classes and it follows, in my opinion, that the trust fund is not entitled to the exemption provided by s. 8 (5), unless persons of the second of these classes are persons in necessitous circumstances in the sense I have mentioned.

It should be stated here that both parties to this appeal were willing to assume that the purposes to which the trust fund is devoted by the will are valid charitable purposes, if not as being for the relief of poverty, at least as being within the fourth class mentioned by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v. Pemsel* (1): cf. *Re Chown*; *Teele v. University of Melbourne* (2); *Perpetual Trustee Co. v. St. Luke's Hospital* (3). Accordingly the commissioner, while not admitting that monies applied for the benefit of the second class of persons mentioned in clause 10 of the will would be applied for the relief of poverty, did not contend that the disposition of the trust fund was invalid; and the appellant did not contend that by virtue of s. 131 of the *Property Law Act* 1928 the trust fund was to be regarded as applicable exclusively for the benefit of the first class of persons mentioned in clause 10 of the will.

The question therefore comes down to this: whether persons can be said to be in necessitous circumstances if nothing is known of their financial position except that, when in need of hospital attention, they are unable to pay such fees as patients at St. Andrew's Hospital are usually required to pay. It is true that it is the Board's opinion, and not the fact, as to the inability to pay such fees which is made by the will the test of eligibility; but it must be assumed, I think, for the purposes of s. 8 (5) that the opinion of a responsible Board entrusted with a fiduciary duty to form a proper opinion will coincide with the fact.

The amount of the fees charged at St. Andrew's may vary from time to time; but it is sufficient, I think, to consider the existing situation. The trust fund cannot be for the relief of persons in necessitous circumstances, unless it be true to say that under

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

(2) (1939) V.L.R. 443.

(3) (1939) 39 S.R. (N.S.W.) 408;
56 W.N. 181.

present-day conditions a person can be described as in necessitous circumstances if, for want of more ample means than he has, he must go for hospital treatment either to a free public hospital or to an intermediate hospital less expensive than St. Andrew's.

The expression "necessitous circumstances" is not defined by the Act, nor has it been judicially interpreted in its present or a comparable context. It does not admit of definition in terms so precise as to provide a yardstick for the determination of every case which may arise. Yet it is an expression which is familiar in common speech, not as limited to cases of abject penury, but as conveying the notion which the Oxford Dictionary endeavours to express as "having little or nothing to support oneself by; poor, needy; hard up." None of these words or phrases can be selected as by itself precisely defining the expression. "There are degrees of poverty less acute than abject poverty or destitution, but poverty nevertheless": *Lemm v. Federal Commissioner of Taxation* (1), per Williams J.; and "necessitous circumstances" refers in my opinion to some degree of poverty. "In such matters one must often be guided to a great degree by one's own experience in the use of terms": *Perpetual Trustee Co. Ltd. v. Federal Commissioner of Taxation* (2), per Dixon J. Approaching the matter in that way, I should say that a person is in necessitous circumstances if his financial resources are insufficient to enable him to obtain all that is necessary, not only for a bare existence, but for a modest standard of living in the Australian community. Such an attempted explanation of the expression is perhaps hardly less vague than the expression itself; but it serves to bring out what I think is important in this case, namely, that s. 8 (5) refers to inability to afford what may fairly be regarded as necessities for persons living in Australia, as distinguished from things which are merely desirable advantages.

On this view of the matter, I should not be prepared to apply the expression "in necessitous circumstances" to that class of persons in Australia who enjoy a modestly comfortable existence and yet are unable to afford hospital treatment at a cost equal to the fees charged at St. Andrew's. There is a considerable margin between necessitous circumstances and affluence, and in my opinion within that margin fall many cases of inability to afford as much for hospital treatment as a privately-conducted hospital like St. Andrew's has to charge under modern conditions, even though not carried on for profit.

Evidence was given by Mr. McFerran to the effect that free public hospitals in Melbourne have been unable to accept all the patients

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(1) (1942) 66 C.L.R. 399, at p. 410. (2) (1931) 45 C.L.R. 224, at p. 233.

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who have desired to enter them, and that this has been the situation ever since the testator's death in 1947. I have no difficulty in believing that this is correct. It was said on behalf of the appellant that in consequence of this situation persons who cannot afford to pay fees such as are charged at St. Andrew's cannot secure hospital accommodation and therefore are in necessitous circumstances. I do not think that this contention should be accepted. Consistently with the will, the income of the trust fund may be used to pay St. Andrew's fees for persons who could have gained admission to free public hospitals. Moreover the trust created by the will is perpetual, and the present inadequacy of public hospital accommodation may well be merely temporary. But in any case the question is not whether the persons for whose benefit the income of the trust fund will be applied would be unable to secure admission to public hospitals; it is whether persons whose financial resources are inadequate to enable them to pay the fees usually charged at St. Andrew's can be said on that account alone to answer the description of persons in necessitous circumstances. I do not think that they can.

In my opinion the objection was rightly disallowed and the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Hoad & Bonella.*

Solicitor for the respondent: *K. C. Waugh*, Crown Solicitor for the Commonwealth.

E. F. H.