Privy Council Appeal No. 8 of 1923.

Sydney Verge - - - - - - - - *Appellant*

v.

Arthur Angwin Somerville and others - - - - *Respondents*

The Attorney-General of Australia - - - - - - *Appellant*

v.

Arthur Angwin Somerville and others - - - - *Respondents*

(*Consolidated Appeals.*)

FROM

THE SUPREME COURT OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JANUARY, 1924.

Present at the Hearing:

LORD ATKINSON.
LORD WRENBURY.
SIR CHARLES DARLING.

[*Delivered by* LORD WRENBURY.]

On the 17th January, 1920, German Verge, of New South Wales, grazier, died, having by his will, dated the 1st October, 1919, bequeathed his residuary estate "unto the trustees for the time being of the 'Repatriation Fund' or other similar fund for the benefit of New South Wales returned soldiers." The questions for decision are whether this is a valid charitable trust, and if it is, how it ought to be administered. The appellant (for the next-of-kin) contends that the gift is void—that it is not a valid charitable trust. The cross-appellant, the Attorney-General for the Commonwealth of Australia, contends that it is a valid trust, and that it ought to be administered by the trustees of a certain

statutory Repatriation Fund for Australian soldiers. The respondent, the Attorney-General for the State of New South Wales, contends also that it is valid, but says that the Judge in Equity was right in ordering, as he did, that a scheme should be settled.

Before dealing with and deciding the proper construction of the words of gift, their Lordships find it convenient to discuss some propositions of law in view of which the case falls to be decided.

To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first inquiry must be whether it is public—whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot. If this test is satisfied, is it necessary to find, further, that the class is confined to poor persons, to the exclusion of persons not poor? Is poverty a necessary element? In argument it was scarcely pressed that it is necessary, and after the decision in *Goodman* v. *Mayor of Saltash*, 7 A.C. 633, it was not possible to maintain the general proposition that it is. A trust or condition in favour of the free inhabitants of ancient tenements in the borough of Saltash, in accordance with a usage whereunder they had the privilege of dredging for oysters, was there held to be a valid charitable trust, and, obviously, some of the inhabitants might not have been poor. The poor are not the only people who like oysters or the profits to be derived from their sale. In the course of the judgments reference was, in fact, made to the character of the "free inhabitants" in terms which show that the noble and learned Lords were, in fact, not regarding them as poor. Thus, Lord Cairns, at p. 650, says that he must conclude that they were persons who originally had some share in the corporation of the borough of Saltash and were in some way connected with the corporation; and Lord Fitzgerald, at p. 668, states the same matter more at large, and indicates that they were probably the burgesses and were persons who contributed to the public charges and took their part in bearing the public duties.

In the course of the judgments in that case, Lord Selborne, at p. 642, says:—

> "A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust, and no charitable trust can be void on the ground of perpetuity."

Lord Cairns, at p. 650, says:—

> "A trust of that kind (*i.e.*, a trust for the free inhabitants of ancient tenements in the borough) would not in any way infringe the law or rule against perpetuities because we know very well that where we have a trust which if it were for the benefit of private individuals, or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet if it creates a charitable trust—that is to say, a public interest—it will be free from any obnoxiousness to the rule with regard to perpetuities."

Neither of the noble and learned Lords adds poverty as a relevant factor, and, obviously, a class of all the free inhabitants is not a class confined to its poorer members. In the *Christchurch Inclosure Act* case (38 Ch. Div. 520–530), Lindley, L.J., referring to the *Saltash* case, said :—

> "Had it not been for the decision of the House of Lords in *Goodman* v. *Mayor of Saltash*, we should have felt great difficulty in holding this trust to be a charitable trust ; for, although the occupiers of these cottages may have been, and perhaps were, poor people, the trust is not for the poor occupiers, but for all the then and future occupiers, whether poor or not."

The decision in the *Christchurch Inclosure Act* case follows and illustrates the *Saltash* case, the class being the occupiers of certain cottages which had theretofore enjoyed rights of turbary over tracts of commonable and waste lands of a manor.

Finding themselves in this difficulty, counsel for the appellant advanced an ingenious argument, viz., that in both these cases the person who claimed the benefit was entitled to it as matter of right, and that the case in which a member of the class is entitled to the benefit as matter of right, if he chooses to claim it, and the case in which he is eligible for the benefit but would only enjoy it if in the administration of the trust the trustees think proper to give it him are different, and that in the latter case poverty is a necessary element. The proposition is strange that a trust may be charitable if the rich are as matter of right objects of the trust, but cannot be charitable if they can share, if, and only if, the trustees administering the fund think proper to admit them to benefit, and their Lordships can find no principle on which this contention can be based. The difference, if any, would seem to be the other way. Counsel were unable to cite any authority for their proposition, and although if it were sound it would surely have received attention before this, yet their Lordships are not prepared to dismiss it without examination, and therefore proceed to examine it.

In the investigation of the legal meaning of the word "charity" as distinguished from its popular meaning, the statute of Elizabeth (43 Eliz., ch. 4) must always be the starting-point. That statute has long been obsolete, and was finally repealed in 1888 by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict., ch. 42), subject to saving words not material for the present purpose. The words in the preamble are not a definition of charitable uses, but are a detailed statement of certain uses which are to be charitable, and in dealing with the matter, the course which the Court of Chancery has pursued has been to look at the enumeration of the charities in the statute, and to include under the word charitable any gift of funds for a public purpose which is analogous to those mentioned in the statute. In fact, the legal meaning and the popular meaning of the word "charitable" are so far apart that it is necessary almost to dismiss the popular meaning from the mind as misleading before setting out to determine whether a gift is charitable within the legal meaning. For instance,

the statute includes gifts for the repair of bridges, ports, harbours, causeways . . . and highways—objects obviously of benefit not to the poor only, but to the community as a whole, comprising rich as well as poor. From this point their Lordships may well pass on to Lord Macnaghten's famous judgment in *Commissioners of Income Tax* v. *Pemsel*, 1891, A.C. 531, 583, where, taking his start evidently from Sir Samuel Romilly's argument in *Morice* v. *Bishop of Durham*, 10 Ves. 521–531, he says :—

> " How far, then, it may be asked, does the popular meaning of the word ' charity ' correspond with its legal meaning ? ' Charity ' in its legal sense comprises four principal divisions : trusts for the relief of poverty ; trusts for the advancement of education ; trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads."

His fourth head does not contain the word " poor." He does not say " beneficial to the poorer members of the community " ; he says, " beneficial to the community." Did he mean his words to be read as confined to the poor ? Education and religion, two of the heads which he had just mentioned, do not require any qualification of poverty to be introduced to give them validity. If he was going by general words to add a fourth class in which poverty must be an ingredient, he would surely have said so. He goes on to say :—

> " The trusts last referred to [*i.e.*, the fourth class] are not the less charitable in the eye of the law because incidentally they benefit the rich as well as the poor."

Upon the word " incidentally " might, perhaps, have been founded an argument that the trust is invalid as a charitable trust if it benefits the rich in any way other than indirectly—but for the fact that *Goodman* v. *Mayor of Saltash* had nine years before upheld as charitable a trust under which rich as well as poor could, not incidentally but directly, claim to share the benefit. Their Lordships understand Lord Macnaghten's words as meaning " beneficial to the community," and not " beneficial to the poor members of the community."

A large number of cases were cited at the Bar—such, for instance, as *Blair* v. *Duncan*, 1902, A.C. 37 ; *Grimond* v. *Grimond*, 1905, A.C. 124 ; and *Hingeston* v. *Sidney* 1908, 1 Ch. 488—in which a gift not confined to charitable purposes but given to " charitable or public purposes," or a gift to " such charitable or religious institution and societies as my trustees may select," or a gift " for such charitable uses or for such emigration uses, or partly for such charitable uses and partly for such emigration uses, as my trustees shall select," were held not to create valid charitable trusts because either they were not confined to charitable purposes or were so vague as to be void for uncertainty. The latest case of this kind is *Attorney-General* v. *National Provincial and Union Bank of England* (" Times " newspaper, 18th December, 1923). These lend no assistance to the present inquiry. There is, however, one case of this kind—*Re Macduff*, 1896,

2 Ch. 451—in which Lindley, L.J., does say something which is relevant but which is not in favour of the appellant. At p. 464 he says :—

> " I am quite aware that a trust may be charitable though not confined to the poor, but I doubt very much whether a trust would be declared to be charitable which excluded the poor."

With the case last supposed their Lordships are not here concerned. Upon a review of the authorities and after the decision in the *Saltash* case, they agree with Lindley, L.J., in the case first supposed. They are of opinion that a valid charitable trust may exist notwithstanding the fact that in its administration the benefit is not confined by the donor to the poor to the exclusion of the rich.

It is, perhaps, well to mention two cases cited for the appellant. *Re Gassiot*, 70 L.J. Ch. 242 (Cozens-Hardy, J.), and *Re Elliott*, 102 L.T. 528 (Parker, J.), in which are to be found expressions which the appellant sought to use as indicating poverty as a necessary qualification.

Their Lordships content themselves with pointing out that in neither case was the *Saltash* case cited.

Their Lordships pass on to consider the nature of the gift and the words of gift in the present case. The words are : " unto the trustees for the time being of the ' Repatriation Fund ' or other similar fund for the benefit of New South Wales returned soldiers." The facts are that when the testator made his will, and when he died the following had been the history of a " Repatriation Fund," not for New South Wales returned soldiers in particular but for Australian soldiers generally. Statute No. 7 of 1916 of the Commonwealth of Australia intituled, " The Australian Soldiers Repatriation Fund Act, 1916," established a statutory fund called " The Australian Soldiers' Repatriation Fund," and appointed trustees of the fund and defined their powers and duties. It provided for " State War Councils " for each State in the Commonwealth, gave the trustees power to allocate sums or property to each State War Council, and gave the Council power to apply those funds for the assistance and benefit of Australian soldiers and of their dependants. The Governor-General was empowered to make regulations prescribing the conditions under which a State War Council might expend sums allocated to it.

Under this Act regulations were made, including a Regulation 11 (4) (*a*), as follows :—

> " (4) The State War Council or the Committee thereof, as the case may be, shall regard as ineligible any applicant who—
>
> > " (*a*) is deemed by it to have adequate means or to be adequately provided for under any scheme promoted by any Governmental or private agency ;
> >
> > . . . . . .
>
> " but may, if it thinks fit, recommend the application of any such applicant for the favourable consideration of the trustees."

By the Act No. 37 of 1917, "The Australian Soldiers' Repatriation Act, 1917," the Act of 1916 was repealed: a Repatriation Commission was appointed, and by Section 9 there was to be a State Repatriation Board for each State, and by Section 12 there might be Local Committees within a State, and they could raise and control funds for the district and disburse funds within the district. By Section 17 the control of local funds for the repatriation of Australian soldiers theretofore raised in a district were vested in the trustees of the fund, and by Section 16 all the trust properties were vested in the Commission.

A subsequent Act 15 of 1918, contains a long section the substance of which is that motherless children and widows and dependants and persons incapacitated, and so on, are in particular the objects of assistance.

Under this Act of 1918 again, statutory regulations were made. They are very lengthy and detailed. On looking through them, their Lordships are satisfied that the giving assistance which the soldier or his dependants require is that which it is intended to give, and the weekly allowances which are to apply to different circumstances, ranging as they do from 42*s*. to 86*s*. 6*d*. a week, show that the class to be benefited is not the rich.

This was the state of the legislation when the testator died. There was not at his death any Repatriation Fund for the benefit of New South Wales soldiers, as distinguished from Australian soldiers.

After his death Act No. 6 of 1920 was passed. This repealed the previous Acts, and appointed a Repatriation Commission, and Section 13 (1) appointed a Repatriation Board for each State.

There can be no question but that the gift in the testator's will satisfies the first test required to support it as a good charitable trust. It is a public trust and is to benefit a class of the community, viz., men from New South Wales who served in the war and were returned or to be returned to their native land. Further, if it were necessary to consider at all the question of a trust for the poor, it is a gift which is to benefit that class in some sense expressed by the word "repatriation." This does not mean simply restoring them to New South Wales by paying their fare home. They may be "returned" already, not "returning" soldiers. It means restoring them to their native land and there giving them a fresh start in life. Their Lordships have no doubt that this is a charitable purpose. If it were (which in their opinion it is not) necessary to find that need of assistance is to be a qualification for benefit—that the gift is charitable in the sense of assisting the needy—they find that the words "Repatriation Fund," in the facts as to the Australian Repatriation Fund of which no doubt the testator had knowledge, indicate an intention to benefit the needy. If his words "Repatriation Fund or other similar fund" are referable at all to the statutory Australian Soldiers' Repatriation Fund, and if it were necessary to find a reference to poverty, their Lordships have no difficulty in finding it.

The testator's words may be read in more than one way. First, the words " for the benefit, etc.," may qualify both the words " Repatriation Fund " and the words " or other similar fund." If this be the meaning there is no gift to the trustees of the statutory Repatriation Fund, for there was no such fund for the benefit of New South Wales returned soldiers. Secondly, the language may be read as if the words " Repatriation Fund " were separated from that which follows and as if the next words stood apart, with the result that the words " for the benefit." etc., qualify the " other similar fund " and nothing else. It remains, however, that the latter fund is to be one " similar " to the former, and the test of similarity must lie in benefit to New South Wales returned soldiers. The Repatriation Fund, therefore, must again be one for the benefit of New South Wales returned soldiers. Thirdly, the words may be read as a gift for the benefit of New South Wales returned soldiers, but made to the trustees of the Repatriation Fund (meaning the statutory " Australian Soldiers' Repatriation Fund ") or other similar fund. If this were the meaning the Attorney-General for the Commonwealth would succeed. But the language, in their Lordships' opinion, does not bear this meaning. The words " Repatriation Fund " are in the will in inverted commas, and purport to state the name of the fund to which the testator refers. To bear this meaning they would look to find the correct name, " Australian Soldiers' Repatriation Fund," set out at length. It is not the phrase used.

From these considerations, in their Lordships' opinion, two results follow : first, as between the Commonwealth of Australia and the State of New South Wales the administration of the fund does not rest with the former ; and secondly, inasmuch as there is no Repatriation Fund for New South Wales returned soldiers, there are no named trustees who are to govern the administration and no detailed directions given as to administration, with the result that it is necessary to settle a scheme.

It results that there was created here a valid charitable trust : that under the circumstances above stated the trustees of the statutory fund known as the " Australian Soldiers' Repatriation Fund " are not the trustees of the charity : that, for want of a trustee named with certainty and for want of clear directions as to the administration of the fund, it is necessary to settle a scheme. This was the opinion of the learned Judge in Equity Their Lordships agree with him. The appeal should be dismissed with costs, and the cross-appeal will also stand dismissed, but without costs. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

SYDNEY VERGE

v.

ARTHUR ANGWIN SOMERVILLE AND OTHERS.

THE ATTORNEY-GENERAL OF AUSTRALIA

v.

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(*Consolidated Appeals.*)

DELIVERED BY LORD WRENBURY.

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