REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1934.

[HIGH COURT OF AUSTRALIA.]

THE ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE . . . . . Defendant, } Appellant;

AND

LAWLOR AND OTHERS . . . . . Defendants and Plaintiff, Respondents.

HIS HOLINESS THE POPE . . . . Defendant, Appellant;

AND

THE NATIONAL TRUSTEES, EXECUTORS AND AGENCY COMPANY OF AUSTRALASIA LIMITED AND OTHERS . . Plaintiff and Defendants, Respondents.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. of A. 1934.

MELBOURNE, *Mar.* 6-9; *May* 23.

Gavan Duffy C.J. Rich, Starke, Dixon, Evatt and McTiernan JJ.

Charity—Gift to establish a Catholic daily newspaper—Gift of intermediate income for Catholic education—Validity—Dependent relative gift—Property Law Act 1928 (*Vict.*) (*No.* 3754), *sec.* 131.

Assets—Order of application—Payment of probate and estate duty, debts and legacies—Alteration of statutory order of application of assets—Contrary provision—Whether expressed—Federal estate duty included in direction to pay probate duty—Administration and Probate Act 1928 (*Vict.*) (*No.* 3632), *secs.* 33, 34, 163, *Second Schedule, Part II.—Estate Duty Assessment Act* 1914-1928 (*No.* 22 *of* 1914—*No.* 47 *of* 1928), *sec.* 35.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

The testator bequeathed to the Roman Catholic Archbishop of Melbourne and others specific personal property "as a nucleus, to establish a Catholic daily newspaper," and provided that the income from that benefaction should be used "for Catholic education, or any good object the Hierarchy may decide, until sufficient funds are in hand, to found the daily paper." After various other gifts, he bequeathed half the residue of the estate to the Hierarchy of the Roman Catholic Church "in addition to the bequest, already made, to establish a Catholic daily paper." The Supreme Court of Victoria held that the specific gift for the establishment of the newspaper involved or tended to a perpetuity, and could not be supported as a gift for a charitable purpose; that the specific gift being invalid, the gift of the intermediate income therefrom also failed; and that the gift of half the residue was intended for the establishment of a Catholic daily paper, and was for the same reasons invalid.

Upon appeal to the High Court, *Gavan Duffy* C.J., *Evatt* and *McTiernan* JJ. were of opinion (1) that the specific gift of personalty and the gift of half the residue were gifts for a charitable purpose, and therefore valid; and (2) that the gift of intermediate income was also valid for the same reason. *Rich*, *Starke* and *Dixon* JJ. were of opinion (1) that the gift for the establishment of a Catholic newspaper could not be supported as being for a charitable purpose, and consequently failed as tending to create a perpetuity, and fell into residue; (2) that the gift of the intermediate income, being dependent on the gift of corpus, failed with it; (3) that the gift of half the residue was for the purpose of founding a Catholic daily paper, was not for a charitable purpose, and therefore failed; and (4) that none of these gifts was saved by the application of sec. 131 of the *Property Law Act* 1928 (Vict.).

The Court being equally divided, the decision of the Supreme Court of Victoria (Full Court): *In re Lawlor*; *National Trustees, Executors and Agency Co. of Australasia Ltd.* v. *Lawlor*, (1934) V.L.R. 22, was affirmed.

The will also contained the following clause: "If the bonds and stock reserved for probate and any liability of mine, are insufficient for the purpose, and all the cash bequests mentioned, the more readily saleable (advantageously realizable) to be sold to meet the liability." No bonds or stock were reserved by the will for the purpose of paying probate duty or any liabilities of the testator.

Held, by the whole Court, (1) that the above clause did not constitute any contrary provision within the meaning of secs. 33 and 34 and the Second Schedule of the *Administration and Probate Act* 1928 (Vict.) and the testator's estate was applicable towards the discharge of the funeral, testamentary and administration expenses and debts according to the order of the application of assets set out in Part II. of the Second Schedule of the *Administration and Probate Act* 1928, and primarily out of the property undisposed of by the testator; and (2) that the probate duty payable to the State of Victoria was payable out of the shares of residue ratably.

Per Gavan Duffy C.J., *Rich*, *Dixon*, *Evatt* and *McTiernan* JJ.: The word "probate" in this clause in the will included Federal estate duty.

Decision of the Supreme Court of Victoria (Full Court) reversed.

APPEAL from the Supreme Court of Victoria.

Patrick Lawlor, formerly of Camberwell, in the State of Victoria, who died on 6th October 1932, after making certain bequests of property and money to individuals, made the following bequests by his will: "To the Archbishop of Melbourne and the Bishops of Ballarat, Bendigo and Sale, my shares in the Herald and Weekly Times, Australian Paper and Pulp and Gordon and Gotch, as a nucleus, to establish a Catholic daily newspaper; to the same beneficiaries, my shares in Goldsbrough Mort and Company, to found a farm, or supplement those already secured, for the training of delinquent or orphan boys, to country life; the income from those two benefactions, to be used for Catholic education, or any good object the Hierarchy may decide, until sufficient funds are in hand, to found the daily paper and secure the farm." The testator then proceeded to give other specific legacies of shares and debentures to various charitable institutions, or for charitable purposes. The testator's will continued: "If the bonds and stock reserved for probate and any liability of mine, are insufficient for the purpose, and all the cash bequests mentioned, the more readily saleable (advantageously realizable) to be sold to meet the liability; the balance, if any, and the remainder of my estate shares etc., not mentioned or bequeathed, to be realized at an opportune time, in an active market, and divided equally one half to Our Holy Father the Pope, for the propagation of the Faith, and the other half to the Hierarchy in addition to the bequest, already made, to establish a Catholic daily paper."

The National Trustees, Executors and Agency Co. of Australasia Ltd., as one of the executors and trustees of the will, took out an originating summons in the Supreme Court of Victoria for the determination of a number of questions arising in the administration of the estate. The defendants to the summons were Margaret Lawlor, the testator's widow, who was sued as one of the executors and trustees of the will, and also as representing herself and all other persons entitled under the *Statute of Distributions* to any part of the estate of the testator as to which he might have died intestate; His Grace the Most Reverend Daniel Mannix, Roman Catholic Archbishop of Melbourne, who was sued as representing

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

himself and all others the Bishops constituting the Hierarchy of the Roman Catholic Church in the State of Victoria being beneficiaries under the will of the testator; His Holiness the Pope of Rome in Italy, who was sued as a beneficiary under the will of the testator; and His Majesty's Attorney-General for the State of Victoria.

The summons was heard by *Macfarlan* J. who answered several of the questions raised, but referred to the Full Court questions 1, 2, and 3, and so much of question 10 as was incidental to the determination of questions 1, 2 and 3. These questions were as follows:—1. Is the bequest to the Archbishop of Melbourne and the Bishops of Ballarat, Bendigo and Sale of the testator's shares in the Herald and Weekly Times, Australian Paper and Pulp and Gordon and Gotch as a nucleus to establish a Catholic daily newspaper valid or how otherwise? 2. Is the direction contained in the will, that the income from the benefaction mentioned in question 1 be used for Catholic education or any good object the Hierarchy may decide until sufficient funds are in hand to found the daily paper valid or otherwise? 3. Is the gift of one-half of the balance and remainder of the testator's estate to the Hierarchy in addition to the bequest mentioned in question 1 to establish a Catholic daily paper valid or how otherwise? 10. In what manner and in what order and out of what part or parts thereof is the testator's estate applicable towards the discharge of the funeral, testamentary and administration expenses, debts, and probate, estate and succession duties and the payment of pecuniary legacies?

Evidence on affidavit was given to the effect (*inter alia*) that the promotion of daily newspapers was one of the means adopted by the Roman Catholic Church for the propagation and advancement of the Catholic faith and religion, and tended to the instruction and edification of the public, and to the propagation and defence of accepted moral principles.

The Full Court answered the questions as follows:—1. That the bequest to the Archbishop of Melbourne, the Bishops of Ballarat, Bendigo and Sale of the testator's shares in the Herald and Weekly Times, Australian Paper and Pulp and Gordon and Gotch as a nucleus to establish a Catholic daily newspaper was invalid. As to this question the Court said: "We are of opinion, however, that

the establishment of a newspaper, as that word is always understood, even though qualified by the word 'Catholic,' is not a charitable object either within the original meaning of the Statute of Elizabeth or within the extensions which have been given to those objects by judicial decision." 2. That the direction contained in the will that the income from the benefaction mentioned in question 1 be used for Catholic education or any good object the Hierarchy may decide until sufficient funds are in hand to found the daily newspaper was invalid. The Court's opinion as to this was :—" The income given for the purpose of Catholic education is not an independent gift, but a gift of income resulting from the benefaction before mentioned for the purpose of founding a newspaper ; property is set aside to be applied to the founding of the newspaper as soon as sufficient funds are in hand to justify that being done ; and then follows a gift of the income in the meantime. The gift is a gift of the income from that benefaction, and that benefaction failing there is no fund to satisfy the subsequent gift, because there is no fund to provide the income." 3. That the gift of one-half of the balance and remainder of the testator's estate to the Hierarchy, in addition to the bequest mentioned in question 1, to establish a Catholic daily paper was invalid. As to this the Court said :—" We are unable to adopt the construction suggested, namely, that that gift might be regarded as a simple gift of half the residue to the Hierarchy without more, and not as a gift to be added to the bequest already made to establish a daily newspaper. Notwithstanding some grammatical difficulties, we think the intention appears to be to supplement by this second bequest the fund already provided by the shares for the establishment of the newspaper." 10. That the funeral, testamentary and administration expenses, debts and Victorian probate duties and the pecuniary legacies were payable out of the bonds and stock of the testator not specifically bequeathed in or by the will. On this question, as to how the debts and liabilities of the testator and probate duty were to be borne, the Court said :—" The way in which these burdens are to be borne as provided by secs. 33 and 34 and the Second Schedule of the *Administration and Probate Act* 1928 is subject to any contrary provision in the will. This has given rise to some difficulty. It has been contended by Dr. *Brennan*

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRAL-ASIA LTD.

that the testator has otherwise provided in this will by the words 'if the bonds and stock reserved for probate and any liability of mine are insufficient for the purpose, and all the cash bequests mentioned, the more readily saleable (advantageously realizable) to be sold to meet the liability.' We have come to the conclusion, with some hesitation, that the reading contended for by Dr. *Brennan* is substantially the correct one; that 'the bonds and stock reserved' means no more than 'bonds and stock which are left and which I have not so far disposed of,' and they are to be used for the satisfaction of those liabilities and the cash bequests, and if they are insufficient certain other steps are to be taken. Those other steps involve a difficult question of construction; but, as all parties are agreed that the bonds and stock are sufficient for the discharge of probate duty and the liabilities, we think we need go no further than to say that those words show, and amount to a direction by the testator, that if they are sufficient they are to be applied for the purposes mentioned."

His Grace, the Roman Catholic Archbishop of Melbourne, now appealed to the High Court from the decision of the Full Court on questions 1, 2, and 3 above set out. His Holiness the Pope also appealed to the High Court from the decision of the Full Court on question 10 above set out.

Hassett and *Adams*, for His Holiness the Pope. The only part of the decision from which the appeal is brought by His Holiness the Pope is the decision on question 10 dealing with the manner in which the debts and liabilities of the testator and probate duty are to be borne. Sec. 33 (2) of the *Administration and Probate Act* 1928 provides that out of the net money arising from the sale and conversion of the real and personal property of the deceased, and out of the ready money of the deceased (so far as not disposed of by will), the personal representative shall pay funeral, testamentary and administration expenses, debts and other liabilities properly payable thereout having regard to the rules of administration contained in Division 5 of Part I. of the Act, and out of the residue the personal representative shall set aside a fund sufficient to provide for any pecuniary legacies. Sec. 34 (2) provides that where the estate of a deceased person is

solvent his real and personal estate shall, subject to rules of Court and to the provisions of the Act relating to charges on property and to the provisions of the will, be applicable towards the discharge of funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II. of the Second Schedule of the Act. Clause 8 (*a*) of Part II. of the Second Schedule provides that the order of application may be varied by the will of the deceased. The Supreme Court was wrong in holding that there was an intention contrary to the provisions of the statute provided by the testator's will by the words " if the bonds and stock reserved for probate and any liability of mine are insufficient for the purpose, and all the cash bequests mentioned, the more readily saleable (advantageously realizable) to be sold to meet the liability." This provision in the will is too uncertain to cut down the effect of the section, and there is nothing to show what bonds and stock are referred to (*Scalé* v. *Rawlins* (1)). If the gift to the Archbishop is void the statute will operate in any event. Sec. 163 (1) of the Act provides that, unless a contrary intention appears in the will, the duty is to be paid out of the residue of the estate. " Residue " there means that portion of the property of the testator which is available for payment of debts and pecuniary legacies (*In re Lamb*; *Vipond* v. *Lamb* (2)). The English and Victorian Acts are the same. No bonds or stock have been reserved for probate, and the provision of the will above set out is meaningless and, therefore, is not a contrary provision within sec. 34 (2) of the Act. Legacies and debts go together as regards Part II. of the Second Schedule (*In re Worthington*; *Nichols* v. *Hart* (3)). The *Statute Law Revision Act* 1933 altered the order of application of assets in Part II. of the Second Schedule.

Sanderson (with him *O'Driscoll*), for the National Trustees, Executors and Agency Co. of Australasia Ltd. The Company takes a neutral attitude in this matter. On the question of a provision to the contrary contained in the will, the Full Court in *In re Neal*; *Neal* v. *Neal* (4), arrived at a different conclusion from the Court

(1) (1892) A.C. 342.
(2) (1929) 1 Ch. 722.
(3) (1933) Ch. 771.
(4) (1933) V.L.R. 222.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

in *In re Lamb* (1), and *In re Worthington* (2). This Court should follow the English cases. If the clause is invalid, the undisposed of portions of the estate should be resorted to first. A statutory order of application of assets is provided and unless it can be reasonably inferred from his will that the testator intended to vary the order, that order should prevail. Though void bequests fall into residue, they are caught by the section as property undisposed of by will before they reach the residue.

Brennan K.C. (with him *King*), for Margaret Lawlor and the next of kin. As to question 10, the testator has indicated that he wishes the various charges, probate duty, debts and legacies to come out of a particular fund. The clause in question is capable of only one meaning, and if a meaning can be deduced from the words of the will, the Court should adopt that meaning. A number of bonds and stock are not disposed of by the will. The passage means " if the bonds and stock which I hereby reserve for probate " &c. By the expression " liability " he intends to cover probate and other liabilities. The Full Court said that the testator had indicated the fund from which these liabilities were to be paid. The sale which is directed must be of something other than the stock and bonds mentioned. When the new order of distribution was introduced, the right of the testator to make his own order was not interfered with, and a very slight indication has been held sufficient to vary the order (*In re Kempthorne* ; *Charles* v. *Kempthorne* (3) ; *In re Worthington* (2)). The pecuniary legacies are charged on bonds and stock. If this clause is bad there is a very great proportion of property undisposed of by the will. The testator has indicated in this clause where the legacies and probate duty are to come from.

Robert Menzies, A.-G. for Victoria (with him *O'Bryan* and *Gowans*), for the Roman Catholic Archbishop of Melbourne. On the main appeal three questions arise :—(1) Whether the gift to form the nucleus to establish a Catholic daily newspaper is valid ? (2)

(1) (1929) 1 Ch. 722.
(2) (1933) Ch. 771.
(3) (1930) 1 Ch. 268.

Whether the gift of income following that gift is good, even assuming that the gift to found a newspaper is invalid? (3) Whether the additional bequest there made stands or falls with the earlier gift for a newspaper? Sec. 131 of the *Property Law Act* 1928 makes alternative gifts good as long as one is charitable. Two other questions arise: (1) What is meant by a Catholic daily newspaper, and (2) is a gift to establish such paper a charitable gift? The first question is self-explanatory, but if not the affidavit filed is admissible to explain it. The Full Court considered that because it was for a newspaper the gift could not be charitable. This is not correct. A Catholic newspaper contains ordinary news, but also articles which present the views of Christian religion as presented by the Catholic Church. Can you say that the gift has a dominant motive which is religious? If so, it is charitable (*In re Scowcroft*; *Ormrod* v. *Wilkinson* (1)). An essential feature of this gift is the furtherance of religion, and that is sufficient to make it a good charitable gift (*In re Hood*; *Public Trustee* v. *Hood* (2)). If it is found that the dominant intention of the testator is the advancement of religion, the mere fact that the paper would provide secular information for secular readers does not annul the dominant intention (*Thornton* v. *Howe* (3)). The test is, what is the effective end of what is being done? In this case the end is religious. The secular portion of the paper forms a means of securing readers or potential readers of the religious lessons contained in the paper. The inquiry in each case is one of substance (*Re Charlesworth*; *Robinson* v. *Cleveland* (*Archdeacon*) (4); *Townsend* v. *Carus* (5)). If this is not a good religious gift, the question arises how far the gift was for the benefit of the public (*In re Grove-Grady*; *Plowden* v. *Lawrence* (6); *Hobart Savings Bank and Launceston Bank for Savings* v. *Federal Commissioner of Taxation* (7)). A bequest for a newspaper which supplies the public with a certain amount of religious teaching would be of a charitable nature.

[STARKE J. referred to *Attorney-General* v. *National Provincial Bank* (8) and *Dunne* v. *Byrne* (9).]

(1) (1898) 2 Ch. 638, at p. 641.
(2) (1931) 1 Ch. 240, at pp. 250, 252, 253.
(3) (1862) 31 Beav. 14; 54 E.R. 1042.
(4) (1910) 101 L.T. 908.
(5) (1844) 3 Hare 257; 67 E.R. 378.
(6) (1929) 1 Ch. 557, at p. 572.
(7) (1930) 43 C.L.R. 364, at p. 374.
(8) (1924) A.C. 262.
(9) (1912) A.C. 407.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

Dunne v. *Byrne* (1) was not referred to the fourth class in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (2), and in the former case there was a gift to the Archbishop to be used and expended by him wholly or in part as such Archbishop might think most conducive to the good of religion in the diocese. There the Archbishop might have used the money for purposes which were not in any sense religious. The matter was also considered in *In re Cranston*; *Webb* v. *Oldfield* (3). This case was followed by *In re Wedgwood*; *Allen* v. *Wedgwood* (4). In order to bring the case within the fourth class in *Pemsel's Case* it must first be determined that there is some colour of charity within the meaning of the Statute of Elizabeth, and also that it is for the public benefit and not against morals. If the Court thinks that there is not sufficient of the religious element to bring it within the third class mentioned in *Pemsel's Case*, the Court may hold that its religious tenour would make it for the public benefit. The mere fact that the gift does disclose secular purposes is not inconsistent with the general tenour to promote morality. The second question arises in relation to the direction to use the income from the two previous benefactions for Catholic education, or any good object the Hierarchy may decide, until sufficient funds are in hand to found the daily paper and secure the farm. The Supreme Court has attributed an erroneous meaning to the word "benefactions," and has assumed wrongly that because the purpose for which an existing fund was brought into being was void, the income arising in the meantime was not to be paid as directed. The testator is here speaking about a sum of money, and says that until the newspaper is established the income is to be used for Catholic purposes. The funds or sources exist, and nothing said here interferes with such fund, and until the day arrives, the Church will have the income for Catholic education. In any event this gift is saved by sec. 131 of the *Property Law Act* 1928, which protects the gift of income given until the establishment of the newspaper as being a good charitable gift. The bequest of the balance and remainder of his estate to be equally divided between the Pope and the Hierarchy is not impressed with a trust to establish

(1) (1912) A.C. 407.
(2) (1891) A.C. 531.
(3) (1898) 1 I.R. 431, at pp. 444, 451.
(4) (1915) 1 Ch. 113.

a Catholic daily paper. "In addition to" there means notwithstanding.

Brennan K.C. On questions 1, 2 and 3 the decision of the Supreme Court is right. There is not and cannot be a charitable gift. In any event this trust is too uncertain to be enforced or understood. And even if the gift for the newspaper were a charity, the gift of the intermediate income would violate the rule against perpetuities because the vesting may possibly be postponed beyond the time limited by the rule.

[DIXON J. referred to *McLaughlin* v. *Campbell* (1) and *In re Moore* (2).]

If under the trust the trustee may do things that are not charitable and still keep within the terms of the trust, the trust will not be upheld as being charitable (*Byrne* v. *Dunne* (3); *Dunne* v. *Byrne* (4)). The category of charitable trusts should not be extended (*In re Grove-Grady* (5), quoting *Campbell* C.J. in *Jeffries* v. *Alexander* (6); *In re Tetley*; *National Provincial and Union Bank of England Ltd.* v. *Tetley* (7); *In re Macduff*; *Macduff* v. *Macduff* (8)). The principle is that if you have a direction to trustees by which they are entitled to devote money to certain charitable works and other patriotic or benevolent works, which are not necessarily charitable, and if a discretion is given to the trustees to carry out works which are not necessarily charitable, the whole trust fails, and the gift is not saved by any provision corresponding to that of sec. 131 of the *Property Law Act* 1928 (*In re Hood*; *Public Trustee* v. *Hood* (9); *In re Scowcroft* (10)). If a trust is in part charitable and in part non-charitable, the non-charitable part will drag down the charitable part (*In re Davis*; *Thomas* v. *Davis* (11); *Thornton* v. *Howe* (12)). It is questionable whether there really is a fourth class of charitable trust as is stated in *Pemsel's Case* (13) (*In re Macduff* (14)). A Catholic daily newspaper is not something fixed and definite that

(1) (1906) 1 I.R. 588.
(2) (1919) 1 I.R. 316.
(3) (1910) 11 C.L.R. 637, at p. 645.
(4) (1912) A.C., at p. 410.
(5) (1929) 1 Ch., at p. 571.
(6) (1860) 8 H.L.C. 594, at p. 648; 11 E.R. 562, at p. 583.
(7) (1923) 1 Ch. 258, at p. 266.
(8) (1896) 2 Ch. 451.
(9) (1931) 1 Ch. 240.
(10) (1898) 2 Ch. 638.
(11) (1923) 1 Ch. 225.
(12) (1862) 31 Beav. 14; 54 E.R. 1042.
(13) (1891) A.C. 531.
(14) (1896) 2 Ch., at p. 467.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

this Court can say is for the advancement of religion (*In re Hummeltenberg*; *Beatty* v. *London Spiritualistic Alliance Ltd.* (1)). The establishment of such a paper would not be charitable within the Statute of Elizabeth. The trust must be in such a form that the Court can say what it means. This gift is vague and indefinite. It does not say where the paper is to be started, nor when it is to be started, and it recognizes that there is not sufficient money in hand to start a newspaper. This gift could not be administered *cy-près* in any way. The fourth class in *Pemsel's Case* (2) must cover charitable purposes not included in the three preceding classes. There can be no supervision of the policy of a newspaper. The Court should consider for itself the meaning of the words "Catholic daily newspaper" without reference to any affidavit explaining them (*In re How*; *How* v. *How* (3)). The onus is on the appellant to show that this is for the public benefit or capable of control by the Court. The dominant intention in the mind of the testator is that the newspaper shall be started, and the gift of the intermediate income is merely incidental to the original gift. The testator must have had the belief that a paper would be established. The judgment of *Mann* J. on this point is correct. Sec. 131 of the *Property Law Act* does not apply to a case such as this, where the principal is given to establish a paper and the intermediate income is given, even if the purpose for which the income is given is charitable (*In re Jackson*; *Midland Bank Executor and Trustee Co.* v. *Archbishop of Wales* (4)). As the dominant intention of the testator is the establishment of the newspaper, and as this is not charitable, the gift will not be executed *cy-près*, and the whole gift fails (*Chamberlayne* v. *Brockett* (5); *In re Lord Stratheden and Campbell*; *Alt* v. *Lord Stratheden and Campbell* (6)). The gift here is conditional on sufficient money being raised to start a newspaper. The newspaper cannot come into existence until some further sum of money is secured (*In re Swain*; *Monckton* v. *Hands* (7); *In re Wilson*; *Twentyman* v. *Simpson* (8); *In re Monk*; *Giffen* v. *Wedd* (9)).

(1) (1923) 1 Ch. 237.
(2) (1891) A.C. 531.
(3) (1930) 1 Ch. 66.
(4) (1930) 2 Ch. 389.
(5) (1872) L.R. 8 Ch. 206.
(6) (1894) 3 Ch. 265.
(7) (1905) 1 Ch. 669.
(8) (1913) 1 Ch. 314.
(9) (1927) 2 Ch. 197.

King. The gift of the intermediate income is entirely dependent on the gift for the newspaper. The gift of the income is bad and falls with the gift of the corpus, and is not saved by sec. 131 of the *Property Law Act* 1928 (*In re Griffiths*; *Griffiths* v. *Griffiths* (1)).

Hassett. As to questions 1, 2 and 3 I adopt the argument of the Attorney-General. The gift for the establishment of a Catholic newspaper is a good charitable gift as tending to the propagation of the faith. Sec. 131 of the *Property Law Act* applies not only where there are two separate benefactions, one charitable and the other non-charitable, but it also applies to a case such as the present, where, even if the gift for the newspaper is not charitable, the gift of the intermediate income is for a charitable purpose. The gift for the establishment of a Catholic newspaper could be carried out in a manner which would be either charitable or not, and sec. 131 would apply in so far as the gift was carried out in a charitable manner.

Adams. There is a true residue clause in this will which catches up the shares given to found a newspaper (*Theobald on Wills*, 8th ed., (1927), p. 252).

Menzies A.-G., in reply. As to the rule against perpetuities. The gift for the establishment of the newspaper is an immediate gift, and as such the rule against perpetuities does apply. From the moment the gift is put into the hands of the Hierarchy it is impressed with a charitable trust (*Wallis* v. *Solicitor-General for New Zealand* (2)). This will makes a charitable gift of the income, followed later by a charitable gift of the corpus (*Christ's Hospital* v. *Grainger* (3); *In re Tyler*; *Tyler* v. *Tyler* (4)). Sec. 131 of the *Property Law Act* supports the remodelling of the will, and what the testator has written may be materially altered by the application of sec. 131. There is no ground for saying that a Catholic newspaper might be used for purposes unconnected with the promotion of the Catholic faith, or for non-charitable purposes (*In re Schoales*; *Schoales* v. *Schoales* (5)).

(1) (1926) V.L.R. 212, at p. 219.
(2) (1903) A.C. 173.
(3) (1848) 16 Sim. 83; 60 E.R. 804.
(4) (1891) 3 Ch. 252.
(5) (1930) 2 Ch. 75.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

May 23.

The Court is at liberty to look at the affidavit filed to show the purposes for which the money will be used if the purpose is carried out (*In re Fowler*; *Fowler* v. *Booth* (1)).

Cur. adv. vult.

The following written judgments were delivered: —

GAVAN DUFFY C.J. AND EVATT J. Under the terms of the will of the late Patrick Lawlor, certain shares were vested in the Archbishop of Melbourne and the Bishops of Ballarat, Bendigo and Sale (comprising the Catholic Hierarchy of Victoria). These shares were to form a nucleus for the purpose of establishing a Catholic daily newspaper. To the same trustees certain other shares were given in order to found or support a farm for the training of orphan or delinquent boys to country life. The testator next provided that, until sufficient funds were in hand to found the daily paper and secure the farm, the income from both benefactions should be used for Catholic education or any good object the Hierarchy might decide.

The main question for determination is whether the establishment of a Catholic daily newspaper under the assumed control and direction of the Catholic Hierarchy in Victoria is a good charitable gift. The term " Catholic daily newspaper " is not a term of art, but it is said to be quite impossible to suppose that a daily newspaper could be produced so as to serve the purpose of carrying on religious and missionary propaganda on behalf of the Catholic Church.

Certain evidence was placed before the Court by Professor Power, a distinguished scholar who is familiar with Roman Catholic educational and missionary activity. *Inter alia*, he says :—

> " One of the means adopted by the Catholic Church for the maintenance and propagation of the Catholic Faith and the advancement of the Catholic religion is the promotion of daily newspapers and other publications of the kind in as many countries as possible. These newspapers are used for the advancement of Catholic religion by defining its attitude towards moral problems of the day, defining its teachings on matters of faith and morals and correcting and counteracting misrepresentations as to the history of the Church and its attitude towards problems both past and present. The publication of daily newspapers which are under the control of the Catholic Church

(1) (1914) 30 T.L.R. 632; (1914) 31 T.L.R. 102.

is part of the action of the Church in the same way as the publication of religious books, the promotion of lectures and sermons &c., for the advancement in the world of the Catholic religion. The publication of a Catholic newspaper is regarded by the Church as tending directly to the instruction and edification of the public in matters relating to the Roman Catholic religion."

In support of the general position thus outlined, Professor Power quoted the following declaration of Pope Pius XI. in the year 1927, when he directed the Archbishops and Bishops of Austria as follows: —" You must not fail to notice the enormous influence for good and for evil which daily newspapers and other publications of the kind have acquired in modern times. And since wicked men make use of them to spread wrong views and corrupt morals you should consider it your duty to make use of them *to promote the salvation of your people*. For by means of good newspapers, and other writings of the kind false views are gradually dissipated, and Catholics are strengthened to make open profession of Faith and of an upright life."

It is said that although a Catholic daily newspaper under the direct control of the Hierarchy may be engaged partly in spreading the religious doctrines and teachings of the Church, it would not be a " news " paper, unless it also contained both news and information of a secular character. But would the Catholic Church be any the less engaged in disseminating its religious doctrines and teachings merely because it chose to reach the public by supplying daily information and news, the main object throughout being the propagation of the faith? The better opinion would seem to be that, although some of the purposes incidentally served by such a propaganda newspaper as the testator contemplated would be non-religious, that is no sufficient reason for denying to each issue of such a newspaper its dominant character and purpose, that of instructing Catholics in matters of faith and morals and of advancing and spreading the faith and teachings of the Catholic Church throughout the territory of Victoria.

It must be remembered that the daily newspaper of to-day is vastly different from the daily newspaper of a generation ago to which an incidental reference was made in *Byrne* v. *Dunne* (1) by

(1) (1910) 11 C.L.R., at p. 645.

H. C. of A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

Gavan Duffy C.J. Evatt J.

Griffith C.J. What *Griffith* C.J. said was: "For instance, it might well be said that a political propaganda for the purpose of procuring State endowment of churches or denominational schools, or the establishment of a newspaper conducted on religious or high moral principles, or the establishment of a contemplative order of nuns, would be purposes conducive to the good or religion." But this statement may easily be misunderstood. What the learned Chief Justice was contemplating was a newspaper "conducted on religious or high moral principles," and not a newspaper which was being used for the purpose of teaching, furthering and spreading definite religious teachings.

The newspaper has largely become an instrument of propaganda. The propaganda may have many aspects, political, social, educational or economic. It may reveal itself not only in leading articles, but in the method of presenting the news items of the day, by comment, express or implied, in the headlines which introduce such news, and by the selection and rejection of news and information or portions thereof, and by the degree of prominence given to some item or aspect of news. This may perhaps appear to be an inadequate description of newspaper production, and, of course, the accuracy of the description varies in different places and under differing managements. But no observer with any sense of the reality of things can deny its general accuracy. The published statements of owners and controllers of modern newspapers provide very conclusive evidence that what has been said is by no means an exaggerated statement of the true position. The truth of the declaration of Pius XI., quoted by Professor Power, cannot be gainsaid.

We are quite unable to see the difference between the Catholic Church's propagating its religious tenets and regulating the performance of religious duties (1) through a medium reaching into the homes of the multitude, including Catholics and non-Catholics, and (2) through the ordinary medium of sermons and tracts. The former may be as much a method of preaching the gospel as the more direct and obvious method of strengthening or extending faith through missions and sermons.

It is said further that a daily newspaper must necessarily be a commercial enterprise and thus be inconsistent with a charitable gift. But it is reasonably clear that the religious newspaper contemplated by the testator was not to be devoted to the purpose of production for profit; to this end, the Hierarchy itself was placed in supreme control. It is clear that a newspaper need not be conducted or controlled for the purpose of profit, and even if the proposed Church paper was made self-supporting, that should not prevent it from being regarded as a means of disseminating Catholic faith and teachings.

It would seem that there is some confusion of thought involved in the argument that the scheme indicated by the testator is not charitable. In the present instance he left no discretion to the Hierarchy as to the character of the newspaper he desired to found. This distinguishes the case from *Dunne* v. *Byrne* (1), where there was not only a discretion given to the Archbishop, but the discretion was expressed in the very widest terms. The will very clearly shows that there must be established a "Catholic" newspaper, and that means one devoted to the spreading of such religious doctrines, teachings and ideals as are comprised in the doctrines, teachings and ideals of the Catholic Church. No more effective instrument could be devised for the inculcation of such doctrines than a newspaper circulating daily amongst the people. Why then should it be inferred either (1) that the selected instrument would not be used for the purpose stated, or (2) that the purpose was to be the furtherance of Catholic "interests" in some political or secular or non-religious direction rather than the purpose asserted or indicated throughout the will? Neither inference seems legitimate, and even if some doubt could be entertained about the intention of the testator, this is eminently a case where the purpose should be regarded *ut res magis valeat quam pereat.*

It has to be recognized that the methods of preaching and extending a gospel or a faith alter and develop with the changing years. In our opinion, the real crux of this case is whether a newspaper is to be regarded by the Courts as being incapable of performing for

(1) (1912) A.C. 407.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

Gavan Duffy C.J. Evatt J.

church and religious purposes the very function it discharges for many other purposes.

Another point urged by the respondents is that it would not be possible to enforce the trust. This seems to beg the whole question. The duty of seeing to the carrying out of the trust would devolve upon the Attorney-General. No greater difficulty would attend the enforcement of the present trust than any other analogous trust. In the last resort, the Court might have to determine as a question of fact whether the newspaper was being used for the spreading of the Catholic religion or for some other purpose. Difficulties of a precisely similar character frequently attend the enforcement of legal obligations. The only question here is, what is the obligation?

The gift for the purpose of establishing a Catholic daily newspaper should therefore be regarded as a valid charitable gift, and it becomes unnecessary to consider whether sec. 131 of the *Property Law Act* 1928 would so operate upon the gift as to compel the Court to adopt such a construction as would ensure its validity. The argument on behalf of the appellant is that sec. 131 applies as much to a one purpose (e.g. " benevolent purposes ") trust or to a specific trust (e.g. the present gift), where the one purpose or specific purpose admittedly includes charitable purposes *stricto sensu*, as it does to a trust which, upon its face, exhibits several distinct purposes, one at least being charitable. An illustration of the latter application of sec. 131 is afforded by the testator's direction as to the application of the income from the two principal gifts.

The question still remains whether the modern rule against perpetuities applies to render the gift wholly void. Now the testator makes it clear that his gift is to be a " nucleus " only, so that it may not be sufficient for the immediate establishment of the newspaper. Until sufficient funds are in hand for such purpose, the income from the shares is to be used for Catholic education, &c. It is, of course, no answer to the suggested application of the rule that, by the will, the shares vest immediately in named trustees, because perpetuities cannot be created under the shield of a trust any more than they can be created in an openly asserted settlement of the legal estate itself.

The first answer suggested by counsel for the appellant is that the gift for the establishment of the newspaper is preceded by a gift for " Catholic education, or any good object the Hierarchy may decide," and that, as the Supreme Court has held, sec. 131 of the *Property Law Act* 1928 operates to confine the alternatively expressed gift of the income to the charitable purpose (Catholic education), and to exclude the non-charitable purpose. The argument then is that we have a gift of the shares to charity A subject to a provision that, on the happening of a certain event, it shall go over to charity B (the newspaper), and the gift over will take effect notwithstanding the possible remoteness of the event (see *Jarman* on *Wills*, 6th ed. (1910), at pp. 211, 212 ; 7th ed. (1930), at p. 197). The authorities cited by *Jarman* and relied upon by the appellant for this proposition of law are *Christ's Hospital* v. *Grainger* (1) and *In re Tyler* (2). The first case related to a provision in a will that upon a contingency which might only occur in the indefinite future, a legacy to the Corporation of the town of Reading on a charitable trust should go over to the Corporation of London upon another charitable trust. The reasoning of Lord *Cottenham* in this case seems to have been based upon the idea of perpetuities in the sense of inalienability rather than in the modern sense of remoteness of vesting, and *Gray*, *The Rule against Perpetuities*, 3rd ed. (1915), fully discusses the case from such a point of view (§599-§601). The other case mentioned by *Jarman*—*In re Tyler*—is regarded by the editor, Mr. *Sweet*, as " contrary to principle " (6th ed., p. 212).

Whatever may be the force of the criticisms of *Sweet* and *Gray*, it is at least open to doubt whether the gifts in the present case are to be regarded as corresponding in any real sense to the trusts in *Christ's Hospital* v. *Grainger* (1), and *In re Tyler* (2). Here the main gift is for the purpose of establishing the newspaper. Its commencing point being uncertain in the view of the testator, he makes an ancillary provision dealing with the income until the paper is founded. This is not so much a gift to charity A with a gift over in a contingency which may never eventuate, but rather a gift to a charity under such circumstances that the charity *may* never enjoy it at all, with a direction that, in the meantime, the income of

(1) (1849) 1 Mac. & G. 460 ; 41 E.R. 1343. (2) (1891) 3 Ch. 252.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

Gavan Duffy C.J. Evatt J.

the gift may be enjoyed by another charity. The distinction may be a fine one, but it is doubtful whether the case is covered by *Christ's Hospital* v. *Grainger* (1) and *In re Tyler* (2).

But the appellant invokes another doctrine in order to escape an infringement of the rule against remote vesting. That doctrine is summed up by *Jarman*, 6th ed. (1910), at p. 212; 7th ed. (1930), at pp. 197, 198, in these terms: "If property is effectually and absolutely devoted to charity, a direction that it shall not be applied in a certain way until after an event which may not happen within the period allowed by the rule against perpetuities, does not affect the validity of the gift." This principle was applied in the case of *Wallis* v. *Solicitor-General for New Zealand* (3), where Lord *Macnaghten* said (4): "It is well settled, as stated in *Tudor's Charitable Trusts*, 3rd ed., p. 53, that where there is an immediate gift for charitable purposes, the gift is not rendered invalid by the fact that the particular application directed cannot immediately take effect, or will not of necessity take effect within any definite limit of time, and may never take effect at all."

We are of opinion that this principle applies to the gift for the purpose of founding a Catholic daily newspaper, and that there is no infringement of the rule against remote vesting.

A question also arises as to the direction of the testator that one-half of the balance and of the remainder of his estate should be given to the Hierarchy "in addition to the bequest, already made, to establish a Catholic daily paper." We are of opinion that this gift is intended, as *Mann* A.C.J. said, "to supplement . . . the fund already provided by the shares for the establishment of the newspaper" (5), and is not a separate or unconditional gift to the Hierarchy. But it necessarily follows from the reasoning of this judgment that the gift is as valid as the main gift which it supplements.

The appeal should, therefore, be allowed and the answers to questions 1, 2 and 3 should be varied by declaring that the respective gifts referred to in such questions are, and each of them is, valid.

(1) (1849) 1 Mac. & G. 460; 41 E.R. 1343.
(2) (1891) 3 Ch. 252.
(3) (1903) A.C. 173.
(4) (1903) A.C., at pp. 185, 186.
(5) (1934) V.L.R., at p. 28.

As the order of the Court is that the appeal shall be dismissed, it becomes necessary to deal with question 10 of the originating summons, the answer to which is the subject of a separate appeal. On that question we agree with the judgment of our brother *Dixon* and with the order proposed by him.

RICH J. These are two appeals raising questions under the will of the late Patrick Lawlor, who died on 6th October 1932 leaving a considerable estate. The first question is whether certain trusts upon which he directs that specific property and a share of his residue shall be held, are valid as trusts for charitable purposes. The trusts of the specific property are as follows: "To the Archbishop of Melbourne and the Bishops of Ballarat, Bendigo and Sale, my shares in the Herald and Weekly Times, Australian Paper and Pulp and Gordon and Gotch, as a nucleus, to establish a Catholic daily newspaper, to the same beneficiaries, my shares in Goldsbrough Mort and Company, to found a farm, or supplement those already secured, for the training of delinquent or orphan boys, to country life; the income from those two benefactions, to be used for Catholic education, or any good object the Hierarchy may decide, until sufficient funds are in hand, to found the daily paper and secure the farm." The residuary disposition of the estate is into two half shares. As to the second half share the will gives it in these words: "To the Hierarchy in addition to the bequest, already made, to establish a Catholic daily paper." Notwithstanding the contention that this is an independent gift to the Hierarchy untrammelled by conditions, I think that the words "to establish a Catholic daily paper" express a condition of the gift and are not merely a description attached to the words "bequest, already made." The substantial question to be decided is therefore, whether the gifts of property "to establish a Catholic daily newspaper" constitute a valid charitable bequest. Of course, in so far as the specific gift fails, the property intended to be thereby disposed of falls into residue, one half of which will, according to the decision of the question I have stated, go either to the next of kin as undisposed of or be held for the purpose directed by the testator. The Supreme Court of Victoria were "of opinion . . . that the establishment of a newspaper, as that word is

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

Rich J.

always understood, even though qualified by the word 'Catholic,' is not a charitable object either within the original meaning of the Statute of Elizabeth or within the extensions which have been given to those objects by judicial decision" (1). The appeal against this decision was supported on the ground that under the classification adopted by Lord *Macnaghten* in *Pemsel's Case* (2) the trust was for religious purposes or, alternatively, for a purpose generally beneficial to the public. Although the classification is acknowledged to be no more than an arrangement of existing case law and not the formulation of definitions, a tendency exists to treat the fourth class as a description, correspondence to which is sufficient to uphold a trust. This is a potent source of error. It has frequently been pointed out that cases falling under this class must come within the analogies recognized by the course of judicial decision as within the general scope of the Statute of Elizabeth. Unfortunately whether a given case not included within the first three classes falls within the fourth class can only be ascertained by familiarity with the decided cases. To my mind it is hopeless to treat this gift as charitable for any reason except one based upon its religious tendency. I therefore turn to the question whether the gift can be supported as one charitable because for the purpose of religion. In considering this question one may, I think, take into account the known policy of the Roman Catholic Church, as stated in the affidavit of Father Power, of promoting the publication of daily newspapers under the control of the Church. At the same time, in the end, we must decide upon the testator's language what kind of publications would be permitted by the provision he has expressed. The notion of a daily newspaper necessarily carries with it the conduct of a business enterprise which could not ignore the temporal necessity of recovering outlay by revenue. However desirous the managers of such an enterprise might be of advancing the cause of the Roman Catholic faith, the means of doing so must bend to exigencies which no daily paper could defy. Indeed, the description "daily newspaper" *ex vi termini* makes the primary character of the publication the dissemination of news, and of some at least of the modern substitutes for news. No doubt both in what the paper would exclude and

(1) (1934) V.L.R., at p. 26. (2) (1891) A.C. 531.

what it would include its Roman Catholic character would be the determining factor. But it would remain a newspaper, although a newspaper conducted for Roman Catholics and directed to the advancement of Roman Catholic interests and beliefs. In the case of trusts for the publication of works or other literary matter in being at the time of the trust taking effect, the Court determines whether the trust is for a charitable object by an examination of the matter to be published (*Thornton* v. *Howe* (1): Compare *De Themmines* v. *De Bonneval* (2)). But in such a case as this, where the trust directs the publication of a periodical of a described character, all the Court can do is to ascertain the meaning of the description and consider whether a publication coming within it performs a function which falls within the legal conception of charitable. In the present case it is important to remember that all purposes of religion are not charitable, and that it is settled by high authority that purposes judged most conducive to the good of religion go beyond what the law allows to be charitable (*Dunne* v. *Byrne* (3)). A newspaper conducted as a vehicle aiding in the advancement of the Roman Catholic faith would, in my opinion, be a publication which could not be contained within the legal conception of charity. But I do not think that the advancement of the Roman Catholic faith is the only purpose included in the description "Catholic daily newspaper." It appears to me to include also the general benefit of the adherents to the faith, considered as a body having common interests, aspirations and aims. In my opinion the gift cannot be supported as a charitable gift. But it was suggested that sec. 131 of the *Property Law Act* 1928 (Vict.) applied in such a way to control the testator's definition of purposes that the Court could uphold the gift, but as for a modified and charitable purpose. This provision, which is peculiar to Victoria, appears to me to apply only where the purposes of the gift or bequest are severable, and to enable the Court to cast out from the category of purposes those which are non-charitable. I am quite unable to see in this case how any definite and ascertainable charitable purpose can be isolated and segregated out of the description

(1) (1862) 31 Beav. 14; 54 E.R. 1042. (2) (1828) 5 Russ. 288; 38 E.R. 1035.
(3) (1912) A.C. 407.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRAL-ASIA LTD.

Rich J.

" Catholic daily newspaper." It is one entire description of one entire purpose. To confine the publication to purposes of religion which are charitable is to change the whole character of the newspaper intended by the testator. Further, I do not know how the Court could secure the application of the fund to a publication of that character. I cannot agree with the further suggestion that the gift of income for " Catholic education, or any good object the Hierarchy may decide, until sufficient funds are in hand, to found the daily paper " was good, and with the help of sec. 131 of the *Property Law Act* 1928 might be treated as the sole and sufficient object to which the fund should be devoted perpetually. This gift of income is, in my opinion, a dependent relative gift attendant upon the gift of corpus. It would defeat the intention of the testator to give it the character of a substantive gift of the fund.

I therefore think the appeal from the decision of the Supreme Court declaring the gift void should be dismissed.

This makes it necessary to consider the appeal from the declaration of the Supreme Court as to the incidence of debts, probate and estate duty and legacies. I have had the advantage of reading the judgment of my brother *Dixon* on this subject and agree with it.

The appeal, therefore, from the declaration in answer to the tenth question in the summons should be allowed, and the question, except as to probate, estate and succession duty should be answered in the manner suggested by my brother *Dixon*.

STARKE J. Patrick Lawlor made the following bequests by his will: " To the Archbishop of Melbourne and the Bishops of Ballarat, Bendigo and Sale, my shares in the Herald and Weekly Times, Australian Paper and Pulp and Gordon and Gotch, as a nucleus, to establish a Catholic daily newspaper; to the same beneficiaries, my shares in Goldsbrough Mort and Company, to found a farm, or supplement those already secured, for the training of delinquent or orphan boys, to country life; the income from those two benefactions, to be used for Catholic education, or any good object the Hierarchy may decide, until sufficient funds are in hand, to found the daily paper and secure the farm. . . . If the bonds and stock reserved for probate and any liability of mine, are insufficient

for the purpose, and all the cash bequests mentioned, the more readily saleable (advantageously realizable) to be sold to meet the liability; the balance, if any, and the remainder of my estate shares etc., not mentioned or bequeathed, to be realized at an opportune time, in an active market, and divided equally one half to Our Holy Father the Pope, for the propagation of the Faith, and the other half to the Hierarchy in addition to the bequest, already made, to establish a Catholic daily paper . . ."

The Supreme Court of Victoria has declared the gift of shares as a nucleus to establish a Catholic daily newspaper, the gift of the income to be used for Catholic education or any good object the Hierarchy may decide, and the gift of one half of what I call the residue of the estate, to the Hierarchy, in addition to the bequest already made to establish a Catholic daily newspaper, are each and all of them invalid, and not charitable bequests. The decision involves a consideration of the *Property Law Act* 1928 of Victoria (No. 3754), sec. 131, but for the moment I pass by that section and consider the questions raised as if it had never been enacted. In my opinion, it is not necessary to wander through what Lord *Sterndale* M.R. described as "the tangle of cases as to what is and what is not a charitable gift" (*In re Tetley*; *National Provincial and Union Bank of England* v. *Tetley* (1)), for the purpose of determining whether the declaration of the Supreme Court was right or wrong. It may be that a gift to establish a Catholic daily newspaper is, in a general way, conducive to the good of religion and education, but *Dunne* v. *Byrne* (2) is quite decisive that it is not a good charitable gift. (See also *In re Davidson*; *Minty* v. *Bourne* (3).) The objects and purposes of a Catholic newspaper are not, and can by no means be, confined to strictly charitable purposes. The conduct of such a paper is "open to such latitude" in the advancement and propagation of the religious, education, social, political, economic and other views or policies of the Catholic Church, that no Court could control or execute the trust. It is equally clear that a gift "to be used for Catholic education, or any good object the Hierarchy may decide" is not a good charitable gift. "It is undoubtedly the law that,

(1) (1923) 1 Ch. 258, at p. 266.
(2) (1912) A.C. 407.
(3) (1909) 1 Ch. 567.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRAL-ASIA LTD.

Starke J.

where a bequest is made for charitable purposes and also for an indefinite purpose "—here any good object—" 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 " (*Hunter* v. *Attorney-General* (1); *Attorney-General* v. *National Provincial Bank* (2)). It was contended that the gift of one-half the balance or remainder of the testator's estate to the Hierarchy, in addition to the bequest already made to establish a Catholic newspaper, was an unconditional gift to the Hierarchy, apart from and in addition to the bequest already made to establish a Catholic newspaper. But in my opinion the gift is an addition to the former gift, and for the purpose of establishing a Catholic newspaper.

The provisions of the *Property Law Act* 1928, sec. 131 must now be considered. The section is as follows:—" (1) No trust shall be held to be invalid by reason that some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed. (2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or of any part thereof to or for any such non-charitable and invalid purpose had been or should be deemed to have been so directed or allowed." The passage already cited from *Hunter* v. *Attorney-General* (3) indicates the mischief or supposed mischief that the section was designed to remedy. But the section cannot be applied to a gift directing the application of the fund for a single purpose—*e.g.* establishing a Catholic daily newspaper—the charitable and non-charitable elements of which cannot be disentangled, separated or delimited. The section might have protected the gift of the income from the two benefactions to be used for Catholic education, or any good object the Hierarchy might decide, but for the fact, as the Supreme Court held and in my opinion rightly held, that the gift was not an independent gift, but a gift of income resulting from the benefactions before mentioned for founding a newspaper, and that gift failing there was no fund to provide the income.

(1) (1899) A.C. 309, at p. 315. (2) (1924) A.C. 262.
(3) (1899) A.C. 309.

Another question raised in this appeal is—in what manner and in what order and out of what part or parts thereof is the testator's estate applicable towards the discharge of the funeral, testamentary and administration expenses, debts, and probate, estate and succession duties and the payment of pecuniary legacies ? The Supreme Court declared that the funeral, testamentary and administration expenses, debts and Victorian probate duties and the pecuniary legacies are payable out of the bonds and stock of the testator not specifically bequeathed in or by the said will. The thirty-fourth section of the Victorian *Administration and Probate Act* 1928 provides :—" (2) Where the estate of a deceased person is solvent his real and personal estate shall subject to Rules of Court and the provisions hereinafter contained as to charges on property of the deceased and to the provisions (if any) contained in his will be applicable towards the discharge of the funeral testamentary and administration expenses debts and liabilities payable thereout in the order mentioned in Part II. of the Second Schedule to this Act. (3) Nothing in this Part shall affect or be construed as affecting the provisions of section one hundred and sixty-two and one hundred and sixty-three relating to the payment of duty under Part VI. of this Act." The Second Schedule, Part II., prescribes the order of application of assets where the estate is solvent, as follows : " 1. Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet pecuniary legacies." It is unnecessary for the purposes of this case to set out further the order of the application of assets, but clause 8 of Part II. provides that the order of application may be varied by the will of the deceased.

These provisions correspond with English legislation, the *Administration of Estates Act* 1925 (15 Geo. V. c. 23), which has been the subject of consideration and decision by several learned Judges and by the Court of Appeal. It has been held that " property of the deceased undisposed of by will " is not confined to property of which no disposition has been made by the will of the deceased—that is, property in respect of which the deceased dies intestate—but includes lapsed or void gifts ; for example, a lapsed share of residue

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

Starke J.

is "properly described as property undisposed of by will" (*In re Lamb* (1); *In re Tong*; *Hilton* v. *Bradbury* (2); *In re Worthington*; *Nichols* v. *Hart* (3)). Again, it has been held that the order of application prescribed by the *Administration of Estates Act*, subject to variation by the provisions of the will, is that debts, funeral and testamentary expenses and legacies are primarily payable out of the property of the deceased undisposed of by will (*In re Lamb* (1); *In re Worthington* (3)). This Court is not bound by these decisions, but it seems desirable that we should treat them as an authoritative construction of the Victorian Act (cf. *Sexton* v. *Horton* (4); *Trimble* v. *Hill* (5)). Unless this statutory order is varied by the will of the deceased, or by statute, the answer to the question above mentioned would be: Primarily out of the property of the deceased undisposed of by his will. But the learned Judges of the Supreme Court were of opinion that the will had varied the order of the application of the assets. This variation they found in the words "if the bonds and stock reserved for probate and any liability of mine, are insufficient for the purpose, and all the cash bequests mentioned, the more readily saleable (advantageously realizable) to be sold to meet the liability; the balance, if any, and the remainder of my estate shares etc., not mentioned or bequeathed, to be realized at an opportune time, in an active market, and divided equally." *In re Kempthorne*; *Charles* v. *Kempthorne* (6) was relied upon, but in that case the residuary gift was "subject to and after payment of my funeral and testamentary expenses and debts and the legacies bequeathed by this my will." In *In re Tong*; *Hilton* v. *Bradbury* (2) the words of the will were: "I direct my executors to collect the income from the remainder of my estate and to pay" as therein directed, and it was insisted that the word "remainder" must mean what was left after the funeral and testamentary expenses, debts and legacies had been paid. *Romer* L.J. (7) thus dealt with the matter:—"There is nothing in this Act which prevents or is intended to prevent executors from paying expenses, debts and liabilities out of the first assets coming to their hands available for the purpose;

(1) (1929) 1 Ch. 722.
(2) (1931) 1 Ch. 202.
(3) (1933) Ch. 771.
(4) (1926) 38 C.L.R. 240, at p. 244.
(5) (1879) 5 App. Cas. 342.
(6) (1930) 1 Ch. 268.
(7) (1931) 1 Ch., at p. 212.

and Part II. of the . . . Schedule really only deals with the ultimate adjustment of the burden as between the parties becoming entitled to the testator's estate. Therefore the use of such a word as 'remainder' does not seem to me to make any difference. Such words throw no light on how as between the persons having beneficial interests in the remainder the liability for expenses and debts is to be apportioned." In the present case, the testator equally fails to indicate any intention that the funeral and testamentary expenses &c. shall be paid in any other mode than that prescribed. The will indicates the most convenient order of realizing his property for payment of his funeral and testamentary expenses &c., but there is nothing to suggest that such expenses are thrown on any fund or property in exoneration of the residue, and no direction altering the order of the application of the assets of the deceased for the payment of such expenses. The duty upon the estate of deceased persons payable under the Victorian law is specially dealt with by the *Administration and Probate Act* 1928, secs. 34 (3), 162, and 163. It is stated in the affidavits that duties on the estate and assets of the deceased are also payable under the laws of the Commonwealth and the States of New South Wales and Queensland. But these duties are not referred to in the order of the Supreme Court, and neither in that Court nor in this was any argument directed to the matter. It is unwise, I think, to express opinions and make declarations with respect to these duties without argument, and I prefer not to do so. The parties, in case any doubt or difficulty arises, can go back to the Supreme Court under the order of that Court, which reserves liberty to apply.

The result is that the order of the Supreme Court in answer to questions 1, 2, and 3 of the originating summons should be affirmed, but reversed as to question 10 and the following order substituted: (1) The funeral, testamentary and administration expenses and debts (other than as hereinafter mentioned) should be discharged in accordance with the order of application of assets set out in Part II. of the second schedule of the *Administration and Probate Act* 1928, and primarily out of the property undisposed of by the will of the deceased. (2) The duty payable under the *Administration and Probate Act* 1928 of Victoria upon the estates of deceased persons

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

should be paid according to the provisions contained in sec. 163 of that Act. (3) As to any other duties on the estate or assets of the testator payable under the laws of the Commonwealth, Victoria, New South Wales, or Queensland, the question is reserved.

DIXON J. The Roman Catholic Archbishop of Melbourne and the Bishops of Ballarat, Bendigo and Sale compose the Hierarchy in Victoria. To them the testator specifically bequeathed certain personalty "as a nucleus, to establish a Catholic daily newspaper." He proceeded to bequeath specifically other personal property "to the same beneficiaries . . . to found a farm, or supplement those already secured, for the training of delinquent or orphan boys, to country life; the income from these two benefactions, to be used for Catholic education, or any good object the Hierarchy may decide, until sufficient funds are in hand, to found the daily paper and secure the farm." Half the residue of the estate he gave "to the Hierarchy in addition to the bequest, already made, to establish a Catholic daily paper." The construction of this residuary disposition is disputed, but, in my opinion, its meaning is that, for the purpose of establishing a Catholic daily paper, an additional bequest is made to the Hierarchy, not that, besides the bequest already made for establishing a Catholic daily paper, a bequest, unconditioned by any expression of purpose, is made to the Hierarchy.

The specific and the residuary gift alike raise the question whether a bequest for the establishment of a Catholic daily paper is valid. "A trust to be valid must be for the benefit of individuals, which this is certainly not, or must be in that class of gifts for the benefit of the public which the Courts in this country recognize as charitable in the legal as opposed to the popular sense of that term" (per Lord *Parker of Waddington*, *Bowman* v. *Secular Society Ltd.* (1)). "There are four objects, within one of which all charity, to be administered in this Court, must fall; 1st relief of the indigent; in various ways: money: provisions: education: medical assistance; &c.; 2ndly, the advancement of learning: 3rdly, the advancement of religion; and 4thly, which is the most difficult, the advancement of objects of general public

(1) (1917) A.C. 406, at p. 441.

utility " (Sir *Samuel Romilly arguendo*, *Morice* v. *Bishop of Durham* (1)). This classification, which, in substance, was adopted by Lord *Macnaghten* in *Pemsel's Case* (2), does not mean that whatever can be brought within the description of one of these heads is a good charitable purpose, but that what cannot be referred to any of them is not recognized as charitable (*In re Macduff* (3)). A trust for the purpose of religion is prima facie a trust for a charitable purpose. It is, however, not every purpose of religion that falls within the legal conception of charity. Religious uses or purposes, using these terms in their natural unrestricted meaning, undoubtedly include purposes which may or may not be charitable (cf., per *Cussen* J., *In re Dobinson* ; *Maddock* v. *Attorney-General* (4)). The prima facie rule supplies a presumption which, if no contrary intention appears in the trust instrument, operates to confine the religious purpose within the boundaries of legal charity. " In connection with the expression ' charitable uses or purposes,' and also ' religious purposes,' the Court has taken upon itself to give them what may be called artificial meanings, and to read those artificial meanings into the wills of testators as well as into Acts of Parliament. ' Charitable uses or purposes ' applies to much more than almsgiving or the relief of poverty, and extends to a number of matters set out in *The Commissioners for Special Purposes of the Income Tax* v. *Pemsel* (5). On the contrary, ' religious purposes,' for the purpose of upholding bequests, has been restricted in its meaning to such purposes or uses as are charitable, so that by these two devices charitable uses or purposes are made very extensive, and religious uses or purposes are made sufficiently restricted to fit in with that extensive meaning of charitable uses or purposes " (per *Cussen* J., *In re Dobinson* ; *Maddock* v. *Attorney-General* (6)). " The process by which in England it has been held that a trust for ' religious purposes ' must receive effect is thus concisely stated by *Lindley* L.J. in the case of *White* v. *White* (7). ' We come therefore to the conclusion, first, that the gift is for religious purposes ; and secondly, that being for religious purposes, it must be treated as a gift for ' charitable '

(1) (1805) 10 Ves. J. 522, at p. 532 ; 32 E.R. 947, at p. 951.
(2) (1891) A.C., at p. 583.
(3) (1896) 2 Ch., at p. 474.
(4) (1911) V.L.R. 300.
(5) (1891) A.C. 531.
(6) (1911) V.L.R., at pp. 309, 310.
(7) (1893) 2 Ch. 41, at p. 53.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

Dixon J.

purposes unless the contrary can be shewn. If once this conclusion is arrived at the rest is plain. A charitable bequest never fails for uncertainty' " (*Grimond (or Macintyre)* v. *Grimond* (1), per Lord *Moncrieff*, whose judgment was approved in the House of Lords (2)).

In order to be charitable the purposes themselves must be religious; it is not enough that an activity or pursuit in itself secular is actuated or inspired by a religious motive or injunction: the purpose must involve the spread or strengthening of spiritual teaching within a wide sense, the maintenance of the doctrines upon which it rests, the observances that promote and manifest it (cf. *Keren Kayemeth Le Jisroel Ltd.* v. *Inland Revenue Commissioners* (3)). The purpose may be executed by gifts for the support, aid or relief of clergy and ministers or teachers of religion, the performance of whose duties will tend to the spiritual advantage of others by instruction and edification; by gifts for ecclesiastical buildings, furnishings, ornaments and the like; by gifts to provide for religious services, for sermons, for music, choristers and organists, and so forth; by gifts to religious bodies, orders, or societies, if they have in view the welfare of others. A gift made for any particular means of propagating a faith or a religious belief is charitable; moreover, a disposition is valid which in general terms devotes property to religious purposes or objects. But, whether defined widely or narrowly, the purposes must be directly and immediately religious. It is not enough that they arise out of or have a connection with a faith, a church, or a denomination, or that they are considered to have a tendency beneficial to religion, or to a particular form of religion. The law has found a public benefit in the promotion of religion as an influence upon human conduct; but it has no standard by which to estimate what public benefit of that order is produced indirectly or incidentally by means which, although they may be considered to contribute to the good of religion, are not in themselves religious and do not serve directly a religious object. There have been many, and there are still some, provisions of the law, the maintenance or abrogation of which has been a matter of deep concern to adherents of one or other

(1) (1905) A.C. 124 and 603, at p. 609.
(2) (1905) A.C., at p. 127.
(3) (1932) A.C. 650, at pp. 657, 661; (1931) 2 K.B. 465, at pp. 469, 477.

religious faith. But these have been considered, not charitable religious purposes, but political objects. In *Bowman's Case* (1), Lord *Parker of Waddington* said :—" The abolition of religious tests, the disestablishment of the Church, the secularization of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath, are purely political objects. Equity has always refused to recognize such objects as charitable . . . a trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift. The same considerations apply when there is a trust for the publication of a book. The Court will examine the book, and if its objects be charitable in the legal sense it will give effect to the trust as a good charity : *Thornton* v. *Howe* (2) ; but if its object be political it will refuse to enforce the trust : *De Themmines* v. *De Bonneval* (3)." It is accordingly well recognized that what concerns a religious denomination goes far beyond the religious purposes which are charitable. " There are, beyond question, many purposes peculiar to every religious denomination, which are not charitable " (per Lord *FitzGibbon* L.J., *MacLaughlin* v. *Campbell* (4)). The objects of a denomination may extend to purposes which, although pious, philanthropic, or benevolent, may not be charitable (cf. per *Holmes* L.J. (4) ; cf. per *Porter* M.R. (5)). Thus, in *In re Jackson* ; *Midland Bank Executor and Trustee Co.* v. *Archbishop of Wales* (6), a bequest to the Archbishop for the time being of Wales to be applied by him *inter alia*, " in his discretion in any manner which he might think best for helping to carry on the work of the Church in Wales " was held bad by *Eve* J., because, " Any expenditure which he might in his discretion think best calculated for helping the work of the Church would . . . be within his discretion irrespective of the question whether it was of a charitable nature or not " (7). Counsel

(1) (1917) A.C., at p. 442.
(2) (1862) 31 Beav. 14 ; 54 E.R. 1042.
(3) (1828) 5 Russ. 288 ; 38 E.R. 1035.
(4) (1906) 1 I.R., at p. 598.
(5) (1906) 1 I.R., at p. 592.
(6) (1930) 2 Ch. 389.
(7) (1930) 2 Ch., at p. 391.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

DIXON J.

for the next of kin said :—" It is impossible on the true construction of the will to say that the use of the Archbishop's discretion must necessarily be charitable. He might use the money provided by the gift to promote a newspaper or a political campaign having for its object the restoration of the Established Church in Wales. That clearly would not be a charity " (1). (Cf. per *Russell* J. in *In re Tetley* (2), who, in relation to " patriotic purposes " gives the illustration of a newspaper.) In *In re Bain* (3) a bequest to the Vicar of a Church " for such objects connected with the Church as he shall think fit," was upheld only because it was construed by the majority of the Court as confined to objects directly connected with the Church in contradistinction to objects which are only conducive to the welfare of the parishioners or the congregation who attend the Church ; that is, as confined to the support of the Church, its fabric, and its services. It was agreed, however, that, if the bequest included the various activities organized or carried on under the superintendence or authority of the Church, the gift would be bad (cf. *In re Stratton* ; *Knapman* v. *Attorney-General* (4)). Again, in *In re Davies* ; *Lloyds Bank Ltd.* v. *Mostyn* (5), *Clauson* J. and the Court of Appeal held invalid as non-charitable a trust in favour of an Archbishop " for work connected with the Roman Catholic Church in the . . . Archdiocese." *Clauson* J. said (6) :—" The expression ' work connected with the Roman Catholic Church ' must cover much that was not in the strict sense charitable. Thus, the carrying on of a social club, qualification for membership of which was adherence to the Roman Catholic faith, could not be said to be a charitable purpose, but it was ' work connected with the Roman Catholic Church.' "

Finally, in *Dunne* v. *Byrne* (7), the Privy Council drew the contrast between purposes of religion and things conducive to the good of religion. They are not synonymous, but the latter is wider and more indefinite. " The fund," said Lord *Macnaghten* (8), " is to be applied in such manner as the ' Archbishop may judge most conducive to the good of religion ' in his diocese. It can hardly be

(1) (1930) 2 Ch., at p. 390.
(2) (1923) 1 Ch., at p. 262.
(3) (1930) 1 Ch. 224.
(4) (1931) 1 Ch. 197.
(5) (1932) 48 T.L.R. 539 ; 49 T.L.R. 5.
(6) (1932) 48 T.L.R., at pp. 539, 540.
(7) (1912) A.C. 407.
(8) (1912) A.C., at p. 410.

disputed that a thing may be 'conducive,' and in particular circumstances 'most conducive,' to the good of religion in a particular diocese or in a particular district without being charitable in the sense which the Court attaches to the word, and indeed without being in itself in any sense religious. In *Cocks* v. *Manners* (1), there is the well known instance of the dedication of a fund to a purpose which a devout Roman Catholic would no doubt consider 'conducive to the good of religion,' but which is certainly not charitable. In the present case the learned Chief Justice suggests by way of example several modes in which the fund now in question might be employed so as to be conducive to the good of religion though the mode of application in itself might have nothing of a religious character about it." The instances, which the learned Chief Justice (Sir *Samuel Griffith*) had suggested, appear from the following passage from his judgment (2) :—"It seems to me that purposes may reasonably be called conducive to the good of religion although they have no such direct tendency. For instance, it might well be said that a political propaganda for the purpose of procuring State endowment of churches or denominational schools, or the establishment of a newspaper conducted on religious or high moral principles, or the establishment of a contemplative order of nuns, would be purposes conducive to the good of religion. Certainly the Archbishop might reasonably think so. I do not at present see my way to deny such a proposition. But I do not think that either purpose would be a charitable purpose." His Honor, therefore, gave as an instance of a non-charitable purpose the very thing which the testator has directed, and apparently the instance gained the approval of the Privy Council. Perhaps the dictum of *Griffith* C.J., so approved, should be treated as decisive of the present question. But, without the help of this precise authority, the answer to the question would not appear to me to be doubtful. The character of the journal contemplated by the testator is indicated only by the phrase "a Catholic daily newspaper." There are no expressions referring to the purposes of religion. It is only such expressions that should be presumptively construed as charitable. The reference to religious objects must be contained, if at all, in the word "Catholic." But

(1) (1871) L.R. 12 Eq. 574.

(2) (1910) 11 C.L.R., at p. 645.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

Dixon J.

that word embraces much more than the "purposes of religion" even in the ordinary unrestricted sense of those words. The phrase "Catholic daily newspaper" should, perhaps, be interpreted in the light of the fact that the fund is placed in the hands of the Hierarchy in Victoria. But even so its character cannot be considered as differing from similar newspapers conducted elsewhere under the authority of the Church, which, as the affidavit filed states, are established as "one of the means adopted by the Catholic Church for the maintenance and propagation of the Catholic faith and the advancement of the Catholic religion." The nature of those newspapers is described as follows:—"Such newspapers in addition to ordinary daily news and articles of general interest include a record of events of special interest to Catholics, contain articles on religious and moral topics, propagate and defend accepted moral principles and Catholic doctrines and religious, moral and sociological subjects, and oppose and denounce principles, ideas and doctrines hostile to or subversive of Christian faith and morality." The carrying on of such an object is not a charitable religious purpose, as the citations I have made from authority appear to me clearly to establish. The conduct of a newspaper may be considered conducive to religion or a form of religion, but no more. Indeed, it is an activity which cannot be confined even within the very wide description of "conducive to religion." There is, in my opinion, no other head of charity, to which the bequest can be referred, and, accordingly, I think it is not charitable.

It is contended, however, that sec. 131 of the Victorian *Property Law Act* 1928 operates to give validity to the bequest for the establishment of a Catholic daily newspaper. This enactment makes the following provision:—"(1) No trust shall be held to be invalid by reason that some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed. (2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or any part thereof to or for any such non-charitable and invalid purpose had been or should be deemed to have been so directed or allowed."

The suggestion is that, in so far as religious purposes are contained within the description "Catholic daily newspaper," they may be segregated from the non-charitable elements with which they are associated in that description, and, by force of this section, given by themselves an independent effect. The contention appears to me to confound the purposes of the newspaper with the purposes of the trust. The purpose of the trust was to contribute to the foundation of a newspaper of a specified character. The character is non-charitable. A newspaper of another character is then assumed, having some of the attributes which the newspaper described by the will would possess, but lacking many others. Such a newspaper is necessarily different in character and its establishment is another purpose, not part of the same purpose. 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* (1)). Such cases are altogether different from the present, where one particular application of the fund is authorized, namely, towards the establishment of a Catholic journal, and that object is not contained within the legal definition of charity.

The true application of the statutory provision is well illustrated by the directions of the will as to intermediate income of the same fund, namely, "the income from those two benefactions, to be used for Catholic education, or any good object the Hierarchy may decide, until sufficient funds are in hand, to found the daily paper and secure the farm." "Any good object" goes beyond charitable purposes and, therefore, apart from sec. 131, the whole trust of income would

(1) (1899) A.C. 309, at p. 315.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

DIXON J.

fail, but the section operates to exclude the non-charitable purposes and leave the income applicable to Catholic education, and, perhaps, also to other charitable purposes answering the description "good object," although this is doubtful. Upon the assumption that the bequest to establish the newspaper was held void, it was contended that the trust of income should be upheld, either as an independent and severable trust, or because it was segregated and validated by the operation of sec. 131. A charitable trust of income of indefinite duration would result. In my opinion the trust of income is dependent upon the trust of corpus. It is a direction for the application of income of a fund disposed of for a main purpose pending the effectuation of that purpose. The failure of the trust of corpus involves the trust of intermediate income, and sec. 131 has, I think, no application. For these reasons I am of opinion that the answers given by the Full Court to the first three questions in the originating summons were right, and that the appeal from that part of the order should be dismissed.

This conclusion makes it necessary to consider the appeal from the declaration made by the Full Court in answer to the tenth question in the originating summons. That declaration is: "That the funeral testamentary and administration expenses, debts and Victorian probate duties and the pecuniary legacies are payable out of the bonds and stock of the testator not specifically bequeathed in or by the said will." The declaration gives effect to the interpretation which the Court placed upon a provision of the will introducing the gift of residue. The provision is as follows: "If the bonds and stock reserved for probate and any liability of mine, are insufficient for the purpose, and all the cash bequests mentioned, the more readily saleable (advantageously realizable) to be sold to meet the liability; the balance, if any, and the remainder of my estate shares etc., not mentioned or bequeathed, to be realized at an opportune time, in an active market, and divided equally one half to" &c.

The order of application of assets is, in the absence of a contrary direction in the will, determined now by statute. In the case of funeral, testamentary and administration expenses, debts and liabilities payable out of the estate, not including Victorian probate duty and Federal estate duty, the incidence of the burden involved

in their discharge is dealt with by sec. 34 of the *Administration and Probate Act* 1928 and the Second Schedule thereto. The remarkable amendment to Part II. of the Schedule made by the *Statute Law Revision Act* 1933 (No. 4191) does not apply to this case. In the case of Victorian probate duty, the incidence is determined by sec. 163 of the *Administration and Probate Act* 1928. In the case of Federal estate duty, it is determined by sec. 35 of the *Estate Duty Assessment Act* 1914-1928.

(1) Funeral, testamentary and administrative expenses, debts and liabilities and pecuniary legacies:—Secs. 33 and 34 and the Second Schedule of the Victorian *Administration and Probate Act* 1928 correspond to secs. 33 and 34 and the First Schedule of the English *Administration of Estates Act* 1925, whence they are taken. The order of application of assets prescribed by sec. 34 may be varied by the will of the deceased (Second Schedule, Part II., 8 (*a*)). Sec. 33, which has effect subject to the provisions of any will (sub-sec. 7), imposes upon property as to which the deceased dies intestate a trust for conversion. The expression " intestate " includes a person who leaves a will, but dies intestate as to some beneficial interest in his real or personal estate (sec. 4, definition of " intestate "). Out of the proceeds of conversion there are to be paid funeral, testamentary and administration expenses, debts and other liabilities properly payable thereout, having regard to the rules of administration contained in the enactment, and, out of the residue of the money, there is to be set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the will, if any, of the deceased (sec. 33 (2)). In the order of application of assets prescribed for solvent estates, the first is : " Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies." The second in order is property disposed of by a residuary or general gift, but, again, " subject to the retention thereout of a fund sufficient to meet any pecuniary legacies." The third is property disposed of for the payment of debts; and the fourth, property charged with the payment of debts. Then the fifth is " The fund, if any, retained to meet pecuniary legacies." Last follow, in order, property specifically devised or bequeathed and property appointed under a power. We

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

Dixon J.

should, I think, hesitate to depart from the interpretation placed upon these provisions in England, at any rate by decisions of the Court of Appeal. It appears now to be established that the first category includes all property and every interest which is not effectually disposed of by will. If dispositions are void or lapse, and, in consequence an estate or interest remains undisposed of, that estate or interest falls into the category of assets first applied, in the statutory order of the application of assets. Further, it is established that a share of the residue given under a lapsed or void disposition falls under this head (*In re Lamb* (1), per *Eve* J.; *In re Kempthorne* (2), per *Maugham* J.; *In re Tong* (3), per *Clauson* J.; *In re Worthington* (4)). (Contrast *In re Kempthorne* (5), per *Lawrence* L.J.)

It is also established that the undisposed of property, including lapsed and invalidly given shares of residue, is the primary source for the payment of pecuniary legacies. This is the interpretation put upon the words, " subject to the retention thereout of a fund sufficient to meet any pecuniary legacies," considered with the direction contained in sec. 33 (2) to set aside a fund out of the proceeds of conversion to provide for them (*In re Worthington* (4)). The application of the provisions so interpreted is attended by much difficulty. As the purpose of the rules contained in Part II. of the Schedule is to determine how the dispositions of the estate shall bear the outgoings such as debts and liabilities, which go in diminution of the total, it might have been understood as speaking of the various portions of the estate prior to that diminution. But pecuniary legacies form, not an outgoing from the estate, but portion of the estate liable in its due order to bear outgoings. Residue prior to the deduction of debts may be ascertained, and the debts may be thrown on that part or share of the amount so ascertained, which is undisposed of, in exoneration of other parts or shares. But the ascertainment involves the prior deduction of the amount of the pecuniary legacies. If these are then thrown against the undisposed of share of residue, the deduction is restored and the whole residue is swollen, including the lapsed share. Further, there is necessarily some

(1) (1929) 1 Ch., at p. 724.
(2) (1930) 1 Ch., at p. 277.
(3) (1930) 2 Ch., at p. 406; (1931) 1 Ch. 202.
(4) (1933) Ch. 771.
(5) (1930) 1 Ch., at pp. 298, 299.

contrariety between the will and the statutory directions. A will containing bequests of pecuniary legacies and residuary dispositions must mean that the residuary legatees shall take what is left after the deduction of pecuniary legacies. The payment of the legacies is meant to be prior to the ascertainment of the share of residue, which, *ex hypothesi*, lapses, and, according to the statutory directions, would provide the source of the payment. But the statutory rules have effect subject to any intention which appears from the will with reasonable clearness. Thus, in the course of his judgment in *In re Tong* (1), referring to *In re Lamb* (2), *Clauson* J. says: "If on the true construction of the will the residue meant that which was left after the debts and funeral and testamentary expenses and legacies had been paid, the will itself could have made provision for the discharge of those payments, and recourse to Part II. of the Schedule would be unnecessary." But could true residue mean anything else? It appears to have been considered that a solution of the difficulty so arising is supplied by the existence of an express direction in the will for the prior deduction of legacies, debts or expenses in ascertaining residue. Such a direction has been treated as a sufficient indication that these burdens shall be regarded as discharged before the undisposed of residuary share is ascertained, and not out of that share. But effect is given to the statutory order in the absence of some such express direction, or, at any rate, of some reference to the deduction of these payments. In *In re Lamb*, the will gave specific and pecuniary legacies, and proceeded to direct that "the rest residue and remainder" of the estate should be divided into shares, one of which lapsed. *Eve* J. could "see nothing to exclude the application of the statutory order" (3), and threw the pecuniary legacies (4) as well as debts upon the lapsed share of residue. But, in *In re Petty*; *Holliday* v. *Petty* (5), *Astbury* J. considered that the statutory order was displaced by the will because it directed conversion of the real and personal estate, and, out of the proceeds, payment of funeral and testamentary expenses, debts and legacies, and then disposed of "the residue of the said moneys" in moieties. He distinguished *In re Lamb* on the ground

(1) (1930) 2 Ch., at p. 408.
(2) (1929) 1 Ch. 722.
(3) (1929) 1 Ch., at p. 725.
(4) (1929) 1 Ch., at p. 724.
(5) (1929) 1 Ch. 726.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

Dixon J.

that the will in that case contained a mere direction to pay debts followed by a specific devise, a gift of legacies, and, subject thereto, a residuary disposition. In *In re Atkinson*; *Webster* v. *Walter* (1), the lapsed gift was a devise of realty, not a share of residue. But the will bequeathed the personalty upon trust for conversion, and out of the proceeds, for payment of the funeral and testamentary expenses and debts and the legacies. *Clauson* J. said (2): "Here the will contains a clear direction to the trustees to convert the personal estate and out of the moneys produced by such conversion to pay his funeral and testamentary expenses and debts: until that provision is worked out there is no necessity to have recourse to Part II. of the First Schedule of the Act." In *In re Kempthorne* (3), a division of the residuary personalty was directed "subject to and after payment of my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil thereto, and the duty on any legacies bequeathed free of duty." The Court of Appeal held that the statutory order of application of assets did not apply and make a lapsed share the primary source for payment of liabilities and legacies. Lord *Hanworth* M.R. said (4): "The terms of the will are explicit and the fund, or net residue, is not ascertained—does not come into being—until the expenses, debts and legacies, have been paid." *Russell* L.J., as he then was, said (5): "The statutory order of application of assets is overridden by the testator's own provisions, the effect of which is (to put the result in another way) that the only personal estate as to which he has died intestate is a share of what personal estate remains after the expenses and debts have in fact been paid thereout."

In *In re Tong* (6), the Court relied upon the distinction between, on the one hand, an express direction to pay prior charges followed by a bequest of "the remainder" of the estate, and, on the other hand, the mere existence of prior charges which must be provided before ascertaining residue. The will directed payment of legacies free of duty and payment of all duty on gifts out of the estate, and it bequeathed pecuniary legacies and annuities and dealt with specific realty. The testator then disposed of "the remainder of

(1) (1930) 1 Ch. 47.
(2) (1930) 1 Ch., at p. 51.
(3) (1930) 1 Ch. 268.
(4) (1930) 1 Ch., at p. 295.
(5) (1930) 1 Ch., at pp. 301, 302.
(6) (1930) 2 Ch. 400; (1931) 1 Ch. 202.

my estate " in shares, one of which lapsed. *Clauson* J. said (1) :— " When I come to the final gift I find a disposition of the ' remainder of my estate.' This I construe, in view of the preceding reference to estate duty, as a direction to pay the estate duty and the legacies out of the general estate before ascertaining the fund which is the subject-matter of the final gift ; but I can find no direction dealing with funeral, testamentary and administration expenses, debts and liabilities, other than and except this estate duty. In order to ascertain how these expenses, debts and liabilities must be met I must, by reason of sec. 34, sub-sec. 3, of the Act turn to Part II. of the First Schedule." Accordingly the statutory order prevailed in the case of debts and the like, but not in that of legacies. This judgment was approved in the Court of Appeal. But *Romer* L.J. said (2) :—" I fail to find anything in the will amounting to an indication of the testator's intention that the funeral and testamentary expenses and debts generally should be paid in any other mode than that specified in Part II. of the First Schedule. Even if the testator had directed his executors to pay all his funeral and testamentary expenses and debts and then given the remainder of his estate on certain trusts, I should still have hesitated to say that this amounted to an indication that the expenses and debts were to be paid in any other order out of the assets than that provided for in the First Schedule. The truth of the matter is that there is nothing in this Act which prevents or is intended to prevent executors from paying expenses, debts and liabilities out of the first assets coming to their hands available for the purpose ; and Part II. of the First Schedule really only deals with the ultimate adjustment of the burden as between the parties becoming entitled to the testator's estate. Therefore the use of such a word as ' remainder ' does not seem to me to make any difference. Such words throw no light on how as between the persons having beneficial interests in the remainder the liability for expenses and debts is to be apportioned. On this point I agree with the learned Judge." (Cf. *In re Littlewood* ; *Clark* v. *Littlewood* (3).) In *In re Worthington* (4), the will bequeathed legacies free of duty, and then devised and bequeathed all the residue

(1) (1930) 2 Ch., at p. 405.
(2) (1931) 1 Ch., at p. 212.
(3) (1931) 1 Ch. 443.
(4) (1933) Ch. 771.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

Dixon J.

of the estate both real and personal in two equal shares, one of which lapsed. *Bennett* J. distinguished between debts and legacies on the ground that payment of the former was not, and of the latter was, directed. His decision was reversed by the Court of Appeal. Lord *Hanworth* M.R. said (1) :—" The learned Judge seems to have read the will as providing for the payment of the legacies first and to have thought that the residue was not to be ascertained until after they had been paid. But the provisions of the statute indicate that unless there is some provision in the will which negatives the prescribed order of administration, that order of administration must apply both to legacies and to debts. The learned Judge seems to have thought that because of the specific reference to legacies in the will there was an indication of an intention that the statutory order of administration should not apply to them. But, after all, if legacies are given by a will, there must be a specific reference to them, and I do not see how that can be sufficient to alter the statutory order of administration." *Lawrence* L.J. said (2) :—" It was contended for the respondent that the gift of ' the residue of my estate ' operated as showing an intention to effect such a variation. In my opinion that contention is not well founded. The will contains no direction as to how the executor is to administer the estate and no direction indicating an intention that the legacies should be paid otherwise than in the statutory order of administration." He then expressed his agreement with what *Romer* L.J. had said in *Tong's Case* (3) about the use of the word " remainder," and the absence of assistance from such words. *Romer* L.J. said (4) :—" All I find is a gift of legacies and a gift of residue, and there is no direction given to the executor as to how, as between persons ultimately found to be interested in the estate, the debts, expenses and legacies are to be paid. I see no reason for departing from anything I said in *In re Tong* (5)."

The observations of all three learned Judges suggest that language in the will, which does no more than express what is undeniable in any case, that residue must be arrived at after the deduction of prior charges, does not override the statutory order. I confess that I feel a difficulty in understanding why a different result should be

(1) (1933) Ch., at p. 775.
(2) (1933) Ch., at pp. 776, 777.
(3) (1931) 1 Ch., at p. 212.
(4) (1933) Ch., at pp. 777, 778.
(5) (1931) 1 Ch. 202.

produced by a specific direction to pay out of the fund which, after all prior deductions are made, constitutes residue.

The declaration of the Full Court now under appeal is based upon the view that the will provided how the debts and other charges and the legacies should be borne, and so displaced the statutory declaration which would have thrown them upon the property of the deceased undisposed of by will. The declaration, however, does not really solve the difficulty which has arisen. It declares that the legacies and charges are payable out of specific property which it describes as "not specifically bequeathed in or by the said will." But this means that, subject to the charge of debts and other outgoings and legacies, which the declaration imposes thereon, that very property forms a component part of the residue. Now the whole question relates to residue. The invalidity of the specific bequest for the establishment of a Catholic daily newspaper caused the specific property so bequeathed to fall into residue. Thus the question is whether the equal half share of the residue invalidly bequeathed to establish a Catholic daily newspaper should bear debts, charges, and legacies in priority to or ratably with the other half share of residue, the disposition of which is valid. Why should the fact, that specific assets forming part of residue are made the primary source for the payment of debts and other charges and legacies, affect the priority between the beneficiaries upon whom the shares devolve into which residue is divided? The division is of the beneficial property in the conglomerate mass of assets in which the specific assets required to answer debts, charges and legacies are contained, at any rate after and subject to that requirement. The effect of the will may have been considered to be to withhold from that mass so much of the specific assets or their proceeds as is applied in payment of legacies, debts and charges so as to produce the result described by Lord *Russell* in the passage already quoted from *Kempthorne's Case* (1), namely, that the only estate as to which the testator has died intestate is a share of what remains after expenses, debts and legacies have in fact been paid thereout. But the declaration does not cover the adoption of that answer to the question in the summons. However the testator

(1) (1930) 1 Ch., at pp. 301, 302.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

Dixon J.

expresses himself, it appears to me that an intestacy as to a share of true residue is always of such a character. In the present case, the property of the deceased not specifically disposed of comprised land, money on current account and fixed deposit, shares in companies conducting commercial and industrial undertakings, and a large amount of Government stock and bonds. He bequeathed pecuniary legacies amounting to a considerable sum. The provision in the will upon which the Full Court relied is very difficult to understand. The will contains no reservation of bonds and stock for probate or any liability of the deceased. It does not, however, specifically dispose of any Government bonds or stock, and the testator may have considered his abstaining from any such specific bequest tantamount to a reservation. Commonwealth stock is accepted at par and Treasury bonds at face value in payment of Federal estate duty (sec. 52 (*c*) of *Commonwealth Inscribed Stock Act* 1911-1932), and this may have been a reason with the testator for such a "reservation." But the chief difficulty in the sentence lies, not in the condition, but in the principal clause. What is intended by the words "the more readily saleable (advantageously realizable)"? The bonds and stock are assumed to be exhausted, and, in any case, are marketable securities all equally "readily saleable." Probably some other kind of property not specifically disposed of was intended to be specified; perhaps some class of shares. I am unable to supply the omission, or find a satisfactory meaning for this part of the clause. But the conditional statement "if the bonds and stock reserved for Probate and any liability of mine, are insufficient for the purpose, and all the cash bequests mentioned" does imply that he intended or supposed that some bonds and stock would be utilized to meet debts, probate duty and legacies. What bonds and stock he intended to refer to must be in some degree uncertain, but, on the whole, I think it should be taken to mean those not specifically disposed of, of which he died possessed. But, in my opinion, the implication that such bonds and stock are to be resorted to for debts and legacies, the reference to "the remainder of my estate shares etc., not mentioned or bequeathed," and the direction to divide this residue or balance, are not separately or in combination enough to displace the statutory rules for the application of assets.

These matters evidence no intention to saddle any interest or property disposed of otherwise than as residue with legacies, debts and charges, nor any intention that residue should be considered as a net fund relieved from the incidence of these charges. Much less is there any intention disclosed inconsistent with a lapsed share of residue bearing the payments in priority to the share effectively given. I think that funeral, testamentary and administration expenses and pecuniary legacies fall primarily on the property undisposed of by will consisting of the share of residue invalidly bequeathed to establish the newspaper.

(2) Victorian probate duty:—The incidence of this duty is governed by sec. 163 of the *Administration and Probate Act* 1928, which provides: "Unless a contrary intention appears in the will the executor or administrator of the estate of any deceased person shall (subject to the provisions of the last preceding section) pay any duty payable on the whole or any part thereof under the provisions of this Part out of the residue of such estate." By sub-sec. 4 "residue" is defined for the purposes of the section as including unbequeathed personalty and any undevised realty. The considerations and views, which I have already set out, would lead to the conclusion that no "contrary intention appears." But, in any event, the definition of residue covers property as to which there is an intestacy, including lapsed shares of residue.

(3) Federal estate duty:—No separate consideration seems to have been given to this duty in the Supreme Court, and little or no argument was directed to it before us. By sec. 35 of the *Estate Duty Act* 1914-1928, subject to any different disposition contained in the will, the duty is apportioned among the beneficiaries in proportion to their interests, certain charitable gifts excepted. The will does contain a different disposition, if, but only if, in the clause in question, the word "probate" includes Federal estate duty and the reference to "the bonds and stock reserved" is held to be sufficiently certain, and to refer to the Government stock and bonds not specifically disposed of by the will. No argument was directed to the first of these questions, and the second question was not discussed with reference to estate duty.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

Dixon J.

In these circumstances we should be justified in refusing to deal with the question in this Court. But I have already expressed my opinion that the clause should be taken to refer to stock and bonds not specifically disposed of. The question whether the testator, by his lay use of the word "probate," meant to include estate duty, is not susceptible of much argument. Estate duty is expressly mentioned in the originating summons. It is, I think, on the whole, better that we should decide the point. In my opinion, the testator did mean to include Federal estate duty under the word "probate." Accordingly, I think there is a different disposition, namely, a provision that estate duty shall be paid out of so much of the residue as consists of Government bonds and stock not specifically bequeathed.

I think the appeal from the declaration in answer to the tenth question in the summons should be allowed, and, except as to probate, estate and succession duty, the question should be answered: According to the order of the application of assets set out in Part II. of the Second Schedule of the *Administration and Probate Act* 1928, and primarily out of the invalidly disposed of share of residue. As to probate duty, it should be answered: Out of the shares of residue ratably. As to estate duty, for myself, I would answer the question: Out of so much of the residue as consists of Government stock and bonds, and as between the shares of residue ratably.

McTIERNAN J. The testator made a specific bequest to the Roman Catholic Archbishop of Melbourne and the Roman Catholic Bishops of Ballarat, Bendigo and Sale "as a nucleus, to establish a Catholic daily newspaper." He also made a residuary gift "to the Hierarchy in addition to the bequest, already made, to establish a Catholic daily paper." The Archbishop and Bishops above mentioned are the Hierarchy of the Roman Catholic Church in Victoria.

A preliminary question arises as to what is the effect of this residuary gift. It was contended that the trust affecting the part of the estate subject to the gift is created by the words "to the Hierarchy," and that the words which follow merely show that the testator intended to create another trust in addition to the trust to

establish a Catholic daily newspaper. I do not agree. It cannot be supposed that the testator became unmindful that he made other bequests to the Hierarchy in addition to the bequest to establish the newspaper. The true construction is, in my opinion, that the testator intended the gift of residue to augment the benefaction to the Archbishop and Bishops to establish a Catholic daily newspaper. The question which arises is whether the object of this gift is within the legal definition of charity. The object of the gift is a Catholic daily newspaper which is to be set up, with the aid of benefactions, by the Roman Catholic Archbishop and the Roman Catholic Bishops of the various dioceses of the Church in Victoria. The gift is immediately followed by a bequest to the same beneficiaries " to found a farm, or supplement those already secured, for the training of delinquent or orphan boys " and by a direction that the income from the two benefactions should be used " for Catholic education, or any good object the Hierarchy may decide, until sufficient funds are in hand, to found the daily paper and secure the farm." The farm is clearly not an undertaking to be conducted for private gain. The money to secure the farm will be provided, if at all, by benefactors but not investors. The newspaper, as I understand the trust, is not to be established to earn profits for those who subscribe the money to start it. The word " Catholic " in the trust now in question imports the Roman Catholic Church, that is the religious institution known by that name. The trust is imposed upon the Archbishop and Bishops in their character as the holders of offices in the Roman Catholic Church. It is therefore a trust for the establishment by the Hierarchy of a " Roman Catholic Church " newspaper. It is not a trust for the establishment of a newspaper, by a body of persons who are identified as the holders of certain ecclesiastical offices, to be used by them for such purposes as they think fit. The trust is more limited than a trust to establish a newspaper for Catholic purposes. I think that, upon its true construction, the trust is imposed upon the Hierarchy in their official character, and it is a trust for the establishment of a newspaper for the use or for the purposes of the Roman Catholic Church as a religious institution.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

McTiernan J.

In *In re Schoales*; *Schoales* v. *Schoales* (1), *Bennett* J. held that a bequest "to the Roman Catholic Church for the use thereof" was a good charitable gift. That decision was founded on *In re Barnes*; *Simpson* v. *Barnes* (2) (see footnote to *In re Schoales*) in which *Romer* J. held that a gift of property "to the Church of England absolutely" is a good charitable gift. *Romer* J. said (3):—"I hold that this is a gift to the institution which ministers religion and gives spiritual edification to the members of the Church of England. If that be so, for what purposes is it given to the Church of England? It appears to me that it is obviously given for these very purposes which I have just mentioned—namely, for the purposes of religion and for giving spiritual edification, and so forth. That being so, I think without any question that the gift is a good charitable gift." In *McLaughlin* v. *Campbell* (4) a bequest to trustees "for such Roman Catholic purposes in the said parish of Coleraine or elsewhere as they may deem fit and proper" was not a good charitable bequest. It was contended that the gift was valid because it must be taken to mean for the benefit of the Roman Catholic Church. *FitzGibbon* L.J. said (at p. 597):—"In his argument, Sergeant *Dodd* brought in the word 'Church' which is not in the will. If that word had been used, it would have been necessary to consider the sense in which the testator used it."

In the present case, I think that it is clear that "Catholic" imports the Church. The testator meant a newspaper of the Catholic Church. *Holmes* L.J. agreed, but not without some difficulty, that the bequest in *McLaughlin* v. *Campbell* (4) was not charitable. He added (5): "If, on the true construction of the will, I were to hold that Roman Catholic purposes are to be understood as the purposes of the Roman Catholic Church, I should not hesitate to decide that the legacy was to be used for teaching the doctrines of that Church, and supporting its worship and services, in which case it would be clearly charitable." These decisions proceeded upon the view, which I think is correct, that where property is given for the use or purposes of the Church, the use or purposes specified are necessarily public and religious. (See also *In re Bain*; *Public Trustee* v. *Ross* (6).)

(1) (1930) 2 Ch. 75.
(2) (1930) 2 Ch. 80.
(3) (1930) 2 Ch., at pp. 81, 82.
(4) (1906) 1 I.R. 588.
(5) (1906) 1 I.R., at p. 598.
(6) (1930) 1 Ch. 224.

There is no suggestion that a daily newspaper could not form part of the equipment and means which the Church may maintain and use for the instruction and edification of the public. Indeed, in the present case there is evidence which is contrary to that suggestion. Father Power in his affidavit said :—" One of the means adopted by the Catholic Church for the maintenance and propagation of the Catholic Faith and the advancement of the Catholic religion is the promotion of daily newspapers and other publications of the kind in as many countries as possible. These newspapers are used for the advancement of Catholic religion by defining its attitude towards moral problems of the day, defining its teachings on matters of faith and morals, and correcting and counteracting misrepresentations as to the history of the Church and its attitude towards problems both past and present. . . . The publication of daily newspapers which are under the control of the Catholic Church is part of the action of the Church in the same way as the publication of religious books, the promotion of lectures and sermons etc., for the advancement in the world of the Catholic religion. It appears, therefore, that the publication of a Catholic newspaper is regarded by the Church as tending directly to the instruction and edification of the public in matters relating to the Roman Catholic religion " (par. 2). " A Catholic daily newspaper established in Victoria under the control of the Archbishop of Melbourne and the other Bishops whose Dioceses are in Victoria would thus be engaged in a work the purpose of which would tend directly to the instruction and edification of the public. It would not merely be a newspaper conducted on religious or high moral principles, but it would be a newspaper conducted for the direct purpose of the advancement of the Catholic religion, using similar means for that purpose as are used in sermons from the pulpit and in lectures from the public platform " (par. 7). The publication of a newspaper is a recognized medium which the Roman Catholic Church adopts and employs for exercising its public religious mission. The purposes of the Roman Catholic Church are public and religious. The newspaper for which the testator made the gift would be owned and controlled by the Church. The object of the present trust is to effectuate public and religious purposes by providing for the

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

McTiernan J.

publication of a newspaper by the Roman Catholic Church in its character as a religious institution. (Cf. *In re Delany*; *Conoley* v. *Quick* (1).) The publication by the Church of an official organ as an instrument of its religious mission would disseminate its doctrines and spread the knowledge of its worship and services. (Cf. *Thornton* v. *Howe* (2).) A newspaper published by the Church as an activity belonging to its religious mission would communicate the message of the Church to the reading public in as direct a way as a preacher conveys the message to the congregation present in a church. (Cf. *Turner* v. *Odgen* (3).) If, for example, it communicated the times at which public worship would be held in the Roman Catholic Churches it would perform a service analogous to that of the Church bells. But it is unnecessary to describe in detail what would be the contents of a typical issue of the journal. The contents of the journal would be substantially religious in character, and would be determined by the purposes which the trust is constituted to effectuate. In my opinion this trust is "within the equity of the Statute of Elizabeth." (Cf. *Hoare* v. *Osborne* (4); *In re Pardoe*; *McLaughlin* v. *Attorney-General* (5).) "We must fall back upon the Statute of Elizabeth, not upon the strict and narrow words of it, but upon what has been called the spirit of it, or the intention of it" (*In re Macduff*; *Macduff* v. *Macduff* (6), per *Lindley* L.J.). The trust is, in my opinion, within the third of Lord *Macnaghten's* enumeration of charitable trusts, namely, the advancement of religion. The trust satisfies the test stated by Lord *Hanworth* M.R. in *Keren Kayemeth Le Jisroel Ltd.* v. *Inland Revenue Commissioners* (7), where the Master of Rolls said: "The promotion of religion means the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests, and the observances that serve to promote and manifest it—not merely a foundation or cause to which it can be related." As I have construed it, the trust is for religious purposes. (See *In re White*; *White* v. *White* (8).) I think, therefore, that it is a trust for a purpose

(1) (1902) 2 Ch. 642, at p. 647, lines 24-32.
(2) (1862) 31 L.J. Ch. 767; 31 Beav. 14; 54 E.R. 1042.
(3) (1787) 1 Cox, Eq. Cas. 316; 29 E.R. 1183.
(4) (1866) L.R. 1 Eq. 585.
(5) (1906) 2 Ch. 184.
(6) (1896) 2 Ch. 451, at p. 467.
(7) (1931) 2 K.B. 465, at p. 477.
(8) (1893) 2 Ch. 41.

which operates directly for the advancement of religion, and as such is charitable. The trust does not fail as a charitable trust for the advancement of religion because the contents of the newspaper may, conformably with the trust, consist partly of secular news. The newspaper is the most valuable instrument of propaganda, because the popular craving for news draws a daily newspaper into almost every home. The publication of some secular news, if this was decided upon by the Hierarchy as a feature of the newspaper, might increase the circulation among their own congregation and outside it. But the terms of the trust require that this feature, if adopted, should be subordinate and ancillary to the institutional purposes and activities of the journal. (Cf. *In re Hood*; *Public Trustee* v. *Hood* (1); *Re Charlesworth* (2); *Young Men's Christian Association* v. *Federal Commissioner of Taxation* (3).)

The result is that the trust in the present case is for a specific object which, in my opinion, is a legal charity. The trust therefore differs from that in *Byrne* v. *Dunne* (4); *Dunne* v. *Byrne* (5), which was strongly relied upon in order to defeat the present trust. In that case the bequest was in the following terms: "To the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in his dioceses." *Griffith* C.J. said (6):—"For instance, it might well be said that a political propaganda for the purpose of procuring State endowment of churches or denominational schools, or the establishment of a newspaper conducted on religious or high moral principles, or the establishment of a contemplative order of nuns, would be purposes conducive to the good of religion. Certainly the Archbishop might reasonably think so. I do not at present see my way to deny such a proposition. But I do not think that either purpose would be a charitable purpose." But the newspaper which is the object of the present trust is a journal which, in my opinion, is to be used by the Church for carrying on the religious work of the Church. Its publication would operate directly to promote religion. The statement of the Chief Justice

(1) (1931) 1 Ch. 240.
(2) (1910) 101 L.T. 908.
(3) (1926) 37 C.L.R. 351, at pp. 357, 360.
(4) (1910) 11 C.L.R. 637.
(5) (1912) A.C. 407.
(6) (1910) 11 C.L.R., at p. 645.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

McTiernan J.

leaves open the question whether the specific object to which the testator in the present case has appropriated part of his estate is within the legal definition of charity. The statement of *Russell* J., as he then was, in *In re Tetley* (1), which was also relied upon to defeat the present trust, does not, in my opinion, cover the present case. "Subsidising a newspaper for the promotion of particular political or fiscal opinions would be a patriotic purpose in the eyes of those who considered that the triumph of those opinions would be beneficial to the community. It would not be an application of funds for a charitable purpose." It was held that such a purpose would not be charitable within the fourth of the divisions enumerated by Lord *Macnaghten* in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (2), that is to say, purposes beneficial to the community not falling under any of the three previous divisions, namely, relief of poverty, advancement of education and the advancement of religion. The advancement of religion according to the tenets of the Christian religion is always presumed to be beneficial to the community. But political or fiscal opinions stand on a different footing. "A trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift" (per Lord *Parker* in *Bowman* v. *Secular Society Ltd.* (3)).

The objection that the gift is void for remoteness is disposed of by the following rule applicable to charitable gifts. "Where there is an immediate and effectual gift to charity, no question of remoteness can arise, although the particular object will not necessarily take effect within any assignable limit of time, and may never take effect at all" (*Tudor* on *Charities*, 5th ed. (1929), p. 76; *Wallis* v. *Solicitor-General for New Zealand* (4)). The testator directs that the income from the benefaction is to be "used for Catholic education, or any good object the Hierarchy may decide, until sufficient funds are in

(1) (1923) 1 Ch., at p. 262.
(2) (1891) A.C., at p. 583.
(3) (1917) A.C., at p. 442.
(4) (1903) A.C. 173, at p. 186.

hand, to found the daily paper." The gift for Catholic education is within the legal definition of charity. But charitable purposes are not as extensive as " any good object." No apportionment is made between the two purposes specified by the testator. The effect of the trust is that the Hierarchy has a discretion to apply the whole or any part of the income to purposes not within the legal definition of charity. It is well settled that such a gift is void. But the trust is clearly within the provisions of sec. 131 of the *Property Law Act* 1928 of Victoria. By force of this enactment the trust must be construed and given effect to in the same manner as if it did not direct or allow the application of the property, subject to the trust, or any part thereof, to or for non-charitable and invalid purposes included within the trust. There is therefore a valid charitable gift of the income of the benefaction, at least for Catholic education.

It follows from these conclusions that there is no intestacy as to the part of the estate which is given to the Hierarchy to establish a Catholic newspaper, or as to the income to be derived from that benefaction until the newspaper is founded. It was agreed at the hearing of the appeal that it would not be necessary to answer question 10 of the originating summons if it were held that the testator did not die intestate as to any part of his estate. But it has become necessary to deal with that question. One matter which arises for decision is whether the will has varied the order in which the Act directs the assets to be applied toward the discharge of the funeral, testamentary and administration expenses, debts and liabilities of the deceased. (Secs. 33, 34, and Part II. of the Second Schedule of the *Administration and Probate Act* 1928 of Victoria.) The primary fund for the discharge of these burdens is " property of the deceased undisposed of by the will, subject to the retention thereout of a fund sufficient to meet pecuniary legacies." According to the decision in *In re Tong* (1), the lapsed share of residue in the present case falls within that division. It has also been decided that assets in this division are the primary fund for the payment of pecuniary legacies as well as of the above-mentioned expenses, debts and liabilities (*In re Worthington* (2)). But the

(1) (1931) 1 Ch. 202.

(2) (1933) Ch. 771.

H. C. OF A. 1934.

ROMAN CATHOLIC ARCHBISHOP OF MELBOURNE v. LAWLOR.

THE POPE v. NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD.

McTiernan J.

statutory order in which the assets are applicable may be varied by the will. It is unnecessary to quote again the clause which is relied upon to override the statutory order. It was contended that the effect of that clause is to vary the statutory order of administration by distributing over the whole of the residue the burden which, under the statute, has to be borne primarily by the undisposed of assets. The clause in question implies a reasonably clear direction that a specific part of the assets should be appropriated to meet what the testator describes as "probate," "any liability of mine" and "the cash bequests." But a will does not vary the statutory order in which the assets are applicable unless it discloses an intention that, as between the beneficiaries, the burden shall be borne differently from the manner provided by the Schedule (*In re Worthington* (1)). This will, in my opinion, does not disclose any such intention.

I have had the advantage of reading the review which my brother *Dixon* has prepared of the decisions governing the construction of secs. 33, 34, and the Second Schedule of the Victorian *Administration and Probate Act* 1928. I agree that the funeral, testamentary and administration expenses and pecuniary legacies should be borne primarily and entirely by the assets included in the lapsed gift of residue. I agree also with his conclusions as to the incidence of Victorian probate duty and Federal estate duty.

I would allow both appeals.

Roman Catholic Archbishop of Melbourne v. *Lawlor and others.—Appeal dismissed; costs of the appeal of all parties out of the estate; costs of the trustees as between solicitor and client.*

His Holiness the Pope v. *The National Trustees, Executors and Agency Co. of Australasia Ltd. and others.—Appeal allowed. Declaration of the Supreme Court made in answer to the tenth question in the originating summons discharged. In lieu thereof declare:—(a) that the testator's estate is applicable towards the discharge of the funeral, testamentary and administration*

(1) (1933) Ch., at pp. 776, 777, 778.

expenses, debts and pecuniary legacies according to the order of the application of assets set out in Part II. of the Second Schedule of the Administration and Probate Act 1928 *and primarily out of the property undisposed of which is or includes the invalidly disposed of share of residue; and (b) that duty payable to the State of Victoria under the said Act should be borne by the net fund representing the residue distributable between His Holiness the Pope and the next of kin so that each and every part of the fund bears such duty ratably. Costs of the appeal of all parties out of the estate; costs of the trustees as between solicitor and client.*

Solicitor for the appellant, *Michael Wallis.*

Solicitors for the respondent, Margaret Lawlor, *Lynch & McDonald.*

Solicitor for His Holiness, the Pope, *Michael Mornane.*

Solicitor for the National Trustees, Executors and Agency Co. of Australasia Ltd., *J. R. A. O'Keeffe.*

H. D. W.