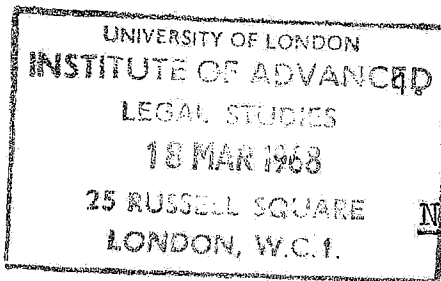


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1967 / 23



IN THE PRIVY COUNCIL

No. 18 of 1967

O N A P P E A L S

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

In suit instituted by Originating Summons No. 754 of 1964.

IN THE MATTER of the trusts of the Will of EDMUND RICHARD EMIL RESCH
deceased

A. BETWEEN

VERA CAROLINE LE CRAS (Defendant) Appellant

10 - and -

PERPETUAL TRUSTEE COMPANY LIMITED (Plaintiff) Respondent

TRUSTEES OF THE SISTERS OF CHARITY OF AUSTRALIA
 EDNA MAVIS SKEWES
 ALICE NOLAN ELPHICK
 FREDERICK McDONOUGH
 FAR WEST CHILDREN'S HEALTH SCHEME
 THE SPASTIC CENTRE
 ROYAL NEW SOUTH WALES INSTITUTION FOR DEAF AND BLIND CHILDREN
 THE SALESIAN SOCIETY INCORPORATED
 20 STEPHEN de BONO and
 THE ATTORNEY GENERAL FOR NEW SOUTH WALES
 (Defendants) Respondents

AND

B. BETWEEN

FAR WEST CHILDREN'S HEALTH SCHEME
 THE SPASTIC CENTRE
 ROYAL NEW SOUTH WALES INSTITUTION FOR DEAF AND BLIND CHILDREN
 (Defendants) Appellants

- and -

PERPETUAL TRUSTEE COMPANY LIMITED (Plaintiff) Respondent

TRUSTEES OF THE SISTERS OF CHARITY OF AUSTRALIA
EDNA MAVIS SKEWES
ALICE NOLAN ELPHICK
FREDERICK McDONOUGH
THE SALESIAN SOCIETY INCORPORATED
VERA CAROLINE LE CRAS
STEPHEN de BONO
BRIAN de BONO and
THE ATTORNEY GENERAL FOR NEW SOUTH WALES

(Defendants) Respondents

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Record

CASE FOR THE RESPONDENT THE SALESIAN SOCIETY
INCORPORATED

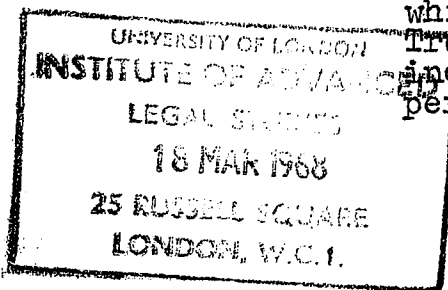
A. INTRODUCTORY. (PARAGRAPHS 1-5)

- Page 188 1. These Appeals are brought to Her Majesty in Council pursuant to final leave to appeal granted by Order made by the Supreme Court of New South Wales (Street J.) on the 16th December, 1966. The said final leave to appeal to Her Majesty in Council was in respect of certain parts of a Decretal Order made by the said Supreme Court (Jacobs J.) on the 27th July, 1966, in a suit instituted by Originating Summons for the determination of certain questions relating to the true construction of the last Will and Testament and Three Codicils thereto of Edmund Richard Emil Resch deceased (hereinafter referred to as "the Testator").
- Page 172
- Page 180 2. By Order made on the 26th August, 1966, by the Supreme Court of New South Wales (Street J.), granting conditional leave to appeal, these appeals were consolidated.
- Page 1
- Page 3 (1.22) 3. By the said Originating Summons filed herein application was made to the Supreme Court of New South Wales in its Equitable Jurisdiction for the determination of the following questions namely:
 - 1. Whether upon the true construction of the Will of the Testator and in the events which have happened the direction to the Trustee to pay two-thirds of the net income of the residue of his real and personal estate to the Sisters of Charity

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as therein provided was a valid bequest?

2. If the answer to question (1) is "No" upon what trusts should the Trustee hold the net income and the corpus of the residue of the Testator's real and personal estate? Page 3 (1.29)

10 3. Whether by the Codicil to his Will which Codicil is dated 5th September, 1963 the Testator revoked the provisions of the two Codicils admitted to probate and dated 22nd May, 1962 and 24th September, 1962 respectively or either of them and if so which of them? Page 4 (1.2)

20 4. If the answer to question 3 is "No" whether upon the true construction of the Testator's Will and in the events which have happened Stephen de Bono is entitled to receive out of the income of the residue of the Testator's real and personal estate an annuity during his lifetime of :- Page 4 (1.9)

- (a) £2,000. per annum; or
- (b) £4,000. per annum; or
- (c) some other and if so what annuity?

5. Whether upon the true construction of the Testator's Will and in the events which have happened the bequest to Brian de Bono of "other personal jewellery" includes :- Page 4 (1.19)

- 30 (a) only jewellery related to the Testator's personal use and enjoyment; or
- (b) some other and if so what jewellery?

4. The Respondent The Salesian Society Incorporated does not wish, on the hearing of these Appeals, to make any submissions in respect of the declaration and Orders made in the said Decretal Order concerning the matters raised in Questions 1, 3, 4 and 5 above.

40 5. The Respondent The Salesian Society

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Incorporated submits, however, that in the event of Question 1. being determined in the negative the answer to Question 2. should be:

Upon trust for the Far West Children's Health Scheme, The Spastic Centre, The Salesian Society Incorporated and the Royal New South Wales Institution for Deaf and Blind Children in equal shares.

B. MATERIAL PROVISIONS OF THE TESTATOR'S WILL
(PARAGRAPH 6)

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Page 12

6. By his Will, made on the 5th December 1960, the Testator gave devised and bequeathed the residue of his real and personal estate to his Trustee upon certain trusts. The relevant trusts are set forth in the Will in the following terms :

Page 21 (1.3)

"I DIRECT my said Trustee from time to time to pay or apply the income of the residue of my real and personal estate and of the investments for the time being representing the same in paying or discharging all costs charges and expenses of my said Trustee of and incidental to the administration of the trusts of this my Will and subject thereto to pay two-third parts of the net income of the said residue and of the investments representing the same to the SISTERS OF CHARITY for a period of two hundred years or for so long as they shall conduct ST. VINCENTS PRIVATE HOSPITAL whichever shall be the shorter period to be applied for the general purposes of such Hospital and upon the expiration of the said period of two hundred years or upon the said Sisters of Charity ceasing to conduct such Hospital whichever shall first happen to pay the said two-third parts of the said net income to FAR WEST CHILDRENS HEALTH SCHEME of Manly THE SPASTIC CENTRE of Mosman BOYS' TOWN of Engadine and ROYAL NEW SOUTH WALES INSTITUTION FOR DEAF AND BLIND CHILDREN of Sydney in equal shares and to pay one-third part of the said net income to the said FAR WEST CHILDRENS HEALTH SCHEME, THE SPASTIC CENTRE, BOYS' TOWN and ROYAL NEW SOUTH WALES INSTITUTION FOR DEAF AND BLIND CHILDREN in

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equal shares for the general purposes of such institutions PROVIDED that if any of the said institutions shall amalgamate with or be absorbed by or otherwise become merged with any other charitable institution its share of income shall thenceforth be paid to the institution with or by which such institution shall amalgamate be absorbed or merged PROVIDED HOWEVER that in the event of any institutions entitled to a share of income as aforesaid being dissolved or ceasing to exist without any such amalgamation absorption or merger as aforesaid then the share of income payable to it shall thenceforth be paid to the other institution or institutions for the time being entitled to receive a share of the said income AND in the event of all the said institutions being dissolved or ceasing to exist without any such amalgamation absorption or merger as aforesaid then I DIRECT my said Trustee to pay or apply the income of the said residue of my estate out of investments for the time being representing the same to such institution or institutions person or persons for such purposes and objects for the relief care education and/or maibtenance of poor and/or sick persons in New South Wales as the Supreme Court of New South Wales in its Equity Jurisdiction shall upon application made by my said Trustee from time to time determine AND I DECLARE that the receipt of the Secretary or Treasurer or other proper officer of the respective institutions as aforesaid shall be sufficient discharge to my said Trustee for all moneys paid to the said institutions respectively and my said Trustee shall not be concerned or bound to enquire into the application thereof AND I DECLARE that any such institution entitled to a share of the income of my estate shall not be entitled to receive any part of the capital of my estate....."

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C. DECISION OF SUPREME COURT IN THIS CASE
(PARAGRAPH 7)

7. Jacobs, J. found that Question 2 did not

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arise for the reason that the answer to Question 1 was in the affirmative. His Honour having set out the provisions set forth above, said in his judgment :

Page 146 (1.48)

"The initial question which arises on these provisions is whether the gift of two-third parts of income to The Sisters of Charity for the general purposes of St. Vincents Private Hospital is a valid gift. If this question were answered in the negative questions would arise on the disposition of the income thus undisposed of, on whether it should go to the institutions intended to take at the end of two hundred years or whether it should be applied cy-pres because of a general charitable intention or whether it passes as on intestacy. However, upon the conclusion which I have reached that the gift in question is valid, these questions do not arise."

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D. FACTS RELATING TO THE RESPONDENT
(PARAGRAPHS 8-13)

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8. The respondent The Salesian Society Incorporated is a body corporate and was incorporated pursuant to the provisions of the Roman Catholic Church Communities Lands Act 1942-1948.

9. (a) The Roman Catholic Church Communities Lands Act, which is Act No.23 of 1942, is entitled : "An Act to make certain provisions relating to property real and personal held upon any trust for or for the use, benefit or purposes of certain orders, congregations, communities and associations of the Roman Catholic Church in New South Wales; and for purposes connected therewith."

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(b) The preamble to the said Act reads, so far as is relevant: "Whereas property real and personal held on trust for or for the use or benefit or for the purposes of certain orders, congregations, communities and associations of the Roman Catholic Church in New South Wales is

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vested in many different bodies of trustees, and, owing to deaths and other causes, the necessity for the appointment of new trustees frequently arises: AND whereas it is expedient that bodies corporate be created for the purpose of holding, managing and dealing with property so held, that provision be made for the vesting in bodies corporate to be created by this Act of real property so held....."

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(c) The most material provisions of the said Act are as follows :

"3. There shall be, for each community, trustees of community land, who shall be the provincial and the community consultors of that community.

4. (1) The trustees of community land for each community shall, by virtue of this Act, be a body corporate, having perpetual succession and a common seal, and being capable of acquiring, holding and disposing of any property, real or personal, and of suing and being sued in its corporate name and of doing and suffering all such acts and things as bodies corporate may by law do or suffer.

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(2) The corporate names of the trustees of community land for the several communities shall be (certain communities are named)

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.....
and for each community named in the first column of the second Schedule to this Act shall be the corporate name set out opposite thereto in the second column of such Schedule. "

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9. Subsection (2) of Section 2. of the said Act provides:

"(2) (a) The Governor may -

(i) upon the written request of the Provincial-General, Provincial, Superior or President of any order, congregation, community, association or society of the church which is not a community within the meaning of this Act, and

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(ii) upon the presentation of a certificate, under the hand and seal of the Bishop of the Diocese within which the principal site or house in New South Wales of such order, congregation, community, association or society is situated, and to the effect that the Bishop of such Diocese approves of such order, congregation, community, association or society being a community for the purposes of this Act,

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by Proclamation published in the Gazette, add the name of such order, congregation, community, association or society to the first column of the Second Schedule to this Act, and add to the second column of the Second Schedule, the corporate name of the trustees of such order, congregation, community, association or society.

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(b) The Second Schedule with the additions made thereto pursuant to the provisions of paragraph (a) of this subsection shall be deemed to be the Second Schedule to this Act."

10. The following Proclamation was published in the Government Gazette of the State of New South Wales, No. 92, of the 12th August 1960 :

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"I, Lieutenant-General Sir Eric Winslow Woodward, Governor of the State of New South Wales, with the advice of the Executive Council and in

pursuance of the provisions of sub-section (2) of the Roman Catholic Church Communities Lands Act 1942-1948 do, by this Proclamation, hereby add the name of the undermentioned community to the first column of the Second Schedule to the said Act, and add to the second column of the Second Schedule thereto the undermentioned name as the corporate name of the Trustees of such community.

10 Canonical Name: Society of St. Francis of Sales.

 Corporate Name: The Salesian Society Incorporated."

11. The constitutions of the Society of St. Francis of Sales, which is commonly known as The Salesian Society, set out the object and aim of the Society in the following terms:

20 "1. The object of the Salesian Society is that its members, whilst striving to attain Christian perfection, shall be engaged in the various works of charity, both spiritual and temporal, on behalf of the young, especially of the poorer classes.
.....

30 4. The first work of charity shall be to gather together poor and neglected boys, in order to instruct them in our Holy Religion, especially on Sundays and Festivals. For this purpose Oratories shall be established and developed more and more, whenever the local circumstances and the ecclesiastical authorities permit.

40 5. Since it often happens, however, that boys are found so neglected, that, unless they are received into a school, every care would be expended upon them in vain, every effort shall be made to open Houses in which, through the assistance of Divine providence, they shall be provided with lodging, food and clothing. These Houses shall have as their scope, not only to give the boys religious instruction, but also to train them to earn an honourable livelihood.

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Hence our Schools for Trades should not have profit for their object, but should be real Schools of Arts and Trades. The management, however, should be such that the boys shall work at their trade, and the workshops be made productive in a manner compatible with their condition as schools. The same applies to agricultural schools."

12. The respondent The Salesian Society Incorporated, in accordance with its above-mentioned objects, conducts Boys' Town which is an institution for needy and underprivileged boys between the ages of 11 and 16 years. The boys who live at Boys' Town are either orphans, or children from broken homes, or children who have been placed in the care of the Salesian Society by Courts because they have committed minor offences or because their home environment is unsuitable. The boys are provided with food, accommodation and academic and technical education to School Certificate Standard. Those in need are also provided with clothing. The institution is not self-supporting and relies upon donations, legacies, proceeds of appeal and the like. 10
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13. In argument before Jacobs, J. it was not disputed by any party to the proceedings that the Testator's bequest to the respondent The Salesian Society Incorporated and to the respondents Far West Childrens Health Scheme, The Spastic Centre, and The Royal New South Wales Institution for Deaf and Blind Children was a valid charitable gift. 30

E. RESPONDENT'S SUBMISSIONS ON QUESTION 2.
(PARAGRAPHS 14-21)

14. A preliminary question to be determined, on this aspect of the appeal, is whether the interest of the respondent The Salesian Society Incorporated and the other three named charities in the two-thirds part of the income of the residue of the Estate was vested as from the death of the Testator. This gives rise to the further questions whether the provisions of the Will of the Testator concerning the disposition 40

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of the gift to the respondent The Salesian Society Incorporated in the event of the respondent's ceasing to exist or amalgating with some other charity constituted a condition precedent or a condition subsequent. It is submitted that the relevant provisions constitute a condition subsequent for the following reasons:

- 10 (a) The form of the provisions is that of a condition subsequent. (Egerton-v-Brownlow (1853) 4 H.L.C. 1; Clavering-v-Ellison (1859) 7 H.L.C. 707; In re Sandbrook, Noel-v-Sandbrook, (1912) 2 Ch. 471; In re Borwick, Borwick-v-Borwick (1933) Ch. 657; In re Allen Deceased: Faith-v-Allen (1953) Ch.820:
- 20 (b) The provisions in question relate not only to the two-thirds part of the income of the residue of the estate bequeathed to the respondent together with the three other named charities on the determination or failure of the gift of income to the Sisters of Charity but also to the one-third share of income from residue for which the said respondent and the said three other named charities became immediately entitled upon the death of the Testator:
- 30 (c) The word "thenceforth" appearing in the relevant provisions of the Testator's Will clearly indicates that the events referred to were intended by the Testator to bring about a change in entitlement in the circumstances postulated, that is, the circumstances postulated were intended by the Testator to divest interests already vested and were not intended to operate as a condition precedent to the vesting in interest of the relevant gifts:
- 40 (d) The conclusion which flows from the words used by the Testator is fortified by the presumption of law in favour of early vesting of gifts, and by the principle of construction that where it is doubtful whether a condition be precedent or subsequent the Court prima facie treats it as being subsequent (see Sifton-v-Sifton (1938) A.C.656 at 676,

Page 22 (1.2) and
Page 22 (1.9)

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and In re Greenwood, Goodhart-v-Woodhead
(1903) 1 Ch. 749).

15. In the light of 14. above it is submitted that the whole of the interest of the respondent The Salesian Society Incorporated in the income of the residue of the estate of the Testator was and is vested.

16. The validity of the Testator's bequest in favour of the Sisters of Charity depends upon the conclusion that the bequest is charitable. A gift of income for two hundred years would "tend to perpetuity" and be void upon grounds of public policy unless it were for charitable purposes. (Generally, see Sibley-v-Ashforth, 1905 1 Ch.535 at 542 per Farwell, J.: Jarman on Wills, 8th Ed. p. 284 et seq: Theobald on Wills, 12th Ed. Article 1471 et seq.)

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17. It is submitted that if the said bequest to the Sisters of Charity is not charitable, and therefore fails because it tends to perpetuity, then, in accordance with the principles relating to acceleration of remainders, the Testator's ultimate gift of two-thirds of the income of the residue of his estate to the respondent The Salesian Society Incorporated and the three other named charities takes effect immediately so that the whole of the income of the residue of the estate is to be held upon trust for the said four charities.

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18. There are many circumstances in which estates in remainder have been held to accelerate upon the failure of prior particular estates. Thus, it has been held that if there is a devise to a person for life with remainder in fee, and the life estate fails either because the life tenant has attested the will, or the testator has revoked the life estate, or the life estate has been determined by a forfeiture clause, or has been disclaimed, then the remainder is accelerated and the gift in remainder takes effect immediately. (Jull-v-Jacobs (1876) 3 Ch.D.703: In re Clarke (1885) 31 Ch.D.72: In re Hodge, Midland Bank Executor & Trustee Company Limited-v-Morrison (1943) 1 Ch.300: In re Hatfield's Will Trusts (1958) 1 Ch.469: Tompkiss-v-Simmons (1930)

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44 C.L R. 546.)

19. The rule which gives rise to accelerations in the cases referred to above is a rule of construction. It was explained by Simonds, J. (as he then was) in In re Hodge, Midland Bank Executor & Trustee Company Limited-v-Morrison (supra) as follows :

10 "The principle of acceleration was first established in regard to remainders in real estate, and probably the origin is to be found in the technicalities of real property law. However that may be, the principle became extended to interests in personalty, and, although Counsel have not found any authority where it has been applied except in the case of what may be called a residuary interest, I see no reason why it should not be appropriate in the case of any interest, whether partial, such as an annuity, or residuary. The principle is the same. An interest is postponed that a prior interest may be enjoyed. If that prior interest is determined, whether by the death of a prior beneficiary or for any other cause, the reason for postponement disappears and there is no reason why there should not be acceleration. Accordingly, when I find an annuity expressed to be subject to a life interest and that the tenant for life has disclaimed his life interest, I come to the conclusion that the annuity is to be accelerated, for it is just as if the direction for the payment of the annuity was 'subject to the interests of the tenant for life which may be determined either by his death or for some other reason'."

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20. Applying that principle to the present case, it is submitted that it was the intention of the Testator that the four charities named in the Will as residuary beneficiaries should take the whole of the income of the residue of the estate subject to the gift which the Testator intended to make to the Sisters of Charity, and upon the failure of that gift, as well as upon its determination, the said charities should benefit immediately.

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21. It has been held that the principle of acceleration does not apply in favour of gifts which are ulterior to and dependent upon prior limitations that are void for remoteness of vesting and offend against the Modern Rule of Perpetuities. (In re Abbott, (1893) 1 Ch. 54: cf. Hubbard's Will Trusts, Marston & Ors.-v-Angiers & Ors. (1963) 1 Ch. 275.) It is submitted, however, that this is irrelevant to the present appeal and does not operate to defeat an acceleration of the interest of the four named charities in the two-thirds part of the income of the residue of the estate for the following reasons :

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(a) The gift to the Sisters of Charity, if it fails at all, does not fail for remoteness of vesting. Indeed, even if it were a charitable bequest that would not appear to save it if it did offend against the Modern Rule of Perpetuities.

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(b) The ultimate gift to the said four charities is not "dependent" upon the prior gift to the Sisters of Charity within the meaning given to that word in the cases on the subject. In this context, the following passage from the judgment of Dixon, J. (as he then was) in Macpherson-v-Maund. (58 C.L.R.349) is of significance. His Honour, after discussing certain cases in which the general rule that ulterior limitations following limitations void for remoteness and dependent upon them are themselves void was applied, and quoting reasons which have been given for the rule said :

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"These seem but two ways of regarding the same thing, although the former makes the result flow directly from the remoteness of the contingency and the other from the fact that implicitly or explicitly its operation is restricted to the case of events contemplated in the preceding limitation not occurring. If, upon its proper construction, the ulterior limitation shows an intention that the

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10 property shall pass under it in other
 events, its validity must depend on the
 nature of those events. Again, if an
 intention is disclosed that the ulterior
 limitation shall operate if for any
 reason at all there is a failure of any
 of the preceding gifts, different
 considerations at once arise. For, in
 such a case, the intention is that the
 ultimate gift shall take effect except
 in so far as the prior gifts may actually
 operate to prevent it. The subsequent
 gift, in other words, is then a
 disposition of so much of the beneficial
 interest as has not already been
 effectively withheld or diverted. Upon
 such a construction, it includes what may
 be called prior lapsed interests, whether
 the lapse occurs from the happening of
 20 events or the initial invalidity of the
 attempt to dispose of them."

F. CONCLUSION AND REASONS

22. The respondent The Salesian Society
 Incorporated therefore respectfully submits
 that in the event of Question 1 being
 determined in the negative the answer to Question
 2 should be that the net income and the corpus
 of the residue of the Testator's real and
 30 personal estate should be held by the Trustee
 upon trust for The Far West Childrens Health
 Scheme, The Spastic Centre, The Salesian Society
 Incorporated and The Royal New South Wales
 Institution for Deaf and Blind Children in
 equal shares for the following amongst other
 reasons, namely that upon the failure of the
 Testator's bequest to the Sisters of Charity
 so much of the Testator's bequest to the said
 four charities as was limited to take effect
 40 upon the determination of the bequest to the
 Sisters of Charity should be taken to have
 accelerated and to have vested immediately in
 interest and in possession.

WILLIAM DEANE

A.M. GLEESON

