MOGGRIDGE v THACKWELL: DEFINING THE NATURE OF THE COURTS' SCHEME-MAKING POWER

John Picton[1]

> 'But thousands die, without or this or that,
> Die, and endow a College or a Cat.
> To some, indeed, Heav'n grants the happier fate,
> T'enrich a bastard, or a son they hate.'[2]

Introduction

One privilege of charity is that gifts for indefinite objects do not automatically lapse. Even a gift for the broadest purposes, such as 'the relief of poverty', or the 'advancement of education' will be held valid. This is because where such general gifts are made it is possible to prepare a scheme, altering the trust so as to define new, and workable, charitable objects. The decision in *Moggridge v Thackwell*[3] (hereafter referred to as *Moggridge*) sets out the legal basis for that far-reaching power.

In the case, following a review of the authorities, Lord Eldon gave judgement upon both the scope of the court's scheme-making jurisdiction, and the rationale for such schemes. The decision represents a hard-fought compromise between established precedent and the judge's express policy concern that next-of-kin should not be readily disinherited by the courts. In turn, this compromise has left a difficult conceptual legacy persisting until the present day.

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2 Alexander Pope, *Moral Essays, 'Epistle to Bathurst'* lines 95-98, referenced by counsel for the Solicitor General in *Moggridge v Thackwell* (1803) 32 ER 15, 22.

3 (1803) 32 ER 15.

The Decision

By a will dated 1779, a wealthy testatrix named Ann Cam provided for a large number of friends and relations. In view of the number of specific bequests, it must have been a very lengthy document. The testatrix was also charitably minded. Her will included a number of legacies to charitable institutions, and a large gift of residue, valued on death at £50000. It was the gift of residue that caused the litigation. She stated:[4]

> And I give the rest and residue of my personal estate unto James Vaston, of Clapton, Middlesex, gentleman, his executors and administrators; desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters … .

Unfortunately Vaston died before the testatrix, and so it was not possible to effect the gift as she had intended it. This problem caused the litigation. Hoping to benefit under the rules of intestacy, the first cousin of the testatrix, Thomas Walker, claimed that the residual gift had lapsed and should pass to him.

Her cousin had been unlucky. At the time the will was written, the testatrix had held entailed estates valued at £12000. If she had not suffered a recovery, then Thomas Walker would have received the title. But before her death, the testatrix had barred the entail, and so he received nothing. The testatrix, who had included a great many other people in her will, had not intended to disinherit him completely. Although she failed to do so, evidence adduced to the court showed that she had intended to leave him a sum of money in lieu of the lost estates.

At first instance, the cousin's claim was rejected. The court ordered that the gift be kept in charity subject to a scheme for its administration. Leave to appeal was granted, and after a period of nine years, the case came before Lord Eldon. That judge took the opportunity to review the authorities and shape forever the law of charitable schemes.

On appeal, counsel for the next-of-kin again argued that there had been a lapse. It was said that the testatrix had a 'personal confidence' in the nominated trustee. On this reasoning, Vaston was the only person who could lawfully carry out the testatrix's charitable direction. Delegating the discretion to another body would amount to creating an alternative charity that the testatrix had never intended.

Lord Eldon decided the case on the basis of two conceptually important rules. First, he held that only the court had jurisdiction to effect a scheme where the gift

4 ibid 16.

was interposed with trust, and that only the Crown had power to effect a scheme in cases where no trust existed. Second, he found that while the two jurisdictions were distinct, charitable and crown schemes shared the same rationale. Their function was to effect the general intention of the otherwise frustrated charitable donor.

On this basis, owing to the existence of a trust, Lord Eldon found that he had jurisdiction to execute a scheme. He further found that, while Vaston's trusteeship was the mode of the gift, the testatrix's general intention to benefit poor clergymen could be executed by the court independent from that mode. Consequently the judge directed that there should be a scheme for the administration of that general gift. The testatrix's choice of trustee was not essential.

Jurisdiction Defined

Moggridge is now best known for its definition of the Crown and Courts' respective scheme making powers. In the case, Lord Eldon stated:[5]

> … where there is a general indefinite purpose, not fixing itself upon any object … the disposition is in the King by Sign Manual: but where the execution is to be by a trustee with general or some objects pointed out, there the Court will take the administration of the trust.

This has established a jurisdictional rule, persisting until the present day. The Crown has jurisdiction in absence of a trust, and the courts have jurisdiction where a trust is interposed in the will. In turn, that rule has impacted upon the development of charity law in two ways. First, it has resulted in a significant restriction on Crown influence in charity, and second, it has equipped the courts with a powerful and evolving scheme-making power.

a. The Crown restrained

Prerogative scheme-making is an ancient power derived from the Crown's role as *parens patriae* (parent of the nation). It flows from the feudal rationale that since each subject owes a duty of ligeance to the Crown, then as a quid pro quo, the monarch will undertake to look after the welfare of his subjects.[6] Alongside children, and the infirm, the objects of charity were thought to be in need of special Crown protection. It was for this reason that the King had a far-reaching

5 ibid 32.

6 See *Calvin's Case* (1608) 77 ER 377, 382, and more generally, Kathryn Chan, 'The Role of the Attorney General in Charity Proceedings in England and Wales' (2010) 89 Canadian Bar Review 373, 375.

discretionary power to dispose of charitable gifts by use of the Royal Sign Manual (the signature of the sovereign).

Yet following *Moggridge*, the Crown power has slipped into relative legal obscurity. The large majority of prerogative cases need not involve the courts at all, and for this reason, judicial consideration of the subject is very rare. Where the prerogative jurisdiction is considered in the courts, it is often incidental to the main issue in a case. So for example in *Re Smith*,[7] a testator left funds 'unto my country England'. The cause of litigation was that it was unclear whether such a gift was validly charitable. The Court of Appeal found that is was a valid gift without the interposition of a trust, 'for the benefit of the testator's countrymen',[8] and then referred the case to the Crown.

The Crown power is now used most frequently in one specific circumstance. It is commonly employed where a testator nominates a charity in his will, but it transpires after death that the charitable legatee has never existed. Cases are infrequent, but the last court case to consider the prerogative jurisdiction, decided in 1960, concerned exactly that point. In *Re Bennett*,[9] a testatrix had left a 25% share of residue, 'to the Hospital for Incurable Women, Brompton Road, London'. But the organisation turned out to have never existed. Vaisey J applied the rule in *Moggridge*, and found that if a trust was in existence it would fall to him to direct the gift by way of a scheme, but the absence of a trust meant that the gift should be referred to the Crown. For this reason, the judge referred the case to the Attorney General.

Within this restricted context, the prerogative power has also become bureaucratised, losing its direct link with the 'hand of the Monarch'. The ancient right has been delegated to the Crown's Law Officers. The Attorney General has been able to direct prerogative schemes since 1986,[10] and pursuant to section 1 of the Law Officers Act 1997, the power has also been extended to the Solicitor General.

Following *Moggridge*, the Crown power has also become restrained in a second respect. Prior to the case, prerogative schemes had been highly discretionary. So much so, that counsel for the next-of-kin submitted that the Crown might use its discretion in order to apply the residue to the next-of-kin. It was stated:[11]

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7 *Re Smith* [1932] 1 Ch 153.

8 ibid 174.

9 *Re Bennett* [1960] Ch 18.

10 As noted in *Report of the Charity Commission for England and Wales* (HMSO 1989) [38].

11 *Moggridge* (n 3) 19.

> If the disposition is in the Master's Office, he will hold himself bound to give a great part to clergymen, to the exclusion of the relations; who will fare better under the Crown's disposition of this Charity.

This wide discretion contrasted with the restrictive approach of the court. By the time of the case, it had already been established that where the court executed the scheme, it was bound to effect the gift 'as near as possible' to the testator's chosen objects. However in *Moggridge*, Lord Eldon brought the two powers into line, recommending that the Crown power be restrained. He held that, whatever the outcome of the case had been, *both* the court and the Crown would have executed the gift in favour of poor clergymen:[12]

> … whether this Court, or the King by Sign Manual, executes it, the constitution finds a trustee in the Court, or the King, to act in the one case as the Court would act; and, considering the King, Parens Patriæ , as one, who would act, exercising a discretion with reference to the intention.

Since *Moggridge*, the prerogative power has been used only in this restricted manner. Where the crown applies the gift to a new charitable object, it no longer follows its own discretionary preferences. Instead, it will apply the gift 'as near as possible' to the testator's intended purposes.[13]

b. The court empowered

In contrast to the restricted role of the Crown, the Court's scheme-making jurisdiction over trusts has emerged as a far-reaching and evolving power. In the centuries following the case, the courts have been able to develop and shape the law.

By way of illustration, the logic in *Moggridge* has been transferred onto fresh terrain. It has been applied in the difficult legal circumstance where a testator nominates a charitable organisation in his will, but it transpires after death that the organisation has closed.

While such cases involve an institutional legatee, in essence they contain the same legal problem that confronted Lord Eldon in *Moggridge*. Regardless of whether an institution or a person is nominated, in both contexts a chosen legatee is unable to effect the testator's gift. And so *Moggridge* and the more contemporary institutional legatee cases share an analogous logic. In both instances, courts are prepared to disassociate legatees from the purposes that they have been nominated to administer.

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12 ibid 34.

13 See Alison MacLennan, 'Moggridge v Thackwell Revisited' (2006) 6 PCB 387, 390.

For example, in *Re Finger's Will Trust*,[14] a gift was left to the unincorporated 'Radium Commission', an overseeing body for the distribution and use of radium in health organisations which had been closed as a consequence of the National Health Service Act 1946. Despite the closure of the institutional legatee, Goff J was still able to find a gift for a general charitable object. The gift was held to be for the general purposes served by the closed Radium Commission. Similarly, in *Re Roberts*,[15] a testatrix had made a gift to an institution named the Sheffield Boys Working Home. By a clause of the institution's trust deed, the institution could be wound up, with funds being applied to alternative charities in the city. By the date of the testatrix's death, that clause had been exercised and the funds applied to another organisation. Yet despite the physical closure of the organisation, the court was able to find a gift the purposes served by the charity. There was no lapse. Wilberforce J held:[16]

> I think that the gift of the testatrix in her will was for the purposes of an institution, and it was not so exclusively tied up with a particular home physically located on the premises used by the home as to enable me to say that, when the trusts of the physical home ceased to exist, the charity ended.

These 'institutional legatee' cases owe *Moggridge* a conceptual debt. First, they directly reflect its logic. In such cases, the courts are able to look beyond the character of the nominated trustee, and disassociate that character from the broad purposes that the testator had intended to effect. This is the same conceptual approach that Lord Eldon employed in disassociating the gift for poor Clergymen from the personal character of Vaston.

Second, the contemporary courts have been able to develop their scheme-making power in this manner in the comfort of full jurisdiction. In this context, a large and innovative body of law has emerged, determining the circumstances and manner in which the court can direct a scheme.

Policy and Precedent

While Lord Eldon assumed control of a powerful jurisdiction for the courts, the judge was at best ambivalent to the strength of the courts' scheme-making role. *Moggridge* was decided in a very particular historical policy context. At that time, the courts had become increasingly sympathetic to the interests of the next-of-kin

14 *Re Finger's Will Trusts* [1972] Ch 286.

15 *Re Roberts* [1963] 1 WLR 406.

16 ibid 415.

vis-à-vis charity,[17] and insofar as it enabled the prevention of lapse, the scheme-making power ran directly counter to family interests.

Moggridge was decided in this policy context. While, the scheme-making power survived litigation which could have destroyed it, through restricting the power to those circumstances where the testator had a general intention, a limit was placed on the jurisdiction of the court.

a. The interests of the next-of-kin

Lord Eldon made no secret of his own inclination towards favouring the next-of-kin over charity. In a later judgement, *Mills v Farmer*,[18] he stated directly that *Moggridge*:

> … was determined entirely by the force of precedents, much against my inclination …

Counsels' arguments are reported extensively, and are strongly orientated towards policy issues. It was a clear concern of both counsel and the judge that execution of the gift in favour of poor clergymen would disappoint the next-of-kin.

In this regard, Lord Eldon directly expressed his anxiety that:[19]

> … I should be taking away from the natural expectations of those, whose disappointment I regret as much as any one…

Even the Solicitor General, arguing in favour of charity, conceded that some gifts at the expense of poor relations were 'destitute of all moral principle'.[20] Although he argued that in some circumstances, the next of kin might not be deserving of the gift. He submitted that: [21]

> It is at least doubtful, with reference to human happiness and misery, whether there are not many institutions, to which property may be applied as usefully as to enrich a spendthrift heir.

The thrust of the policy argument was against charity and in favour of protecting the interests the next-of-kin. On this point, it was submitted by counsel that if the testatrix had made a gift of land, then that gift would have been caught by Statute

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17 See Gareth Jones, 'History of the Law of Charity 1532-1827' (CUP 1969) 150.

18 (1815) 34 ER 597, 612.

19 *Moggridge* (n 3) 34.

20 ibid 22.

21 ibid.

of Mortmain and lapsed to the next of kin. Consequently, it was suggested that in an era where it was becoming increasingly common for individuals to hold other varieties of property, a similar policy of encouraging lapse should be extended to all types of charitable gift.[22]

This type of policy argument had been heard before in the century before the case was decided. For example in *Arnold v Attorney-General*,[23] where the court had to decide how to dispose of a surplus of income, it was argued in favour of the heirs that:[24]

> … it is pursuant to the Rules of Law and Equity, in all doubtful Cases, to adjudge in favour of the Heir at Law, and not to extend the general Words of a Will to enlarge a Charity beyond the Intent expressed, especially against a near Relation and Heir … .

And in *Attorney-General v Downing*[25] the court expressed suspicion of favouring charity over family on policy grounds:[26]

> The right of the heir at law seems to arise as naturally in this case as in any other; but instead of favouring him as in all other cases, the testator is made to disinherit him for a charity he never thought of …

In *Moggridge*, Lord Eldon explicitly acknowledged that his natural inclination was in favour of legal reform. Such a change would presumably have taken the form of a decision curtailing or abolishing the power of the court to effect general purpose gifts in preference to lapse. But in view of the force and considerable age of the precedents, the judge felt that it would be inappropriate for his lower court to change the law. And so Lord Eldon encouraged the next-of-kin to appeal to the House of Lords. He stated:[27]

> If this decision is wrong, and if this strange doctrine, as I should have called it, if I had sat here two centuries ago, that you can find a charitable purpose in a purpose that is to fail altogether, can be shaken, I can do no more than allow them to go to a higher tribunal … the experiment should be made without expence to the parties.

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22 ibid.

23 (1698) Shower 22, 1 ER 15.

24 ibid 23.

25 (1767) 1 Wilm 1.

26 ibid 32.

27 *Moggridge* (n 3) 15.

Insofar as the scheme-making power has persisted to the present day, Lord Eldon was unsuccessful in his entreaty. In modern times, policy concern for the next-of-kin is rare. Judges are very unlikely to take account of the interests of the family in their exercise of the scheme-making power.

In contemporary cases, courts have generally proceeded on the basis that the testator would not wish his family to receive the gift. This in turn has encouraged the courts to proactively exclude them. For example, in *Re Whittaker*,[28] a testator attempted to establish a cottage hospital on the Isle of Thanet. His plan proved impracticable, but Harman J did not permit a lapse. In reaching his decision, the judge took into account the fact there was no *positive* evidence in the will that the next-of-kin were intended to benefit. Mere silence in relation to the family members was sufficient for the judge to conclude that they should not receive the gift. More strikingly, in the New Zealand case *Re Collier*,[29] Hammond J stated that while the will had left the relatives disappointed, he could only use the term family 'advisedly',[30] with regards to the testatrix's niece and nephew, in view of their distant relation to the testatrix.

b. Testamentary intention

Lord Eldon was also troubled by a second policy concern. He was anxious not to take an unwarranted liberty with the testatrix's charitable intention. Counsel for the next-of-kin had pressed the point in argument, submitting that the court could not effect the general gift to 'poor clergymen' without creating an entirely new charity. It was said that the Court risked 'rewriting' the will for the testatrix.[31]

In response to this second policy issue, Lord Eldon affirmed, and clarified, a principle that had been developing over the preceding decades.[32] The judge found that the court's scheme-making power rested upon the *general intention* of the testatrix. In the context of an extensive review of the authorities, he stated what he thought to be a general rule:[33]

> … if the testator had manifested a general intention to give to charity, the failure of the particular mode, in which the charity is to be effectuated, shall not destroy the charity: but, if the substantial intention is charity, the

28 [1951] 2 TLR 955.

29 [1998] 1 NZLR 81.

30 ibid 86.

31 *Moggridge* (n 3) 21.

32 See for example *Corbyn v French* [1775-1802] All ER Rep 404.

33 *Moggridge* (n 3) 26.

> law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished.

That rule was then directly applied to testatrix's gift to Vaston. Lord Eldon said that on the facts of the case, he was prepared to execute:[34]

> … the general intention of this testatrix, who seems to have been saturated and satiated with the idea of charity, and yet not to have had mind enough herself to determine upon the particular objects … .

This concept of general intention meshes with Lord Eldon's policy concern; it has a restraining effect on the court. It is only in those circumstances where an abstract gift for charitable objects can be discerned that lapse will be prevented. In its absence, the next-of-kin will receive the property. The general intention requirement prevents courts from 'rewriting' wills in circumstances where the testator's intention will not allow it.

The general intention requirement did not develop solely in *Moggridge*. In the preceding decades, some prior cases had already started to construct it.[35] Yet Lord Eldon's influential exposition embedded the principle into the case law,[36] in no small part because he restated the concept twelve years later in *Mills v Farmer*.[37] In that case, a testator had left a gift for the clear purpose of 'promoting the gospel in foreign parts and for bringing up ministers'. But unfortunately, the will continued to state that property should be applied for other charitable purposes 'as I do intend to name hereafter'. However, no such purposes were named. In view of the fact that the testator had actually nominated general objects in his will, Lord Eldon was able to follow his earlier decision and direct a scheme. In doing so, he echoed the same 'general intention' rationale that he had employed in the earlier case:[38]

> In all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by the court, which will then supply the mode which alone was left deficient.

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34 *Moggridge* (n 3) 31.

35 *Corbyn v French* (n 32); *AG v Goulding* (1788) 2 Bro CC 428.

36 See *Re Lysaght* [1966] Ch 191.

37 *Mills v Farmer* 34 ER 597.

38 ibid 611.

On this understanding of the scheme-making jurisdiction, in order for lapse to be prevented, the testator must have intended to make a gift for a general charitable object. This requirement curtails the courts' scheme-making power. Such schemes are only directed where a general intention can be constructed. Otherwise, there will be a lapse.

Gifts for General Objects: An Uncertain Conceptual Legacy

In *Moggridge*, Lord Eldon based the rationale for testamentary schemes around the general intention of the testatrix. Conceptualised this way, he was able to disassociate Vaston's trusteeship from the objects that the trustee was intended to carry out. The judge was able to say that the testatrix had intended a broad gift for charitable objects.

Yet the case does not explain how such a general intention might be found. That task is left to later authorities. Over a long period, and in a large number of cases, tests have emerged to state the distinction between instances where the mode of gift is essential, and where the gift is in fact made for an abstract purpose. The most succinct is found in *Re Rymer,* where Lindley LJ stated:[39]

> … in coming to that conclusion you have to consider whether the mode of attaining the object is only machinery, or whether the mode is not the substance of the gift.

And in *Re Willis*, Younger LJ stated:[40]

> … if a testator has manifested a general intention to give to charity, whether in general terms or to charities of a defined character or quality, the failure of the particular mode in which the charitable intention is to be effectuated shall not imperil the charitable gift.

The best known test is found in *Re Wilson*.[41] In that case, a testator had left a gift to establish a school in his local area, but there was not enough money to carry out the plan. He had outlined a highly detailed vision, setting out the school syllabus and timetable in his will. In light of this mass of detail, Parker J was unwilling to find that the gift was for a general object and so the bequest was allowed to lapse.

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39 *Re Rymer* [1895] 1 Ch 19.

40 [1921] 1 Ch 44, 54.

41 [1913] 1 Ch 314.

In a now regularly cited statement of the law, the judge explained that a gift for a general object could only be found where:[42]

> It is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect. In that case, though it is impossible to carry out the precise directions, on ordinary principles the gift for the general charitable purpose will remain and be perfectly good, and the Court, by virtue of its administrative jurisdiction, can direct a scheme as to how it is to be carried out.

All these formulations closely reflect Lord Eldon's logic in *Moggridge*. The court can only administer a scheme where the testator was motivated by a general object. But however refined the test, it is subject to a conceptual problem. That is, every valid charitable bequest must in some way be connected to a general purpose.

A gift to establish a hospital is connected to the more general purpose of advancing health, or a gift to establish a soup kitchen is related to the relief of poverty. If there was no general object involved, there would be no valid gift. A clear example in the case law is *Re Royce*,[43] where Simonds J said of a gift to church choir:[44]

> … a gift simply for the musical services in a church is not charitable unless there is an underlying charitable intention. The charitable intention (and I use the word 'charitable' in its legal sense) in giving money for the purpose of musical services in a church is for the advancement of religion, and it is only the particular mode of carrying out that intent which is indicated when the testator directs that it is to be applied in the promotion of musical services.

So *in a sense*, all testamentary gifts can be described as being for 'general objects'. There is no conceptually clear method of discerning a general gift from a particular one. This difficulty is well illustrated by the Australian case *Attorney-General v Perpetual Trustee*.[45] A testatrix had left a gift of her farm named 'Milly

42 ibid 320-21.

43 *Re Royce* [1940] Ch 514.

44 ibid 521.

45 [1940] ALR 209.

Milly', and directed that the property should be used 'for a training farm for orphan lads being Australians'. Unfortunately the plan was not practicable. The homestead was too small, the plant machinery was too old-fashioned, and there was no prospect of generating enough income to support the charity.

The High Court of Australia was divided on the question of whether or not the testatrix had a general intention. The majority held that she did, even though the testatrix had made a gift of specific property. It was found that her real intention was the general object of training of orphan lads in farm pursuits.[46] However, in a dissenting judgement, Latham CJ considered that the court should not automatically find a general gift in such circumstances. He held:[47]

> In every case of a charitable gift there is a charitable intention. By a process of abstraction it is always possible to disengage that intention in the case of any particular gift and then to argue that the intention so discovered is an intention which is general and not particular in character.

The judges formed differing opinions concerning the circumstances in which a particular gift can be treated as a general one; the majority were prepared to find a gift for the training of orphans, but the minority were not. But in view of the inherently abstractable nature of particular charitable bequests, it must be suspected that this is an irresolvable difficulty. There can be no predictable way of knowing whether the testator had a general object in his mind when he made the gift.

Conclusion

Moggridge contains two fundamental contributions to the law. First, the case defines the relative jurisdictions of the Crown and court. Second, it develops the rule that in order for a gift to avoid a lapse, that gift must be intended as being for general charitable objects. Both contributions steered future decisions.

One consequence of the case's jurisdictional contribution is that the Crown's scheme-making power has largely slipped into obscurity. It has become bureaucratised, and applies only to a narrow range of cases. By way of contrast, the Courts' scheme-making power has expanded. The jurisdiction is used innovatively, and has been extended into new contexts, notably that of gifts on trust to expired organisations.

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46 ibid 230.

47 ibid 216.

The 'general intention' contribution must be understood in a particular policy context. The case was decided at a time when the interests of the next-of-kin were of great concern to the court. Paradoxically, while Lord Eldon achieved a secure judicial jurisdiction, his decision left the scheme-making power more restrained than it might otherwise have been. The judge's emphasis on 'general intention' means that, in testamentary cases, only those wills construed as being for general objects can avoid a lapse.

This is a conceptually ambiguous legacy. Over the centuries that have followed the case, no clear method of identifying general charitable intention has emerged in the law. Judges can reasonably disagree on whether such a general intention exists in almost any case. In turn, this inevitably inhibits the clear precedential development of the law.