Privy Council Appeal No. 120 *of* 1916.

The Attorney-General for the Dominion of New Zealand - - - - - *Appellant,*

v.

John Vigor Brown and Others - - - *Respondents,*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH MARCH, 1917.

Present at the Hearing:

LORD BUCKMASTER.
LORD PARKER OF WADDINGTON.
SIR WALTER PHILLIMORE, Bart.

[*Delivered by* LORD BUCKMASTER.]

The difficulty in this case lies in determining the exact values to be given to a series of words which follow each other in the bequest of the testator's residuary estate.

The appellant contends that these words constitute a valid charitable gift, and, as representing the public, the Attorney-General for the Dominion of New Zealand has brought this appeal from the judgment of the Court of Appeal of New Zealand, where by a majority of four Judges to one it was decided that the gift was void and that the residue passed to the next of kin, who are represented by the third and fourth respondents.

The will containing the bequest, dated the 12th September, 1914, is that of Edward William Knowles, who died on the 23rd April, 1915, domiciled at Napier, in the said Dominion; by its terms the first three respondents were appointed executors and trustees, and by them the will was duly proved on the 13th May, 1915. The material part of the clause in question is in these words:—

"I direct and declare that the residue of the residuary trust funds (into which shall fall all bequests and legacies that may have lapsed) shall be held by my trustees in trust for such charitable benevolent religious and educational institutions societies associations and objects as they in

their uncontrolled discretion shall select And I leave it entirely to the discretion of my trustees to decide upon the amounts to be given and paid to any such institutions societies associations and objects and also at their discretion to decide whether to make periodical payments or one single payment to any such institutions societies associations or objects"

It is obvious that the real obstacle that lies in the appellant's path is due to the word "benevolent." In accordance with a well-established series of authorities, beginning at least as early as *James* v. *Allen*, 3 Mer., p. 17, a gift for benevolent purposes is bad, because such purposes go beyond the legal definition of charities—a word which, in the construction of wills, has always possessed a limited and technical meaning. It is far too late to question the soundness of these authorities at the present day. It may well be that in the minds of people unversed in the subtlety of legal phrases "benevolent" and "charitable" are equivalent terms. But in the Courts the meaning of "charitable" has been influenced by the preamble to the Statute 43 Eliz., c. 4, and charitable purposes have been regarded as those which that statute enumerates, or which by analogy are deemed within its spirit and intendment (see *Morice* v. *Bishop of Durham*, 9 Vesey, p. 399 at p. 405). From this it follows that a gift for charitable or benevolent purposes is void for uncertainty because it is impossible to divide the gift between the two objects, or to determine to which it should be given, and consequently the good cannot be separated from the bad, and the gift fails (see *Re Jarman*, 8 Ch. D., p. 584, and *Ellis* v. *Selby*, 1 My. and Cr., p. 286). If, therefore, the words of the gift in the present case are to be read disjunctively, and the word "benevolent" in New Zealand has, for legal purposes, the same meaning as that which it possesses here, the gift in the present instance would be bad. But the appellant contends that neither of these conditions is involved in the true interpretation of the words. He says, first, that the word "charitable" governs, or at least explains, all the words that follow, and that, as religious and educational purposes are proper subjects of charitable bequests, the introduction of the words "religious and educational" show that all the words following "charitable" are covered by its mantle, and that, consequently, "benevolent" objects must be read as though it meant such benevolent objects as are in their nature the proper subject of a charitable gift. This argument derives some force from the fact that there is no need for defining two classes of charities such as religious and educational, when they are all included in the first word of the bequest. But the terms of the investment clause in the will really destroy the effect of this contention, for there the testator directs his monies to be invested by depositing them "with any firm "bank company or corporation or public body or institution "commercial municipal religious charitable educational or

" otherwise " ; and, in their Lordships' opinion, this shows that the meaning of the word " charitable " in the testator's mind was something that did not embrace religious or educational purposes, and that it ought rather to be regarded as eleemosynary, an interpretation which at once prevents tautology and gives a sensible meaning to each of the words.

So construed, however, the gift must fail, subject to the appellant's argument as to the meaning in New Zealand of the word " benevolent," for it is, in their Lordships' opinion, impossible to use the word " and " as a link intended to join all the words together and make the gift available only for such institutions or objects as satisfied each one of the conditions represented by each of the separate words. Apart from the fact that such a restriction would all but render the gift inoperative, it is plain from the use of the word " and " in the phrase " institutions societies associations and objects," which occurs twice in immediate succession to the words in question, that " and " must be regarded as " or."

In the case of *Williams* v. *Kershaw*, 5 Cl. and Fin. 111, where a gift to " benevolent charitable and religious purposes " was held bad by Lord Cottenham, the same principle of construction must have been applied, and it is, in their Lordships' opinion, impossible to distinguish the principle upon which that case was decided from the principle that ought to govern the present dispute.

There remains the consideration of the true meaning to be attached in this will to the word " benevolent," owing to the fact that it is used in a New Zealand will by a testator having a New Zealand domicil. It is, of course, quite possible that an English word might be used in New Zealand with a meaning different from that which it possesses here, and it may well be that " benevolent institutions and organisations " are, for the reasons pointed out by Chief Justice Stout, charitable institutions in New Zealand according to the strict meaning of the phrase. Indeed, it seems so to have been regarded in the case of *Clarke* v. *Attorney-General*, 33 N.Z.L.R. 936, and also in the State of Victoria, in *Moule* v. *Attorney-General*, 20 Vic., L.R. 314.

But, even upon this assumption, the appellant's difficulties are not removed, for this reasoning would not endow the word " benevolent " with the same signification, when it is—as it must be in the present will—attached to the word " objects," and their Lordships cannot accept the appellant's argument that if benevolent institutions and benevolent associations in New Zealand are properly regarded as charitable, this involves the conclusion that benevolent objects, where the adjective has no such local limitation of meaning, are necessarily charitable also.

Their Lordships consequently are of opinion that the judgment of the Court of Appeal was correct, and that this appeal should be dismissed.

The trustees will have their costs as between solicitor and client out of the estate. As to the costs of the real litigant parties, their Lordships think that in the circumstances of this case, the Attorney-General ought not to pay the costs of this appeal, but, on the other hand, they do not think that he ought to receive his costs out of the estate. As to the other respondents, it is possible that it will make no difference in the ultimate incidence of the expense whether their costs are included in the order or no; but it may simplify matters of administration if a formal order be made that their costs as between solicitor and client should come out of the estate, and their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

THE ATTORNEY-GENERAL FOR THE

DOMINION OF NEW ZEALAND

v.

JOHN VIGOR BROWN AND OTHERS.

DELIVERED BY LORD BUCKMASTER.

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