*Privy Council Appeal No.* 28 *of* 1958

**Doris Caroline Mary Leahy and others** – – – – *Appellants*

*v.*

**The Attorney General in and for the State of New South Wales and others**– – – – – – – – *Respondents*

FROM

**THE HIGH COURT OF AUSTRALIA**

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# JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH APRIL, 1959

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*Present at the Hearing:*

VISCOUNT SIMONDS
LORD MORTON OF HENRYTON
LORD COHEN
LORD SOMERVELL OF HARROW
LORD DENNING

[*Delivered by* VISCOUNT SIMONDS]

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The appellants in this case are the widow and children of a wealthy Australian, Francis George Leahy, who died on the 11th January, 1955. The respondents are the trustees of his will, which was made on the 16th February, 1954, and Her Majesty's Attorney General in and for the State of New South Wales.

The questions raised in the appeal concern the validity of the dispositions made by two clauses of the will which may at once be conveniently referred to and, so far as is necessary, stated verbatim. By his will the testator after appointing executors and trustees and giving legacies of £1,000 each to the Reverend Mother or person in charge for the time being of St. Joseph's Convent at Bungendore in the State of New South Wales and to the Rector for the time being of the Passionist Fathers, Mary's Mount, Goulburn, with specific directions as to the disposal of such sums, and after making certain dispositions in favour of members of his family which need not be further mentioned by Clause 3 provided as follows:—

> 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 absolute discretion of my said Executors and Trustees.

By clause 4 he devised and bequeathed certain other property in New South Wales upon certain trusts and subject to certain conditions in favour of an Order of Nursing Sisters known as "The Nursing Sisters of the Little Company of Mary" and by clause 5 he disposed of the residue of his real and personal property in the following terms:—

> 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.

Finally, the testator directed that the trustees should be at liberty to sell and dispose of the whole or any part of his real or personal estate as they in their absolute discretion should think fit and in the meantime should have the wide powers of leasing and management therein mentioned.

It will be observed that in the relevant clauses of the will the Testator referred to "Orders of Nuns". It was, however, held in the High Court of Australia and has not been disputed before their Lordships that this phrase was not used in its strict canonical sense but included also Congregations of Sisters of which there are a considerable number in Australia. It further appeared that among the Orders represented in Australia are Contemplative Orders. Such Orders are not regarded as charitable in the legal sense of that word.

In these circumstances questions arose as to the validity of the dispositions made by clauses 3 and 5. It was conceded that, as the trustees had under clause 5 a power of selection amongst Orders which were charitable and Orders which were not charitable, the disposition of residue was invalid unless it was saved by the provisions of section 37D of the Conveyancing Act 1919-1954. In regard to clause 3 the position was different. The respondent trustees urged as a second line of defence that the same section saved from invalidity the disposition made by that clause. But this alone was not enough for them; for, even if the plea was successful, it would not enable them to select a contemplative Order as a beneficiary. Accordingly they urged that Clause 3 was in effect an absolute gift to the Order which they might select: if so, no question of invalidity would arise: they would have freedom of choice amongst all Orders including Contemplative Orders.

Upon these questions coming before the Supreme Court of New South Wales on an originating summons issued by the trustees it was held by Mr. Justice Myers (1) that there was no territorial limitation in the will which would restrict the selection by the trustees to Orders in New South Wales or Australia, that once the recipient, whether an Order of Nuns or the Christian Brothers, had been selected the gift was an absolute one to the selected body and that, as there was no uncertainty or perpetuity, the disposition by clause 3 was valid, but (2) that the disposition of residue by clause 5 was invalid in that it involved the devotion of property to purposes not necessarily charitable for a period longer than that permitted by the rule against perpetuities and was not in his opinion saved by section 37D of the Conveyancing Act 1919-1954.

Upon appeal to the High Court of Australia that Court (1) affirmed the Order of Mr. Justice Myers in regard to the disposition made by clause 3 holding (by a majority) that an absolute gift was thereby established in favour of the selected beneficiary and (unanimously) that in any case it was saved by section 37D, but (2) allowed the appeal in regard to the disposition made by clause 5 holding (again unanimously) that it was saved from invalidity by the section. From this Order the testator's widow and children appeal to Her Majesty in Council.

Section 37D of the Conveyancing Act, 1919-1954, which has been the subject of much judicial discussion, as has its prototype, section 131

of the Property Law Act, 1928, of the State of Victoria, is in the following terms:—

> (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.
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> (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.
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> (3) This section shall not apply to any trust declared before or to the will of any testator dying before the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1938.

The genesis and purpose of this section are clear. As the law stood before its enactment, a gift to such charitable or other purposes as trustees might think fit was void, and this was the law whether the alternative to charitable purposes was the vague and general expression "other purposes" or a less vague but still indefinite expression such as "benevolent purposes" or even a precisely defined non-charitable institution. Equally the gift was invalid if it was given for a purpose expressed in a compendious phrase which embraced both charitable and non-charitable objects. It was to remedy this state of the law that the section was enacted and their Lordships will observe at once that there is no reason to confine its operation to those cases in which the invalidity of the alternative gift is due to one cause rather than another. The language is clear and admits of no qualification. It applies alike to invalidity due to uncertainty or to perpetuity.

The disposition made by clause 5 will first be considered. A preliminary point can be disposed of. It was argued on behalf of the appellants that the word "amenities" was of such vague and uncertain meaning as to invalidate the whole gift. This argument ignores the fact that the testator in the succeeding sentence of his will explains what he means by "amenities" in language which cannot fairly be challenged on the ground of uncertainty. Their Lordships therefore approach the question of the application of the section upon the footing that the gift would be valid if all convents could be regarded as charitable, but, as they cannot, the section must be invoked to save it. They would only interpolate that upon the question (on which there was a difference of opinion in the Courts of Australia) whether the Orders among which the trustees have a power of selection are in any way limited to Orders operating in New South Wales at the date of the death of the testator they agree with the view expressed by the Chief Justice and Mr. Justice McTiernan that the language of the will does not admit of any territorial limitation being placed upon the Orders which may benefit by the gift. This does not appear to affect in any way the question whether the section is applicable.

The real question can now be stated. It is whether the section only applies where the testator has expressly indicated alternative purposes, the one charitable, the other non-charitable or not necessarily charitable, or applies also where the gift is for a purpose described in a compendious expression which is apt to include both charitable and non-charitable purposes. In the latter case the further question will arise whether the section applies if the area of choice, however wide and indeterminate, admits of a charitable application or whether some specific indication of a charitable intention is demanded—a question of great nicety to which further reference will be made.

Upon the main question their Lordships are in agreement with the unanimous opinion of the learned Judges of the High Court. The trust being declared to be the provision of amenities in convents in such manner as is prescribed with the further direction that the trustees are to have an absolute discretion as to the Order or Orders of Nuns who

shall benefit, can it be predicated of it that it would be invalid (but for the section) 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? For the sake of simplicity this may be regarded as a gift for the benefit of such Order of Nuns as the trustees may select. If the testator had expanded these words into " for such Order of Nuns whether active or contemplative, as my trustees shall select ", the gift would but for the section have been invalid but the section would, as counsel for the appellants was constrained to admit, have clearly applied. But the area of selection is the same whether these words are expanded or not. Both Orders, the charitable and non-charitable, both purposes, the valid and the invalid, are embraced in the single phrase " Orders of Nuns ". It appears to their Lordships not only that the language of the section upon a reasonable construction covers the case of a composite expression embracing charitable and non-charitable purposes, but that, as the present case forcibly illustrates, a contrary view leads to a result which cannot sensibly have been intended by the Legislature. This conclusion accords with the overwhelming weight of authority in the Courts of New South Wales and of Victoria and also of New Zealand where a similar Act is in force. The relevant cases are discussed in the several judgments of the High Court of Australia in the case now under appeal. Their Lordships respectfully concur in what is there said. They endorse the view that the judgment in re *Belcher* (1950 V.L.R. 11) cannot be supported. Some reliance was placed by the appellants upon the expression " is or could be deemed to be included ", but it is difficult to see how it helps them. On the contrary, as is pointed out by Mr. Justice Kitto, these words seem particularly appropriate to the case of a composite expression. There is no need for them if there is a clearcut alternative between charitable and non-charitable purposes.

But, though their Lordships are of opinion that the section may operate, where there is a composite expression covering charitable and non-charitable purposes, and does so in the present case, it is clear that not every expression which might possibly justify a charitable application is brought within it. For instance in *In re Hollole* 1945 V.L.R. 295 there was a gift to a trustee " to be disposed of by him as he may deem best ". The trustee might presumably have deemed it best to dispose of it for a charitable purpose, and, if he had done so, could not be said to have exceeded his powers. Yet Mr. Justice O'Bryan held that the gift was not saved by the section and his decision has been rightly approved in the High Court. This was a clear case because the testator did not designate any purpose at all but in effect delegated his testamentary power in a manner that the law does not permit. Greater difficulty will arise where the permissible objects of choice are described in a composite expression which, though not so vague and general as to amount to a delegation of testamentary power, does not very clearly indicate a charitable intention on the part of the testator. " In the present case ", say the Chief Justice and Mr. Justice McTiernan, " there is reference to a distributable class which, while not exclusively charitable, is predominantly charitable in character ". The same concept appears in a different form in the judgment of Mr. Justice Williams and Mr. Justice Webb. " One can also agree with him (i.e. Mr. Justice Myers) " they say " 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 . . . " Thus whether the gift be to Orders of Nuns, an object so predominantly charitable that a charitable intention on the part of the testator can fairly be assumed, or for (say) benevolent purposes, which connotes charitable as well as non-charitable purposes, the section will apply. Inevitably there will be marginal cases, where an expression is used which does not significantly indicate a charitable intention, and their Lordships do not propose to catalogue the expressions which will or will not attract

the section. It may be sufficient to say that in the chequered history of this branch of the law the misuse of the words " benevolent " and " philanthropic " have more than any others disappointed the charitable intention of benevolent testators and that the section is clearly designed to save such gifts.

The disposition made by clause 3 must now be considered. As has already been pointed out, it will in any case be saved by the section so far as Orders other than Contemplative Orders are concerned, but the trustees are anxious to preserve their right to select such Orders. They can only do so if the gift is what is called an absolute gift to the selected Order, an expression which may require examination.

Upon this question there has been a sharp division of opinion in the High Court. Mr. Justice Williams and Mr. Justice Webb agreed with Mr. Justice Myers that the disposition by clause 3 was valid. They held that it provided for an immediate gift to the particular religious community selected by the trustees and that it was immaterial whether the Order was charitable or not because the gift was not a gift in perpetuity. " It is given " they said (and these are the significant words) " 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 ". Mr. Justice Kitto reached the same conclusion. He thought that the selected Order would take the gift immediately and absolutely and could expend immediately the whole of what is received. " There is ", he said, " no attempt to create a perpetual endowment ". A different view was taken by the Chief Justice and Mr. Justice McTiernan. After an exhaustive examination of the problem and of the relevant authorities they concluded that the provision made by clause 3 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 ", they said, " 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 these 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." They therefore held that unless the trust could be supported as a charity it must fail.

The brief passages that have been cited from the judgments in the High Court sufficiently indicate the question that must be answered and the difficulty of solving it. It arises out of the artificial and anomalous conception of an unincorporated society which, though it is not a separate entity in law, is yet for many purposes regarded as a continuing entity and, however inaccurately, as something other than an aggregate of its members. In law a gift to such a Society *simpliciter* (i.e. where, to use the words of Lord Parker in *Bowman's* case [1917] A.C. at p. 437 neither the circumstances of the gift nor the directions given nor the objects expressed impose on the donee the character of a trustee) is nothing else than a gift to its members at the date of the gift as joint tenants or tenants in common. It is for this reason that the prudent conveyancer provides that a receipt by the Treasurer or other proper officer of the recipient society for a legacy to the Society shall be a sufficient discharge to executors. If it were not so, the executors could only get a valid discharge by obtaining a receipt from every member. This must be qualified by saying that by their rules the members might have authorised one of themselves to receive a gift on behalf of them all.

It is in the light of this fundamental proposition that the statements, to which reference has been made, must be examined. What is meant when it is said that a gift is made to the individuals comprising the community and the words are added " it is given to them for the benefit of the community."? If it is a gift to individuals, each of them is entitled to his distributive share (unless he has previously bound himself by the rules of the Society that it shall be devoted to some other purpose). It is difficult to see what is added by the words " for the benefit of the

community". If they are intended to import a trust, who are the beneficiaries? If the present members are the beneficiaries, the words add nothing and are meaningless. If some other persons or purposes are intended, the conclusion cannot be avoided that the gift is void. For it is uncertain and beyond doubt tends to a perpetuity.

The question then appears to be whether, even if the gift to a selected order of nuns is *prima facie* a gift to the individual members of that order, there are other considerations arising out of the terms of the will, or the nature of the Society, its organisation and rules, or the subject matter of the gift which should lead the Court to conclude that, though *prima facie* the gift is an absolute one (absolute both in quality of estate and in freedom from restriction) to individual nuns, yet it is invalid because it is in the nature of an endowment and tends to a perpetuity or for any other reason. This raises a problem which is not easy to solve as the divergent opinions in the High Court indicate.

The *prima facie* validity of such a gift (by which term their Lordships intend a bequest or demise) is a convenient starting point for the examination of the relevant law. For as Lord Tomlin (sitting at first instance in the Chancery Division) said in *In re Ogden* [1933] Ch. 678, a gift to a voluntary association of persons for the general purposes of the association is an absolute gift and *prima facie* a good gift. He was echoing the words of Lord Parker in *Bowman's* case [1917] A.C. 406 at p. 442 that a gift to an unincorporated association for the attainment of its purposes "may . . . be upheld as an absolute gift to its members". These words must receive careful consideration, for it is to be noted that it is because the gift can be upheld as a gift to the individual members that it is valid, even though it is given for the general purposes of the association. If the words "for the general purposes of the association" were held to import a trust, the question would have to be asked, what is the trust and who are the beneficiaries? A gift can be made to persons (including a corporation) but it cannot be made to a purpose or to an object: so also a trust may be created for the benefit of persons as *cestuis que trustent* but not for a purpose or object unless the purpose or object be charitable. For a purpose or object cannot sue, but, if it be charitable, the Attorney General can sue to enforce it. (Upon this point something will be added later.) It is therefore by disregarding the words "for the general purposes of the association" (which are assumed not to be charitable purposes) and treating the gift as an absolute gift to individuals that it can be sustained. The same conclusion had been reached fifty years before in *Cocks* v. *Manners* L.R. 12 Eq. 574 where a bequest of a share of residue to the "Dominican Convent at Carisbrooke (payable to the Superior for the time being)" was held a valid gift to the individual members of that Society. In that case no difficulty was created by the addition of words which might suggest that the community as a whole, not its members individually, should be the beneficiary. So also with *In re Smith* ([1914] 1 Ch. 937). There the bequest was to "the society or institution known as the Franciscan Friars of Clevedon County of Somerset" absolutely. Mr. Justice Joyce had no difficulty in construing this as a gift individually to the small number of persons who had associated themselves together at Clevedon under monastic vows. Greater difficulty must be felt when the gift is in such terms that, though it is clearly not contemplated that the individual members shall divide it amongst themselves, yet it is *prima facie* a gift to the individuals and, there being nothing in the constitution of the society to prohibit it, they can dispose of it as they think fit. Of this type of case *In re Clarke* [1901] 2 Ch. 110 may be taken as an example. There the bequest was 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 learned Judge (Mr. Justice Byrne) was able to uphold this as a valid gift on the ground that all the members of the association could join together to dispose of the funds or the barracks. He assumed (however little the testator may have intended it) that the gift was to the individual members in the name of the Society or of the Committee of the Society. This might be regarded as an extreme case had it not been followed by *In re Drummond* [1914] 2 Ch. 90.

In that case a testator devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion and to stand possessed of the proceeds upon trust for the Old Bradfordians Club, London (being a Club instituted by Bradford Grammar School old boys), the receipt of the treasurer for the time being of the Club to be a sufficient discharge to his trustees. By a Codicil the testator declared that he desired that the said moneys should be used by the Club for such purpose as the committee for the time being might determine, the object and intent of the bequest being 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 the use of the members with various other powers, including the founding of scholarships, as the committee for the time being should think best in the interests of the club or the school. Mr. Justice Eve said that he could not hold, as the result of the will and codicil together, that the residuary gift to the Old Bradfordian Club was a gift to the members individually, but there was in his opinion a trust and there was abundant authority for holding that it was not such a trust as would render the legacy void as tending to a perpetuity. He cited only in *re Clarke*, though other cases had been referred to in argument, and he ignored that Mr. Justice Byrne had been able to reach his conclusion in that case just because he regarded the gift as a gift to the individual members of the Corps who could together dispose of its assets as they thought fit. The learned Judge added that the legacy was not subject to any trust which would prevent the committee of the club from spending it in any manner they might think fit for the benefit of the class intended. There was therefore a valid gift to the club for such purposes as the Committee should determine for the old boys or members of the club. Their Lordships have thought it desirable to state *Drummond's* case at some length both because it provides an interesting contrast to cases that will be referred to later and was itself an authority relied on by Farwell J. in *In re Taylor* [1940] Ch. 481 and by Cohen J. (as he then was) in *In re Price* [1943] Ch. 422. In the former case the learned Judge observed that *re Clarke* showed that a gift to a fund for a voluntary body of persons may be perfectly valid unless the rules governing that fund or the purpose for which the institution was created prevent the members from dealing with it, both capital and income, in any way they please. It does not appear that he was making any distinction between a gift to a voluntary body of persons and a gift to a fund for such a body. Two other cases had in the meantime been decided to which reference may be made. In *In re Prevost* [1930] 2 Ch. 383 a testator had devised and bequeathed the whole of his residuary estate to the trustees of the London Library to be held by them upon trust for the general purposes of that institution including the benefit of the staff. This case too came before Mr. Justice Eve, who held that the gift was valid upon the ground that it was a gift to the trustees of the Library upon trust to be expended in carrying out the objects of the Society according to its rules and that, inasmuch as there was nothing in the terms of the gift or in the Rules of the Library to prevent the expenditure of the corpus of the property, the gift did not fail for perpetuity. Here there was no question of a gift to an unincorporated society which was to be regarded as a gift to its individual members and capable of being dealt with by them as they should think fit. The learned Judge nevertheless regarded it as falling within the class of case of which *Cocks* v. *Manners* was the leading authority. Nearer to *Cocks* v. *Manners* and nearer too to the present case was *In re Ray's Will Trusts* [1936] Ch. 520. In that case a testatrix who was a nun in a convent by her will gave all her property to the person who at the time of her death should be or should act as the abbess of the convent. The will was attested by two nuns belonging to the convent, one of whom was subsequently elected abbess and held that office at the time of the death of the testatrix. The substantial question was whether the gift was invalidated by section 15 of the Wills Act 1937, and it was held not to be so invalidated because the gift was not to the abbess

personally but in trust for and as an addition to the funds of the community. As to this Mr. Justice Clauson made the following observations which state the point at issue " Another perfectly lawful form of gift would be a gift of a legacy to the controlling officer of a society in his capacity of officer to be dealt with as he would deal with other funds with which, as such officer of a voluntary society, it would be his duty to deal. Again that would be a gift which the Court will recognise as a good gift, subject only to this point, which sometimes causes difficulty, that if the frame of the gift indicates that the legacy is not to be used at once and immediately for the purposes of the voluntary society, but is to be set aside and invested and the income only to be used, the capital being preserved as an endowment of the voluntary society, the Court will not give effect to the gift because it infringes the rule that no gift except a charitable gift is to be a perpetuity, and a gift thus to endow a voluntary society necessarily creates a perpetuity ".

The cases that have been referred to (and many others might have been referred to in the Courts of Australia, England and Ireland) are all cases in which gifts have been upheld as valid either on the ground that, where a society has been named as legatee, its members could demand that the gift should be dealt with as they should together think fit ; or on the ground that a trust had been established (as in *re Drummond*) which did not create a perpetuity. It will be sufficient to mention one only of the cases in which a different conclusion has been reached before coming to a recent decision of the House of Lords which must be regarded as of paramount authority. In *Carne* v. *Long* 2 De G. F. & J. 75 the testator devised his mansion house after the death of his wife to the trustees of the Penzance Public Library to hold to them and their successors for ever for the use benefit maintenance and support of the said library. It appeared that the library was established and kept on foot by the subscriptions of certain inhabitants of Penzance, that the subscribers were elected by ballot and the library managed by officers chosen from amongst themselves by the subscribers, that the property in the books and everything else belonging to the library was vested in trustees for the subscribers and that it was provided that the institution should not be broken up so long as ten members remained. It was urged that the gift was to a number of private persons and there were in truth no other beneficiaries. But Lord Chancellor Campbell rejected the plea in words which, often though they have been cited, will bear repetition. " If the devise had been in favour of the existing members of the society and they had been at liberty to dispose of the property as they might think fit, then it might, I think, have been a lawful disposition and not tending to a perpetuity. But looking to the language of the rules of this society it is clear that the library was intended to be a perpetual institution and the testator must be presumed to have known what the regulations were." This was perhaps a clear case where both from the terms of the gift and the nature of the society a perpetuity was indicated.

Their Lordships must now turn to the recent case of *Macaulay* v. *O'Donnell* which appears to be reported only in a footnote to *In re Price* [1943] Ch. 422. There the gift was to the Folkestone Lodge of the Theosophical Society absolutely for the maintenance and improvement of the Theosophical Lodge at Folkestone. It was assumed that the donee " the Lodge " was a body of persons. The decision of the House of Lords in July, 1933, to which both Lord Buckmaster and Lord Tomlin were parties, was that the gift was invalid. A portion of Lord Buckmaster's speech may well be quoted. He had previously referred to *In re Drummond* and *Carne* v. *Long*. " A group of people ", he said, " defined and bound together by rules and called by a distinctive name can be the subject of gift as well as any individual or incorporated body. The real question is what is the actual purpose for which the gift is made. There is no perpetuity if the gift is for the individual members for their own benefit, but that, I think, is clearly not the meaning of this gift. Nor again is there a perpetuity if the Society is at liberty in accordance with the terms of the gift to spend both capital and income as they think fit . . . If the gift is to be for the endowment of the Society to be held as an endowment

and the Society is according to its form perpetual, the gift is bad: but, if the gift is an immediate beneficial legacy, it is good." In the result he held the gift for the maintenance and improvement of the Theosophical Lodge at Folkestone to be invalid. Their Lordships respectfully doubt whether the passage in Lord Buckmaster's speech in which he suggests the alternative ground of validity: viz., that the Society is at liberty in accordance with the terms of the gift to spend both capital and income as they think fit, presents a true alternative. It is only because the Society, i.e. the individuals constituting it, are the beneficiaries, that they can dispose of the gift. Lord Tomlin came to the same conclusion. He found in the words of the will "for the maintenance and improvement" a sufficient indication that it was the permanence of the Lodge at Folkestone that the testatrix was seeking to secure and this, he thought, necessarily involved endowment. Therefore a perpetuity was created. A passage from the judgment of the Master of the Rolls, Lord Hanworth (which has been obtained from the records) may usefully be cited. He said "the problem may be stated in this way. If the gift is in truth to the present members of the Society described by their Society name so that they have the beneficial use of the property and can, if they please, alienate and put the proceeds in their own pocket, then there is a present gift to individuals which is good: but if the gift is intended for the good not only of the present but of future members so that the present members are in the position of trustees and have no right to appropriate the property or its proceeds for their personal benefit then the gift is invalid. It may be invalid by reason of there being a trust created, or it may be by reason of the terms that the period allowed by the rule against perpetuities would be exceeded."

It is not very clear what is intended by the dichotomy suggested in the last sentence of the citation, but the penultimate sentence goes to the root of the matter. At the risk of repetition their Lordships would point out that, if a gift is made to individuals whether under their own names or in the name of their Society and the conclusion is reached that they are not intended to take beneficially, then they take as trustees. If so, it must be ascertained who are the beneficiaries. If at the death of the testator the class of beneficiaries is fixed and ascertained or ascertainable within the limit of the rule against perpetuities, all is well. If it is not so fixed and not so ascertainable the trust must fail. Of such a trust no better example could be found than a gift to an order for the benefit of a community of nuns once it is established that the community is not confined to living and ascertained persons. A wider question is opened if it appears that the trust is not for persons but for a non-charitable purpose. As has been pointed out, no one can enforce such a trust. What follows? Ex hypothesi the trustees are not themselves the beneficiaries yet the trust fund is in their hands and they may or may not think fit to carry out their testator's wishes. If so, it would seem that the testator has imperfectly exercised his testamentary power; he has delegated it, for the disposal of his property lies with them not with him. Accordingly the subject matter of the gift will be undisposed of or fall into the residuary estate as the case may be. Their Lordships do not ignore that from this fundamental rule there has from time to time been a deviation: see for example *In re Dean* 41 Ch.D. 552, *In re Thompson* [1934] Ch. 342: and that attempts have been made to explain or justify such cases (see in particular the 4th Edn. of Gray on the Rule against perpetuities, pp. 776 *et seq.*). But the rule as stated in *Morice* v. *Bishop of Durham*, 9 Ves. 399 (per Sir William Grant, M.R.) 10 Ves. 522 (per Lord Eldon, L.C.) continues to supply the guiding principle. It may be difficult to reconcile this principle with the decision of *Drummond's* case, but the learned Judge did treat that case as governed by *Cocks* v. *Manners* and, if so, must have assumed that when the will trustees had got the trust fund in their hands they could be compelled by the members of the Old Bradfordonians Club or of the school to apply it as they thought fit. But it is difficult to see how he made such an assumption or arrived at the conclusion that no perpetuity had been created. No similar difficulty arises in

regard to the observations of Lord Buckmaster and Lord Tomlin which have already been cited. The effect is the same whether the gift is to A., B. and C. or to a Society consisting of A., B. and C. and no others upon such terms that they can spend both capital and income as they think fit.

It is significant of the fine distinctions that are made in these cases that in *In re Price* the learned Judge to whose attention *Macaulay* v. *O'Donnell* had been called held that 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. Rudolf Steiner ", was a valid gift.

Before turning once more and finally to the terms of the present gift their Lordships must mention the case of *In re Cain* [1950] V.L.R. 382. In that case Mr. Justice Dean has made an exhaustive examination of the relevant case law which must prove of great value in similar cases.

It must now be asked then whether in the present case there are sufficient indications to displace the prima facie conclusion that the gift made by clause 3 of the will is to the individual members of the selected order of nuns at the date of the testator's death so that they can together dispose of it as they think fit. It appears to their Lordships that such indications are ample.

In the first place it is not altogether irrelevant that the gift is in terms upon trust for a selected Order. It is true that this can in law be regarded as a trust in favour of each and every member of the Order. But at least the form of the gift is not to the members and it may be questioned whether the testator understood the niceties of the law. In the second place the members of the selected Order may be numerous, very numerous perhaps, and they may be spread over the world. If the gift is to the individuals it is to all the members who were living at the death of the testator but only to them. It is not easy to believe that the testator intended an " immediate beneficial legacy " (to use the words of Lord Buckmaster) to such a body of beneficiaries. In the third place the subject matter of the gift cannot be ignored. It appears from the evidence filed in the suit that Elmslea is a grazing property of about 730 acres with a furnished homestead containing 20 rooms and a number of outbuildings. With the greatest respect to those learned Judges who have taken a different view, their Lordships do not find it possible to regard all the individual members of an Order as intended to become the beneficial owners of such a property. Little or no evidence has been given about the organisation and rules of the several Orders, but it is at least permissible to doubt whether it is a common feature of them, that all their members regard themselves or are to be regarded as having the capacity of (say) the Corps of Commissionaires (see *re Clarke*) to put an end to their association and distribute its assets. On the contrary it seems reasonably clear that, however little the testator understood the effect in law of a gift to an unincorporated body of persons by their society name, his intention was to create a trust not merely for the benefit of the existing members of the selected order but for its benefit as a continuing society and for the furtherance of its work. Different views have been held upon the question whether the legal title remains in the will trustees after they have selected an Order. Mr. Justice Kitto (expressly) and Mr. Justice Williams and Mr. Justice Webb (by implication) held that " when a body is selected by the trustees the property will be at home " and will vest presumably in some authorised person or persons. (The Roman Catholic Charities Land Act of 1942 was not invoked in the High Court and becomes irrelevant if the chosen Order is not a charity.) The Chief Justice and Mr. Justice McTiernan were of opinion 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 selected Order. The latter view is attractive if only because of the difficulty of transferring title when the above-mentioned Act does not apply. But their Lordships do not think it necessary for the purpose of this case to decide the question. No difficulty will arise if only a charitable body can

be selected. If the choice is wider, the question will not arise. The dominant and sufficiently expressed intention of the testator is in their opinion (again in the words of Lord Buckmaster) that " the gift is to be an endowment of the Society to be held as an endowment " and that " as the Society is according to its form perpetual " the gift must, if it is to a non-charitable body, fail.

Their Lordships therefore humbly advise Her Majesty that the appeal should be dismissed but that the gift made by clause 3 of the will is valid by reason only of the provisions of section 37 (D) of the Conveyancing Act 1919-1954, and that the power of selection thereby given to the trustees does not extend to contemplative Orders of Nuns. The costs of all parties will be paid out of the estate of the testator. The costs of all the respondents will be taxed as between solicitor and client.

(39756) Wt. 8021—25 120 5/59 D.L

**In the Privy Council**

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**DORIS CAROLINE MARY LEAHY AND OTHERS**

*v.*

**THE ATTORNEY GENERAL IN AND FOR THE STATE OF NEW SOUTH WALES AND OTHERS**

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DELIVERED BY
VISCOUNT SIMONDS

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1959