[HIGH COURT OF AUSTRALIA.]

SMITH . . . . . APPELLANT;
DEFENDANT,

AND

THE WEST AUSTRALIAN TRUSTEE EXECUTOR & AGENCY COMPANY LIMITED AND ANOTHER . . . RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1950.

PERTH, *Sept.* 6.

Latham C.J., Fullagar and Kitto JJ.

Will—Construction—Charities—Gift of residue—Gift to "such charitable institutions, bodies and organisations as my trustees may select"—Uncertainty.

By his will the testator directed his trustees to "pay and distribute the balance of my estate between such charitable institutions bodies and organisations in the Perth-Fremantle Area as my Trustees may select in such proportions and in such manner and at such times as my Trustees shall think fit."

Held that the words used constituted a good charitable bequest and that the trustees being limited in their selective choice to charitable institutions, charitable bodies and charitable organisations, the gift did not fail for uncertainty.

Decision of the Supreme Court of Western Australia (*Dwyer* C.J.) affirmed.

APPEAL from the Supreme Court of Western Australia.

Charles MacCallum Smith who died at Perth on 21st August 1939 by clause 13 (*c*) of his will directed his trustees to stand possessed of the residue of his estate "Upon Trust to pay and distribute the balance of my estate between such charitable institutions bodies and organisations in the Perth-Fremantle Area as my Trustees may select in such proportions and in such manner and at such times as my Trustees shall think fit" and by clause 20

declared the term "Perth-Fremantle Area" to mean the area within a radius of twenty miles from the Perth Town Hall.

The West Australian Trustee Executor & Agency Company Limited, one of the trustees, applied on originating summons to the Supreme Court for the determination of (*inter alia*) the following question arising out of the administration of the trusts under the will namely:—whether on the true construction of the will the residuary bequest contained in clause 13 (*c*) of the will is a valid charitable bequest or is void for uncertainty or otherwise.

The application was heard by *Dwyer* C.J. who by order dated 30th June 1950 declared that the bequest was valid.

Against the decision Aileen Smith the widow of the deceased and an executor and trustee of his will appealed to the High Court.

J. W. Durack K.C. (with him *J. Dunphy*), for the appellant. The adjective "charitable" qualifies only the noun "institutions." The trustees have power to select and pay to bodies and organisations which may not be charitable, and money so paid may not be used for charitable purposes (*In re Ashton*; *Westminster Bank* v. *Farley* (1)). The objects of the trust are too vague and uncertain (*Attorney-General for New Zealand* v. *Brown* (2); *Re Diplock*; *Wintle* v. *Diplock* (3)). The deceased has not made definite the objects of his bounty and has attempted to give to his trustees power to make a will for him (*Grimond* (*or MacIntyre*) v. *Grimond* (4)). In *In re Pardoe*; *McLaughlin* v. *Attorney-General* (5) the selection was to be made from a particular class. The fact that the gift is to a charitable institution does not by itself make it a charitable gift. The gift must be such that the institution is bound to use the money for charitable purposes (*In re Davidson*; *Minty* v. *Bourne* (6); *Hunter* v. *Attorney-General* (7) per Lord *Davey*; *Byrne* v. *Dunne* (8); *Attorney-General for New South Wales* v. *Adams* (9)). *Hardey* v. *Tory* (10) can be distinguished in that there the object of the gift was a society with a known and distinctive charitable purpose.

T. S. Louch K.C. (with him *P. F. Brinsden*) for the respondent, The West Australian Trustee Executor & Agency Company Limited and *R. V. Nevile* for the Attorney-General were not called on.

(1) (1938) Ch. 482.
(2) (1917) A.C. 393.
(3) (1941) 1 All E.R. 193.
(4) (1905) A.C. 124; (1905) A.C. 603.
(5) (1906) 2 Ch. 184.
(6) (1909) 1 Ch. 567.
(7) (1899) A.C. 309, at p. 323.
(8) (1910) 11 C.L.R. 637.
(9) (1908) 7 C.L.R. 100.
(10) (1923) 32 C.L.R. 592.

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The following judgments were delivered :—

LATHAM C.J. This appeal raises the question of the true construction of a provision in the will of the late James MacCallum Smith whereby it was provided that a fund should be set aside to cover certain expenses and that the capital and income remaining in the fund should be held " upon trust to pay and distribute the balance of my estate between such charitable institutions bodies and organisations in the Perth-Fremantle Area as my Trustees may select in such proportions and in such manner and at such times as my Trustees shall think fit."

It is argued for the appellant, who is the widow of the deceased and who represents the next-of-kin, that this provision is invalid because it is uncertain and that it is not saved by any of the rules relating to charitable dispositions.

The first question which arises is a question of the construction of the clause. The relevant words are " such charitable institutions bodies and organisations in the Perth-Fremantle Area as my Trustees may select." The question is whether the adjective " charitable " applies to each of the nouns " institutions bodies and organisations " or whether, on the other hand, this provision relates to three separate classes, the first being charitable institutions, the second class being bodies of any kind, whether charitable or non-charitable, and the third class being organisations of any kind, whether charitable or non-charitable. It is pointed out for the appellant that in other parts of the will gifts are given to institutions and bodies and organisations, some of which are not charitable in character. His Honour the Chief Justice has held that the adjective " charitable " applies to the three nouns " institutions, bodies and organisations." That construction is certainly open upon the words of the will. It is a natural method of reading the phrase, and the decision of his Honour that the words should be so interpreted is fully justified. Considering then, the provision as being a provision for the distribution of the balance of the estate between institutions, bodies and organisations, provided that the institutions bodies and organisations are charitable, then is it a good gift ? It is a gift to charitable institutions &c. and therefore is prima facie a gift for charitable purposes. That was so held in the case of *Hardey* v. *Tory* (1), where it was decided that where a gift is made to a society having a distinctive charitable purpose, prima facie the gift is for that purpose. But it is said that, notwithstanding

(1) (1923) 32 C.L.R. 592.

the existence and the applicability of that principle, under this provision the trustees may appropriate the part of the estate to which this provision applies to non-charitable purposes. Now it is clear that a gift will not be upheld as a charitable gift unless the provision is such that the trustees are bound to apply the funds to charitable purposes. As was said by Sir *Samuel Griffith* C.J. in *Byrne* v. *Dunne* (1), " The question is whether these words constitute a good charitable bequest. The test is, in the words of *Buckley* L.J. in *In re Sidney; Hingeston* v. *Sidney* (2), 'whether under this will the trustee is bound to apply these funds to charitable purposes. If consistently with the will he could apply any part of it to purposes which are not charitable in the sense in which the word is understood in this Court, the gift must fail as being too indefinite for the Court to execute.' " In this case the words of the will, interpreted in the manner which I have stated, plainly limit the selective choice of the trustees to charitable institutions and charitable bodies and charitable organisations. Accordingly there is no possibility of the trustees, consistently with the terms of their trust, applying any part of the fund to a non-charitable purpose.

It is argued that the testator has not really disposed of his residuary estate but has vested the power to dispose thereof in his executors and trustees. But this is not a valid objection to a disposition in favour of charitable objects. In *Blair* v. *Duncan* (3), Lord *Davey*, in a passage which has been referred to frequently in subsequent cases, said " At any rate it is *positivi juris* that the courts will give effect to a gift for charitable purposes to be selected by an individual." Reference has been made to the case of *Grimond* (*or MacIntyre*) v. *Grimond* (4), in which Lord *Halsbury* L.C. referred to the principle that the testator must specify his own beneficiaries. But in that case there was a complicating circumstance in that there was power to devote the property in question not only to charitable purposes strictly so-called, but also to religious purposes. In the case of *In re Pardoe*; *McLaughlin* v. *Attorney-General* (5), to which we have been referred by Mr. *Durack*, reference was made to what was said in *Grimond* v. *Grimond*. In *In re Pardoe* (6), *Kekewich* J. said, referring to what the Lord-Chancellor said in *Grimond* v. *Grimond*—" I repeat I cannot consider him—having regard to the settled law as laid down by Lord *Davey*

(1) (1910) 11 C.L.R. 637, at p. 643.
(2) (1908) 1 Ch. 488, at p. 492.
(3) (1902) A.C. 37, at p. 45.
(4) (1905) A.C. 124.
(5) (1906) 2 Ch. 184.
(6) (1906) 2 Ch., at p. 192.

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in *Blair* v. *Duncan* (1)—as saying that it is not allowable for a testator to give to his executors the power of selecting charities within a certain area." In similar words in the more recent case of *Chichester Diocesan Fund and Board of Finance (Incorp.)* v. *Simpson* (2), in the judgment of Lord *Macmillan* (3), his Lordship says: —"My Lords, the law, in according the right to dispose of property mortis causa by will, is exacting in its requirement that the testator must define with precision the persons or objects he intends to benefit. This is the condition on which he is entitled to exclude the order of succession which the law otherwise provides. The choice of beneficiaries must be the testator's own choice. He cannot leave the disposal of his estate to others. The only latitude permitted is that, if he designates with sufficient precision a class of persons or objects to be benefited, he may delegate to his trustees the selection of individual persons or objects within the defined class. The class must not be described in terms so vague and indeterminate that the trustees are afforded no effective guidance as to the ambit of their power of selection . . . One class of objects, however, notwithstanding its generality and comprehensiveness, namely, charitable purposes, has always been accepted as sufficiently definite to satisfy the rule, because of the favour which the law extends to charity." Accordingly, this being a gift to charitable institutions, charitable bodies and charitable organisations, the objection that the beneficiaries are not described with sufficient certainty must be held to fail.

It is further objected that this provision would allow organisations etc. to use the bequest for other than charitable purposes. I have already referred to the case of *Hardey* v. *Tory* (4) which shows that a gift to a charitable institution is a gift for the charitable purposes of that institution. In the present case the trustees in making their selection will be subject to the control of the court and they would simply have no power to make a non-charitable institution an object of the testator's bounty.

The last ground of appeal refers in particular to a bequest to the Aberlour Orphanage, Aberlour, Scotland. It is sufficient to say that the provision as to that orphanage throws no light upon the proper construction of the provision in clause 13 (*c*) of the will which has to be construed upon this appeal. I am therefore of opinion that the appeal should be dismissed.

(1) (1902) A.C. 126.
(2) (1944) A.C. 341.
(3) (1944)A.C. 341, at pp. 349, 350.
(4) (1923) 32 C.L.R. 592.

FULLAGAR J. I agree. I just wish to add a few words. It would not, I imagine, be disputed that, if any of the money given by clause 13 (*c*) could be applied to any non-charitable purpose, the gift would fail. It was argued that that was so because the word "charitable" qualified only the word "institution" and did not qualify the words "objects and organisations." I consider it impossible so to construe the clause. I would think it clear myself that the natural and only reasonable construction is to treat the adjective as qualifying all three substantives. To my mind, once that conclusion is reached, that is simply the end of the matter. Mr. *Durack* has sought to distinguish between a gift in terms for charitable purposes and a gift in terms for charitable institutions or charitable bodies or charitable organisations. It does not appear to me that any such distinction can possibly be maintained. The case to which his Honour the Chief Justice of Western Australia referred, *Dick* v. *Audsley* (1), appears to me to be quite sufficient authority, if authority be needed, to refute that argument. Of course quite difficult questions may arise as to whether any institution or body or organisation is charitable in the legal sense. With a view to avoiding possible difficulties and disputes, a wise trustee in such a case generally, I suppose, chooses institutions bodies and organisations whose objects are clearly and exclusively charitable. If the objects of an organisation or body or institution are charitable, the body or organisation or institution is bound by law to apply the moneys received to those charitable purposes. If it does not do so, it is guilty of a breach of trust and the usual remedies are available. In my opinion the appeal should be dismissed.

KITTO J. I agree. I think that it is quite impossible to read clause 13 (*c*) in such a manner as to treat the word "charitable" as attaching to the first only of the nouns which immediately follow it. The rest of the case in my opinion may be dismissed upon the principle stated in one sentence in the judgment of Lord *Simonds* in the *Chichester Case* (2)—"A testator may validly leave it to his executors to determine what charitable objects shall benefit, so long as charitable and no other objects may benefit." In my opinion that is the situation under this clause and I agree, for the reasons stated by the Chief Justice, that the appeal should be dismissed.

(1) (1908) A.C. 347.

(2) (1944) A.C. 341, at p. 371.

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Appeal dismissed with costs. Appellant to pay costs of respondents as between party and party. Executor will be entitled to its costs in default of payment by the appellant out of the estate and in any event the executor will be entitled to its costs as between solicitor and client taking any difference between party and party costs and solicitor and client costs out of the estate.

Solicitors for the appellant, *Dwyer, Durack & Dunphy.*

Solicitors for the respondent, The West Australian Trustee Executor & Agency Company Limited, *Villeneuve Smith, Keall & Hatfield.*

Solicitor for the respondent, the Attorney-General of Western Australia, *R. V. Nevile,* Crown Solicitor for Western Australia.

F. T. P. B.