Privy Council Appeal No. 37 of 1984

The Attorney General	*Appellant*

v.

The Royal Trust Company and Ernest Raymond Lawson	*Respondents*

FROM

THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JUNE 1986

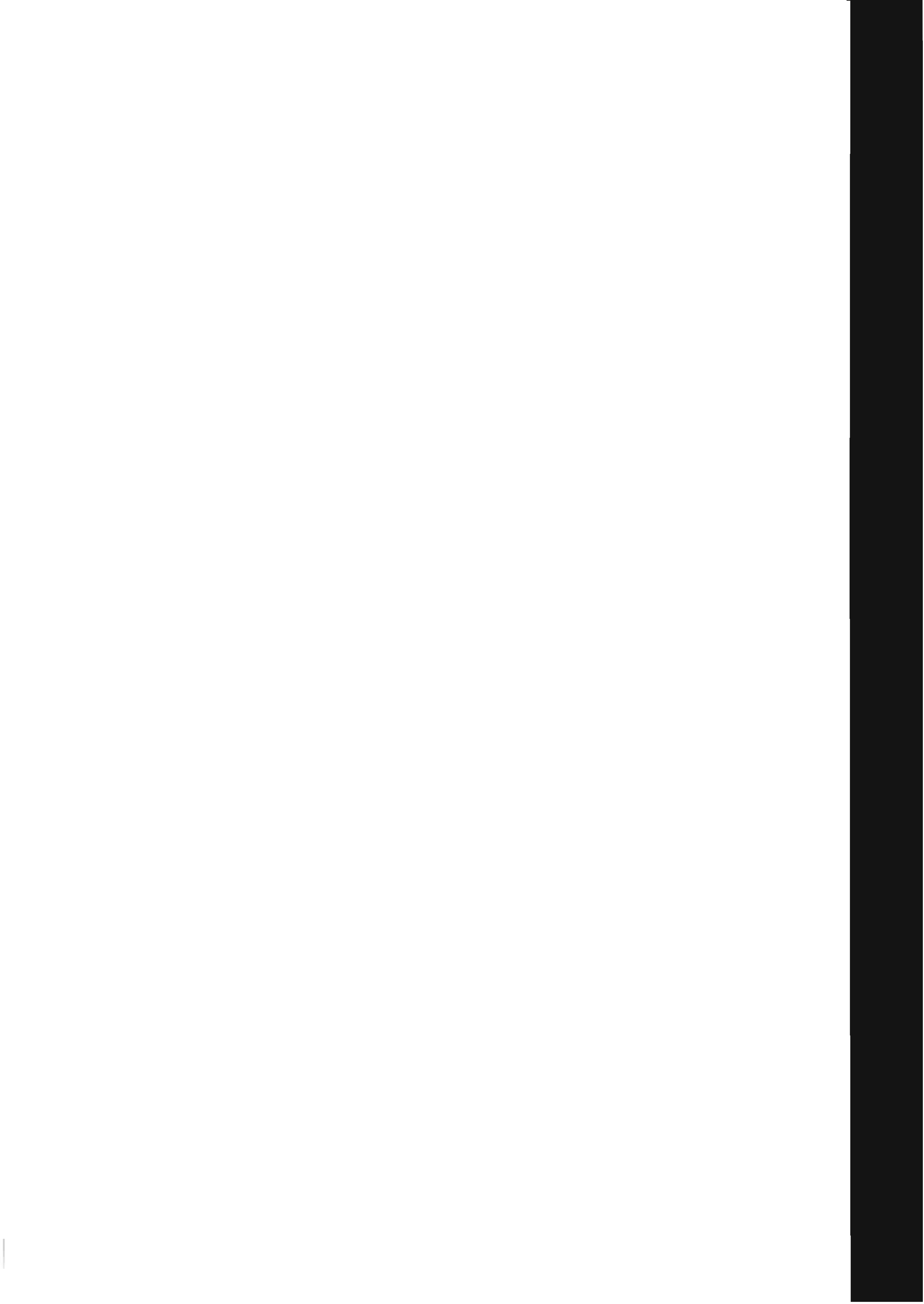
Present at the Hearing:

LORD KEITH OF KINKEL
LORD TEMPLEMAN
LORD GRIFFITHS
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY

[Delivered by ***Lord Oliver of Aylmerton****]*

This is an appeal from an order dated 26th October 1983 of the Court of Appeal of the Commonwealth of the Bahamas (Sir Joseph Luckhoo P., Da Costa and Zacca JJ.A) dismissing the appellant's appeal from that part of a decision of Blake C.J. in the Supreme Court (Equity Side) dated 30th April 1982 which declared that certain trusts contained in clause 15(t) of the will of the late Albert Edward Worswick deceased as amended by the third codicil to his will were not charitable and were void.

Albert Edward Worswick ("the testator") died on 20th April 1953 leaving a will dated 30th April 1951 and three codicils dated respectively 13th September 1951, 16th March 1953 and 8th April 1953. By clause 3 of his will he appointed his wife, Delphine Elizabeth Worswick, Sir Stafford Lofthouse Sands and the First Respondent, the Royal Trust Company, to be trustees of the trusts of his will and by clause 13 bequeathed to his trustees certain shares (subsequently replaced by shares bequeathed by the first codicil to the will) (therein and hereafter referred to as "the Trust Estate") on trusts taking



effect for the period of the life of his widow. By clause 14 he directed that on the death of his widow his trustees should realise the Trust Estate and pay thereout two pecuniary legacies.

The question raised by this appeal arises from the provisions of clause 15 of the will as varied by the third codicil. By this clause the testator directed that the remainder of the Trust Estate should be held upon trusts contained in paragraphs (a) to (v) inclusive. No question arises in relation to paragraphs (a) to (g) or (m) to (r) (inclusive) which consisted simply of pecuniary legacies to a number of named bodies most of them, if not all, being charities. The remaining paragraphs of the clause, however, contained trusts some of which were arguably void for perpetuity and others of which have been revoked. Paragraph (v) was a final gift of the residue of the Trust Estate to the University of Toronto, but this was revoked by the third codicil and replaced by a further residuary trust being the trust which has given rise to this appeal.

The provisions of the second codicil to the will are immaterial for present purposes, but by the third codicil the testator revoked paragraphs (s), (t), (u) and (v) of his will and substituted therefor (in paragraph (s)) a further pecuniary legacy to a named charity and a new paragraph (t) which was in the following terms:-

> "(t) All the rest residue and remainder of my Trust Estate I direct my Trustees to pay over to the Manager of the Nassau Branch of The Royal Bank of Canada for the time being the Manager of the Nassau Branch of Barclays Bank (Dominion, Colonial and Overseas) for the time being and the said Stafford Lofthouse Sands upon trust to invest the same in any investments for the time being authorised by law for the investment of trust moneys or on mortgage of any real or personal estate situate within the Colony and in their absolute and uncontrolled discretion to use the income therefrom and any part of the capital thereof for any purposes for and/or connected with the education and welfare of Bahamian children and young people either within or without the Colony and in all respects as they shall in their absolute discretion deem fit."

By clause 16 of his will the testator bequeathed the whole of the remainder of his personal estate to his widow absolutely.

The testator's will and codicils were duly proved on 8th May 1953 and the Trust Estate was duly vested

in the trustees. The first respondent is now the sole trustee of the will. It has rightly adopted an entirely neutral attitude on this appeal. The second respondent represents the estate of the testator's widow who died on 4th April 1968.

On 15th July 1970 an originating summons was issued in the Supreme Court of the Bahamas for the determination of a number of questions which had arisen in the administration of the trusts of the will including questions whether the bequests in paragraphs (h), (j) and (l) of clause 15 of the will were valid charitable gifts or failed and so fell into the residuary trust declared by paragraph (t) substituted by the third codicil. At the hearing before Blake C.J. it was determined that the bequests in paragraphs (h) and (j) were good charitable gifts but that that in paragraph (l) failed and there has been no appeal against that part of his decision.

The primary question however was that of the validity of the residuary trust in the new paragraph (t) substituted by the third codicil. It was the contention of the second respondent that the gift contained in this paragraph, inasmuch as it embraced purposes connected with the "welfare" as well as the "education" of Bahamian children and young people, was not a valid charitable gift and that accordingly the trusts of this paragraph failed and the funds subject to the trusts fell into the residuary gift contained in clause 16 of the will. That contention was accepted by Blake C.J. in a carefully considered judgment and his decision was upheld by the Court of Appeal. Before the Chief Justice the Attorney General had conceded that the broad principles of law relating to charities in the Bahamas were the same as the law of England but before the Court of Appeal that concession was withdrawn and it was sought to argue that the court was not bound to proceed upon the footing that the question was governed by the English authorities. That argument was, in the event, rejected and has not been revived before their Lordships' Board.

Thus the sole question on this appeal is one of the true construction of paragraph (t) and it is common ground between the parties that if the trusts declared in this paragraph were trusts solely for the "welfare" of Bahamian children and young persons they would not, as the authorities stand, be valid charitable trusts. It follows that if, as both the Chief Justice and the Court of Appeal held, the words "education and welfare" in the paragraph are to be construed disjunctively (i.e. as embracing two distinct purposes) this appeal must necessarily fail, since the fund will then be capable of being applied in perpetuity to purposes some of which may be non-charitable. It is, however, Mr. Newman's contention

on behalf of the appellant that, reading the will and codicils as a whole, the true construction of the paragraph is one which involves reading the word "and" in its conjunctive sense, that is to say, that the only purposes for which the trust moneys are authorised to be disbursed by the paragraph are purposes which are not merely for the welfare of Bahamian children and young persons but are also educational. To put it another way the word "education" limits the word "welfare" and there is only one overall purpose of the trust and that is the purpose of educational welfare.

In approaching the question it is helpful to bear in mind the analysis of Sargant J. in *Re Eades* [1920] 2 Ch. 353. He was there concerned to decide whether a gift for "religious, charitable and philanthropic objects" constituted a good charitable bequest. In the course of his judgment, after observing that there were only two possible constructions (that is to say, either that the objects must possess all three characteristics or that there were three distinct, but possibly overlapping, characteristics the possession of any one of which would qualify an object for selection as a proper object of the trusts) he observed at page 356:-

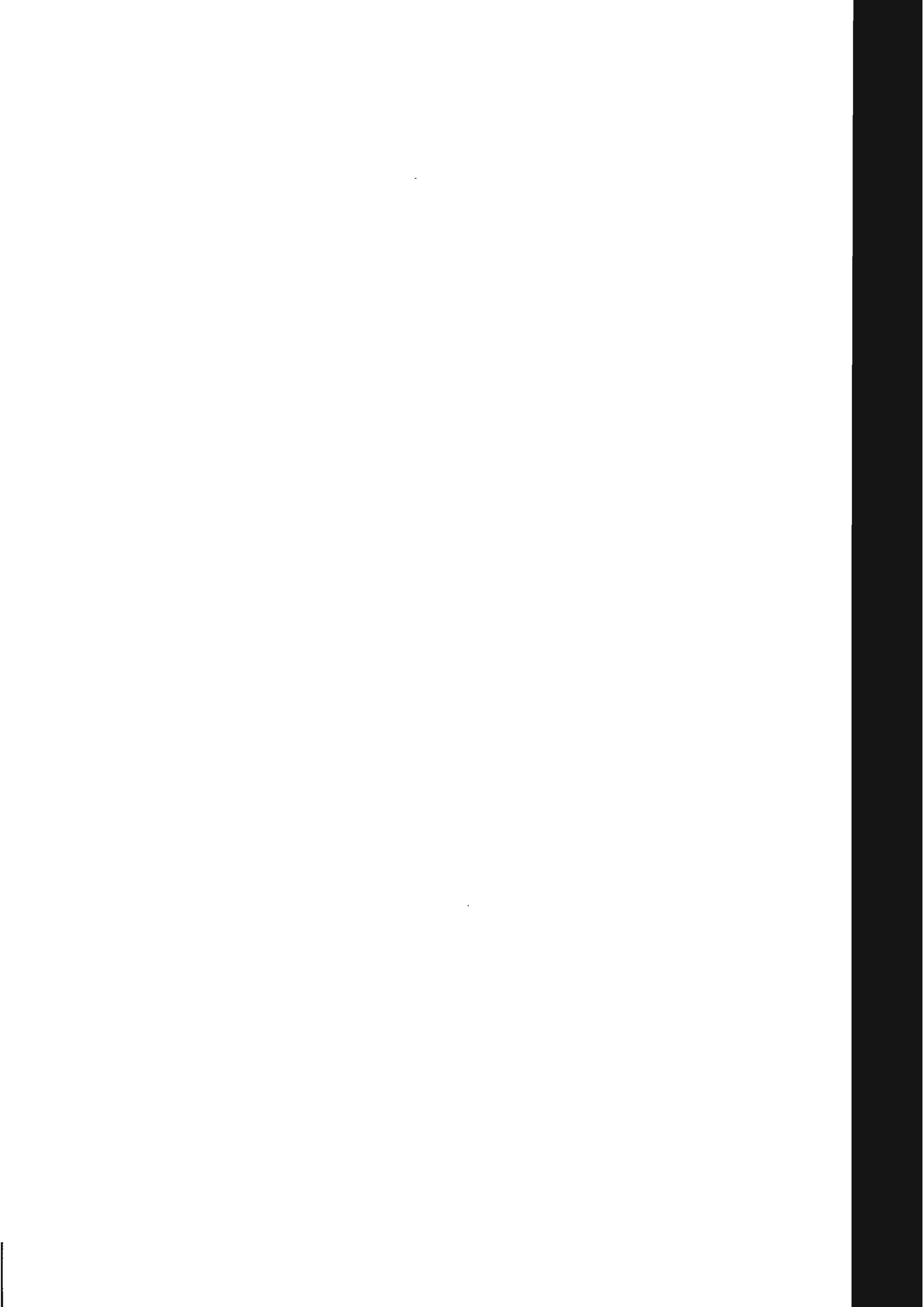
> "Such a construction as the second is sometimes referred to as a disjunctive construction, and as involving the change of the word 'and' into 'or'. This is a short and compendious way of expressing the result of the construction, but I doubt whether it indicates accurately the mental conception by which the result is reached. That conception is one, I think, which regards the word 'and' as used conjunctively and by way of addition, for the purpose of enlarging the number of objects within the area of selection; and it does not appear to be a false mental conception, or one really at variance with the ordinary use of language, merely because it involves in the result that the qualifications for selection are alternative or disjunctive.
>
> Further, the greater the number of the qualifications or characteristics enumerated, the more probable, as it seems to me, is a construction which regards them as multiplying the kinds or classes of objects within the area of selection, rather than as multiplying the number of qualifications to be complied with, and so diminishing the objects within the area of selection."

It would be a work of supererogation to rehearse yet again the numerous reported decisions in which testators have used somewhat similar, although not identical, expressions. They have been fully and

helpfully reviewed in the judgment of Blake C.J. and in the judgments in the Court of Appeal and have been drawn to their Lordships' attention by Mr. Newman in the course of his able argument. In the end, however, the question is one of the construction of the particular dispositions of this testator and references to the construction placed upon different expressions in the wills of other testators, whilst perhaps useful as guidelines, are necessarily of limited assistance.

It is true that in the instant case there are two and only two objects specified, so that, to that extent, it is the easier to adopt the conjunctive construction for which Mr. Newman contends. But there are a number of formidable difficulties about this, and not least that it is not easy to imagine a purpose connected with the education of a child which is not also a purpose for the child's welfare. Thus if "welfare" is to be given any separate meaning at all it must be something different from and wider than mere education, for otherwise the word becomes otiose. Mr. Newman has sought to meet this by the submission that, in the context of the paragraph as a whole, "welfare" is used in the sense of "welfare ancillary to education". But "welfare" is a word of the widest import and when used in connection with a class of "children and young people" generally is capable of embracing almost anything which would lead to the enhancement of the quality of life of any member of the class. Mr. Newman's difficulty then is to find any context, either in the paragraph itself or in other parts of the will, for subordinating this wide concept to the object of education. Despite Mr. Newman's helpful argument, their Lordships have been unable to discern any context from which the inference of subordination can be drawn and that difficulty would remain even if the trustees had been directed simply to apply the income for "education and welfare". The difficulty is, however, compounded by the additional and not unimportant words "for any purposes for and/or connected with", for, if Mr. Newman were otherwise able to link the word "welfare" with the preceding word "education" in a conjunctive sense, it would then be impossible to find a purpose which was connected with "welfare" (used in this ancillary sense) which was not also "connected with" education, so that the reference to "welfare" would again become otiose.

The point is not one which is susceptible of a great deal of elaboration and their Lordships need say no more than that they agree with Blake C.J. and the Court of Appeal that the phrase "education and welfare" in this will inevitably falls to be construed disjunctively. It follows that, for the reasons which were fully explored in the judgments in the courts below, and as is now conceded on the



footing of a disjunctive construction, the trusts in paragraph (t) do not constitute valid charitable trusts and that, accordingly, the residue of the Trust Estate falls into the residuary gift in clause 16 of the will. In the Court of Appeal, the costs of all parties were ordered to be taxed on the common fund basis and paid out of the estate and it has been agreed between the parties that the costs of both parties before their Lordships' Board should be similarly taxed and paid.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. The costs of the appellant and the respondents before their Lordships' Board shall be taxed and paid in the manner so agreed.