

9, 1959

IN THE PRIVY COUNCIL

Appeal No.28 of 1958.

75573

O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA

I N T H E M A T T E R of the TRUSTS of the WILL
of FRANCIS GEORGE LEAHY Late of Harefield
and Bungendore in the said State of New South Wales
deceased.

B E T W E E N :

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
12 MAR 1960
25 RUSSELL SQUARE
LONDON, W.C.1.

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

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

- and -

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

CASE FOR THE RESPONDENT TRUSTEES JOHN
FRANCIS DONNELLY, CLEMENT OSBORNE
WRIGHT and JOHN BEDE MULLEN.

30 This is an Appeal from an Order dated 11th
March 1958 of the High Court of Australia (Dixon
C.J., McTiernan, Williams, Webb and Kitto JJ.).
By its said Order the High Court allowed an appeal
by the Respondent Attorney General from a Decretal
Order made on 11th April 1957 by the Supreme Court

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of New South Wales in its Equitable Jurisdiction (Myers J.) and dismissed a second appeal by the present Appellants from another portion of the said Decretal Order.

p.1 The said Decretal Order was made in relation
p.5 to two questions asked in an Originating Summons brought to interpret parts of the Will of the said Francis George Leahy deceased.

p.5 2. The Respondents John Francis Donnelly, Clement Osborne Wright and John Bede Mullen are the Executors and Trustees of the Will (dated 16th February, 1954) of Francis George Leahy who died on 11th January, 1955. Probate of his said Will was, on 6th July 1955 granted to the said Respondent Trustees by the Supreme Court of New South Wales in its Probate Jurisdiction. The value of the Estate, of the said deceased, for purposes of Death and Estate Duty was £348,791. 2.1. The Testator left him surviving Doris Caroline Mary Leahy his widow and Francis John Leahy, Henry Joseph Leahy, Dorothy Margaret Hall, James Patrick Leahy, Michael Maurice Leahy, George Bonaventure Leahy, Genevieve Mary Reddy, his children. They were all aged over 21 years at the time of his death and no child predeceased the Testator. They are the present Appellants. 10 20

p.1 3. By Originating Summons dated 9th July 1954 the following questions in respect of the said Will were submitted to the Court:

"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. 30

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." 40

p.7, 1.18 The first question related to Clause 3 of the Will, which was 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."

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10 4. Argument on the said questions was heard by Myers J. on 15th and 21st February and 8th March 1957 and judgment was delivered on 21st February, 8th March and 11th April 1957. On the hearing of the said Originating Summons and on the hearing of the Appeal in the High Court of Australia Counsel for the present Respondent Trustees was the only Counsel to submit argument that Clause 3 of the said Will was valid on the ground that it constituted an absolute gift to the members of the Order selected by the said Trustees. This argument was upheld by the Supreme Court and by Williams, Webb and Kitto JJ. in the High Court. Counsel for the present Respondent Trustees did not submit an independent argument on any other point either in the Supreme Court or the High Court.

p.34

The part of the order of the said Supreme Court relating to the first question submitted was as follows:-

p.43,1.36

30 "On the true construction of the Will of the abovenamed Testator Francis George Leahy and in the events which have happened the Trust directed therein in respect of the property known as "Elmslea" situated at Bungendore is not void for uncertainty or any other ground and that on the true construction of the said Will and in the events which have happened the trust directed therein as to the rest and residue of the Estate of the said Testator both real and personal is void."

40 5. From the decision of the Supreme Court there were two appeals to the High Court of Australia, one by the present Appellants in respect of Clause 3 and the other by the Attorney General for New South Wales in respect of Clause 5.

pp.44 & 47

The grounds of appeal by the present Appellants were as follows:

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1. That His Honour was in error in holding that the said trust was not void for uncertainty

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or on any other ground.

2. That His Honour was in error in holding that the reference to "orders to nuns" must be taken to mean orders of nuns of the Roman Catholic Church anywhere in the world.
 3. That His Honour was in error in holding that the gift in the will of the property "Elmslea" did not create a perpetuity.
 4. That His Honour was in error in holding that the said gift was an absolute gift to the order. 10
 5. That His Honour was in error in holding that there was a valid trust and that the trustees are at liberty to select as the beneficiary any order of nuns of the Roman Catholic Church anywhere in the world or the Christian Brothers.
 6. The High Court (Dixon C.J., McTiernan, Williams, Webb and Kitto JJ.) heard the appeal on 21st, 22nd and 25th November 1957 and decision was reserved. Judgment was delivered on 11th March 1958. By its orders the Court unanimously dismissed the appeal of the present Appellants and allowed the appeal of the Attorney General. The decision of the High Court is reported in (1958) A.L.R. 257. 20
pp.92 & 94
- On the hearing of the appeal to the High Court the following arguments were submitted on behalf of the Respondent Trustees:- 30
1. That on its true construction clause 3 of the Will conferred an absolute gift upon the Order selected by the Trustees.
 2. That on the true construction of the said clause the gift was an absolute gift to the individuals who are members of the Order at the time of the gift.
7. Dixon C.J. and McTiernan J. in a joint judgment refuted the arguments submitted on behalf of the present Respondent Trustees and held that unless the trust is capable of being supported wholly or in part as a charity it should fail:- see (1958) A.L.R. at p. 264. 40
p.49

8. Williams, Webb and Kitto JJ. upheld the arguments submitted on behalf of the present Respondent Trustees and the reasons of their Honours are reported:- Williams and Webb JJ. (1958) A.L.R. at p. 277, and Kitto J. (1958) A.L.R. at p. 281.

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pp.64 & 82

10 9. The present Respondent Trustees respectfully submit that the judgment of Myers J. and the Judgments of Williams, Webb and Kitto JJ. on the construction of clause 3 of the Will are correct.

pp.34, 64
& 82.

10. On the hearing of this appeal the following arguments are intended to be submitted on behalf of the present Respondent Trustees:-

1. That on its true construction clause 3 of the Will conferred an absolute gift upon the Order selected by the Trustees.
2. That on the true construction of the said clause the gift was an absolute gift to the individuals who are members of the Order at the date of the gift.
3. That it is not material whether the Order selected by the Trustees was charitable in the legal sense or not.

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11. The present Respondent Trustees respectfully submit that the Order of the High Court of Australia, on the true construction of Clause 3 of the Will, was correct and that this Appeal so far as it relates to Clause 3 of the Will ought to be dismissed for the following (amongst other)

p.94

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R E A S O N.

BECAUSE Clause 3 is valid as an absolute gift in favour of whatever Order of Nuns was chosen by the Trustees or the Christian Brothers Order as the case may be, as was held by Myers J., Williams, Webb and Kitto JJ.

D.G. MCGREGOR.

B.P. MACFARLANE

No. 28 of 1958

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE HIGH COURT OF
AUSTRALIA

re TRUSTS of the WILL of FRANCIS
LEAHY deceased

LEAHY and others

- v -

THE ATTORNEY-GENERAL
for New South Wales

C A S E

- for -

RESPONDENT TRUSTEES DONNELLY,
WRIGHT and MULLEN.

BELL, BRODRICK & GRAY,
The Rectory,
29, Martin Lane,
Cannon Street, E.C.4.