decision. But if it was made, it would cover a situation where the plaintiff relied on the defendant to act carefully, the defendant being aware of this and taking it upon himself to do so, but nevertheless, acted so negligently that the plaintiff suffered financial loss. It seems that, since the law views protection against acts with more favour than protection against statements, that *Hedley Byrne*[29] is wide enough to cover this anyway. Probably it is only a matter of waiting for the right fact situation.

The other argument advanced by the plaintiff was that of strict liability for the escape of dangerous things brought on to land: the doctrine of *Rylands v. Fletcher*.[30] This argument was not pressed, and it was rejected by Widgery J. on the authority of a dictum of Blackburn J. in *Cattle v. Stockton Waterworks Co.*[31] to the effect that *Rylands v. Fletcher*[32] is not available except to protect an interest in property. Whether or not the law is quite as narrow as that is open to doubt, although Lord MacMillan in *Read v. Lyons*[33] certainly thought it was. On the other hand, recovery has been permitted for personal injuries, in such cases as *Shiffman v. Order of St. John*[34] and *Hale v. Jennings Bros.*[35]. But there is certainly no authority giving recovery under *Rylands v. Fletcher*[36] for purely economic loss, nor does it seem desirable when that rule imposes strict liability.

G. J. HARRIS

IN Re LYSAGHT decd.[1]

Gift to found medical scholarships—Members of Jewish and Roman Catholic faiths excluded as beneficiaries—whether valid charitable trust or void for uncertainty or as contrary to public policy—whether general charitable trust intention—could the court order a scheme without religious discrimination due to impracticability.

In her will the testatrix said 'it has long been my wish to found certain medical scholarships . . . within the gift of the Royal College of Surgeons of England.' To further this end she directed that her trustees pay £5,000 of the net residue of her estate for an endowment fund which the Royal College of Surgeons were to hold on trust. The bequest included instructions that the money should be invested and the income used to establish and maintain studentships to benefit persons not of the Roman Catholic or Jewish faiths. The President and Council of the Royal College of Surgeons were to have sole discretion in selecting persons for such studentships.

The Council of the Royal College of Surgeons informed the trustees that it could not accept the bequest on the terms laid down in the will, since the stipulation designed to exclude people of the Roman Catholic and Jewish faiths was in the words of the Council 'so invidious and alien to the spirit of the college's work as to make the gift inoperable in its pre-

29 *Ibid.* 30 (1868) L.R. 3 H.L. 330.
31 (1875) L.R. 10 Q.B. 453. 32 (1868) L.R. 3 H.L. 330.
33 *Ibid.* 34 [1936] 1 All E.R. 557.
35 [1938] 1 All E.R. 579. 36 (1868) L.R. 3 H.L. 330.
1 [1965] 3 W.L.R. 391. Chancery Division: Buckley J.

sent form.' The Council added, however, that they would be willing to accept the trust if the discriminative provisions were removed.

At this stage the trustees took out a summons to determine whether the trust was a valid charitable trust or whether it failed for uncertainty. Presuming that the trust was valid, they also wanted to know whether the £5,000 should be paid to the College on the ground that the religious discrimination clause was invalid or whether the sum should be applied *cy-près*.

Buckley J. sitting in the Chancery Division rejected the notion that the trust was invalid for uncertainty in the requirements of the religious conditions, since persons could establish with certainty that they were neither of the Roman Catholic nor Jewish faiths. Whilst His Honour agreed that such discrimination was deplorable, he rejected the submission of the residuary legatee that the trusts were void because they were contrary to public policy.

Thus the trust itself was valid but it would fail if the Council of the Royal College of Surgeons refused to accept. Normally if the trustee finds that his own convictions prevent him from occupying this position, the court will appoint another trustee. The College was given wide discretionary powers in choosing students for the scholarships and in regulating the course which the students should follow. Coupled with these powers was the testatrix's expressed wish to establish studentships with the money which was to go to the Royal College of Surgeons. Owing to these facts the court held that the trust was conditional upon the College being able to act as trustee, since it was so well suited, and it was the testatrix's intention that only the College should be trustee. This meant that according to the principles of *In re Lawton*[2] and *Reeve v. Attorney General*[3] the trust would fail unless the College acted as the trustee. The College, however, would not accept this position, so long as the restrictive religious conditions remained.

His Honour sought to overcome this difficulty by applying the funds *cy-près* on the ground that it had become impracticable to execute the trust since it was not in keeping with the spirit of the College. Buckley J. followed the authority of cases such as *Re Willis*[4] which insist that a general charitable intention is necessary before an initially impracticable endowment will be applied *cy-près*. In looking for a general charitable desire in the testatrix's will, His Honour defined such an intention as

> a paramount intention on the part of a donor to effect some charitable purpose which the court can find a method of putting into effect notwithstanding that it is impracticable to give effect to some direction by the donor which is not an essential part of the trust.[5]

In trying to ascertain whether the testatrix had a paramount charitable intention, the court considered that her motive for making the gift was

[2] [1936] 3 All E.R. 378. Where it is of the essence of a trust, that only the trustees selected by the settlor shall act as trustee, then the trust will fail if the trustee selected cannot occupy that position.

[3] (1843) 3 Hare. 191.

[4] [1921] 1 Ch. 44.

[5] [1965] 3 W.L.R. 391, 399.

contained in the words ' . . . it has long been my wish to found certain medical studentships to be placed within the gift of the President and Council of the Royal College of Surgeons.' Buckley J. held that the expression of the testatrix's motive revealed that her main intention was to establish the medical studentships which should be administered by the Royal College of Surgeons. His Honour maintained that whilst the testatrix gave detailed provisions for the exclusion of Roman Catholic and Jewish people from the studentships, nothing in the terms of the will suggested that these regulations as to eligibility were essential to her intention. On the construction of the will, the court came to the conclusion that the testatrix had a more general charitable intention and that the particulars as to eligibility were not indispensable. It is arguable that the testatrix did not regard the discriminatory provisions as inessential for why would she include them at all, after she had given the College wide discretionary powers in awarding and maintaining the scholarships, if they were not important for her purposes in making the gift. Yet the court came to the conclusion that there was nothing to suggest that these conditions were essential elements of the testatrix's intentions. Does this mean that every time conditions of eligibility are imposed in a trust they will be inessential, unless there is a term in the gift which spells out that the conditions are an integral part of the donor's intention?

It has been said that if the donor gives detailed provisions for the execution of the impracticable object then there is a strong inference that the donor does not have a general charitable intention.[6] In the present case the testatrix gave the College wide discretionary powers in awarding and maintaining the scholarships yet she declared with particularity that the scholarships were not to go to Roman Catholic and Jewish people. This particularity tends to give rise to the inference that the testatrix did not have a general charitable intention, yet the court concluded that she had such an intention. Perhaps the court was willing to infer that the testatrix had a general charitable intention for the reasons stated in *Attorney General for N.S.W. v. Perpetual Trustee Company (Limited)*,[7] namely that ' . . . the court leans, it is said, in favour of charity and is ready to infer a general intention.'

His Honour examined *In Re Robinson*[8] where a condition, that a black gown be worn in the pulpit, had made a gift to a church impracticable. Lawrence J. decided that where the main purpose of the charitable gift was practicable but a subsidiary condition was not, then the court should modify the trust so as to carry out the main intention of the donor and dispense with the subsiduary purpose. Following the reasoning of the decision in *In Re Robinson*,[9] Buckley J. decided that the exclusion of the Roman Catholic and Jewish people was merely a subsiduary, impracticable condition and as such it could be deleted. This meant that the trust was executed *cy près* so that the gift went to the hospital free from the discriminatory clauses.

6 Sheridan & Delany, *The Cyprès Doctrine* (1959) 34.
7 (1940) 63 C.L.R. 209, *per* Dixon and Evatt J.J.
8 [1923] 2 Ch. 332; 39 T.L.R. 509. 9 *Ibid.*

Perhaps, the main importance of *Re Lysaght*[10] lies in its extension of the court's notion of impracticability. In previous cases judges have not insisted that it must be absolutely impossible to carry out the trust before it will fail for impracticability. In cases such as *In Re Dominion Students' Hall Trust*[11] judges have urged that a wide significance should be given to the notions of impracticability. In that case it is easy to see that the clause of racial discrimination would make the trust difficult to execute since it is virtually contrary to the aim of the trust, namely, the promotion of inter-Commonwealth relationships. Unlike the above case, the gift in *Re Lysaght*[12] is not so clearly impracticable. It had become impracticable to carry out the trust because the trustees claimed that the gift was 'alien to the spirit of the college's work.' In effect, the Royal College of Surgeons was saying that it did not like the gift with the religious conditions included and would not accept the trust so long as the conditions remained. Buckley J. has clearly extended the notions of impracticability by holding that the trustees dislike for such a gift in these circumstances was sufficient to make the trust impracticable.

As a result of *Re Lysaght*[13] it will be interesting to note in the future whether universities, hospitals and other such institutions which have already accepted charitable gifts, subject to discriminatory conditions, will seek to have such restrictions removed by arguing that the spirit of the institution has changed so that it has become impracticable to carry out the trust.

JAN BOXALL

BANK OF NEW SOUTH WALES v. DERI[1]

Quasi-contract—Money had and received under a mistake of fact—Payment of stopped cheque—Whether money recoverable by Bank.

A case of some interest to both banks and customers with regard to payment, by mistake, of stopped cheques was decided in N.S.W. District Court in 1964 by Clegg D.C.J. In *Bank of N.S.W. v. Deri*[2] the plaintiff bank sued to recover £400 paid to the defendant Deri[3] on a cheque drawn by a Mrs Irene Wieder—a customer of the plaintiff bank. Mrs Wieder entered negotiations for the purchase of a business from Mr and Mrs Deri. In the course of these negotiations Mrs Wieder handed the defendant (son of Mr and Mrs Deri) a cheque payable to 'cash' for the above amount. The negotiations, not having been concluded, Mrs Wieder called at the bank's office and, learning that the cheque had not yet been

10 [1965] 3 W.L.R. 391.
11 [1947] Ch. 183.
12 [1965] 3 W.L.R. 391.
13 *Ibid.*

1 (1963) 80 W.N. (N.S.W.) 1499. District Court, N.S.W.; Clegg D.C.J.
2 *Ibid.*
3 There was some doubt at the trial as to who actually cashed the cheque, Clegg D.C.J. was, however, satisfied that the defendant, Stephen Deri, had in fact been the person who presented it. *Ibid.* p. 1500.