

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals (1) Isabella Dilworth (widow) and others v. The Commissioner for Land and Income Tax, and (2) Isabella Dilworth (widow) and others v. The Commissioner of Stamps, from the Court of Appeal of New Zealand; delivered 26th November 1898.

Present :

LORD WATSON.

LORD HOBHOUSE.

LORD DAVEY.

[*Delivered by Lord Watson.*]

The Appellants, in both these cases, are the testamentary trustees and executors of the late James Dilworth of Remuera, near Auckland, in the Colony of New Zealand, who died on the 23rd day of December 1894. Before the commencement of either of the suits in which these appeals are taken, the Appellants had obtained probate and had carried out the whole directions of the testator, with the single exception of his instructions with regard to disposal of the residue of his estate, real and personal.

The testator, after making due provision for all persons whom he conceived to have a moral claim upon him, declared his intention of establishing an Institution, to be called the Dilworth Ulster Institute, with the object of affording to boys of the classes therein-after mentioned such maintenance education and training as would enable them to become good and

useful members of society; and for that purpose he bequeathed to the Appellants the whole of the residue of his real and personal estate which he had power to dispose of by will. At the time of the testator's death, the residue of his trust estate, both real and personal, was certified by the Commissioner of Stamps to be of the value of 100,655*l.* 2*s.* 3*d.*

The testator directed the Appellants to reserve not less than twenty-five acres of his land at Remuera, known as Graham's Hill, for the purpose of erecting suitable buildings for the Dilworth Ulster Institute; and also, in the event of their resolving to establish an industrial branch of the Institute at Waitakerei, to reserve sufficient land for that purpose. Instructions were given to the Appellants, that, in order to prevent the net income derivable from the residue falling below the sum of 5,000*l.* per annum, they should accumulate and invest such sum of money as they might think necessary, before proceeding to erect any buildings for the purposes of the Institute. And they were directed that, whenever the net income of the residue amounted to not less than 5,000*l.* per annum, and the money in their hands amounted to not less than 10,000*l.* over and above any sums which they had invested for the purpose of securing the net income of 5,000*l.*, they should proceed to erect a substantial building upon the testator's lands at Auckland known as Graham's Hill.

The testator further directed that, as soon as the buildings at Auckland were completed, and all liabilities incurred in the erection thereof discharged, the Appellants should select so many boys of sound bodily and mental health, being orphans or sons of persons of good character and of any race, as in the opinion of the Appellants that portion of the income available for the

purpose will be sufficient from time to time to support, train and educate. All boys selected must be either destitute orphans or the children of persons in straitened circumstances resident in the provincial district of Auckland or in the province of Ulster in Ireland; and, *ceteris paribus*, a preference is to be given to boys resident in or near the town of Dungannon in the province of Ulster. Boys selected from the Provincial district of Auckland must not be under three nor above five years of age, and those selected in the province of Ulster must be between five and eight years of age. The Ulster boys are to be selected by the minister for the time being of a Church in Dungannon in connection with the General Synod of the Anglican Church called the Church of Ireland, and failing his nomination by the Appellants themselves. Provision is made for supplying the Ulster boys with an outfit, and forwarding them to the Dilworth Ulster Institute at Auckland. No pupil is to remain in the Institute after he has attained the age of fifteen, but in the case of pupils distinguished by their industry and natural talents, the Appellants are empowered to make arrangements for their maintenance and the prosecution of their studies, at any University in New Zealand, or in Dublin, or in or near the City of Belfast in Ireland, and to allow such pupils in the meantime to remain resident in the Institute.

All boys selected as pupils of the Institute are to be maintained in the buildings of the Institute, are to be clothed in a suitable uniform dress, are to be brought up and educated in the tenets of the Church of the Province of New Zealand commonly called the Church of England, and are to be instructed in such branches of learning and industry as

shall be considered likely to make them good and useful members of society. It is expressly declared that no person shall be appointed chaplain, secretary, master, teacher or other officer of the Institute, until he shall have signed a declaration that he is a member of the Church of the Province of New Zealand commonly called the Church of England, and that he accepts and maintains the principles of the Reformation accomplished in the Church of England in the sixteenth century of the Christian era.

The Appellants have hitherto been accumulating the income of the residue, in accordance with the directions of the testator; and they have not yet commenced to erect the buildings of the Dilworth Ulster Institute.

So far as hitherto stated, the facts are common to both appeals; but the questions raised by these appeals depend upon the construction of different Acts of the Legislature of New Zealand, and must now be separately considered.

First Appeal.

Under the provisions of "The Deceased Persons Estates Duties Act 1881," the Commissioner of Stamps for the Colony, who is the Respondent in this appeal, assessed the death duty payable by the Appellants in respect of the residue of the testator's estate, at the sum of 12,735*l.* 13*s.* 6*d.* The Appellants declined to pay, upon the ground that they were exempted from liability by "The Charitable Gifts Duties Exemption Act 1883"; but the Respondent held that they were not entitled to exemption, inasmuch as the bequest to the Ulster Institute is a gift to a sect or class, and is not a devise or bequest to a public institution, or a charitable bequest within the meaning of the Act. A case

was accordingly prepared for the opinion of the Supreme Court of the Colony. The questions submitted to the Court were:—

I. Is the bequest to the Dilworth Ulster Institute so made as aforesaid exempt from the payment of duty chargeable under “The Deceased Persons Estates “Duties Act 1881” and its amendments?

II. What refund of duty (if any) are the said executors entitled to demand in respect of said assessment?

The case was first heard before Mr. Justice Connolly, who, on the 18th December 1895, answered both these questions in the negative. On the 27th April 1896, his judgment was affirmed by the Court of Appeal, who unanimously held that the testator’s bequest of residue did not come within the exemption provided by the Act of 1883.

The controversy between the parties turns upon the construction of two clauses in “The “Charitable Gifts Duties Exemption Act 1883,” which are in these terms:—

Section 2. “In this Act, the term ‘charitable ‘purposes’ includes devises, bequests and “legacies of real or personal property respectively “of whatever description to public institutions “such as libraries, museums, institutions for “the promotion of science and art, colleges “and schools, or to hospitals, orphan, lunatic, or “benevolent asylums, dispensaries.”

Section 3. “Notwithstanding anything contained in ‘The Deceased Persons Estates “‘Duties Act, 1881,’ or in any other Act of a “like character, no duty whatsoever shall be “payable in respect of any charitable devise or “bequest.”

These two clauses form the substance of the exempting Act of 1883, which contains only four sections. Section 1 relates to the short title of the Act, and Section 4 to the date on and after which its provisions were to be operative.

Section 3, which enacts exemption from the duty imposed by "The Deceased Persons Estates Act 1881," or by any Act of a like character, is expressed in very wide and general terms. It provides that no duty whatsoever shall be payable "in respect of any charitable devise or bequest." The only test of immunity required by that enactment, when considered *per se*, is that the devise or bequest shall be of a "charitable" nature. It does not appear to their Lordships to admit of reasonable doubt that the gift of residue to the Ulster institute is charitable, in the popular sense of that word. It provides for the maintenance and education of boys who are orphans, or the sons of parents who are in straitened circumstances; and it does not, in their Lordships' opinion, derogate from the charitable nature of the gift, that the institution is to be managed by persons of a particular religious persuasion, or that its inmates are to be instructed in the tenets of the same sect. But, in the argument addressed to their Lordships, a question was raised in regard to the true legal construction of Section 2, and to what extent, if any, its provisions qualify the enactments of the succeeding clause.

Section 2 is, beyond all question, an interpretation clause, and must have been intended by the Legislature to be taken into account in construing the expression "charitable devise or bequest," as it occurs in Section 3. It is not said in terms that "charitable bequest" shall mean one or other of the things which are

enumerated, but that it shall "include" them. The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the Statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word "include" is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include," and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions.

Their Lordships have come to the conclusion that it is not necessary for the decision of this Appeal, to determine in which of these senses the word "include" is used in Section 2. They are willing to assume, and will accordingly assume that the word was meant to introduce an exhaustive definition, and that the provisions of that clause must govern the meaning of the words "any charitable devise or bequest" which are the subjects of direct exemption in Section 3. The objects defined in Section 2 are charitable in the legal sense of the word; but they do not comprehend all of the objects which would naturally fall under the general definition of "charitable."

Upon the assumption now made, the crucial question in this appeal comes to be,—whether the gift of residue to the Ulster Institute is a

charitable bequest within the meaning of the second clause of the Act of 1883?

The second clause enumerates two classes of institutions, a legacy or devise of real or personal property in whose favour will constitute a charitable bequest, not chargeable under the Death Duties Act of 1881. The first class of objects must be of a public and not a private character, and consist of "public institutions" such as libraries, museums, institutions for the "promotion of science and art, colleges and "schools." The second class of objects is introduced by the alternative "or," and consists of "hospitals," orphan, lunatic, or benevolent "asylums, dispensaries." The word public, which characterises all the objects of the first class, is not repeated in or connected with the second class; and it appears to their Lordships that it was not meant to apply to any of the objects enumerated in that class.

In considering whether the Ulster Institute is within the second class of objects enumerated in Section 2, their Lordships therefore think it is immaterial whether the institution, when duly completed and administered according to the testators directions will be public or private. One thing is tolerably certain, that it will not be a dispensary, the main purpose of which is the distribution of medicine. "Hospital" is a word of wider and more variable meaning, and primarily signifies a place built for the reception of the sick or the support of the aged or infirm poor. It has been used in Great Britain, in some instances, to denote an institution in which poor children are fed and educated. But that is not the ordinary meaning of the word; and, in the present case it is necessary to compare it with the other expressions which

occur in Section 2. "Schools" are enumerated in the first class; and, if it were plain that the Ulster Institute, when in operation, will be a public school, there would be an end of the present question. On the other hand, if the Institute will be a private school, and is so excluded from the first class, there can, in their Lordships' opinion, be no presumption that it was meant to be included in the second class, under the general description of an hospital. It would, in their opinion, require more definite language in order to produce that result. The word "Asylum," which is the only other term of importance occurring in the second enumeration, is qualified by the expressions, which are used as adjectives, "orphan, lunatic, or benevolent." The word "Asylum," according to its original derivation, and in its widest meaning, simply signifies a refuge, a place of retreat and security. In its English acceptance, the word is most commonly used to denote an establishment for the detention and cure of persons suffering from mental disease, and also a place for the reception and up-bringing of destitute orphans. Although the word might be loosely applied to a night refuge for the homeless, or to any similar institution, there does not seem to be any warrant for describing the Ulster Institute as a "benevolent asylum." Then the institute has no relation to the insane; and the benefits which it confers are not confined to the children of deceased parents. The fact that some of its inmates are to be orphans will not impart to the institution generally the character of an orphan asylum.

It does not appear to their Lordships to admit of doubt that the Ulster Institute is in its essential character a school for the education of boys between the ages of 3 and 15, and that

it must, at all events, be regarded as an institution of a similar nature to a college or school. But the right to exemption from death duty depends, in their view, upon the Institute being a "public" institution within the meaning of the first branch of the enumeration in Section 2. It was plainly the intention of the Legislature to exclude from the benefit of the exemption bequests to scholastic institutions which are not public, or in other words, which are of a private character; but the context of the Act does not define, and affords no means of determining what, according to the general understanding of the Colony, constitutes the essential difference between a public and a private school. As these words are used in England, there would be no difficulty in pointing out some schools which are public, and others which are unmistakably private; but it might be troublesome to explain the reason why some schools are called public, whilst others, not very different in their character and circumstances are known as private. It is in regard to the latter class that the difficulty arises of correct description, such as occurs here.

Schools founded or maintained by the community, and managed by its representatives, are clearly public, while schools conducted by individuals, for their own emolument, are as clearly private. All schools, whether public or private in the strictest sense of the words, which have a reasonably large attendance of scholars, have one feature in common. They give instruction to the public, or in other words to the children of different sections of the public; and the character of the school, as public or private, must depend not upon the scholars to whom education is given, but upon the terms on which and the circumstances in which education is given.

The Ulster Institute is designed to give free maintenance, clothing and education to the children of a certain section of the public whose parents are resident in the Colony of New Zealand. In their Lordships' opinion the character of the institution is not materially altered either by the circumstance that the remainder of the beneficiaries are to be selected in another country, and thence conveyed to the institute at Auckland, or by the circumstance that all of the beneficiaries are to be educated according to the religious tenets of a particular church. If the institute be, within the meaning of the Act of 1883, a public institution such as a school, there is no provision in that Act which can deprive it of the benefit of the exemption, in respect of either of these circumstances.

Their Lordships have come to the conclusion, not without hesitation, owing to the view taken by the courts below, that the Ulster Institute, as designed by its founder, does answer the description of a public institution such as a school. It appears to them that, if the testator had directed his trustees forthwith to hand over the administration and management of the Ulster Institute to a public body in New Zealand, or if he had made his bequest directly to such public body for the same purposes, the institute would necessarily have been regarded as a public and not as a private institution. What he has directed to be done is in substance the same thing. His trustees to whom he has delegated the duty of building the institute and of superintending its administration, are his trustees in this sense only that he appointed them. They have no personal interest in the residue, which they hold only for behoof of those children, members of the public, whom he has directed them from time to time to select as the beneficiaries under the trust. The bequest is an educational endow-

ment in perpetuity, and the beneficial interest in it is not vested in any private person, but belongs inalienably to the public. Such being the character of the charity founded by the testator, their Lordships do not think that the inmates of the Dilworth Ulster Institute could with propriety be described as the recipients of private education.

Second Appeal.

In this case, the Appellants complain of an assessment of 557*l.* 9*s.* 8*d.*, imposed by the Respondent, who is Commissioner of the Colony for Land and Income Tax, upon the income and profits of the land and personalty forming the residue of the testator's estate, during the year 1895-96. The assessment was made under "The Land and Income Assessment Act, 1891," which repealed the provisions of "The Property Assessment Act, 1885," and it was objected to by the Appellants, upon the ground that the income derived by them from the residue was expressly exempted from duty by Section 16 of the Act of 1891. The Respondent disallowed the objection; and a Special Case was stated by the parties for the opinion of the Court of Appeal, in which the only question submitted was, in substance:— Whether the Appellants, as trustees of Mr. Dilworth's will, are liable to pay to the Respondent "Land Tax upon the lands vested in them as aforesaid?" The case does not raise any question as to income arising from estate other than lands. It was heard before the Court of Appeal, who, on the 29th October 1896, unanimously answered the question submitted to them in the affirmative, and gave the Respondent judgment for the amount of duty which he claimed.

In the case lodged by them with a view to this Appeal, the Appellants rely upon a clause in "The Land and Income Assessment Act Amendment

“ Act 1892,” creating additional exemption, which is in the following terms :—“ Section 3 (4). All mortgages held and all income received or derived by or on behalf of any public charitable institution whether formed under ‘ The Hospitals and Charitable Institutions Act, 1885,’ or any other Act for the time being in force, or howsoever formed, if carried on for any public charitable purpose, and not for any gain or profit.” Their Lordships are of opinion that these provisions, whatever be their effect, must be taken into account in construing the principal Act of 1891; because the assessment in question was imposed in virtue of that Act, as amended by the Statute of 1892.

The enactments with respect to exemption from duty, in so far as they have any bearing upon the present case, are contained in Sub-section (1) of Section 16 of the principal Act, which is in these terms :—

“ 16. Land owned and income derived or received, as herein-after mentioned, shall be exempt from taxation under this Act, subject, however, to the provisions hereof :—

“ (1.) All land owned by any person or body, corporate or unincorporate, and used or occupied by such person or body solely for any of the purposes herein-after mentioned :—

“ (a) A place of worship or a place of residence for the clergy or ministers of any religious body.

“ (b) Any public school established under ‘ The Education Act 1877,’ and all lands and buildings used for any school which is not carried on exclusively for pecuniary gain or profit, but so that not more than 15 acres be used or occupied for the purposes of any one such school.

- “(c) The site of any university, or college or
 “ school, incorporate by any Act or
 “ Ordinance, or the site of a public
 “ library, athenæum, or mechanics
 “ institute, or any public museum, or
 “ any school of mines.
- “(d) A public cemetery or burial ground.
- “(e) The ground or place of meeting for any
 “ Agricultural Society being the pro-
 “ perty of the society.
- “(f) A place of meeting for the purposes of
 “ a friendly society, or of a masonic
 “ lodge, or of any building society
 “ registered under the Acts in force
 “ relating to building societies.
- “(g) Public charitable institutions constituted
 “ under ‘The Hospitals and Charitable
 “ ‘Institutions Act 1885,’ and chari-
 “ table institutions not carried on for
 “ gain or profit.
- “(h) Public gardens, domains, or recreation
 “ or other public reserves not occupied
 “ by a tenant, and all public roads or
 “ streets.
- “(i) Owned and occupied by Maoris only,
 “ and not leased to or occupied by
 “ any person other than the Maori
 “ owner.
- “(j) Any public railway, including the land
 “ occupied and used as permanent way,
 “ and for yards, stations, sheds, and all
 “ buildings used for the purposes of
 “ traffic only, but not further or
 “ otherwise.
- “No lands vested in Her Majesty or in the
 “ New Zealand Railway Commissioner, nor any
 “ land vested in any corporate or other body for
 “ the purposes of, or in relation to, local self-

“ government, or for any educational, or public
 “ charitable purpose, shall be liable to taxation
 “ under this Act, except when there is a tenant
 “ or occupier liable to pay such tax.”

The sub-section which has just been quoted creates certain exemptions from the taxability of lands and buildings. Its sub-sub-sections, which are denoted alphabetically, only exempt such lands or buildings as are actually used or occupied for one or other of the purposes therein specified. Thus, in the case of any school which is not carried on exclusively for pecuniary gain or profit (*f*), or of a charitable institution not carried on for gain or profit (*g*), the exemption obviously has no application, except to an institution which has been erected and is in actual operation. It is therefore unnecessary to consider whether, if the Ulster Institute had been completed according to the testator's directions, exemption could have been claimed for it under one or other of these heads. In that case the claim would not have extended beyond the building and its site; and if it were held to be a school within the meaning of Sub-sub-section (*b*), not more than 15 acres used and occupied for the purposes of the institute would be entitled to exemption.

The concluding enactments of Sub-section (1) have a much wider scope. They expressly exempt lands vested in the Crown, and all lands vested in any corporate or other body for the purposes of, or in relation to, “ local self-govern-
 “ ment, or for any public educational or public
 “ charitable purpose.” The trustees of the late Mr. Dilworth, although not a public body, are within the alternative of “ any other body,” and they are vested for certain purposes with the

residue of his real and personal estate. The only question which arises under this part of the subsection, is, whether the Appellants are vested with the residue, so far as consisting of lands, either for a public educational purpose, or for a public charitable purpose. It would be difficult to arrive at the conclusion that an institution like the Ulster Institute, which is unquestionably in the nature of a charity, would not serve any public charitable purpose, seeing that the objects of the charity, who are to be selected from the public have a vested beneficial interest in perpetuity. And if it were held to be in its character a public charity, the real estate forming part of the residue would be exempted from taxation, although it has not yet been applied to the objects for which it is held by the Appellants.

Section 3 of the Amendment Act of 1893, which is incorporated with, and must be read as part of the principal Act, appears to their Lordships, to be sufficient to entitle the Appellants to the exemption which they claim in this appeal. They are not incorporated under "The Hospitals and Charitable Institutions Act 1885," or under any other Act; but the exemption extends to the income derived or received by any and every other body, whether corporate or not, which performs the same charitable function toward the public, "not for any gain or profit."

Their Lordships will humbly advise Her Majesty, in both these cases, to reverse the judgment of the Supreme Court of New Zealand; in the First Appeal, to declare that the Appellants, as trustees of the will of the testator, are not liable to pay to the Respondent death duty upon the lands vested in them as part of the residue of the testator's estate; to remit to the Court below to determine what refund of

duty (if any) the Appellants are entitled to demand and receive from the Respondent, the Commissioner of Stamps; and, in the Second Appeal, to answer the question submitted by the special case in the negative. In each case the Respondent must pay to the Appellants their costs of the Appeal.
