[HIGH COURT OF AUSTRALIA.]

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

AND

DONNELLY AND OTHERS . . . . RESPONDENTS.

LEAHY AND OTHERS . . . . . APPELLANTS;

AND

DONNELLY AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1957-1958.

SYDNEY, 1957, *Nov.* 21, 22, 25;

MELBOURNE, 1958, *Mar.* 11.

Dixon C.J., McTiernan, Williams, Webb and Kitto JJ.

Will—Constitution—Grazing property—Trust for orders of nuns—To be selected by trustees—"Orders"—Term of canon law—Congregations of sisters—Whether included in objects of trust—Trust for provision of amenities in convents—To be selected by trustees—Active orders—Contemplative orders—Charitable and non-charitable purposes—Validity of trusts—Conveyancing Act 1919-1954 (*N.S.W.*), *s.* 37 *D.*

Section 37D of the *Conveyancing Act* 1919-1954 (N.S.W.) provides:—"(1) No trust shall be held to be invalid by reason that some non-charitable and invalid purpose as well as some charitable purpose is or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed. (2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or of any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed."

A testator devised a grazing property to trustees by cl. 3 of his will "upon trust for such Order of Nuns of the Catholic Church or the Christian Brothers as my said Executors and Trustees shall select and I again direct that the

selection of the Order of Nuns or Brothers as the case may be to benefit under this clause . . . shall be in the sole and absolute discretion of my said Executors and Trustees ". By cl. 5 he disposed of his residuary estate to his trustees "upon trust to use the income as well as the capital to arise from any sale thereof in the provision of amenities in such Convents as my said Executors and Trustees shall select either by way of building a new Convent where they think necessary or the alteration of or addition to existing buildings occupied as a Convent or in the provision of furnishings in any such Convent or Convents ". The clause went on to provide (*inter alia*) for a complete discretion in the trustees as to the order or orders of nuns who should benefit thereunder. The evidence established that the canon law of the Roman Catholic Church distinguishes between order of nuns and congregations of sisters, reserving the first title for organisations which take solemn vows and the second for those which take simple vows, but this distinction is not generally known to the laity and the terms " order " " congregation " " nun " and " sister " are commonly used indiscriminately by laymen and clergy alike, when there is no call for canonical precision. It further appeared that some convents include contemplative orders whose members were not engaged in any activity recognised by the law as charitable.

Held: (1) by *Williams*, *Webb* and *Kitto* JJ. (contra by *Dixon* C.J. and *McTiernan* J.) that the trust in cl. 3 of the will was a valid trust for the selected body, and s. 37D of the *Conveyancing Act* had no application to it;

(2) by the whole Court that the trust in cl. 5, (and by *Dixon* C.J. and *McTiernan* J. that the trust in cl. 3) was saved from invalidity by the operation of s. 37D.

(3) by the whole Court, that in referring to " orders " of nuns the testator was using the word in a non-technical sense and, accordingly, both orders of nuns and congregations of sisters were within the class of organisations from which the trustees might make their selection.

(4) by *Dixon* C.J., *McTiernan* and *Kitto* JJ., *Williams* and *Webb* JJ. dissenting, that there was no territorial limitation placed upon the class of persons intended to benefit under the trusts.

The operation and effect of s. 37D of the *Conveyancing Act* 1919-1954 (N.S.W.), considered.

Decision of the Supreme Court of New South Wales (*Myers* J.) in part affirmed, in part reversed.

APPEAL from the Supreme Court of New South Wales.

These were appeals, each from a part of a decretal order made in the Supreme Court of New South Wales (*Myers* J.) on the hearing of an originating summons brought by the executors and trustees of the will of Francis George Leahy, grazier, late of Harefield and Bungendore, New South Wales. The questions submitted to the

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court were: (1) whether the trust directed in the testator's will in respect of the property known as "Elmslea" situated at Bungendore was void for uncertainty? and (2) whether the trust directed in the will as to the rest and residue of his estate both real and personal, was void for uncertainty?

The relevant trusts were continued in cll. 3 and 5 of the will in the following words:—"3. AS TO my property known as 'Elmslea' situated at Bungendore aforesaid and the whole of the lands comprising the same and the whole of the furniture contained in the homestead thereon UPON TRUST for such Order of Nuns of the Catholic Church or the Christian Brothers as my said Executors and Trustees shall select and I again direct that the selection of the Order of Nuns or Brothers as the case may be to benefit under this clause of my Will shall be in the sole and absolute discretion of my said Executors and Trustees . . . 5. AS TO all the rest and residue of my Estate both Real and Personal or whatsoever kind or nature and wheresoever situated UPON TRUST to use the income as well as the capital to arise from any sale thereof in the provision of amenities in such Convents as my said Executors and Trustees shall select either by way of building a new Convent where they think necessary or the alteration of or addition to existing buildings occupied as a Convent or in the provision of furnishings in any such Convent or Convents and I DECLARE that my said Executors and Trustees shall have the sole and absolute discretion of deciding where any such premises shall be built or altered or repaired and the Order or Orders of Nuns who shall benefit under the terms of this clause the receipt of the Reverend Mother for the time being of that particular Order of Nuns or Convent shall be a sufficient discharge to my said Executors and Trustees for any payment under this clause."

Myers J. declared in answer to question (1) that the trust of "Elmslea" was not void for uncertainty or any other ground, and in answer to question (2) that the trust of the residuary estate of the testator was void.

The next-of-kin appealed to the High Court against the answer to question (1) and the Attorney-General appealed to that Court against the answer to question (2).

It was by consent ordered pursuant to r. 23 of O. 44 of the *High Court Rules* that the appeals be heard together and that Her Majesty's Attorney-General for New South Wales have the carriage of both appeals and be at liberty to prepare and serve one appeal book for the purpose of the hearing of both appeals.

Further facts and relevant statutory provisions appear in the judgments hereunder.

N. H. Bowen Q.C. (with him *F. J. D. Officer*), for the Attorney-General. As to cl. 5 the evidence shows that the orders referred to were capable of precise ascertainment. It was conceded that such orders were charitable because they were, in any case, both religious and educational. Section 37D does not apply only where a general charitable intention appears from the trust itself. This would be sufficient to enable effect to be given to the trust without any statute. Moreover, it cannot be necessary to find an express reference to charity before s. 37D can be applied. The section is designed to cover cases where, no charity being expressed, charity and non-charity can be comprehended, that is to say can "be deemed to be included". It is contended that the gift is charitable and therefore good apart from the application of s. 37D. Even apart from the section a gift of this type is prima facie for such of the orders as are charitable: *In re White*; *White* v. *White* (1). Prior to the enactment of s. 37D there were three types of case in which there was difficulty in giving effect to a testator's charitable intention. The first was a gift for "charitable or benevolent" purposes where the whole gift failed because funds might be applied wholly to the non-charitable purposes. The second, was a gift for "benevolent purposes", where again the gift failed because although charitable purposes were comprehended in the expression it might be devoted to purposes wholly non-charitable. The third was the case of a gift for "religious purposes" which, although it might include purposes both charitable and non-charitable, was as a matter of construction restricted to such of the purposes as were charitable. [He referred to *Hunter* v. *Attorney-General* (2)].

[DIXON C.J. referred to *In re Douglas*; *Obert* v. *Barrow* (3)].

The earliest provision, namely the Victorian section in 1914, appears to have been passed as a result of the decision in *In the Will of Forrest*; *Forrest* v. *McWhae* (4). [He referred to *Attorney-General for New South Wales* v. *Adams* (5); *In re Griffiths*; *Griffiths* v. *Griffiths* (6); *In re Bond*; *Brennan* v. *Attorney-General* (7); *Re MacGregor*; *Thompson* v. *Ashton* (8); *Re Price*; *Price* v. *Church of England Property Trust Diocese of Goulburn* (9); *Farley* v. *West-*

(1) (1893) 2 Ch. 41, at pp. 51-53.
(2) (1899) A.C. 309, at pp. 315, 318, 319, 323, 324.
(3) (1887) 35 Ch. D. 472.
(4) (1913) V.L.R. 425, at pp. 430, 432.
(5) (1908) 7 C.L.R. 100.
(6) (1926) V.L.R. 212.
(7) (1929) V.L.R. 333.
(8) (1932) 32 S.R. (N.S.W.) 483, at p. 491; 49 W.N. 179, at p. 180.
(9) (1935) 35 S.R. (N.S.W.) 444, at pp. 452, 453, 458; 52 W.N. 139, at pp. 140, 141.

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minster Bank (1) and *In re Rumball (dec'd.)*; *Sherlock* v. *Allan* (2). Section 37D was inserted in the *Conveyancing Act* (N.S.W.) by Act No. 30 of 1938. Shortly before this *Long Innes* C.J. in Eq. in *Re Price*; *Price* v. *Church of England Property Trust Diocese of Goulburn* (3) had expressed the view that the Victorian section might well be adopted in New South Wales. We rely upon *Re Price*; *Price* v. *Church of England Property Trust Diocese of Goulburn* (4) (i) as being in the line of authorities in favour of the restricted construction where there is a power of selection for religious orders which may be charitable or non-charitable restricting it prima facie, to religious, and (ii) as showing that the mischief aimed at by the section was not confined simply to the case where there was separate expression of charitable and non-charitable purposes. Also prior to the passing of the New South Wales section the matter had been discussed in *Roman Catholic Archbishop of Melbourne* v. *Lawlor* (5). The main case on s. 37D is *Union Trustee Co. of Australia Ltd.* v. *Church of England Property Trust* (6) in which a wide interpretation of the section was adopted (7). The main case on the Victorian section is *In re Belcher (dec'd.)* (8) in which *Fullagar* J. took what may be called the narrower view of the section (9). Later in *Lloyd* v. *Federal Commissioner of Taxation* (10) *Fullagar* J. indicated that he wished to consider further the view which he had taken in *In re Belcher (dec'd.)* (11). In New Zealand where a similar section was adopted, the wider view was also taken in *In re Ashton (dec'd.)*; *Siddall* v. *Gordon* (12). When s. 37D says "is or could be deemed to be included" it covers dispositions such as those for "benevolent purposes" which could comprehend both charitable and non-charitable purposes. The section applies where there has been a delegation by the testator to trustees of the power of choosing certain purposes. If the testator marks out those purposes so that there is comprehended in them both charitable and non-charitable, the section will apply even though he has not himself specified the exclusively charitable purposes. So long as he uses an expression which marks out of an objective range which includes charitable and non-charitable, the section applies. It validates the trust as a whole by sub-s. (1) and by sub-s. (2) it eliminates the non-charitable portion, leaving only the charitable portion operative.

(1) (1939) A.C. 430.
(2) (1956) Ch. 105, at p. 118.
(3) (1935) 35 S.R. (N.S.W.), at p. 453; 52 W.N., at p. 140.
(4) (1935) 35 S.R. (N.S.W.) 444; 52 W.N. 139.
(5) (1934) 51 C.L.R. 1, at pp. 18, 23, 24, 26, 32, 36-38, 55.
(6) (1946) 46 S.R. (N.S.W.) 298; 63 W.N. 153.
(7) (1946) 46 S.R. (N.S.W.), at pp. 301-303; 63 W.N., at p. 155.
(8) (1950) V.L.R. 11.
(9) (1950) V.L.R., at p. 15.
(10) (1955) 93 C.L.R. 645, at p. 666.
(11) (1950) V.L.R. 11.
(12) (1955) N.Z.L.R. 192, at p. 205.

[He referred to *Perpetual Trustee Co. (Ltd.)* v. *King George's Fund for Sailors* (1).]

So far do the provisions of this will show religious purposes, one would prima facie construe them as referring to such orders as are charitable. However, if that view is not taken the disposition then falls precisely within the section. See also articles on *Mixed Charitable and Non-Charitable Gifts* by *E. H. Coghill* Esq. (2).

A. B. Kerrigan Q.C. (with him *D. S. Hicks*), for some of the next-of-kin in the first matter, and for the appellants in the second matter. The disposition of residue is clearly a perpetuity. The trust is primarily a disposition of income of indefinite duration. The power of selection may be exercised beyond the perpetuity period. The word " amenities " used by the testator is non-specific and vague. An amenity is something which makes life more comfortable and enjoyable. " Furnishings " is also vague and uncertain. It is impossible to confine amenities in convents within the notion of charity. There can be an amenity which does not contribute anything to charitable activity. There is no intention here to vest any property in any individual or individuals. This cannot be construed as a gift to a set of individuals at any time, giving them any proprietary rights. The field of selection, from " Orders of Nuns ", is not free from uncertainty ; it is not stated whether the field is New South Wales, or Australia, or the world. Section 37D presupposes a trust otherwise good, except that the purposes of the trust include a non-charitable and invalid purpose as well as a charitable purpose to which the trust fund may be applied, wholly or in part. If the trust is imperfect in any other respect the section cannot apply. It is difficult to see any room for the operation of the words " or could be deemed to be included " in s. 37D (1). The only possible application is where the Court is in doubt. Section 37D is not here attracted. A disposition for the supply of amenities is bad for uncertainty. [He referred to *In re Charlesworth* ; *Robinson* v. *Cleveland* (3) ; *In re Mariette* ; *Mariette* v. *Governing Body of Aldenham School* (4) ; *Re White's Will Trusts* ; *Tindall* v. *Board of Governors of United Sheffield Hospitals* (5) ; *In re Coxen* ; *McCallum* v. *Coxen* (6).] If the Court finds that the nature of the gift is so specific as to be a furtherance of charity, then it will uphold it. But, unless the Court can see that the nature of the gift is specifically a furtherance of charity it will not uphold it. The two gifts that the

(1) (1949) 50 S.R. (N.S.W.) 145, at p. 147 ; 67 W.N. 72, at p. 73.
(2) (1940) 14 A.L.J. 58 ; (1950) 24 A.L.J. 239 ; (1955) 29 A.L.J. 62.
(3) (1910) 101 L.T. 908, at p. 909.
(4) (1915) 2 Ch. 284.
(5) (1951) W.N. 152.
(6) (1948) Ch. 747, at p. 755.

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testator has made in point of locality in New South Wales, indicate perhaps that he never intended those moneys to go out of New South Wales. [He referred to *In re Mirrlees' Charity*; *Mitchell* v. *Attorney-General* (1).] If a geographical limitation is to be implied then there is not any clear indication of any geographical limitation. The power of selection goes beyond what is a permissible exercise of testamentary power. As to limitations on testamentary disposition: see *Tatham* v. *Huxtable* (2); *Houston* v. *Burns* (3) and *Attorney-General* v. *National Provincial Bank* (4).

[DIXON C.J. referred to *Blair* v. *Duncan* (5).]

The power of selection is not analogous even to a special power because its exercise will never confer any individual proprietary interest on anyone. If there is set up a power to select objects which are non-charitable there is a failure to dispose and a trust is never constituted. [He referred to *Morice* v. *Bishop of Durham* (6); *Chichester Diocesan Fund and Board of Finance (Incorp.)* v. *Simpson* (7) and 69 *Law Quarterly Review*, pp. 334-339.] Once it appears, as it does on the evidence in this case, that there are charitable and non-charitable objects embraced within the phrase "Orders of Nuns" there is no general charitable intention. So a general word, such as amenities, cannot be given a charitable colour because there is no general charitable intention. The testator's purpose is too wide for the Court to execute the trusts.

[WILLIAMS J. referred to *Armenian General Benevolent Union* v. *Union Trustee Co. of Australia Ltd.* (8) and *In re Gott; Glazebrook* v. *University of Leeds* (9).]

Section 37D only cures one thing, and that is where there is a non-charitable and invalid purpose, which is the one and only defect, as well as a charitable purpose. The submissions made go to uncertainty, uncertainty not only of purpose but of class, and to a failure to dispose. There is no person, or no set of persons, who can come to the Court and say "We are all the persons in whose favour this power can be exercised". There is a disposition of income for a period not allowed by law unless it is to a charity. [He referred to *Tudor* on *Charities*, 5th ed. (1929), pp. 66, 77; and *Morris and Leach* on *Perpetuities* (1956), at pp. 311, 315.] The power might be exercised in favour of a particular order not earlier than twenty-one years—assuming that its convents are not charitable institutions.

(1) (1910) 1 Ch. 163.
(2) (1950) 81 C.L.R. 639.
(3) (1918) A.C. 337, at pp. 342, 343.
(4) (1924) A.C. 262, at pp. 264, 268.
(5) (1902) A.C. 37, at p. 43.
(6) (1805) 10 Ves. 522 [32 E.R. 947].
(7) (1944) A.C. 341, at pp. 344, 348, 349, 364, 365, 371.
(8) (1952) 87 C.L.R. 597, at p. 615.
(9) (1944) Ch. 193.

[McTiernan J. referred to *Chamberlayne* v. *Brockett* (1).]

The invalid purpose mentioned in s. 37D is not an invalidity in the gift arising by way of a perpetuity. [He referred to *Roman Catholic Archbishop of Melbourne* v. *Lawlor* (2); *Hunter* v. *Attorney-General* (3); *Re Price*; *Price* v. *Church of England Property Trust Diocese of Goulburn* (4) and *In the Will of Forrest* (5).] Section 37D was intended to save a well-known type of case where the donor had made a gift to charitable or to indefinite non-charitable purposes; it was never intended to be a universal panacea for every imperfect charitable gift. It does not embrace anything beyond an invalid purpose, and that does not include the perpetuity. [He referred to *Cocks* v. *Manners* (6) and *In re Clarke*; *Clarke* v. *Clarke* (7).]

[Dixon C.J. referred to *In re Smith*; *Johnson* v. *Bright-Smith* (8); *Gilmour* v. *Coats* (9); *Re Delany* (10) and *Halsbury's Laws of England*, 3rd ed. (1953), vol. 4, p. 232.]

The correct approach is indicated in *In re Belcher* (*dec'd.*) (11), that is, that the testator's phrase is examined to see if he has himself manifested an intention embracing alternative purposes. If he has not s. 37D does not apply. It could not be said that s. 37D was intended to cure the type of gift dealt with in *Dunne* v. *Byrne* (12). As to the property "Elmslea" the power of selection is bad as it extends beyond charitable purposes; that it is a perpetuity; that the ambit of the power is uncertain; that is an attempted delegation of testamentary power not authorised by law. Therefore s. 37D is not attracted—there is no trust invalid only by reason of an admixture of a non-charitable and invalid purpose with a charitable purpose. If s. 37D is attracted it is conceded that it will save the gift for the Christian Brothers.

G. P. Donovan (with *B. P. Macfarlan* Q.C.), for the trustees in the first matter and for other respondents in the second matter. Clause 3 is an absolute gift to the members of the orders (*In re Smith*; *Johnson* v. *Bright-Smith* (13); *In re Ogden*; *Brydon* v. *Samuel* (14); *Perpetual Trustee Co. (Ltd.)* v. *Wittscheibe* (15)). Members of a community order such as this may be recipients of a gift, even though by their vows they may be morally bound to apply it

(1) (1872) 8 Ch. App. 206, at p. 211.
(2) (1934) 51 C.L.R., at pp. 18, 19, 23, 25, 36, 54.
(3) (1899) A.C. 309.
(4) (1935) 35 S.R. (N.S.W.) 444; 52 W.N. 139.
(5) (1913) V.L.R. 425, at pp. 426, 433.
(6) (1871) L.R. 12 Eq. 574.
(7) (1901) 2 Ch. 110.
(8) (1914) 1 Ch. 937.
(9) (1949) A.C. 426.
(10) (1881) L.R.Ir. 9 Ch. 226.
(11) (1950) V.L.R. 11.
(12) (1912) 16 C.L.R. 500; (1912) A.C. 407; (1910) 11 C.L.R. 637.
(13) (1914) 1 Ch., at pp. 941, 944, 945.
(14) (1933) Ch. 678.
(15) (1940) 40 S.R. (N.S.W.) 501; 57 W.N. 166.

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in a particular way. There is such a gift (*In re Smith*; *Johnson* v. *Bright-Smith* (1)), even if it were to the order, for the general purposes of the order (*In re Ogden*; *Brydon* v. *Samuel* (2)) and there is nothing in the disposition to indicate that the capital is to be kept intact: *Morris and Leach* on *Perpetuities* (1956), p. 302. There is no trust attached to the gift no matter which order is selected. The only requirement is that of certainty in the recipients and that is completely covered by the evidence. The suggested uncertainty geographically is covered by the roster which is kept at the Vatican. This is a matter not of ambiguity but of construction. The certain individual congregations or orders to be selected from are here. There is nothing in this disposition to justify an argument based on perpetual dedication of income to the order. The word "orders" is not used in a strictly canonical sense.

N. H. Bowen Q.C., in reply. As to the question of amenities, the testator in cl. 5 has furnished his own dictionary. The erection of a convent is the provision of an amenity in his sense. If he has not completely confined the power of the trustees to the four classes of expenditure mentioned in the will, the presumption will still apply that the power conferred upon the trustees is to provide such amenities as will be appropriate and convenient for the furtherance of the orders. A construction will not be adopted which will suppose some provision by the trustees outside the furtherance of the work of the orders. Even if that were not so s. 37D would apply to restrict it to purposes which were consonant with the objects of the orders or such of the orders as were charitable. Whether the term "orders" is used in its strictly canonical sense or is wide enough to include congregations is a matter of construction not a question of failure to exercise testamentary power. Similarly with regard to the suggestion that there is uncertainty where the testator refers to orders which are within the jurisdiction of the Court in New South Wales, or in Australia, or anywhere in the world. The respondent seeks to deal first with the question whether there is a perpetuity before dealing with s. 37D. But the rule against perpetuities has no application to a gift which is void for uncertainty. If it is void for uncertainty, it is simply not an exercise of the testamentary power. It is in determining whether the gift is uncertain in this sense that s. 37D has to be applied. When it operates it renders the trust valid and the disposition then has to be construed and given effect to in the same manner in all respects as if no application of the trust funds for any non-charitable

(1) (1914) 1 Ch. 937. (2) (1933) Ch. 678.

and invalid purposes had been or could have been deemed to have been directed or allowed. It is at this stage that one would have to consider whether the rule against perpetuities applied. But it is then seen that the gift, being confined to charitable purposes, is not invalidated by the rule against perpetuities. If it were otherwise, the matter was entirely overlooked in the earlier cases dealing with this subject. [He referred to *In the Will of Forrest* (1) and *In re Belcher* (*dec'd.*) (2).] To say that the gift is invalid because it is a delegation of testamentary power and that therefore s. 37D cannot apply is to consider the matter in the reverse. There is a possibility the trustees might apply the residue to non-charitable purposes. Section 37D operates to confine the purposes to those which are charitable. It is only after the requirement of s. 37D that the disposition should be construed and take effect in this way that one proceeds to consider the question whether the testamentary power has been properly exercised. [He referred to *Chichester Diocesan Fund and Board of Finance* (*Incorp.*) v. *Simpson* (3); *Tatham* v. *Huxtable* (4).

Cur. adv. vult.

Mar. 11, 1958.

The following written judgments were delivered :—

DIXON C.J. AND MCTIERNAN J. These are two appeals from a decree of *Myers* J. declaring the effect of two clauses of the will of the late Francis George Leahy of Harefield and Bungendore in New South Wales, grazier. The questions with respect to the provisions of the will with which the decree deals are whether they are valid either as charitable trusts or otherwise to any and what extent. The will in question was made on 16th February 1954 and the testator died on 11th January 1955. His estate, the net value of which was about £348,000, comprised several grazing properties and a block of flats in Goulburn. Testator left him surviving a widow and seven children all of whom are of full age. They are respondents in one appeal and appellants in the other. By his will the testator, after a bequest of £1,000 for the benefit of St. Joseph's Convent at Bungendore and a bequest of £1,000 to the Rector of the Passionist Fathers Mary's Mount Goulburn, gave specific bequests to two of his children and a nephew and made certain provisions in favour of one of his daughters. He then disposed of the whole of his real estate and the residue of his personal estate by devising and bequeathing it to his trustees upon trusts which the will proceeded to declare. Under the first trust his

(1) (1913) V.L.R. 425.
(2) (1950) V.L.R. 11.
(3) (1944) A.C. 341, at p. 348.
(4) (1950) 81 C.L.R. 639, at p. 655.

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wife was entitled to occupy one of the flats in Goulburn so long as she should remain his widow and to use the furniture. Subject to that he devised the flats and the furniture to one of his daughters. He directed that his trustees should pay his wife an annuity of £750 and should refund to his wife the income tax upon the annuity. He then dealt with his grazing properties. In the first place he made provision as to a property known as "Elmslea". One of the appeals turns on that provision and it is better before setting it out to describe the other provisions of the will. The testator went on to deal with the homestead on the grazing property known as "Overdale" at Harefield and certain cultivation paddocks annexed to it. He directed his trustees to permit the order of nursing sisters known as "The Nursing Sisters of the Little Company of Mary" to use and occupy the homestead furniture and lands of "Overdale" for a period of ten years from his death upon condition that the property should be used for the care and comfort of the sick or the like in a manner which he indicated. At the expiration of ten years upon being satisfied that the provision had been fulfilled his trustees should be at liberty to convey the property to the order. If the trustees were not so satisfied they were directed to select some other order of nuns and offer the property to them on the same conditions. The will proceeded to make provision as to the rest and residue of his estate and this provision is the subject of the other appeal. It will be necessary to set it out later in terms. There follow certain powers: a power to continue the employment of the testator's secretary and accountant, a power to sell, a very full power of management and some incidental authorities.

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

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

The provision disposing of the residue is somewhat fuller but no more need be set out verbatim than the dispositive trust which is as follows: "Upon trust to use the income as well as the capital to arise from any sale thereof in the provision of amenities in such Convents as my said Executors and Trustees shall select either by way of building a new Convent where they think necessary or the alteration of or addition to existing buildings occupied as a Convent or in the provision of furnishings in any such Convent or Convents." The disposition goes on to give the trustees complete discretion as to the building or alteration or repair of premises and, what is more important, as to the order or orders of nuns who should benefit under the terms of the clause. It provides that the receipt of the Reverend Mother for the time being of the particular order of nuns or convent shall be a sufficient discharge for any payment under the clause. This provision was held bad by *Myers* J. on the ground that inasmuch as it included contemplative orders it went beyond the confines of a valid charitable trust. His Honour considered closely the possibility of applying s. 37D of the *Conveyancing Act* 1919-1954 (N.S.W.) and under that clause severing, so to speak, the intended objects of the provision and excluding the contemplative orders. The material parts of the section are as follows: "37D. (1) No trust shall be held to be invalid by reason that some non-charitable and invalid purpose as well as some charitable purpose is or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed. (2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or of any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed." *Myers* J. came to the conclusion that the foregoing provisions could not be applied to save any part of the bequest by the exclusion from the operation of its general words of those contemplative orders whose life is outside the legal conception of charitable purposes. His Honour's reasons for this conclusion must be read in full to be appreciated, but in the end they come down to the view that the mischief to which the section is directed is the failure of

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trusts in which testators have shown an intention to benefit charity but which, because of the inclusion of non-charitable objects, have failed altogether and that the section cannot give effect to trusts irrespective of the intention of the testator but only conformably with it or part of it. " Accordingly ", said his Honour, " the section only applies where a charitable intention appears from the trust itself, and the application of the whole fund to charity is one way of completely satisfying the intention of the testator. A trust for such purposes as the trustee should select would therefore not qualify under s. 37D because it shows no charitable intention." In conformity with this view the decree declared the provision as to the residue to be void. From this part of the order the Attorney-General has appealed.

It appears that within the Roman Catholic Church associations of religious women are divided according to canon law into two kinds of institutions, namely orders and congregations. In an order the members take solemn vows; in a congregation the members take only simple vows, whether perpetual or temporary. An order has for its objects the observance of one of four ancient rules: the Rule of St. Basil, St. Benedict, St. Augustine or of St. Francis of Assisi. The rules or constitution of a congregation which the members observe are not necessarily the same as the foregoing ancient rules or as rigorous. Strictly speaking, the term " nun " is applied only to religious women who take solemn vows while those who take simple vows are called " sisters ". It appears, however, that the distinction between orders and congregations within the Catholic Church is strictly a canonical distinction and that it would not be known generally to the laity. It further appears that even among the clergy of the Roman Catholic Church the terms " order ", " congregation ", " nun " and " sister " are commonly used without discrimination and without the canonical distinction unless there is some cause for precision. In Australia about fifty associations of religious women of the Roman Catholic Church are represented, some only of which are orders properly so called, the remainder being congregations. It seems clear enough that when the will speaks of orders of nuns it includes congregations of sisters. There are included among the orders represented in Australia contemplative orders which are so called because their members are strictly enclosed in their convents and engage in no external work but devote their lives to contemplation and penance and other religious duties of prayer and reflexion. Since *Cocks* v. *Manners* (1) such purposes have been

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

held to be outside what the law treats as valid because they promote what are considered legally to be charitable purposes. In *Gilmour* v. *Coats* (1) where the nature of the religious duties to which such orders are devoted is fully discussed, the conclusion that they were not charitable purposes in point of law was upheld as inevitable. It is convenient to refer to orders of this description as contemplative even if that word be inadequate as a description.

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

In the next place it will be noticed that among the orders the executors and trustees are to have an unfettered power of selection. We think that this means that they are to make their choice once for all, not from time to time. The choice is among the orders of nuns with the Christian Brothers added as a possible object of the choice. If the bodies over which the choice extends were all charitable within the legal meaning of that word the fact that the choice lay with the executors and trustees and that it extended over such a wide area could not affect the validity of the trust. That is the effect of the decision of this Court in *Smith* v. *West Australian Trustee Executor & Agency Co. Ltd.* (2), a decision based upon

(1) (1949) A.C. 426.

(2) (1950) 81 C.L.R. 320.

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the *dicta* in *Blair* v. *Duncan* (1) and *Chichester Diocesan Fund and Board of Finance (Incorp.)* v. *Simpson* (2). Nor would we have thought if it were possible to construe the trust as one in favour of some definite body of persons to be chosen as beneficial objects of the trust that it ought not to be upheld as a valid power of appointment. The difficulty is however to construe the trust as one intended to place the chosen body in the position of beneficial owners of the land and the furniture to dispose of as the body should think fit. The trust is very briefly expressed but from its subject matter it appears to us to be clear that the trustees were intended subject to the power of sale to remain the repository of the whole legal title and to administer the trust by affording the enjoyment to the order of nuns or the Christian Brothers as the case might be who might be selected. The orders are not treated otherwise than as large congregations or orders by the Roman Catholic Church and subsisting under a canonical organisation the character of which the testator presumably did not understand nor regard as relevant. The argument that the gift can be regarded as valid independently of the law of charity is based upon the Irish cases which begin with the suggestion made by *Christian* L.J. in *Stewart* v. *Green* (3) which probably preceded *Cocks* v. *Manners* (4). Of the Irish cases which followed illustrating successful and unsuccessful attempts to apply the same mode of construction it will suffice to mention *In re Delany's Estate* (5); *Morrow* v. *M'Conville* (6); *Bradshaw* v. *Jackman* (7); *In re Byrne (dec'd.)*; *Shaw* v. *Attorney-General* (8); *Munster and Leinster Bank* v. *Attorney-General* (9); *In re Keogh*; *McNamee* v. *Mansfield* (10); *In re Rickard (dec'd.)*; *Harbison* v. *Meany* (11). We shall not analyse these cases but we think two comments upon them may be made namely, that they disclose not a little difference of opinion and in the second place that where this mode of construction applied it related to a fund or property that might be handed over to a particular body at an ascertainable place or in a more or less definite area. In England *Wickens* V.C. in *Cocks* v. *Manners* (12) decided that a bequest of a share of residue to " the Dominican Convent at Carisbrook (payable to the Superior for the time being) " and another to " the Sisters of Charity of St. Paul, Selly Oak near Birmingham (payable to the

(1) (1902) A.C. 37, at p. 47.
(2) (1944) A.C. 341, at pp. 349, 350, 371.
(3) (1871) I.R. 5 Eq. 470, at p. 483.
(4) (1871) L.R. 12 Eq. 574.
(5) (1882) L.R. Ir. 9 Ch. 226.
(6) (1883) L.R. Ir. 11 Ch. 236.
(7) (1887) L.R. Ir. 21 Ch. 12.
(8) (1935) Ir. R. 782, at pp. 793, 807-809, 811, 818, 819.
(9) (1940) Ir. R. 19.
(10) (1945) Ir. R. 13.
(11) (1954) L.R. N.I. 100.
(12) (1871) L.R. 12 Eq., at pp. 584, 585.

Superior thereof for the time being)" were valid as gifts to the members associated at those places. In *In re Clarke*; *Clarke* v. *Clarke* (1) *Byrne* J. upheld in similar manner a bequest to the committee for the time being of the Corps of Commissionaires in London to aid in the purchase of their barracks or in any other way beneficial to the corps. The corps consisted of about 2,600 former soldiers and sailors. His Lordship after reviewing the Irish cases said: "I think there is considerable room for argument; but it does seem to me that all the members of a society constituted as this one is could, if they so pleased, and unless the building of the barracks be a charity, deal with the funds intended for building or with the buildings just as they please. If it is a charity they could not deal with them as they please, but then the gift is perfectly good. If it is not a charity they could deal with them as they please, because there is nothing to prevent all the members of the association joining together to dispose of the funds or of the barracks" (2). In *In re Smith*; *Johnson* v. *Bright-Smith* (3) *Joyce* J. construed a gift in residue for "the society or institution known as the Franciscan Friars of Clevedon, County of Somerset, absolutely" (4) as an absolute and immediate gift to the individual friars composing the society or institution at the testator's death and on that ground upheld it as valid. It appeared that at the date of the will and at the testator's death there was at Clevedon a society or community consisting of six Franciscan Friars who had taken monastic vows and this was the body to which the testator referred. No doubt there was little difficulty in a case of that description in construing the gift as one to designated persons. In *In re Drummond*; *Ashworth* v. *Drummond* (5) there was a devise and bequest of residuary real and personal estate to trustees upon trust for sale and conversion and subject to certain payments to stand possessed of the residue of the proceeds upon trust for the Old Bradfordians' Club, London, being a club instituted by Bradford Grammar Old Boys, and the receipt of the Treasurer for the time being of the club to be a sufficient discharge to the trustees. There was a codicil declaring that the object and intention of the bequest was to benefit old boys of the Bradford Grammar School residing in London or members of the club and to enable the committee if possible to acquire premises to be used as a club-house for their use. *Eve* J. said that he could not hold that a residual gift of realty and personalty to the Old Bradfordians' Club was a gift to the members individually. There was in his opinion a trust but there was abundant authority

(1) (1901) 2 Ch. 110.
(2) (1901) 2 Ch., at p. 121.
(3) (1914) 1 Ch. 937.
(4) (1914) 1 Ch., at p. 944.
(5) (1914) 2 Ch. 90.

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for holding that it was not such a trust as to render the legacy void as tending to perpetuity: *In re Clarke*; *Clarke* v. *Clarke* (1). The legacy was not subject to any trust which would prevent the committee of the club from spending it in any manner they might decide for the benefit of the class intended. In his Lordship's opinion there was a valid gift to the club for such purposes as the committee should determine for the benefit of the Old Boys or members of the club. In *In re Taylor*; *Midland Bank Executor and Trustee Co. Ltd.* v. *Smith* (2) *Farwell* J. upheld a residuary disposition in trust for a bank staff association fund to be administered according to the constitution and rules that had been approved at a general meeting and any amendment thereof. The constitution and rules referred to were elaborate but under them *Farwell* J. was of opinion that the members of the association were entitled to deal with the fund as they wished and to direct the trustee to divide it among them, putting an end to the association by the constitution and rules, and although his Lordship thought that the trustee might have difficulty in determining what persons were members of the association, that that was not a material matter. His Lordship said "In my judgment, the decision in the case of *In re Clarke* (1) really covers this case because it shows that a gift to a fund for a voluntary body of persons may be perfectly valid unless the rules governing that fund or the purposes for which the institution was created prevent the members from dealing with it, both capital and income, in any way they please" (3). The decision of *Cohen* J. as he then was in *In re Price*; *Midland Bank Executor and Trustee Co. Ltd.* v. *Harwood* (4) gave a like effect to a gift of a share of residue to the Anthroposophical Society in Great Britain to be used at the discretion of the Chairman and Executive Council of the society for carrying on the teachings of the founder, Dr. Rudolph Steiner. His Lordship quoted from the speech of Lord *Buckmaster* in *In re Macaulay's Estate; Macaulay* v. *O'Donnell*, reported in a note to *In re Price; Midland Bank Executor and Trustee Co. Ltd.* v. *Harwood* (5). The passage quoted ended with a reference to *In re Drummond*; *Ashworth* v. *Drummond* (6) and to *Carne* v. *Long* (7), a gift to a library at Penzance to hold for the use benefit and support of the library which was held a gift in perpetuity. Lord *Buckmaster* said: "These two cases illustrate exactly the point for consideration. If the gift is to be for the endowment of the society, to be held as an endowment, and the society is, according to its form,

(1) (1901) 2 Ch. 110.
(2) (1940) Ch. 481.
(3) (1940) Ch., at p. 488.
(4) (1943) Ch. 422.
(5) (1943) Ch., at p. 435.
(6) (1914) 2 Ch. 90.
(7) (1860) 2 De G. F. & J. 75 [45 E.R. 550].

perpetual, the gift is bad, but if the gift is an immediate beneficial legacy, it is good" (1). Lord *Cohen* construed the disposition before him as of the latter character. In *In re Cain (dec'd.)*; *National Trustees Executors & Agency Co. of Australasia Ltd.* v. *Jeffrey* (2) *Dean* J. brought together these and other authorities, judicial and extra-judicial, and in the course of a helpful discussion pointed out some distinctions in the form of the gifts that have been considered to unincorporated non-charitable associations. *Dean* J. said: "Such gifts take various forms. Sometimes, as in the present case, the gift is to the society *simpliciter*, no reference being made in the terms of the gift to any purposes to be served; sometimes the will or other instrument expresses an intention that the association is to hold and apply the gift in accordance with its constitution and rules; sometimes, again, the instrument itself states the purposes for which the gift is applicable. From another aspect, a further distinction may be drawn between these bodies, such as clubs, which exist for the benefit of the members themselves, and those which are expressed by their constitution as intended to serve some other purpose" (3). We are not here dealing with a disposition in favour of bodies existing for the benefit of the members themselves.

We do not think that the devise and bequest of "Elmslea" falls within the application of the foregoing authorities. The evident intention of the trust was to enable the trustees to appropriate it to the purposes of some order the selection of which was left in the discretion of the trustees. The choice was to be made of an order, including in that expression congregation, in that capacity independently of the locality in which a particular branch, sub-division or members of it might be found and simply because it was, according to the choice of the trustees an order to which it was suitable or desirable that the property should be devoted. Doubtless a consideration of great importance would be the appropriateness of the property for the service or benefit of the order or, stated in another way, the desirability of that order having regard to its work and character obtaining the advantages which the property presented. It was intended as a trust operating for the furtherance of the purposes of the order as a body of religious women, or in the case of the Christian Brothers as a teaching order. The membership of any order chosen would be indeterminate and the trust was intended to apply to those who should become members

(1) (1943) Ch., at p. 436.
(2) (1950) V.L.R. 382, at p. 390 et seq.
(3) (1950) V.L.R., at p. 389.

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at any time. There was no intention to restrain the operation of the trust to those presently members or to make the alienation of the property a question for the governing body of the order chosen or any section or part of that order. For these reasons we think that unless the trust is capable of being supported wholly or in part as a charity it should fail. The conclusion we have reached is that having regard to s. 37D of the *Conveyancing Act* 1919-1954 (N.S.W.) it is capable of being supported in part. Before giving reasons for this conclusion it is, however, convenient to turn to the trust of residue to provide amenities in such convents as the testator's trustees should select.

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

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

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

These last words in fact define the amenities in the provision of which the money is to be expended. If it were not for the fact that convents of contemplative orders are outside the charitable purposes defined by law there would be no reason why the expenditure of money towards building a convent or altering or adding to it or providing furnishings for a convent should not be a charitable purpose. But the decision in *Gilmour* v. *Coats* (1) already mentioned puts it beyond controversy that the convents of contemplative orders fall outside the legal conception of charity. It is therefore clear enough that the trust of the residual real and personal estate would, apart from s. 37D, extend beyond what is charitable and could not be supported as valid. The trust is clearly one for purposes. In *Bowman* v. *Secular Society Ltd.* (2) Lord *Parker of Waddington* said: "A trust to be valid must be for the benefit of individuals . . . or must be in that class of gifts for the benefit of the public which in the courts of this country are recognised as charitable in the legal as opposed to the popular sense of that term. Moreover, if a trustee is given a discretion to apply trust property for purposes some of which are and some are not charitable, the trust is void for uncertainty" (3). See further *Houston* v. *Burns* (4) where the further point is made that a power to select among charitable and non-charitable purposes goes beyond any admissible exercise of the testator's testamentary power. It is therefore quite plain that if it were not for s. 37D the trust of residue for the purposes of providing amenities in convents must fail. If the simple dichotomy stated by Lord *Parker* in the passage cited remained unqualified it would be enough to say the reason is because this trust is not in favour of individuals but is for purposes and the purposes extend beyond the conception of charity. The tendency however has grown to assign as the ground of invalidity, even in the case of a trust for what can be nothing more than a purpose, that there is a direction to apply income so as to tend to a perpetuity or there is an uncertainty of purpose or that there is a delegation of testamentary power. In other words there is a tendency to add to or go beyond the simple view that there must either be a trust for individuals or for purposes which can be valid only when the purposes are charitable. If one turns to the text of s. 37D (1) it will be seen why the additional grounds of invalidity are relied upon by those attacking the trust. The opening words of that sub-section are: "No trust shall be held invalid by reason that some non-charitable and invalid purpose as well as some charitable purpose is or could

(1) (1949) A.C. 426; (1948) Ch. 1.
(2) (1917) A.C. 406.
(3) (1917) A.C., at p. 441.
(4) (1918) A.C. 337, at p. 343.

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

(1) (1950) 81 C.L.R. 320.

(2) (1945) V.L.R. 295.

a testator gave the balance of his real and personal estate to his trustee to be disposed of by him as the trustee may deem best. This was held to be void for uncertainty and to be outside the operation of s. 131 of the *Property Law Act* 1928 (Vict.) from which s. 37D was taken. But in the present case in both trusts there is reference to a distributable class which, while not exclusively charitable, is predominantly charitable in its character. Little difficulty has been felt in cases where there is a specific reference, whether in abstract or concrete terms, to something charitable with a specific reference to what is not charitable. Such cases are obvious. The difficulty has been felt in confining general words. It would be unsafe to deal with such cases without discrimination. In *In re Belcher (dec'd.)* (1) *Fullagar* J. had before him a direction to trustees to distribute income at their discretion among " Navy League Sea Cadets Geelong Branch or any other youth welfare organization male or female as in their wisdom they deem fit ". His Honour had no doubt that the Navy League Sea Cadets Geelong Branch formed a charitable object but was of opinion that the words " any other youth welfare organization " went too far and could not be confined by the use of the statutory provision to charitable purposes. This view was possibly at variance with the *Union Trustees & Co. of Australia Ltd.* v. *Church of England Property Trust* (2) where *Nicholas* C.J. in Eq. gave a wide application to s. 37D, though his Honour stopped short of applying it to a gift of income to be applied for the benefit of any deserving female a member of the Church of England residing in a specified parish or attending the church whose income did not exceed a given amount in case of illness or otherwise. In *Lloyd* v. *Federal Commissioner of Taxation* (3) *Fullagar* J. referred to the fact that this decision had not been before him nor were certain papers in 14 A.L.J. 58 ; 24 A.L.J. 239 ; to which 29 A.L.J. 62 should be added. His Honour refrained from expressing any view as to what difference these citations might have made. In *In re Ashton* (4) the question of the meaning of the provision, which has been adopted in New Zealand, was reviewed in the New Zealand Court of Appeal by *Gresson*, *Hay* and *Turner* JJ. The bequest there to be dealt with was " to hand any surplus to the trustees of the Church of Christ Wanganui to help in any good work ". Their Honours distinguished the decision in *In re Hollole* (5) and the decision in *In re Belcher* (1) but did not adhere to the view expressed in the latter decision that

(1) (1950) V.L.R. 11.
(2) (1946) 46 S.R. (N.S.W.) 298 ; 63 W.N. 153.
(3) (1955) 93 C.L.R. 645, at p. 666.
(4) (1955) N.Z.L.R. 192.
(5) (1945) V.L.R. 295.

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the section " will . . . apply only where the testator has expressly indicated a distinct and severable class of charitable objects as among the possible recipients of his bounty " (1). Doubtless the paraphrase may be too narrow or, at all events, be read too narrowly. It appears to us that what must be found in order to justify an application of the provision is a distinct or sufficient indication of an intention to authorise the application of the income or corpus of the fund or other property to what is clearly a charitable purpose even although the description which embraces the purpose is so wide that it may go beyond charitable purposes or there is associated with the description a description of non-charitable purpose or purposes capable of going beyond the legal conception of charity. But it is perhaps unsafe to generalise. For ourselves we should think that the conclusion of *O'Bryan* J. in *In re Hollole (dec'd.)* (2) was right on the ground that the wide general words " to be disposed of by him as he may deem best " did not seem necessarily to advert to any charitable object and were so vague as to be quite indeterminate and only embraced anything that lies within the legal conception of charity because of their indeterminancy. But in the present case it appears to us that the reference is prima facie charitable in the sense that it is known that most convents would be the object of legal charity. The words are distributive and it is plain that by restricting their application they may be restrained to charitable objects. This appears to us to be true both in the case of the trust of residue and of the trust of "Elmslea". In their partial operation as restrained under s. 37D these trusts are in our opinion valid. In the case of the trust of residue we think it should be declared that the operation of the trust is modified by the application of s. 37D of the *Conveyancing Act* 1919-1954 (N.S.W.) and so modified operates in the terms of the trust with respect, however, only to convents of orders or congregations the purposes of which are not contemplative only. A corresponding declaration should be made in relation to " Elmslea ". This means that the appeal of the Attorney-General should be allowed and subject to a variation of the order the appeal of Mrs. Leahy the widow of the testator and her children should be dismissed. We think an order that costs of the appeals should be paid out of the estate would be proper.

WILLIAMS AND WEBB JJ. These are two appeals in a suit instituted by originating summons in the Supreme Court of New South Wales in its equitable jurisdiction to determine two questions arising under the will of Francis George Leahy deceased. These

(1) (1950) V.L.R., at p. 16. (2) (1945) V.L.R. 295.

questions are (1) whether upon the true construction of the will of the said deceased and in the events which have happened the trust directed therein in respect of the property known as " Elmslea " situated at Bungendore is void for uncertainty ; (2) whether upon the true construction of the said will and in the events which have happened the trust directed therein as to the rest and residue of his estate both real and personal is void for uncertainty. *Myers* J., who heard the suit declared in answer to the first question that the trust of " Elmslea " is not void for uncertainty or any other ground and in answer to the second question declared that the trust of the residuary estate of the testator is void. The appellants from the answer to the first question are the next-of-kin of the testator and the appellant from the answer to the second question is Her Majesty's Attorney-General in and for the State of New South Wales.

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

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or Brothers as the case may be to benefit under this Clause of my Will shall be in the sole and absolute discretion of my said Executors and Trustees." Clause 5 provides—"AS TO all the rest and residue of my Estate both Real and Personal or whatsoever kind or nature and wheresoever situated UPON TRUST to use the income as well as the capital to arise from any sale thereof in the provision of amenities in such Convents as my said Executors and Trustees shall select either by way of building a new Convent where they think necessary or the alteration of or addition to existing buildings occupied as a Convent or in the provision of furnishings in any such Convent or Convents and I DECLARE that my said Executors and Trustees shall have the sole and absolute discretion of deciding where any such premises shall be built or altered or repaired and the Order or Orders of Nuns who shall benefit under the terms of this Clause the receipt of the Reverend Mother for the time being of that particular Order of Nuns or Convent shall be a sufficient discharge to my said Executors and Trustees for any payment under this clause." Clause 4 should also be shortly referred to. It relates to the homestead and other buildings on the testator's property known as " Overdale " situated at Harefield and four named paddocks comprising approximately 850 acres a portion of " Overdale ". It directs his trustees to permit the Order of Nursing Sisters known as " The Nursing Sisters of the Little Company of Mary " to use and occupy the same for a period of ten years from his death and to have the income to arise therefrom either for the care and comfort of the sick or aged members of the said order or for the purpose of conducting therein a hospital on lines similar to that conducted by them in the city of Wagga Wagga and at the expiration of that period if his executors and trustees be satisfied that the property had been used in this manner to forthwith convey transfer and assign the property so devised to the said order of nuns provided however if the said order of nuns should decline to accept the bequest or his trustees were not so satisfied as aforesaid the testator directed his executors and trustees to select some other order of nuns and to offer the property to such order upon the same conditions and he directed that the selection of such order of nuns should be in the absolute discretion of his executors and trustees.

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

his real estate for such periods and upon such terms and conditions as they should think proper or to carry on and manage his grazing properties themselves for which purpose he conferred on them very wide powers of management.

The reference in the will to orders of nuns is not self-explanatory but evidence was given by three Doctors of Canon Law of the Roman Catholic Church that within that Church associations of religious women are divided according to the code of canon law into two kinds of institutions named orders and congregations. An order is a religious organisation the members of which take solemn vows ; a congregation is a religious organisation the members of which take only simple vows whether such vows are perpetual or temporary. The orders of nuns are divided into contemplative orders and active orders. Contemplative orders are so called because their members are strictly enclosed in their convents and engage in no external work but devote their lives to contemplation and penance. In the active orders the members engage in external works such as the performance of public services, teaching, nursing the sick, tending the poor and other like activities. There are in New South Wales three orders of nuns which are contemplative and a number of orders of nuns which are active. There are also a number of congregations which are not orders in the view of the canon law. The St. Joseph's Convent at Bungendore is a religious house of the Congregation of the Sisters of St. Joseph of the Most Sacred Heart of Jesus which carries on educational and other charitable work there and elsewhere. The Passionist Fathers of Mary's Mount Goulburn is a novitiate house of the Congregation of the Passion a religious institute devoted to penance prayer and preaching. The Christian Brothers is a congregation of religious men carrying on educational work in New South Wales. The Nursing Sisters of the Little Company of Mary is a congregation and not an order of religious women. The canon law provides certain formal procedures before approval is given to the establishment of an order or congregation of religious women. A congregation may commence as a congregation of diocesan right. But as it expands into a number of dioceses control of the congregation may be taken from the local bishop or bishops and vested directly in the Holy See when it becomes a Congregation of Pontifical Right. The approval of ecclesiastical authority has always been necessary to found an order or congregation. Records are kept in each diocese of orders and congregations which have received approval and only those bodies which have received such approval are recorded as orders or congregations. The Congregation of

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Religious, one of the Congregations constituting the Roman Curia has jurisdiction over the government discipline studies properties and privileges of all religious orders and congregations and keeps a complete record of all orders and congregations of both Diocesan and Pontifical Right throughout the world. As orders are no longer founded present regulations pertain to the foundation of congregations. The distinction between orders and congregations within the Catholic Church is strictly canonical distinction which would not generally be known to the laity and among the clergy and laity the terms "order" "congregation" "nun" and "sister" are commonly used indiscriminately without reference to that distinction when there is no call for canonical precision.

It will be seen that in his will the testator refers to the Congregation of The Nursing Sisters of the Little Company of Mary as an order, to the Sisters of the St. Joseph's Convent at Bungendore as nuns, and provides for gifts to two congregations of religious men. It was contended that the will supplies a context to indicate that when the testator refers to orders of nuns he is using these words in a popular sense to include not only orders of nuns according to strict canon law but also congregations of religious women. It was also contended that it is not likely that the testator would have been interested in orders and congregations other than those which were carrying on their activities in New South Wales. He was a resident of New South Wales. His business activities, mainly the carrying on of grazing properties, were confined to New South Wales, the whole of his assets were in New South Wales, the four congregations he picked out for special mention all carried on their activities in New South Wales and his executors and trustees are residents of New South Wales. The trusts of residue require the trustees to spend the income and capital in the building of new convents the alteration of or addition to existing buildings occupied as convents, and the provision of furnishings in any such convent or convents. These are active trusts and it is difficult to believe that the testator could have intended to impose upon his trustees the duties of executing such trusts anywhere in the world. The intention of the testator to be gathered from the provisions of his will and the surrounding circumstances appears to be plainly enough that the orders of nuns to benefit under the will should be orders operating in New South Wales, that the word "order" should include congregations, that any new convents should be built in New South Wales, and that the alteration of or addition to existing buildings should be to buildings used as convents in New South Wales.

The argument before us centered mostly on the appeal by the Attorney-General so that it will be convenient to dispose of that appeal first. Clause 5 specifies the amenities upon which the income and capital may be spent and confines the beneficiaries to orders of nuns. Within these limits the trustees have an absolute discretion to select the particular amenities upon which the money will be spent and the particular order or orders of nuns to benefit from the expenditure. The trust is one to spend the money for one or more specified purposes for the benefit of such an order or orders. The specified purposes are to provide amenities by building new convents or by altering and adding to existing convents or by providing furnishings in any such convents for the benefit of the selected order or orders. It was contended that this trust, unless wholly charitable, is void for uncertainty because the meaning of " amenities " is quite uncertain and it is quite uncertain what order or orders of nuns the testator intended to benefit. The testator had left it wholly within the discretion of his trustees to decide the extent to which the building of new convents or the alteration of or additions to existing convents or the provision of furnishings in such buildings could be regarded as amenities and to decide what was meant by the words " order or orders of nuns ". It was contended that the trust was an attempted delegation to his trustees of the testator's testamentary power to make a will and therefore invalid unless it was wholly charitable. This principle has been stated in many cases of the highest authority. It will be sufficient to refer to what Lord *Macmillan* said in *Chichester Diocesan Fund and Board of Finance (Incorp.)* v. *Simpson* (1): " My Lords, the law, in according the right to dispose of property *mortis causa* by will, is exacting in its requirement that the testator must define with precision the persons or objects he intends to benefit. This is the condition on which he is entitled to exclude the order of succession which the law otherwise provides. The choice of beneficiaries must be the testator's own choice. He cannot leave the disposal of his estate to others. The only latitude permitted is that, if he designates with sufficient precision a class of persons or objects to be benefited, he may delegate to his trustees the selection of individual persons or objects within the defined class. The class must not be described in terms so vague and indeterminate that the trustees are afforded no effective guidance as to the ambit of their power of selection : see *Houston* v. *Burns* (2), per Viscount *Haldane* (3) ". The principle is illustrated by many

(1) (1944) A.C. 341.
(2) (1918) A.C. 337, at pp. 342, 343.
(3) (1944) A.C., at p. 349.

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cases, of which *Morice* v. *Bishop of Durham* (1) is an early example, relating to trusts which authorise the expenditure of trust funds at the sole discretion of the trustees for charitable or non-charitable indefinite purposes so that the trustees can spend the money wholly upon the indefinite purposes or in other words upon such purposes as they and not the testator select. Such a trust is not a proper exercise of testamentary power and fails for uncertainty. But the trust in cl. 5 would not fail on this ground. Neither the purposes nor the orders of nuns to be benefited are uncertain. *Myers* J. was of opinion that the expression "order or orders of nuns" meant orders in the strict sense and included all the orders existing at the date of the death of the testator anywhere in the world, so that the trustees in their discretion could spend the money on building new convents, etc., in any country. For the reasons already stated we are unable to give the same interpretation to this expression as his Honour. We are of opinion that the trust only authorises the building etc. of convents in New South Wales but that it includes congregations as well as orders of religious women. The trustees can therefore spend the money on providing new convents, etc. in New South Wales for congregations as well as orders which carry on their work in New South Wales. Both the amenities and the orders of nuns referred to in the clause are sufficiently defined and all that the testator has done is to give his trustees what is in effect a special power of appointment amongst them.

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

No beneficial interests in individuals are created by the exercise of the trustees' powers. The amenities are to be provided for the benefit of those religious women who are members of the selected orders and who from time to time live in New South Wales in the convents that are provided for them. The trustees are authorised to spend the trust funds from time to time in the provision of the specified amenities. They could spend the money wholly for the benefit of non-charitable bodies because they could spend it all

(1) (1805) 10 Ves. Jun. 522 [32 E.R. 947].

in providing any of these amenities for the benefit of the contemplative orders and such orders are not charitable: *Gilmour* v. *Coats* (1). The trust is of an unlimited duration. In order that the modern rule against perpetuities may not be infringed the future interest must vest within a period of a life or lives in being and twenty-one years. It is not this rule which is in question but an analogous rule that a trust to fulfil certain purposes which are non-charitable, the fulfilment of which will not vest beneficial proprietary interests in any particular individuals but only benefit those who are members for the time being of some un-incorporated body, is void on the ground of public policy if its duration may extend beyond the period permitted by the rule against perpetuities, that is to say beyond a period of a life or lives in being and twenty-one years. Trusts for charitable purposes have always been regarded as exempt from this form of perpetuity but trusts for non-charitable purposes have always been held to be subject to it and invalid: *Carne* v. *Long* (2); *Commissioner for Special Purposes of Income Tax* v. *Pemsel* (3); *In re Clarke*; *Clarke* v. *Clarke* (4); *In re Swain*; *Phillips* v. *Poole* (5); *In re Compton*; *Powell* v. *Compton* (6); *Kennedy* v. *Kennedy* (7); *Halsbury's Laws of England* 3rd ed., vol. 4, par. 618, p. 300. In the present case there is no life in being so that the permitted period is twenty-one years.

Apart from statute, therefore, cl. 5 would be void and the crucial question is whether the trust is saved by s. 37D of the *Conveyancing Act* 1919 (N.S.W.) as amended. The first two sub-sections of the section, which are alone material, provide as follows: "(1) No trust shall be held to be invalid by reason that some non-charitable and invalid purpose as well as some charitable purpose is or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed. (2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or of any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed." *Myers* J., after referring to certain decisions relating to this section (*Union Trustee Co. of Australia Ltd.* v. *Church of England Property Trust, Diocese of Sydney* (8)) and to two other practically identical sections, namely

(1) (1949) A.C. 426.
(2) (1860) 2 DeG.F. & J. 75 [45 E.R. 550].
(3) (1891) A.C. 531, at p. 581.
(4) (1901) 2 Ch. at p. 116.
(5) (1908) 99 L.T. 604.
(6) (1945) Ch. 123, at p. 126.
(7) (1914) A.C. 215, at p. 220.
(8) (1946) 46 S.R. (N.S.W.) 298; 63 W.N. 153.

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s. 131 of the Victorian *Property Law Act* 1928 (*In re Belcher* (1)) and s. 2. of the New Zealand *Trustee (Amendment) Act* 1935 (*In re Ashton* (2)), held that s. 37D was inapplicable to the trusts of residue because by them the trustees were authorised to apply the income and capital to purposes which were wholly non-charitable. He said : " In my view the statute was enacted to give effect to trusts not irrespective of the intention of the testator but conformably to it or at least to that part of it which contemplated the direction of the whole fund to charity. Accordingly the section only applies where a charitable intention appears from the trust itself, and the application of the whole fund to charity is one way of completely satisfying the intention of the testator. A trust for such purposes as the trustee should select would therefore not qualify under s. 37D because it shows no charitable intention. Nor, for the same reason would a trust for benevolent purposes. A testator who had benevolent purposes in mind would not necessarily have in mind benevolent purposes which are charitable, and it would be pure conjecture to hold that the devotion of the fund to purposes which were legally charitable would in fact satisfy the testator's intention. The mere fact that benevolence goes beyond charity shows in my opinion that a testator who creates a trust for benevolent purposes cannot necessarily be said to have had any charitable purpose in his mind at all. Similar considerations seem to me to apply to trusts for organizations described by general terms as a class. In this particular case the testator has, in effect, given the fund to such order or orders of nuns as the trustees might select. Some orders of nuns are charitable and some are not. It is true that the orders actually in existence at the date of his will and the date of his death or at any other time can be ascertained with complete accuracy. This, however, does not seem to me to distinguish this trust from any gift upon trust for organizations described as a class, because it is impossible to say that the testator had in mind orders which were in fact charitable. I cannot distinguish this from a trust simply for benevolent purposes. I do not think that it could be said that the application of this fund to orders which are in fact charities would be a complete satisfaction of any intention which has been expressed or is implicit in his will. As far as I can see, there is nothing to indicate that he had charitable orders in his mind at all. In the circumstances, therefore, I do not think that s. 37D applies . . . ."

With all respect to his Honour we cannot reach the same conclusion. The genesis of s. 37D was s. 2 of the *Charitable Trusts Act*

(1) (1950) V.L.R. 11. (2) (1955) N.Z.L.R. 192.

1914 (Vict.) which became s. 79 of the *Trusts Act* 1915 and later s. 131 of the *Property Law Act* 1928. The text of the New South Wales section is the same as that of the Victorian section except that, in the New South Wales section, sub-s. (1) contains the word " purpose " after the word " invalid " and towards the end of sub-s. (2) substitutes the word " could " for the word " should " in the Victorian section. Section 2 of the *Charitable Trusts Act* was passed after the decision of *Madden* C.J. in *In the Will of Forrest* (1) where it was held that a large gift failed for uncertainty because it was a gift to objects some of which were charitable but others of which were non-charitable and indefinite and the trustees were given an absolute discretion to apply the whole or any part of the trust fund as they thought fit to the charitable or indefinite objects. It was held that the court could not sever the bad from the good and retain the charitable objects only so that the whole trust was void for uncertainty. In so deciding, *Madden* C.J. was but applying, as he was bound to do, the principle of law illustrated by such cases as *Morice* v. *Bishop of Durham* (2) where it was held that a purported gift by a testatrix of a legacy to the Bishop of Durham to be disposed of to such objects of benevolence and liberality as the bishop in his own discretion should most approve of could not be said to be given for charitable purposes. As the intention was too indefinite to create a trust, the residue was undisposed of. The first cases in which the Victorian section was applied were cases of this character : *In re Griffiths* ; *Griffiths* v. *Griffiths* (3) ; *In re Bond* ; *Brennan* v. *Attorney-General* (4). In *In re Bond* ; *Brennan* v. *Attorney-General* (4) a testatrix directed that certain property should be disposed of and given " to the blind and their children ". It was held that the gift, though otherwise void for uncertainty, was by virtue of s. 79 of the *Trusts Act* 1915 valid as a charitable gift to the blind. *Cussen* J. said " I think that section should be given a construction, having regard to the very wide words used, which will validate this particular gift to the blind as though the words ' and their children ' did not appear in the gift " (5). In *In re Hollole* (*dec'd.*) (6) *O'Bryan* J. refused to apply the Victorian section where the gift was " to my trustee and executor to be disposed of by him as he may deem best ". With that decision we agree. One could not construe such a gift as including both a charitable and non-charitable purpose. It is not a trust of any purposes at all. It is quite indefinite and the only question that could

(1) (1913) V.L.R. 425.
(2) (1805) 10 Ves. 522 [32 E.R. 947].
(3) (1926) V.L.R. 212.
(4) (1929) V.L.R. 333.
(5) (1929) V.L.R., at p. 336.
(6) (1945) V.L.R. 295.

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arise would be that which his Honour decided, namely, whether or not the executor took the residue beneficially. In *In re Belcher (dec'd.)* (1) a testator bequeathed to trustees the income from certain property in trust " for the Navy League Sea Cadets Geelong Branch or any other youth welfare organization male or female as in their wisdom they deem fit ". *Fullagar* J. held that the gift to the cadets was a charitable gift, but that the gift to " any other youth welfare organization " was void for uncertainty; the former gift was, and the latter gift was not, saved by s. 131 of the *Property Law Act*. His Honour said " Shortly expressed the criterion of the application of s. 131 is that there should be a trust which, apart from the section, would be invalid because some non-charitable, as well as some charitable, purpose is included in its terms . . . the trust in question is (in my view of it) invalid simply because it is uncertain, and not because it includes non-charitable, as well as charitable, objects. In the case supposed by the statute there is an invalidity which not merely arises from the uncertainty of the objects but can be saved by the possibility of a constructional severance of the charitable from the non-charitable trusts. It will, I think, apply only where the testator has expressly indicated a distinct and severable class of charitable objects as among the possible recipients of his bounty. So it will apply where the gift is for ' charitable or benevolent objects ', but not where the gift is for ' benevolent objects '. So, where the gift is for ' the X institution ' (which is charitable) and ' other worthy institutions ', it will apply to save the gift for ' the X institution ' by excluding all other worthy institutions (2) ". Later, however, in *Lloyd* v. *Federal Commissioner of Taxation* (3) his Honour said: " I had to consider the validity and effect of the gift in question in *In re Belcher (dec'd.)* (1) in which I held that a gift to the Navy League Sea Cadets was a gift for charitable purposes, but that a gift to ' other youth welfare organizations ' was a gift for purposes which included non-charitable purposes. I then had to consider the effect on the actual gift made by the will of s. 131 of the *Property Law Act* 1928 (Vict.). I concluded that the gift took effect as a gift of the income of the whole of the testator's interest in Belcher's Corner to the Navy League Sea Cadets. The correctness of this decision on the effect of the statute was, of course, in no way in question on this appeal. I think I should mention, however, that my attention was not called either to an article by Mr. *E. H. Coghill* ' *Mixed Charitable and Non-Charitable Gifts* ' (4), or to the decision of *Nicholas* C.J. in Eq. in *Union Trustee Co.*

(1) (1950) V.L.R. 11.
(2) (1950) V.L.R. at p. 16.
(3) (1955) 93 C.L.R. 645.
(4) (1940) 14 A.L.J. 58.

of Australia Ltd. v. *Church of England Property Trust, Diocese of Sydney* (1). I have not considered whether, if I had had these before me, I should have taken a different view, but I have thought that I ought to mention them, and to mention also two later articles by Mr. *Coghill* (2), in the latter of which he cites the recent case in New Zealand of *In re Ashton (dec'd.)*; *Siddall* v. *Gordon* (3)" (4). In *Union Trustee Co. of Australia Ltd.* v. *Church of England Property Trust, Diocese of Sydney* (1) a testatrix devised certain realty to a trustee upon trust to use and apply the realty and the income thereof and the proceeds of any lease mortgage or sale thereof "in such manner and for such purposes relating to the work of St. John the Baptist Church of England at Ashfield as the Rector and Church Wardens for the time being of the said Church shall in their absolute discretion think fit". *Nicholas* C.J. in Eq. held that the gift was an absolute gift to an unincorporated body for defined purposes, and that, although the gift did not create a perpetuity and the unincorporated body was clearly defined, since the purposes, as defined in the will, for which the gift might be applied, were so vague that portion of it might be used for non-charitable purposes, the gift would have been invalid but for the operation of s. 37D of the *Conveyancing Act* 1919-1943; that by virtue of that section the application of the gift was restricted to charitable purposes and, therefore, that the gift was valid. In our opinion, in the passages cited from *In re Belcher (dec'd.)* (5) *Fullagar* J. placed too narrow a construction on the section, and *Nicholas* C.J. in Eq. was right when he said in *Union Trustee Co. of Australia Ltd.* v. *Church of England Property Trust, Diocese of Sydney* (1): "It was contended before me that the section applied only to gifts in which charitable and non-charitable objects were mentioned separately or as included in separate classes such as 'charitable or benevolent', and did not apply when the gift was directed or authorized in the one phrase to be applied to charitable and non-charitable purposes. In my judgment this limited interpretation is not justified by authority, or by the history of the section, or by the words used in it" (6). The broader view of the section was adopted by the Full Supreme Court of New Zealand in *In re Ashton (dec'd.)*; *Siddall* v. *Gordon* (3). The New Zealand section is in the same words as the Victorian section. It was held that a residuary bequest in a will "to hand any surplus to the trustees of the Church of Christ

(1) (1946) 46 S.R. (N.S.W.) 298; 63 W.N. 153.
(2) (1950) 24 A.L.J. 239; (1955) 29 A.L.J. 62.
(3) (1955) N.Z.L.R. 192.
(4) (1955) 93 C.L.R., at p. 666.
(5) (1950) V.L.R. 11.
(6) (1946) 46 S.R. (N.S.W.), at p. 302; 63 W.N., at p. 155.

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Wanganui to help in any good work" was not a valid charitable trust and failed for uncertainty but that the words in the will, "to help in any good work", could be and should be, deemed to include both charitable purposes and non-charitable purposes; that, accordingly, s. 2 of the *Trustee Amendment Act* 1935, rescued the gift from invalidity as those words can be deemed to include a charitable purpose or purposes and some non-charitable and invalid purposes; and that the gift should be upheld with the qualification that the trust funds should be restricted to charitable purposes, so that the trust became one for any good and charitable work. *Gresson* J., said "the view I take is that the language of the section indicates that a broad rather than a narrow construction is to be adopted. It is not only when some non-charitable purpose, as well as some charitable purpose *is included* that the section is to apply; it is to apply equally when some non-charitable purpose as well as some charitable purpose *could be deemed* to be included. . . . It appears to me that the terms of the section have been deliberately widely expressed to cover cases where the language of the will does not expressly state purposes charitable and non-charitable, but uses such general language that both purposes charitable and purposes non-charitable may be deemed to have been included. It seems to me illogical to suppose that the Legislature intended the beneficent effect of the section to apply where purposes charitable and purposes non-charitable were definitely expressed, but not to apply where language was used which though not specifying with particularity purposes charitable and purposes non-charitable yet comprehended both categories" (1).

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

(1) (1955) N.Z.L.R., at p. 197.

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

One can agree with his Honour that the charitable intention must appear from the trust itself if by this is meant that it is sufficient if the trust directs or allows the use of the trust funds or any part thereof for a charitable purpose. One can also agree with him that in order to satisfy the section the application of the whole fund to charity must be one way of completely satisfying the intention of the testator. But if the trust either directs or allows this to be done, the testator's intention will be completely satisfied if the trust funds are so applied and sub-s. (2) requires that the trust funds shall be applied in this and in no other way. But we must part company

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with his Honour where he says that in the case of a trust for benevolent purposes it would be pure conjecture to hold that the devotion of the trust funds to purposes which are legally charitable would in fact satisfy the testator's intention. If the trust directs or allows the trustees to spend the trust funds for purposes which include charitable purposes, how can it be said that the trust would not be completely satisfied by the expenditure of the whole of the fund for these purposes? But, be this as it may, the trust in cl. 5 clearly includes charitable purposes because the trustees are authorised to provide amenities for orders of nuns which are charitable and one way of completely satisfying the testator's intention would be to expend the whole of the trust funds in providing amenities for these communities alone. The trust in cl. 5 is therefore clearly within s. 37D. If the word "directed" stood alone the case would be clear enough. But the word "allowed" places it beyond doubt. "Directed" seems the more appropriate word where the trust itself requires the trustees to apply the trust funds for some non-charitable and invalid purpose as well as some charitable purpose, whereas the word "allowed" is more appropriate where the trust authorises the trustees in the exercise of their discretion so to apply them. It is difficult to understand what his Honour meant when he said "I do not think that it could be said that the application of this fund to orders which are in fact charities would be a complete satisfaction of any intention which has been expressed or is implicit in his will. As far as I can see, there is nothing to indicate that he had charitable orders in his mind at all". His Honour had already held that the testator, when he referred in cl. 5 to the order or orders of nuns who should benefit under its terms, intended the class to include both active and contemplative orders or in other words intended to authorise his trustees to spend the trust funds for charitable or non-charitable purposes, and to give his trustees an absolute discretion to spend the money wholly or partly upon either, from which it necessarily followed that expenditure wholly upon charitable purposes would be a complete satisfaction of any intention expressed in his will.

Section 37D was enacted pursuant to the suggestions repeated many times by *Long Innes* C.J. in Eq., when dealing with trusts of this character, that the Victorian legislation should be adopted in New South Wales: *Re Macgregor*; *Thompson* v. *Ashton* (1); *Re Price*; *Price* v. *Church of England Property Trust, Diocese of Goulburn* (2). In *Roman Catholic Archbishop of Melbourne* v.

(1) (1932) 32 S.R. (N.S.W.) 483; 49 W.N. 179.

(2) (1935) 35 S.R. (N.S.W.) 444; 52 W.N. 139.

Lawlor (1), *Dixon* J., as he then was, said: " The object of s. 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* (2)) " (3). It may be conceded that the particular occasion for enacting s. 37D as in the case of the original Victorian section was to provide against the failure for uncertainty of trusts expressed to be partly for charitable purposes and partly for indefinite non-charitable purposes where the trustee has a discretion to apply the whole trust fund for any of these purposes and no apportionment can be directed between the valid charitable and invalid indefinite purposes.

Accordingly it was contended that the failure of the trust in cl. 5 is not the kind of failure that s. 37D was intended to cure. It was passed to cure a failure where the trust includes charitable and non-charitable objects which are indefinite in the sense that they are uncertain, whereas the non-charitable purpose in the present case is not invalid for uncertainty but because it infringes the rule against perpetuities. But the question is not what mischief was the section intended to remedy but what does it mean ? It states in clear and unambiguous language that it is applicable whenever some non-charitable and invalid purpose as well as some charitable purpose is included in the purposes for which the trust funds may be spent. A non-charitable purpose which is certain but infringes the rule against perpetuities is a purpose which is non-charitable and invalid. It has the same fatal effect upon the validity of the trust as a whole as a non-charitable purpose which is invalid because it is uncertain, and there is nothing in the language of the section to suggest that it is not equally applicable to either case or indeed to any case where there is an admixture of a non-charitable and invalid purpose, whatever form the invalidity may take, and a charitable purpose.

(1) (1934) 51 C.L.R. 1.
(2) (1899) A.C. 309, at p. 315.
(3) (1934) 51 C.L.R. 1, at p. 37.

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For these reasons the appeal of the Attorney-General should be allowed and it should be declared that the trust in cl. 5 of the will of the testator is validated by s. 37D of the *Conveyancing Act*.

The appeal of the next-of-kin remains for consideration. His Honour held that the provisions of cl. 3 of the will are valid. With this we agree. They provide for an immediate gift to the particular religious community selected by the trustees from among the orders of nuns or the Christian Brothers. It is immaterial whether the order is charitable or not because the gift is not a gift in perpetuity. It is given to the individuals comprising the community selected by the trustees at the date of the death of the testator. It is given to them for the benefit of the community. It must be put " so to speak into the common chest; but when there it will be subject to no trust which will prevent the existing members from spending it as they please ". At present the gift consists of land but the selected community will be free, in accordance with its constitution, to sell and convert the land into money when it pleases and use the proceeds of sale in this way: *Cocks* v. *Manners* (1); *In re Smith*; *Johnson* v. *Bright-Smith* (2); *Bourne* v. *Keane* (3); *In re Ogden*; *Brydon* v. *Samuel* (4); *In re Price*; *Midland Bank Executor and Trustee Co. Ltd.* v. *Harwood* (5); *Perpetual Trustee Co. (Ltd.)* v. *Wittscheibe* (6). It is only necessary to add that for the reasons already given, we are of opinion that the words " Orders of Nuns " in the clause include congregations of sisters as well as orders of nuns in the strict sense and that the orders and congregations which are eligible for selection must be restricted to orders and congregations which were carrying on their activities in New South Wales at the date of the testator's death.

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

The will contains a general devise and bequest of the testator's real and residuary personal estate to his executors and trustees

(1) (1871) L.R. 12 Eq., at p. 586.
(2) (1914) 1 Ch. 937.
(3) (1919) A.C. 815, at pp. 874, 875, 916.
(4) (1933) Ch. 678, at pp. 681, 682.
(5) (1943) Ch. 422.
(6) (1940) 40 S.R. (N.S.W.) 501, at p. 507; 57 W.N. 166, at p. 167.

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

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

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

No other part of the will is material, except cl. 7 which gives certain general powers to the trustees. They are given liberty to sell and dispose of the whole or any part of the testator's real and personal estate at any time as they in their absolute discretion think proper. They are empowered until such sale to lease the whole or any part of the testator's real estate should they decide that in the best interest of the estate it would be more beneficial not themselves to carry on or manage what are described as " my said grazing properties ". They are further empowered in their discretion to carry on and manage the testator's grazing properties, and to continue any investments held by the testator at his death, for such period as they may deem proper; and for that purpose they are given a wide range of more specific powers and authorities.

The originating summons asked whether the trust as to " Elmslea " or the trust as to the residuary estate was void for uncertainty.

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

The two clauses which we have thus to consider illustrate two methods by which a testator may seek to effectuate a desire that property shall be used or applied after his death for purposes rather than for particular persons. One method is to give property to an individual or an aggregation of individuals without creating a trust, reliance being placed upon some matter personal to the donee or donees as a sufficient guarantee that the property will be applied to the desired end. If the gift is to a designated individual the fact that he occupies a particular office or position may be considered enough. If it is to a body of persons, the nature of the body or the agreement which unites its members may provide sufficient assurance. But whatever it be that is relied upon, in this class of cases the donee takes beneficially. The donee or donees may of course be either selected by the testator or left by him to be selected by someone else (e.g. the trustees of the will) from a group or class of particular persons or aggregation of persons, corporate or unincorporate, ascertained or ascertainable: cf. *Tatham* v. *Huxtable* (1). The trust is not void for uncertainty of objects unless the words of description cannot be given any clear meaning or their application is of such indefinite width that the donees, or every one of the persons or bodies from whom the donee or donees may be chosen, cannot be determined with certainty. So a trust for an institution to be selected by the trustees from those of a given description, where the selected institution is to take the whole beneficial interest absolutely, is valid unless " there is such uncertainty in the field of selection that it is impossible for the selector to determine from which institutions he is to select ": *In re Ogden*; *Brydon* v. *Samuel* (2); *Inland Revenue Commissioners* v. *Broadway Cottages Trust* (3); *In re Sayer*; *MacGregor* v. *Sayer* (4).

The other method is to refrain from giving the beneficial interest to any particular individual, and, instead, to create a trust for the application of the property for the desired purposes. It is only in relation to a disposition in this form that the law of charities has

(1) (1950) 81 C.L.R. 639.
(2) (1933) Ch. 678, at p. 682.
(3) (1955) Ch. 20.
(4) (1957) Ch. 423.

to be considered. It has to be considered because of the general principle that a trust must fail unless there is " somebody in whose favour the court can decree specific performance ": *Morice* v. *Bishop of Durham* (1). (I do not stay to consider the anomalous line of cases relating to the maintenance of animals and tombs, or cases like *In re Thompson* ; *Public Trustee* v. *Lloyd* (2) which may need to be reconsidered in the light of the clear statement of the Court of Appeal that a valid power is not to be spelt out of an invalid trust : *Inland Revenue Commissioners* v. *Broadway Cottages Trust* (3).) It follows from the general principle that there must be someone definitely pointed out by the will as an object of the trust, or someone to whom the law gives the same right of suit as if he were so pointed out. Only the Crown as *parens patriae* enjoys such a right, and it is a right in respect only of such trusts as are in the legal sense charitable. The second method of disposition therefore requires for its validity a restriction of the purposes to which the property may be applied, so that only purposes legally charitable are included. To that extent, but to that extent only, certainty in the objects of the trust is required. As to property which, consistently with the will, could be applied to non-charitable purposes, the absence of definite objects spells unenforceability and therefore invalidity. The cause of invalidity is not any failure by the testator to declare his intention clearly—he may in fact have done so with precision, though it is true that in many instances the description of purposes is vague and shadowy—but the fact that it is of the very nature of his intention that no person shall have an enforceable interest.

As regards property which cannot be applied under the trust to other than charitable purposes, not only is it true that the intentional uncertainty as to the particular individuals who may benefit does not make the trust invalid, but there is a further important consequence of the charitable nature of the purposes. This is that the corpus of the fund may be devoted in perpetuity to the production of income for application to those purposes ; that is to say there may be a perpetual endowment for those purposes. In many reported cases it has been the tendency to perpetuity which has seemed to call for a decision as to whether the trust is charitable. But it is true nevertheless that whenever a will discloses an intention to create a trust for purposes not confined to the benefit of particular individuals, either selected by the testator or to be selected

(1) (1805) 10 Ves. 521 [32 E.R. 947].
(2) (1934) Ch. 342.
(3) (1955) Ch., at p. 36.

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from a group or class of particular individuals, the question whether the purposes are charitable at once arises. If they are, the trust is valid, whether there is or is not a tendency to perpetuity. If they are not, the trust is void for uncertainty of objects, and the question of perpetuity need not be decided. The case in which it is essential to consider whether a perpetual endowment is intended is the case where the gift is for the benefit of particular individuals; and then the case is outside the sphere of charity.

Clause 3 of the will adopts what I have called the first method. It describes large, but none the less quite definite, bodies of persons, and gives the whole beneficial interest in "Elmslea" absolutely to such of those bodies as the trustees select. There is a preliminary question as to the meaning of the expression "Order of Nuns", because the canon law of the Roman Catholic Church distinguishes between orders of nuns and congregations of sisters, reserving the first title for organisations which take solemn vows and the second for organisations which take simple vows. *Myers* J. attributed to the testator an observance of this distinction, but without, I think, a sufficient warrant. The evidence shows that it is not a distinction which is generally known to the laity, and that the terms "order", "congregation", "nun" and "sister" are commonly used indiscriminately, by laymen and clergy alike, when there is no call for canonical precision. The will itself, as I have already mentioned, contains in cl. 4 strong evidence that the testator himself was not mindful of the distinction. In my opinion the class of organisation from which the trustees may make their selection under cl. 3 includes, besides the Christian Brothers, all orders of nuns and congregations of sisters of the Roman Catholic Church. (I would add, whether they are represented in New South Wales or not: see *Gleeson* v. *Phelan* (1); but probably this is of no practical importance.) This construction makes the ambit of choice wider than his Honour considered that it was, but its scope is none the less definite to a degree. The disposition therefore does not fail for want of certainty in the range of objects eligible for selection: cf. *Inland Revenue Commissioners* v. *Broadway Cottages Trust* (2). And although it is obvious that the testator was led to make the gift by a desire to assist the general purposes of the bodies to which cl. 3 refers, there is no attempt to impose any trust upon the body which the trustees select. That body will take immediately and absolutely, and may expend immediately

(1) (1914) 15 S.R. (N.S.W.) 30, at p. 36; 32 W.N. 2, at p. 3.

(2) (1955) Ch., at pp. 35, 36.

the whole of what it receives. There is no attempt to create a perpetual endowment. Some suggestion was made in argument that such an attempt is to be discerned when cl. 3 is read with cl. 7 ; but when a body is selected by the trustees the property will be at home, and there is nothing in cl. 7 to prevent the body from insisting upon immediate and complete realisation and so terminating the powers which cl. 7 confers. The rules of the body may well place limits upon the uses to which the property or its proceeds may be put ; but such rules, binding though they be upon the members *inter se*, do not affect the quality of the gift : it is an absolute gift to all the members, so that by unanimous agreement they might even divide it amongst themselves : *In re Smith* ; *Johnson* v. *Bright-Smith* (1). This being the case, there is no occasion to inquire as to the charitable or non-charitable character of the bodies amongst which the selection is to be made. As Lord *Tomlin* said of the gift in *In re Ogden* ; *Brydon* v. *Samuel* (2) : " The validity of the gift does not depend upon its being charitable, but upon its being an absolute gift " (3). To uphold it is in accordance with a long line of authorities, of which only a few need be mentioned : *Cocks* v. *Manners* (4) ; *Van Kerkvoorde* v. *Moroney* (5) ; *Bowman* v. *Secular Society Ltd.* (6) ; *In re Cain* (7).

I turn now to cl. 5. There is here no gift to any particular person or body of persons, selected or to be selected. There is nothing but an attempt to bind the trustees of the will to a use of the income, and of the proceeds of realisation of the corpus, for purposes which will enure, not for the benefit of particular persons, but for the indefinite membership, as it may exist from time to time, of such communities of religious women as happen to be located in particular convents. Such a trust must be void for uncertainty of objects, unless it is to be construed as limited to communities which exist for the pursuit of legally charitable purposes. Apart from statute, it is clear that it cannot be so construed. The evidence in this case shows, as has been proved in other cases, that the communities of religious women to be found in convents may have any of a wide variety of objects. Some conduct schools, some care for the aged or for the sick or the poor. These are undoubtedly charitable, and if cl. 5 referred only to such convents as house members of religious societies carrying on such activities the trust would be a good charitable trust : cf. *Attorney-General* v. *Bishop of Chester* (8). But the religious women in some convents

(1) (1914) 1 Ch. 937, at p. 948.
(2) (1933) Ch. 678.
(3) (1933) Ch., at pp. 681, 682.
(4) (1871) L.R. 12 Eq. 574.
(5) (1917) 23 C.L.R. 426.
(6) (1917) A.C. 406.
(7) (1950) V.L.R. 382.
(8) (1785) 1 Bro. C.C. 444 [28 E.R. 1229].

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devote themselves wholly to pious contemplation and personal sanctification; and, because in the nature of things it is impossible to prove by evidence admissible in courts of law that benefit results to the public, the courts are bound to hold that the purposes of these communities are outside the legal category of charity: *Gilmour* v. *Coats* (1).

In this situation the trust declared in cl. 5 must be held void unless its construction is modified, and its validity saved, by s. 37D of the *Conveyancing Act* 1919-1943 (N.S.W.). This somewhat difficult provision makes the following provisions: "(1) No trust shall be held to be invalid by reason that some non-charitable and invalid purpose as well as some charitable purpose is or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed. (2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or of any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed."

The section postulates a trust under which the trust fund or part of it must or may be applied to or for purposes of which one is a charitable purpose, and that because of that purpose the trust would be valid were it not that, in addition, "some non-charitable and invalid purpose" is included or could be deemed to be included. "Some non-charitable and invalid purpose" clearly means some purpose which is neither charitable nor for the benefit of any particular beneficiary either selected or to be selected. Some difference of opinion as to the scope of the section has emerged since its prototype was enacted in Victoria as s. 2 of the *Charitable Trusts Act* 1914 (Vict.). *Myers* J. in the present case reached the conclusion that the section applies only where a charitable intention appears from the trust instrument, and the application of the whole fund to charity is one way of completely satisfying the testator's intention. His Honour considered that a trust for such purposes as the trustee may select, or for benevolent purposes, would be outside the section because no charitable intention would appear. This construction of the section is based upon the view that the mischief aimed at is that which is felt to exist when a trust, in the terms of which an intention to benefit charity is shown, is nevertheless defeated because an intention to benefit non-charitable purposes also is shown. A wider view of the nature of the mischief

(1) (1949) A.C. 426.

led *Nicholas* C.J. in Eq. to give the section a wider meaning: *Union Trustee Co. of Australia Ltd.* v. *Church of England Property Trust, Diocese of Sydney* (1). Other learned judges who have considered the matter have taken some the one view, some the other. With all respect to those who prefer the narrower view, it seems to me that the words of the section give more support to the wider. The section asks, in relation to every trust which directs or allows an application of trust funds to or for purposes, (1) whether the purposes referred to include any charitable purpose, and, (2) if so, whether they include also, or could be deemed to include also, any non-charitable and invalid purpose. The answer, I think, must be yes to both branches of the question, whenever the description of the purposes comprehends, but is not certainly confined to, purposes legally charitable. If a charitable purpose and a non-charitable purpose are separately described, there is no difficulty. That is an obvious case for the application of the section; for the invalidity of the trust apart from the section may be said to be due to the fact that, there being no definite beneficiary, the charitable purpose which, if it stood alone, would save the trust, cannot save it because a non-charitable and invalid purpose "is included". If, on the other hand, there is a composite description of the purposes of the trust, the invalidating feature may be that a purpose which is neither charitable nor for the benefit of any particular beneficiary "is included", but alternatively it may be that (to use some words of Lord *Davey* in *Hunter* v. *Attorney-General* (2)), "the description includes purposes which may or may not be charitable (such as 'undertakings of public utility'), and a discretion is vested in the trustees" (3). In the second case, it would not be incorrect to say that the trust is invalid because some non-charitable and invalid purpose "could be deemed to be included". It is difficult to see to what other case the words "could be deemed to be included" can possibly apply; and if, as I should conclude, those words show that that case was contemplated by the legislature when enacting the section and was intended to be within its application, the view must be untenable that the only case covered by the section is that in which an intention to benefit charitable purposes is separately disclosed. Against the view which I have described as the wider view an argument has been put by way of a *reductio ad absurdum*. The argument is that if the section applies whenever a dissection of the purposes which are made the objects of the trust would yield both charitable and non-charitable purposes, it must apply even

(1) (1946) S.R. (N.S.W.) 298; 63 W.N. 153.
(2) (1899) A.C. 309.
(3) (1899) A.C., at p. 323.

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to a case such as that which came before *O'Bryan* J. in *In re Hollole (dec'd.)* (1), where there was a gift to a trustee " to be disposed of by him as he may deem best ". The learned judge held that this gift was not saved by the section. In my opinion the decision was clearly correct, because the section applies only where the trust fund or part of it is directed or allowed to be applied for some designated purposes, the designation or designations extending into but also beyond the area of charity. The key to the section, I think, is to be found in the expression " included in any of *the purposes* to or for which " etc., considered with the fact that the section is dealing with cases of invalidity arising from the nature of those purposes. For the section to apply, purposes must be designated as the objects of the trust, and they must be purposes not for the benefit of definite beneficiaries. But I see nothing in the section to suggest that it means to discriminate between, on the one hand, cases where charitable purposes and non-charitable and invalid purposes are designated by separate descriptions and, on the other hand, cases where they are designated by a composite description.

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

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

Appeal of the Attorney-General allowed. Discharge so much of the order appealed against as declares that upon the true construction of the will of Francis George Leahy deceased and in the events which have happened the trust directed therein as to the rest and residue of his estate both real and personal is void.

(1) (1945) V.L.R. 295.

In lieu thereof declare that the said trust is confined to the provision of amenities in any of the ways mentioned in cl. 5 of the said will in respect of such convents only as are exclusively devoted to charitable purposes and is to that extent valid.

Appeal of Doris Caroline Mary Leahy and others dismissed.

Costs of all parties to the appeals as between solicitor and client to be paid out of the estate.

Solicitor for the Attorney-General in both matters, *F. P. McRae*, Crown Solicitor for New South Wales.

Solicitors for certain next-of-kin in the first matter and for the appellants in the second matter, *Taylor, Kearney & Reed*, agents for *Hanley, Reddy & Doolan*, Crookwell.

Solicitors for the trustees in the first matter and for other respondents in the second matter, *Murphy & Moloney*, agents for *J. B. & L. A. Mullen*, Goulburn.

J. B.