[HIGH COURT OF AUSTRALIA.]

SALVATION ARMY (VICTORIA) PROPERTY TRUST . . . . . Defendant, } Appellant;

AND

PRESIDENT, COUNCILLORS AND RATEPAYERS OF THE SHIRE OF FERN TREE GULLY . . . . . Complainant, } Respondent.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1951-1952.

1951. MELBOURNE, *Oct.* 10, 12.

1952. *March* 5.

Dixon, McTiernan, Williams, Webb and Fullagar JJ.

Local Government—Rating—Exemption—Land used exclusively for charitable purposes — "Exclusively" — "Charitable" — Local Government Act 1946 (*No.* 5203) (*Vict.*), *s.* 249 (1) (*b*) (*ix*).

The appellant was the registered proprietor of certain lands situate within the municipal district of the respondent shire. The lands were used for the purpose of conducting a boys' training farm for delinquent boys and homes for difficult, wayward or underprivileged boys. As part of the activities of the training farm, pigs and cattle were raised, fruit and flowers were grown, and a herd of milking cows was kept and milked. The produce of the farm was sold, realizing an annual sum of approximately £4,000. This sum was applied in reduction of the costs of conducting the farm and the boys' homes, which were in fact conducted at a loss.

Held that the lands were used "exclusively for charitable purposes" within the meaning of the *Local Government Act* 1946 (Vict.), s. 249 (1) (*b*) (ix).

Nunawading Shire v. *Adult Deaf & Dumb Society of Victoria*, (1921) 29 C.L.R. 98, distinguished.

Held, also, by *Dixon*, *Williams*, *Webb* and *Fullagar* JJ. (*McTiernan* J. dissenting), that in s. 249 (1) (*b*) (ix) the word "charitable" is to be understood in its technical legal sense.

Queen's College v. *Melbourne Corporation*, (1905) V.L.R. 247, not followed.

Decision of the Supreme Court of Victoria (*Sholl* J.) reversed.

H. C. OF A. 1951-1952.

SALVATION ARMY (VICTORIA) PROPERTY TRUST v. FERN TREE GULLY CORPORATION.

APPEAL from the Supreme Court of Victoria.

The appellant corporation was the registered proprietor of certain lands situate within the municipal district of the respondent Shire of Fern Tree Gully. The lands in question consisted of a number of pieces of land, with two exceptions contiguous one to another, but separately rated by the respondent shire. A boys' home (known as the No. 1 Home) was erected and conducted on one of the pieces of land and was used in connection with a boys' training farm. This home and training farm was registered as a reformatory and was used for the reception and training of delinquent boys committed to the home by the Children's Courts and of certain difficult boys placed in the home by their own parents. As part of the reformative treatment, certain farm training was provided. Dependent upon the seasons, this training included such work as the pruning of fruit trees and the picking of the fruit, the cultivating and picking of flowers, the caring for pigs and cattle, the sowing and harvesting of crops, and the conducting of a fully-mechanised dairy. Two other boys' homes (known respectively as the No. 2 Home and the No. 3 Home) were erected and conducted on other pieces of the land, and the pieces of land on which they stood were also used for the purposes of the training farm. The boys in these homes took no part in the conduct of the farm and produced no produce. The produce of the farm, over and above the domestic requirements of the homes, was sold; the returns (particulars of which appear in the judgments hereunder) were used, so far as they would go, to make good losses incurred in the conduct of the homes. In the case of milk, contracts for its supply were entered into upon the forms of contract required by the Milk Board of the State of Victoria, and these contracts required the provision of a minimum quantity of milk to each purchaser.

The respondent shire rated the appellant in respect of these lands, contending that the lands were not used by the appellant "wholly and exclusively for charitable purposes". The appellant denied liability, and the respondent shire commenced proceedings in the Court of Petty Sessions at Fern Tree Gully by way of complaint for rates due and owing. The stipendiary magistrate dismissed the complaint, and the respondent shire obtained an order nisi to review the decision in the Supreme Court of Victoria. Upon its return, *Sholl* J. set aside the decision of the magistrate and remitted the complaint to him for further hearing.

The appellant appealed, by special leave, from this decision to the High Court.

A. D. G. Adam K.C. (with him *B. J. Dunn*), for the appellant. The appellant is exempt from rating by virtue of the *Local Government Act* 1946 (Vict.), s. 249 (1) (*b*) (ix). It is a charitable organization conducting a training farm for delinquent and unruly boys. The stipendiary magistrate took the view that on the evidence the farming activities were no more than those reasonably necessary to train the large numbers of boys in the institution.

[DIXON J. *Sholl* J. took the view that the incidental-purpose test could not be availed of as a matter of law.]

Yes, but he added something on the assumption that he was wrong there. The sale of products is not essential to the training of the boys, but the production of the surplus is incidental to the running of the homes. The user of the land is no less exclusively for charitable purposes because in the course of carrying out those purposes certain surplus products emerge and are disposed of with the consequence that the cost of the institution is reduced. There is only one purpose which actuates the use of the land. There is no independent purpose involved in the sale of the products: the surplus is merely an advantage from the charitable activity.

[FULLAGAR J. Your argument would be the same if you made a profit.]

[DIXON J. Suppose they gave the milk away free to a non-charitable organization ?]

If the milk is produced in the carrying on of the training farm, it is immaterial what they do with the surplus. See the *Bland-Sutton Case* (1); *Re Royal College of Surgeons* (2).

[WILLIAMS J. referred to *Royal Australasian College of Surgeons* v. *Federal Commissioner of Taxation* (3).

[MCTIERNAN J. referred to *Southport Corporation* v. *Corporation of the Trustees of the Order of the Sisters of Mercy in Queensland* (4).]

An incidental purpose does not destroy the exclusive nature of the main purpose. Here there is no second purpose at all. As to when an activity is not a purpose, see the *Bland-Sutton Case* (1); *Institution of Civil Engineers* v. *Inland Revenue Commissioners* (5); *Borough of Battersea* v. *British Iron & Steel Research Association; British Launderers' Research Association* v. *Borough of Hendon Rating Authority* (6). The production of a surplus is incidental to the charitable purpose for which the land is used. It follows logically that the surplus is disposed of and there is not thereby a use other than

(1) (1951) Ch. 485.
(2) (1899) 1 Q.B. 871.
(3) (1943) 68 C.L.R. 436.
(4) (1935) 53 C.L.R. 296.
(5) (1932) 1 K.B. 149, at pp. 173, 176.
(6) (1949) 1 K.B. 434, at p. 452.

H. C. OF A. 1951-1952.

SALVATION ARMY (VICTORIA) PROPERTY TRUST v. FERN TREE GULLY CORPORATION.

for a charitable purpose (*Municipality of North Fremantle* v. *Saw* (1); *Borough of Sebastopol* v. *Murray* (2)), and *Nunawading Shire* v. *Adult Deaf & Dumb Society of Victoria* (3) are distinguishable: in the latter case there was an independent purpose beyond the training.

[McTIERNAN J. referred to *Borough of Leichhardt* v. *Moran* (4).]

In *Nunawading Shire* v. *Adult Deaf and Dumb Society of Victoria* (3) the use of the land served a twofold purpose. As one purpose was non-charitable, the society was liable. There was there a real and independent object, namely, to raise revenue. Revenue derived in the course of carrying on the home does not destroy the exemption (*Municipal Council of Sydney* v. *Salvation Army* (*N.S.W. Property Trust*) (5)). There is a distinction between the purpose and the means of carrying it into effect (*Roman Catholic Archbishop of Sydney* v. *Metropolitan Water, Sewerage and Drainage Board* (6); *Inland Revenue Commissioners* v. *Falkirk Temperance Cafe Trust* (7)). As to the meaning of "charitable", see *Randwick Municipal Council* v. *Kessell* (8).

D. M. Campbell K.C. (with him *K. H. Gifford*), for the respondent. The decision in *Nunawading Shire* v. *Adult Deaf & Dumb Society of Victoria* (3) was based on a section re-enacted in the precise words in the *Local Government Act* 1928 (Vict.), s. 249. An exception was provided by the *Local Government Act* 1941 (Vict.), s. 21, but that exception relates only to a building and not to the land as a whole. The doctrine of *expressio unius est exclusio alterius* applies. The section as amended by the 1941 Act was re-enacted in the *Local Government Act* 1946 (Vict.), s. 249.

[DIXON J. The Act of 1941 would overcome the decision in *Southport Corporation* v. *Corporation of the Trustees of the Order of the Sisters of Mercy in Queensland* (9).]

This case on the evidence falls clearly and completely within *Nunawading Shire* v. *Adult Deaf & Dumb Society of Victoria* (3). Further, in that case the sale of the flowers was part of the training; but the sale of produce does not serve that purpose in the present case. Only a small proportion of the boys is engaged in the actual farming, which goes far beyond the necessities of training and

(1) (1906) 8 W.A.L.R. 164.
(2) (1920) V.L.R. 211.
(3) (1921) 29 C.L.R. 98.
(4) (1904) 4 S.R. (N.S.W.) 361; 21 W.N. 96.
(5) (1931) 31 S.R. (N.S.W.) 585; 48 W.N. 219.
(6) (1928) 40 C.L.R. 472, at p. 479.
(7) (1927) S.C. 261.
(8) (1929) 9 L.G.R. (N.S.W.) 86.
(9) (1935) 53 C.L.R. 296

exists for a collateral purpose. The *Nunawading Case* (1) has stood for thirty years and Parliament has re-enacted the Act twice since that decision was given. The Act provides that all land is ratable save for the exceptional cases expressly stated. The *Nunawading Case* (1) has been distinguished in New South Wales because of the different provisions of the New South Wales Acts (*Whatmore* v. *St. Peters Municipal Council* (2)).

[DIXON J. In view of the decision in *Queen's College* v. *Melbourne Corporation* (3), does not "purpose" have a popular meaning such as "the end in view"?]

Here one of the uses to which the land is put is the production of farm produce for sale. In any case, the goods are prepared for sale on the land. Further, the appellant is bound by its contracts to supply a minimum quantity of milk for sale. As to the construction of an exemption from taxation, see *Swinburne* v. *Federal Commissioner of Taxation* (4). See also *Purvis* v. *Traill* (5). "Charitable purposes" cannot mean "charitable" in the legal sense. It must bear the colloquial sense of almsgiving or something done for the support of the needy (*Queen's College* v. *Melbourne Corporation* (3)). If the term were as wide as the legal definition of "charity", many of the other exemptions specified in s. 249 would be unnecessary. The Act has been re-enacted in identical terms on three occasions since that decision. See *Kelly* v. *Municipal Council of Sydney* (6); *Warringah Shire Council* v. *Salvation Army* (*N.S.W. Property Trust*) (7).

A. D. G. Adam K.C., in reply. "Charity" has its technical meaning here (*Chesterman* v. *Federal Commissioner of Taxation* (8); *Adamson* v. *Melbourne & Metropolitan Board of Works* (9); *Christ College Trust* v. *Hobart Corporation* (10)). If "charity" bears its popular meaning, the institution is still charitable (*Warringah Shire Council* v. *Salvation Army* (*N.S.W. Property Trust*) (11)). The work of the Salvation Army is charitable (*In re Smith*; *Walker* v. *Battersea General Hospital* (12)). As to the popular meaning of charity, see *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (13); *Swinburne* v. *Federal Commissioner of Taxation* (14);

(1) (1921) 29 C.L.R. 98.
(2) (1926) 8 L.G.R. (N.S.W.) 42; 43 W.N. 184.
(3) (1905) V.L.R. 247.
(4) (1920) 27 C.L.R. 377, at p. 382.
(5) (1849) 3 Ex. 344 [154 E.R. 876].
(6) (1920) 28 C.L.R. 203.
(7) (1943) 15 L.G.R. (N.S.W.) 91, at p. 93.
(8) (1926) A.C. 128.
(9) (1929) A.C. 142.
(10) (1928) 40 C.L.R. 308.
(11) (1943) 15 L.G.R. (N.S.W.) 91, at p. 93.
(12) (1938) 54 T.L.R. 851.
(13) (1891) A.C. 531.
(14) (1920) 27 C.L.R. 377, at p. 384.

H. C. OF A. 1951-1952.

SALVATION ARMY (VICTORIA) PROPERTY TRUST v. FERN TREE GULLY CORPORATION.

Randwick Municipal Council v. *Kessell* (1). The amending Act of 1941 throws no light upon the present problem of exclusive user. It is the duty of the trustees of the institution to realize on rather than to waste the products, and this does not affect the exclusive user of the land for charitable purposes. See *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society* (2).

Cur. adv. vult.

March 5.

The following written judgments were delivered :—

DIXON, WILLIAMS AND WEBB JJ. The question at issue in these proceedings is whether the appellant is liable to be rated under the provisions of the *Local Government Act* 1946 (Vict.) in respect of its ownership of about 400 acres of land situated in the area of the respondent shire on which the appellant is carrying on an institution known as " The Salvation Army Bayswater Boys Home Training Farm and Vocational Centre ". Section 249 (1) of the Act provides that all land shall be ratable property within the meaning of the Act save as is next thereinafter excepted. A number of exceptions follow, one of which is (1) (*b*) (ix) : " Land used exclusively for—Charitable purposes ". The respondent shire sued the appellant in the court of petty sessions for the rates under s. 339 of the Act. The learned stipendiary magistrate was of opinion that the land in question fell within this exception and dismissed the complaint. Upon appeal to the Supreme Court of Victoria *Sholl* J. set aside the order of the magistrate and remitted the complaint back to him for further hearing as to what portions, if any, of the property were exempted consistent with his Honour's decision. The appeal to this Court is by special leave from the order of the Supreme Court.

The institution in question was established by the Salvation Army in 1897, when some of the land was purchased. The remaining land was acquired between 1897 and 1906. There are three homes on the land. Number 1 Home was rebuilt in 1947 at a cost of £80,000, of which the State Government contributed approximately £25,000. The institution caters for three types of boys : (1) those committed by courts for reformatory treatment, who are accommodated in No. 1 Home ; (2) those who come to the institution through the Children's Welfare Department, having been declared by court orders to be neglected children ; if over school age, they go to No. 1 Home, if of school age, to No. 2 Home ; (3) those who

(1) (1929) 9 L.G.R. (N.S.W.) 86.

(2) (1928) 1 K.B. 611, particularly at pp. 630, 632.

come from private homes, as uncontrollable ; they are all of school age, and go to No. 2 Home. In 1950, there were some forty-five boys over school age in No. 1 Home, and some forty-eight boys of school age in No. 2 Home. The latter attend a school on the property. Number 3 Home is used as quarters for officers of the Salvation Army who carry on the work of the institution.

The institution carries on a number of farming activities. It has a dairy herd, orchards, vegetable gardens, flower gardens, piggeries and poultry. The products are used in the maintenance of the institution, but there are from time to time substantial surpluses which are sold to the public. In the year ending 30th September 1949, the total revenue was £8,950, of which £2,690 came from capitation fees paid by the Children's Welfare Department, £1,603 from child endowment, £252 from private maintenance fees, £176 from donations, and £4,229 (nearly half the gross revenue) from sales of surplus products. The total expenditure was £11,947 including £2,443 for " purchase of live stock, plant, materials, etc., for use in training operations ". The deficit of £2,997 was met from the Central Social Fund of the Salvation Army. By far the greatest portion of the £4,229, revenue from sales, was from milk, the details being " milk £2,842, orchard £49, vegetables £195, flowers £224, livestock and poultry £784, workshop £86, and sundries £49 ". From the establishment of the institution in 1897 to 1949, an overall loss on its operations was incurred in all except five years, and over the whole period there was an accumulated deficit of £35,000 odd which was met from the Central Social Fund of the Salvation Army. To that fund the surpluses in the five years were paid. The total milk production per day is now approximately ninety gallons from sixty cows of which from twenty to twenty-five gallons are used in the institution, and the balance is sold. In 1949 the average weekly cost of each inmate was £2 0s. 2d. and the average weekly income £1 13s. 1d. of which 7s. 7d. was from net sales of surplus products.

The boys of the No. 1 Home take part in the farming activities of the institution. The boys in the No. 2 Home take part in the cleaning up of their own part of the property but not in the work of the rest of the institution. The institution was founded to care for neglected boys who were becoming a problem in Australian cities and to give these boys a practical and religious training so that they would be encouraged to start life afresh and become useful citizens. In his evidence Brigadier Saunders was asked whether the whole of the work on the property was carried out for the sole purpose of training the boys, and he replied : " Yes, that all the work done in regard to the dairying, vegetable growing,

H. C. OF A. 1951-1952.

SALVATION ARMY (VICTORIA) PROPERTY TRUST v. FERN TREE GULLY CORPORATION.

Dixon J. Williams J. Webb J.

and orchard was done for the purpose of training the lads, and in order that they might, if possible, develop into useful citizens upon their discharge from the institution". He said that they endeavoured whilst the boys were there to instil into them a religious background and to bring them up on right moral principles. The superintendent of the institution Brigadier Leggett was asked the following questions and answered them as follows: "Q. With regard to No. 1 Home you might tell his Worship when a boy comes to the home approximately what is the programme? A. When a boy is committed to us I generally interview him and introduce him to the officers. The whole idea is to establish friendship as soon as possible and confidence between us. Then we show the boy his private room. We show him the dining and other facilities and over the home generally. Q. When he has seen around, what does he do? A. He is placed with about twenty boys and they are in the care of about four officers and the big thing for us is to hold the boy to the place because his whole idea then is to break away, to abscond and get into further difficulties and it takes us all our time to hold him. We try to get him generally occupied. He may go for one or two days perhaps cutting wood, then may be another day they are digging up docks, cutting blackberries, generally cleaning up about the place or if they are too restless they are taken to the gymnasium or cricket field or football. This is what we call bridging the restless period. Q. Do I gather that the whole point is to hold his interest by frequent changes? A. Yes, he usually resents coming and we just have to wait until he is prepared to work. We have to move him about from one place to another to keep his interest and promote friendship. Q. How long does that period generally last? A. We find that settling down and getting him to pay attention and listen, it generally takes about six months. Tremendous patience is necessary, you cannot force the boy. You just have to quietly move him round, keep him occupied as much as you can—it generally takes about six months. This is what we call the most important part, because unless he settles down he won't improve nor be fit to go out. Q. What is the next step in his training? A. We generally have what we call the semi-trust period—when we feel that a lad may be slightly trusted—he won't run away as quickly. He is given an opportunity of being trusted. He will be taken to the dairy or to the orchard or general farming and he will watch the operations, perhaps take a small part in them, clean up the dairy, watch the milking—perhaps he will be taught to strip, maybe in the orchard he will be shown the pruning or the cropping, it depends on the season. He may get a chance to handle the horses. The

idea is to trust him a little bit. That period averages about three to four months. Q. What is the final period ? A. When a boy is showing some promise we put him to what we call a full trust. Then he goes to the orchard or to the dairy where his training will be a little more intensive. He is given more lectures and opportunities to handle things and generally fit him for some job when we have found what he is most adapted to. Q. For the purpose of adequate facilities for these boys, is it necessary to have each of the various phases of activity that you have there ? A. Yes, variety is the thing at Bayswater. We must have it for the type of boy committed to us. Q. It was as a result of the need for more variety that you recently established this workshop ? A. Yes, and the flowers &c. Q. Then the whole of the activities in their various phases are directed only to providing training for the boys in some particular vocation ? A. The facilities which we have there are to give the boy an opportunity to express himself if he will. We do not feel that we have any chance of making a boy a dairy farmer or a carpenter or any of these trades in just the little time we have at our disposal. The only thing we can hope to do is to create a desire. Q. Is it a fact that behind all this training there is a very strong emphasis on religious training ? A. The moral and religious training is paramount because we feel that this is a foundation ".

The magistrate found that the land was being used exclusively for charitable purposes. He said it appeared that certain products resulting from the boys' labour were sold to various people—such as flowers, pigs taken into market, milk and vegetables, and the proceeds devoted to the boys themselves. " Still, I take the view that the mere selling of the surplus proceeds for the purpose of helping to finance the home does not necessarily mean that this land is being used for purposes other than charitable purposes. I think the whole use to which the land is put is charitable in its nature and the surplus proceeds is merely something which is incidental to the training of the boys ". He distinguished the *Nunawading Case* (1), to which we shall refer later, on the facts, expressing the opinion that it was obvious that the Adult Deaf and Dumb Society of Victoria used the premises for other than charitable purposes. " It allowed outsiders to come in and made charges ". On the appeal to *Sholl* J., it was submitted for the appellant shire (a) that the case fell within the decision in the *Nunawading Case* (1) and it could not be said, consistently with that case, that the land, even if used for " charitable purposes "

(1) (1921) 29 C.L.R. 98.

H. C. OF A. 1951-1952.

SALVATION ARMY (VICTORIA) PROPERTY TRUST v. FERN TREE GULLY CORPORATION.

Dixon J. Williams J. Webb J.

within the meaning of that expression as defined by the Full Court in *Queen's College* v. *Melbourne Corporation* (1), was exclusively so used, having regard to the business or commercial activities involved in the sale of surplus produce; (b) that even if the *Nunawading Case* (2) did not cover this case, the purposes for which the land was used were not exclusively charitable, within the *Queen's College Case* (1) definition—i.e., they were not limited to purposes charitable in the popular sense, in that they were not solely for the relief of poverty, since boys other than poor boys might be inmates. It was submitted for the respondent, the Salvation Army, that the *Nunawading Case* (2) was distinguishable in that it turned on a finding of fact by this Court that the use of the land there proved went beyond what was merely a necessary consequence of, or merely an incidental requirement of, the use of the land for the charitable purpose of training deaf and dumb people, whereas in the present case there was no use of the land except what was the necessary consequence of, or (according to the magistrate's finding) a merely incidental requirement of, the use of the land for the charitable purpose of training boys in order to reform or train them morally and socially. It was also submitted that the purposes of the institution were all charitable purposes in the popular sense within the meaning of *Hood* J.'s test in the *Queen's College Case* (1), or alternatively, it should be held, since the decisions of the Privy Council in *Chesterman* v. *Federal Commissioner of Taxation* (3) and *Adamson* v. *Melbourne and Metropolitan Board of Works* (4) that the *Queen's College Case* (1) was wrongly decided, and that "charitable purposes" in s. 249 (1) (*b*) (ix) should now be read as referring to purposes charitable in the legal sense, which the purposes of this institution plainly are. Counsel agreed, however, that he could not pursue this alternative argument before *Sholl* J. since his Honour was bound by the Full Court decision, and there was no sufficiently direct decision of the Privy Council to enable him to ask his Honour to act on the basis that the Full Court decision had been overruled.

With respect to the first submission *Sholl* J. posed for himself the following question: "Is, then, the principle of exemption this, that there is no use for a purpose other than an exclusively charitable purpose, if there is no use save such as is the necessary consequence of, or merely incidental to, an overriding charitable purpose? Or is the principle that the exemption is lost if, upon the facts, it can be said that the land, though used for a charitable purpose,—and, if it be desired to add it, an overriding or primary charitable

(1) (1905) V.L.R. 247.
(2) (1921) 29 C.L.R. 98.
(3) (1926) A.C. 128.
(4) (1929) A.C. 142.

purpose,—is *also* used for a non-charitable purpose, at all events one involving public commercial trading activities, notwithstanding it is a necessary consequence of, or merely incidental to, the charitable purpose ? " In the course of discussing this question his Honour sought to ascertain the line of demarcation which distinguishes the exclusive from the non-exclusive charitable use of land. He referred to three cases decided in England under the provisions of the *Scientific Societies Act* 1843 (Imp.) (6 & 7 Vict. c. 36). This Act provided in effect that no person should be rated in respect of any land &c. belonging to any society instituted for the purposes of science &c. exclusively and occupied by it for the transaction of its business and for carrying into effect its purposes. These cases are *Purvis* v. *Traill* (1); *Borough of Battersea* v. *British Iron & Steel Research Association; British Launderers' Research Association* v. *Borough of Hendon Rating Authority* (2). In these cases it was decided that a society lost the exemption unless it was instituted for scientific &c. purposes exclusively but that it was still so constituted although it had other purposes provided the other purposes were merely a means to the fulfilment of its scientific &c. purposes and incidental thereto but that the exemption was lost if the other purposes ceased to be a means to an end and became collateral and additional purposes. His Honour, however, considered that this test was not appropriate to s. 249 (1) (*b*) (ix) of the *Local Government Act* 1946 and that it was not consistent with the test adopted by this Court in the *Nunawading Case* (3). Of that case his Honour said : " In my judgment, the *Nunawading Case* involves the conclusion that land ceases to be used exclusively for charitable purposes within the meaning of the exemption if, though the primary and indeed the overriding purpose of its use is and remains charitable within that meaning, the land is used for carrying on commerce with the general public, notwithstanding that such commercial activities are designed solely to obtain revenue for, or are merely incidental to, or even are the necessary consequence of, the pursuit on the land of the charitable objects of the occupier ".

Before us Mr. *Campbell* for the respondent shire insisted that the present case was indistinguishable from the *Nunawading Case* (3). If we acceded to this submission it would be necessary to consider whether that case was rightly decided. But we do not consider that it was more than a decision upon the particular facts, and we do not think that it purports to establish any principle that would constrain us one way or the other in the present case. In the

(1) (1849) 3 Ex. 344 [154 E.R. 876].
(2) (1949) 1 K.B. 434.
(3) (1921) 29 C.L.R. 98.

H. C. OF A. 1951-1952.

SALVATION ARMY (VICTORIA) PROPERTY TRUST v. FERN TREE GULLY CORPORATION.

Dixon J. Williams J. Webb J.

Nunawading Case (1) a flower garden was maintained as a method of treating, training and instructing deaf and dumb persons. The flowers were cut and sold and a substantial income was received which was applied to the upkeep of the institution. There was a lake on the land, and the society habitually allowed boating and picnic parties to use the lake and part of the land, the society making charges therefor, the income from which was substantial and was applied to its upkeep. In the course of its judgment the Court pointed out that the question at issue was whether the land was used exclusively for charitable purposes and that the word " exclusively " could not be disregarded. " The use must be so as to exclude all purposes but the particular purpose ". At (2) the Court said : " A flower garden has been made and is maintained as a method of treating, training and instructing these persons (i.e. the deaf and dumb inmates). But the flower-growing scheme went far beyond these purposes. A business, which consisted of selling flowers to the public, was carried on, with the result that a large return accrued to the Society in each year ". " It is not enough that the primary or main object of the use of the land was for charitable purposes, unless it can be affirmed that the land was used for these purposes only. The use of the land in the present case was twofold—(1) the treatment and training of the inmates of the Home, and (2) the carrying on the business of growing and selling flowers to assist in the upkeep of the institution. The latter purpose is not in any sense a charitable purpose, and so excludes the exemption claimed. . . . In addition to using the land for a flower garden, the Society habitually allowed boating and picnic parties to enter upon and use portions of the land, charging various sums of money for such use, and the sums received were not inconsiderable. . . . The use of the land as a kind of recreation reserve for boating and picknicking parties is not a charitable purpose, and consequently excludes the exemption claimed by the Society ".

As we understand this judgment the Court decided that the land was not being used exclusively for charitable purposes because it was also being used for another collateral purpose. We do not understand the judgment as deciding that land is not used exclusively for charitable purposes where the charity derives some subsidiary and incidental benefit flowing from the carrying out of that use. In the *Nunawading Case* (1) the Court found that the society was carrying on upon the land as a distinct purpose the business of growing and selling flowers. In the present case the

(1) (1921) 29 C.L.R. 98.

(2) (1921) 29 C.L.R., at p. 104.

magistrate found that the sole object of the institution in carrying on the various farming activities on the land was to achieve the charitable purpose of giving the boys committed to its charge an elementary education in these activities. If this finding can be sustained there is in the present case no dual use as there was in the *Nunawading Case* (1). Farming activities necessarily result in the production of various forms of primary products. It would be fantastic to hold that the land would not be ratable if the appellant destroyed or gave away the surplus products resulting from such training that remained after satisfying the needs of the inmates but that it would be ratable if it disposed of such surplus at a profit and used that profit in aid of the revenues of the institution. There is nothing in the evidence to suggest that the appellant is carrying on the farming activities to a greater extent than is reasonably necessary to achieve the above purpose or that under the cloak of this purpose it is really engaged in carrying on the business of a farmer for the purposes of gain. There is no reason to doubt the evidence of Brigadier Leggett that it is necessary to pursue a variety of activities to interest the various types of boys sent to the institution. In our opinion *Sholl* J. went too far when he said that the *Nunawading Case* (1) involved the conclusion that land ceases to be used exclusively for charitable purposes where it is used for carrying on commerce with the general public notwithstanding that such commercial activities are merely incidental to the pursuit on the land of the charitable objects of the occupier. We can see no reason for not construing the word "exclusively" in s. 249 (1) (*b*) (ix) of the *Local Government Act* 1946 in the same manner as that word has been construed in the English cases under the *Scientific Societies Act* 1843. This construction was accepted in *Southport Corporation* v. *Corporation of the Trustees of the Order of the Sisters of Mercy in Queensland* (2), where the question was whether certain land was used exclusively for a public school within the meaning of par. (vi) of s. 216 of *The Local Authorities Acts* 1902 *to* 1932 (Q.). It was held however that the premises were used both as a convent and a school, and that the conventual life of the nuns was not a mere incident of the school. The same construction was adopted in the case of the exemption from income tax now contained in the *Income Tax Act* 1918 (Imp.) (8 & 9 Geo. 5 c. 40) (s. 37 (1) (*b*)), re-enacting provisions of the *Income Tax Act* of 1842 (Imp.) (5 & 6 Vict. c. 80), which provided in effect that exemptions should be granted from income tax in respect of the income of any body of persons or

(1) (1921) 29 C.L.R. 98.

(2) (1935) 53 C.L.R. 296.

H. C. OF A. 1951-1952.

SALVATION ARMY (VICTORIA) PROPERTY TRUST v. FERN TREE GULLY CORPORATION.

Dixon J. Williams J. Webb J.

trusts established for charitable purposes only so far as that income was applied for charitable purposes only. It was pointed out in *Royal Australasian College of Surgeons* v. *Federal Commissioner of Taxation* (1) that the English authorities show that an institution qualified for exemption under these provisions if its main purpose was charitable although it might have other purposes which were merely concomitant and incidental to that purpose. To the authorities there cited there can now be added the recent decisions of the Court of Appeal in *Tennant Plays, Ltd.* v. *Inland Revenue Commissioners* (2) and *In re Bland Sutton's Will Trusts* (3). In *Royal Choral Society* v. *Commissioners of Inland Revenue* (4) Lord *Greene* M.R. said: "It is true that you have to find the purpose of the alleged charitable establishment. It may very well be that a purpose which, on the face of it looks to be the real purpose, on close examination, is found not to be the real purpose. A body of persons may purport to set themselves up for educational purposes; but, on a full examination of the facts, it may turn out that their purpose is nothing of the kind, and is one merely to provide entertainment or relaxation to others, or profit to themselves. In other words, the presence of the element of entertainment or pleasure may be either an inevitable concomitant of a charitable or educational purpose, or it may be the real fundamental purpose, and education may merely be a by-product. Whether a case falls within one class or the other is, no doubt, a question of fact, save and so far as it may depend upon the construction of written documents". In our opinion a similar approach to that exemplified in the English cases under discussion should be adopted in deciding whether land is used exclusively for charitable purposes within the meaning of s. 249 (1) (*b*) (ix) of the *Local Government Act* 1946. If the land is used for a dual purpose then it is not used exclusively for charitable purposes although one of the purposes is charitable. But if the use of the land for a charitable purpose produces a profitable by-product as a mere incident of that use the exclusiveness of the charitable purpose is not thereby destroyed.

We are unable to agree with the magistrate that in the *Nunawading Case* (5) the Court found that the land was used for a dual purpose simply because the society allowed picnickers on to the land and charged them. The Court would, we think, have found a dual purpose existed because the society was engaged in the business of selling flowers irrespective of this use. But we can see no

(1) (1943) 68 C.L.R. 436.
(2) (1948) 1 All E.R. 506.
(3) (1951) 1 Ch. 485.
(4) (1943) 2 All E.R. 101, at p. 106.
(5) (1921) 29 C.L.R. 98.

reason for dissenting from his finding that the whole purpose of the appellant in engaging in farming activities on the land was charitable and that the sale of the surplus products derived from these activities was a mere incident in the execution of that purpose. There is no distinction in principle between selling the surplus proceeds of a charitable activity and making a charge for supplying a charitable activity such as an educational performance or meals and beds in a hostel for the needy, yet in the case of the *Royal Choral Society* (1) it was held that the fact that the performance of plays produced a profit and in *Municipal Council of Sydney* v. *Salvation Army* (*N.S.W. Property Trust*) (2) the fact that a charge was made in some instances for beds and meals in a hostel did not destroy the exclusiveness of the charitable purpose. In the last mentioned case the *Nunawading Case* (3) was distinguished. *Ferguson* J., with whose judgment *Davidson* J. and *Halse-Rogers* J. agreed, pointed out that the price of meals sold did not return the actual cost and the operations generally were carried on at a considerable loss. " Taking them as a whole they are operations under which the wants of needy persons are supplied at considerable expense to the Home, and I think it is impossible to say that, in those circumstances, these buildings are used for anything else than charitable purposes " (4).

This leads us to consider whether the word " charitable " in s. 249 (1) (*b*) (ix) of the *Local Government Act* 1946 is used in its legal sense or has a popular meaning. The legal meaning of the word was of course discussed and charity in its legal sense classified in four principal divisions by Lord *Macnaghten* in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (5) (adopted from the argument of Sir *Samuel Romilly* in *Morice* v. *Bishop of Durham* (6)). His Lordship said : " ' Charity ' in its legal sense comprises four principal divisions ; 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. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly ". In its legal sense the work of reforming and educating the boys committed to the institution is plainly a charitable purpose

(1) (1943) 2 All E.R. 101.
(2) (1931) 31 S.R. (N.S.W.) 585 ; 48 W.N. 219.
(3) (1921) 29 C.L.R. 98.
(4) (1931) 31 S.R. (N.S.W.), at pp. 591, 592 ; 48 W.N., at p. 220.
(5) (1891) A.C. 531, at p. 583.
(6) (1805) 10 Ves. 522, at p. 526 [32 E.R. 947, at p. 949].

H. C. OF A. 1951-1952.

SALVATION ARMY (VICTORIA) PROPERTY TRUST v. FERN TREE GULLY CORPORATION.

Dixon J. Williams J. Webb J.

as being either for an educational purpose or alternatively for a purpose beneficial to the community. But it was contended that in the context of s. 249 (1) as a whole the words " charitable purposes " should be given a popular meaning and that the work of the institution is not charitable in this sense because the sons of well-to-do parents could participate and its benefits are not therefore confined to necessitous and needy boys. In *Queen's College* v. *Melbourne Corporation* (1), it was held by the Full Court of Victoria that the word " charitable " in s. 246 of the *Local Government Act* 1890 which exempted from rating lands " used exclusively for charitable purposes " was used in its ordinary colloquial sense. The same exemption was repeated in s. 249 of the *Local Government Acts* of 1915 and 1928 and now appears in s. 249 of the Act of 1946. It was pointed out that the enumeration of exemptions in s. 249 of the present Act contains categories that would not be required if the word " charitable " is given its legal meaning because they would be comprised within that meaning. The respondent relied on the principle of interpretation that where the language of a statute has received judicial interpretation, and Parliament again employs the same language in a subsequent statute dealing with the same subject, there is a presumption that Parliament intended that the language so used by it in the subsequent statute should be given the meaning which has been judicially attributed to it in the meantime. But this principle affords at most a valuable presumption as to the meaning of the language employed. It should not lead the Court to perpetuate the construction of a statutory provision which it considers to be erroneous (*Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ltd.* (2)); *Robinson Brothers (Brewers) Ltd.* v. *County of Durham Assessment Committee* (3); *Royal Court Derby Porcelain Co. Ltd.* v. *Russell* (4)). In *Chesterman* v. *Federal Commissioner of Taxation* (5) the Privy Council, reversing the decision of this Court, held that in the construction of s. 8 (5) of the *Estate Duty Assessment Act* 1914-1916, which exempted from the payment of estate duty so much of an estate as was bequeathed " for religious, scientific, charitable or public educational purposes ", the word " charitable " was used in its legal sense and should not be given the narrow meaning of " eleemosynary " which it has in popular language. The same arguments as were addressed to us on the importance of adopting a construction which would avoid redundancy and tautology and such like objections were

(1) (1905) V.L.R. 247.
(2) (1933) A.C. 402, at pp. 446, 447.
(3) (1938) A.C. 321.
(4) (1949) 2 K.B. 417.
(5) (1926) A.C. 128.

addressed to the Privy Council but did not prevail. There is in this case, as there was in that case, no sufficient indication of intention that the word " charitable " should be given any other than its legal meaning. There has been, perhaps, too great a tendency in the Australian courts, as the Privy Council rather hinted in *Adamson* v. *Melbourne and Metropolitan Board of Works* (1), to depart from the legal meaning of " charitable " on rather slight grounds. Our courts in the future should be slow to do this unless there is a clear indication of a contrary intention.

For these reasons we are of opinion that the appeal should be allowed, the order of the Supreme Court of Victoria set aside, and in lieu thereof the order nisi discharged with costs and the order of the magistrate dismissing the complaint with twenty guineas costs restored. The respondent should pay the costs of the appeal to this Court.

McTIERNAN J. This appeal raises the question whether the whole of an area of land is brought within s. 249 (1) (*b*) (ix) of the *Local Government Act* 1946 (Vict.): that is whether the land is used exclusively for charitable purposes. The appellant holds the land on trust to apply it and the income to the " social work " of the Salvation Army. That body conducts on the land the institution known as the Salvation Army Bayswater Boys Training Farm and Vocational Centre. The social work of the Salvation Army is directed to the social, moral and temporal welfare and improvement of, among other classes, children needing care in reformatories, and the Salvation Army carries on this work by means of this institution. The inmates are boys committed to the institution by the Criminal Courts, the Children's Welfare Department or their parents : the boys consist of three classes : juvenile offenders, neglected and uncontrollable children. By using the land for carrying on their social work for the welfare and improvement of these classes of boys, the Salvation Army uses the land for purposes that are charitable either in the legal or the popular sense. The respondent denied that the word " charitable " in s. 249 (1) (*b*) (ix) is used in its legal sense, and that the purposes for which the Salvation Army used the land are charitable in the popular sense. Admission to the institution is not refused to boys whose parents are not badly off but most of the boys committed to it come from the impecunious classes of society. The popular meaning of the word " charity " is not definite and it is by no means evident that it is restricted to the relief of poverty ; this appears from the

(1) (1929) A.C. 142.

H. C. OF A. 1951-1952.

SALVATION ARMY (VICTORIA) PROPERTY TRUST v. FERN TREE GULLY CORPORATION.

McTiernan J.

observations made by Lord *Herschell* in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1). A boy whose social condition warrants his committal to this institution excites Christian compassion by reason of his moral and material needs; in most cases he would belong to the underprivileged class of society: but, even if he did not, I think it could not be right to say that it is beyond the popular conception of charity, to meet the need of moral and social betterment of such a youth and to save him from the social misery and the material and moral misfortune and ruin towards which he is tending. In my opinion this institution is charitable in the popular sense: I agree with *Sholl* J. on this point in the case. In this view it does not avail the respondent that the legislature used the word "charitable" in s. 249 (1) (*b*) (ix) in the popular sense. However, I agree with the respondent's contention that the legislature did use the word in that sense: at any rate that is the intention which the Court ought to attribute to the legislature. The Full Court of Victoria decided in the *Queen's College Case* (2), that the word "charitable" in an identical context, and with reference to the same subject matter, was not used in its legal sense. The case was decided upon the meaning of "charitable" in s. 246 of the *Local Government Act* 1890 of Victoria. The context, in the opinion of the court, pointed to a legislative intention to use the word in its popular meaning: see per *Hood* J. (3). The Parliament of Victoria has since that case, more than once, enacted the exemption now found in s. 249 (1) (*b*) (ix). A court cannot avoid attributing to the legislature an intention on each occasion and, what is here material, in 1946, to use the word "charitable" in the sense in which the Full Court construed it in the *Queen's College Case* (2). In the light of *Chesterman's Case* (4) and *Adamson's Case* (5), the more correct view may be that the context of the Act is not sufficient to displace the presumption in favour of the legal meaning of the word "charitable". The judgment of the Full Court in the *Queen's College Case* (2) cannot be left out of consideration as it supplies a valuable presumption of what the Parliament meant by the word "charitable". Lord *Russell* in *Barras* v. *Aberdeen Steam Trawling & Fishing Co. Ltd.* (6) cited two clear statements of this principle of construction, one made by Lord *Coleridge* in *Barlow* v. *Teal* (7), and the other by Lord *Loreburn* in *North British Rly. Co.* v. *Budhill Coal & Sandstone Co.* (8). It may be difficult, by relying upon considerations of over-

(1) (1891) A.C. 531, at pp. 571, 572.
(2) (1905) V.L.R. 247.
(3) (1905) V.L.R., at p. 255.
(4) (1926) A.C. 128.
(5) (1929) A.C. 142.
(6) (1933) A.C. 402, at p. 442.
(7) (1885) 15 Q.B.D. 403, at p. 405.
(8) (1910) A.C. 116, at p. 127.

lapping and arguments from the context, to limit the scope of the word "charitable" in s. 249 (1) (*b*) (ix) to its popular content: that is not enough to displace the presumption created by the judicial interpretation given by the Full Court to the word; see *Barras' Case* (1). The present case is a typical one for the application of this rule of construction. It was applied by the House of Lords in *Barras' Case* (2): and that is a precedent for the application of the rule to this case. The House of Lords discussed the value and limitations of the rule: nothing was said which would justify rejecting it in the present case. Lord *Buckmaster* described it as "a salutary rule" and one necessary to confer some certainty upon Acts of Parliament. The *Queen's College Case* (3) was decided in 1905 and it has apparently governed the application of the exemption now in question since that time.

The institution includes, as its name implies, a training farm. Certain types of boys in the institution who are suitable to be trained for farm work are put to work on this farm, not only as a training in useful pursuits but as a form of discipline and correction. The farm is not maintained on a scale which is out of proportion to its use as a medium for training, discipline and correction. The produce of the farm is consumed by the inmates and staff of the institution. There is a surplus, chiefly of milk, and the surplus of all the produce of the farm is sold and the profits are applied to the purposes of the institution. The matter to be considered is what is the effect of this trade on the claim that the land is used exclusively for charitable purposes. The trade in the surplus is put as the bar to the exemption. The fact that the land comprised in the farm was used productively or that a surplus over and above the necessities of the institution was produced is not set up as an answer to the claim. It is conceded, as I understand the argument, that if the institution had given away or destroyed the surplus of produce, instead of trading in it, the land comprised by the farm would not have been diverted to a purpose which is not charitable. The question whether the trade in the produce has any effect in putting the land in the category of ratable property depends upon what is the intended scope and operation of s. 249 (1) (*b*) (ix). Decisions upon other Acts may not provide safe guidance to the answer to this question. *Sholl* J. in his careful judgment has shown the difference between the form of s. 249 (1) (*b*) (ix) and the Acts in which a number of the decisions cited in the argument were decided. It is important to note that this provision does not

(1) (1933) A.C., at p. 412.
(2) (1933) A.C. at p. 402.
(3) (1905) V.L.R. 247.

H. C. OF A. 1951-1952.

SALVATION ARMY (VICTORIA) PROPERTY TRUST v. FERN TREE GULLY CORPORATION.

McTiernan J.

exclude from its scope land which is applied to a productive use. Such land is within the exemption if the use is solely for charitable purposes. The exemption applies equally to land used exclusively as a training farm for the welfare of delinquent boys and land used exclusively, for instance, as a playing area for their recreation. The case comes down to the point whether the selling of the produce arising in the course of training boys in this institution on its farm prevents the application of s. 249 (1) (*b*) (ix). The playing fields are clearly exempt; there was no produce obtained in the course of using them and hence no trade. Express words would be necessary to justify a distinction based merely on the difference between productive and non-productive use in the application of the exemption. The commercial disposal of the produce of the training farm is, of course, not irrelevant to the issue whether the institution's land was exclusively used for the charitable purpose of training these boys.

In the *Nunawading Case* (1), where the question was whether a provision identical with s. 249 (1) (*b*) (ix) applied, the Court said: "It is not enough that the primary or main object of the use of the land was for charitable purposes, unless it can be affirmed that the land was used for these purposes only". This consequence follows from the ordinary meaning of "exclusively" which is a rigid word. The facts in the *Nunawading Case* (2) have a resemblance to the facts of the present case, but it is distinguishable on the facts. The Court said in the judgment (3): "A number of unfortunate persons who are deaf and dumb were housed upon the land, and were treated, trained and instructed. A flower garden has been made and is maintained as a method of treating, training and instructing these persons. But the flower-growing scheme went far beyond these purposes. A business, which consisted of selling flowers to the public, was carried on, with the result that a large return accrued to the Society in each year (See Annual Reports of the Society 1910-1918). It is true that the motive for establishing the flower garden was the treatment and instruction of the deaf and dumb". On the issue of the use of the land the Court's conclusions were: "The use of the land in the present case was two-fold—(1) the treatment and training of the inmates of the Home, and (2) the carrying on the business of growing and selling flowers to assist in the upkeep of the institution". The Court added: "The latter purpose is not in any sense a charitable purpose, and so excludes the exemption claimed". The evidence in the present

(1) (1921) 29 C.L.R. 98, at p. 104.
(2) (1921) 29 C.L.R. 98.
(3) (1921) 29 C.L.R., at pp. 103, 104.

case does not prove that the productive activities which yielded the produce sold to the public were upon a scale which exceeded the purpose of training the boys. The scale of the flower-growing scheme in the *Nunawading Case* (1) obviously contributed to the conclusion that the land was used for the second purpose of carrying on a business of growing and selling flowers to assist in the upkeep of the institution. The evidence in the present case shows that the production of the milk and the other commodities sold to the public was carried on solely for the purpose of training the boys in rural pursuits: it is not the case that the training of the boys was the primary or main object of carrying on the dairy, growing the produce and other productive activities: such training was in truth the only object of these activities. The pecuniary return obtained by the institution is no doubt a pertinent fact to be taken into consideration in determining whether there ran with the charitable purpose of training the boys any other purpose. If there were another purpose, not charitable, it would not matter that it was subordinate to the training of the boys, the exemption would not apply, as the land would not be exclusively used for a charitable purpose. The commercial disposal of the produce resulting from the productive use of land for a charitable purpose is material on the issue whether the use of the land is diverted to another purpose: but it is not always a conclusive fact. If it were decisive the result would be reached that an institution which uses its land for carrying on productive activities solely for charitable purposes would not come within the exemption if it sold the by-products of its charitable work but would do so if it wasted them. It is difficult to imagine that the Parliament intended this absurd result. The language of s. 249 (1) (*b*) (ix) does not, in my opinion, compel the Court to think that the Parliament did intend it. The condition of the exemption in s. 249 (1) (*b*) (ix) is a rigid one, but the mere fact that this institution sold the produce of the farm is not sufficient in the circumstances of this case to exclude its land from the exemption.

I should allow the appeal.

FULLAGAR J. This case is not free from difficulty, but I am of opinion that a wrong conclusion was reached in the Supreme Court.

Certain land at Bayswater is used by the Salvation Army as a home, training farm and "vocational centre" for boys who, by reason of delinquency, parental neglect, apparent defect of character, or other disadvantage in life, stand in need of assistance or rehabili-

(1) (1921) 29 C.L.R. 98.

H. C. OF A. 1951-1952.

SALVATION ARMY (VICTORIA) PROPERTY TRUST v. FERN TREE GULLY CORPORATION.

Fullagar J.

tation and are likely to be benefited—with consequent advantage to the community—by being generally educated and particularly trained in farming pursuits. This very general statement will suffice for the moment. The question is whether the land is rateable property within the meaning of the *Local Government Act* 1946 (Vict.). Exemption is claimed under s. 249 (1) of the Act, which provides that all land shall be rateable property within the meaning of the Act except (*inter alia*) " land used exclusively for charitable purposes ". The appellant says that its land *is* used exclusively for charitable purposes. The respondent municipality, relying mainly on the fact that a considerable revenue is derived from the sale of stock and farm products, says that the land is *not* used exclusively for charitable purposes.

The first question requiring consideration is, in my opinion, the question whether the word " charitable " in s. 249 (1) of the Act is used in its " popular " sense or in its legal or technical sense. With regard to this question, *Sholl* J. regarded himself as bound by the decision of the Full Court of Victoria in *Queen's College* v. *Melbourne Corporation* (1). In that case *Holroyd*, *a'Beckett* and *Hood* JJ., dealing with a provision in the *Local Government Act* 1890, which was in terms identical with those of s. 249 (1) of the Act of 1946, held that the words " charitable purposes " were " not used in the legal technical meaning but in the more limited sense ". They held accordingly that land of an educational institution was not exempt from rating, though (for reasons which are not here material) they also held that the land should be rated on a nominal value only. *Sholl* J. was well aware of certain later decisions which have at the very least cast grave doubt on the correctness of the view taken in the *Queen's College Case* (1), but, since those decisions were given on other statutes, he rightly thought that he should hold himself bound by a decision of a superior court on the very provision which he was called upon to consider. This court is not bound by the *Queen's College Case* (1), and it is open to it to consider whether it ought not, in the light of later decisions, to be overruled.

In *Swinburne* v. *Federal Commissioner of Taxation* (2) it was held in this court that the word " charitable " in the expression " public charitable institution " should be construed in the sense of affording relief to persons in necessitous or helpless circumstances. This case was followed and applied in *Kelly* v. *Municipal Council of Sydney* (3) where again what was conceived to be the ordinary or popular meaning was given to the word " charitable " in a statutory

(1) (1905) V.L.R. 247.
(2) (1920) 27 C.L.R. 377.
(3) (1920) 28 C.L.R. 203.

provision exempting from rating. The same meaning was again given to the word in question in *Chesterman* v. *Federal Commissioner of Taxation* (1), in which an exempting provision in the *Estate Duty Assessment Act* 1914-1916 was in question. From the time of the decision in *Swinburne's Case* (2) it is fairly safe to say that there was thought to exist in Australia a rule that the word " charitable ", when used in a statute, was prima facie to be understood in its " popular " sense, and that that popular sense was connected, primarily at any rate, with the relief of poverty. *Chesterman's Case* (1), however, was taken on appeal to the Privy Council, and the decision of this court was reversed (3). Lord *Wrenbury*, who delivered the judgment of their Lordships said (4):—" The appellants contend that the word ' charitable ' in the Act bears its technical legal meaning as in the statute of Elizabeth. The respondent contends that it bears its popular meaning, which involves the idea of assisting poverty or destitution and which may perhaps be expressed by the word eleemosynary. In approaching this question the starting-point is found in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (5) in the House of Lords, and in Lord *Macnaghten's* words : ' In construing Acts of Parliament, it is a general rule . . . that words must be taken in their legal sense unless a contrary intention appears '." It was held that no contrary intention could be found in the particular case. A year or two later a similar question came again before the Privy Council in an appeal from the Supreme Court of Victoria in *Adamson* v. *Melbourne & Metropolitan Board of Works* (6). *Anglin* C.J., who delivered the judgment of the Board, after referring to *Swinburne's Case* and *Chesterman's Case* said (7):—" From this statement of the effect of the two judgments it is obvious that, although *Swinburne's Case* is not expressly adverted to in the report of *Chesterman's Case*, it must be regarded as overruled by that decision. Indeed the principle of construction upon which *Swinburne's Case* rests is directly opposed to that which forms the foundation of the judgment of this Board in *Chesterman's Case* ".

The actual decision in *Adamson's Case* (6) affirmed the decision of the Supreme Court of Victoria on the ground that, although in a statute the word " charitable " must prima facie be treated as bearing its legal or technical meaning, there were, in the particular statute under consideration, words which limited the exemption

(1) (1923) 32 C.L.R. 362.
(2) (1920) 27 C.L.R. 377.
(3) (1926) A.C. 128; (1925) 37 C.L.R. 317.
(4) (1925) 37 C.L.R., at p. 319.
(5) (1891) A.C. 531, at p. 580.
(6) (1929) A.C. 142; (1929) V.L.R. 27.
(7) (1929) V.L.R., at p. 32.

H. C. OF A. 1951-1952.

SALVATION ARMY (VICTORIA) PROPERTY TRUST v. FERN TREE GULLY CORPORATION.

Fullagar J.

to a particular kind of charitable institution. The actual decision (which has not escaped extra-curial criticism) did not really turn on the meaning of the word "charitable", and, from a strictly technical point of view, the passage quoted above from the judgment has the force of a dictum only, though, of course, a very strong and important dictum. Moreover there is much to be said for the view that, making full allowance for *Chesterman's Case* (1), the actual decision in *Swinburne's Case* (2) was nevertheless correct. But, for present purposes, these considerations do not matter. What does matter is that, since the decision in the *Queen's College Case* (3), their Lordships have recalled, and directly applied to an Australian statute, the rule stated by Lord *Macnaghten* in *Pemsel's Case* (4). The application of that rule must have led to the adoption of the view of the word "charitable" in the section under consideration opposite to the view which the Supreme Court in fact adopted. Whatever may be said in the future about *Swinburne's Case* (5), the *Queen's College Case* (3) must clearly be taken to be overruled in so far as it decides that the word "charitable", which now appears in s. 249 (1) (*b*) (ix) of the *Local Government Act* 1946, is to be read in its popular or ordinary sense and not in its legal and technical sense.

On the hearing of the present appeal, two main arguments were advanced against this view. The first was that, if the word "charitable" were given its technical meaning, the express exemption by s. 249 of land used for other specified objects, and especially for "public libraries" and "primary schools in which education is given free", would be superfluous and unnecessary. This argument was strongly advanced, and with at least as much support from the context, in *Chesterman's Case* (1), but it was decisively negatived by reasoning and by reference to authority (6). The second argument was that the Victorian legislature, by re-enacting the relevant provision without alteration in consolidations of the *Local Government Acts* of 1915, 1928 and 1946, had shown that its intention was that the word "charitable" should bear the meaning assigned to it in the *Queen's College Case* (3). This is a familiar, but somewhat artificial, argument. It never carries great weight: indeed it can seldom be effectively used except as lending additional support to a view which is already supported by an independent argument. It was pressed strongly in *Melbourne*

(1) (1926) A.C. 128.
(2) (1920) 27 C.L.R. 377.
(3) (1905) V.L.R. 247.
(4) (1891) A.C. 531.
(5) (1920) 27 C.L.R. 377.
(6) (1926) A.C., at p. 132.

Corporation v. *Barry* (1) but what is said by *Isaacs* J. in that case (2) is precisely applicable to the present case.

The conclusion that the *Queen's College Case* (3) was wrongly decided, and that the word " charitable " in s. 249 (1) (*b*) (ix) means charitable in the legal sense, is important because the purpose of training boys along the lines followed at the Boys' Home at Bayswater is unquestionably a charitable purpose in the legal sense. I should not myself have thought that that purpose was a charitable purpose in the " ordinary " or " popular " sense. In *Hobart Savings Bank* v. *Federal Commissioner of Taxation* (4) *Dixon* J., in a passage quoted in this case by *Sholl* J., said :— " Doubtless the truth is that nowhere is it possible really to know to what attributes the popular meaning of the word ' charitable ' is confined ". But in *Swinburne's Case* (5), *Kelly's Case* (6) and *Chesterman's Case* (7) this court, in addition to holding that the word carried its popular meaning, expressed the opinion that that popular meaning (though they did not profess to define it with precision) was essentially connected with the idea of the relief of poverty or " affording *relief* to persons in necessitous or helpless circumstances ". And see the passage already cited from the judgment of the Privy Council in *Chesterman's Case* (8). I should not have thought that the real purpose of the Boys' Home came within that conception. If what was said in those cases had to be applied here, I would think that the appellant must fail.

But the conclusion that the word " charitable " is used in the statute in its legal sense is of importance for a further reason. It necessarily, of course, follows from it that the land at Bayswater is used for charitable purposes. But it tends also to simplify in some degree the question whether it is to be regarded as used *exclusively* for charitable purposes. For the approach to that question will differ according as we are using the word " charitable " in its popular sense or in its legal sense. The judgment now under appeal was, I think, conditioned by the adoption of the former sense, and I am not at all sure that the judgment in *Shire of Nunawading* v. *Adult Deaf & Dumb Society of Victoria* (9) was not conditioned by the same factor.

Although it may be conceded that the popular signification of the word " charitable " is vague and nebulous, and although the lawyer will instinctively and inevitably tend (as Lord *Watson* did

(1) (1922) 31 C.L.R. 174.
(2) (1922) 31 C.L.R. at pp. 190-192.
(3) (1905) V.L.R. 247.
(4) (1930) 43 C.L.R. 364, at p. 373.
(5) (1920) 27 C.L.R. 377.
(6) (1920) 28 C.L.R. 203.
(7) (1923) 32 C.L.R. 362.
(8) (1926) A.C. 128.
(9) (1921) 29 C.L.R. 98.

H. C. OF A. 1951-1952.

SALVATION ARMY (VICTORIA) PROPERTY TRUST v. FERN TREE GULLY CORPORATION.

Fullagar J.

in *Pemsel's Case* (1)) to assimilate the popular meaning to his own meaning, it cannot be denied that the legal sense of the term is much wider than any sense in which the word is used as an ordinary English non-technical term. But there is really a fundamental difference between the two senses. There is a subjective element in the term as used non-technically, which is absent when it is used technically. The characteristic of a charitable act or purpose in this sense is that it possesses a certain moral quality. This is so although that quality is extremely vague and difficult to define, and even if it be true that common usage has narrowed the scope of the term by reference to relief of poverty. On the other hand, when we ask whether an act or purpose is charitable in the technical sense, the test to be applied is wholly objective. The whole question is whether the act or purpose itself falls within a particular class which we say is to be defined by reference to the statute of Elizabeth.

This difference is bound to affect the approach in any particular case to the question whether land is being used " exclusively for charitable purposes ". The approach will be affected even if he who approaches the question is not fully conscious of the difference, and even if he *is* fully conscious of the fact that the question whether land is used or occupied " by a society or institution having exclusively charitable purposes " is an entirely different question. For, in such a case as the present (where the land is admittedly being used for a charitable purpose) if he is using the word " charitable " in its popular sense, he will tend to analyse the various activities carried on upon the land, with a view to seeing whether there is any one or more which is not directly and immediately actuated by a " charitable " intention. And, if he finds that things are being produced on the land with the intention of selling them he will tend to say that this intention constitutes a " purpose " for which the land is being used, and that, therefore, the land is not used exclusively for a charitable purpose. If, on the other hand, he is thinking of the technical conception of a charitable purpose, he will look rather at the totality of what is being done on the land without regard to any particular intention, and will ask himself whether any separate and independent activity is being carried on which does not fall within the intendment of the statute of Elizabeth. And, if he finds that things are being produced on the land with the intention of selling them, he will say that this does not necessarily affect at all the character of the totality of what is being done.

It may be thought that the distinction which I have drawn represents an undue refinement. I believe that the distinction is

(1) (1891) A.C., at p. 558.

a real and important distinction. But, whether it amounts to an undue refinement or not, I am quite clearly of opinion that the correct approach to the question in the present case is the approach which I have attributed to the man who is fully conscious that, in the question which he is asking himself the word " charitable " bears its legal and technical meaning.

The question is indeed the same question as that which might arise in a case where land was devised to trustees for a charitable purpose. It would clearly be a breach of trust to use the land for any purpose which was not charitable in the legal sense : the land must be used exclusively for the charitable purpose. The same question which arises here might arise if the Attorney-General took proceedings for breach of trust. We may take the well-known *Milly Milly Case* (*Attorney General for N.S.W.* v. *Perpetual Trustee Co. Ltd.*) (1). There the testatrix gave a property known as Milly Milly, which consisted of some 3,800 acres of pastoral and agricultural land, to her trustees " for a training farm for orphan lads, being Australians ". The trust was plainly a charitable trust, and required the land to be used exclusively for charitable purposes. It was in fact found impracticable to carry out the trust, and the importance of the case lies in matters remote from this case. But let it be supposed that the trustees had proceeded to carry out the trust according to its tenor, and that they had sold live stock and wool and wheat produced on the property. If the Attorney-General took proceedings for breach of trust, alleging that the land had been used partly for a purpose which was non-charitable, it is impossible to suggest that he could succeed on the mere ground that produce had been sold—even if the station profit and loss account showed a profit. Neither the sale nor the growing for sale, nor even the profit, would of itself show a departure from the terms of the trust, or establish that the land had not been used exclusively for the charitable purpose prescribed by the trust. The position would be exactly the same if the trust were a trust to use the land for charitable purposes, and the particular use chosen was a use as a training farm for orphan lads. The mere fact that produce was grown for sale and sold—even if a profit were made—could not justify a finding that a separate and distinct activity had been carried on which fell outside the scope of the intendment of the statute of Elizabeth. The fact that produce was sold, and, perhaps a *a fortiori*, the fact that a profit was made, might be used as evidence that the purpose of the totality of the activities carried on upon the land was not the purpose of training

(1) (1940) 63 C.L.R. 209.

H. C. OF A. 1951-1952.

SALVATION ARMY (VICTORIA) PROPERTY TRUST v. FERN TREE GULLY CORPORATION.

Fullagar J.

orphan lads or was not a charitable purpose, but further and other evidence would be necessary to establish either position.

Coming to the present case, it is not necessary to state the facts in any detail. What may be called the general object—the *raison d'être*—of the activities carried on upon the land in question has already been stated. There are in fact two pieces of land, lying some distance away from the rest, as to which special considerations arise. With regard to the rest, three "homes" are maintained thereon. No. 1 Home takes boys who are committed to reformatory institutions by the courts, and who are described in the evidence as of "reformatory type". No. 2 Home takes boys of "non-reformatory" type, who come mostly through the Children's Welfare Department as neglected children: a few come direct from private homes. Some are of school age, and a school is maintained, which is staffed by the Education Department. No. 3 Home serves at present to house the officers of the Salvation Army who are in charge of the farming and other activities carried on. The total number of boys in residence has ranged from one hundred and thirty-five in 1945 to ninety-three in 1950. The boys are fed and clothed by the Army, and given religious instruction. A gymnasium, a swimming pool, sports grounds and facilities for games and recreation are provided.

On the facts, it is plain that the land is being used for charitable purposes. The only question is whether it is used exclusively for charitable purposes. And the only ground which has been suggested for saying that it is not exclusively so used is that farm and garden products are produced for sale and sold. But it is not reasonable to regard this as constituting a separate and distinct activity having a non-charitable purpose. It is a natural—one might almost say, inevitable—part and parcel of a general mass of activities, which, regarded as a totality, has a purpose which is clearly charitable. The other view involves the absurdity that the land would be exclusively used for charitable purposes if the produce were destroyed, but not exclusively so used if the produce were sold. *Sholl* J. recognized, but was not impressed by, this absurdity. It does not, of course, involve a logical or mathematical *reductio ad absurdum*, but it most strongly suggests that there is something wrong with the proposition from which it results. And it affords an additional reason for saying that production for sale cannot be regarded as a separate and distinct activity having a separate and distinct purpose.

Sholl J., however, did not rest his decision merely on the ground negatived above. He said that he did not think it a correct conclusion on the evidence that what he called the "commercial

activities" carried on were "at all events to their full extent, necessarily involved in, or merely incidental to, the training of the boys". I do not think that the question thus dealt with is the real question involved in the case, and the use of the expression "commercial activities" more or less assumes that what I do consider to be the real question is to be answered in favour of the municipality by saying that production for sale is an activity separate and distinct from the general mass of activities carried on upon the farm. No doubt, the scale of operations in relation to the number of boys accommodated is a matter relevant both to the question whether the land is really being used at all for charitable purposes and to the question whether production for sale constitutes a separate and distinct activity having a non-charitable purpose. But neither question depends on how many cows or how many acres of wheat it is necessary to have in order to train ten or twenty or fifty boys in dairy-farming or wheat-growing. Such an inquiry would, it seems to me, completely misunderstand the true aims and objects of the Army in maintaining the Boys' Home, taking altogether too narrow a view of them. It is no mere matter of teaching a boy to milk, or plough, or plant flower-seeds. The whole character and atmosphere of the place must be of vital importance, if the ultimate aim of rehabilitating the boys, giving them a new outlook and getting them interested in a healthy occupation, is to have the slightest hope of succeeding. What conduces to the attainment of such an object cannot be measured or estimated in terms of number of cows or of square yards under potatoes. From the Army's point of view it must be absolutely essential to have a real farm run on a fairly substantial scale. On the evidence in the case the whole matter seems to me to stand thus. An undoubtedly charitable purpose attaching to the use of the land is shown. And it is not shown that the nature or scale of any operations carried on is such as to warrant the conclusion that it is used for any separate and distinct purpose of a non-charitable character.

It is necessary to say but little about the *Nunawading Case* (1). So far as the decision in that case rests on the use of the land "as a kind of recreation reserve for boating and picnicking parties", it is clear that the view was open that there was here a use of land which bore no relation to the charitable purpose except that it produced revenue which could be used for that purpose, and that is not enough to give exemption. But clearly the decision did not rest alone on this special use of the land. One is forced to the conclusion that the case would have been decided in the same way if the "flower-growing scheme" had been the only element relied

(1) (1921) 29 C.L.R. 98.

H. C. OF A. 1951-1952.

SALVATION ARMY (VICTORIA) PROPERTY TRUST v. FERN TREE GULLY CORPORATION.

Fullagar J.

on by the municipality. The relevant facts in this connection appear in the report of the case in the Supreme Court (1). On those facts it might perhaps be held that the relation of the flower-growing to the charitable purpose was different from the relation of the farming operations to the charitable purpose in the present case. The case was decided at a time when it was thought that the word "charitable" in s. 249 of the *Local Government Act* was used in its popular sense, and I am disposed to think that the decision was really conditioned by that view. The contrary view is now accepted. It is only because of the possibility of a distinction being drawn in some future case that I am not prepared to say that the *Nunawading Case* (2) should be regarded as overruled so far as the decision rested on the growing of flowers for sale. Certainly, in my opinion, it ought not to be regarded as compelling a decision in the present case in favour of the respondent.

It remains only to refer to the land coloured red on the plan which was put in evidence. This land is some distance away from the land on which the three homes stand, and it is obvious that there is separate rateable occupation. It is "vacant" land, and the only "use" that is made of it is to be found in the fact that firewood is cut upon it and is used at the Boys' Home. I do not think that this constitutes a use for a charitable purpose any more than would the letting at a rent of the land, if it were let at a rent and the rent devoted to the purposes of the Boys' Home.

In my opinion, the appeal should be allowed except as to the land coloured red on the plan. Subject to this exception, the decision of the magistrate should be restored. The respondent should pay the costs of the appeal, and of the order to review in the Supreme Court.

Appeal allowed. Order of Supreme Court set aside. In lieu thereof order that the order nisi be discharged with costs and that the order of the magistrate dismissing the complaint with twenty guineas costs be restored. The respondent to pay the costs of the appeal.

Solicitors for the appellant: *E. P. Johnson & Davies.*
Solicitors for the respondent: *Maddock Lonie & Chisholm.*

E. F. H.

(1) (1920) V.L.R. 369, at pp. 374, 375. (2) (1921) 29 C.L.R. 98.