[HIGH COURT OF AUSTRALIA.]

THE ARMENIAN GENERAL BENEVOLENT UNION . . . . . } APPELLANT;
DEFENDANT,

AND

THE UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED AND OTHERS } RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 6, 10, 11.

SYDNEY, *Aug.* 21.

Dixon C.J., McTiernan, Williams, Webb and Kitto JJ.

Charities—Gift "for the benefit of the orphans whose fathers fought with the Russian Army against Germany and Japan" in World War II—Construction—Validity.

Will—Construction—Intent to vest beneficial interest in trustee.

A testator after providing by his will, dated 28th June 1946, for the payment of certain annuities, directed that the whole of the net income from his estate be paid at least yearly to the Armenian General Benevolent Union, a body incorporated in Switzerland and having its permanent administrative seat in New York, U.S.A. This body was directed to pay the annuities and to "use the balance if any of the said income for the benefit of the orphans whose fathers fought with the Russian Army against Germany and Japan in the World War which ended last year". If the Union so desired it was authorized to call for the transfer to it of the assets of the estate, and directions were given as to the mode of investment of such assets and for the setting up of a fund called the "Permanent Trust Fund" which fund the Union was to stand possessed of upon the trusts declared by the will.

Held, that there was a valid charitable trust for the children of fathers of the Armenian race who died on active service with the Russian army in the world war against Germany and Japan which ended in 1945, if the children were under twenty-one years of age at the date of the testator's death and in need of assistance or protection and, per *Williams*, *Webb* and *Kitto* JJ., such children would remain orphans so long as they continued in need of assistance, whether they had attained the age of twenty-one years or not.

Held, further, by *Williams*, *Webb* and *Kitto* JJ (*Dixon* C.J. and *McTiernan* J. dissenting), that subject to the performance of the trusts declared in the will, the Armenian General Benevolent Union was beneficially entitled to the whole of the residuary estate of the testator.

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

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APPEAL from the Supreme Court of Victoria.

Haroutiun Garabet Balakian died on 28th October 1946. Probate of his will dated 28th June 1946 was duly granted by the Supreme Court of Victoria to the Union Trustee Company of Australia Limited which was described in the will as " my Trustee ". The testator by his will, after reciting that he had been born at Tokat, Asia Minor on 1st August 1868 and that he had arrived in Melbourne on 20th July 1897 and that he had been naturalized under the laws of the Commonwealth of Australia on 1st August 1920, declared that the country of his domicile was Victoria and that he desired that the will should be construed and take effect according to the laws there in force. After providing for the payment of certain annuities the will provided, *inter alia* : " I also direct that the whole of the net income from my estate be paid at least yearly to The Armenian General Benevolent Union of Number 432 Fourth Avenue New York . . . (hereinafter called ' my Permanent Trustee ') which Permanent Trustee shall make the monthly payments as provided in this my Will and use the balance if any of the said income for the benefit of the orphans whose fathers fought with the Russian Army against Germany and Japan in the World War which ended last year. Should my Permanent Trustee so desire it my Trustee shall sell . . . my house and land at Eltham . . . and the whole of my then assets of my estate shall then be transferred to my Permanent Trustee. I authorize my Permanent Trustee to hold any assets of my estate . . . in the same form of investment as they are held at the time of transfer or to invest any moneys available for investment at any time . . . and shall form a fund (hereinafter called my ' Permanent Trust Fund ') and stand possessed of the same upon the trusts hereinbefore declared concerning the same . . . I declare that the receipt of the Secretary or of the Treasurer for the time being of my Permanent Trustee shall be a good and complete discharge to my Trustee for all moneys paid to my Permanent Trustee by my Trustee pursuant to the terms of this my Will and I further declare that my Trustee shall not inquire or concern itself in any way as to the disposal of my permanent trust fund or the income therefrom by my Permanent Trustee ".

Doubts and difficulties having arisen in the administration of the estate the Union Trustee Company of Australia Limited took out an originating summons naming as defendants thereto the Armenian General Benevolent Union and Rosa Andreassion who was sued as representing herself and the next of kin of the deceased who were then living and the estates of such of the next of kin

as had died since the death of the deceased. Subsequently the Attorney-General for the State of Victoria was added as a defendant.

The originating summons sought a determination without administration of the following questions: 1. Is the gift in favour of the orphans whose fathers fought with the Russian army against Germany and Japan in the world war which ended in 1945 a valid gift? 2. If yea, what persons are comprised within the description "the orphans whose fathers fought with the Russian Army against Germany and Japan in the World War which ended" in 1945? 3. Is the corpus of the said estate distributable only on the death of the last of the persons designated in the answer to the second question or at some earlier and what time such as the time when the permanent trustee under the will is satisfied that no person so designated can be found? 4. What person or persons are entitled to the corpus of the estate of the said deceased upon the death of the last of the persons designated in the answer to the second question or at the earlier time indicated in answer to the third question? 5. (a) Should the plaintiff pay to the defendant the Armenian General Benevolent Union or to some and what representative of such defendant (i) any and what part of the corpus of the estate of the said deceased; (ii) any and what part of the income of the said estate? (b) If any payment should be made by the plaintiff to the defendant Union or to some and what representative of the defendant Union, (i) on whose receipt should such payment be made; (ii) should the plaintiff require some form of release or indemnity from the defendant Union or some and what person acting on its behalf?

On 12th February 1952 *Sholl* J. answered the questions as follows: Question 1. No, it is void for uncertainty nor is there any general charitable intention which should be executed *cy-près*. Question 2. Not answered. Questions 3 and 4. Subject to the payment of the annuities given by the will and the provision as to the testator's wife's grave the whole of the income and corpus of residue is held in trust as from the death of the testator for the testator's next-of-kin ascertained as at the date of such death. Question 5. (a) No. Question 5. (b) Not answered.

From this decision the Armenian General Benevolent Union appealed to the High Court of Australia. The respondents to the appeal were the Union Trustee Company of Australia Limited, Rosa Andreassion and the Attorney-General for the State of Victoria. Subsequently the Attorney-General for the State of Victoria served on the other parties notice of his intention to contend that the decision of *Sholl* J. was wrong.

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R. M. Eggleston Q.C. (with him *H. R. Newton*), for the appellant. The gift to the Union is valid. [He referred to *In re Gott*; *Glazebrook* v. *University of Leeds* (1); *Armstrong* v. *Attorney-General* (2).] [He was stopped.]

C. I. Menhennit, for the respondent, Rosa Andreassion. There are two issues (1) what happens to corpus; (2) whether the disposition relating to the income is valid. It is clear that the Union does not take beneficially but as a trustee. The trust is not for the objects of the Union, and even if it was those objects are not charitable. The charitable intent shown by the disposition is particular and not general. The corpus should not be transferred from the jurisdiction. The disposition of income is only for a limited period which is of uncertain duration and moreover it is uncertain in its object in that no one can tell who is to benefit. The Union is out of the jurisdiction, and accordingly it is not practicable for the Court to settle a scheme. [He referred to *In re Gott*; *Glazebrook* v. *University of Leeds* (3); *Jarman* on *Wills*, 8th ed. (1951), pp. 244, 249; *Attorney-General* v. *Powell* (4); *Halsbury's Laws of England*, 2nd ed. vol. 4, p. 176; *Tyssen* on *Charitable Bequests*, 2nd ed. (1921), p. 184; *Thomson* v. *Whittard* (5); *Mills* v. *Farmer* (6); *Re de Little*; *Union Trustee Co. of Australia Ltd.* v. *Attorney-General* (7); *Re Leverhulme*; *Cooper* v. *Leverhulme* [*No.* 2] (8); *Re West*; *George* v. *Grose* (9); *In re Cain Deceased*; *National Trustees Executors and Agency Co. of Australasia Ltd.* v. *Jeffrey* (10); *In re Foord*; *Foord* v. *Conder* (11); *Croome* v. *Croome* (12); *In re Marshall*; *Graham* v. *Marshall* (13); *In re Hollole Dec'd.* (14); *Attorney-General* v. *Sidney Sussex College* (15); *In re Lavelle*; *Concannon* v. *Attorney-General* (16); *In re McEnery Dec'd.*; *O'Connell* v. *Attorney-General* (17); *Attorney-General* v. *Merchant Tailors' Co.* (18); *Attorney-General* v. *The Wax Chandlers' Co.* (*Master, Wardens, etc.*) (19); *Williams' Trustees* v. *Inland Revenue Commissioners* (20); *In re Robinson*; *Besant* v. *German Reich* (21); *Re Thackrah*; *Thackrah* v. *Wilson* (22); *Keren Kaye-*

(1) (1944) Ch. 193.
(2) (1934) 34 S.R. (N.S.W.) 454; 51 W.N. 151.
(3) (1944) Ch. 193, at p. 196.
(4) (1890) 11 L.R. (N.S.W.) Eq. 263.
(5) (1925) 25 S.R. (N.S.W.) 430; 42 W.N. 32.
(6) (1815) 19 Ves. 483, at p. 488 [34 E.R. 595, at pp. 596-597].
(7) (1943) Q.S.R. 31.
(8) (1943) 2 All E.R. 274.
(9) (1900) 1 Ch. 84.
(10) 1950) V.L.R. 382.
(11) (1922) 2 Ch. 519.
(12) (1888) 59 L.T. 582.
(13) (1928) Ch. 661.
(14) (1945) V.L.R. 295.
(15) (1869) L.R. 4 Ch. App. 722.
(16) (1914) 1 I.R. 194.
(17) (1941) I.R. 323, at p. 327.
(18) (1834) 5 L.J. Ch. 62.
(19) (1873) L.R. 6 H.L. 1.
(20) (1947) A.C. 447.
(21) (1931) 2 Ch. 122.
(22) (1939) 2 All E.R. 4.

meth Le Jisroel Ltd. v. *Inland Revenue Commissioners* (1); *Clayton* v. *Ramsden* (2); *Chichester Diocesan Fund and Board of Finance (Incorporated)* v. *Simpson* (3); *Blair* v. *Duncan* (4); *Houston* v. *Burns* (5); *Property Law Act* 1928 (Vict.), s. 131; *Roman Catholic Archbishop of Melbourne* v. *Lawlor*; *His Holiness The Pope* v. *National Trustees Executors and Agency Co. of Australasia Ltd.* (6)].

H. A. Winneke Q.C., Solicitor-General for the State of Victoria (with him *F. Maxwell Bradshaw*), for the respondent, the Attorney-General for the State of Victoria. The gift is a valid charitable gift. See *Armstrong* v. *Attorney-General* (7); *In re Coulthurst Dec'd.*; *Coutts & Co.* v. *Coulthurst* (8). Uncertainty of object is no objection to a charitable gift: see *In re Gott*; *Glazebrook* v. *University of Leeds* (9); *Theobald* on *Wills*, 10th ed. (1946), p. 282; *Hanbury's Modern Equity*, 5th ed. (1949), p. 222; *In re Parker Dec'd*; *The Ballarat Trustees Executors & Agency Co. Ltd.* v. *Parker* (10). The corpus should be held for charitable purposes.

Trevor Rapke, for the respondent, the Union Trustee Company of Australia Limited.

R. M. Eggleston Q.C., in reply, referred to *In re Robinson*; *Besant* v. *German Reich* (11); *Attorney-General* v. *Fraunces* (12).

Cur. adv. vult.

Aug. 21

The following written judgments were delivered.

DIXON C.J. AND MCTIERNAN J. This appeal concerns the interpretation of an ill-considered will by which an elderly Armenian attempted to dispose of his property. The will was made on 28th June 1946 and the testator died four months later. He was domiciled in Victoria and expressed a desire that his will should be construed according to the law of that State. One curious feature of the document is that, while he appointed the respondent trustee company the executor and trustee of his will, he gave directions for the payment to a body in New York, which he described as

(1) (1932) A.C. 650.
(2) (1943) A.C. 320.
(3) (1944) A.C. 341.
(4) (1902) A.C. 37.
(5) (1918) A.C. 337.
(6) (1934) 51 C.L.R. 1.
(7) (1934) 34 S.R. (N.S.W.), at pp. 459, 460; 51 W.N., at pp. 152, 153.
(8) (1951) Ch. 661, at p. 665.
(9) (1944) 1 Ch. 193.
(10) (1949) V.L.R. 133.
(11) (1931) 2 Ch. 122.
(12) (1866) W.N. 280.

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his permanent trustee, of the whole of the net income of his estate and the transfer to it of corpus, should the body so desire. This body is the Armenian General Benevolent Union, an association incorporated under the law of Switzerland but having its principal administrative seat in New York. The testator devised and bequeathed his property to the plaintiff trustee company. After providing for debts testamentary expenses and death duties he declared trusts for the payment out of the income of £7 a month to a sister, and after her death to a niece, and of £5 a month to a brother, who has since died. After a provision for a stone for his late wife's grave he directed that the whole of the net income be paid at least yearly to the Armenian General Benevolent Union (thereinafter called his permanent trustee) which permanent trustee, said the will, should make the monthly payment as provided in the will " and use the balance of any of the said income for the benefit of the orphans whose fathers fought with the Russian Army against Germany and Japan in the World War which ended last year " *scil.* 1945.

The first question to be determined is whether this direction forms a valid charitable trust and in that question is involved its meaning. A point of some importance has been raised as to its duration. Is it restricted to the life of the surviving annuitant ? In support of an affirmative answer it is said that the use of the expression " balance if any of the said income " implies that the trust relates only to the surplus while the payment continues of the two monthly sums or one of them. Logical as this inference from the language may appear we do not think that it should be made. All substantial considerations are against it and the words " balance of the said income " are not incapable of applying to future income generally after the annuities have been satisfied. The duration is therefore not restricted to the lives of the annuitants but, so far as meaning goes, the trust is to continue while the purposes exist and remain practicable.

How far then can the meaning be fixed of the phrase " the orphans whose fathers fought with the Russian Army against Germany and Japan " ? In the context " orphan ", as it seems to us, means bereft of a father, a not uncommon application of the word. A more difficult question is whether the trust imports that the death of the father shall result from the war. In point of actual expression there may be little upon which to base the limitation but the subject matter and the general purport of the trust suggest it and *a priori* it seems improbable that the testator intended to provide a benefit for a child born some decades hence

as the issue of a late marriage made by an aged veteran of the Russian army. We think that it is implied that the objects in view shall be orphaned as a result of the war. It is of course clear enough that it does not matter where the fathers fought in the conflict with Germany and Japan so long as they fought with the Russian army, and we take " fought with " to include all forms of active service with the Russian army. The probability is high that the testator had in mind only soliders of Armenian origin. But is there enough ground for reading that intention out of the provisions of his will ? His preoccupation with his Armenian affiliations is clear enough. He mentions at the opening of the will that he was born at Tokat in Asia Minor. He turns to the Armenian General Benevolent Union notwithstanding that its operations are conducted in New York and he confides the execution of the trust to them as his permanent trustee. In doing this he must have been moved by the thought that they would be in touch with Armenians and it appears *aliunde* that the Union is a philanthropic society concerned with the Armenian population in all the countries of the Near East.

Not without hesitation we think that these considerations suffice and that the trust should be interpreted as relating to orphans of Armenian fathers.

How much Armenian blood is required to make a father Armenian for the purposes of the trust and what is Armenian blood might be questions too difficult to answer if this were a trust giving proprietary interests to a class of *cestuis que trust* who must be definitely ascertained. But obviously it is a charitable trust or nothing. In our opinion it is a good charitable trust. The reference to orphans of fathers who fought in the Russian army would, according to ordinary usage, be understood as contemplating persons who were young and, through orphanage, if not reduced to poverty, or other hardship, had at least been placed in a situation where relief in the way of succour assistance or protection was desirable : see *Attorney-General* v. *Comber* (1) ; *Armstrong* v. *Attorney-General* (2).

No very definite description of distress or disadvantage is perhaps conveyed, but that is not necessary. As to age *Long Innes* J. says in *Armstrong* v. *Attorney-General* (3) that the majority of persons who have attempted to define the term orphan appear to hold the view that the state of orphanage is confined to minority

(1) (1824) 2 Sim. & St. 93 [57 E.R. 281].
(2) (1934) 34 S.R. (N.S.W.) 454, at p. 459 ; 51 W.N. 151, at p. 152.
(3) (1934) 34 S.R. (N.S.W.), at p. 459 ; 51 W.N., at p. 152.

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and that the term orphans is not properly applicable to adults, though he himself would find some difficulty in holding that an adult was not an orphan. However, to speak of adults as orphans is felt by everyone to be an incongruous even though logical use of the word and there can be little doubt that the trust is for the benefit of young people, minors, who are bereft of their fathers. The testator must have known that the class which he wished to benefit by the trust was very numerous and that the income of the relatively small property of which he was able to dispose would serve only as a means of benefiting a few orphans. It is evident therefore, that he contemplated an application of the income by the Armenian General Benevolent Union in a manner involving a discretion on the part of that body and a wide one: cf. per *Maugham* J., *In re Robinson*; *Besant* v. *German Reich* (1). *Sholl* J., from whom this appeal comes, held the trust void for uncertainty. With respect we are unable to agree in this view. It has long been accepted doctrine that a charitable trust is never void for uncertainty in the object, a statement which of course, assumes that the object is charity. *Jarman*, vol. 1, 7th ed. (1930), p. 215. In *Re Parker* (2) *Fullagar* J. said, "Uncertainty of object will never defeat a charitable trust, but certainty as to the property made subject to the trust is, I think, just as essential to the validity of a charitable trust as to the validity of a trust for individual persons". In *In re Gott*; *Glazebrook* v. *University of Leeds* (3), *Uthwatt* J. said "No doubt, when a purpose is stated, no charitable trust is created unless the purpose is certainly charitable, but, given that certainty, uncertainty as to the particular charitable purpose intended is, in my opinion, immaterial".

In the present case there is no uncertainty as to the property of which the trust is declared and we think that it is certain that the object is charitable. The purpose being certainly charitable, the rest is a question only of administration. The will proceeds to confer upon the permanent trustee an option to call for the sale of the testator's land house and furniture and to direct that then the whole of the assets of his estate should be transferred to his permanent trustee. After giving certain powers in relation to the investment of the estate which is then to form a fund to be called the testator's permanent trust fund, there is an anacoluthic provision amounting to a direction to the permanent trustee to stand possessed of the same upon the trusts hereinbefore expressed

(1) (1931) 2 Ch. 122, at p. 126.
(2) (1949) V.L.R. 133, at p. 136.
(3) (1944) Ch. 193, at p. 197.

concerning the same. This in our opinion does not operate to apply the trusts of income to corpus *mutatis mutandis*, but it impresses upon the fund in the hands of the Armenian General Benevolent Union the same trust to apply the income in the manner thereinbefore directed.

It is of course clear that the purpose of benefiting orphans of fathers who fought with the Russian army must ultimately be spent or exhausted. The question whether that has happened must, as we think, be decided when it arises, by considering whether the execution of the purpose of the trust has ceased to be practicable. It will not be a question of ascertaining whether there remains somewhere an orphan within age of an Armenian soldier who fought with the Russian army. What is to be considered is whether the purpose of the trust has failed as no longer practicable. But the question arises who is entitled to the corpus when the purpose of the trust is exhausted and that question must be decided in these proceedings. There is no charitable purpose, underlying the trust in question, which is wider than that which the trust expresses. Prima facie there is upon that event a resulting trust and the property is held for the next-of-kin. More than one answer was given to this prima facie position. That which has the strongest claim to consideration is that the general tenor and sense or spirit of the will shows that the Armenian General Benevolent Union was to take the property for its corporate purposes, that is subject of course to the declared trusts.

Where a person, natural or artificial, is constituted a trustee and property is vested in him or it under that description or in that character the presumption is that he or it takes only as a fiduciary, and in order to prevent the resulting trust it must appear affirmatively from the trust instrument that it was intended to confer a beneficial interest. In this will there appears to us to be very little to point to as evidence of an intention that the Union should take beneficially. It is true that the testator must have perceived, if he adverted to the question, that the purposes of his expressed trusts must come to an end. It is true that he nevertheless directed that the entire property should be handed over to the Union by the plaintiff trustee company. Further it may be conceded that the Union existed for purposes which may have looked to him like public trusts, that is to say objects for the furtherance of which the body applied funds without any benefit to itself. But these are not very definite indications of the requisite intention and on the other side is the repeated description of the body as the testator's permanent trustee, and of the estate in its

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hands as the testator's permanent trust fund. There is the grant to the permanent trustee of specific powers to retain the estate in the same form of investment or to invest in securities authorized for trustees by the laws of England or of the United States. There is also an express provision making the receipt of the secretary or treasurer a good discharge to the plaintiff trustee company. All these things stamp the Armenian General Benevolent Union unequivocally as a fiduciary and the suggested reasons for inferring that the Union was to take in its corporate character beneficially appear to us to be too speculative to authorize an affirmative inference.

We do not think that the Armenian General Benevolent Union takes the property beneficially for its corporate purposes subject to the expressed trusts.

A contention was advanced that it took the property, subject to such trusts, as a trustee for its corporate objects, which, so it was said, are charitable. It may be that the testator looked upon the Union as a body administering funds for causes of an Armenian character which made it look like a trustee in all its corporate aspects and that he therefore described it as a trustee. But that is no more than speculation.

There is, in our opinion, no consideration arising from the will itself which gives any substantial support to the view that a trust for the objects of the body was intended. Nor can we see any ground for imputing a general intention of charity extending beyond the trust for orphans and affecting the property after the failure of that trust through the disappearance of the class for whose advantage it was created. There is, in our opinion, a resulting trust in favour of the next-of-kin arising on the failure of the trust for orphans. But that is no reason why the direction of the testator to transfer the property to the Armenian General Benevolent Union should not be carried into execution.

We think that the order of the Supreme Court should be varied as follows :—

For the answer to question 1 in the originating summons there should be substituted a declaration that the trust for the benefit of the orphans whose fathers fought with the Russian army against Germany and Japan in the world war is a good charitable trust. In answer to the second question it should be declared that the said trust is for the benefit of the children of Armenian fathers who served with the Russian army during the war between the U.S.S.R. and Germany or that between the U.S.S.R. and Japan

and lost their lives in the course of that service if such children are under age and in need of assistance or protection.

In the answer to the third and fourth questions the words " the death of the testator " should be struck out and for them there should be substituted the words " as from the failure of the purposes of the said trust by reason of its becoming impracticable further to administer the same for the benefit of such minors ".

For the answer to the fifth question the following should be substituted :—

5. (a) Yes the corpus.

(b) (i) That of the secretary or treasurer of the defendant the Armenian General Benevolent Union.

(ii) Nothing further than such receipt is necessary for the protection of the plaintiff.

WILLIAMS, WEBB AND KITTO JJ. This is an appeal from an order of the Supreme Court of Victoria (*Sholl* J.) answering certain questions in an originating summons relating to the construction of the will of Haroutiun Garabet Balakian who died in Victoria on 28th October 1946. The will is dated 28th June 1946. It declares that the testator is domiciled in Victoria and desires the will to be construed and take effect according to the laws in force in that State. It appoints the Union Trustee Co. of Australia Ltd. executor and trustee and proceeds as follows—" I give devise and bequeath all my estate Real and Personal unto my trustee in trust to pay therefrom Firstly all my just debts funeral and testamentary expenses including Probate and Estate duties and Secondly to pay as from the date of my death out of the income of the remainder of my estate the sum of Seven pounds (£7) per month to my sister Madame Rosa N. Andriassion so long as she lives and as from the date of her death to pay the like amount to my niece Alice N. Andriassion daughter of my said sister so long as she lives and Thirdly to pay as from the date of my death out of the said income the sum of Five Pounds (£5) per month to my brother Hagope Garabet Balakian at present a resident of Bombay India. All these amounts shall be payable in full without any deductions for Probate or Estate Duties. I direct that a grave stone be erected on the grave of my late wife in the Eltham Cemetery Grave Number 116 at a cost of about Thirty pounds. I also direct that the whole of the net income from my estate be paid at least yearly to The Armenian General Benevolent Union of Number 432 Fourth Avenue, New York in the United States of America (hereinafter called ' my Permanent Trustee ') which Permanent

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Trustee shall make the monthly payments as provided in this my Will and use the balance if any of the said income for the benefit of the orphans whose fathers fought with the Russian Army against Germany and Japan in the World War which ended last year. Should my Permanent Trustee so desire it my Trustee shall sell to the best advantage but preferably by public auction my house and land at Eltham and the contents of such house and the whole of my then assets of my estate shall then be transferred to my Permanent Trustee. I authorise my Permanent Trustee to hold any assets of my estate (which are transferred to my said Permanent Trustee) in the same form of investment as they are held at the time of transfer or to invest any moneys available for investment at any time in any form of investment (selected by the Central Council of my Permanent Trustee) as trustees are by the laws of England or The United States of America for the time being in force authorised to invest trust moneys and shall form a fund (hereinafter called my ' Permanent Trust Fund ') and stand possessed of the same upon the trusts hereinbefore declared concerning the same but until my Permanent Trustee makes request as set out in this Will I give my trustee authority to retain any part of my estate in the same form of investment or asset as at the date of my decease. I declare that the receipt of the Secretary or of the Treasurer for the time being of my Permanent Trustee shall be a good and complete discharge to my Trustee for all moneys paid to my Permanent Trustee by my Trustee pursuant to the terms of this my Will and I further declare that my Trustee shall not inquire or concern itself in any way as to the disposal of my Permanent Trust Fund or the income therefrom by my Permanent Trustee ".

The questions asked in the originating summons and the answers thereto given by *Sholl* J. are as follows—

1. Is the gift in favour of the orphans whose fathers fought with the Russian army against Germany and Japan in the world war which ended in 1945 a valid gift ? Answer : No, the gift in the abovementioned will in favour of the orphans whose fathers fought with the Russian army against Germany and Japan in the world war which ended in 1945 is void for uncertainty nor is there any general charitable intention which should be executed *cy-près*. 2. If yea, what persons are comprised within the description " the orphans whose fathers fought with the Russian Army against Germany and Japan in the World War which ended " in 1945 ? Not answered. 3. Is the corpus of the said estate

distributable only upon the death of the last of the persons designated in the answer to the second question or at some earlier and what time such as the time when the permanent trustee under the said will is satisfied that no person so designated can be found ? 4. What person or persons are entitled to the corpus of the estate of the said deceased upon the death of the last of the persons designated in the answer to the second question or at the earlier time indicated in answer to the third question ? Answer to questions 3 and 4 : Subject to the payment of the annuities given by the said will of the testator and the provision in it as to the testator's wife's grave, the whole of the income and corpus of the residue is held in trust as from the death of the testator for the testator's next-of-kin ascertained as at the date of such death. 5. (a) Should the plaintiff pay to the defendant the Armenian General Benevolent Union or to some and what representative of such defendant (i) any and what part of the corpus of the estate of the said deceased ; (ii) any and what part of the income of the said estate ? (b) If any payment should be made by the plaintiff to the defendant Union or to some and what representative of the defendant Union (i) on whose receipt should such payment be made ; (ii) should the plaintiff require some and what form of release or indemnity from the defendant Union or some and what person acting on its behalf ? Answer to question 5. (a) : No. The plaintiff should not pay to the defendant, the Armenian General Benevolent Union, any part of the corpus or income of the estate of the testator. (b) Not answered. His Honour then proceeded to order that it be referred to the Master to inquire and certify who were at the date of the testator's death his next-of-kin entitled to share in his residuary estate, and who is or are the legal personal representative or representatives of any of such next-of-kin who have since died.

The Armenian General Benevolent Union and the Attorney-General for the State of Victoria have both appealed from his Honour's answers to questions 1 to 4 and from his consequential order that there should be an inquiry as to the next-of-kin. The main contention of the Union is that, subject to the trusts of income to the extent to which these trusts are valid and to the direction to erect the grave stone, the Union is beneficially entitled to the residuary estate. It does not seek to impeach the validity of the orphan trust but submits that on the true construction of the will question 1 should be answered Yes and that question 2 should be answered that orphans include any person upon whom the Union is authorized by its constitution to confer benefits and whose

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father was killed upon active service with the Russian army against Germany or Japan in the world war in which hostilities ended in the year 1945 or whose father died prior to 28th June 1946 (that is the date of the will) as a result of injuries received upon such active service, and who at the time of his or her father's death was under the age of twenty-one years, and that such a person would remain an orphan so long as he or she was suffering economic distress attributable to the death of his or her father. The Attorney-General supports this construction of the orphan trust and also submits that if the learned Judge was correct in holding that this trust was too uncertain to be given direct effect he ought to have held that the income which was the subject of the gift should be applied to some charitable purpose *cy-près* and have directed a scheme to be settled for that purpose. Both appellants contest his Honour's opinion that if the orphan trust be valid the period of its operation is limited to the death of the survivor of the three annuitants. The Attorney-General contends that the Court should not allow the residuary estate to be transferred or the income thereof to be paid to the Union out of the jurisdiction without some inquiry to satisfy the Court that the Union is a fit and proper trustee to whom the income and corpus may safely be so transferred and paid whilst there are still in existence trusts of that corpus or income.

The will appoints the Union Trustee Co. of Australia Ltd. executor and trustee of the will but imposes on the company powers and duties which are of a temporary nature. It is in the first instance directed to pay the testator's just debts, funeral and testamentary expenses (in which are included probate and estate duties), secondly it is directed to pay certain annuities out of the income of residue and to erect a grave stone on the grave of the testator's late wife. The trust imposed on the company to pay the annuities takes a curious form because it is in terms imposed directly on the company but is to be fulfilled by the company paying the whole of the net income of the estate at least yearly to the Union in New York in the United States of America (in the will called the permanent trustee) which is to pay the annuities monthly and use the balance, if any, of the income for the benefit of the orphans whose fathers fought with the Russian army against Germany and Japan in the recent world war. The company is to remain in possession of the residue until the Union requests the company to sell the house and land at Eltham and the contents of the house. It is then to transfer the whole of the assets to the Union. This transfer could be effected by a transfer of the legal title without the assets being

removed from the jurisdiction because the testator authorizes the Union to hold any assets in the same state of investment as they are held in at the date of transfer. But the testator clearly contemplated that the assets might be removed from the jurisdiction because he provides that his permanent trustee may invest any moneys available for investment at any time in any form of investment as trustees are by the laws of England or the United States of America for the time being in force authorized to invest trust moneys.

The most important question that arises on the construction of the will is whether the Union takes a beneficial interest in the corpus of the estate. The question next in importance is the meaning of the orphan trust. His Honour was of opinion that the trust if valid would terminate on the death of the survivor of the annuitants because there would not any longer be a balance of income to be applied to the trust. The annuities are bequests of annual sums of fixed amounts out of a fund of income of unascertained amount and in our opinion a gift of the balance of income, after providing for such fixed amounts, is a gift of the whole residue of the income of the fund subject to the payment of the annuities so that, as the annuities fall in, the amount of the residuary income will increase until it includes the whole of the income of the fund. The word " balance " is really equivalent to residue and connotes a true residue and not an aliquot portion of any specific sum, *In re Andrew dec'd.* ; *Andrew* v. *Andrew* (1).

The question whether the Union takes a beneficial interest in the corpus is not easy to answer. Apart from the trust to pay the annuities, the only trust imposed upon the Union is the orphan trust. The general principle of construction is concisely stated in *Halsbury, Laws of England*, 2nd ed., vol. 33, p. 193 : " Where property is given to a person upon trust, there is a presumption that the property is given to him entirely as a trustee and not to any extent beneficially. Where, however, the trust does not exhaust the whole beneficial interest in the property, this presumption can be rebutted by an indication in the instrument of disposition that he is intended to take the residue of it for his own benefit ". There is a long line of decisions applying this principle with different results according to the particular facts right down to *In re Rees* ; *Williams* v. *Hopkins* (2). But these decisions are not of much assistance in the elucidation of the present will. This will is not completely in the class of home drawn wills because it shows some technical glimmerings but it is emphatically not the product of a skilled

(1) (1934) N.Z.L.R. 526. (2) (1950) Ch. 204.

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draftsman. In *Croome* v. *Croome* (1) in the Court of Appeal, *Bowen* L.J. said, " It is very difficult to justify to other minds the impression language makes on one's own mind; but, of course, the business of a judge is to act on the impression made on his own mind, and I can only say that those words do convey to me the impression, and an impression which is more than a mere guess, on which I am willing to act, and on which I seriously do act, in dealing with the property of others. They convey to me the distinct impression that it was the intention of the testator to give a beneficial interest to his brother ". *Fry* L.J. said " It is difficult, no doubt, to express in words the exact impression which the language of a testator often produces on the mind; but the result of the language of the testator in this case is to convince me that he has given the real estate to his brother for a purpose which he does not contemplate as exhausting the whole—in other words, the whole legal interest is given, but it is not given for the purposes of express trust " (2). In *In re Foord*; *Foord* v. *Conder* (3), *Sargant* J., as he then was, after referring to *Croome* v. *Croome* (4) for the purpose of seeing the general spirit in which the Court deals with wills of this character, said, " I find that the Court is prepared to hold that there is a beneficial gift to the first taker on slight expressions and indications of intention. The indications there " (in *Croome* v. *Croome* (4)) " were so slight that the judges of the Court of Appeal confessed that it was difficult to state in words reasons for the impression produced on their minds by the language of the testator's will ". In *Perrin* v. *Morgan* (5), Lord *Atkin* said, " No will can be analysed in vacuo. There are material surroundings . . . in every case, and they have to be taken into account. The sole object is, of course, to ascertain from the will the testator's intentions ". One of the material surroundings to which Lord *Atkin* refers is the provision for other beneficiaries in the will. In the present will the testator provides annuities for a brother and sister who are two of his next-of-kin and for the daughter of that sister, so that he must have considered the claims of his relatives upon his bounty but there is no other express gift to any of his next-of-kin. It would be natural to expect that any further benefits for his relatives would be expressly given. The will provides that the Union is to stand possessed of the fund (called the permanent trust fund) " upon the trusts hereinbefore declared concerning the same ". The only trusts hereinbefore declared are

(1) (1888) 59 L.T. 582, at p. 585.
(2) (1888) 59 L.T., at p. 586.
(3) (1922) 2 Ch. 519, at pp. 521, 522.
(4) (1888) 59 L.T. 582.
(5) (1943) A.C. 399, at pp. 414, 415.

trusts of the income of the fund. There are no trusts of the corpus. "Possessed" is a word strongly indicative of ownership. The Union is described as the permanent trustee and the fund as the permanent trust fund and in some contexts this might well be a decisive indication that the Union was to be a trustee of the fund and was not to take a beneficial interest. But this description of the Union appears to have been used to differentiate the permanent nature of the duties imposed upon the Union from the temporary nature of the duties imposed upon the company. It was probable that the direction to pay the annuities would endure for a considerable period as the first annuity is payable to the testator's niece after the death of her mother. It was also probable that the orphan trust would endure for a considerable period. In these circumstances it would not be unreasonable for the testator to describe the Union, on whom the trusts to pay the annuities and to provide for the orphans are imposed, as his permanent trustee to distinguish it from his initial trustee although he intended the Union to take an ultimate beneficial interest. Further the Union is a corporate body, the purpose of which is to carry out the philanthropic objects authorized by its constitution. These objects fall under three main heads: (1) to assist in the intellectual and moral development of the Armenian population and their country; (2) to assist Armenians with a view to ameliorating their material and economic position; and (3) to encourage any and all charitable works likely to bring about these results. A testator would naturally expect such an institution to preserve and invest a large sum bequeathed to it as a permanent fund and use the income for the furtherance of these objects and not immediately to expend the capital. The testator must have intended that the Union should have permanent possession of the trust fund after it had been transferred to it by the company. But the only trusts declared of the fund are trusts which do not exhaust the beneficial interest.

The distinct impression produced by the language of the will as a whole is that the testator intended to dispose of his entire estate. He expressly gave his relatives all the bounty he intended them to enjoy. The Union is to invest the fund, apply the income in payment of the annuities and in execution of the orphan trust and, subject to the performance of these duties, to stand possessed of the fund for its own objects, that is to say, beneficially. Permanent possession of the fund is quite inconsistent with an intention that the fund should be distributed amongst the testator's next-of-kin or their estates upon the expiry of the orphan trust. The only alternative is to conclude that the testator failed to realise that he

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had not exhausted the beneficial interests and had unintentionally died partly intestate. But the general impression to be gathered from the will as a whole is that it was intended to be a complete disposition of his estate. In cases of ambiguity you may, at any rate in certain wills, gather an intention that the testator did not intend to die intestate, per *Romer* L.J. in *In re Edwards*; *Jones* v. *Jones* (1).

The will is one which directs that a trustee out of the jurisdiction shall have the administration of the trusts of income and shall enjoy the corpus beneficially. The will authorizes this trustee to remove the corpus from the jurisdiction and absolves the trustee appointed within the jurisdiction from any responsibility for its application. There is no evidence that the Union will not faithfully carry out its duties as a trustee. The evidence is all to the contrary. It is evident that it is a substantial and responsible body. In these circumstances, but for the fact that the testator has directed that his will shall be construed and take effect according to the law of Victoria, there could be no reason why the estate should not be administered in accordance with the testator's directions and the assets transferred to the Union, the responsibility devolving on that body to make such application as it thought fit to the Courts of its domicile, that is to the Courts of the United States of America, to have the will construed. But this provision, we think, authorizes and indeed places a duty on the Australian courts to construe those provisions of the will which require elucidation. The only provision in this class with which we have not yet dealt is the meaning of the orphan trust. His Honour held that this trust, although a charitable trust, in the absence of a general charitable intention, failed for uncertainty.

We are inclined to agree with his Honour that there is no general charitable intent but, assuming that there is none, we do not agree that a particular charitable intent can fail for uncertainty. There must be certainty as to the property that is subject to the trust. It must also be certain that the testator intended to devote that property to a charitable purpose. If these conditions are fulfilled the gift cannot fail for uncertainty although it discloses only a particular charitable intent. The exact point arose for decision in *In re Gott*; *Glazebrook* v. *University of Leeds* (2), and *Uthwatt* J., as he then was, held that a charitable gift cannot fail for uncertainty whether the charitable intention be general or only specific. The correctness of that decision was challenged by counsel for the next-of-kin, but we are of opinion that it was right. His Lordship said,

(1) (1906) 1 Ch. 570, at p. 574. (2) (1944) Ch. 193.

" No authority was cited to me which supports the proposition that certainty in the definition of an intended specific charitable purpose is necessary and the proposition appears to be wrong in principle and never to have been accepted in practice . . . There is no practical reason why certainty of the exact ambit of a particular charitable purpose should be required, for the court has, as regards all charitable trusts, jurisdiction to settle a scheme for their administration—I am not referring to cy pres schemes—and it is settled practice that these schemes may deal, not only with methods of administration, but also with, and define, the substance of the trust " (1). This statement is in line with the statement of *Maugham* J., as he then was, in *In re Robinson* ; *Besant* v. *German Reich* (2). His Lordship said " I should point out that a scheme directed by this Court in relation to gifts for charitable purposes is not necessarily or, I think, generally a scheme for the application of the fund cy pres. It is well known that a charitable gift in this country does not fail merely because there is an uncertainty as to the mode of carrying out the gift. In numerous cases of gifts for charitable purposes it is necessary to fill up a number of details in regard to which the testator or the donor has not described his wishes in clear terms. In such cases the gift does not fail, but the Court fills up the details of the donor's charitable intention by means of a scheme " (3). See also *In re Parker* (4). The orphan trust is a trust for a charitable purpose out of the jurisdiction. Of such a trust *Maugham* J. said in *In re Robinson* (5), " It is abundantly clear that, whatever the construction which might have been placed upon the Statute of Elizabeth when that statute was passed in the forty-third year of that Queen's reign, for at least 200 years the Courts have been in the habit of treating the phrase ' charitable purposes ' as not confined to charitable purposes within this realm ".

The purpose of the orphan trust is clearly charitable within the Statute of Elizabeth. It carries an implication that the orphans to be assisted are poor orphans not necessarily in the sense of orphans who are completely destitute but of orphans who would without the assistance, in the words of *Evershed* M.R. in *In re Coulthurst dec'd.* ; *Coutts & Co.* v. *Coulthurst* (6), " have to ' go short ' in the ordinary acceptation of that term, due regard being had to their status in life, and so forth ". There is a considerable degree of certainty as to the orphans the testator intended to assist.

(1) (1944) Ch., at p. 197.
(2) (1931) 2 Ch. 122.
(3) (1931) 2 Ch., at pp. 128, 129.
(4) (1949) V.L.R. 133, at p. 136.
(5) (1931) 2 Ch., at pp. 126, 127.
(6) (1951) Ch. 661, at p. 666.

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They are described as the orphans of fathers who fought with the Russian army against Germany and Japan in the recent world war. An orphan may be a person who is bereaved by the death of his father or mother or both. In the present context the word naturally refers to a child who was bereaved by the death of his father in this war. While orphans are not necessarily confined to persons under the age of twenty-one years, the word most naturally refers to children who are in need of assistance through the loss of a parent. We are of opinion that the objects of the gift are the children in need of assistance of soldiers who fought and died in the Russian army. It is most likely that the testator intended to confine the gift to orphans of soldiers of the Armenian race. There are no express words in the will to this effect but it appears to be a fair inference to draw from the choice of the trustee. Certainly such children are included in the gift. The income available to provide for the orphans is only the income of a fund of £14,000 less the income required to pay the annuities and it would not be sufficient to benefit many orphans. Most of the orphans are within Soviet territory and it is probably impracticable to assist them at the present time. The affidavit of the secretary of the Union says that the Union has suspended its activities in Soviet Armenia owing to the deterioration in the relations between the Union of Soviet Socialistic Republics and the United States of America, but that it intends to resume these activities as soon as normal relations between the two countries are restored. No one could prophesy when this will be, but there may be some orphans who are this side of the Iron Curtain. It is impossible for the Court to say on the present evidence that the trust has failed because it has become impracticable to carry it out. If it becomes clear that it is impracticable the question will then arise whether there is a general charitable intent which can be executed *cy près*. But that question has not yet arisen. The testator has authorized the Union to remove his assets from the jurisdiction and no reason exists why effect should not be given to his wishes. In view of this provision in the will, it would not be proper for the Supreme Court or this Court to order that a scheme should be settled for the administration of the trust: *In re Robinson* (1).

For these reasons we would allow the appeal, set aside the answers to the questions asked in the originating summons and the direction for an inquiry as to the next-of-kin in the order of *Sholl* J. and in lieu thereof order that the questions should be

(1) (1931) 2 Ch. 122.

answered as follows—1. Yes; 2. The children in need of assistance of fathers of the Armenian race who died on active service with the Russian army in the recent world war against Germany or Japan and who were under twenty-one years of age at the date of the testator's death. Such persons will remain orphans so long as they continue in need of assistance whether they have attained the age of twenty-one or not; 3 and 4. Subject to payment of the annuities and to the performance of the trust in favour of orphans the Armenian General Benevolent Union is beneficially entitled to the whole of the residuary estate of the testator. If there be any difficulty in ascertaining when the trusts of income have come to an end, the Union should apply to some appropriate court for directions. It should apply to the Supreme Court of Victoria if the assets are still in Victoria. Otherwise it should apply to some appropriate foreign court; 5. The plaintiff should, when requested, pay and transfer the whole residuary estate of the testator and the income thereof to the Union. The receipt of the secretary or treasurer of the Union shall be a sufficient discharge to the plaintiff for such assets and income. The costs of all parties of the appeal as between solicitor and client should be paid out of the residuary estate of the testator.

Appeal allowed. Answers to the questions asked in the originating summons and the direction for an inquiry as to the next-of-kin in the order of Sholl J. set aside and in lieu thereof order that the questions be answered as follows: 1. *Yes;* 2. *The children in need of assistance of fathers of the Armenian race who died on active service with the Russian army in the recent world war against Germany or Japan and who were under twenty-one years of age at the date of the testator's death. Such persons will remain orphans so long as they continue in need of assistance whether they have attained the age of twenty-one or not;* 3 *and* 4. *Subject to payment of the annuities and to the performance of the trust in favour of orphans the Armenian General Benevolent Union is beneficially entitled to the whole of the residuary estate of the testator;* 5. *The plaintiff should, when requested, pay and transfer the whole residuary estate of the testator and the income thereof to the Union. The receipt of the secretary or treasurer of the Union shall be a sufficient discharge to the plaintiff*

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for such assets and income. Costs of all parties of the appeal as between solicitor and client to be paid out of the residuary estate of the testator.

Solicitors for the appellant, *Blake and Riggall.*

Solicitor for the respondent, the Union Trustee Company of Australia Limited, *F. R. E. Dawson.*

Solicitors for the respondent, Rosa Andreassion, *H. T. McKean & Park.*

Solicitor for the respondent, the Attorney-General for the State of Victoria, *F. G. Menzies*, Crown Solicitor for the State of Victoria.

R. D. B.