was to some extent because of under-nourishment that the testatrix's mental condition was as bad as it was, whereas she was physically well when Dr. Erichsen saw her in 1949, it will be seen that there is strong reason to doubt whether a fear of poisoning, if it really did exist in 1946, persisted beyond that year, for in the next three years, during the greater part of which the testatrix was living with Mrs. Dugan, the testatrix cannot have been sufficiently oppressed by a fear of poisoning to neglect with any consistency the food provided for her. On the whole, it seems quite likely that Dr. Goode made insufficient allowance for the common tendency of old people to exaggerate small matters which displease them and constantly to revert to such matters in conversation. After all, there is nothing very much out of the way in the spectacle of an old lady of some irritability and no little force of character expressing from time to time her objections to medicines or food she did not like in terms suggesting, if taken literally, attempts to poison her.

The learned judge was of course quite right in treating the evidence of Dr. Goode and Mrs. Dugan as raising a doubt as to the validity of the will, and in considering that the plaintiff was disentitled to have the will upheld unless the rest of the evidence provided a satisfactory answer to that doubt. In his Honour's mind the doubt persisted after his consideration of the evidence was complete, and for that reason he concluded that he ought to pronounce against the will. We respectfully differ from his conclusion, but only because we find in the case a number of features which in combination appear to us decisively to outweigh the causes of his Honour's doubt, and to which we are of opinion that he allowed less than their due significance.

To some of these features we have already referred : the character of the dispositions made by the document propounded and by the three wills which preceded it in the same year ; the impression the testatrix made upon Mr. Jeffries at the time of the preparation and execution of the first two of those wills ; the inference arising from her dealings with the Homburgs and their abstention from giving evidence in the case although acting in it as solicitors for the defendants ; the impression produced upon Mr. Hunter and Mr. Mills at the time the will in suit was prepared ; the events which took place on that occasion according to those gentlemen and to the plaintiff, none of whom the trial judge criticized as a witness ; the complete absence of evidence as to any deficiency of memory, any inability to grasp the details of business matters, or any failure to appreciate the extent or nature of her property

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or of such claims as any of her relatives can be said to have had. But, in addition to all this, there is some important evidence not yet mentioned which is entitled to considerable weight. It consists of the evidence of Dr. Erichsen as to the condition in which he found the testatrix when she visited him on 30th November 1949, of Mr. Jeffries as to dealings he had with the testatrix in July 1949, October 1949 and an unspecified date in 1950 (no doubt August), and of Miss Gilmore (Mr. Jeffries' partner) relating to October 1949, July 1950 and August 1950. Dr. Erichsen, who is a general practitioner, saw the testatrix on one occasion only, and then for only twenty minutes or half an hour. His examination of the testatrix was no more complete than Dr. Goode's examinations had been, for he considered only her appearance and conversation. Unfortunately he was not told of any suggestion that she suffered from delusions. But he had a solicitor's letter specifically asking for a report regarding her testamentary capacity, and stating that she was eighty-six years of age and might not be in a fit state of health to give proper instructions for her will. Having thus applied his mind to the very question and at the very period we have to consider, he formed the opinion, and testified to it in the witness box, that the testatrix's capacity to make a will was quite good and that she was quite alert mentally for her age. Mr. Jeffries' interviews in July and October 1949 and in 1950 were on business matters; they concerned her wish to make, first, some definite arrangements for a weekly payment to her nephews with whom she was living, and later the purchase of a house. Mr. Jeffries thought her mental condition very good, and never had any doubts about her being quite normal. Miss Gilmore, a solicitor of some years' standing, in October 1949 discussed with the testatrix some bank pass books and deposit slips which were with Mr. Homburg; and in 1950 she discussed with her the purchase of a house and the letting of rooms in it, and carried out the purchase of the house for her. On each occasion, as she said in the box, Miss Gilmore formed the impression that the testatrix understood the transaction and in her demeanour and her actions seemed perfectly normal. She appeared to take an intelligent interest and to appreciate fully everything that was said. Mr. Jeffries, it may be noted, was not shaken in cross-examination, and Miss Gilmore was not cross-examined at all.

After anxious consideration of the whole case we are of opinion that there is no sufficient reason for denying that a testatrix who appeared to so many competent observers to be completely sane, and made a completely rational will, lacked a sound disposing

mind. A doubt being raised as to the existence of testamentary capacity at the relevant time, there undoubtedly rested upon the plaintiff the burden of satisfying the conscience of the court that the testatrix retained her mental powers to the requisite extent. But that is not to say that he was required to answer the doubt by proof to the point of complete demonstration, or by proof beyond a reasonable doubt. The criminal standard of proof has no place in the trial of an issue as to testamentary capacity in a probate action. The effect of a doubt initially is to require a vigilant examination of the whole of the evidence which the parties place before the court; but, that examination having been made, a residual doubt is not enough to defeat the plaintiff's claim for probate unless it is felt by the court to be substantial enough to preclude a belief that the document propounded is the will of a testatrix who possessed sound mind, memory and understanding at the time of its execution. It appears to us that there is ample ground for that belief in this case. Accordingly we must allow the appeal and substitute for the judgment below an order establishing the will.

Appeal allowed. Order of the Supreme Court of South Australia discharged. In lieu thereof, pronouncement in favour of the alleged last will and testament of Mary Jane Worth deceased being the script bearing date 14*th December* 1949 *now in the Probate Registry of the Supreme Court. Costs of the suit and of the appeal as between solicitor and client to be paid out of the estate.*

Solicitors for the appellant, *Baker, McEwin, Millhouse & Ligertwood.*

Solicitors for the respondents, *Homburg & Melrose.*

B. H.

[HIGH COURT OF AUSTRALIA.]

SCHELLENBERGER . . . . . APPELLANT;
DEFENDANT,

AND

THE TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED AND ANOTHER } RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1952.

MELBOURNE, *Oct.* 31.

SYDNEY, *Dec.* 12.

Dixon C.J., McTiernan and Fullagar JJ.

Charities—Will—Trust for "beautification and advancement of the township of Bunyip"—Construction—Validity.

A bequest of residuary estate in trust "for the beautification and advancement of the township of Bunyip" is a valid charitable trust.

Per curiam: The words "beautification and advancement" should, as a matter of construction, be read disjunctively.

Decision of the Supreme Court of Victoria (*Coppel* A.J.): *In re Shelley Deceased*; *Trustees Executors and Agency Co. Ltd.* v. *Schellenberger*, (1952) V.L.R. 525, affirmed.

APPEAL from the Supreme Court of Victoria.

Emile Henry Shelley, late of Bunyip, Victoria, died on 8th January 1944 leaving a will dated 15th November 1941, probate whereof was duly granted on 8th August 1944 to the Trustees Executors and Agency Company Ltd., the executor named therein. The will provided *inter alia*: "And as to all other my estate to be known as the Emile Henry Shelley Trust in trust as to capital and income to be administered by my trustee as it in its absolute discretion shall decide for the beautification and advancement of the township of Bunyip aforesaid. And my trustee may seek the advice of Frank Shelford Hodge, John Alfred Cock and George Brown Calderwood all of Bunyip aforesaid or the survivor or survivors of them". Doubts and difficulties having arisen in the

course of administration of the estate the executor on 9th April 1952 took out an originating summons naming Frederick Schellenberger and the Attorney-General of the State of Victoria, as defendants. The originating summons sought a determination (without administration) of *inter alia* the following questions and/or the following orders :—

1. Is the provision that the residuary estate of the testator is to be held in trust for the beautification and advancement of the town of Bunyip

(a) wholly or partly valid as a charitable trust ?

(b) void for uncertainty or otherwise invalid ?

2. If yea to 1 (a) hereof—

Has the trustee power to join with other persons or institutions in carrying out or maintenance of projects for the beautification and advancement of the town of Bunyip ?

3. If yea to 1 (a) hereof—for an order that a scheme for the administration of the charity be settled.

4. If yea to 1 (b) hereof—who or what persons are entitled to the residuary estate of the said deceased ?

5. For an order that for the purpose of these proceedings the defendant Frederick Schellenberger shall represent himself and all other persons who are next of kin of the testator.

The originating summons was heard by *Coppel* A.J., who on 26th June 1952 delivered judgment, answering the questions as follows :—

1. The provision is wholly valid as a charitable trust.

2. It is unnecessary to answer this question.

3. Reserved for further consideration.

4. It is unnecessary to answer this question.

In addition, an order was made in the terms of question 5.

From this decision on questions 1 (a), 1 (b), 2, 3 and 4 the defendant Frederick Schellenberger appealed to the High Court.

L. Voumard Q.C. (with him *W. A. Fazio*) for the appellant. We do not contest the view that the expression " beautification and advancement . . . of Bunyip " should be construed disjunctively. It means beautification in such a way as to advance. Read thus the phrase is too uncertain to be limited to strictly charitable purposes.

[DIXON C.J. Do you say " beautification " goes beyond the fourth category of charitable trusts ?]

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Yes. Many forms of beautification are outside the fourth category, e.g., grants might be made to householders to plant shrubs in their gardens.

[FULLAGAR J. Would that be within the fair and reasonable meaning of this will ?]

A town may be beautified in ways which fall outside the Statute of Elizabeth (Imp.) (43 Eliz. I. c. 4). See *Monds* v. *Stackhouse* (1). It is necessary to construe the words "beautification" and "advancement" without calling in aid any canon of construction. The learned trial judge called in aid the canon of construction exemplified in *In re Smith*; *Public Trustee* v. *Smith* (2) that the words must be construed so as to limit them to charitable purposes. But in a case where specific purposes are indicated by the will the rule in *In re Smith* (2) has no application: see *In re Corelli*; *Watt* v. *Bridges* (3). *In re Bones*; *Goltz* v. *Ballarat Trustees Executors and Agency Co. Ltd.* (4). The words must be construed according to their natural meaning. See *In re Strakosch Decd.*: *Temperley* v. *Attorney-General* (5).

J. P. Bourke (with him *Arthur Adams*), for the respondent, the Trustees Executors and Agency Company Limited. On the question of costs he referred to *Gale* v. *Gale* (6); *Trustees Executors and Agency Co. Ltd.* v. *Ramsay* (7); *Currie* v. *Glen* (8); *Neil* v. *McDonnell* (9).

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 trust is a valid charitable trust if it is for purposes analogous to those set out in the Statute of Elizabeth (Imp.) (43 Eliz. I. c. 4). See *Monds* v. *Stackhouse* (10); *Faversham Corporation* v. *Ryder* (11). "Beautification" and "advancement" are both charitable purposes: see *In re Allen*; *Hargreaves* v. *Taylor* (12); *Grant* v. *Commissioner of Stamp Duties* (13); *In re Verrall*; *National Trust for Places of Historic Interest or Natural Beauty* v. *Attorney-General* (14).

[DIXON C.J. referred to *In re Belcher Decd.* (15).]

(1) (1948) 77 C.L.R. 232.
(2) (1932) 1 Ch. 153.
(3) (1943) Ch. 332.
(4) (1930) V.L.R. 346.
(5) (1949) Ch. 529, at pp. 539, 541.
(6) (1914) 18 C.L.R. 560, at p. 574.
(7) (1920) 27 C.L.R. 279.
(8) (1936) 54 C.L.R. 445.
(9) (1949) 79 C.L.R. 177.
(10) (1948) 77 C.L.R., at pp. 241, 242, 246, 250.
(11) (1854) 5 De G.M. & G. 350 [43 E.R. 905].
(12) (1905) 2 Ch. 400.
(13) (1943) N.Z.L.R. 113.
(14) (1916) 1 Ch. 100, at pp. 114, 115.
(15) (1950) V.L.R. 11.

If the words must be read disjunctively and if " beautification " connotes objects non-charitable as well as charitable the *Property Law Act* 1928 (Vict.), s. 131 applies. See *Union Trustee Co. of Australia Ltd.* v. *Church of England Property Trust, Diocese of Sydney* (1). If the words are read conjunctively then, although a non-charitable purpose was expressed first, the whole disposition would be charitable: see *In re Scowcroft*; *Ormrod* v. *Wilkinson* (2).

L. Voumard Q.C. in reply. [He referred to *Foundling Hospital and Infants' Home* v. *Trustees Executors and Agency Co. Ltd.* (3); *In re Hollole Decd.* (4); *In re Belcher Decd.* (5); *In re Griffiths*; *Griffiths* v. *Griffiths* (6).]

H. A. Winneke Q.C., by leave, referred to *Perpetual Trustee Co. (Ltd.)* v. *King George's Fund for Sailors* (7).

Cur. adv. vult.

Dec. 12.

THE COURT delivered the following written judgment:—

This is an appeal from a decision of *Coppel* A.J. in chambers on an originating summons relating to the will of Emile Henry Shelley deceased.

The testator, who was a resident of Bunyip, a small country town in Victoria, made his will on 15th November 1941, and died on 8th January 1944. By his will he appointed the respondent company to be the executor and trustee thereof, and he devised and bequeathed the whole of his estate both real and personal to the company upon trust for his wife for her life. After her death he gave a sum of £1,000 to the trustees of the Bunyip Mechanics' Institute for the purposes of the Institute, and a sum of £1,000 to the trustees of the Bunyip Agricultural Society for the purposes of the Society. The will proceeded:—" And as to all other my estate to be known as the Emile Henry Shelley Trust in trust as to capital and income to be administered by my trustee as it in its absolute discretion shall decide for the beautification and advancement of the township of Bunyip aforesaid And my trustee may seek the advice of Frank Shelford Hodge, John Alfred Cock and George Brown Calderwood all of Bunyip aforesaid or the survivor or survivors of them.". The will concluded with a discretionary power of sale expressed to be given for the purpose of enabling the trustee to carry out the provisions of the will.

(1) (1946) 46 S.R. (N.S.W.) 298; 63 W.N. 153.
(2) (1898) 2 Ch. 638.
(3) (1945) 19 A.L.J. 383.
(4) (1945) V.L.R. 295.
(5) (1950) V.L.R. 11.
(6) (1926) V.L.R. 212.
(7) (1949) 50 S.R. (N.S.W.) 145; 67 W.N. 72.

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The testator's widow died on 3rd June 1950. All debts, and the two legacies of £1,000, have been paid, and the respondent company has in its hands property of the value of about £9,600. The main question raised by the originating summons was as to the validity of the trust for the "beautification and advancement" of the township of Bunyip. It was argued for the next of kin of the testator that the trust was void for uncertainty. It was argued for the Attorney-General of Victoria that it was a charitable trust and valid. *Coppel* A.J. held that the trust was a good charitable trust, and against that decision the next of kin appeal.

The learned judge appears to have attached some importance to the question whether the expression "beautification and advancement" should be construed—to use his Honour's own words—"conjunctively" or "disjunctively". His Honour thought that it should be construed "conjunctively". He said: "I think that grammatically the words express a single conception, and that any steps which are taken to put this conception into effect must be such as will *both* beautify *and* advance the township of Bunyip". The question is, of course, arguable, but, on the whole, we are of opinion that the other view is correct, and that anything which will *either* beautify *or* advance the township of Bunyip is within the terms of the trust. As a matter of meaning, the word "beautification" should be regarded as giving some colour to the word "advancement", with which it is associated. But, as a matter of construction, we think that the testator, who is devoting the whole of the capital and income of his residuary estate to the interests of the community in which he lives, should be regarded as contemplating the use of that whole for the fulfilment of two classes of purpose and the use of any part of that whole for either. This view is supported by the fact that, if the other view be adopted, the word "advancement" is really superfluous. For everything which will tend to the beautification of the township will tend to its advancement within the fair meaning of the words used by the testator, although not everything that will tend to its advancement will necessarily operate for its beautification. The provision of a public swimming pool for children is an example which occurs readily to one's mind.

But, although the question of construction which we have been considering is obviously of great importance from the point of view of the administration of the trust, it has, in our opinion, no bearing on its validity. Whichever construction be adopted, we are of opinion that the right conclusion was reached in the Supreme Court, and that the trust is a charitable trust.

We would regard it as plain that what the testator has in mind is the provision of physical things within a particular locality, which, because they have an element of beauty, or for some other reason, will tend to the general benefit or advantage of the small community dwelling in that locality, and so "advance" it as a community. Such trusts have been uniformly held to be charitable. They might indeed be said to afford an outstanding example of the fourth of Lord *Macnaghten's* four classes of charitable trusts and to fall very clearly within the "scope and intendment" of the preamble to the statute of Elizabeth I. They afford an outstanding example because in them we find a private person choosing to devote a part of his resources to what could fairly be regarded as a possible subject of public responsibility. Examples of trusts of this class which have been held to be charitable are *Howse* v. *Chapman* (1) (to the improvement of the city of Bath), *Attorney-General* v. *Heelis* (2) (for the improvement of the town of Bolton); *Faversham Corporation* v. *Ryder* (3) (for the benefit and ornament of the town of Faversham); *Wrexham Corporation* v. *Tamplin* (4) (for the use and benefit of the borough of Wrexham), *Mitford* v. *Reynolds* (5) (words which were construed as meaning that the bequest was to be applied to "works—something to be constructed or established—for the benefit of the native inhabitants" of the city of Dacca in Bengal), *Dolan* v. *Macdermot* (6) (charities and other public purposes in the parish of Tadmarton), *Re Allen*; *Hargreaves* v. *Taylor* (7) ("general purposes for the benefit of the town of Kendal"; *Re Bones*; *Goltz* v. *Ballarat Trustees Executors & Agency Co. Ltd.* (8) (the improvement of the city of Ballarat). In *Theobald* on *Wills*, 10th ed. (1947), pp. 277, 278, are cited a number of other decisions in which the trust has been of a more specific character than is conveyed by such general words as "benefit" or "improvement" or "advantage", e.g., for providing a water supply to a town or for repairing bridges in a town. A good example of this latter class of case is *Monds* v. *Stackhouse* (9). Such cases provide examples of what may be comprehended within more general words, such as are found in the present case. An example of a gift for the beautification of a locality in a particular way is to be found in *Grant* v. *Commissioner of Stamp Duties* (10). *Johnston* J. thought it clear that the gift was charitable.

(1) (1799) 4 Ves. 542 [31 E.R. 278].
(2) (1824) 2 S. & S. 67 [57 E.R. 270].
(3) (1854) 5 De G.M. & G. 350 [43 E.R. 905].
(4) (1873) 21 W.R. 768.
(5) (1842) 1 Ph. 185 [41 E.R. 602].
(6) (1867) L.R. 5 Eq. 60; (1868) L.R. 3 Ch. App. 676.
(7) (1905) 2 Ch. 400.
(8) (1930) V.L.R. 346.
(9) (1948) 77 C.L.R. 232.
(10) (1943) N.Z.L.R. 113.