

[HIGH COURT OF AUSTRALIA.]

MUIR AND OTHERS APPELLANTS ;
PLAINTIFFS,

AND

THE OPEN BRETHREN AND OTHERS . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF
TASMANIA.

H. C. OF A. *Charities—Gift to religious body for relief of need and distress “ and in assisting
1956. persons in indigent circumstances and in particular (but not exclusively or in
any way that shall limit their discretion) in assisting or relieving persons who
have been or shall be adversely affected by the effects of ” the Second World War—
Construction—Validity.*
HOBART,
Mar. 14;
SYDNEY,
April 13.
Dixon C.J.,
Webb,
Fullagar
and
Kitto JJ.

A testator bequeathed his residuary estate to a religious body “ to be employed by them in relieving cases of need and distress and in assisting persons in indigent circumstances and in particular (but not exclusively or in any way that shall limit their discretion) in assisting and relieving persons who have been or shall be adversely affected by the effects of ” the Second World War.

Held that the bequest was a valid charitable bequest.
Decision of the Supreme Court of Tasmania (*Gibson J.*), affirmed.

APPEAL from the Supreme Court of Tasmania.
Charles Edmond Button, late of Burnie, Tasmania died on 10th November 1945 leaving a will dated 25th June 1945 probate whereof was duly granted by the Supreme Court of Tasmania to the Equity Trustees Company of Tasmania Limited, Ewart Gladstone Button and Keith Stuart Button, the executors named therein. The testator gave the whole of his estate to his trustees upon trust to permit his wife to receive the income thereof for her life and from and after her death to convert the estate into money and to pay certain pecuniary legacies out of the proceeds and by cl. 2 (j) “ To pay the

balance (if any) of the said net proceeds into the funds of the Assembly or body of Christians commonly known as 'Open Brethren' meeting at the date of this my Will in the Gospel Hall Wilson Street Burnie aforesaid such sum to be employed by them in relieving cases of need and distress and in assisting persons in indigent circumstances and in particular (but not exclusively or in any way that shall limit their discretion) in assisting and relieving persons who have been or shall be adversely affected by the effects of the War in which the British Commonwealth of Nations is now engaged and I declare that the receipt or acknowledgement of not less than three of the Elder Brethren belonging to the said Assembly or body of Christians shall be a good discharge to my Trustees in respect of the said monies and I declare that any Brethren who are accustomed to regularly attend the business meetings of the said Assembly shall be deemed to be 'Elder Brethren' within the meaning of the said term so used in my said Will."

By originating summons dated 24th May 1955 Ena Grace Muir, Edward Henry McClymont, David Charles McClymont, Margaret Rector, Alice Hacking Button, as executrix of the estate of Ewart Gladstone Button, deceased, and the National Executors and Trustees Company of Tasmania Limited as executor of the estate of Keith Stuart Button, deceased, as plaintiffs sought a determination of the following question: (1) Whether the trusts expressed in cl. 2 (j) of the will are valid or whether the testator died intestate as to his residuary estate and whether the same devolves upon his next of kin? The defendants to the originating summons were the Equity Trustees Company of Tasmania Limited (the other executors of the estate having in the meantime died), the Open Brethren meeting at the Gospel Hall, Burnie, Frank Herbert Atkinson, one of the Elder Brethren of the Open Brethren and the Attorney-General for the State of Tasmania.

The application was heard before *Gibson J.* who, in a written judgment delivered on 4th October 1955 held that the trusts in cl. 2 (j) were valid.

From this decision the plaintiffs appealed to the High Court.

R. C. Wright, for the appellants.

F. N. Jouglin, for the respondent, the Equity Trustees Company of Tasmania Limited.

G. H. Crawford, for the respondents, the Open Brethren and Frank Herbert Atkinson.

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D. M. Chambers and Miss N. W. Levis, for the respondent, the Attorney-General for the State of Tasmania.

Cur. adv. vult.

The following written judgments were delivered :—

DIXON C.J., WEBB AND KITTO JJ. This appeal concerns the residuary bequest contained in the last will of Charles Edmund Button late of Burnie who died on 10th November 1945. The will was duly admitted to probate. The question is whether the residuary provision is a valid charitable bequest or is void. The contest is between parties representing those who would take as on an intestacy on the one side and, on the other side, the Attorney-General representing the interest of charities and the particular body in question, namely the Open Brethren. The Open Brethren constitutes a religious body which, according to the affidavit, is known throughout the English-speaking world. There is a branch at Burnie in Tasmania consisting of an assembly which is self-governing. At Burnie there is a gospel hall held upon trust for the Open Brethren.

After appointing executors and trustees the testator's will gives, devises and bequeaths to his trustees all his real and personal property upon trust for conversion. Subject to payment of debts, the will directs that the net proceeds of conversion should be dealt with by the trustees in the manner which it proceeds to direct. There are certain specific bequests and certain directions to pay sums of money to named charitable institutions. The residuary gift the validity of which is now in question is as follows :—"To pay the balance (if any) of the said net proceeds into the funds of the Assembly or body of Christians commonly known as 'Open Brethren' meeting at the date of this my Will in the Gospel Hall Wilson Street Burnie aforesaid such sum to be employed by them in relieving cases of need and distress and in assisting persons in indigent circumstances and in particular (but not exclusively or in any way that shall limit their discretion) in assisting and relieving persons who have been or shall be adversely affected by the effects of the War in which the British Commonwealth of Nations is now engaged and I declare that the receipt or acknowledgement of not less than three of the Elder Brethren belonging to the said Assembly or body of Christians shall be a good discharge to my Trustees in respect of the said monies and I declare that any Brethren who are accustomed to regularly attend the business meetings of the said Assembly shall be deemed to be 'Elder Brethren' within the meaning of the said term so used in my said Will."

The validity of this provision is attacked upon the ground that a valid charitable purpose is not expressed by so much of it as provides that the sum bequeathed shall be employed by the Open Brethren in assisting and relieving persons who have been or shall be adversely affected by the effects of the war. On that footing it is contended that it forms an inseverable part of the objects for which the money may be employed so that the whole bequest is void.

It is not seriously contended that if the earlier part of the provision stood alone it would not be valid as a bequest to a charitable object although it is not conceded that it would be so. There is little doubt, however, that if it were not for the words following the expression "and in particular" the provision would amount to a bequest for the relief of poverty. Clearly it must be so if the words "in relieving cases of need and distress" are confined to the relief of poverty, and upon the true construction of these words it can hardly be doubted that they do not go further than the relief of necessitous cases. In *Kendall v. Granger* (1), Lord *Langdale* M.R. says: "In this case the direction is to apply this fund 'for the relief of domestic distress, assisting indigent but deserving individuals'. I confess, in my view, that if the sentence had ended here, I should have said that this was a good charitable purpose; for its object is to relieve distress by assisting indigent but deserving individuals and that would be a valid charitable purpose because of the word 'indigent' . . ." (2). It is, of course, undeniable that the words "in assisting persons in indigent circumstances" relate only to the relief of poverty.

On the other hand, it was maintained on the part of the Attorney-General and of the Open Brethren that the words "in assisting and relieving persons who have been or shall be adversely affected by the effects of the War", if they stood alone, would not go beyond a valid charitable object. But unless some very narrow construction be given to the words "adversely affected" this would indeed be a difficult view to sustain. As will appear the earlier part of the clause does enable, and in fact require, a restricted meaning to be placed upon them. But on the hypothesis that they stood alone there would not be a justification for construing them narrowly.

The real question is whether the words "in particular" confine that part of the bequest so as to make it only a special instance of that for which the earlier part of the clause provides, viz. of the relief of cases of need and distress and the assistance of persons in indigent circumstances. In the Supreme Court *Gibson* J. construed the

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(1) (1842) 5 Beav. 300 [49 E.R. 593]. (2) (1842) 5 Beav., at p. 303 [49 E.R., at p. 594].

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bequest in this manner and upon that construction upheld it as valid.

There is a considerable amount of tautology in the provision. The same conception of poverty is referred to by the words "need", "distress" and "indigent". It is hard to distinguish between "relief" in the case of "need and distress" and "assistance" in the case of indigency. But clearly enough the purpose of the bequest so far is alleviation of necessitous circumstances. The challenged portion of the bequest immediately follows and is introduced by the words "in particular". It is an expression commonly used when a special example is given of what precedes. Indeed the words "in particular" can have no other meaning. The bracketed words "but not exclusively or in any way that shall limit their discretion", inevitably suggest a fear on the part of the draftsman that what he intended as but one example might be treated as covering the whole ground, so that the general and wider discretion he had given would be limited by his particular example. The words "assisting and relieving" are repeated from the earlier part of the clause. Although "adversely affected" is an extremely wide expression it would not be inappropriate to use it as a compendious though perhaps vague reference back to the earlier words. Probably the purpose of the provision beginning with the words "in particular" was to state that among persons in need or in distress or indigent those affected by the war formed a special object of the testator's solicitude. It is equivalent to saying "and in particular the Open Brethren are to prefer that class in employing the money". To treat the words "in particular" as introducing a new and different class not falling at all within the earlier words would be to give the expression a very unnatural meaning. Once the clause is construed as merely giving a special example of persons in need or in distress and of persons in indigent circumstances no difficulty exists in holding it to be a good charitable bequest.

It follows that the order made by *Gibson J.* is correct. The appeal should be dismissed with costs.

FULLAGAR J. In this case I am of opinion that the decision of *Gibson J.* was correct, and I agree with the judgment of the Chief Justice and *Webb* and *Kitto JJ.*

If the will, on its proper construction meant that the trust for "assisting and relieving persons adversely affected by the effects of the War" was a trust for a specific purpose additional to that of "relieving cases of need and distress and assisting persons in indigent circumstances", it must, I think, have been held that we

have here a trust for mixed charitable and non-charitable purposes. And, since there is in Tasmania no such statutory provision as that contained in s. 131 of the *Property Law Act* 1928 (Vict.), it must have followed that the whole trust of residue failed for uncertainty. But the words “in particular”—reinforced and emphasised, as they seem to me to be, by the words in brackets, which immediately follow—make it clear, in my opinion, that no such specific additional purpose is intended. They show that the words “persons adversely affected by the war” are intended to describe a particular class of “persons in indigent circumstances”—a class to which the testator desires, but does not command, that preferential consideration be given. The whole trust is thus seen to be a trust for the relief of poverty, and nothing else, and such a trust is a charitable trust.

The appeal should, in my opinion, be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Crisp & Wright*.

Solicitors for the respondent, The Equity Trustees Company of Tasmania Limited, *C. Roberts Thomson*, Burnie, by *Dobson, Mitchell & Allport*.

Solicitors for the respondents the Open Brethren and Frank Herbert Atkinson, *Douglas & Collins*, Launceston, by *Bruce Piggott & Jennings*.

Solicitor for the respondent the Attorney-General for the State of Tasmania, *D. M. Chambers*, Crown Solicitor for the State of Tasmania.

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