~~PC~~
~~(1960)~~

Judgment 1, 1959

IN THE PRIVY COUNCIL — Appeal No.28 of 1958

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

IN THE MATTER OF THE TRUSTS OF THE WILL OF FRANCIS GEORGE LEAHY late of Harefield and Bungendore in the State of New South Wales, Grazier, deceased.

B E T W E E N :-

DORIS CAROLINE MARY LEAHY
HENRY JOSEPH LEAHY
JAMES PATRICK LEAHY
GEORGE BONAVENTURE LEAHY
FRANCIS JOHN LEAHY
DOROTHY MARGARET HALL
MICHAEL MAURICE LEAHY
GENEVIEVE MARY REDDY
Appellants

- and -

HER MAJESTY'S ATTORNEY GENERAL IN AND FOR THE STATE OF NEW SOUTH WALES
JOHN FRANCIS DONNELLY
CLEMENT OSBORNE WRIGHT and
JOHN BEDE MULLEN the Executors and Trustees of the Will of the said Francis George Leahy.
Respondents

RECORD OF PROCEEDINGS

WATERHOUSE & CO.,
1, New Court,
Lincoln's Inn,
London, W.C.2.
Solicitors for the Appellants.

BELL BRODRICK & GRAY,
The Rectory,
29, Martin Lane,
Cannon Street,
London, E.C.4.
Solicitors for the Respondents other than the Attorney General of New South Wales.

LIGHT & FULTON,
24, John Street,
Bedford Row,
London, W.C.1.
Solicitors for the Attorney General of New South Wales.

IN THE PRIVY COUNCIL No.28 of 1958

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

IN THE MATTER OF THE TRUSTS OF THE WILL OF FRANCIS GEORGE LEAHY late of Harefield and Bungendore in the State of New South Wales, Grazier, deceased.

B E T W E E N:

DORIS CAROLINE MARY LEAHY, FRANCIS JOHN LEAHY HENRY JOSEPH LEAHY, DOROTHY MARGARET HALL, JAMES PATRICK LEAHY, MICHAEL MAURICE LEAHY, GEORGE BONAVENTURE LEAHY, GENEVIEVE MARY REDDY
Appellants

- and -

HER MAJESTY'S ATTORNEY GENERAL in and for the State of New South Wales, JOHN FRANCIS DONNELLY CLEMENT OSBORNE WRIGHT and JOHN BEDE MULLEN the Executors and Trustees of the Will of the said Francis George Leahy
Respondents

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

No. 1.

In the Supreme Court of New South Wales in Equity

No. 1.

Originating Summons.

9th July, 1956.

ORIGINATING SUMMONS

IN THE SUPREME COURT OF) NEW SOUTH WALES IN EQUITY) No. 737 of 1956

IN THE MATTER of the Trusts of the Will of FRANCIS GEORGE LEAHY late of Harefield and Bungendore in the said State Grazier, deceased.

BETWEEN:- JOHN FRANCIS DONNELLY CLEMENT OSBORNE WRIGHT and JOHN BEDE MULLEN the Executors and Trustees of the Will of the said Francis George Leahy Plaintiffs

- and -

DORIS CAROLINE MARY LEAHY (Widow of the said Francis George Leahy) FRANCIS JOHN LEAHY HENRY JOSEPH LEAHY DOROTHY MARGARET HALL JAMES PATRICK LEAHY MICHAEL MAURICE LEAHY GEORGE BONAVENTURE LEAHY GENEVIEVE MARY REDDY (the children of the said Francis George Leahy) and HER MAJESTY'S ATTORNEY GENERAL in and for the State of New South Wales Defendants

LET DORIS CAROLINE MARY LEAHY of 246 Cowper Street, Goulburn.

FRANCIS JOHN LEAHY of "Merton Park", near Wagga Wagga.
HENRY JOSEPH LEAHY of "Vailima", near Wagga Wagga
DOROTHY MARGARET HALL of "Tangmere", Junee.
MICHAEL MAURICE LEAHY of Trangie
JAMES PATRICK LEAHY of "Rotherwood", Tarago.
GEORGE BONAVENTURE LEAHY of "Bonny Doone", Tarago.
GENEVIEVE MARY REDDY of Crookwell and
HER MAJESTY'S ATTORNEY GENERAL in and for the State of New South Wales within sixteen (16) days after the service of this Originating

In the Supreme Court of New South Wales in Equity

No. 1.

Originating Summons.

9th July, 1956 - continued.

Summons upon them respectively inclusive of the day of such service cause appearances to be entered for them to this Originating Summons which is issued upon the application of the above-named Executors for the determination of the following questions, namely :-

1. Whether upon the true construction of the Will of the said deceased and in the events which have happened the trust directed therein in respect of the property known as "Elmslea" situated at Bungendore is void for uncertainty.

2. Whether upon the true construction of the said Will and in the events which have happened the Trust directed therein as to the rest and residue of his Estate both real and personal is void for uncertainty.

AND for the following orders namely :-

1. That the Defendant DORIS CAROLINE MARY LEAHY may be appointed to represent for the purposes of this suit the class of persons consisting of herself and other the persons between whom the property the subject of the above-mentioned trusts would be divided in the event of the said trusts being declared void.

2. That the costs of all parties of this Originating Summons may be provided for AND for such further or other order as the nature of the case may require Appearances may be entered in the office of the Master in Equity, Elizabeth Street, Sydney.

DATED this 9th day of July, 1956.

Signed A.G. WHITE,
for Chief Clerk in Equity.

This originating Summons is taken out by Messrs. Murphy & Moloney of 79 Elizabeth Street, Sydney, City Agents for J.B. & L.A. Mullen of Goulburn, Solicitors for the above-named Plaintiffs.

NOTE if the Defendants do not enter an appearance within the time and at the place above-mentioned, such order will be made and proceedings taken as the Judge thinks fit and expedient.

No. 2.

AFFIDAVIT OF JOHN FRANCIS DONNELLY, CLEMENT OSBORNE WRIGHT and JOHN BEDE MULLEN

In the Supreme Court of New South Wales In Equity

No. 2.

Affidavit of John Francis Donnelly, Clement Osborne Wright and John Bede Mullen Sworn 10th, 11th and 12th July, 1956.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY) No. 735 of 1956

IN THE MATTER of the Trusts of the Will of FRANCIS GEORGE LEAHY late of Harefield and Bungendore in the said State Grazier, deceased.

Between:- JOHN FRANCIS DONNELLY, CLEMENT OSBORNE WRIGHT and JOHN BEDE MULLEN the Executors and Trustees of the Will of the said Francis George Leahy Plaintiffs

- and -

DORIS CAROLINE MARY LEAHY (Widow of the said Francis George Leahy) FRANCIS JOHN LEAHY HENRY JOSEPH LEAHY DOROTHY MARGARET HALL JAMES PATRICK LEAHY GEORGE BONAVENTURE LEAHY GENEVIEVE MARY REDDY (the children of the said Francis George Leahy) and HER MAJESTY'S ATTORNEY GENERAL in and for the State of New South Wales Defendants

ON the respective days hereinafter mentioned JOHN FRANCIS DONNELLY of Bungendore Stock and Station Agent, CLEMENT OSBORNE WRIGHT of Wagga Wagga Secretary, and JOHN BEDE MULLEN of Goulburn Solicitor being duly sworn jointly and severally make oath and say as follows :-

1. The above-named FRANCIS GEORGE LEAHY late of Harefield and Bungendore died on the eleventh day of January One thousand nine hundred and fifty-five.

2. By his Will made on the Sixteenth day of February One thousand nine hundred and fifty-four the

In the Supreme Court of New South Wales in Equity

No. 2.

Affidavit of John Francis Donnelly, Clement Osborne Wright and John Bede Mullen Sworn 10th, 11th and 12th July, 1956.

- continued.

said Francis George Leahy appointed us these deponents Executors and Trustees of his Will.

3. Probate of the said Will was granted to us by the Supreme Court in its Probate Jurisdiction on the sixth day of July One thousand nine hundred and fifty-five.

4. Annexed hereto and marked with the letter "A" is a true copy of the said Will.

5. The said Francis George Leahy left him surviving his Widow Doris Caroline Mary Leahy and the following children namely, Francis John Leahy, Henry Joseph Leahy, Dorothy Margaret Hall, Michael Maurice Leahy, George Bonaventure Leahy and Genevieve Mary Reddy all of whom are over the age of Twenty-one (21) years. No child of the deceased predeceased him leaving issue him or her surviving.

6. Questions have arisen as to the validity of the Trusts directed in the said Will.

(1) As to the property known as "Elmslea" and
(2) As to the residue of the Estate

And it is respectfully requested that declarations may be made in respect of these Trusts.

SWORN by the Deponent JOHN FRANCIS DONNELLY at Bungendore on the 10th day of July One thousand nine hundred and fifty-six, Signed J.F. Donnelly.

Before me :-
Signed. E.Gardner, J.P.

SWORN by the Deponent CLEMENT OSBORNE WRIGHT at Wagga Wagga on the 11th day of July One thousand nine hundred and fifty-six Signed. C. Wright.

Before me :-
Signed. W.J.Hedditch, J.P.

SWORN by the Deponent JOHN BEDE MULLEN at Goulburn on the 12th day of July One thousand nine hundred and fifty-six, Signed. J.B. Mullen.

Before me :-

No. 2A.

In the Supreme Court of New South Wales In Equity

No.2A.

Annexure "A" Will of Francis George Leahy. 16th February, 1954.

ANNEXURE "A" TO AFFIDAVIT OF JOHN FRANCIS DONNELLY, CLEMENT OSBORNE WRIGHT and JOHN BEDE MULLEN being WILL of FRANCIS GEORGE LEAHY dated 16th FEBRUARY, 1954

THIS IS THE LAST WILL AND TESTAMENT of me FRANCIS GEORGE LEAHY of Harefield and Bungendore in the State of New South Wales Grazier I REVOKE all prior Wills at any time heretofore made by me and declare this to be my last Will I APPOINT JOHN FRANCIS DONNELLY of Bungendore Stock and Station Agent CLEMENT OSBORNE WRIGHT of Wagga Wagga Secretary and JOHN BEDE MULLEN of Goulburn Solicitor to be the Executors and Trustees of this my Will I GIVE AND BEQUEATH the sum of One thousand pounds (£1000) to the Reverend Mother or person in charge for the time being of St. Joseph's Convent at Bungendore aforesaid and I DIRECT that the said sum of One thousand pounds (£1000) be invested by the said Reverend Mother and that the income to arise from any such investment or investments shall be used in providing for the personal necessities of the Nuns attached to such Convent from time to time, it being my desire that neither the capital or the income of or from such bequest shall be used in connection with the Building Fund of any such Convent or for any requisites for the school attached thereto but shall be used solely in providing personal requirements and comforts for the said Nuns AND I DESIRE to state that the said bequest of One thousand pounds (£1000) has been fixed by me at that figure by reason of the fact that I have already expended a considerable sum in the rebuilding of the said Convent I GIVE AND BEQUEATH to the Rector for the time being of the Passionist Father Mary's Mount Goulburn the sum of One thousand pounds (£1000) AND I DIRECT that the said sum of One thousand pounds (£1000) shall be invested and used for the same purpose of the community of the said Passionist Fathers and in the same manner as the before mentioned bequest in favour of the Reverend Mother of St. Joseph's Convent at Bungendore I GIVE AND BEQUEATH to THOMAS STANLEY LEAHY son of the late Mrs. Maude Leahy the sum of Five hundred pounds (£500) I GIVE AND BEQUEATH the sum of Five hundred pounds (£500) to MISS FLORENCE OSBORNE I GIVE AND BEQUEATH unto my

In the Supreme Court of New South Wales In Equity

No.2A.

Annexure "A"

Will of Francis George Leahy.

16th February, 1954

- continued.

nephew JOHN ALFRED VAUGHAN the sum of One thousand pounds (£1000) AND I FURTHER DIRECT that the whole of the legacies hereinbefore mentioned shall be paid in full without any deduction whatsoever from the same on account of death duties either Federal or State and shall be paid as and when my said Executors and Trustees consider it convenient for my estate to meet such obligations AND FURTHER that no interest shall be payable on any such legacies WHEREAS I have entered into an Agreement with my daughter GENEVIEVE MARY LEAHY for the sale to her of my property known as "Bulwarra Flats" situate in Cowper Street Goulburn being Lot Five on Registered Plan No.689 situate in the Parish of Goulburn and County of Argyle for the sum of Five thousand six hundred and seventy five pounds (£5675) and such agreement provides for payments of the purchase price by instalments in manner therein provided NOW in the event of my death before the whole of the moneys payable under the said Agreement shall have been fully paid and satisfied I GIVE AND BEQUEATH to my said daughter Genevieve Mary Leahy the debt of Five thousand six hundred and Seventy five pounds (£5675) which is payable under the said agreement or so much thereof as shall be owing at the date of my death free of all Death Duty Estate Succession or otherwise State or Federal AND I DIRECT my said Executors and Trustees to convey the said property to my said daughter freed and discharged from any liability or encumbrance which may then be existing under and by virtue of the said Agreement of Sale I GIVE DEVISE AND BEQUEATH the whole of my real Estate and residue of my personal estate of whatsoever kind or nature the same may be and wheresoever situate and whether in possession remainder reversion or expectancy (hereinafter collectively referred to as "my trust estate") to my said Executors and Trustees upon the following trusts namely:-

1. I DIRECT my said Executors and Trustees to allow my wife DORIS CAROLINE MARY LEAHY provided she shall so long remain my widow to reside during her lifetime in Flat No.1 Bulwarra Flats Cowper Street Goulburn free of any charge and to have the use of the furniture and effects therein during her period of residence in such home AND subject thereto I GIVE DEVISE AND BEQUEATH the said property and the furniture and effects therein contained unto my daughter GENEVIEVE MARY LEAHY absolutely I DIRECT my said Executors and Trustees to

observe the provision of a residence for my wife strictly and that they should not in any circumstances permit my said wife to reside on either of my properties known as "Overdale" at Harefield or "Elmslea" at Bungendore.

2. I DIRECT my said Executors and Trustees to pay to my said wife Doris Caroline Mary Leahy for so long as she shall remain my widow the annual sum of Seven hundred and fifty pounds (£750) and I DIRECT that such sum be paid by equal quarterly instalments the first payment to be made three months from the date of my death AND I FURTHER DIRECT that in addition to the said annual sum of Seven hundred and fifty pounds (£750) my said Executors and Trustees shall refund to my said wife any income or other taxes payable by her in respect of the said annual payments.

3. AS to my property known as "Elmslea" situated at Bungendore aforesaid and the whole of the lands comprising the same and the whole of the furniture contained in the homestead thereon UPON TRUST for such Order of Nuns of the Catholic Church or the Christian Brothers as my Executors and Trustees shall select and I again direct that the selection of the Order of Nuns or Brothers as the case may be to benefit under this Clause of my Will shall be in the sole and and absolute discretion of my said Executors and Trustees.

4. AS to the homestead on my property known as "Overdale" situated at Harefield aforesaid and the sheds stables and other outbuildings and the gardens and grounds immediately surrounding the same and the whole of the furniture and furnishings therein contained and also as to the paddocks known as "Wright's Cultivation" and "Webbs" and "Thistle" and "Horse" comprising approximately Eight hundred and fifty acres (850) portion of the said property "Overdale" to permit the Order of Nursing Sisters known as "The Nursing Sisters of the Little Company of Mary" to use and occupy the said homestead furniture and lands for a period of ten years (10) from the date of my death and to have the income to arise therefrom during that period UPON the condition that they pay any outgoings in connection therewith during that period and use the same either for the care and comfort of the sick or aged members of the said Order or for the purpose of

In the Supreme Court of New South Wales In Equity

No.2A.

Annexure "A"

Will of Francis George Leahy.

16th February, 1954

- continued.

conducting therein a Hospital on lines similar to that conducted by them in the City of Wagga Wagga AND I FURTHER declare and direct that if at the expiration of the said period of ten years (10) my said Executors and Trustees for the time being of this my Will are satisfied that the said homestead and Lands and furniture have been used during the said period in the manner herein provided then my said Executors and Trustees shall be at liberty to forthwith convey transfer and assign the property so devised as aforesaid to the said Order of Nuns but otherwise free from any restriction or trusts whatsoever PROVIDED HOWEVER if the said Order of Nuns shall decline to accept the bequest contained in this clause or if my said Trustees be not so satisfied as aforesaid then I DIRECT my said Executors and Trustees to select some other Order of Nuns and to offer the said homestead furniture and lands to such Order of Nuns UPON the same conditions as hereinbefore specified in this paragraph and I DIRECT that the selection of such other Order of Nuns shall be in the absolute discretion of my said Executors and Trustees.

5. AS to all the rest and residue of my Estate both Real and Personal of whatsoever kind or nature and wheresoever situated UPON TRUST to use the income as well as the capital to arise from any sale thereof in the provision of amenities in such Convents as my said Executors and Trustees shall select either by way of building a new Convent where they think necessary or the alteration of or addition to existing buildings occupied as a Convent or in the provision of furnishings in any such Convent or Convents and I DECLARE that my said Executors and Trustees shall have the sole and absolute discretion of deciding where any such premises shall be built or altered or repaired and the Order or Orders of Nuns who shall benefit under the terms of this Clause the receipt of the Reverend Mother for the time being of that particular Order of Nuns or Convent shall be a sufficient discharge to my said Executors and Trustees for any payment under this clause.

6. I DIRECT my said Executors and Trustees to continue to retain and employ the said Clement Osborne Wright as Secretary and Accountant in connection with the administration of my estate notwithstanding his acting as an Executor and Trustee

of this my Will upon such terms and conditions as they in their discretion shall deem reasonable.

7. I DIRECT that my said trustees shall be at liberty to sell and dispose of the whole or any part of my real and/or personal estate at any time as they in their absolute discretion shall think proper and in the meantime and until such sale as aforesaid to lease the whole or any part of my said real estate for such periods and upon such terms and conditions as they shall think proper should they decide that in the best interest of my estate it would be more beneficial not to carry on or manage my said grazing properties themselves AND I EMPOWER my said Executors and Trustees in their discretion to carry on and manage my grazing properties and to continue any investments held by me at the date of my death for such periods as they may deem proper and for that purpose may in their discretion exercise all or any one of the following powers and authorities :-

(a) may use and employ any live or dead stock working plant machinery waggons carts implements utensils and other effects upon or appropriated to the said stations or any of them.

(b) may employ managers agents servants and workmen at such salaries remuneration or wages and for such time and upon such terms and conditions in all respects as my Executors and Trustees may think fit and may determine any such employment or agency.

(c) may acquire by purchase lease exchange or otherwise lands of any tenure or licence to use land adjoining or near to any one or more of the said stations to be used as part thereof and may dispose of any such lands.

(d) may erect buildings upon or effect repairs or improvements of or to any one or more of my said stations.

(e) may buy and sell live and dead stock wool grain and other produce.

(f) may effect insurance including insurance against liability under the Workmen's Compensation Act or any other Act of a similar nature or purport and may pay the premium and other moneys necessary to effect or renew or keep on foot any such insurances.

In the Supreme Court of New South Wales In Equity

No.2A.

Annexure "A"

Will of Francis George Leahy.

16th February, 1954 - continued.

(g) may pay rates and taxes of every description all purchase and other moneys payable including fees and stamp duty and all other outgoings and expenses of every description incidental to such managing and carrying on or to the exercise of any of the powers discretions and authorities herein contained.

(h) may convert conditionally purchased lands into Freehold and any conditionally leased lands into conditionally purchased lands and generally may at their discretion convert lands of any tenure or holding under the Crown Lands Act into any other tenure or holding under such Acts and make all applications and do all things necessary in that behalf.

(i) may generally act in all matters whether spefically mentioned herein or not relating to the said stations as if they were the absolute owners thereof.

(j) for any of the purposes aforesaid my Executors and Trustees may employ and expend any moneys in hand or forming part of my residuary estate and may borrow any moneys which may be required and may secure payment of such moneys with interest thereon at such rates as my Executors and Trustees think fit by mortgage of the whole or any part of my estate and any such mortgage shall contain all powers and provisions and shall be upon such terms and conditions in all respects as my Executors and Trustees think proper.

11. I DECLARE that the said JOHN BEDE MULLEN shall notwithstanding his acceptance of this office of trustee and executor of my Will and his acting in the execution thereof be entitled to make the same professional or non-professional charges and to receive the same pecuniary emoluments and remunerations for all business done by him and all attendances time and trouble given or bestowed by him in or about the execution of the trusts and powers of my Will or the management and administration of my trust estate real or personal as if he not being himself a Trustee or Executor of my Will were employed by the trustees and executors thereof as their Solicitor.

IN WITNESS whereof I have hereunto set my hand at

Goulburn this Sixteenth day of February One thousand nine hundred and fifty-four.

Frank G. Leahy.

SIGNED by the said Testator as and for his last Will in the presence of us both present at the same time and we at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses -

R. G. JELLINS,
Manufacturer,
92, Citizen Street,
Goulburn.

ABRAHAM LANGSNER,
Mechanic,
86, Citizen Street,
Goulburn.

This is the annexure marked "A" referred to in the Affidavit of JOHN FRANCIS DONNELLY sworn at Bungendore this 10th day of July One thousand nine hundred and fifty-six, before me :-

Signed E. Gardner, J.P.

A Justice of the Peace.

This is the annexure marked "A" referred to in the Affidavit of CLEMENT OSBORNE WRIGHT sworn at Wagga Wagga this 11th day of July, One thousand nine hundred and fifty-six, before me :-

Signed W.J.Hedditch, J.P.

A Justice of the Peace.

This is the annexure marked "A" referred to in the Affidavit of JOHN BEDE MULLEN sworn at Goulburn this 12th day of July, One thousand nine hundred and fifty-six, before me :-

Signed J. Chester, J.P.

A Justice of the Peace.

In the Supreme Court of New South Wales In Equity

No.2A.

Annexure "A"

Will of Francis George Leahy.

16th February, 1954 - continued.

In the Supreme Court of New South Wales In Equity

No. 3.

Affidavit of George Clifford Gallen.

6th February, 1957.

No. 3.

AFFIDAVIT OF GEORGE CLIFFORD GALLEN.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY) No. 735 of 1956

IN THE MATTER of the Trusts of the Will of FRANCIS GEORGE LEAHY late of Harefield and Bungendore in the said State, Grazier, deceased.

Between:- JOHN FRANCIS DONNELLY and OTHERS Plaintiffs

- and -

DORIS CAROLINE MARY LEAHY (Widow of the said Francis George Leahy) and Others Defendants

ON the Sixth day of February One thousand nine hundred and fifty-seven GEORGE CLIFFORD GALLEN of St. Mary's Cathedral, Sydney, in the State of New South Wales, Catholic Priest, being duly sworn makes oath and says as follows :-

1. I am a Doctor of Canon Law and a graduate of the Pontificial University of Propoganda Fide in Rome and I am a Professor of Canon Law at St. Patrick's College, Manly in the said State.

2. With.n the Roman Catholic Church, Associations of religious women are divided according to the code of the Canon Law into two kinds of institutions namely orders or congregations. An order is a religious organisation the members of which take solemn vows; a congregation is a religious organisation the members of which take only simple vows whether such simple vows are perpetual or temporary. An order has for its objects the observance of one of four ancient Rules, namely the Rule of St.Basil, the Rule of St.Benedict, the Rule of St.Augustine and the Rule of St.Francis of Assisi; a congregation has a constitution or set of rules for observance which are not necessarily identical with or as rigorous as one of the ancient aforesaid Rules. Religious women who take solemn vows are called "Nuns" and those who take simple vows are called "Sisters".

4. There are in the Commonwealth of Australia approximately Fifty Associations of Religious women some of which are "Orders" properly so called and the remainder of which are congregations. Such associations have a wide variety of objects for example: the cultivation of personal piety, the conduct of schools, the maintenance of homes for the aged, the provision of service for the poor and the sick and for other like objects.

5. Orders within the religious institutes are divided into Contemplative Orders and Active Orders. Contemplative Orders are so called because their members are strictly enclosed in their convents and engage in no external work but devote their lives to contemplation and penance including reciting the Divine Office and other vocal prayers as well as the reflection of the mind on God and the things of God evoking from the will or heart acts of adorationpropitiation love and intercession towards God, by which they attain a life of perfect devotion and prayer.

6. The contemplative Orders are so called to distinguish them from the Active Orders the members of which engage in external works such as performance of public services, teaching, nursing the sick and tending the poor and other like activities.

7. In the State of New South Wales there exist three Orders of Nuns which are contemplative namely :-

(i) The order of the Blessed Virgin Mary of Mount Carmel (Carmelites)

(ii) Nuns of the Order of St. Benedict.

(iii) Adorers of the Sacred Heart of Jesus of Monmartre (Benedictine)

8. There is represented in New South Wales a number of Orders of Nuns which are active and not contemplative and there are also a number of congregations which are not Orders in the view of the Canon Law.

9. The Christian Brothers is a congregation or religious men carrying on educational work in New South Wales.

In the Supreme Court of New South Wales In Equity

No. 3.

Affidavit of George Clifford Gallen.

6th February 1957 - continued.

10. St. Josephs Convent at Bungendore is a religious house of the Congregation of the Sisters of St. Joseph of the Most Sacred Heart of Jesus which carries on educational and other charitable work there and elsewhere.

11. The Passionist Fathers of Mary's Mount Goulburn is a Novitiate House of the Congregation of the Passion a religious institute devoted to Penance prayer and preaching.

SWORN by the Deponent GEORGE CLIFFORD GALLEN at Sydney on the Sixth day of February One thousand nine hundred and fifty-seven, before me :-) G.C. GALLEN.

W.H. Thom, J.P.

No. 4.

Affidavit of John Bede Mullen.

12th February, 1957.

No. 4.

AFFIDAVIT OF JOHN BEDE MULLEN

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY) No. 735 of 1956

IN THE MATTER of the Trusts of the Will of FRANCIS GEORGE LEAHY late of Harefield and Bungendore in the said State, Grazier, deceased.

Between:- JOHN FRANCIS DONNELLY CLEMENT OSBORNE WRIGHT and JOHN BEDE MULLEN the Executors and Trustees of the Will of the said Francis George Leahy Plaintiffs

- and -

DORIS CAROLINE MARY LEAHY (Widow of the said Francis George Leahy) FRANCIS JOHN LEAHY HENRY JOSEPH LEAHY DOROTHY MARGARET HALL JAMES PATRICK LEAHY MICHAEL MAURICE LEAHY GEORGE BONAVENTURE LEAHY GENEVIEVE MARY REDDY (the Children of the said Francis George Leahy) and HER MAJESTY'S ATTORNEY GENERAL in and for the State of New South Wales Defendants

In the Supreme Court of New South Wales In Equity

No. 4.

Affidavit of John Bede Mullen.

12th February, 1957 - continued.

On this 12th day of February One thousand nine hundred and fifty-seven JOHN BEDE MULLEN of Goulburn in the State aforesaid Solicitor, being duly sworn makes oath and says as follows :-

1. I am one of the above-named Plaintiffs.

2. Annexed hereto and marked "A" is a copy of the Stamp Affidavit and Schedules thereto filed in the Estate of the above-named deceased. The property "Overdale" referred to in the Will of the said deceased comprises the lands described in clauses (a) and (b) of Schedule 1 and the property "Elmslea" comprised the lands in Clause (c) of such Schedules.

3. "Overdale" comprises in all approximately 6912 acres and is situated at Harefield about 12 miles from Wagga Wagga. "Elmslea" comprises approximately 729¼ acres and is adjacent to the village of Bungendore about 45 miles south of Goulburn. "Elmslea" is a grazing property and apart from the usual improvements of clearing and fencing the following improvements are also erected thereon.

(a) Brick homestead containing twenty rooms in all with sewerage, well water and electric light connected. This building comprises approximately 4941 square feet.

(b) Garage, stables and feed room with cow bail attached, constructed of brick with iron roof and concrete floor. These buildings comprise approximately 2000 square feet.

(c) Killing house of brick, iron roof, concrete floor, containing about 120 square feet.

(d) Fowl house of brick, iron roof, concrete floor and yards.

(e) Quarters and garages of brick with iron roof comprising four rooms, kitchen, bathroom and toilet, with enclosed verandah. Light and power is connected. Sewered. These premises comprise about 1930 square feet.

(f) An old brick cottage with iron roof which is unoccupied and out of use.

In the Supreme Court of New South Wales In Equity

No. 4.

Affidavit of John Bede Mullen.

12th February, 1957 - continued.

4. The Sisters comprising the Community of St. Joseph's Convent at Bungendore conduct a school in that village, attended by Boarders and day pupils. The school is for boys and girls and has an average attendance of approximately ninety pupils. Such Sisters are members of the Congregation of the Sisters of St. Joseph of the Most Sacred Heart of Jesus, which is a Corporate Body by virtue of the provisions of the Roman Catholic Church Communities - Lands Act 1942. 10

SWORN by the Deponent JOHN BEDE MULLEN at Goulburn on the day first hereinbefore mentioned, before me :-

J. B. MULLEN (Signed)

Signed

A Justice of the Peace.

No. 5.

ANNEXURE "A" to AFFIDAVIT OF JOHN BEDE MULLEN Sworn 12th FEBRUARY, 1957 being STATEMENT OF ASSETS and LIABILITIES of ESTATE of FRANCIS GEORGE LEAHY

See Photostat Copy

In the Supreme Court of New South Wales In Equity

No. 5.

Annexure "A" to Affidavit of John Bede Mullen sworn 12th February 1957.

Statement of Assets and Liabilities of Estate of Francis George Leahy.

June 1955.

"A"

THIS IS the Annexure ~~marked~~ "A" referred to in the attached Affidavi of JOHN BEDE MULLEN, sworn at Goulburn the 12th day of February 1957, before me:-

(Signed)
A Justice of the Peace

"D"

No. B

Form of Affidavit to be lodged with application for administration

NEW SOUTH WALES } TO WIT. }

IN the estate of FRANCIS GEORGE LEAHY

late of HAREFIELD AND BUNGENDORE in the State aforesaid,

† GRAZIER deceased, * Testate ~~Intestate~~

† State last occupation of deceased.
* Strike out whichever is unnecessary.

ON the ____ day of June

one thousand nine hundred and fifty five

If more than one applicant, the form to be filled up accordingly.

WE, CLEMENT OSBORNE WRIGHT, Secretary, Wagga, JOHN FRANCIS DONNELLY, Stock & Station Agent, Bungendore, JOHN BEDE MULLEN, Solicitor, Goulburn

being duly ~~sworn, severally~~ saith, and saith as follows:—

1. I am/we are the party/parties making application for the purpose of obtaining administration of the estate of the abovenamed deceased and the party/parties liable for the payment of the duty, if any, on the estate herein included.

2. The abovenamed deceased who died on the eleventh day of January 1955, aged 69 years, was at the time of death † married and was domiciled * New South Wales

† State whether married, bachelor, spinster, widower, widow, divorcee, or minor.
* State whether domiciled in or out of New South Wales.

3. The annexed inventory contains a true statement of all and singular the real and personal estate of or to which the abovenamed deceased was possessed or entitled and all property liable to duty under the Stamp Duties Act, 1920-1952, and of the values thereof, and includes the whole of the accruing income in the estate up to the date of death. The debts therein stated were actually due and owing at the date of the death of the deceased, and are such as may be deducted under Section 107 of the Stamp Duties Act, 1920-1952.

Words in full.

4. The final balance of the estate of the abovenamed deceased is Three hundred an forty eight thousand seven hundred & ninety one pounds 2/1

5. In the event of any additional assets being discovered, I/we will advise the Commissioner of Stamp Duties, and will pay any further duty found to be payable.

Strike out clause if not applicable.

Regulation form to be used.

6. The deceased having been domiciled in the State of New South Wales and the amount of the dutiable estate when aggregated with the value of the foreign assets after deducting all debts due and owing other than debts referred to in sub-section 2 of Section 107 being under the sum of seven thousand five hundred pounds I/we claim an assessment of the duty payable at concession rates set forth in Section 112c of the Stamp Duties Act, 1920-1952 on the properties set out in the annexed schedule marked "A" after deducting the proportion of the debts chargeable thereon as the said properties pass to the lawful * ____ of the deceased.

* Widow, widower and/or children under 21 years.

Strike out clause if not applicable.

Regulation form to be used.

7. The deceased having been domiciled in the State of New South Wales and the amount of the dutiable estate when aggregated with the value of the foreign assets after deducting all debts due and owing other than debts referred to in sub-section 2 of Section 107 being under the sum of two thousand five hundred pounds I/we claim exemption from duty on the properties set out in the annexed schedule marked "B" after deducting the proportion of the debts chargeable thereon as the said properties pass to the lawful * ____ of the deceased.

*Widow, widower and/or children under 21 years.

Regulation form to be used.

Strike out clause if not applicable.

8. The annexed schedule marked "C" contains a true statement of all and singular the real and personal estate and the values thereof of or to which the abovenamed deceased was possessed or entitled outside the State of New South Wales at the time of death other than real and personal estate liable to duty under the Stamp Duties Act, 1920-1952.

Strike out clause if not applicable.

9. The deceased was not possessed of or entitled to any property in New South Wales or elsewhere at the date of his death other than the property set out in the annexed inventory.

10. The annexed schedule marked "D" contains a true statement of the persons entitled to the property included in the dutiable estate, their relationship, if any, to the deceased, the description and value of such property and how same was derived.

Strike out clause if not applicable.

11. The annexure hereto marked "E" is a certified copy of the will of the deceased.

12. Particulars of property in which the deceased or any other person had an interest limited to cease on the death of the deceased, as provided by Section 102 (2) (g) of the Stamp Duties Act, 1920-1952, and the name of the person who created the limited interest, are shown in the annexed schedule marked "F."

Sworn by the deponent on the day first abovementioned at Wagga before me,—

CLEMENT OSBORNE WRIGHT
C.O. Wright

A Commissioner for Affidavits (or) Justice of the Peace

Sworn by the Deponents John Francis Donnelly and John Bede Mullen on the day of June 1955 before me:-

Inventory referred to in

FULL particulars and value of the estate and effects at the date of the death of the deceased chargeable with duty under the Stamp Duties Act, 1920-1952.

Assets	*	Value £	s.	d.
REAL ESTATE				
Real Estate possessed by the deceased at the time of his death, and Real Estate liable to duty under Section 102 of the Stamp Duties Act, 1920-1952, as per Schedule No. 1		201161	2	6
PERSONAL ESTATE				
Landed property held under lease, as per Schedule No.	Nil			
Rents accrued but unpaid, as per Schedule No. 2		464	5	9
Furniture, as per Schedule No. 3		4302	1	—
Watches, trinkets, jewellery, etc., as per Schedule No. 4		20	—	—
Live Stock, as per Schedule No. 5		12736	10	—
Wool unsold and moneys due for wool sold, as per Schedule No. 6		107	19	3
Crops, as per Schedule No.	Nil			
Farming implements, Harness and Saddlery, as per Schedule No. 7		757	10	—
Motor Cars, Vehicles, etc., as per Schedule No. 8		460	—	—
Plant, Tools, etc., as per Schedule No.	Nil			
Stock (as per stock sheets) in shop or business, as per Schedule No.	Nil			
Goodwill, as per Schedule No.	Nil			
Money in hand or house		7	19	6
Money on current accounts as per Schedule No. 10		51042	9	1
Money in banks or financial institutions on deposit } as per Schedule No.	Nil			
Interest accrued on same } as per Schedule No.	Nil			
Shares in companies listed on an Australian Stock Exchange, as per Schedule No. 11		12	10	—
Shares in companies, not so listed, as per Schedule No.	Nil			
Dividends declared but unpaid, including dividends on shares valued "ex-dividend," as per Schedule No.	Nil			
Government Stock, as per Schedule No.	Nil			
Debentures (including interest accrued) as per Schedule No.	Nil			
Mortgages } as per Schedule No. 12		1504	4	5
Interest accrued on same } as per Schedule No. 12				
Life Policies (including Settlement Policies and Policies for payment of Death Duty) } as per Schedule No. 13		56976	3	2
Bonuses } as per Schedule No. 13				
Debts due to Estate, as per Schedule No. 14		20536	19	1
Interest in a partnership, as per Schedule No.	Nil			
Interest in a deceased person's estate, as per Schedule No.	Nil			
Voluntary disposition. *Vide* Section 102 of the Stamp Duties Act, 1920-1952, as per Schedule No.	Nil			
Gifts of any kind whatever, made within three years preceding date of death, as per Schedule No.	Nil			
Specialty debts. *Vide* Section 103 (1) (*a*) of the Stamp Duties Act, 1920-1952, as per Schedule No.	Nil			
Funeral donations or other payments in excess of £50 from any Lodge or Society, as per Schedule No.	Nil			
Taxation credits (Provisional tax, Group Certificates, etc.), as per Schedule No.	Nil			
Payments (other than annuity or pension) under any scheme of superannuation, as per Schedule No.	Nil			
Monetary value of long service or other leave, etc., as per Schedule No.	Nil			
Other personal property not coming under any of the above headings, as per Schedule No. 15		1	—	—
Dutiable estate	£	350090	13	0
Total debts that may be deducted (Section 107)	£	1299	11	8
Final balance upon which duty is payable	£	348791	2	1

To be signed here by executors or administrators making the affidavit.

C. C. Wright
J. F. Donnelly
J. B. Mullen

(*Date*) June, 1955.

NOTE.—*In any cases where no asset exists corresponding to the above headings, the word "Nil" must be written against each of them in the column marked *. Property coming under each of the above headings must be particularised in Schedules.* If there are any assets not coming properly under any of the above headings, such assets must be included in the statement under a special heading describing the same.

In the Supreme Court of New South Wales In Equity

No. 5.

Annexure "A" to the Affidavit of John Bede Mullen Sworn 12th February, 1957.

Statement of Assets and Liabilities of Estate of Francis George Leahy -

- continued.

IN THE SUPREME COURT OF NEW SOUTH WALES
PROBATE JURISDICTION

In the Will of FRANCIS GEORGE LEAHY Late of Harefield and Bungendore in the State of New South Wales Grazier, deceased.

SCHEDULE NO. 1.

Real Estate

(a)	ALL THOSE parcels of land in the Parishes of Jeralgambeth, Wallace, Bilda, Claris and Cura County Clarenden containing 6278 acres 0 roods 11 perches as per Valuer-General's Valuation	£124,000.-.-
(b)	ALL THOSE parcels of land in the Parish of Jeralgambeth County Clarenden containing 634 acres 0 roods 12 perches as per valuation of New Zealand Loan & Mercantile Agency Co., Limited	9,511.2.6
(c)	ALL THOSE parcels of land situated in the Parish of Currandooley County Murray containing 729 acres 1 rood 22 perches as per valuation of Messrs. Woodgers & Calthorpe Ltd.	27,900.-.-
(d)	ALL THAT parcel of land in the Parish of Wollongong County Camden being Lot 8 of a resubdivision of Lot 2 Section 9 known as Nos.20/22 Valuer-General's valuation	15,650.-.-

Real Estate (Contd.) SCHEDULE NO. 1. (Contd.)

(e) ALL THAT parcel of land in the Parish of Wollongong County Camden being Lot 10 DP 18414 known as No.8 Mount Keira Road Wollongong as per Valuer-General's Valuation	3,300.-.-
(f) ALL THAT parcel of land in the Parish of Wollongong County Camden being Lot 37 DP 6920 known as No.9 Church Street, Wollongong as per Valuer-General's Valuation	
(g) ALL THAT parcel of land in the Parish of Wollongong County Camden being Lot 6 DP 19311 known as No.55 Woodlawn Avenue, Wollongong as per Valuer-General's valuation	5,000.-.-
(h) ALL THAT parcel of land in the Parish of Wollongong County Camden being Lot 3 DP 17709 known as 82A Cliff Road, Wollongong as per Valuer-General's valuation	11,800.-.-
	£ 201,161.2.6

This is Schedule No.1 referred to in the Affidavit of CLEMENT OSBORNE WRIGHT sworn at Wagga Wagga this day of One thousand nine hundred and fifty-five before me :-

A Justice of the Peace.

This is Schedule No.1 referred to in the Affidavit of JOHN FRANCIS DONNELLY and JOHN BEDE MULLEN sworn at Goulburn this day of One thousand nine hundred and fifty-five before me :-

A Justice of the Peace.

In the Supreme Court of New South Wales In Equity

No. 5.

Annexure "A" to the Affidavit of John Bede Mullen Sworn 12th February, 1957.

Statement of Assets and Liabilities of Estate of Francis George Leahy

- continued.

SCHEDULE NO. 2.

Rents accrued but unpaid -

20/22 Cliff Road				
Wollongong	E.F.Whittaker	- - -		
"	Mrs. D.E. May	4.17.10		
"	A. G. Higgins	13. 3. 6		
"	G. K.McDonald	- - -		
"	V. J. Glynn	6. 0. 0		
"	Mrs.E.Longhurst	18. 0. 0		
82A Cliff Rd.				
Wollongong	Hardy	30. 6. 8		
"	"	4. 9. 3		
"	O'Hanlon	22. 1. 0		
"	Carver	28.10. 0		
"	Carver	4. 1. 6		
"	Vacant	- - -		
55 Woodlawn Av.				
Wollongong	Marsden	84. 0. 0		
9 Church Street				
Wollongong	Wright	51. 9. 0		
Lot 10 Mt.Keira				
Rd. Wollongong	Bartlett	20. 0. 0		
Bungendore	Reardon Bros.	177. 7. 0	464.5.9	

SCHEDULE NO. 3.

Furniture -

(a) "Overdale" as per valuation of New Zealand Loan & Mercantile Agency	1497.15. 0	
(b) "Elmslea" as per valuation of Woodgers & Calthorpe Ltd.	697. 0. 0	
(c) Flat 82A Cliff Road, W'gong as per valuation of P. Healey & Co.	555. 3. 0	
(d) 55 Woodlawn Avenue, W'gong as per valuation of P. Healey & Co.	809. 5. 0	
(e) 9 Church Street, W'gong per valuation of P.Healey & Co.	531. 3. 0	
(f) Office furniture Wagga	211.15. 0	4302.1.0

SCHEDULE NO. 4.

Jewellery

Gold watch and chain as per valuation herewith	20.0.0

In the Supreme Court of New South Wales In Equity

No. 5.

Annexure "A" to the Affidavit of John Bede Mullen Sworn 12th February, 1957.

Statement of Assets and Liabilities of Estate of Francis George Leahy

- continued.

These are Schedules Nos. 2 to 4 referred to in the Affidavit of CLEMENT OSBORNE WRIGHT sworn at Wagga Wagga this day of One thousand nine hundred and fifty-five, before me :-

A Justice of the Peace.

These are the Schedules Nos. 2 to 4 referred to in the Affidavit of JOHN FRANCIS DONNELLY and JOHN BEDE MULLEN sworn at Goulburn this day of One thousand nine hundred and fifty-five, before me :-

A Justice of the Peace.

SCHEDULE NO. 5.

Livestock		
Livestock as detailed in the valuation of New Zealand Loan & Mercantile Agency Co. Ltd., herewith		12736.10. 0

SCHEDULE NO. 6.

Wool unsold -		
1 Bale of Wool	103. 2.9	
2 skins & 5 pelts	4.16.6	107.19. 3

SCHEDULE NO. 7.

Farming Implements -		
(a) "Overdale" as detailed in the valuation of New Zealand Loan & Mercantile Agency Co., Ltd.	697.10.0	
(b) "Elmslea" as detailed in the valuation of Woodgers & Calthorpe	60. 0.0	757.10. 0

SCHEDULE NO. 8.

Motor Cars -	
Humber car as per valuation of P. Healey & Co.	460. 0. 0

In the Supreme Court of New South Wales In Equity

No. 5.

Annexure "A" to the Affidavit of John Bede Mullen Sworn 12th February, 1957.

Statement of Assets and Liabilities of Estate of Francis George Leahy

- continued.

SCHEDULE NO. 9.

	B/Forward £	460. 0. 0
Money on hand		7.19. 6

SCHEDULE NO.10.

Money in Banks -		
Money in current account at Commonwealth Bank of Australia, Wagga Wagga, as per Bank's letter herewith	51,042. 9. 1	10

SCHEDULE NO.11.

Shares -		
10 Shares in Australian Fertilizer Ltd., at £1/5/- per share		12.10. 0

SCHEDULE NO.12.

Mortgages -			
(a) amount secured by mortgage over property at Bungendore from Mrs. F.B. McAuliffe	110. 0. 0		20
(b) amount secured by mortgage over property at Goulburn from L.A. Mullen - Mortgage dated 1/9/1951 No.490 Book 2229	1375. 0. 0		
Accrued interest (a)	- - -		
" " (b)	19. 4. 5	1,504. 4. 5	

These are Schedules Nos.5 to 12 referred to in the Affidavit of CLEMENT OSBORNE WRIGHT sworn at Wagga Wagga this day of One thousand nine hundred and fifty-five, before me :- 30

A Justice of the Peace.

These are Schedules Nos.5 to 12 referred to in the Affidavit of JOHN FRANCIS DONNELLY and JOHN BEDE MULLEN Sworn at Goulburn this day of One thousand nine hundred and fifty-five, before me :-

A Justice of the Peace. 40

In the Supreme Court of New South Wales In Equity

No. 5.

Annexure "A" to the Affidavit of John Bede Mullen Sworn 12th February 1957.

Statement of Assets and Liabilities of Estate of Francis George Leahy

- continued.

SCHEDULE NO. 13.

Life Policies -			
(a) Amount secured by Policy No. 968485 A. M.P. Society	1000. 0. 0		
(b) Amount secured by Policy No. 1050009 A.M.P. Society	5000. 0. 0		
(c) Amount secured by Policy No. 902349 National Mutual Life Association	10000. 0. 0		
(d) Amount secured by Policy No. 509828 Mutual Life & Citizens Assurance Co., Ltd.	40000. 0. 0	£56,000. 0. 0	
Bonuses Accrued:			
(a)	24. 8. 2		
(b)	252.10. 0		
(c)	390. 0. 0		
(d)	309. 5. 0	976. 3. 2	

SCHEDULE NO. 14.

Debts due to Estate -	
Caltex Oil Ltd., Drums deposit	2. 0. 0
M.M.Leahy, amount of advance to purchase property at Tarago	6745. 0. 0
Miss G.M.Leahy, balance due at date of death for purchase of properties "Bulwarra" Flats Cowper Street, Goulburn and Nos.5/7 Montague Street Goulburn	11530.12.11
J.B. & L.A. Mullen, balance in Trust Account at date of death	66.18. 2
Sisters of St.Joseph, Balance at date of death for purchase of property at Bungendore	761. 4.11
Department of Agriculture condemned cattle compensation	121. 5. 9

In the Supreme Court of New South Wales In Equity

No. 5.

Annexure "A" to the Affidavit of John Bede Mullen Sworn 12th February 1957.

Statement of Assets and Liabilities of Estate of Francis George Leahy

- continued.

SCHEDULE NO. 14 (Contd.)

Australian Wool Realization Commission - J.O. Payment	1301. 5. 9		
J. & M. Vaughan, adjustment telephone account	1. 1. 6		
P.M.G. Department Telephone account overpaid, Bungendore	3.12. 2		
W.C.Penfold & Co., Goods refunded	2.13. 6		
Edmondson & Co., Goods refunded	1. 4. 6	20,536.19. 1	

SCHEDULE NO. 15.

Other personal property - Value of Bulk Wheat Certificates as disclosed in letter from Australian Wheat Board		1. 0. 0

These are the Schedules Nos. 13 to 15 referred to in the Affidavit of CLEMENT OSBORNE WRIGHT Sworn at Wagga Wagga this day of One thousand nine hundred and fifty-five before me :-

A Justice of the Peace.

These are the Schedules Nos. 13 to 15 referred to in the Affidavit of JOHN FRANCIS DONNELLY and JOHN BEDE MULLEN sworn at Goulburn this day of One thousand nine hundred and fifty-five, before me :-

A Justice of the Peace.

In the Supreme Court of New South Wales In Equity

No. 5.

Annexure "A" to the Affidavit of John Bede Mullen Sworn 12th February 1957.

Statement of Assets and Liabilities of Estate of Francis George Leahy - continued.

SCHEDULE "A" LIST OF CREDITORS AT 11.1.55. 6th June, 1955

NAME	ADDRESS	NATURE	AMOUNT	DATE INCURRED
Cheques unpresented at 11.1.55				
Caraglia, C.	Harefield	Wages	52. 0.11	To 31.12.54
Dep Co. Taxation	Sydney	Group Deductions	22.17. 6	" 31.12.54
Marzol, J.	Wagga	Attention to office	2. 2. 0	Dec. Jan.
Spiers, J. & R.A.	"	Rent of office	8.19.10	" 31.12.54
Rapley, M.	"	Showing horses	6. 6. 0	" 12.12.54
Richards Miss	Wonoona	Telephone Account	36. 3. 7	" 31.10.54
Mullen, J.B. & L.A.	Solicitors, Goulburn	Costs, fees and Disbursements	347.16. 5	" 20.12.54
Day, W.	"Overdale", Harefield	Wages - less tax	18.10. 8	" 11. 1.55
Iannutti, G.	" "	Wages - less tax and Meat	17. 8. 2	" 11. 1.55
Guinco, P.	" "	Wages - less tax and Meat	19. 4. 2	" 11. 1.55
Caraglia, C.	" "	Wages - less tax	18.10. 8	" 11. 1.55
Scutti, G.	" "	Wages - less tax	18.10. 8	" 11. 1.55
Wright, C.	Wagga	Salary - less tax	11.12. 0	" 11. 1.55
Dep. Co. Taxation	Sydney	Group deductions	5.10. 9	" 11. 1.55
City of G.Wollongong	Wollongong	Electricity C/C Woonona	36. 1. 3	" 12. 1.55
Woonona Service Stn.	Woonona	Motor Repairs etc.	4.16. 8	" 31.12.54
Daniel, C.S.	Wollongong	Motor Repairs etc.	19.12. 6	" 30.11.54
Fallon, Sister M.	Wollongong	Nursing fees	3.12. 0	" 11. 1.55
Callachor, J.C.	Woonona	Chemist	6.13. 6	" 11. 1.55

In the Supreme Court of New South Wales in Equity

No. 5.

Annexure "A" to the Affidavit of John Bede Mullen Sworn 12th February 1957.

Statement of Assets and Liabilities of Estate of Francis George Leahy

- continued.

NAME	ADDRESS	NATURE	AMOUNT	DATE INCURRED
Marcus Clarke Ltd.	Wollongong	Clothing	3.17. 5	To 31.12.54
Phillips, Mrs. C.	Caringbah	Sheeting etc.	1. 4. 0	" 11. 1.55
Phillips, C.	"	Christmas Hams	8. 2. 9	" 31.12.54
Castles Bros. Ltd.	Wagga	Power Mower, Tools & Hardware	115.17. 9	" 31.12.54
Leslies Central Motors	Junee	Engine Repairs	3.15. 0	" 4. 5.55
Bell,W.E.& Sons	"	2 coils wire	7. 3. 6	" 31.12.54
Lannutti, G.	"Overdale", Harefield	Suit etc. in lieu of bonus	29. 0. 0	" 31.12.54
Edmondson & Co.	Wagga	Sheep lick	2. 4. 3	" 31.12.54
N. Riverina C.Council	Temora	Electricity A/c. "Overdale"	58. 1. 3	" 31.12.54
		" " "Elmslea"	18. 5. 8	" 31.12.54
Yarrowlumla Shire	Queanbeyan	Hardware and Petrol	6. 0. 6	" 11. 1.55
Perram, W.A.	Harefield	W'Compensation Insurance	107. 4. 0	1.7.54 to 30. 6.55
F.& G.Co-op. Co. Ltd.	Sydney	Office rent	3. 3.10	To 11. 1.55
		Stationery	1.13. 8	" 7. 1.55
Speirs, J.& R.A.	Wagga	Telephone A/c. Harefield 5	12. 4. 7	" 30.11.54
Penfold, W.C. & Co.	Sydney			
Postal Department	Harefield	Telephone A/c. Wagga 2398	5. 5. 8	" 31. 1.55
Postal Department	Wagga		£ 1039.13. 1	

NAME	ADDRESS	NATURE	AMOUNT	DATE INCURRED
		c/f	1039.13. 1	
Harefield, B.F.Brigade	Harefield	Subscription 1954/55	7. 0. 0	1954
Healey, P. & Co.	Wollongong	Cash supplied to F.G. Leahy	100. 0. 0	To 8. 1.55
		Sundries	2. 0. 0	" 10. 1.55
Petty Cash		"Evening Post"	9. 0	" 11. 2.55
Daniel Bros. & Co.Ltd.	Goulburn	Fees	26. 5. 0	" 11. 1.55
Dr. B.A. Cook	Bulli	Repairs Hangerton	12.15. 0	" 11. 1.55
Wallace, W.	West Wollongong	Sundries	9. 4. 5	" 5. 1.55
Davidson J. & Son	Woonona	Dri-Rak	2.11. 8	" 5. 1.55
Waters, W. & Sons	Wollongong	Telephone A/c Corrimal 85 (Trunk Calls only)	36.16. 6	" 17. 1.55
Postal Department	Corrimal	Allowance	25. 0. 6	" 3. 1.55
Leahy, Mrs. F.G.	Goulburn	Reimbursement, Medical & Optical fees	6. 6. 0	10. 1.55
Leahy, Mrs. F.G.	Goulburn	Accountancy Fees	31.10. 0	To 11. 1.55
			£ 1299.11. 8	
Johnson, L.S.	Sydney			

In the Supreme Court of New South Wales In Equity

No. 5.

Annexure "A" to the Affidavit of John Bede Mullen Sworn 12th February 1957

Statement of Assets and Liabilities of Estate of Francis George Leahy

- continued.

the preceding affidavit

FULL particulars of the debts actually due and owing by the deceased at the date of death which may be deducted from the value of the assets under Section 107 of the Stamp Duties Act, 1920-1952.

* Date	Name of Creditor	Domicile of Creditor	For what contracted	Secured £	Secured s.	Secured d.	Unsecured £	Unsecured s.	Unsecured d.
		As per Schedule attached							
			TOTAL DEBTS ... £				1299	11	8

* Insert date when debt contracted or date of last item in a running account. No debts to be inserted which were not contracted before date of death.

ANNEXURE "F" TO AFFIDAVIT "D"

Particulars of property in which the deceased or any other person had an interest limited to cease on the death of the deceased:—

Full name of person who created the limited interest	How was the limited interest created (whether by will or settlement *inter vivos*)?	Names and addresses of Trustees	Particulars of Property
	Nil		

If there was no such interest limited to cease on the death of the deceased, the word "Nil" is to be written across this Annexure.

This is the Annexure marked "F," referred to in the Affidavit of JOHN FRANCIS DONNELLY, CLEMENT OSBORNE WRIGHT, JOHN BEDE MULLEN in the Estate of FRANCIS GEORGE LEAHY

Made before me this ... day of June, 1955. by t
said CLEMENT OSBORNE WRIGHT
and made before me this day of June, 1955 by the said John Fr
Donnelly and John Bede Mullen.

54 2501—3

In the Supreme Court of New South Wales In Equity

No. 5.

Annexure "A" to the Affidavit of John Bede Mullen Sworn 12th February 1957

Statement of Assets and Liabilities of Estate of Francis George Leahy

Continued and Conclusion.

No.5. ANNEXURE "A" to the AFFIDAVIT OF JOHN BEDE MULLEN sworn 12th February 1957 STATEMENT OF ASSETS AND LIABILITIES OF ESTATE OF FRANCIS GEORGE LEAHY

last page.

contains endorsement only

NOT COPIED.

No. 6.

In the Supreme Court of New South Wales In Equity

No. 6.

Affidavit of Colin Anthony McKay.

20th February, 1957.

AFFIDAVIT OF COLIN ANTHONY McKAY

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY) No. 735 of 1956

IN THE MATTER OF THE TRUSTS OF THE WILL OF FRANCIS GEORGE LEAHY late of Harefield and Bungendore in the said State, Grazier, deceased.

Between:- JOHN FRANCIS DONNELLY CLEMENT OSBORNE WRIGHT and JOHN BEDE MULLEN the Executors and Trustees of the Will of the said Francis George Leahy Plaintiffs

- and -

DORIS CAROLINE MARY LEAHY (Widow of the said Francis George Leahy) FRANCIS JOHN LEAHY HENRY JOSEPH LEAHY DOROTHY MARGARET HALL JAMES PATRICK LEAHY MICHAEL MAURICE LEAHY GEORGE BONAVENTURE LEAHY GENEVIEVE MARY REDDY (the children of the said Francis George Leahy) and HER MAJESTY'S ATTORNEY GENERAL in and for the State of New South Wales Defendants

ON the 20th day of February One thousand nine hundred and fifty-seven COLIN ANTHONY McKAY of St. Mary's Cathedral Sydney in the State of New South Wales Catholic Priest being duly sworn makes oath and says as follows :-

1. I am a Doctor of Canon Law.

2. I have read what purports to be a copy of the affidavit of Monsignor George Clifford Gallen sworn and filed in these proceedings. The said Monsignor Gallen is at present absent from his duties at St. Mary's Cathedral on holidays.

3. The Canon Law provides certain formal procedures before approval is given to the establishment of an Order or Congregation of religious women. The approval of ecclesiastical authority has always

In the Supreme Court of New South Wales In Equity

No. 6.

Affidavit of Colin Anthony McKay.

20th February, 1957 - continued.

been necessary to found an Order or Congregation. As orders are no longer founded present regulations pertain to the foundation of Congregations.

4. A group of women desiring to form a Congregation must obtain permission from the local Ordinary or Bishop of the Diocese.

5. It is the duty of the Bishop to seek approval from Rome before he may exercise his jurisdiction to found a Congregation. That Congregation is then known as a Congregation of Diocesan Right. After the lapse of time and most likely with expansion into various Dioceses control over the Congregation may be taken from the local Bishop or Bishops and vested directly in the Holy See, the Congregation is then called of "Pontifical Right".

6. No group of religious women has any juridical personality under Canon Law unless it has received the formal Decree of creation of the local Ordinary or Bishop.

7. Records are kept in each Diocese of the Orders and Congregations which have received approval and only those bodies which have received such approval are recorded as Orders or Congregations.

8. The Congregation of Religious, one of the Congregations constituting the Roman Curia has jurisdiction over the government discipline studies properties and privileges of all Religious Orders and Congregations.

9. The Sacred Congregation of Religious keeps a complete record of all Orders and Congregations of both Diocesan and Pontifical Right throughout the World.

SWORN by the Deponent on the day and year first hereinbefore mentioned at Sydney, before me :- } Signed. Colin McKay

Signed. W.E.Wilkinson, J.P.

No. 7.

In the Supreme Court of New South Wales In Equity

No. 7.

Affidavit of John Bettridge.

8th March 1957.

AFFIDAVIT OF JOHN BETTRIDGE.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY } No. 735 of 1956

IN THE MATTER OF THE TRUSTS OF THE WILL OF FRANCIS GEORGE LEAHY late of Harefield and Bungendore in the said State, Grazier, deceased.

Between:- JOHN FRANCIS DONNELLY
CLEMENT OSBORNE WRIGHT and
JOHN BEDE MULLEN the Executors and Trustees of the Will of the said Francis George Leahy

- and - Plaintiffs

DORIS CAROLINE MARY LEAHY (Widow of the said Francis George Leahy)
FRANCIS JOHN LEAHY
HENRY JOSEPH LEAHY
DOROTHY MARGARET HALL
JAMES PATRICK LEAHY
MICHAEL MAURICE LEAHY
GENEVIEVE MARY REDDY (the children of the said Francis George Leahy)
and HER MAJESTY'S ATTORNEY GENERAL in and for the State of New South Wales Defendants

ON the eighth day of March One thousand nine hundred and fifty-seven FATHER JOHN BETTRIDGE of St. Patrick's Church, Harrington Street, Sydney in the said State Catholic Priest being duly sworn makes oath and says as follows :-

1. I am a member of the Society of Mary a Congregation of Priests and I am at present attached as a Secretary to the Apostolic Delegation to Australia, New Zealand and Oceania.

2. I am a Doctor of Canon Law, such Doctorate having been conferred upon me in Rome after studies in that City.

3. The distinction between Orders and Congregations within the Catholic Church is strictly a Canonical distinction which would not generally be known to the laity and among the clergy and laity

In the Supreme Court of New South Wales In Equity

No. 7.

Affidavit of John Bettridge.

8th March 1957 - continued.

the terms "Order" "Congregation" "Nun" and "Sister" are commonly used indiscriminately without reference to that distinction when there is no call for Canonical precision.

4. His Holiness Pope Pius XII has not infrequently used in discourses the terms "Order" "Congregation" "Nun" and "Sister" without regard to the Canonical distinction where precision in the use of such terms has not been required.

5. The Nursing Sisters of the Little Company of Mary referred to in Clause 4 of the Will of Francis George Leahy dated the Sixteenth day of February One thousand nine hundred and fifty-four as an Order of Nursing Sisters is according to the Canon Law a Congregation and not an Order.

SWORN by the Deponent on the day and year first hereinbefore mentioned) Signed John V.Bettridge.

Before me:

Signed J.P.

No. 8.

Reasons for Judgment of His Honour Mr. Justice Myers.

11th April, 1957.

No. 8.

REASONS FOR JUDGMENT OF HIS HONOUR MR.JUSTICE MYERS

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY)

CORAM: Myers, J.

THURSDAY, 21st FEBRUARY, 1957.

DONNELLY & OTHERS v. LEAHY & OTHERS

JUDGMENT

HIS HONOUR: By his Will the Testator, after appointing executors and trustees and making certain dispositions which are not material gave the whole of his real estate and the residue of his personal estate to his executors and trustees on certain trusts.

The third clause is in these terms :-

"As to my property known as 'Elmslea' situated at Bungendore aforesaid and the whole of the lands comprising the same and the whole of the furniture contained in the homestead thereon upon trust for such Order of Nuns of the Catholic Church or the Christian Brothers as my said Executors and Trustees shall select and I again direct that the selection of the Order of Nuns or Brothers as the case may be to benefit under this Clause of my Will shall be in the sole and absolute discretion of my said Executors and Trustees".

The questions which have been argued before me relate to the validity and effect of this provision. There is evidence, from Monsignor Gallen and Dr. McKay, the effect of which is that there are within the Roman Catholic Church, which is conceded to be the church referred to, associations of religious women divided into two kinds, namely, orders and congregations. Members of orders are nuns and members of congregations are called sisters. Some orders of nuns have purposes which are legally charitable and others have not. The Canon Law provides for the procedure for forming an order or congregation, and records of orders and congregations of each diocese are kept in the diocese and a complete record of all of them is kept at Rome at the Vatican. There is, therefore, no difficulty of ascertaining at any time what orders of nuns exist in any part of the world or in the whole world.

It has been contended that the gift is uncertain for two reasons, firstly that it is uncertain whether the testator referred to orders of nuns properly so called or intended to include also congregations, and secondly it is uncertain whether he meant orders of nuns in N.S.W. or in Australia or elsewhere. Since the phrase "Order of Nuns" is one perfectly well known in the Roman Catholic Church and refers to particular associations of women, I do not find any difficulty in holding that the testator meant to refer to what his words described, namely, associations of women properly described, according to the Canon Law of the Roman Catholic Church, as orders of nuns.

So far as the second point is concerned, there is no restriction as to place in the will, and

In the Supreme Court of New South Wales In Equity

No. 8.

Reasons for Judgment of His Honour Mr. Justice Myers.

11th April, 1957 - continued.

nothing in it to which I have been referred which would require me to place any restriction upon it. In my opinion, since the Roman Catholic Church is a church to be found all over the world, the reference to orders of nuns in the Roman Catholic Church must be taken to mean orders of nuns of the Roman Catholic Church anywhere in the world. These being the only grounds on which the trust is attacked for uncertainty, I am of the opinion that it is certain and that it is not open to challenge on those grounds.

The result is that it is open to the trustees to select any order of nuns, charitable or non-charitable as the sole object of the testator's bounty. They could, of course select the Christian Brothers, which is admittedly a charity and an association of the Church in N.S.W.

It is then said that the terms of the gift are such that it would require the income of the fund to be applied in perpetuity for the purposes of whatever order might receive it if the trustees should select an order of nuns in preference to the Christian Brothers, and that since the order selected might not be a charity, the power to select an order was invalid. In my opinion the clause of the will which I have quoted does not create a perpetuity. As was said By Joyce J. in In re Smith (1914 1 Ch. 937 at 945), "There is no direction to apply the income for ever, or for an indefinite period, but for particular purposes; nor is there any direction whatever in reference to the application of the corpus."

This is, in my opinion, an absolute gift to the order. I could not express my conclusions more accurately than by adopting the words of Lord Tomlin in In re H.J.Ogden (1933 Ch.678 at 683) when, after discussing a similar problem, he said - "I hold that when the bodies have been selected from the prescribed field, the gift to each body will be an absolute gift for the purposes of such body, and accordingly valid".

I am therefore of the opinion that this is a valid trust and that the trustees are at liberty to select as the beneficiary any order of nuns of the Roman Catholic Church anywhere in the world or the Christian Brothers.

I answer question 1 (adding at the end the words "Or on any other ground"), "No."

(At this stage argument proceeded on the Second question and further hearing was adjourned till Friday, 8th March, 1957.)

In the Supreme Court of New South Wales In Equity

No. 8.

Reasons for Judgment of His Honour Mr. Justice Myers.

11th April, 1957 - continued.

JUDGMENT (Continued)

HIS HONOUR: By Clause 5 of the Will the Testator gave the residue of his real and personal estate

> "Upon trusts to use the income as well as the capital to arise from any sale thereof in the provision of amenities in such convents as my said Executors and Trustees shall select either by way of building a new convent where they think necessary or the alteration of or addition to existing buildings occupied as a convent or in the provision of furnishings in any such convent or convents, and I declare that my said Executors and Trustees shall have the sole and absolute discretion of deciding where any such premises shall be built or altered and repaired, and the Order or Orders of Nuns who shall benefit under the terms of this clause, the receipt of the Reverend Mother for the time being of that particular Order of Nuns or convent shall be a sufficient discharge to my said Executors and Trustees for any payment under this clause."

It has been contended that this provision is, apart from Section 37D of the Conveyancing Act, 1919-1943, invalid for various reasons. It is conceded on all sides that Order of Nuns includes Orders which are legally charitable and Orders which are not. It is first said that Clause 5 is invalid because it gives power to distribute the estate of the testator among a class or group which is not sufficiently certain, and amounts therefore to an attempted delegation of testamentary power. Tatham v. Huxtable, 87 C.L.R.

In my opinion this argument cannot succeed. It is at all times possible to ascertain what Orders of Nuns are in existence and it is possible to find this information with complete certainty and accuracy. I think this is a power to distribute among an accurately defined class, and I do not think that the clause is void on that account.

In the Supreme Court of New South Wales In Equity

No. 8.

Reasons for Judgment of His Honour Mr. Justice Myers.

11th April, 1957 - continued.

It is next said that the clause in effect amounts to an endowment, and since the objects to be benefited are not necessarily charitable, it is perpetuity and therefore void. This view is not disputed by any party and indeed Counsel for the Attorney General, who is the only person interested in contending the reverse, has conceded that it is correct, I think it is a perpetuity, and I think that apart from Statute the clause would on that account be invalid.

A further argument has been submitted which, having regard to the contentions as to the applicability of S.37D, I feel I must decide. It is said that the direction to provide amenities is a direction to provide something which may or may not be required for the purposes of carrying on the work of any Order of nuns. It is said, therefore, that even though all Orders of Nuns were charities, since the amenities to be provided would not necessarily be required or devoted to the attainment of their charitable objects, that it would be itself a cause of invalidity.

In my opinion the Testator meant by the use of the word "amenities" no more than the actual matters he has enumerated, namely the building of a new convent where the Trustees might think it necessary, the alteration of or addition to existing buildings occupied as convents, and the provisions of furnishings in convents. I do not think that the use of the word "amenities" has any significance at all.

The position then is that there is a disposition for the purpose of providing any or all of the three matters I have quoted, namely, new buildings, alterations or additions to buildings and the provision of furnishings. Assuming, as the argument does, all Orders of nuns to be charitable, it is my opinion that the provisions of buildings to house them, the repair of buildings which do house them, and the furnishing of such buildings, are necessarily charitable. They are all matters which are necessary if the nuns are to carry on with their activities, and seem to me to be clearly charitable.

It was said that the funds may be used for the provision of buildings and furnishings which

would not be necessary or reasonably required for the purposes of carrying on the activities of the Orders. This is an argument which would invalidate any gift of a building, or for the maintenance of a building for any charitable purpose at all. It would invalidate a gift to erect a church or provide an organ because it might be said that those charged with the expenditure of the funds might erect a church which was unnecessarily elaborate or an organ which was unnecessarily large. The view put to me is that where one has such gifts the Trustees are only entitled to build such a church as is necessary for the purposes of religion in the particular parish, or such an organ as is necessary to provide appropriate music in the church. I do not think that the law considers degrees of that kind. In my opinion this would clearly be a charitable gift if all Orders of Nuns were in fact charitable.

(Judgment continued on Thursday, 11th April, 1957)

JUDGMENT (continued)

HIS HONOUR: Clause 5 of the Will being, apart from Statute, invalid, it is necessary to consider whether its validity is saved by Section 37D of the Conveyancing Acts 1919/1943. The reported decisions on this provision are conflicting. According to one view the section applies to any trust which is in such a form that it permits the fund to be applied for charitable or non-charitable purposes even though it contains no express or implied reference to charity at all. The other view is that the section only applies to trusts in which the Testator has expressly indicated a distinct and severable class of charitable objects as being among the possible recipients of his bounty. The former view was expressed by Nicholas Chief Judge in Equity, in Union Trustee Co., Ltd., v. The Church of England Property Trust 46 S.R. 298, and was subsequently adopted by the Full Court of New Zealand in Re Ashton (1955 N.Z.L.R.192) while the latter view was that taken by Fullagar J. then a judge of the Supreme Court of Victoria in In re Belcher (1950) V.L.R.11.

The distinction between the two views is that in the one case the test of applicability of the

In the Supreme Court of New South Wales In Equity

No. 8.

Reasons for Judgment of His Honour Mr. Justice Myers.

11th April, 1957 - continued.

section is to be found in the purposes to which the fund may be devoted in pursuance of the terms of the trust, while in the other the governing factor is the expressed intention of the Testator. Nicholas C.J. in Equity, based his conclusion on three grounds, namely, reported decisions, the intention of the Legislature, and the interpretation of the section.

With respect, I do not think that the cases on which Nicholas C.J. in Equity, relied as authority binding him, justify the conclusion that he drew from them. In each the trust expressly mentioned purposes or objects, and one of them, Roman Catholic Archbishop of Melbourne v. Lawler (51 C.L.R.1) is, if anything opposed to the view which he took.

With respect to the third ground, namely, the interpretation of the section itself, there can, I think, be no doubt that the section is capable of bearing the meaning which he attributed to it, but this does not appear to me to be a ground for holding that it should bear that meaning. The narrower construction is equally open, and the solution of the problem as to which meaning should be accepted must therefore be sought elsewhere than in the terms of the section itself. In my opinion it is to be found by reference to the intention of the legislature, which was the third ground upon which Nicholas J. proceeded, and indeed was the approach of the High Court in Roman Catholic Archbishop of Melbourne v. Lawler, Starke J. and Dixon J., as he then was, both held that the intention of the Legislature was to remove or provide against a very well known ground upon which many dispositions were invalidated and which is set out in the following passage from the speech of Lord Halsbury, Lord Chancellor, in Hunter v. The Attorney-General (1899 A.C. 309 at 315) :-

> "It is undoubtedly the law that, where a bequest is made for charitable purposes and also for an indefinite purpose not charitable and no apportionment is made by the will, so that the whole might be applied for either purpose, the whole bequest is void ..... "

Nicholas C.J. in Equity, however, found the mischief intended to be remedied in the following passage which appears in his judgment at p.304:-

"Nor does there appear to be any doubt that the mischief which S.37D was intended to remedy was that state of the law in relation to charities which defeated the intention of testators not merely when there are enumerated charitable and non-charitable objects but when the powers in one expression might be used for charitable or non-charitable objects at the discretion of the Trustee."

This is in such wide terms that it would make S.37D applicable to and validate a trust in which no charitable intention appeared at all, as for example a trust for such purposes as the trustee should select. I do not think that the principle which results in the failure of such trusts has ever been regarded as a mischief which required to be remedied. In my opinion what has been regarded as a mischief is the failure of trusts in which testators have shown an intention to benefit charity but which, because of the inclusion of non-charitable objects, have failed altogether. Indeed I think that this appears from the very authorities referred to in the Union Trustee Company case. In my view the Statute was enacted to give effect to trusts not irrespective of the intention of the Testator but conformably to it or at least to that part of it which contemplated the direction of the whole fund to charity. Accordingly the section only applies where a charitable intention appears from the trust itself, and the application of the whole fund to charity is one way of completely satisfying the intention of the Testator. A trust for such purposes as the Trustee should select would therefore not qualify under S.37D because it shows no charitable intention. Nor, for the same reason, would a trust for benevolent purposes. A Testator who had benevolent purposes in mind would not necessarily have in mind benevolent purposes which are charitable, and it would be pure conjecture to hold that the devotion of the fund to purposes which were legally charitable would in fact satisfy the Testator's intention. The mere fact that benevolence goes beyond charity shows in my opinion that a Testator who creates a trust for benevolent purposes cannot necessarily be said to have had any charitable purpose in his mind at all.

Similar considerations seem to me to apply to trusts for organisations described by general terms

In the Supreme Court of New South Wales In Equity

No. 8.

Reasons for Judgment of His Honour Mr. Justice Myers.

11th April, 1957 - continued.

as a class. In this particular case the Testator has, in effect, given the fund to such order or orders of nuns as the Trustees might select. Some orders of nuns are charitable and some are not. It is true that the orders actually in existence at the date of his Will and the date of his death or at any other time can be ascertained with complete accuracy. This, however, does not seem to me to distinguish this trust from any gift upon trust for organisations described as a class, because it is impossible to say that the testator had in mind orders which were in fact charitable. I cannot distinguish this from a trust simply for benevolent purposes. I do not think that it could be said that the application of this fund to orders which are in fact charities would be a complete satisfaction of any intention which has been expressed or is implicit in his Will. As far as I can see, there is nothing to indicate that he had charitable orders in his mind at all.

In the circumstances, therefore, I do not think that S.37D applies, and for that reason I find it unnecessary to consider a number of other arguments which Mr. Kerrigan addressed to me.

The questions are to remain as previously answered. The orders may be taken out and are to date wholly as from to-day.

No. 9.

Decree of His Honour Mr. Justice Myers.

11th April, 1957.

No. 9.

DECREE OF HIS HONOUR MR. JUSTICE MYERS

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY) No. 735 of 1956

IN THE MATTER OF THE TRUSTS OF THE WILL OF FRANCIS GEORGE LEAHY late of Harefield and Bungendore in the State of New South Wales, Grazier, deceased

Between:- JOHN FRANCIS DONNELLY CLEMENT OSBORNE WRIGHT and JOHN BEDE MULLEN the Executors and Trustees of the Will of the said Francis George Leahy

Plaintiffs

- and -

DORIS CAROLINE MARY LEAHY (Widow of the said Francis George Leahy) FRANCIS JOHN LEAHY HENRY JOSEPH LEAHY DOROTHY MARGARET HALL JAMES PATRICK LEAHY MICHAEL MAURICE LEAHY GEORGE BONAVENTURE LEAHY GENEVIEVE MARY REDDY (the children of the said Francis George Leahy) and HER MAJESTY'S ATTORNEY-GENERAL in and for the State of New South Wales Defendants

In the Supreme Court of New South Wales In Equity

No. 9.

Decree of His Honour Mr. Justice Myers.

11th April, 1957 - continued.

THURSDAY the eleventh day of April One thousand nine hundred and fifty-seven.

THIS SUIT instituted by Originating Summons coming on to be heard before the Honourable Frederick George Myers a Judge of the Supreme Court sitting in Equity on the fifteenth and twenty first days of February last the eighth day of March last and this day WHEREUPON AND UPON HEARING READ the said Originating Summons the Affidavit of John Francis Donnelly, Clement Osborne Wright and John Bede Mullen sworn the tenth day of July One thousand nine hundred and fifty-six the Affidavit of John Bede Mullen sworn the twelfth day of February last the Affidavit of Colin Anthony McKay sworn the twentieth day of February last and the Affidavit of John Bettridge sworn the eighth day of March last and all filed herein AND UPON HEARING what was alleged by Mr. Macfarlan of Queen's Counsel with whom was Mr. Donovan of Counsel for the Plaintiffs by Mr. Kerrigan of Queen's Counsel with whom was Mr. Hicks of Counsel for all Defendants other than Her Majesty's Attorney General in and for the State of New South Wales and by Mr. Officer of Counsel for Her Majesty's Attorney General in and for the State of New South Wales THIS COURT DOTH DECLARE that on the true construction of the Will of the above-named Testator Francis George Leahy and in the events which have happened the Trust directed therein in respect of the property known as "Elmslea" situated at Bungendore is not void for uncertainty or any other ground AND THIS COURT DOTH FURTHER DECLARE that on the true construction of the said Will and in the events which have happened the trust directed therein as to the rest and residue of the Estate of the said Testator both real and personal is void AND THIS COURT DOTH FURTHER ORDER that it be referred to the Deputy

In the Supreme Court of New South Wales In Equity

No. 9.

Decree of His Honour Mr. Justice Myers.

11th April, 1957 - continued.

Registrar or Chief Clerk in Equity to tax as between Solicitor and Client and certify the costs of all parties of this suit up to and inclusive of this Decretal Order and that such costs when so taxed and certified as aforesaid be paid out of the Estate of the said Testator in manner following that is to say the costs of the Plaintiffs be retained by them or paid to their Solicitor and the costs of the Defendants be paid to them or to their respective Solicitors AND THIS COURT DOTH FURTHER ORDER that the Plaintiffs have leave to amend the said Originating Summons by adding parties and generally AND THIS COURT DOTH FURTHER ORDER that the Plaintiffs have leave to take out this Decretal Order and all parties are to be at liberty to apply as they may be advised.

PASSED this Twenty first day of June, 1957.

T.L.
Entered same day.

R.T.C.S.

Signed. R.T.C.Storey
DEPUTY REGISTRAR IN EQUITY

In the High Court of Australia.

No.10.

Notice of Appeal concerning Residuary Estate No.30 of 1957.

2nd May, 1957.

No. 10.

NOTICE OF APPEAL CONCERNING RESIDUARY ESTATE (NO. 30 of 1957)

IN THE HIGH COURT OF AUSTRALIA)
NEW SOUTH WALES REGISTRY) No. 30 of 1957

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES IN ITS EQUITABLE JURISDICTION

Between:- HER MAJESTY'S ATTORNEY-GENERAL in and for the State of New South Wales Appellant

- and -

JOHN FRANCIS DONNELLY CLEMENT OSBORNE WRIGHT and JOHN BEDE MULLEN, the Executors and Trustees of the Will of Francis George Leahy deceased DORIS CAROLINE MARY LEAHY FRANCIS JOHN LEAHY,

HENRY JOSEPH LEAHY DOROTHY MARGARET HALL, JAMES PATRICK LEAHY, MICHAEL MAURICE LEAHY, GEORGE BONAVENTURE LEAHY and GENEVIEVE MARY REDDY
Respondents

In the High Court of Australia.

No.10.

Notice of Appeal concerning Residuary Estate No.30 of 1957.

2nd May, 1957 - continued.

NOTICE OF APPEAL

TAKE NOTICE the above-named Appellant hereby appeals to the Full Court of the High Court of Australia against so much of the Judgment Decree and Order of the Supreme Court of New South Wales in its Equitable Jurisdiction made by the Honourable Frederick George Myers a Judge thereof sitting in Equity on the 11th day of April 1957 as declared that upon the true construction of the Will of the above-named Francis George Leahy deceased and in the events which have happened the Trust directed therein as to the rest and residue of his estate both real and personal is void UPON the following amongst other grounds namely :-

1. THAT His Honour was in error in holding that the provisions of Section 37D of the Conveyancing Acts 1919-1943 of the State of New South Wales do not apply to the trust declared in his said Will by the said Testator with regard to his residuary estate.

2. THAT His Honour was in error in holding that the provisions of Section 37D of the Conveyancing Acts 1919-1943 of the State of New South Wales only apply where a charitable intention appears from the trust itself and the application of the whole fund to charity is one way of completely satisfying the intention of the Testator.

3. THAT His Honour should have held that the provisions of the said Section 37D apply where charitable purposes as well as non-charitable purposes are or could be deemed to be included among the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed notwithstanding that no such charitable purpose is expressly referred to in the terms of the trust instrument.

4. THAT His Honour was in error in holding that

In the High Court of Australia.

No.10.

Notice of Appeal concerning Residuary Estate No.30 of 1957.

2nd May, 1957 - continued.

it is impossible to say with regard to the trust in respect of his residuary estate that the said Testator had in mind Orders of Nuns which are in fact charitable.

5. THAT His Honour should have held that by the terms of the trust in his said Will relating to his residuary estate the said Testator did show an intention to benefit Orders of Nuns which are in fact charitable.

6. THAT His Honour should have declared that upon the true construction of the said Will and in the events which have happened the trust directed therein as to the rest and residue of the estate of the said Testator was not void but is a valid and enforceable trust and that the said trust shall be construed and given effect to in accordance with the provisions of Section 37D of the Conveyancing Acts 1919-1943 so that the said trust is a trust for the provision of amenities in such Convents conducted by Orders of Nuns which are charitable in the legal sense as the Executors and Trustees of the said Will shall select.

DATED this Second day of May, 1957.

Signed N.H.Bowen,

Counsel for the Appellant.

NOTE: This Notice of Appeal is filed by Finlay Patrick McRae, Crown Solicitor of No. 237 Macquarie Street, Sydney, Solicitor for the Appellant.

No. 11.

NOTICE OF APPEAL CONCERNING PROPERTY "ELMSLEA" (NO. 31 of 1957)

In the High Court of Australia.

No.11.

Notice of Appeal concerning "Elmslea" (No.31 of 1957)

2nd May, 1957.

IN THE HIGH COURT OF AUSTRALIA)
NEW SOUTH WALES REGISTRY) No. 31 of 1957

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

IN THE MATTER OF THE TRUSTS OF THE WILL OF FRANCIS GEORGE LEAHY late of Harefield and Bungendore in the said State, Grazier, deceased.

Between:- DORIS CAROLINE MARY LEAHY (Widow of the said Francis George Leahy) FRANCIS JOHN LEAHY HENRY JOSEPH LEAHY DOROTHY MARGARET HALL JAMES PATRICK LEAHY MICHAEL MAURICE LEAHY GEORGE BONAVENTURE LEAHY GENEVIEVE MARY REDDY (the children of the said Francis George Leahy) Appellants

- and -

JOHN FRANCIS DONNELLY CLEMENT OSBORNE WRIGHT and JOHN BEDE MULLEN the Executors and Trustees of the Will of the said Francis George Leahy and HER MAJESTY'S ATTORNEY-GENERAL in and for the State of New South Wales Respondents

NOTICE OF APPEAL

TAKE NOTICE that the above-named Appellants DORIS CAROLINE MARY LEAHY (Widow of the said Francis George Leahy) FRANCIS JOHN LEAHY, HENRY JOSEPH LEAHY, DOROTHY MARGARET HALL, JAMES PATRICK LEAHY, MICHAEL MAURICE LEAHY, GEORGE BONAVENTURE LEAHY, GENEVIEVE MARY REDDY (the children of the said Francis George Leahy) Appeal to the High Court of Australia from so much of the judgment and Decretal Order of the Supreme Court of New South Wales in its Equitable Jurisdiction given and made on the 11th day of April, 1957 by the Honourable Frederick George Myers a Judge of the said Supreme Court sitting in Equity on the hearing of a Suit instituted by Originating Summons numbered 735 of 1956

In the High Court of Australia.

No.11.

Notice of Appeal concerning "Elmslea" (No.31 of 1957)

2nd May, 1957 - continued.

wherein the above-named Appellants were Defendants and the above-named Respondents excepting Her Majesty's Attorney General in and for the State of New South Wales who was a Defendant were the Plaintiffs as declares that upon the true construction of the Will of the above-named Francis George Leahy deceased and in the events which have happened the trust directed therein in respect of the property known as "Elmslea" situated at Bungendore is not void for uncertainty or on any other ground upon the following amongst other grounds namely:-

1. That His Honour was in error in holding that the said trust was not void for uncertainty or on any other ground.

2. That His Honour was in error in holding that the reference to "orders of nuns" must be taken to mean orders of nuns of the Roman Catholic Church anywhere in the world.

3. That His Honour was in error in holding that the gift in the will of the property "Elmslea" did not create a perpetuity.

4. That His Honour was in error in holding that the said gift was an absolute gift to the order.

5. That His Honour was in error in holding that there was a valid trust and that the trustees are at liberty to select as the beneficiary any order of nuns of the Roman Catholic Church anywhere in the world or the Christian Brothers.

AND FURTHER TAKE NOTICE that the Appellants seek an order declaring that upon the true construction of the Will of the above-named Francis George Leahy deceased and in the events which have happened the said trust in respect of the property known as "Elmslea" is void for uncertainty and invalid as creating a perpetuity and an order upholding this appeal and for an order that the costs as between Solicitor and Client of all parties to this appeal should be paid out of the estate of the Testator.

DATED this second day of May, 1957.

To the above-named Respondents and their Solicitors, F.P.McRae and Murphy & Moloney as agents for J.B.& L.A.Mullen and to the District Registrar, High Court of Australia, SYDNEY

Sgd. F.E.Reed.
Solicitor for the Appellants.

No. 12(a)

In the High Court of Australia.

No.12(a)

Reasons for Judgment of their Honours The Chief Justice Sir Owen Dixon and Mr. Justice McTiernan.

11th March, 1958.

REASONS FOR JUDGMENT OF THEIR HONOURS THE CHIEF JUSTICE SIR OWEN DIXON AND MR. JUSTICE McTIERNAN

HER MAJESTY'S ATTORNEY-GENERAL IN AND FOR THE STATE OF NEW SOUTH WALES

V.

DONNELLY AND OTHERS
LEAHY AND OTHERS

V.

DONNELLY AND OTHERS

These are two appeals from a decree of Myers J. declaring the effect of two clauses of the Will of the late Francis George Leahy of Harefield and Bungendore in New South Wales, grazier. The questions with respect to the provisions of the Will with which the decree deals are whether they are valid either as charitable trusts or otherwise to any and what extent. The Will in question was made on 16th February 1954 and the Testator died on 11th January 1955. His estate, the net value of which was about £348,000, comprised several grazing properties and a block of flats in Goulburn. Testator left him surviving a widow and seven children all of whom are of full age. They are Respondents in one appeal and Appellants in the other. By his Will the Testator, after a bequest of £1,000 for the benefit of St. Joseph's Convent at Bungendore and a bequest of £1,000 to the Rector of the Passionist Fathers, Mary's Mount, Goulburn, gave specific bequests to two of his children and a nephew and made certain provisions in favour of one of his daughters. He then disposed of the whole of his real estate and the residue of his personal estate by devising and bequeathing it to his trustees upon trusts which the Will proceeded to declare. Under the first trust his wife was entitled to occupy one of the flats in Goulburn so long as she should remain his widow and to use the furniture. Subject to that he devised the flats and the furniture to one of his daughters. He directed that his Trustees should pay his wife an annuity of £750 and should refund to his wife the income tax upon the annuity. He then dealt with his grazing properties. In the

In the High Court of Australia.

No.12(a)

Reasons for Judgment of their Honours The Chief Justice Sir Owen Dixon and Mr. Justice McTiernan.

11th March, 1958 - continued.

first place he made provision as to a property known as "Elmslea". One of the appeals turns on that provision and it is better before setting it out to describe the other provisions of the Will. The Testator went on to deal with the homestead on the grazing property known as "Overdale" at Harefield and certain cultivation paddocks annexed to it. He directed his trustees to permit the Order of nursing sisters known as "The Nursing Sisters of the Little Company of Mary" to use and occupy the homestead furniture and lands of "Overdale" for a period of ten years from his death upon condition that the property should be used for the care and comfort of the sick or the like in a manner which he indicated. At the expiration of ten years upon being satisfied that the provision had been fulfilled his Trustees should be at liberty to convey the property to the Order. If the Trustees were not so satisfied they were directed to select some other Order of nuns and offer the property to them on the same conditions. The Will proceeded to make provision as to the rest and residue of his estate and this provision is the subject of the other appeal. It will be necessary to set it out later in terms. There follow certain powers: a power to continue the employment of the Testator's Secretary and Accountant, a power to sell, a very full power of management and some incidental authorities.

Turning now to the trust of "Elmslea", that trust first describes the property and its situation and includes the furniture contained in the homestead. The material part of the trust is then as follows:- "Upon trust for such Order of Nuns of the Catholic Church or the Christian Brothers as my said Executors and Trustees shall select and I again direct that the selection of the Order of Nuns or Brothers as the case may be to benefit under this Clause of my Will shall be in the sole and absolute discretion of my said Executors and Trustees." Myers J. decided that this trust was valid as a disposition in favour of whatever Order of Nuns was chosen by the trustees or the Christian Brothers' Order as the case might be. His Honour placed his judgment on the simple ground that the provision amounted to an immediate gift in favour of the body chosen or its members and upheld it independently altogether of any charitable character it might possess. The widow and children of the

Testator have appealed from this decision and maintain that the trust cannot be construed as a beneficial gift to a body of individuals and must stand or fall as a charitable bequest. The Appellants deny that it is a charitable bequest on the ground that Contemplative Orders must be included in the description and that such Orders are not charitable objects.

The provision disposing of the residue is somewhat fuller but no more need be set out verbatim than the dispositive trust which is as follows :- "Upon trust to use the income as well as the capital to arise from any sale thereof in the provision of amenities in such Convents as my said Executors and Trustees shall select either by way of building a new Convent where they think necessary or the alteration of or addition to existing buildings occupied as a Convent or in the provision of furnishings in any such Convent or Convents". The disposition goes on to give the Trustees complete discretion as to the building or alteration or repair of premises and, what is more important, as to the Order or Orders of Nuns who should benefit under the terms of the clause. It provides that the receipt of the Reverend Mother for the time being of the particular Order of Nuns or Convent shall be a sufficient discharge for any payment under the clause. This provision was held bad by Myers J. on the ground that inasmuch as it included Contemplative Orders it went beyond the confines of a valid charitable trust. His Honour considered closely the possibility of applying Sec.37D of the Conveyancing Act 1919-1954 (N.S.W.) and under that clause severing, so to speak, the intended objects of the provision and excluding the Contemplative Orders. The material parts of the Section are as follows:- "37D. (1) No trust shall be held to be invalid by reason that some non-charitable and invalid purpose as well as some charitable purpose is 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 of any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed" Myers J. came to the conclusion that the foregoing

In the High Court of Australia.

No.12(a)

Reasons for Judgment of their Honours The Chief Justice Sir Owen Dixon and Mr. Justice McTiernan.

11th March, 1958 - continued.

provisions could not be applied to save any part of the bequest by the exclusion from the operation of its general words of those Contemplative Orders whose life is outside the legal conception of charitable purposes. His Honour's reasons for this conclusion must be read in full to be appreciated, but in the end they come down to the view that the mischief to which the section is directed is the failure of trusts in which Testators have shown an intention to benefit charity but which, because of the inclusion of non-charitable objects, have failed altogether and that the section cannot give effect to trusts irrespective of the intention of the Testator but only conformably with it or part of it. "Accordingly", said His Honour, "the section only applies where a charitable intention appears from the trust itself, and the application of the whole fund to charity is one way of completely satisfying the intention of the Testator. A trust for such purposes as the Trustee should select would therefore not qualify under S.37D because it shows no charitable intention". In conformity with this view the decree declared the provision as to the residue to be void. From this part of the order the Attorney-General has appealed.

It appears that within the Roman Catholic Church associations of religious women are divided according to Canon Law into two kinds of institutions, namely Orders and Congregations. In an Order the members take solemn vows; in a Congregation the members take only simple vows, whether perpetual or temporary. An Order has for its objects the observance of one of four ancient Rules: The Rule of St. Basil, St. Benedict, St. Augustine or St. Francis of Assisi. The Rules or Constitution of a Congregation which the members observe are not necessarily the same as the foregoing ancient Rules or as rigorous. Strictly speaking, the term "Nun" is applied only to religious women who take solemn vows while those who take simple vows are called "sisters". It appears, however, that the distinction between Orders and Congregations within the Catholic Church is strictly a canonical distinction and that it would not be known generally to the laity. It further appears that even among the clergy of the Roman Catholic Church the terms"order", "congregation", "nun" and "sister" are commonly used without discrimination and without the canonical distinction unless there

is some cause for precision. In Australia about fifty associations of religious women of the Roman Catholic Church are represented, some only of which are Orders properly so called, the remainder being Congregations. It seems clear enough that when the Will speaks of Orders of nuns it includes Congregations of sisters. There are included among the Orders represented in Australia Contemplative Orders which are so called because their members are strictly enclosed in their convents and engage in no external work but devote their lives to contemplation and penance and other religious duties of prayer and reflexion. Since Cocks v. Manners 1871 L.R.12 Eq. 574 such purposes have been held to be outside what the law treats as valid because they promote what are considered legally to be charitable purposes. In Gilmour v. Coats 1949 A. C.426 where the nature of the religious duties to which such Orders are devoted is fully discussed, the conclusion that they were not charitable purposes in point of law was upheld as inevitable. It is convenient to refer to Orders of this description as Contemplative even if that word be inadequate as a description.

The first question to be decided is whether the trust of "Elmslea" can be supported in point of validity on the ground that it is a trust in which the Order or Congregation of nuns or sisters chosen by the Trustees or if the Christian Brothers be chosen, for that male teaching Order are beneficiaries, a trust taking effect independently of the law of charities, so that the persons constituting the Order or Congregation or whatever section of them may be thought to be within the scope of the gift are the persons entitled collectively to the equitable interest. It will be noticed that there is no territorial limitation upon the trust. It is a trust of land and furnishing of the buildings upon it and it is not difficult to imply an intention that unless the power of sale be exercised the subject of the trust shall be applied to its purpose in situ. That may mean that the persons who in their work or otherwise enjoy the benefit of the trust must be at hand. But it does not follow that there must be some geographical limitation placed upon the Order or Congregation of which they form members. The Orders or Congregations concerned are in some cases world wide and in all cases have convents in many parts of the

In the High Court of Australia.

No.12(a)

Reasons for Judgment of their Honours The Chief Justice Sir Owen Dixon and Mr. Justice McTiernan.

11th March, 1958 - continued.

world. We feel unable to say that there is any territorial limitation placed upon the class of persons who (be it personally or in respect of their work) are intended to benefit by the trust.

In the next place it will be noticed that among the Orders the Executors and Trustees are to have an unfettered power of selection. We think that this means that they are to make their choice once for all, not from time to time. The choice is among the Orders of nuns with the Christian Brothers added as a possible object of the choice. If the bodies over which the choice extends were all charitable within the legal meaning of that word the fact that the choice lay with the Executors and Trustees and that it extended over such a wide area could not affect the validity of the trust. That is the effect of the decision of this Court in Smith v West Australian Executor & Agency Co., Ltd. 1950 Argus L.R.735, a decision based upon the dicta in Blair v. Duncan 1902 A.C.37 at p.47 and Chichester Diocesan Fund etc. v. Simpson 1944 A.C.341 at pp.349-50 and 371. Nor would we have thought if it were possible to construe the trust as one in favour of some definite body of persons to be chosen as beneficial objects of the trust that it ought not to be upheld as a valid power of appointment. The difficulty is however to construe the trust as one intended to place the chosen body in the position of beneficial owners of the land and the furniture to dispose of as the body should think fit. The trust is very briefly expressed but from its subject matter it appears to us to be clear that the Trustees were intended subject to the power of sale to remain the repository of the whole legal title and to administer the trust by affording the enjoyment to the Order of Nuns or the Christian Brothers as the case might be who might be selected. The Orders are not treated otherwise than as large Congregations or Orders established by the Roman Catholic Church and subsisting under a canonical organisation the character of which the Testator presumably did not understand nor regard as relevant. The argument that the gift can be regarded as valid independently of the law of charity is based upon the Irish cases which begin with the suggestion made by Chatterton L.J. in Stewart v. Green 1871 I.R.5 Eq. 470 at p. 483 which probably preceded Cocks v. Manners 1871 L.R.12 Eq.574. Of the Irish case which followed

illustrating successful and unsuccessful attempts to apply the same mode of construction it will suffice to mention Re Delany 1881 I.R. 9 Ch.226; Morrow v. M'Conville 1883 I.R. 11 Ch.236; Bradshaw v. Jackman 1887 I.R. 21 Ch.12; Re Byrne 1935 I.R. 782 at pp.793, 807-809, 811, 818-819; Munster and Leinster Bank v. Attorney-General 1940 I.R. 19; Re Keogh 1945 I.R. 141; Re Rickard 1954 N.I.100. We shall not analyse these cases but we think two comments upon them may be made namely, that they disclose not a little difference of opinion and in the second place that where this mode of construction applied it related to a fund or property that might be handed over to a particular body at an ascertainable place or in a more or less definite area. In England Wickens V.C., in Cocks v. Manners 1871 L.R. 12 Eq. 574 at pp.584-5 decided that a bequest of a share of residue to "The Dominican Convent at Carisbrook (payable to the Superior for the time being)" and another to "the Sisters of Charity of St. Paul, Selley Oak near Birmingham (payable to the Superior thereof for the time being)" were valid as gifts to the members associated at those places. In re Clarke 1901 2 Ch.110 Byrne J. upheld in similar manner a bequest to the committee for the time being of the Corps of Commissionaires in London to aid in the purchase of their barracks or in any other way beneficial to the corps. The corps consisted of about 2,600 former soldiers and sailors. His Lordship after reviewing the Irish cases said: "I think there is considerable room for argument; but it does seem to me that all the members of a society constituted as this one is could, if they so pleased, and unless the building of the barracks be a charity, deal with the funds intended for building or with the buildings just as they please. If it is a charity they could not deal with them as they please, but then the gift is perfectly good. If it is not a charity they could deal with them as they please, because there is nothing to prevent all the members of the association joining together to dispose of the funds or of the barracks." (at p.121). In re Smith 1914 1 Ch.937 Joyce J. construed a gift in residue for "the society or institution known as the Franciscan Friars of Clevedon, County of Somerset, absolutely" as an absolute and immediate gift to the individual friars composing the society or institution at the Testator's death and on that ground upheld it as valid. It

In the High Court of Australia.

No.12(a)

Reasons for Judgment of their Honours The Chief Justice Sir Owen Dixon and Mr. Justice McTiernan.

11th March, 1958

- continued.

appeared that at the date of the Will and at the Testator's death there was at Clevedon a society or community consisting of six Franciscan Friars who had taken monastic vows and this was the body to which the Testator referred. No doubt there was little difficulty in a case of that description in construing the gift as one to designated persons. In re Drummond 1914 2 Ch.90 there was a devise and bequest of residuary real and personal estate to trustees upon trust for sale and conversion and subject to certain payments to stand possessed of the residue of the proceeds upon trust for the Old Bradfordians' Club, London, being a club instituted by Bradford Grammar Old Boys, and the receipt of the Treasurer for the time being of the Club to be a sufficient discharge to the Trustees. There was a codicil declaring that the object and intention of the bequest was to benefit old boys of the Bradford Grammar School residing in London or members of the Club and to enable the committee if possible to acquire premises to be used as a club house for their use. Eve J. said that he could not hold that a residual gift of realty and personalty to the Old Bradfordians' Club was a gift to the members individually. There was in his opinion a trust but there was abundant authority for holding that it was not such a trust as to render the legacy void as tending to perpetuity; In re Clarke (supra). The legacy was not subject to any trust which would prevent the Committee of the club from spending it in any manner they might decide for the benefit of the class intended. In His Lordships' opinion there was a valid gift to the club for such purposes as the committee should determine for the benefit of the Old Boys or members of the club. In re Taylor 1940 1 Ch. 481 Farwell J. upheld a residuary disposition in trust for a bank staff association fund to be administered according to the constitution and rules that had been approved at a general meeting and any amendment thereof. The constitution and rules referred to were elaborate but under them Farwell J. was of the opinion that the members of the association were entitled to deal with the fund as they wished and to direct the Trustee to divide it among them, putting an end to the association by the constitution and rules, and although His Lordship thought that the Trustee might have difficulty in determining what persons were members of the association, that that

was not a material matter. His Lordship said at p.488: "In my judgment, the decision in the case of In re Clarke 1901 2 Ch.110 really covers this case because it shows that a gift to a fund for a voluntary body of persons may be perfectly valid unless the rules governing that fund or the purposes for which the institution was created prevent the members from dealing with it, both capital and income, in any way they please." The decision of Cohen J. as he then was in re Price 1943 1 Ch. p. 423 gave a like effect to a gift of a share of residue to the Anthroposophical Society in Great Britain to be used at the discretion of the Chairman and Executive Council of the Society for carrying on the teachings of the founder, Dr. Rudolph Steiner. His Lordship quoted from the speech of Lord Buckmaster in Macaulay v. O'Donnell reported in a note to re Price. The passage quoted ended with a reference to re Drummond and to Carne v. Long, a gift to a library at Penzance to hold for the use benefit and support of the library which was held a gift in perpetuity. Lord Buckmaster said: "These two cases illustrate exactly the point for consideration. If the gift is to be for the endowment of the society, to be held as an endowment, and the society is, according to this form, perpetual, the gift is bad, but if the gift is an immediate beneficial legacy, it is good." (1943 Ch. at p.436). Lord Cohen construed the disposition before him as of the latter character. In re Cain 1950 V.L.R. at p.390 et seq. 1950 Argus L.R. 796 at pp.812 et seq. Dean J. brought together these and other authorities, judicial and extra-judicial, and in the course of a helpful discussion pointed out some distinction in the form of the gifts that have been considered to unincorporated non-charitable associations. Dean J. said: "Such gifts take various forms. Sometimes, as in the present case, the gift is to the society simpliciter, no reference being made in the terms of the gift to any purposes to be served; sometimes the will or other instrument expresses an intention that the association is to hold and apply the gift in accordance with its constitution and rules; sometimes, again, the instrument itself states the purposes for which the gift is applicable. From another aspect, a further distinction may be drawn between these bodies, such as clubs, which exist for the benefit of the members themselves, and those which are expressed by their constitution as

In the High Court of Australia.

No.12(a)

Reasons for Judgment of their Honours The Chief Justice Sir Owen Dixon and Mr. Justice McTiernan.

11th March, 1958 - continued.

intended to serve some other purpose". (1950 V.L.R. at p.389) We are not here dealing with a disposition in favour of bodies existing for the benefit of the members themselves.

We do not think that the devise and bequest of "Elmslea" falls within the application of the foregoing authorities. The evident intention of the trust was to enable the Trustees to appropriate it to the purposes of some Order the selection of which was left in the discretion of the Trustees. The choice was to be made of an Order, including in that expression Congregation, in that capacity independently of the locality in which a particular branch, sub-division or members of it might be found and simply because it was, according to the choice of the Trustees an Order to which it was suitable or desirable that the property should be devoted. Doubtless a consideration of great importance would be the appropriateness of the property for the service or benefit of the Order or, stated in another way, the desirability of that Order having regard to its work and character obtaining the advantages which the property presented. It was intended as a trust operating for the furtherance of the purpose of the Order as a body of religious women, or in the case of the Christian Brothers as a teaching order. The membership of any Order chosen would be indeterminate and the trust was intended to apply to those who should become members at any time. There was no intention to restrain the operation of the trust to those presently members or to make the alienation of the property a question for the governing body of the Order chosen or any section or part of that Order. For these reasons we think that unless the trust is capable of being supported wholly or in part as a charity it should fail. The conclusion we have reached is that having regard to Sec. 37D of the Conveyancing Acts 1919-1954 (N.S.W.) it is capable of being supported in part. Before giving reasons for this conclusion it is, however, convenient to turn to the trust of residue to provide amenities in such Convents as the Testator's trustees should select.

The validity of that trust is contested on the grounds that it cannot be supported as a gift for a charitable purpose or purposes, that it tends to a perpetuity because there is no trust for sale

and there is in fact a direction to apply income indefinitely, that, since the power of selection continues and is not exercisable only once for all, it contravenes the rule against perpetuities and that the gift is too uncertain and vague to be capable of operating in furtherance of a charitable purpose. Exception is taken to the word "amenities" because of its indefiniteness. It is said that an amenity is something which makes life more comfortable or enjoyable and that even if otherwise the gift were for charity the provision of amenities might well mean travelling outside any charitable purpose or what might be ancillary thereto. The word "convents" naturally covers both orders and congregations of religious women. It is objected that there is no limitation in point of place and the ascertainment of what convents exist in the world is too uncertain.

It is hardly necessary to say that some of these objections are made with a view to excluding the operation of Sec.37D of the Conveyancing Acts 1919-1954. That is to say the purpose of the objections is to establish that the grounds for the invalidity of the gift go beyond the evil which that provision is directed to meet.

It is desirable first to deal with the construction of the trust. To begin with it is to be noted that it is a trust of real and personal estate. In the next place, whilst there is a power of sale which doubtless extends to the realty involved there is no trust for sale. Nevertheless the trust is to use the income as well as the capital to arise from any sale. Clearly enough this is of indefinite duration. But the word "amenities" does not define what is to be provided. It is an introductory description of purposes which are expressed by the words "either by way of building a new convent ..... or the alteration of or addition to existing buildings occupied as a convent or in the provision of furnishings in any such convent or convents". These last words in fact define the amenities in the provision of which the money is to be expended. If it were not for the fact that convents of Contemplative Orders are outside the charitable purposes defined by law there would be no reason why the expenditure of money towards building a convent or altering or adding to it or providing furnishings for a convent

In the High Court of Australia.

No.12(a)

Reasons for Judgment of their Honours The Chief Justice Sir Owen Dixon and Mr. Justice McTiernan.

11th March, 1958 - continued.

should not be a charitable purpose. But the decision in Gilmour v. Coats 1949 A.C. 427; 1948 Ch. 1: 1946 Ch.340 already mentioned puts it beyond controversy that the convents of Contemplative Orders fall outside the legal conception of charity. It is therefore clear enough that the trust of the residual real and personal estate would, apart from Sec.37D, extend beyond what is charitable and could not be supported as valid. The trust is clearly one for purposes. In Bowman v. Secular Society Limited 1917 A.C. 406 at p.441 Lord Parker of Waddington said: "A trust to be valid must be for the benefit of individuals ..... or must be in that class of gifts for the benefit of the public which in the Courts of this country are recognised as charitable in the legal as opposed to the popular sense of that term. Moreover, if a trustee is given a discretion to apply trust property for purposes some of which are and some are not charitable, the trust is void for uncertainty". See further Houston v. Burns 1918 A.C. 337 at p. 343 where the further point is made that a power to select among charitable and non-charitable purposes goes beyond any admissible exercise of the testator's testamentary power. It is therefore quite plain that if it were not for sec. 37D the trust of residue for the purposes of providing amenities in convents must fail. If the simple dichotomy stated by Lord Parker in the passage cited remained unqualified it would be enough to say that the reason is because this trust is not in favour of individuals but is for purposes and the purposes extended beyond the conception of charity. The tendency however has grown to assign as the ground of invalidity, even in the case of a trust for what can be nothing more than a purpose, that there is a direction to apply income so as to tend to a perpetuity or that there is an uncertainty of purpose or that there is a delegation of testamentary power. In other words there is a tendency to add to or go beyond the simple view that there must either be a trust for individuals or for purposes which can be valid only when the purposes are charitable. If one turns to the text of Sec.37D (1) it will be seen why the additional grounds of invalidity are relied upon by those attacking the trust. The opening words of the subsection are: "No trust shall be held invalid by reason that some non-charitable and invalid purpose as well as some charitable purpose is or could be deemed to be

included... "In support of the contention that sec. 37D does not apply it is said that it is not simply because a non-charitable and invalid purpose is included that the trust is void. It is because the trusts are uncertain, tend to a perpetuity and involve a testamentary delegation. It appears to us that the direct and simple answer to this contention is that if the trust was wholly charitable none of these objections would be open and therefore it would be to hold the trust invalid for the reason forbidden by the section. It is clear enough that the uncertainties relied upon would not suffice to invalidate what otherwise would be a charitable trust. It is equally clear that reliance upon the tendency to a perpetuity or the direct application of the rule against perpetuities would be impossible were the trust admittedly for charitable purposes. The section therefore cannot be excluded because the trust extends beyond the conception of charity if in other respects sub-section (1) of Sec. 37D is applicable. The question whether it is applicable in other respects depends upon the question whether the present is a case where some non-charitable and invalid purpose as well as some charitable purpose is or could be deemed to be included in any of the purposes to or for which an application of the trust funds is by the trust directed or allowed. Some light is of course thrown upon these words by sub-section (2) which requires any such trust to be construed and to receive effect in the same manner in all respects as if no application of the trust funds to or for any such non-charitable and invalid purpose has been or could be deemed to have been so directed or allowed. There is no doubt a difficulty in saying precisely what is the ambit of the words "by reason that some nom-charitable and invalid purpose as well as some charitable purpose is or could be deemed to be included in the purposes". Provided the Convents comprised within the clause were all associations of religious women whose purposes were within the legal conception of charity none of the uncertainties relied on could have taken the trust outside that section nor could the fact that a complete discretion resided in the trustees have mattered. For this it is enough again to cite Smith v. W.A.Trustee etc. Company 1950 A.L.R. 735. The difficulty lies wholly in the ambit of the word "Convents". In cases where a purely abstract purpose is stated as, to take an

In the High Court of Australia.

No.12(a)

Reasons for Judgment of their Honours The Chief Justice Sir Owen Dixon and Mr. Justice McTiernan.

11th March, 1958 - continued.

extreme example, that decided by O'Bryan J. of In re Hollole 1945 V.L.R. 295 it may be impossible to reduce the object to a charitable purpose because of the extreme width and uncertainty of the terms used. In that case a Testator gave the balance of his real and personal estate to his Trustee to be disposed of by him as the Trustee may deem best. This was held to be void for uncertainty and to be outside the operation of Sec.131 of the Property Law Act 1928 (Vic.) from which Sec.37D was taken. But in the present case in both trusts there is a reference to a distributable class which, while not exclusively charitable, is predominantly charitable in its character. Little difficulty has been felt in cases where there is a specific reference, whether in abstract or concrete terms, to something charitable associated with a specific reference to what is not charitable. Such cases are obvious. The difficulty has been felt in confining general words. It would be unsafe to deal with such cases without discrimination. In re Belcher 1950 V.L.R.11 Fullagar J. had before him a direction to trustees to distribute income at their discretion among "Navy League Sea Cadets Geelong Branch or any other youth welfare organisations male or female as in their wisdom they deem fit". His Honour had no doubt that the Navy League Sea Cadets Geelong Branch formed a charitable object but was of opinion that the words "any other youth welfare organisation" went too far and could not be confined by the use of the statutory provision to charitable purposes. This view was possibly at variance with the Union Trustee etc. Company v. Church of England Property Trust (1946) 46 S.R.N.S.W.298 where Nicholas C.J. in Eq. gave a wide application to Sec. 37D, though His Honour stopped short of applying it to a gift of income to be applied for the benefit of any deserving female a member of the Church of England residing in a specified parish or attending the church whose income did not exceed a given amount in case of illness or otherwise. In Lloyd v. Federal Commissioner of Taxation 1955 C.L.R. 645 at p. 666 Fullagar J. referred to the fact that this decision had not been before him nor were certain papers in 14 A.L.J. 58:24 A.L.J. 239: to which 29 A.L.J. 62 should be added. His Honour refrained from expressing any view as to what difference these citations might have made. In re Ashton 1955 N.Z.L.R. 192 the question of the meaning of the provision,

which has been adopted in New Zealand, was reviewed in the New Zealand Court of Appeal by Gresson, Hay and Turner JJ. The bequest there to be dealt with was "to hand any surplus to the Trustees of the Church of Christ Wanganui to help in any good work". Their Honours distinguished the decision in re Hollole (supra) and the decision in re Belcher (supra) but did not adhere to the view expressed in the latter decision that the section will apply only where the Testator has expressly indicated a distinct and severable class of charitable objects as among the possible recipients of his bounty" Doubtless the paraphrase may be too narrow or, at all events, be read too narrowly. It appears to us that what must be found in order to justify an application of the provision is a distinct or sufficient indication of an intention to authorise the application of the income or corpus of the fund or other property to what is clearly a charitable purpose even although the description which embraces the purpose is so wide that it may go beyond charitable purposes or there is associated with the description a description of non-charitable purpose or purposes capable of going beyond the legal conception of charity. But it is perhaps unsafe to generalise. For ourselves we should think that the conclusion of O'Bryan J. in re Hollole (supra) was right on the ground that the wide general words "to be disposed of by him as he may deem best" did not seem necessarily to advert to any charitable object and were so vague as to be quite indeterminate and only embraced anything that lies within the legal conception of charity because of their indeterminancy. But in the present case it appears to us that the reference is prima facie charitable in the sense that it is known that most convents would be the object of legal charity. The words are distributive and it is plain that by restricting their application they may be restrained to charitable objects. This appears to us to be true both in the case of the trust or residue and of the trust of "Elmslea". In their partial operation as restrained under Sec.37D these trusts are in our opinion valid. In the case of the trust of residue we think it should be declared that the operation of the trust is modified by the application of Sec.37D of the Conveyancing Acts 1919-1954 (N.S.W.) and as so modified the trust operates in its terms with respect, however, only to convents of Orders or Congregations the purposes of which

In the High Court of Australia.

No.12(a)

Reasons for Judgment of their Honours The Chief Justice Sir Owen Dixon and Mr. Justice McTiernan.

11th March, 1958 - continued.

are not contemplative only. A corresponding declaration should be made in relation to "Elmslea". This means that the appeal of the Attorney-General should be allowed and subject to a variation of the order the appeal of Mrs. Leahy the widow of the Testator and her children should be dismissed. We think an order that costs of the appeals should be paid out of the estate would be proper.

No. 12(b)

No.12(b)

Reasons for Judgment of Their Honours Mr. Justice Williams and Mr. Justice Webb.

11th March 1958.

REASONS FOR JUDGMENT OF MR. JUSTICE WILLIAMS AND MR. JUSTICE WEBB

HER MAJESTY'S ATTORNEY-GENERAL in and for the STATE OF NEW SOUTH WALES

V.

DONNELLY AND OTHERS (No. 30 of 1957)

LEAHY AND OTHERS

V.

DONNELLY AND OTHERS (No. 31 of 1957)

These are two appeals in a suit instituted by originating summons in the Supreme Court of New South Wales in its Equitable Jurisdiction to determine two questions arising under the Will of Francis George Leahy deceased. These questions are (1) whether upon the true construction of the Will of the said deceased and in the events which have happened the trust directed therein in respect of the property known as "Elmslea" situated at Bungendore is void for uncertainty; (2) whether upon the true construction of the said Will and in the events which have happened the trust directed therein as to the rest and residue of his estate both real and personal is void for uncertainty. Myers, J., who heard the suit declared in answer to the first question that the trust of "Elmslea" is not void for uncertainty or any other ground

In the High Court of Australia.

No.12(b)

Reasons for Judgment of Their Honours Mr. Justice Williams and Mr. Justice Webb.

11th March, 1958 - continued.

and in answer to the second question declared that the trust of the residuary estate of the Testator is void. The Appellants from the answer to the first question are the next-of-kin of the Testator and the Appellant from the answer to the second question is Her Majesty's Attorney-General in and for the State of New South Wales.

The testator Francis George Leahy made his last Will on the 16th day of February 1954 and died on 11th January 1955. By his Will he appointed the Plaintiffs John Francis Donnelly, Clement Osborne Wright and John Bede Mullen his executors and trustees probate whereof was granted to them on 6th July 1955. By his Will the Testator bequeathed the sum of £1,000 to the Reverend Mother or person in charge for the time being of St. Joseph's Convent at Bungendore and directed that this sum should be invested by her and the income used in providing for the personal necessities of the Nuns attached to such Convent from time to time. He also bequeathed the sum of £1,000 to the Rector for the time being of the Passionist Fathers, Mary's Mount, Goulburn, and directed that this sum should be invested and used for the same purpose of the community of the Passionist Fathers and in the same manner as the before-mentioned bequest in favour of the Reverend Mother of St.Joseph's Convent at Bungendore. Subject to certain other pecuniary legacies, an annuity to his widow, and a specific devise to one of his daughters the Testator gave devised and bequeathed the residuary estate to his Executors and Trustees upon certain trusts contained in a number of clauses of which it is only necessary to set out verbatim the provisions of Clauses 3 and 5 which are the subject matter of the questions asked in the originating summons. Clause 3 provides - "AS TO my property known as "Elmslea" situated at Bungendore aforesaid and the whole of the lands comprising the same and the whole of the furniture contained in the homestead thereon UPON TRUST for such Order of Nuns of the Catholic Church or the Christian Brothers as my said Executors and Trustees shall select and I again direct that the selection of the Order of Nuns or Brothers as the case may be to benefit under this Clause of my Will shall be in the sole and absolute discretion of my said Executors and Trustees. "Clause 5 provides - "AS TO all the rest and residue of my Estate both real and personal

In the High Court of Australia.

No.12(b)

Reasons for Judgment of Their Honours Mr. Justice Williams and Mr. Justice Webb.

11th March, 1958 - continued.

of whatsoever kind or nature and wheresoever situated UPON TRUST to use the income as well as the capital to arise from any sale thereof in the provision of amenities in such Convents as my said Executors and Trustees shall select either by way of building a new Convent where they think necessary or the alteration of or addition to existing buildings occupied as a Convent or in the provision of furnishings in any such Convent or Convents and I DECLARE that my said Executors and Trustees shall have the sole and absolute discretion of deciding where any such premises shall be built or altered or repaired and the Order or Orders of Nuns who shall benefit under the terms of this Clause the receipt of the Reverend Mother for the time being of that particular Order of Nuns or Convent shall be a sufficient discharge to my said Executors and Trustees for any payment under this clause."

Clause 4 should also be shortly referred to. It relates to the homestead and other buildings on the Testator's property known as "Overdale" situated at Harefield and four named paddocks comprising approximately 850 acres a portion of "Overdale". It directs his trustees to permit the Order of Nursing Sisters known as "The Nursing Sisters of the Little Company of Mary" to use and occupy the same for a period of Ten years from his death and to have the income to arise therefrom either for the care and comfort of the sick or aged members of the said Order or for the purpose of conducting therein a hospital on lines similar to that conducted by them in the City of Wagga Wagga and at the expiration of that period if his Executors and Trustees be satisfied that the property had been used in this manner to forthwith convey transfer and assign the property so devised to the said Order of Nuns provided however if the said Order of Nuns should decline to accept the bequest or his Trustees were not so satisfied as aforesaid the Testator directed his Executors and Trustees to select some other Order of Nuns and to offer the property to such Order upon the same conditions and he directed that the selection of such Order of Nuns should be in the absolute discretion of his Executors and Trustees.

The Testator directed that his Trustees should be at liberty to sell and dispose of the whole or any part of his real or personal estate at any time as they in their absolute discretion should think proper and in the meantime and until such sale as

aforesaid in the exercise of their discretion either to lease the whole or any part of his real estate for such periods and upon such terms and conditions as they should think proper or to carry on and manage his grazing properties themselves for which purpose he conferred on them very wide powers of management.

In the High Court of Australia.

No.12(b)

Reasons for Judgment of Their Honours Mr. Justice Williams and Mr. Justice Webb.

11th March, 1958 - continued.

The reference in the Will to Orders of Nuns is not self-explanatory but evidence was given by three Doctors of Canon Law of the Roman Catholic Church that within that Church associations of religious women are divided according to the code of the Canon law into two kinds of institutions named Orders or Congregations. An Order is a religious organisation the members of which take solemn vows; a Congregation is a religious organisation the members of which take only simple vows whether such vows are perpetual or temporary. The Orders of Nuns are divided into Contemplative Orders and Active Orders. Contemplative Orders are so called because their members are strictly enclosed in their Convents and engage in no external work but devote their lives to contemplation and penance. In the Active Orders the members engage in external works such as the performance of public services, teaching, nursing the sick, tending the poor and other like activities. There are in New South Wales three Orders of Nuns which are contemplative and a number of Orders of Nuns which are active. There are also a number of Congregations which are not Orders in the view of the Canon law. The St. Joseph's Convent at Bungendore is a religious house of the Congregation of the Sisters of St. Joseph of the Most Sacred Heart of Jesus which carried on educational and other charitable work there and elsewhere. The Passionist Fathers of Mary's Mount Goulburn is a novitiate house of the Congregation of the Passion, a religious institute devoted to penance prayer and preaching. The Christian Brothers is a Congregation of religious men carrying on educational work in New South Wales. The Nursing Sisters of the Little Company of Mary is a Congregation, and not an Order, of religious women. The Canon Law provides certain formal procedures before approval is given to the establishment of an Order or Congregation of religious women. A congregation may commence as a Congregation of Diocesan Right. But as it expands into a number of Dioceses control of the Congregation may be

In the High Court of Australia.

No.12(b)

Reasons for Judgment of Their Honours Mr. Justice Williams and Mr. Justice Webb.

11th March, 1958 - continued.

taken from the local bishop or bishops and vested directly in the Holy See when it becomes a Congregation of Pontifical Right. The approval of ecclesiastical authority has always been necessary to found an Order or Congregation. Records are kept in each Diocese of Orders and Congregations which have received approval and only those bodies which have received such approval are recorded as Orders or Congregations. The Congregation of Religious, one of the Congregations constituting the Roman Curia, has jurisdiction over the government discipline studies properties and privileges of all religious Orders and Congregations and keeps a complete record of all Orders and Congregations of both Diocesan and Pontifical Right throughout the world. As Orders are no longer founded present regulations pertain to the foundation of Congregations. The distinction between Orders and Congregations within the Catholic Church is strictly a Canonical distinction which would not generally be known to the laity and among the clergy and laity the terms "Order" "Congregation" "Nun" and "Sister" are commonly used indiscriminately without reference to that distinction when there is no call for Canonical precision. It will be seen that in his Will the Testator refers to the Congregation of the Nursing Sisters of the Little Company of Mary as an Order, to the Sisters of the St. Joseph's Convent at Bungendore as Nuns, and provides for gifts to two Congregations of religious men. It was contended that the Will supplies a context to indicate that when the Testator refers to Orders of Nuns he is using these words in a popular sense to include not only Orders of Nuns according to strict Canon Law but also Congregations of religious women. It was also contended that it is not likely that the Testator would have been interested in Orders and Congregations other than those which were carrying on their activities in New South Wales. He was a resident of New South Wales. His business activities, mainly the carrying on of grazing properties, were confined to New South Wales, the whole of his assets were in New South Wales, the four Congregations he picked out for special mention all carried on their activities in New South Wales and his Executors and Trustees are residents of New South Wales. The trusts of residue require the Trustees to spend the income and capital in the building of new Convents the alteration of or addition to existing buildings

occupied as Convents, and the provision of furnishings in any such Convent or Convents. These are active trusts and it is difficult to believe that the Testator could have intended to impose upon his Trustees the duties of executing such trusts anywhere in the world. The intention of the Testator to be gathered from the provisions of his Will and the surrounding circumstances appears to be plainly enough that the Orders of Nuns to benefit under the will should be Orders operating in New South Wales, that the word "Order" should include Congregations, that any new Convents should be built in New South Wales, and that the alteration of or addition to existing buildings should be to buildings used as Convents in New South Wales.

The argument before us centred mostly on the appeal by the Attorney-General so that it will be convenient to dispose of that appeal first. Clause 5 specifies the amenities upon which the income and capital may be spent and confines the beneficiaries to Orders of Nuns. Within these limits the trustees have an absolute discretion to select the particular amenities upon which the money will be spent and the particular Order or Orders of Nuns to benefit from the expenditure. The trust is one to spend the money for one or more specified purposes for the benefit of such Order or Orders. The specified purposes are to provide amenities by building new Convents or by altering and adding to existing Convents or by providing furnishings in any such Convents for the benefit of the selected Order or Orders. It was contended that this trust, unless wholly charitable, is void for uncertainty because the meaning of "amenities" is quite uncertain and it is quite uncertain what Order or Orders of Nuns the Testator intended to benefit. The Testator had left it wholly within the discretion of his Trustees to decide the extent to which the building of new Convents or the alteration of or additions to existing Convents or the provision of furnishings in such buildings could be regarded as amenities and to decide what was meant by the words "Order or Orders of Nuns". It was contended that the trust was an attempted delegation to his Trustees of the Testator's testamentary power to make a Will and therefore invalid unless it was wholly charitable. This principle has been stated in many cases of the highest authority. It will be sufficient to refer to what Lord MacMillan said in

In the High Court of Australia.

No.12(b)

Reasons for Judgment of Their Honours Mr. Justice Williams and Mr. Justice Webb.

11th March, 1958 - continued.

Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson and Others (1944) A.C. 341 at p.349: "My Lords, the law, in according the right to dispose of property mortis causa by Will, is exacting in its requirement that the Testator must define with precision the persons or objects he intends to benefit. This is the condition on which he is entitled to exclude the order of succession which the law otherwise provides. The choice of beneficiaries must be the Testator's own choice. He cannot leave the disposal of his estate to others. The only latitude permitted is that, if he designates with sufficient precision a class of persons or objects to be benefited, he may delegate to his Trustees the selection of individual persons or objects within the defined class. The class must not be described in terms so vague and indeterminate that the trustees are afforded no effective guidance as to the ambit of their power of selection: see Houston v. Burns (1918 A.C. 337, 342, 343) per Viscount Haldane". The principle is illustrated by many cases, of which Morice v. The Bishop of Durham 10 Ves.522: 32 E.R.947 is an early example, relating to trusts which authorise the expenditure of trust funds at the sole discretion of the Trustees for charitable or non-charitable indefinite purposes so that the Trustees can spend the money wholly upon the indefinite purposes or in other words upon such purposes as they and not the Testator select. Such a trust is not a proper exercise of testamentary power and fails for uncertainty. But the trust in clause 5 would not fail on this ground. Neither the purposes nor the Orders of Nuns to be benefited are uncertain. Myers J. was of opinion that the expression "Order or Orders of Nuns" meant Orders in the strict sense and included all the Orders existing at the date of the death of the Testator anywhere in the world, so that the Trustees in their discretion could spend the money on building new Convents, etc., in any country. For the reasons already stated we are unable to give the same interpretation to this expression as his Honour. We are of opinion that the trust only authorises the building etc. of Convents in New South Wales but that it includes Congregations as well as Orders of religious women. The Trustees can therefore spend the money on providing new Convents, etc., in New South Wales for Congregations as well as Orders which carry on their work in New South Wales. Both the amenities and the

Orders of Nuns referred to in the clause are sufficiently defined and all that the Testator has done is to give his Trustees what is in effect a special power of appointment amongst them.

It was also contended that the trust is void because it infringes the rule against perpetuities and that on this ground, unless the purposes are wholly charitable, the trust is void. No time is limited within which the Trustees must expend the trust funds. There is no trust to convert the residue into money and distribute it. The Trustees are empowered to sell at their discretion and in the meantime, if they so decide, to carry on the Testator's grazing businesses.

No beneficial interests in individuals are created by the exercise of the Trustees' powers. The amenities are to be provided for the benefit of those religious women who are members of the selected Orders and who from time to time live in New South Wales in the Convents that are provided for them. The Trustees are authorised to spend the trust funds from time to time in the provision of the specified amenities. They could spend the money wholly for the benefit of non-charitable bodies because they could spend it all in providing any of these amenities for the benefit of the Contemplative Orders and such Orders are not charitable: Gilmour v. Coats (1949) A.C.426. The trust is of unlimited duration. In order that the modern rule against perpetuities may not be infringed the future interest must vest within a period of a life or lives in being and twenty-one years. It is not this rule which is in question but an analogous rule that a trust to fulfil certain purposes which are non-charitable, the fulfilment of which will not vest beneficial proprietary interests in any particular individuals but only benefit those who are members for the time being of some unincorporated body, is void on the ground of public policy if its duration may extend beyond the period permitted by the rule against perpetuities, that is to say beyond a period of a life or lives in being and twenty-one years. Trusts for charitable purposes have always been regarded as exempt from this form of perpetuity but trusts for non-charitable purposes have always been held to be subject to it and invalid: Carne v. Long 2 De G.F. & J. 75:45 E.R.550; Pemsel's case (1891) A.C. 531 at p.581;

In the High Court of Australia.

No.12(b)

Reasons for Judgment of Their Honours Mr. Justice Williams and Mr. Justice Webb.

11th March 1958 - continued.

In Re Clarke (1901) 2 Ch.110 at p.116; in Re Swain 99 L.T.604; In Re Compton (1945) Ch.123 at p.126; Kennedy v. Kennedy (1914) A.C.215 at p.220; Halsbury 3rd Edition, Vol.4, p.300. In the present case there is no life in being so that the permitted period is twenty-one years.

Apart from statute, therefore, Clause 5 would be void and the crucial question is whether the trust is saved by Sec.37D of the Conveyancing Act 1919 (N.S.W.) as amended. The first two subsections of the section, which are alone material, provide as follows: "(1) No trust shall be held to be invalid by reason that some non-charitable and invalid purpose as well as some charitable purpose is 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 of any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed". Myers J., after referring to certain decisions relating to this section (Union Trustee Company of Australia Limited v. Church of England Property Trust, Diocese of Sydney and Others 46 S.R.(N.S.W.) 298) and to two other practically identical sections, namely sec.131 of the Victorian Property Law Act 1928 (In Re Belcher (1950) V.L.R.11) and Sec.2 of the New Zealand Trustee (Amendment) Act 1935 (In Re Ashton (1955) N.Z.L.R. 192), held that Sec. 37D was inapplicable to the trusts of residue because by them the trustees were authorised to apply the income and capital to purposes which were wholly non-charitable. He said "In my view the Statute was enacted to give effect to trusts not irrespective of the intention of the Testator but conformably to it or at least to that part of it which contemplated the direction of the whole fund to charity. Acoordingly the section only applies where a charitable intention appears from the trust itself, and the application of the whole fund to charity is one way of completely satisfying the intention of the Testator. A trust for such purposes as the trustee should select would therefore not qualify under s.37D because it shows no charitable intention. Nor, for the same reason, would a trust for benevolent purposes. A testator who

had benevolent purposes in mind would not necessarily have in mind benevolent purposes which are charitable, and it would be pure conjecture to hold that the devotion of the fund to purposes which were legally charitable would in fact satisfy the Testator's intention. The mere fact that benevolence goes beyond charity shows in my opinion that a testator who creates a trust for benevolent purposes cannot necessarily be said to have had any charitable purpose in his mind at all. Similar considerations seem to me to apply to trusts for organisations described by general terms as a class. In this particular case the Testator has, in effect, given the fund to such order or orders of nuns as the trustees might select. Some orders of nuns are charitable and some are not. It is true that the orders actually in existence at the date of his will and the date of his death or at any other time can be ascertained with complete accuracy. This, however, does not seem to me to distinguish this trust from any gift upon trust for organisations described as a class, because it is impossible to say that the Testator had in mind orders which were in fact charitable. I cannot distinguish this from a trust simply for benevolent purposes. I do not think that it could be said that the application of this fund to orders which are in fact charities would be a complete satisfaction of any intention which has been expressed or is implicit in his Will. As far as I can see, there is nothing to indicate that he had charitable orders in his mind at all. In the circumstances, therefore, I do not think that S.37D applies ....."

With all respect to his Honour we cannot reach the same conclusions. The genesis of Sec.37D was Sec. 2 of the Charitable Trusts Act 1914 (Victoria) which became Sec.79 of the Trusts Act 1915 and later Sec.131 of the Property Law Act 1928. The text of the New South Wales section is the same as that of the Victorian section except that, in the New South Wales section, sub-section (1) contains the word "purpose" after the word "invalid" and towards the end of Sub-section (2) substitutes the word "could" for the word "should" in the Victorian section. Section 2 of the Charitable Trusts Act was passed after the decision of Madden C.J. in In the Will of Forrest (1913) V.L.R. 425 where it was held that a large gift failed for uncertainty because it was a gift to objects some of which were charitable but

In the High Court of Australia.

No.12(b)

Reasons for Judgment of Their Honours Mr. Justice Williams and Mr. Justice Webb.

11th March 1958 - continued.

others of which were non-charitable and indefinite and the trustees were given an absolute discretion to apply the whole or any part of the trust fund as they thought fit to the charitable or indefinite objects. It was held that the Court could not sever the bad from the good and retain the charitable objects only so that the whole trust was void for uncertainty. In so deciding, Madden C.J. was but applying, as he was bound to do, the principle of law illustrated by such cases as Morice v. The Bishop of Durham (supra) where it was held that a purported gift by a testatrix of a legacy to the Bishop of Durham to be disposed of to such objects of benevolence and liberality as the Bishop in his own discretion should most approve of could not be said to be given for charitable purposes. As the intention was too indefinite to create a trust, the residue was undisposed of. The first cases in which the Victorian section was applied were cases of this character: Re Griffiths (1926) V.L.R.212; In Re Bond (1929) V.L.R.333. In In Re Bond a Testatrix directed that certain property should be disposed of and given "to the blind and their children". It was held that the gift, though otherwise void for uncertainty, was by virtue of Sec.79 of the Trusts Act 1915 valid as a charitable gift to the blind. At p.336 Cussen J. said "I think that section should be given a construction, having regard to the very wide words used, which will validate this particular gift to the blind as though the words 'and their children' did not appear in the gift". In In Re Hollole (1945) V.L.R.295 O'Bryan J. refused to apply the Victorian section where the gift was "To my trustee and executor to be disposed of by him as he may deem best". With that decision we agree. One could not construe such a gift as including both a charitable and non-charitable purpose. It is not a trust for any purposes at all. It is quite indefinite and the only question that could arise would be that which his Honour decided, namely, whether or not the executor took the residue beneficially. In In re Belcher (supra) a testator bequeathed to trustees the income from certain property in trust "for the Navy League Sea Cadets Geelong Branch or any other youth welfare organisation male or female as in their wisdom they deem fit". Fullagar J. held that the gift to the cadets was a charitable gift, but that the gift to "any other youth welfare organisation" was void

for uncertainty; the former gift was, and the latter gift was not, saved by Sec.131 of the Property Law Act. At p.16 his Honour said "Shortly expressed the criterion of the application of Section 131 is that there should be a trust which, apart from the section, would be invalid because some non-charitable, as well as some charitable, purpose is included in its terms ..... the trust in question is (in my view of it) invalid simply because it is uncertain, and not because it includes non-charitable, as well as charitable, objects. In the case supposed by the statute there is an invalidity which not merely arises from the uncertainty of the objects but can be saved by the possibility of a constructional severance of the charitable from the non-charitable trusts. It will, I think, apply only where the Testator has expressly indicated a distinct and severable class of charitable objects as among the possible recipients of his bounty. So it will apply where the gift is for "Charitable or benevolent objects", but not where the gift is for 'benevolent objects'. So, where the gift is for 'the X institution' (which is charitable) and 'other worthy institutions', it will apply to save the gift for 'the X institution' by excluding all other worthy institutions". Later, however, in Lloyd and Another v. Federal Commissioner of Taxation 93 C.L.R.645 his Honour said at p.666: "I had to consider the validity and effect of the gift in question in In Re Belcher deceased (1950 V.L.R.11) in which I held that a gift to the Navy League Sea Cadets was a gift for charitable purposes, but that a gift to 'other youth welfare organisations' was a gift for purposes which included non-charitable purposes. I then had to consider the effect on the actual gift made by the will of S.131 of the Property Law Act 1928 (Vict.) I concluded that the gift took effect as a gift of the income of the whole of the Testator's interest in Belcher's Corner to the Navy League Sea Cadets. The correctness of this decision on the effect of the statute was, of course, in no way in question on this appeal. I think I should mention, however, that my attention was not called either to an article by Mr. E.H. Coghill 'Mixed Charitable and Non-Charitable Gifts' (1940 14 A.L.J.58), or to the decision of Nicholas C.J. in Eq. in Union Trustee Co., of Australia Ltd. v. Church of England Property Trust, Diocese of Sydney (1946) 46 S.R. (N.S.W.) 298; 63 W.N.153. I have not considered whether, if I had

In the High Court of Australia.

No.12(b)

Reasons for Judgment of Their Honours Mr. Justice Williams and Mr. Justice Webb.

11th March 1958 - continued.

had these before me, I should have taken a different view, but I have thought that I ought to mention them, and to mention also two later articles by Mr. Coghill (1950) 24 A.L.J. 239; (1955) 29 A.L.J. 62, in the latter of which he cites the recent case in New Zealand of In re Ashton (dec'd) Siddall v. Gordon (1955 N.Z.L.R. 192)". In Union Trustee Co. of Australia Ltd. v. Church of England Property Trust, Diocese of Sydney and Others, (supra) a testatrix devised certain realty to a trustee upon trust to use and apply the realty and the income thereof and the proceeds of any lease mortgage or sale thereof "in such manner and for such purposes relating to the work of St. John the Baptist Church of England at Ashfield as the Rector and Church Wardens for the time being of the said Church shall in their absolute discretion think fit". Nicholas C.J. in Eq. held that the gift was an absolute gift to an unincorporated body for defined purposes, and that, although the gift did not create a perpetuity and the unincorporated body was clearly defined, since the purposes, as defined in the will, for which the gift might be applied, were so vague that portion of it might be used for non-charitable purposes, the gift would have been invalid but for the operation of s. 37D of the Conveyancing Acts1919-1943; that by virtue of that section the application of the gift was restricted to charitable purposes and, therefore, that the gift was valid. In our opinion, in the passages cited from In Re Belcher Fullagar J. placed too narrow a construction on the section, and Nicholas C.J. in Eq. was right when he said in Union Trustee Company of Australia Limited v. Church of England Property Trust (supra) at p.302, "It was contended before me that the section applied only to gifts in which charitable and non-charitable objects were mentioned separately or as included in separate clauses such as 'charitable or benevolent', and did not apply when the gift was directed or authorised in the one phrase to be applied to charitable and non-charitable purposes. In my judgment this limited interpretation is not justified by authority, or by the history of the section, or by the words used in it". The broader view of the section was adopted by the Full Supreme Court of New Zealand in In Re Ashton (supra). The New Zealand section is in the same words as the Victorian section. It was held that a residuary bequest in a will "to hand any surplus to the trustees of the Church of Christ Wanganui to help in

any good work" was not a valid charitable trust and failed for uncertainty but that the words in the will, "to help in any good work", could be and should be, deemed to include both charitable purposes and non-charitable purposes; that, accordingly s. 2 of the Trustee Amendment Act, 1935, rescued the gift from invalidity as those words can be deemed to include a charitable purpose or purposes and some non-charitable and invalid purposes; and that the gift should be upheld with a qualification that the trust funds should be restricted to charitable purposes, so that the trust became one for any good and charitable work. At p.197 Gresson J. said "the view I take is that the language of the section indicates that a broad rather than a narrow construction is to be adopted. It is not only when some non-charitable as well as some charitable purpose is included that the section is to apply; it is to apply equally when some non-charitable purpose as well as some charitable purpose could be deemed to be included. It appears to me that the terms of the section have been deliberately widely expressed to cover cases where the language of the will does not expressly state purposes charitable and non-charitable, but uses such general language that both purposes charitable and purposes non-charitable may be deemed to have been included. It seems to me illogical to suppose that the legislature intended the beneficent effect of the section to apply where purposes charitable and purposes non-charitable were definitely expressed, but not to apply where language was used when though not specifying with particularity purposes charitable and purposes non-charitable yet comprehended both categories."

In order that the section may operate some charitable purpose must be included in the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed. But the application of the trust funds or any part thereof need not be directed to a charitable purpose. It is sufficient if the trust allows them to be used for such a purpose. If some non-charitable or invalid purpose is also included or could be deemed to be included in the purposes to or for which an application of the trust funds or any part thereof is directed or allowed, the trust shall not be held to be invalid. Such a trust must be construed and given effect to in the same manner and in all respects as if no application of the trust funds or any part thereof

In the High Court of Australia.

No.12(b)

Reasons for Judgment of Their Honours Mr. Justice Williams and Mr. Justice Webb.

11th March 1958 - continued.

to or for any such non-charitable and invalid purpose had been or could be deemed to have been directed or allowed. In other words the non-charitable and invalid purpose is struck out of the trust and the trust must be construed and take effect as if it had never been included. In order that the section may operate the purpose to be deleted must be non-charitable and invalid. If the purpose is non-charitable but nevertheless valid the section has no operation. But once it is found that a trust directs or allows, or in other words requires or permits, the use of the trust funds or any part thereof for a purpose that is charitable and also for a purpose that is non-charitable and invalid the section operates. It may be that the words in sub-section (1) "or could be deemed to be" should not be given too much significance. But at least they emphasise the wide scope of the section. They make it clear that the section applies if some non-charitable and invalid purpose as well as some charitable purpose could be deemed to be included in the purposes directed or allowed. They may have been inserted to ensure that where the trust is for such purposes as "benevolent purposes" or "philanthropic purposes" or "patriotic purposes" (expressions which have been held not to create valid charitable trusts because they are capable of including within their meaning purposes which are non-charitable as well as purposes which are charitable) the trust falls within the section. Such trusts would probably be validated by the section, if it had not included these words because benevolent, philanthropic, and patriotic purposes do in fact include many purposes which are charitable as well as some purposes which are non-charitable, and there must be imputed to a testator who creates a trust for such purposes an intention to authorise the use of the trust funds for any purposes which are benevolent, philanthropic or patriotic whether they are charitable or not. But it is sufficient if a non-charitable and invalid purpose as well as some charitable purpose could be deemed to be included in any of the purposes for which the trust funds or any part thereof are authorised to be applied, and there certainly could be deemed to be included in trusts for benevolent, philanthropic or patriotic purposes both non-charitable and invalid purposes and charitable purposes.

One can agree with his Honour that the charitable intention must appear from the trust itself if by this is meant that it is sufficient if the trust directs or allows the use of the trust funds or any part thereof for a charitable purpose. One can also agree with him that in order to satisfy the section the application of the whole fund to charity must be one way of completely satisfying the intention of the Testator. But if the trust either directs or allows this to be done, the testator's intention will be completely satisfied if the trust funds are so applied and sub-sec. (2) requires that the trust funds shall be applied in this and in no other way. But we must part company with his Honour where he says that in the case of a trust for benevolent purposes it would be pure conjecture to hold that the devotion of the trust funds to purposes which are legally charitable would in fact satisfy the Testator's intention. If the trust directs or allows the trustees to spend the trust funds for purposes which include charitable purposes, how can it be said that the trust would not be completely satisfied by the expenditure of the whole of the fund for these purposes? But, be this as it may, the trust in Clause 5 clearly includes charitable purposes because the Trustees are authorised to provide amenities for Orders of Nuns which are charitable and one way of completely satisfying the Testator's intention would be to expend the whole of the trust funds in providing amenities for these communities alone. The trust in Clause 5 is therefore clearly within sec. 37D. If the word "directed" stood alone the case would be clear enough. But the word "allowed" places it beyond doubt. "Directed" seems the more appropriate word where the trust itself requires the Trustees to apply the trust funds for some non-charitable and invalid purpose as well as some charitable purpose, whereas the word "allowed" is more appropriate where the trust authorises the Trustees in the exercise of their discretion so to apply them. It is difficult to understand what his Honour meant when he said "I do not think that it could be said that the application of this fund to orders which are in fact charities would be a complete satisfaction of any intention which has been expressed or is implicit in his will. As far as I can see, there is nothing to indicate that he had charitable orders in his mind at all". His Honour had already held that the Testator, when he referred in clause 5 to the Order or Orders of Nuns

In the High Court of Australia.

No.12(b)

Reasons for Judgment of Their Honours Mr. Justice Williams and Mr. Justice Webb.

11th March 1958 - continued.

who should benefit under its terms, intended the class to include both Active and Contemplative Orders or in other words intended to authorise his trustees to spend the trust funds for charitable or non-charitable purposes, and to give his trustees an absolute discretion to spend the money wholly or partly upon either, from which it necessarily followed that expenditure wholly upon charitable purposes would be a complete satisfaction of any intention expressed in his will.

Section 37D was enacted pursuant to the suggestions repeated many times by Long Innes C.J. in Eq., when dealing with trusts of this character, that the Victorian legislation should be adopted in New South Wales: Re Macgregor 32 S.R. (N.S.W.) 483; Re Price 35 S.R. (N.S.W.) 444. In Roman Catholic Archbishop of Melbourne v. Lawler 51 C.L.R. 1, Dixon J., as he then was said at p.37 "The object of sec.131 is apparent. It was to remove or provide against a very well known ground upon which many dispositions were invalidated. That ground is that a trust not in favour of an individual is wholly invalid, if, according to its terms, the Trustees are at liberty to apply the fund as well to purposes outside the definition of charity as to purposes within it, and if, independently of the Trustees, no measure is provided of the amount applicable to the non-charitable purpose. 'It is undoubtedly the law that, where a bequest is made for charitable purposes and also for an indefinite purpose not charitable, and no apportionment is made by the will, so that the whole might be applied for either purpose, the whole bequest is void' (per Lord Halsbury L.C., Hunter v. Attorney-General (1899) A.C.309, at p. 315)". It may be conceded that the particular occasion for enacting sec. 37D as in the case of the original Victorian Section was to provide against the failure for uncertainty of trusts expressed to be partly for charitable purposes and partly for indefinite non-charitable purposes where the Trustees had a discretion to apply the whole trust fund for any of these purposes and no apportionment can be directed between the valid charitable and invalid indefinite purposes.

Accordingly it was contended that the failure of the trust in Clause 5 is not the kind of failure that sec. 37D was intended to cure. It was passed

to cure a failure where the trust includes charitable and non-charitable objects which are indefinite in the sense that they are uncertain, whereas the non-charitable purpose in the present case is not invalid for uncertainty but because it infringes the rule against perpetuities. But the question is not what mischief was the section intended to remedy but what does it mean? It states in clear and unambiguous language that it is applicable whenever some non-charitable and invalid purpose as well as some charitable purpose is included in the purposes for which the trust funds may be spent. A non-charitable purpose which is certain but infringes the rule against perpetuities is a purpose which is non-charitable and invalid. It has the same fatal effect upon the validity of the trust as a whole as a non-charitable purpose which is invalid because it is uncertain, and there is nothing in the language of the section to suggest that it is not equally applicable to either case or indeed to any case where there is an admixture of a non-charitable and invalid purpose, whatever form the invalidity may take, and a charitable purpose.

For these reasons the appeal of the Attorney-General should be allowed and it should be declared that the trust in Clause 5 of the Will of the Testator is validated by sec. 37D of the Conveyancing Act.

The appeal of the next-of-kin remains for consideration. His Honour held that the provisions of Clause 3 of the Will are valid. With this we agree. They provide for an immediate gift to the particular religious community selected by the Trustees from among the Orders of Nuns or the Christian Brothers. It is immaterial whether the Order is charitable or not because the gift is not a gift in perpetuity. It is given to the individuals comprising the community selected by the Trustees at the date of the death of the Testator. It is given to them for the benefit of the community. It must be put "so to speak into the common chest; but when there it will be subject to no trust which will prevent the existing members from spending it as they please". At present the gift consists of land but the selected community will be free, in accordance with its constitution, to sell and convert the land into money when it pleases and use the proceeds of sale in this way.

In the High Court of Australia.

No.12(b)

Reasons for Judgment of Their Honours Mr. Justice Williams and Mr. Justice Webb.

11th March 1958 - continued, and concluded.

Cocks v. Manners L.R. 12 Eq. 574 at p.586: In re Smith (1914) 1 Ch. 937: Bourne v. Keane (1919) A.C. 815 at pp. 874, 875 and 916: In re Ogden (1933) Ch. 678 at pp. 681, 682: in re Price (1943) Ch. 422: Perpetual Trustee Co. (Ltd.) v. Wittscheibe & Others. 40 S.R. (N.S.W.) 501 at p.507. It is only necessary to add that for the reasons already given, we are of opinion that the words "Orders of Nuns" in the clause include Congregations of Sisters as well as Orders of Nuns in the strict sense and that the Orders and Congregations which are eligible for selection must be restricted to Orders and Congregations which were carrying on their activities in New South Wales at the date of the Testator's death,

No.12(c)

Reasons for Judgment of His Honour Mr. Justice Kitto.

11th March, 1958.

No. 12(c)

REASONS FOR JUDGMENT OF MR.JUSTICE KITTO

HER MAJESTY'S ATTORNEY-GENERAL IN AND FOR THE STATE OF NEW SOUTH WALES

v.

DONNELLY AND OTHERS

LEAHY AND OTHERS

v.

DONNELLY AND OTHERS

The Court has before it two appeals, each from a part of a decretal order made in the Supreme Court of New South Wales on the hearing of an originating summons. The appeals are concerned with the validity of two dispositions contained in the Will of Francis George Leahy deceased. He was a grazier, and he left a large estate which included, as well as other assets, two grazing properties in New South Wales, one situated in Harefield and known as "Overdale", and the other situated at Bungendore and known as "Elmslea".

The Will contains a general devise and bequest of the Testator's real and residuary personal estate

to his Executors and Trustees upon trusts declared in numbered clauses. Clauses 1 and 2 make provision for the Testator's wife and daughter, and contain nothing which need be mentioned here. Clause 3 contains trusts as to "Elmslea". It provides that the devise and bequest of that property to the Trustees is to be "upon trust for such Order of Nuns of the Catholic Church or the Christian Brothers" as the Trustees shall select; and it adds specifically that the selection of the Order of Nuns or Brothers to benefit shall be in the sole and absolute discretion of the Trustees.

Clause 4 declares trusts concerning "Overdale". No question arises upon this clause, but it is material to mention that in referring to a congregation of sisters known as "The Nursing Sisters of the Little Company of Mary" it calls the congregation an "Order of Nursing Sisters" and an "Order of Nuns".

Clause 5 contains the trust as to residue. It is a trust to use the income as well as the capital to arise from any sale of the residuary real and personal estate in the provision of amenities in such Convents as the Trustees shall select, either by way of building a new Convent where they think necessary or the alteration of or addition to existing buildings occupied as a Convent or in the provision of furnishings in any such Convent or Convents. Then follows a declaration that the Trustees shall have the sole and absolute discretion of deciding where any such premises shall be built or altered or repaired and the "Order or Orders of Nuns" who shall benefit under the clause, and that the receipt of the Reverend Mother for the time being of that particular Order of Nuns or Convent shall be a sufficient discharge for any payment by the Trustees under the clause.

No other part of the Will is material, except clause 7 which gives certain general powers to the Trustees. They are given liberty to sell and dispose of the whole or any part of the Testator's real and personal estate at any time as they in their absolute discretion think proper. They are empowered until such sale to lease the whole or any part of the Testator's real estate should they decide that in the best interest of the estate it would be more beneficial not themselves to carry

In the High Court of Australia.

No.12(c)

Reasons for Judgment of His Honour Mr. Justice Kitto.

11th March, 1958 - continued.

on or manage what are described as "my said grazing properties". They are further empowered in their discretion to carry on and manage the Testator's grazing properties, and to continue any investments held by the Testator at his death, for such period as they may deem proper; and for that purpose they are given a wide range of more specific powers and authorities.

The originating summons asked whether the trust as to "Elmslea" or the trust as to the residuary estate was void for uncertainty. Myers J., who heard the case, amended the question concerning "Elmslea" by adding "or on any other ground" and answered it in the negative. The question as to the residuary estate, however, his Honour answered in the affirmative. The next-of-kin appeal against the first answer and the Attorney-General appeals against the second.

The two clauses which we have thus to consider illustrate two methods by which a Testator may seek to effectuate a desire that property shall be used or applied after his death for purposes rather than for particular persons. One method is to give property to an individual or an aggregation of individuals without creating a trust, reliance being placed upon some matter personal to the donee or donees as a sufficient guarantee that the property will be applied to the desired end. If the gift is to a designated individual, the fact that he occupies a particular office or position may be considered enough. If it is to a body of persons, the nature of the body or the agreement which unites its members may provide sufficient assurance. But whatever it be that is relied upon, in this class of cases the donee takes beneficially. The donee or donees may of course be either selected by the Testator or left by him to be selected by someone else (e.g. the Trustees of the will) from a group or class of particular persons or aggregation of persons, corporate or unincorporated, ascertained or ascertainable of Tatham v. Huxtable (1950) 81 C.L.R. 639. The trust is not void for uncertainty of objects unless the words of description cannot be given any clear meaning or their application is of such indefinite width that the donees, or every one of the persons or bodies from whom the donee or donees may be chosen, cannot be determined with certainty. So a trust for an

institution to be selected by the Trustees from those of a given description, where the selected institution is to take the whole beneficial interest absolutely, is valid unless "there is such uncertainty in the field of selection that it is impossible for the selector to determine from which institutions he is to select"; In re H.J. Ogden, Brydon v. Samuel (1933) Ch. 678 at p.682; Inland Revenue Commissioners v. Broadway Cottages Trust (1955) Ch. 20; In re Sayer, MacGregor v. Sayer (1957) Ch. 423.

The other method is to refrain from giving the beneficial interest to any particular individual, and, instead, to create a trust for the application of the property for the desired purposes. It is only in relation to a disposition in this form that the law of charities has to be considered. It has to be considered because of the general principle that a trust must fail unless there is "somebody in whose favour the Court can decree specific performance"; Morice v. Bishop of Durham (1805) 10 Ves. 521, 32 E.R.947. (I do not stay to consider the anomalous line of cases relating to the maintenance of animals and tombs, or cases like In re Thompson (1934) Ch. 342 which may need to be reconsidered in the light of the clear statement of the Court of Appeal that a valid power is not to be spelt out of an invalid trust; Inland Revenue Commissioners v. Broadway Cottages Trust (1955) Ch. at p.36). It follows from the general principle that there must be someone definitely pointed out by the will as an object of the trust, or someone to whom the law gives the same right of suit as if he were so pointed out. Only the Crown as parens patriae enjoy such a right, and it is a right in respect only of such trusts as are in the legal sense charitable. The second method of disposition therefore requires for its validity a restriction of the purposes to which the property may be applied, so that only purposes legally charitable are included. To that extent, but to that extent only, certainly in the objects of the trust is required. As to property which, consistently with the will, could be applied to non-charitable purposes, the absence of definite objects spells unenforceability and therefore invalidity. The cause of invalidity is not any failure by the Testator to declare his intention clearly - he may in fact have done so with precision though it is

In the High Court of Australia.

No.12(c)

Reasons for Judgment of His Honour Mr. Justice Kitto.

11th March, 1958 - continued.

true that in many instances the description of purposes is vague and shadowy - but the fact that it is of the very nature of his intention that no person shall have an enforceable interest.

As regards property which cannot be applied under the trust to other than charitable purposes, not only is it true that the intentional uncertainty as to the particular individuals who may benefit does not make the trust invalid, but there is a further important consequence of the charitable nature of the purposes. This is that the corpus of the fund may be devoted in perpetuity to the production of income for application to those purposes; that is to say there may be a perpetual endowment for those purposes. In many reported cases it has been the tendency to perpetuity which has seemed to call for a decision as to whether the trust is charitable. But it is true nevertheless that whenever a will discloses an intention to create a trust for purposes not confined to the benefit of particular individuals, either selected by the Testator or to be selected from a group or class of particular individuals, the question whether the purposes are charitable at once arises. If they are, the trust is valid, whether there is or is not a tendency to perpetuity. If they are not, the trust is void for uncertainty of objects, and the question of perpetuity need not be decided. The case in which it is essential to consider whether a perpetual endowment is intended is the case where the gift is for the benefit of particular individuals; and then the case is outside the sphere of charity.

Clause 3 of the will adopts what I have called the first method. It describes large, but none the less quite definite, bodies of persons, and gives the whole beneficial interest in "Elmslea" absolutely to such of those bodies as the trustees select. There is a preliminary question as to the meaning of the expression "Order of Nuns", because the canon law of the Roman Catholic Church distinguishes between Orders of Nuns and Congregations of Sisters, reserving the first title for organisations which take solemn vows and the second for organisations which take simple vows. Myers J. attributed to the Testator the observance of this distinction, but without, I think, a sufficient warrant. The evidence shows that it is not a

distinction which is generally known to the laity, and that the terms"Order", "Congregation", "Nun" and "Sister" are commonly used indiscriminately, by laymen and clergy alike, when there is no call for canonical precision. The will itself, as I have already mentioned, contains in clause 4 strong evidence that the Testator himself was not mindful of the distinction. In my opinion the class of organisations from which the Trustees may make their selection under Clause 3 includes, besides the Christian Brothers, all Orders of Nuns and Congregations of Sisters of the Roman Catholic Church. (I would add, whether they are represented in New South Wales or not: see Gleeson v. Phelan (1914) 15 S.R. (N.S.W.) 30 at p.36; but probably this is of no practical importance). This construction makes the ambit of choice wider than his Honour considered that it was, but its scope is none the less definite to a degree. The disposition therefore does not fail for want of certainty in the range of objects eligible for selection: cf. Inland Revenue Commissioner v. Broadway Cottages Trust (1955) Ch. at pp. 35-36. And although it is obvious that the Testator was led to make the gift by a desire to assist the general purposes of the bodies to which Clause 3 refers, there is no attempt to impose any trust upon the body which the Trustees select. That body will take immediately and absolutely, and may expend immediately the whole of what it receives. There is no attempt to create a perpetual endowment. Some suggestion was made in argument that such an attempt is to be discerned when Clause 3 is read with Clause 7; but when a body is selected by the Trustees the property will be at home, and there is nothing in Clause 7 to prevent the body from insisting upon immediate and complete realisation and so terminating the powers which Clause 7 confers. The rules of the body may well place limits upon the uses to which the property or its proceeds may be put; but such rules, binding though they be upon the members inter se, do not affect the quality of the gift; it is an absolute gift to all the members, so that by unanimous agreement they might even divide it amongst themselves; In re Smith (1914) 1 Ch. 937 at p. 948. This being the case, there is no occasion to inquire as to the charitable or non-charitable character of the bodies amongst which the selection is to be made. As Lord Tomlin said of the gift in In re Ogden, Brydon v.

In the High Court of Australia.

No.12(c)

Reasons for Judgment of His Honour Mr. Justice Kitto.

11th March, 1958 - continued.

Samuel (1933) Ch. 678 at pp. 681-682, "The validity of the gift does not depend upon its being charitable, but upon its being an absolute gift". To uphold it is in accordance with a long line of authorities of which only a few need be mentioned: Cocks v. Manners (1871) L.R.12 Eq.574; Van Kerkvoorde v. Moroney (1917) 23 C.L.R. 426; Bowman v. Secular Society (1917) A.C.406; In re Cain (1950) V.L.R. 382.

I turn now to Clause 5. There is here no gift to any particular person or body of persons, selected or to be selected. There is nothing but an attempt to bind the Trustees of the will to a use of the income, and of the proceeds of realisation of the corpus, for purposes which will enure, not for the benefit of particular persons, but for the indefinite membership, as it may exist from time to time of such communities of religious women as happen to be located in particular Convents. Such a trust must be void for uncertainty of objects, unless it is to be construed as limited to communities which exist for the pursuit of legally charitable purposes. Apart from the statute, it is clear that it cannot be so construed. The evidence in this case shows, as has been proved in other cases, that the communities of religious women to be found in Convents may have any of a wide variety of objects. Some conduct schools, some care for the aged or for the sick and the poor. These are undoubtedly charitable, and if Clause 5 referred only to such Convents as house members of religious societies carrying on such activities the trust would be a good charitable trust: cf. Attorney-General v. Bishop of Chester (1785) 1 Bro. C.C. 444, 28 E.R.1229. But the religious women in some convents devote themselves wholly to pious contemplation and personal sanctification; and, because in the nature of things it is impossible to prove by evidence admissible in courts of law that benefit results to the public, the courts are bound to hold that the purposes of these communities are outside the legal category of charity: Gilmour v. Coats (1949) A.C.469.

In this situation the trust declared in Clause 5 must be held void unless its construction is modified, and its validity saved, by S.37D of the Conveyancing Acts, 1919-1943 (N.S.W.) This somewhat difficult provision makes the following provisions:

"(1) No trust shall be held to be invalid by reason that some non-charitable and invalid purpose as well as some charitable purpose is 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 of any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed."

The section postulates a trust under which the trust fund or part of it must or may be applied to or for purposes of which one is a charitable purpose, and that because of that purpose the trust would be valid were it not that, in addition, "some non-charitable and invalid purpose" is included or could be deemed to be included. "Some non-charitable and invalid purpose" clearly means some purpose which is neither charitable nor for the benefit of any particular beneficiary either selected or to be selected. Some difference of opinion as to the scope of the section has emerged since its prototype was enacted in Victoria as S. 2 of the Charitable Trusts Act 1914 (Vict.) Myers J. in the present case reached the conclusion that the section applies only where a charitable intention appears from the trust instrument, and the application of the whole fund to charity is one way of completely satisfying the Testator's intention. His Honour considered that a trust for such purposes as the Trustees may select, or for benevolent purposes, would be outside the section because no charitable intention would appear. This construction of the section is based upon the view that the mischief aimed at is that which is felt to exist when a trust, in the terms of which an intention to benefit charity is shown, is nevertheless defeated because an intention to benefit non-charitable purposes also is shown. A wider view of the nature of the mischief led Nicholas C.J. in Eq. to give the section a wider meaning: Union Trustee Co. v. Church of England Property Trust (1946) 46 S.R. (N.S.W.) 298. Other learned Judges who have considered the matter have taken some the one view, some the other. With all respect to those who

In the High Court of Australia.

No.12(c)

Reasons for Judgment of His Honour Mr. Justice Kitto.

11th March, 1958 - continued.

prefer the narrower view, it seems to me that the words of the section give more support to the wider. The section asks, in relation to every trust which directs or allows an application of trust funds to or for purposes. (1) whether the purposes referred to include any charitable purpose and (2) if so, whether they include also, or could be deemed to include also, any non-charitable and invalid purpose. The answer, I think, must be yes to both branches of the question, whenever the description of the purposes comprehends, but is not certainly confined to, purposes legally charitable. If a charitable purpose and a non-charitable purpose are separately described, there is no difficulty. That is an obvious case for the application of the section; for the invalidity of the trust apart from the section may be said to be due to the fact that, there being no definite beneficiary, the charitable purpose which, if it stood alone, would save the trust, cannot save it because a non-charitable and invalid purpose "is included". If, on the other hand, there is a composite description of the purposes of the trust, the invalidating feature may be that a purpose which is neither charitable nor for the benefit of any particular beneficiary "is included", but alternatively it may be that (to use some words of Lord Davey in Hunter v. Attorney-General (1899) A.C.309 at p.323) "the description includes purposes which may or may not be charitable (such as "undertakings of public utility"), and a discretion is vested in the trustees". In the second case, it would not be incorrect to say that the trust is invalid because some non-charitable and invalid purpose "could be deemed to be included". It is difficult to see to what other case the words "could be deemed to be included" can possibly apply; and if, as I should conclude, those words show that that case was contemplated by the legislature when enacting the section and was intended to be within its application, the view must be untenable that the only case covered by the section is that in which an intention to benefit charitable purposes is separately disclosed. Against the view which I have described as the wider view an argument has been put by way of a reductio ad absurdum. The argument is that if the section applies whenever a dissection of the purposes which are made the objects of the trust would yield both charitable and non-charitable purposes, it must apply even to a

case such as that which came before O'Bryan J. In re Hollole (1945) V.L.R.295, where there was a gift to a Trustee "to be disposed of by him as he may deem best". The learned judge held that this gift was not saved by the section. In my opinion the decision was clearly correct, because the section applies only where the trust fund or part of it is directed or allowed to be applied for some designated purposes, the designation or designations extending into but also beyond the area of charity. The key to the section, I think, is to be found in the expression "included in any of the purposes to or for which" etc., considered with the fact that the section is dealing with cases of invalidity arising from the nature of those purposes. For the section to apply, purposes must be designated as the objects of the trust, and they must be purposes not for the benefit of definite beneficiaries. But I see nothing in the section to suggest that it means to discriminate between, on the one hand, cases where charitable purposes and non-charitable and invalid purposes are designated by separate descriptions and, on the other hand, cases where they are designated by a composite description.

Accordingly I am of opinion that the section applies in the present case and saves the trust in clause 5, requiring that it be construed and given effect to in the same manner in all respects as if no application of the trust fund or any part thereof had been or could be deemed to have been directed or allowed to or for the provision of amenities in other Convents than those which serve legally charitable purposes.

For the foregoing reasons, I would dismiss the appeal of the next-of-kin, which relates to the trust in Clause 3 as to "Elmslea", and I would allow the appeal of the Attorney-General, which relates to the trust in Clause 5 as to the residuary estate. The decretal order should be varied, I think, by omitting the declaration as to the latter trust, and by substituting a declaration that on the true construction of the Will that trust is confined to the provision of amenities, in any of the three ways mentioned in Clause 5, in respect of such Convents only as are exclusively devoted to charitable purposes and is valid.

In the High Court of Australia.

No.13.

Order of Full Court of the High Court of Australia in Appeal concerning Residuary Estate No.30 of 1957

11th March, 1958.

No. 13.

ORDER OF THE FULL COURT OF THE HIGH COURT IN APPEAL CONCERNING RESIDUARY ESTATE

IN THE HIGH COURT OF AUSTRALIA
NEW SOUTH WALES REGISTRY } No. 30 of 1957

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES IN ITS EQUITABLE JURISDICTION.

Between:- HER MAJESTY'S ATTORNEY GENERAL IN AND FOR THE STATE OF NEW SOUTH WALES Appellant

- and -

JOHN FRANCIS DONNELLY, CLEMENT OSBORNE WRIGHT and JOHN BEDE MULLEN the Executors and Trustees of the Will of Francis George Leahy, deceased, DORIS CAROLINE MARY LEAHY, FRANCIS JOHN LEAHY, HENRY JOSEPH LEAHY, DOROTHY MARGARET HALL, JAMES PATRICK LEAHY, MICHAEL MAURICE LEAHY, GEORGE BONAVENTURE LEAHY and GENEVIEVE MARY REDDY Respondents

BEFORE THEIR HONOURS THE CHIEF JUSTICE SIR OWEN DIXON, MR. JUSTICE McTIERNAN, MR.JUSTICE WILLIAMS, MR.JUSTICE WEBB and MR. JUSTICE KITTO.

TUESDAY the 11th day of MARCH, 1958.

THIS APPEAL from the judgment and Decree of the Supreme Court of New South Wales in its Equitable Jurisdiction given and made by His Honour Mr.Justice Myers on the 11th day of April, 1957 coming on for hearing before this Court at Sydney on the 21st, 22nd and 25th days of November 1957 UPON READING the Transcript Record of the proceedings herein AND UPON HEARING Mr. Bowen of Queen's Counsel and Mr. Officer of Counsel for the Appellant and Mr. Macfarlan of Queen's Counsel and Mr. Donovan of Counsel for the Respondents John Francis Donnelly, Clement Osborne Wright and John Bede Mullen, the Executors and Trustees of the Will of Francis George Leahy, deceased and Mr. Kerrigan of Queen's Counsel and Mr.Hicks of Counsel, for the Respondents, Doris Caroline Mary Leahy,

In the High Court of Australia.

No.13.

Order of Full Court of the High Court of Australia in Appeal concerning Residuary Estate No.30 of 1957

11th March, 1958 - continued.

Francis John Leahy, Henry Joseph Leahy, Dorothy Margaret Hall, James Patrick Leahy, Michael Maurice Leahy, George Bonaventure Leahy and Genevieve Mary Reddy this Court did order on the said 25th day of November 1957 that this Appeal should stand for judgment and the same standing for judgment this day accordingly at Melbourne THIS COURT DOTH ORDER that this Appeal be and the same is hereby allowed AND THIS COURT DOTH FURTHER ORDER that so much of the judgment and decree appealed against as declares that upon the true construction of the Will of Francis George Leahy deceased and in the events which have happened the trust directed therein as to the rest and residue of the estate both real and personal is void be and the same is hereby discharged AND in lieu thereof THIS COURT DOTH DECLARE that the said trust is confined to the provision of amenities in any of the ways mentioned in Clause 5 of the said Will in respect of such convents only as are exclusively devoted to charitable purposes and is to that extent valid AND THIS COURT DOTH FURTHER ORDER that it be referred to the proper officer of this Court to tax and certify as between Solicitor and Client the costs of all parties to this appeal and that such costs when so taxed and certified as aforesaid be paid out of the Estate of the said Francis George Leahy deceased to the said parties respectively or to their respective Solicitors AND THIS COURT DOTH BY CONSENT ALSO ORDER that the sum of Fifty pounds (£50.) paid into Court as security for costs by the Appellant be paid out of Court to the Appellant or to his Solicitor, Finlay Patrick McRae, Crown Solicitor for New South Wales.

BY THE COURT

N.Gamble

District Registrar.

In the High Court of Australia.

No.14.

Order of the Full Court of the High Court of Australia in Appeal concerning property "Elmslea" No.31 of 1957.

11th March, 1958.

No. 14.

ORDER OF THE FULL COURT OF THE HIGH COURT IN APPEAL CONCERNING PROPERTY "ELMSLEA"

IN THE HIGH COURT OF AUSTRALIA)
NEW SOUTH WALES REGISTRY) No. 31 of 1957

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES IN ITS EQUITABLE JURISDICTION

IN THE MATTER OF THE TRUSTS OF THE WILL OF FRANCIS GEORGE LEAHY late of Harefield and Bungendore in the said State, Grazier, deceased.

Between:- DORIS CAROLINE MARY LEAHY (Widow of the said Francis George Leahy) FRANCIS JOHN LEAHY, HENRY JOSEPH LEAHY, DOROTHY MARGARET HALL, JAMES PATRICK LEAHY, MICHAEL MAURICE LEAHY, GEORGE BONAVENTURE LEAHY, and GENEVIEVE MARY REDDY (the children of the said Francis George Leahy) Appellants

- and -

JOHN FRANCIS DONNELLY, CLEMENT OSBORNE WRIGHT and JOHN BEDE MULLEN the Executors and Trustees of the Will of the said Francis George Leahy and HER MAJESTY'S ATTORNEY-GENERAL in and for the State of New South Wales Respondents

BEFORE THEIR HONOURS THE CHIEF JUSTICE SIR OWEN DIXON MR.JUSTICE McTIERNAN, MR.JUSTICE WILLIAMS, MR.JUSTICE WEBB and MR.JUSTICE KITTO.

TUESDAY the 11th day of MARCH, 1958.

THIS APPEAL from the judgment and Decree of the Supreme Court of New South Wales in its Equitable jurisdiction given and made by His Honour Mr. Justice Myers on the 11th day of April 1957 coming on for hearing before this Court at Sydney on the 21st, 22nd and 25th days of November 1957 UPON READING the Transcript Record of the proceedings herein AND UPON HEARING Mr.Kerrigan of Queen's Counsel and

In the High Court of Australia.

No.14.

Order of the Full Court of the High Court of Australia in Appeal concerning property "Elmslea" No.31 of 1957.

11th March, 1958 - continued.

Mr.Hicks of Counsel for the Appellants and Mr.Macfarlan of Queen's Counsel and Mr.Donovan of Counsel for the Respondents John Francis Donnelly, Clement Osborne Wright and John Bede Mullen the Executors and Trustees of the Will of Francis George Leahy, deceased, and Mr. Bowen of Queen's Counsel and Mr. Officer of Counsel for the Respondent, Her Majesty's Attorney-General in and for the State of New South Wales this Court did order on the said 25th day of November 1957 that this Appeal should stand for judgment and the same standing for judgment this day accordingly at Melbourne THIS COURT DOTH ORDER that this Appeal be and the same is hereby dismissed AND THIS COURT DOTH FURTHER ORDER that it be referred to the proper officer of this Court to tax and certify as between Solicitor and Client the costs of all parties to this Appeal and that such costs when so taxed and certified as aforesaid be paid out of the Estate of the said Francis George Leahy deceased to the said parties respectively or to their respective Solicitors AND THIS COURT DOTH BY CONSENT ALSO ORDER that the sum of Fifty pounds (£50.0.0) paid into Court as security for costs by the Appellants be paid out of Court to the Appellants or to their Solicitors, Messrs.Taylor, Kearney & Reed.

BY THE COURT

N.Gamble

DISTRICT REGISTRAR.

In the Privy Council

No.15.

Order in Council granting Leave to Appeal.

3rd June 1958.

No. 15.

ORDER IN COUNCIL GRANTING LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

AT THE COURT AT BUCKINGHAM PALACE

The 3rd day of June, 1958

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRESIDENT
MR.SECRETARY LENNOX-BOYD
MR.GEOFFREY LLOYD
MR.MAUDLING

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 19th day of May 1958 in the words following, viz:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of (1) Doris Caroline Mary Leahy (2) Francis John Leahy (3) Henry Joseph Leahy (4) Dorothy Margaret Hall (5) James Patrick Leahy (6) Michael Maurice Leahy (7) George Bonaventure Leahy and (8) Genevieve Mary Reddy in the matter of an Appeal from the High Court of Australia in the matter of the Trusts of the Will of Francis George Leahy late of Harefield and Bungendore in the said State Grazier deceased between the Petitioners and (1) the Attorney General in and for the State of New South Wales and (2) John Francis Donnelly (3) Clement Osborne Wright and (4) John Bede Mullen Executors and Trustees of the Will of the late Francis George Leahy Respondents setting forth (amongst other matters): that the Petitioners desire to obtain special leave to appeal from a Judgment of the High Court of Australia dated the 11th day of March 1958 allowing an Appeal by the first Respondent against a decision of the Supreme Court of New South Wales sitting in Equity on an Originating Summons thereinafter mentioned: that by his Will made on the 16th February 1954 the late Francis George Leahy declared (inter alia) the following trusts :-

(i) As to his property "Elmslea"

'Upon trust for such Order of Nuns of the

Catholic Church or the Christian Brothers as my said Executors and Trustees shall select and I again direct that the selection of the Order of Nuns or Brothers as the case may be to benefit under this clause of my Will shall be in the sole and absolute discretion of any said Executors and Trustees.'

(ii) As to his residuary estate -

'Upon trust to use the income as well as the capital to arise from any sale thereof in the provision of amenities in such Convents as my said Executors and Trustees shall select either by way of building a new Convent where they think necessary or the alteration of or addition to existing buildings occupied as a Convent or in the provision of furnishings in any such Convent or Convents AND I Declare that my said Executors and Trustees shall have the sole and absolute discretion deciding whether any such premises shall be built or altered or repaired and the Order or Orders of Nuns who shall benefit under the terms of this clause':

that the High Court by its Judgment aforesaid decided that each of the trusts was valid: that at the hearing of the said Originating Summons in the Supreme Court of New South Wales the following questions had been submitted by the trustees of the Will for decision :-

(1) Whether upon the true construction of the Will of the said deceased and in the events which have happened the trust directed therein in respect of the property known as "Elmslea" situated at Bungendore is void for uncertainty.

(2) Whether upon the true construction of the said Will and in the events which have happened the trust directed therein as to the rest and residue of his estate both real and personal is void for uncertainty:

that the Respondents to the said Summons were the Petitioners and the first Respondent and the Court answered the first question 'No' and the second question 'Yes': And humbly praying Your Majesty

In the Privy Council

No.15.

Order in Council granting Leave to Appeal.

3rd June 1958 - continued.

in Council to grant the Petitioners special leave to appeal from the Judgment of the High Court of Australia dated the 11th March 1958 and for such further or other Order as to Your Majesty in Council may seem just:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble petition into consideration and having heard Counsel in support thereof and on behalf of the Attorney General in and for the State of New South Wales no one appearing at the Bar on behalf of the other Respondents their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the High Court of Australia dated the 11th day of March 1958 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same".

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

WHEREOF the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W.G. AGNEW.

IN THE PRIVY COUNCIL — Appeal No.28 of 1958

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

IN THE MATTER OF THE TRUSTS OF THE WILL OF FRANCIS GEORGE LEAHY late of Harefield and Bungendore in the State of New South Wales, Grazier, deceased.

B E T W E E N :-

DORIS CAROLINE MARY LEAHY
HENRY JOSEPH LEAHY
JAMES PATRICK LEAHY
GEORGE BONAVENTURE LEAHY
FRANCIS JOHN LEAHY
DOROTHY MARGARET HALL
MICHAEL MAURICE LEAHY
GENEVIEVE MARY REDDY

Appellants

- and -

HER MAJESTY'S ATTORNEY GENERAL IN AND FOR THE STATE OF NEW SOUTH WALES
JOHN FRANCIS DONNELLY
CLEMENT OSBORNE WRIGHT and
JOHN BEDE MULLEN the Executors and Trustees of the Will of the said Francis George Leahy.

Respondents

RECORD OF PROCEEDINGS

WATERHOUSE & CO.,
1, New Court,
Lincoln's Inn,
London, W.C.2.
Solicitors for the Appellants.

BELL BRODRICK & GRAY,
The Rectory,
29, Martin Lane,
Cannon Street,
London, E.C.4.
Solicitors for the Respondents other than the Attorney General of New South Wales.

LIGHT & FULTON,
24, John Street,
Bedford Row,
London, W.C.1.
Solicitors for the Attorney General of New South Wales.