no application, the result of s. 24 (1) is that the notice to quit upon which the respondent relies is invalid. The only question debated before the Court was whether s. 24 (2) (b) is inapplicable to the case. The appellant's contention was that, by virtue of s. 5 (3) (d), the word " tenant " in s. 24 (2) (b) must be read, in the case of a share-farming agreement, as " share-farmer ", and that " sub-tenant " is either meaningless in such a case or means a sub-share-farmer. On either alternative he would be entitled to succeed, because the respondent is not a share-farmer.

This contention treats s. 5 (3) as providing for a mechanical substitution of the word " share-farmer " for " tenant " throughout the Act when its provisions come to be applied to a share-farming agreement and the parties thereto. But the opening words of s. 5 (3) make plain that the function of the sub-section is to assist in carrying out the provision contained in s. 5 (1) for the application of the Act to share-farming agreements and the parties thereto. The Act is to apply to them " in like manner " as it applies to contracts of tenancy and the parties to any such contract. Accordingly the process with which s. 5 (3) deals is the process of adapting to the case of a share-farming agreement, not so much the words of the Act, as the references which its words make to certain persons or things. Section 24 (2) (b) contains the words " tenant " and " sub-tenant ", but the reference which these words make is to the landlord and the tenant who are the parties to the tenancy in respect of which a notice to quit is given. It describes the landlord as a tenant and the tenant as a sub-tenant, because it is directed to the case where the person who is the landlord in relation to the tenancy in question holds the land as tenant of a third person. In expanded form, s. 24 (2) (b) provides that the section shall not apply to any notice given by a landlord to a tenant where the landlord is himself the tenant of a head-landlord. What s. 5 (3) requires, in the application of the Act to the parties to a share-farming agreement, is that the party who grants the licence shall be treated as the subject of any reference which the Act contains to a landlord, and that the party who is the share-farmer shall be treated as the subject of any reference which the Act contains to a tenant. Since, in s. 24 (2) (b), the words " tenant " and " sub-tenant " refer to the parties to a contract of tenancy who are respectively landlord and tenant in relation to one another, s. 5 (3) requires these words to be construed, in the application of the Act to a share-farming agreement, as referring to the owner and the share-farmer respectively.

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On this construction, s. 24 (2) (b) precludes the application of s. 24 (1) in the case of a share-farming agreement, where the notice is given by a person who is himself a tenant of a third party to a share-farmer with whom he has made a share-farming agreement. The respondent in this case was such a person and the appellant was such a share-farmer. The only person to whom the word "sub-tenant" in s. 24 (2) (b) can refer in applying the Act to the agreement in this case and the parties to it is the share-farmer; and by reading the word "sub-tenant" as referring to him, the direction in s. 5 (1) to apply the Act to this agreement and the parties to it, and the rule of construction laid down by s. 5 (3) for the purpose of carrying out that direction, are satisfied. To adopt the contention that s. 24 (2) (b) does not apply to this case would be to disregard the peremptory requirement of s. 5 (1) that the Act must be applied to the case of a share-farming agreement unless otherwise expressly provided.

The notice to quit given by the respondent to the appellant was therefore not invalidated by s. 24 (1), and the appellant has no defence to the action of ejectment.

For these reasons the Court has dismissed the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *A. B. Shaw & Co.*, Singleton, by *Shaw, McDonald & Co.*

Solicitor for the respondent, *C. R. Biddulph.*

J. B.

[HIGH COURT OF AUSTRALIA.]

TATHAM AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

HUXTABLE AND OTHERS . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Sept.* 5; SYDNEY, *Dec.* 11.

Latham C.J., Fullagar and Kitto JJ.

Will—Construction—Residuary estate—Authority to executor to distribute "to the beneficiaries of this my Will and Testament . . . or to others not otherwise provided for who, in my opinion have rendered service meriting consideration by the Testator"—Uncertainty—Evidence by draughtsman as to mistake made by him—Admissibility.

The testator by his will gave a number of legacies including two separate pecuniary legacies to his executor and made the following provision as to residue: "I hereby authorise and empower in law my Executor the said Edgar Ernest Huxtable, to distribute any balance of my real and personal estate which may at the time of my decease be possessed wholly or in part by me, to the beneficiaries of this my Will and Testament, in addition to amounts already specified, or to others not otherwise provided for who, in my opinion have rendered service meriting consideration by the Testator". The will was written by the executor at the dictation of the testator. The executor made an affidavit in which he sought to explain the words used by saying that he became confused while taking the dictation and that the words "in my opinion have rendered service meriting consideration by the Testator" should have read "in the opinion of my Executor have rendered service meriting my consideration".

Held, (1) by *Fullagar* and *Kitto* JJ. (*Latham* C.J. dissenting), that the testator had not provided a definite criterion for the ascertainment of his beneficiaries and that the entire residuary bequest was void for uncertainty; *Re Park*; *Public Trustee* v. *Armstrong*, (1932) 1 Ch. 580; *Re Jones*; *Public Trustee* v. *Jones*, (1945) Ch. 105, doubted.

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(2) by the whole Court that the evidence directed to prove that the words appearing in the will had been inserted by mistake was not admissible.

Decision of the Supreme Court of Western Australia, (1949) 51 W.A.L.R. 39 (*Wolff* J.) reversed.

APPEAL from the Supreme Court of Western Australia.

By his will dated 15th August 1947 Joseph Tatham of Perth, in the State of Western Australia, after appointing Edgar Ernest Huxtable his executor and after giving various pecuniary legacies by clause (11) provided as to the residue of his estate: "(11) I hereby authorise and empower in law my executor the said Edgar Ernest Huxtable, to distribute any balance of my real and personal estate which may at the time of my decease be possessed wholly or in part by me, to the beneficiaries of this my Will and Testament, in addition to amounts already specified, or to others not otherwise provided for who, in my opinion have rendered service meriting consideration by the Testator".

The will was written by the executor on a printed form at the dictation of the deceased.

The testator died on 31st August 1948 and probate of the will was granted to the executor on 5th November 1948.

On application by originating summons to the Supreme Court of Western Australia the executor asked, *inter alia*, the following questions:—(*a*) Does par. (11) of the will of the testator confer on the plaintiff as executor of such will any discretion to decide the manner in which and the persons amongst whom the residuary estate of the testator is to be distributed. (*b*) If the answer to Question (*a*) is Yes, are there any limits on the discretion of the plaintiff in making such distribution and, if so, what are the limits. (*c*) If the answer to Question (*a*) is No, who (if any person or body) is entitled to benefit under par. (11) of the will of the testator and to what extent.

On 18th July 1949 and on application by the executor for directions as to service, *Dwyer* C.J. made an order in substance as follows:—(*a*) That Richard and John Tatham to be served and that they should represent all the deceased's next-of-kin. (*b*) That the Attorney-General for the State of Western Australia be served and that he represent institutions and individuals not named in the will. (*c*) That the defendant the Princess Margaret Hospital for Children be served and that that institution represent all the named beneficiaries.

The executor's application for interpretation was supported by an affidavit made by himself in which he sought to explain the

words as they appear in clause (11) of the will. The evidence of the executor was as follows :—" The Will of the testator was written by me personally on a printed form to the dictation of the testator. In writing out Paragraph 11 of the Will of the Testator I became a little confused in the language I used and the words ' in my opinion have rendered service meriting consideration by the Testator ' should have read ' in the opinion of my executor have rendered service meriting my consideration ' ". This evidence was admitted in the Supreme Court.

It was held by *Wolff* J. that the latter part of clause (11) relating to " others not otherwise provided for who, in my opinion have rendered service meriting consideration by the Testator " was so uncertain that it was void, but that the invalidity of this part of the clause did not affect the other part of the clause, which was held to be valid. The order made by the Supreme Court was that par. (11) of the will was effective in so far as it conferred benefits on the named beneficiaries under the will but was void for uncertainty in so far as it empowered the executor to distribute any moneys among any person or institutions not named in the will.

The question of the manner in which the residuary estate was to be distributed among the named beneficiaries was reserved for further argument.

From this decision Richard Tatham and John Tatham representing themselves and all other next-of-kin of the deceased appealed to the High Court on the ground that the deceased had authorized his executor to distribute his residuary estate between the members of one or two alternative classes, the members of the first class being defined and those of the second class not defined and that accordingly the deceased had failed to define the objects of his bounty and with the result that the provision made by him as to the residue of his estate was void for uncertainty.

R. V. Nevile, for the Attorney-General, withdrew with leave of the Court.

O. J. Negus, for the appellants. Parol evidence is not admissible to correct a mistake in a will or to show that words have been omitted or left in a will by mistake (*Theobald* on *Wills*, 10th ed. (1947), p. 93). A court of construction has no jurisdiction to correct the probate, but such a court may correct an error on inferences obtained from the whole will (*Halsbury's Laws of England*, 2nd ed.,

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vol. 34, p. 162). Clause (11) of the will authorizes the executor to distribute the residue between one of two classes, one of such classes is definite and ascertainable and the other indefinite and uncertain. The use of the word " or " shows that the clause should be read disjunctively. It is not a gift to named persons " unless the executor should determine otherwise." The will does not indicate that either of the two classes has a prior right to the residue. Both classes are on exactly the same footing. The gift is ineffective because it amounts to a delegation by the testator of his testamentary power (*Theobald* on *Wills*, 10th ed. (1947), p. 343 ; *Houston* v. *Burns* (1)). The objects of a testator's bounty must be described with certainty or must be capable of being ascertained on evidence which is admissible (*Theobald* on *Wills*, 10th ed. (1947), p. 202 ; *Halsbury's Laws of England*, 2nd ed., vol. 34, pp. 41, 42). The only exception to this general rule is a charitable bequest. Where a discretion is left to a trustee to apply the whole of the gift either to charitable or other indefinite purposes the whole gift is void (*Theobald* on *Wills*, 10th ed. (1947), p. 282). The words " others who have rendered service meriting consideration by the Testator " mark out no class within which the executor is to distribute. This provision is uncertain and is void, with the result that the whole clause becomes void for uncertainty. The principle is that where the description includes purposes which may or may not be charitable and a discretion is vested in the trustee the whole gift fails for uncertainty : *Morice* v. *Bishop of Durham* (2) ; *Vezey* v. *Jamson* (3) ; *Williams* v. *Kershaw* (4) ; *Hunter* v. *Attorney-General* (5) ; *Houston* v. *Burns* (6) ; *Attorney-General* v. *National Provincial and Union Bank of England* (7).

T. S. Louch K.C. (with him *J. E. Virtue*), for the respondent The Princess Margaret Hospital. *Wolff* J. found a clear intention to benefit the named beneficiaries unless the executor made a certain determination under the alternative provision. The alternative provision is too vague to confer power on the executor and has no effect upon the prior gift. *Brown* v. *Higgs* (8) is authority for two propositions :—1. that the words " I authorise and empower my executor to distribute the balance " are sufficient to create a trust in favour of the persons named ; and 2. that in the

(1) (1918) A.C. 337, at p. 342.
(2) (1804) 9 Ves. 339 [32 E.R. 656] ; (1805) 10 Ves. 522 [32 E.R. 947].
(3) (1822) 1 Sim. & St. 69 [57 E.R. 27].
(4) (1835) 5 Cl. & F. 111 [7 E.R. 346].
(5) (1899) A.C. 309.
(6) (1918) A.C. 337.
(7) (1924) A.C. 262.
(8) (1799) 4 Ves. 708 [31 E.R. 366] ; (1800) 5 Ves. 495 [31 E.R. 700] ; and (1803) 8 Ves. 561 [32 E.R. 473].

construction of a will the word " or " can be read as " and " in order to carry out the intention of the testator. The use of the disjunctive " or " is ambiguous and under the circumstances the Court will read " or " as " and " to save the gift from being void for uncertainty (*Jarman* on *Wills*, 6th ed. (1910), vol. 1, p. 610). Clause (11) of the will could be read as a gift to nine named beneficiaries and to a class of such undefined charitable and non-charitable objects as the executor should think fit. On this construction the case is on all fours with *In re Clarke*; *Bracey* v. *Royal National Lifeboat Institution* (1), and results in there being an intestacy as to one-tenth of the residuary estate. (*In re King*; *Henderson* v. *Cranmer* (2)). If the will is ambiguous the court will adopt a benevolent construction in order to avoid an intestacy (*Halsbury's Laws of England*, 2nd ed., vol. 34, p. 221).

H. N. Guthrie, for the executor, was not called upon.

O. J. Negus, in reply. The proposition that one may in the construction of a will place oneself in the armchair of the testator can only be accepted subject to reservation. If the meaning of the will is clear surrounding circumstances cannot be looked at to throw a doubt upon that meaning or to give the will a different meaning (*Theobald* on *Wills*, 10th ed. (1947) p. 96). It is not competent for the court to read the word " or " as " and ", there being no error patent on the face of the will. In *In re Clarke*; *Bracey* v. *Royal National Lifeboat Institution* (1), the trustee was bound to give portion of the residuary estate to a charitable object. That case can be distinguished from the present case in that here the executor would be entitled to apply the whole of the fund to non-charitable indefinite objects. The learned Judge below construed the will as if all words appearing after the word " specified " had not been inserted. A court is not entitled to disregard words unless they have been inserted by accident, by mistake or as a result of fraud (*Theobald* on *Wills*, 10th ed. (1947), p. 27; *Halsbury's Laws of England*, 2nd ed., vol. 34, pp. 197-198).

Cur. adv. vult.

Dec. 11.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from an order of the Supreme Court of Western Australia (*Wolff* J.) whereby the will of the late Joseph Tatham was interpreted. By his last will the testator gave eleven legacies to such beneficiaries as the Children's Hospital,

(1) (1923) 2 Ch. 407. (2) (1931) W.N. (Eng.) 232.

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Masonic Lodges, a children's home and other benevolent institutions, a bowling club and two individual persons. The will contained the following provision in par. (11):—"I hereby authorise and empower in law my executor the said Edgar Ernest Huxtable, to distribute any balance of my real and personal estate which may at the time of my decease be possessed wholly or in part by me, to the beneficiaries in this my Will and Testament, in addition to amounts already specified, or to others not otherwise provided for who, in my opinion have rendered service meriting consideration by the testator". It was held by *Wolff* J. that the latter part of this provision, relating to "others not otherwise provided for who, in my opinion have rendered service meriting consideration by the testator", was so uncertain that it was void, but that the invalidity of this part of the clause did not affect the other part of the clause, which was held to be valid. Accordingly, his Honour made an order that par. (11) of the will was effective in so far as it conferred benefits on the named beneficiaries under the will of the testator but was void for uncertainty in so far as it empowered the executor to distribute any moneys among any persons or institutions not named in the will of the testator. His Honour reserved for further argument the question of the manner in which the residuary estate of the testator was to be distributed amongst the beneficiaries named in the will. An appeal is brought to this Court by the representatives of the next-of-kin of the deceased, who contend that the whole of par. (11) is invalid and that there is an intestacy as to the residuary estate of the testator. The Attorney-General was made a party to the proceedings in order to cover the possibility of a contention that par. (11) was, or at least contained, a charitable gift. In this Court the Attorney-General through his counsel quite properly intimated that he was of opinion that this contention was unarguable.

(1) The wording of the final part of par. (11) is certainly strange. It is improbable that any testator, when giving benefits by his will, would attempt to define his beneficiaries by reference to some unexpressed opinion of his own. But, if he did so, he would not refer to himself as "*the testator*". The words "merited consideration by *me*" would be much more fitting if the words "in my opinion" referred to the mind of the testator.

The will was written out by the executor E. E. Huxtable at the dictation of the testator and he made an affidavit in which he explained how it happened that par. (11) was expressed in the words in which it actually appears in the will. The evidence of the executor was as follows:—"The Will of the testator was

written by me personally on a printed form to the dictation of the testator. In writing out Paragraph 11 of the Will of the Testator I became a little confused in the language I used and the words 'in my opinion have rendered service meriting consideration by the Testator' should have read 'in the opinion of my executor have rendered service meriting my consideration' ". This evidence was admitted in the Supreme Court. In my opinion it was not admissible. No evidence is admissible in a court of construction in order to show that words have been placed in a will by mistake. If it can be shown that words have been included by mistake it is for the Court of Probate and not for a court of construction to determine the true terms of the will: *In re Bywater*; *Bywater* v. *Clarke* (1); see the law as stated in *Theobald* on *Wills*, 10th ed. (1947), p. 93; *Jarman* on *Wills*, 7th ed. (1930), vol. 1, pp. 32 and 45.

(2) But a consideration of the words of par. (11) makes it clear that a mistake has been made in the expression of the testator's intention. If the testator had meant to refer in the final words of the paragraph to his own opinion so that " in my opinion " is right, then it is plain that he would have said " by me " and not " by the testator ", so that the latter words would be wrong. The provision makes sense if the word " my " is regarded as an obvious mistake for " his " and a court is entitled so to hold without considering the extrinsic evidence to which reference has been made. As was stated more than a century ago by *Jarman* in the first edition of his work on wills:—" It often happens, however, that the misuse of some word or phrase is so palpable on the face of the will, as that no difficulty occurs in pronouncing the testator to have employed an expression which does not accurately convey his meaning. But this is not enough: it must be apparent, not only that he has used the wrong word or phrase, but also what is the right one; and, if this be clear, the alteration of language is warranted by the established principles of construction."—quoted in *Jarman* on *Wills*, 7th ed. (1930), vol. 1, p. 574; and see *Jarman* on *Wills*, 7th ed. (1930), vol. 3, p. 2147. I therefore proceed to consider the validity of par. (11), reading it with the substitution of the word " his " for the word " my ".

(3) There can be no objection to the validity of the first part of par. (11) taken by itself. It empowers the executor to distribute the balance of the testator's estate to named beneficiaries. This is a provision for the benefit of those specified persons and it creates a fiduciary power which it is the duty of the executor to exercise. It is a power in the nature of a trust: see the discussion

(1) (1888) 18 Ch. D. 17.

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of this subject in *In re Combe*; *Combe* v. *Combe* (1). That would be the position if par. (11) consisted only of the first portion thereof.

(4) But it is contended that the second part of par. (11) is invalid and the learned judge has so held. It is further contended for the appellants that the invalidity of the second part should have been held to infect the first part, so that the whole provision became invalid, with the result that the named beneficiaries lose their possible benefits under clause (11) because of the failure in operative effect of the addition of the words conferring benefits on persons who in the executor's opinion had rendered service meriting consideration by the testator.

The argument for the invalidity of the second part of par. (11) is founded upon such cases as *Houston* v. *Burns* (2), where Lord *Haldane* said that a testator cannot leave it to another person to make a disposition of the beneficial interest of his estate unless he has passed the beneficial interest to that person to dispose of as his own :—" He may, indeed, provide that a special class of persons, or of institutions invested by law with the capacity of persons to hold property, are to take in such shares as a third person may determine, but that is only because he has disposed of the beneficial interest in favour of that class as his beneficiaries. There is, however, an apparent exception to the principle. The testator may indicate his intention that his estate is to go for charitable purposes " (3). Lord *Haldane* repeated this opinion in *Attorney-General* v. *National Provincial and Union Bank of England* (4), where he used the following words (5) :—A testator " cannot leave it to some one else to make a will for him, nor can he leave it to his trustees to give it for purposes which are to be completely in their discretion, unless these purposes are so indicated as in some sense to confer on a class of beneficiary an interest ". These words recognized that it is possible for a testator by his will to create a special power of appointment in a person who may or may not be given a beneficial interest in the estate. But a testator may also create a general power of appointment authorizing a disposition in favour of any person and not only of members of a specified class : see *Jarman* on *Wills*, 7th ed. (1930), vol. 1., p. 458, where, after a reference to *Attorney-General* v. *National Provincial and Union Bank of England* (4), the learned authors say :—" But a general power of appointment may be given, for that is equivalent to property, and a power of distribution

(1) (1925) Ch. 210.
(2) (1918) A.C. 337.
(3) (1918) A.C., at pp. 342-343.
(4) (1924) A.C. 262.
(5) (1924) A.C., at p. 268.

among charities may be given". Thus what was said in *Houston* v. *Burns* (1) and in the last-mentioned case should not be understood as denying the well-established law with respect to powers of appointment: see *Re Hughes*; *Hughes* v. *Footner* (2), where an estate was given to an executor "upon trust for all my children and their issue in such shares and in such manner as I shall by codicil direct or appoint, or, failing any such direction or appointment by me, then in such shares as [the said executor] shall in his discretion think fit and proper". The testator did not make a codicil and it was held that the children and their issue living at the death of the testator were entitled to the estate subject to the power of selection given to the executor. *Sargant* J. said (3):— "The general law on the subject is well settled, and is that the power of testamentary disposition is essentially a personal one and cannot be exercised by a will merely purporting to delegate to another the distribution of the testator's estate and the ascertainment of the objects of his bounty. But there are some real or apparent exceptions to or qualifications of this general rule. One is that of the creation of a general power which the donee may exercise for his own benefit, for such a power is equivalent to property. Another is that of the creation of a power of distribution amongst charities. A third is that of the creation of a power of selection amongst individuals or a class of individuals who are pointed out as the beneficiaries: see *Houston* v. *Burns* (4)".

Re Hughes (2) was a case of a special power of appointment. I agree that a power cannot be a special power of appointment unless a class of possible appointees is selected by the testator himself. But where the donee of a power of appointment can exercise it for his own benefit the power is "equivalent to property". In that case the donee of the power can appoint the property to himself or to any other person whomsoever for any reason whatsoever. In the present case the will gives to the executor £50 and £25. He is therefore one of "the beneficiaries in this my will and testament". Therefore he can distribute the balance of the estate to himself or to other named beneficiaries or to other persons selected by him for the reason that in his opinion they have rendered what he regards as service meriting consideration by the testator. As he can give the whole of the balance to himself the testator has, under the established doctrine as to general powers of appointment, actually disposed of the balance by his will. Accordingly, in my opinion clause (11) is

(1) (1918) A.C. 337.
(2) (1921) 2 Ch. 208.
(3) (1921) 2 Ch., at p. 212.
(4) (1918) A.C., at pp. 342-343.

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valid. The executor can make such distribution to himself or to others as he thinks proper and there is no need for any order reserving the question of the manner of distribution.

I would therefore allow the appeal and answer the relevant questions in the following way:—"*Question* (*d*). Does par. (11) of the will of the testator confer on the plaintiff as executor of such will any discretion to decide the manner in which and the persons amongst whom the residuary estate of the testator is to be distributed?" *Answer*: Yes. "*Question* (*e*). If the answer to Question (*d*) is Yes, are there any limits on the discretion of the plaintiff in making such distribution and, if so, what are the limits?" *Answer*: No. "*Question* (*f*). If the answer to Question (*d*) is No, who (if any person or body) is entitled to benefit under par. (11) of the will of the testator and to what extent?" Not necessary to answer.

The order of the Court will be in accordance with the opinions of my brethren. The terms of the will are responsible for the litigation; the appellant has succeeded in the appeal; the respondents supported the order of the Supreme Court in whole or in part. In these circumstances it is proper to direct that the costs of all parties be paid as between solicitor and client out of the residuary estate, the costs of the Attorney-General to be as of a submitting party.

FULLAGAR J. In this case I have had the advantage of reading the judgment prepared by my brother *Kitto*, and I agree with his conclusions and with his reasons.

I would infer that *Kitto* J. felt doubt as to the correctness of the decisions in *Re Park*; *Public Trustee* v. *Armstrong* (1) and *Re Jones*; *Public Trustee* v. *Jones* (2). I do not myself think that either of those decisions is sound. I would agree that certainty may be achieved as well by an exclusive as by an inclusive definition, though I think that instances where that principle will be of critical importance are likely to be very rare. An example of an "exclusive" definition is to be found in *Re Combe*; *Combe* v. *Combe* (3), but the question whether the class was made sufficiently certain in that case did not arise: there are indications in the judgment that, if it had arisen, it might have been answered in the negative. But, while I would agree that certainty may be achieved by an exclusive definition, I do not think that the mere exclusion of one person or some persons from a class will, generally speaking,

(1) (1932) 1 Ch. 580.
(2) (1945) Ch. 105.
(3) (1925) Ch. 210.

be enough to achieve the requisite certainty. And in *Re Park* (1) and *Re Jones* (2) I do not think that the classes were made sufficiently certain.

With great respect to the learned judges who decided those cases, I would think that the real question was not whether the power which was given was a valid power as such, but whether it amounted to a true testamentary disposition of property, or, in other words, whether it complied with the well-established rule stated by Lord *Haldane* in *Houston* v. *Burns* (3) and by Lord *Simonds* in the *Diplock Case* (*Chichester Diocesan Fund* v. *Simpson* (4)). It is to be remembered that the ultimate basis of the rule lies in the *Wills Act*, which provides that every person may dispose of all his property by will but that no will shall be valid unless it is in writing and executed by the testator in a particular manner. It is inherent in the very nature of the power so given that it cannot be delegated or exercised by an agent for the testator, and it seems to me necessarily to follow that some powers of appointment, which would be perfectly good in any instrument other than a will, are ineffective in a will for the simple reason that they do not amount to a testamentary " disposition " of property, or indeed to any " disposition " of property at all. It seems quite consistent with legal principle to say that the creation by will of a general power of appointment (which has been said to confer the equivalent of ownership) is a testamentary disposition of property. It also seems consistent with legal principle to say the same of the creation of a special power of appointment among a class, where the class is described with certainty and (as in the normal case) there is, unless and until the power is exercised, a trust for the class or for persons who are to take in default of appointment. Where there is, as a matter of construction, no such trust, there does seem to be a departure from principle if we say that the creation by will of a special power to appoint among a class is a testamentary disposition of property, but to say so represents a natural enough " latitude " of view, which is perhaps characteristic of a system which has never regarded strict logic as its sole inspiration. Unless, however, there is a class designated with certainty, to say that the creation of a power to select beneficiaries amounts to a testamentary disposition of property is not merely to relax the principle to meet an exceptional case but to deny the principle absolutely. And this is, I think, what was done both in *Re Park* (1) and in *Re Jones* ; *Public Trustee* v. *Jones* (2). When

(1) (1932) 1 Ch. 580.
(2) (1945) Ch. 105.
(3) (1918) A.C. 337, at pp. 342-343.
(4) (1944) A.C. 341, at p. 371.

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it is said in such cases that the power given is a valid power as such, as no doubt it is, the real question—the question whether there is a testamentary disposition of property—seems to me, with great respect, to be simply avoided.

In the present case I do not think it material to determine whether, as a matter of construction, the executor is "authorized and empowered" to give to himself all or any part of residue. I am strongly inclined to think that he is not, although he is himself a "beneficiary in the will". The use of the word "distribute", the fact that his legacy is given "as a token of appreciation", the fact that he is then given, after the authority to distribute, a further legacy of £25, and the description of the second class of objects of selection—these things all, in my opinion, support the view that a trust is intended under which the executor himself cannot be a beneficiary. But, whether this be so or not, the power is a power in the nature of a trust, and the class of possible beneficiaries is not defined with sufficient certainty to give to its creation the character of a testamentary disposition. Although there was not in that case in terms a "power" to distribute, the case of *Briggs* v. *Penny* (1) is, in its essentials, the same kind of case as the present.

I should perhaps also add that, since s. 131 of the Victorian *Property Law Act* 1928 is not in force in Western Australia, the last question which I had to consider in *Re Belcher* (2) does not arise in the present case.

In my opinion this appeal should be allowed. I agree with the formal order proposed by the Chief Justice including the provision for costs.

KITTO J. The testator by his will gave a number of legacies and made the following provision in clause (11) as to residue:—"I hereby authorise and empower in law my executor the said Edgar Ernest Huxtable, to distribute any balance of my real and personal estate which may at the time of my decease be possessed wholly or in part by me, to the beneficiaries in this my Will and Testament, in addition to amounts already specified, or to others not otherwise provided for who, in my opinion have rendered service meriting consideration by the testator".

This appeal is from an order made upon an originating summons taken out for the determination of certain questions as to, *inter alia*, the effect of this clause and the destination of the residuary

(1) (1851) 3 Mac. & G. 546 [42 E.R. 371].

(2) (1950) V.L.R. 11, at pp. 15-16.

estate. On the hearing of the summons evidence was tendered in an affidavit made by the executor to the effect that the will was written by him personally on a printed form to the dictation of the testator, that in writing out the clause above quoted the executor had become confused in the language he used, and that the words " in my opinion have rendered service meriting consideration by the testator " should be read " in the opinion of my executor have rendered service meriting my consideration ".

Evidence directed to proving that words appearing in a will were inserted therein by a mistake on the part of the draftsman or amanuensis is not receivable in a court of construction. A court exercising probate jurisdiction may in certain circumstances act upon such evidence by excluding the words erroneously inserted (though not by inserting the words erroneously omitted), in accordance with principles which are referred to in *Perpetual Trustee Co. Ltd.* v. *Williamson* (1). But the relevance of such evidence in a probate court is in relation to the issue of the testator's knowledge and approval of the will as executed: *Morrell* v. *Morrell* (2). In a court of construction the probate is conclusive of the testator's knowledge and approval of the will as thereby authenticated; and evidence of the kind referred to is accordingly inadmissible: *In re Bywater*; *Bywater* v. *Clarke* (3).

The only sense in which it is true to say that a court of construction may correct mistakes in a will is that that court may give effect to inferences obtained from the will as a whole (with the assistance of evidence of surrounding circumstances if ambiguity in the will justifies resort to such evidence): cf. *Bradshaw* v. *Bradshaw* (4), notwithstanding that to do so involves an alteration of the words used.

In this case an inference appears to me plainly to arise from the language of the will itself that " my opinion " means " his opinion ". It is, I think, a case in which " anybody who reads this will cannot, if he has his senses about him, doubt that some mistake must have happened; and that is a legitimate ground in construing an instrument, because that is a reason derived not *dehors* the instrument, but one for which you have not to travel from the four corners of the instrument itself ": *Langston* v. *Langston* (5). It is well nigh inconceivable that a testator would intend to describe a class of possible beneficiaries by reference to his own unexpressed opinion and without indicating any date as at

(1) (1929) 29 S.R. (N.S.W.) 487; 46 W.N. 151.
(2) (1882) 7 P.D. 68, at p. 75.
(3) (1881) 18 Ch. D. 17, at p. 22.
(4) (1836) 2 Y. & C. Ex. 72 [160 E.R. 316].
(5) (1834) 2 Cl. & F. 194, at pp. 240-241 [6 E.R. 1128, at p. 1146].

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which the opinion should be held, or how or to whom it should be declared, or by what means it should be ascertained. In a clause which empowers a named person to distribute the residuary estate amongst a number of beneficiaries, some of whom are described by reference only to an opinion as to whether their services merit the testator's consideration, the inference is strong that the opinion intended is the opinion of the person who is to make the distribution. And when it is found that, although the testator has referred to himself in the first person everywhere else in the will, he calls himself "the testator" at the end of the sentence in which "in my opinion" occurs, the conclusion seems to me inevitable that there has been an unintended interchange of the first person and the third.

The clause should therefore be construed, in my opinion, as authorizing and empowering the executor to distribute the residuary estate to the beneficiaries named in the will or to others not provided for in the will who in the executor's opinion have rendered service meriting consideration by the testator.

In the Supreme Court *Wolff* J. construed the clause in this sense. He went on to hold that the beneficiaries named in the will, being the testator's primary choice, were intended to take the residuary estate unless the executor should make a determination in favour of persons answering the second of the descriptions contained in the clause, that the power to make such a determination is void for uncertainty, and that therefore the whole residuary estate is distributable amongst the beneficiaries named in the will. He reserved for further consideration the question as to the shares in which those beneficiaries should take.

In my opinion the language of the clause does not admit of a construction which would give to the beneficiaries named in the will a vested interest and would confine the executor's discretion to the making of a determination operating to divest that interest. There are no words of gift in respect of either of the classes of persons referred to. Both classes are expressed to be the objects of a power; and the power is conferred as a single power authorizing the executor to decide, within the limits of the two classes of persons mentioned, who the residuary beneficiaries shall be. Those qualified for selection are the persons who either have been named by the testator himself as objects of his testamentary bounty or are considered by the executor to merit being made objects of that bounty by reason of service they have rendered.

Thus, as I read the clause, the testator has committed to another the selection of his residuary beneficiaries within a limited field.

But the limits of the field are not defined with certainty. What constitutes " service " within the meaning of the will it is impossible to say; and the standard by which the executor is to decide whether the service rendered by a particular person merits consideration by the testator is none other than the executor's own opinion, for the formation of which no guidance is provided by the will. It is necessary to decide whether a testator may validly commit in this manner the selection of his beneficiaries to the discretion of someone else.

If the power of distribution had been confined to such charitable objects as the executor might choose, it would have been valid. The reasons for this need not be considered; suffice it to say that " it is positivi juris that the Courts will give effect to a gift for charitable purposes to be selected by an individual ": *Blair* v. *Duncan* (1). But there is no charitable intention manifested in this will.

It is "a cardinal rule", to which a power of selection among charitable objects is the sole exception, that " a man may not delegate his testamentary power. To him the law gives the right to dispose of his estate in favour of ascertained or ascertainable persons. He does not exercise that right if in effect he empowers his executors to say what persons or objects are to be his beneficiaries ": *Chichester Diocesan Fund* v. *Simpson* (2). It is therefore necessary in all cases (other than charity cases) that the persons or objects to benefit under the will shall be, by the will itself, ascertained or made ascertainable. They may be made ascertainable by reference to a specified future event, including an act to be done by another person provided that that act does not amount to the making by one man of another man's will: *Stubbs* v. *Sargon* (3). Thus a testator may, consistently with the " cardinal rule ", confer upon another person a power of appointment in respect of all or any of his property, provided that its creation does not amount to a delegation by the testator of his right of testamentary disposition. The principle upon which the present case should be decided is to be found, I think, by a consideration of the grounds upon which validity is conceded to the creation by will of a general or special power of appointment as not amounting to such a delegation.

The creation of a general power of appointment, that is to say a gift by will to such person or persons as X shall appoint, the power

(1) (1902) A.C. 37, at p. 45.
(2) (1944) A.C. 341, per Lord *Simonds*, at p. 371.
(3) (1838) 3 My. & Cr. 507, at pp. 511-512 [40 E.R. 1022, at p. 1024.].

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being exercisable in favour of X himself or his legal personal representatives, is regarded as involving no infringement of the general rule, because X is thereby placed for all practical purposes in the position of beneficial owner of the property. The power, by reason of its complete generality, confers on him "a right of disposition which is in many respects the equivalent of property", since it enables him "to devise or bequeath the property subject to the power as freely and effectually as if it were his own": *Grey* v. *Federal Commissioner of Taxation* (1); *In re Hughes*; *Hughes* v. *Footner* (2); *In the Will of Lewis*; *Gollan* v. *Pyle* (3). "He is virtually the owner of that property. If and when he exercises the power the interests of his appointees come to them by virtue of and are created by the deed of appointment": *Muir or Williams* v. *Muir* (4). Thus an exercise of the power amounts in substance to the appointor's disposition, and not to a testamentary act done by him on behalf of the testator. In a real sense, the testator has "passed the beneficial interest to (the donee) to dispose of as his own": *Houston* v. *Burns* (5).

The validity of the creation of a special power of appointment, that is to say a gift by will to such of a limited class or group of persons as X shall appoint, must necessarily rest upon a different ground. It depends upon the certainty of description of the class or group within which the testator authorizes a selection to be made. In *Houston* v. *Burns* (6), Lord *Haldane* said: "a testator can defeat the claim of those entitled by law in the absence of a valid will to succeed to the beneficial interest in his estate only if he has made a complete disposition of that beneficial interest. He cannot leave it to another person to make such a disposition for him unless he has passed the beneficial interest to that person to dispose of as his own. He may, indeed, provide that a special class of persons, or of institutions invested by law with the capacity of persons to hold property, are to take in such shares as a third person may determine, but that is only because he has disposed of the beneficial interest in favour of that class as his beneficiaries". In *Attorney-General* v. *National Provincial and Union Bank of England* (7), his Lordship returned to the same topic and showed, I think, that he referred to the disposition of the beneficial interest in a practical rather than a technical sense. He said: "a man cannot disinherit his heirs by giving away his property unless he

(1) (1939) 62 C.L.R. 49, per *Dixon* J., at p. 63.
(2) (1921) 2 Ch. 208, at p. 212.
(3) (1907) A.L.R. 431, at p. 433.
(4) (1943) A.C. 468, per Lord *Romer*, at p. 483.
(5) (1918) A.C., at p. 342.
(6) (1918) A.C., at pp. 342-343.
(7) (1924) A.C. 262, at p. 268.

really gives it away; he cannot leave it to someone else to make a will for him, nor can he leave it to his trustees to give it for purposes which are to be completely in their discretion, unless these purposes are so indicated as in some sense to confer on a class of beneficiary an interest". The words "in some sense" leave room for a power to appoint among a class where no trust for the class is implied: see *In re Weekes' Settlement* (1); *Re Combe*; *Combe* v. *Combe* (2).

In *Chichester Diocesan Fund* v. *Simpson* (3), *Lord Macmillan*, referring to the passage I have quoted from Lord *Haldane's* judgment in *Houston* v. *Burns* (4), used words which I take to express accurately the principle upon which special powers are supported. He said: "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."

Having regard to these principles, the proposition should, I think, be accepted that a testamentary disposition in favour of a person or persons to be selected by someone other than the testator himself, if it is not to fail as infringing the general rule forbidding the delegation of testamentary power, must either confer upon the person authorized to make the selection a general power equivalent to ownership or define with certainty a class or group from which the selection is to be made.

A special class of cases which is not free from difficulty is that in which a power is given by will to appoint to anyone the donee may select except a specified person or certain specified persons. Such a power is plainly not general, and it cannot be upheld on the reasoning applicable to general powers. "Anything less than a power to appoint as he thinks fit is not equivalent to ownership. A power so to appoint, but with an exception, is something less than proprietorship": *In re Byron's Settlement*; *Williams* v. *Mitchell* (5). A provision conferring such a power must therefore be conceded to be one which, if valid, will operate, when the power is exercised, as the testator's disposition; and it follows that its

(1) (1897) 1 Ch. 289.
(2) (1925) Ch. 210.
(3) (1944) A.C. 341, at p. 349.
(4) (1918) A.C. 337.
(5) (1891) 3 Ch. 474, at p. 479.

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validity must depend upon the latitude in the general rule, of which Lord *Macmillan* spoke in the *Chichester Case* (1). But certainty in the description of the class or group of persons from which the selection may be made is the essential qualification for the benefit of that latitude; and the validity of a power to appoint to anyone except specified persons must therefore be rested, it seems to me, upon the view that certainty may be achieved as well by an exclusive as by an inclusive description. It is on this basis, I think, that the cases of *In re Park*; *Public Trustee* v. *Armstrong* (2), and *In re Jones*; *Public Trustee* v. *Jones* (3), if correctly decided, must be explained. See also *Re Harvey*; *Bannister* v. *Thirtle* (4).

On the view I have stated, the question whether a power is or is not exercisable in favour of the donee himself or his legal personal representatives does not provide the test of validity. It is true that a power cannot be upheld for the reason applicable to general powers unless it is exercisable in favour of the donee or his legal personal representatives as well as of the rest of the world; but if it is created in favour of a limited class or group, and therefore must be upheld, if at all, by reference to the latitude in the general rule, the question whether the donee and his legal personal representatives are within that limited class or group is not the question which has to be considered. The relevant question in the latter case is whether the class or group is defined with certainty.

In the present case, even assuming that clause (11) of the will, if valid, would entitle the executor to take the whole residuary estate himself, the clause cannot be supported, in my opinion, on the principle applicable to general powers of appointment, for it does not purport to empower the executor to dispose of the residuary estate as freely as if it were his own. It restricts his power of disposition by limiting his choice to persons answering one of two descriptions—either that of beneficiaries named in the will, or that of persons who in his opinion have rendered service meriting consideration by the testator. In my opinion, the clause must be judged upon the principles applicable to special powers of appointment; and so judged it must fail, for the testator has not provided a definite criterion for the ascertainment of his beneficiaries, but has purported to delegate the choice of them to the insufficiently guided judgment of another person. The words of Lord *Halsbury* in *Grimond* v. *Grimond* (5) appear to me to be

(1) (1944) A.C. 341.
(2) (1932) 1 Ch. 580.
(3) (1945) Ch. 105.
(4) (1950) 1 All. E.R. 491.
(5) (1905) A.C. 124, at p. 126.