It is submitted on this state of the authorities that, notwithstanding the dicta of Williams and Rich JJ., it is open to the High Court to follow the clear and simple principle of *Ryan's Case* and to reject the cumbrous and almost inapplicable doctrine of the *Hutley* and *Hancock Cases*. *Gulson's Case* and the recent English cases can be distinguished on the ground that the emergency legislation there dealt with was obviously applicable to subjects rather than to the Crown. Of course, the English cases are not binding on Australian courts, but even their persuasive authority is reduced since the important difference between the old principle and the more modern one adopted by Craies does not seem to have been appreciated or pointed out in argument.

It should be one of the first duties of parliaments to insist that every statute has an express provision about its relation to the Crown, in spite of the occasional desire of departments to leave the point in doubt. But pending this reform in legislative practice, it would seem unfortunate for the High Court to drift into adopting an obscure rule which adds to the privileges and immunities of the Executive, when a clear rule limiting those privileges can be obtained from Australian decisions of high authority.

J. GOUGH.
D. P. DERHAM.

CHARITABLE TRUSTS & P.L.A. 131.

Re Hollole, [1945] *V.L.R.* 296; [1946] *A.L.R.* 78.

Although the decision on the point is disappointingly inconclusive, *Re Hollole* is at least an interesting example of an attempt to secure for charities the benefit of Section 131 of the Property Law Act 1928.[1] Here the litigation concerned the disposal of residuary estate. Testator had included among the beneficiaries the sole executor and trustee, who had drafted the will and drawn attention to the fact that there would be a surplus after debts, expenses and specific legacies had been met. This surplus was disposed of in the following words: " The balance of my real and personal estate I give to my Trustee to be disposed of by him as he thinks fit."

The trustee therefore took out an originating summons to determine whether he was entitled to the residue beneficially, or on any and what trusts he held it.

Evidence was admitted which tended to show that the testator wanted the executor to include charities among the participants under the trust. Thus the testator had said to the trustee when the will was being drafted that he had given his relatives all that he intended and

REFERENCES—
1. The Section enacts:—
(1) No trust shall be held to be invalid by reason that some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed.
(2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or any part thereof to or for any such non-charitable and invalid purpose had been or should be deemed to have been so directed or allowed

would leave the balance to the trustee to distribute. The trustee suggested churches and charitable institutions and the testator said: "Very well, I will leave it to you to dispose of as you think fit."

It was contended for the Attorney-General (on behalf of charities) that though on the face of the will the trustee took beneficially, the will was subject to a secret parol trust partly in favour of charities. This reasoning follows the decision of the House of Lords in *McCormack* v. *Grogan*[2] that a trust created by an expression of the testator's wishes communicated to and accepted by the legatee may bind the conscience of the legatee though in the terms of the will the bequest was absolute. It was further contended that, since on the words of the will charities "could be deemed to be included," the trust was saved to that extent by P.L.A. 131 and the parol trust was saved likewise. This was the conclusion that the trustee himself wished but O'Bryan J. found himself unable to reach it.

His Honour said that it was impossible to extract from any of the cases cited in argument any principle of interpretation which helped in this case and so turned to the language of the will itself. An examination of the document caused him to arrive at the conclusion that the will meant to impose a legally binding trust to distribute the balance in the hands of the trustee and the latter did not take by way of gift. Consequently unless the trust was saved by P.L.A. 131 it would fail for uncertainty and the next-of-kin would take (*Neo v. Neo*[3]). The conversations did not impress His Honour as doing more than conferring on the trustee "an entire and unfettered discretion to distribute the estate among such persons as he thought fit" and instanced a request (to which the trustee assented) to provide for a "Mr. Mac."

As to P.L.A. 131, O'Bryan J. thought that it had no application since it contemplated a severable trust—one partly charitable and partly not—not a trust which is entirely undefined and uncertain as to subject matter and where no attempt has been made to define its objects. Hollole had left his trustee "completely at large in his choice of persons or objects," but if he had said "for charitable or other good objects selected by the trustee" this probably would have been severable. But the conversations could not be treated as creating a trust for charities or other purposes; the trustee took on a trust which was void for uncertainty and there was a resulting trust to the next-of-kin.

In the course of his judgment, O'Bryan J. referred to *Re Lawlor*[4] as an authority for not applying P.L.A. 131. Dixon J. at the page referred to[5] say that the object of P.L.A. 131 is to remove a ground of invalidating dispositions, namely where trustees of a trust not in favour of individuals are at liberty to apply the fund as well to purposes outside the definition of charities as to purposes within it and if independently of the trustees no measure is provided of the amount applicable to the non-charitable purposes, and refers to Lord Halsbury L.C.'s statement in *Hunter v. A.-G.*[6] that "where a bequest is made for charitable purposes

2. L.R. 4 H.L. 82.
3. (1875) L.R. 6 P.C. 381, at 389.
4. 51 C.L.R. 1.
5. 51 C.L.R. at 37.
6. [1899] A.C. 309 at 315.

and also for an indefinite purpose not charitable, and no appointment is made by the will, so that the whole might be applied for either purpose, the whole bequest is void."

It would appear that the present case bears more than a slight resemblance to such a state of affairs and would be a fitting case for the validating operation of P.L.A. 131. The learned Judge, however, did not see it in this light. He considered that to carve out a piece and say : " This is for charitable purposes only " would be to make a new will for the testator. It is submitted with respect that the decision in this case has a similar effect, contrary to the expressed wishes of the testator. Does this mean that the words " or could be deemed to be " (included) are to be ignored in construing s. 131, or that two clearly defined classes of objects must be provided so that one may be stricken out ? *Semble*, although *Re Lawlor* is not an authority for adopting this " blue-pencil " interpretation of the section, *Re Hollole* and *Re John Danks and Sons Pty. Ltd. Settlement*[7] indicate that this is to be the interpretation to be placed on it. Accordingly, the submission[8] that the section could be applied to save gifts where both charitable and non-charitable gifts could be implied from some vague expression, or the double aspect is derived from the gift itself, although it had gained fairly general acceptance, must be relegated to the realm of what might have been—at least until the matter has been conclusively determined by a higher court.

Meanwhile there is at least one further interesting point raised in this case. Dixon J. in *Re Lawlor* referred to s. 131 as applying to " a trust not in favour of individuals." Section 131 refers only to " purposes." What is the position when persons as well as purposes are included among the objects ? Such a case was *Re Griffith*[9] where the non-charitable gift to persons was eliminated and the rest of the gift was good. However, the correctness of this decision may be, and has been, doubted. O'Bryan J. gives no conclusive answer to this question and indeed the answer may well be somewhat difficult to ascertain. Thus it would be at least desirable to apply the section when a substantial residue was expressed to be given " to hospitals with the exception of a few pounds which is to go to the fund for needy students in art." But if section 131 would apply in such a case, where would the line be drawn ; e.g. what would be the answer if the dispositions in the foregoing example were reversed ? Perhaps this point, like others raised in *Re Hollole*, may be safely left for future determination.

ARTHUR R. WATSON.

7. [1942] V.L.R. 215.
8. 15 A.L.J. p. 58.—This has recently received judicial approval in *Union Trustee Co. of Australia v. Church of England Property Trust*, [1946] N.S.W. W.N. Vol 63, 153, where Nicholas C.J. in Equity held that a gift on trust to be applied " in such manner and for such purposes relating to the work of St. John's Church as the rector and churchwardens for the time being of the said church in their absolute discretion think fit " was validated by application of Sec. 37D of Conveyancing Act 1919-43 (which corresponds to the Victorian P.L.A. 131). There is was recognized that an undefined portion could be applied to non-charitable purposes, but the section was held to restrict the gift to charitable purposes, so that the gift was valid.
9. [1922] V.L.R. 212.