

IN THE PRIVY COUNCIL

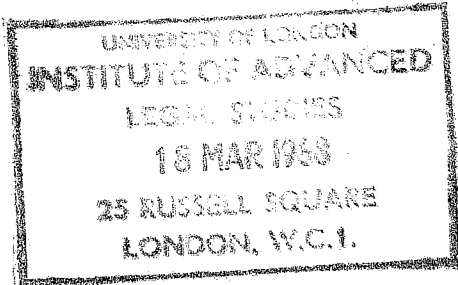
No.18 of 1967

ON APPEALS 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

10 A. B E T W E E N :- VERA CAROLINE LE CRAS
(Defendant) Appellant

- and -



PERPETUAL TRUSTEE
COMPANY LIMITED
(Plaintiff) Respondent

20 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
STEPHEN de BONO and
30 THE ATTORNEY GENERAL FOR
NEW SOUTH WALES
(Defendants) Respondents

AND
B. B E T W E E N : FAR WEST CHILDREN'S
HEALTH SCHEME
THE SPASTIC CENTRE
ROYAL NEW SOUTH WALES
INSTITUTION FOR DEAF
AND BLIND CHILDREN
(Defendants) Appellants

40

- and -

RECORD

PERPETUAL TRUSTEE
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(Plaintiff) Respondent

TRUSTEES OF THE SISTERS
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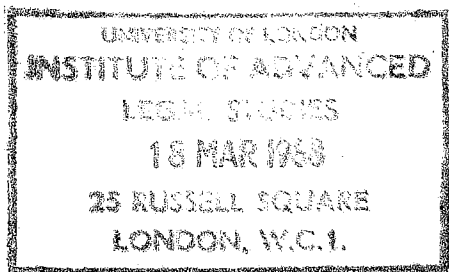
VERA CAROLINE LE CRAS
STEPHEN de BONO
BRIAN de BONO and
THE ATTORNEY GENERAL FOR
NEW SOUTH WALES
(Defendants) Respondents

CASE FOR THE APPELLANTS
FAR WEST CHILDREN'S HEALTH SCHEME,
THE SPASTIC CENTRE AND ROYAL NEW
SOUTH WALES INSTITUTION FOR DEAF
AND BLIND CHILDREN

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INTRODUCTION

1. The Appeal by Far West Children's Health Scheme, The Spastic Centre and Royal New South Wales Institution for Deaf and Blind Children is one of two consolidated appeals by leave of the Supreme Court of New South Wales from a decretal order made on the 27th day of July, 1966, by the Honourable Kenneth Sydney Jacobs a Judge of the Supreme Court sitting in Equity in a suit instituted by originating summons dated the 21st day of July, 1964 by Perpetual Trustee Company Limited a Respondent to both appeals. 30
2. The above named deceased, Edmund Richard Emil Resch, died on the 2nd day of October, 1963, leaving a Will dated the 5th day of December, 1960 and three codicils thereto dated respectively the 22nd day of May, 1962, the 24th day of September, 1962 and the 5th day of September, 1963, probate of which was 40



granted by the Supreme Court of New South Wales in its Probate Jurisdiction on the 7th day of November, 1963, to the said Respondent Perpetual Trustee Company Limited. At the date of the commencement of the said suit the residuary estate of the abovenamed deceased was valued at approximately £8,000,000 (Australian).

- 10 3. Pursuant to the said originating summons the following questions arising out of the provisions of the said Will and codicils were submitted for the determination of the Court:--
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 as therein provided is a valid bequest?
- 20 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 testators real and personal estate?
- 30 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?
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:--
- (a) £2,000 per annum; or
- 40 (b) £4,000 per annum; or
- (c) Some other and if so what annuity?

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RECORD

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 :-

(a) only jewellery related to the testator's personal use and enjoyment; or

(b) some other and if so what jewellery?

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4. The Supreme Court answered the said questions as follows:-

pp.170-171

Question 1. - Yes.

Question 2. - does not arise.

Question 3. -- not answered but in lieu thereof I declare that the provisions of the third codicil do not render ineffective the whole of the provisions of the first and second codicils.

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Question 4. - (a) - No.

(b) - Yes.

(c) - Does not arise.

Question 5. - (a) - No.

(b) - All items set forth in Paragraph 7 of the affidavit of John Sanders sworn on 12th March 1965 except watches and chains, they being specifically bequeathed and items numbered 26, 27, 29 and 30 and the six various

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pp. 9-10

semi-precious stones
in Item 43.

The Court ordered that the costs and expenses of the Plaintiff of and incident to the originating summons and the costs of all other parties as between solicitor and client should be paid out of the residuary estate of the testator.

10 5. The appeal of the Appellant Far West Children's Health Scheme, the Spastic Centre and Royal New South Wales Institution for Deaf and Blind Children is from the whole of the said decretal order except so far as the same makes provision for the costs of the parties as aforesaid.

FIRST AND SECOND QUESTIONS

6. The provisions of the Will of the said Testator which are relevant to these questions are in the following terms:-

20 I DIRECT my said Trustee from 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
30 SISTERS OF CHARITY for a period of two hundred years or for so long as they shall conduct ST. VINCENT'S 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-thirds parts of the said net
40 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

pp. 21-23

RECORD

FAR WEST CHILDREN'S HEALTH SCHEME THE SPASTIC CENTRE, BOYS' TOWN and ROYAL NEW SOUTH WALES INSTITUTION FOR DEAF AND BLIND CHILDREN in 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 institution 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 and of the 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 maintenance 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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THE RELEVANT FACTSRECORD

7. The evidence establishes the following matters:-

- (a) St. Vincents Private Hospital is a hospital conducted by the Sisters of Charity of Australia in Sydney, New South Wales. It was established in 1909 and has been conducted continuously since that time. The buildings in which it is conducted are erected upon land which is vested in trustee pursuant to the provisions of the St. Vincents Hospital Act, 1912. "St. Vincent's Hospital" is an institution separate and distinct from "St. Vincent's Private Hospital" and is a "public hospital" within the meaning of those words as used in the Public Hospitals Act, 1929-1965 and as those words are commonly understood in New South Wales; namely, a hospital to which all persons are eligible for admission and who are charged fees only according to their financial means (if any). St. Vincent's Private Hospital is registered under the Private Hospitals Act, 1908-1964, whereas St. Vincent's Hospital is registered under the Public Hospitals Act, 1929-1965. Public Hospitals are subsidised by the Government of New South Wales and their administration and expenditure and charges are regulated and supervised by the Hospitals Commission of New South Wales established under the provisions of the Public Hospitals Act, 1929-1965. In short, to the extent to which the revenues of public hospitals do not meet their expenditures (both revenue and capital) the difference is provided from public moneys of the State.
- (b) The Sisters of Charity of Australia is a "Congregation" of Sisters of the Roman Catholic Church which carries out in various places throughout Australia activities of diverse character. "St.
10. p.33, 1.22
p.37, 1.31
p.38, 1.1-5
- 20 p.49, 1.30-32
p.50, 1.1-10
p.64, 1.8-23
p.226, 1.22
- 30
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RECORD

- p.45,1.7-9 Vincent's Hospital" and "St. Vincent's Private Hospital" are conducted by a community of Sisters described as a House of the Congregation within the meaning of the Constitutions of the Congregation.
- (c) The purposes for which "St. Vincent's Private Hospital" was established were as deposed to on behalf of the Sisters of Charity as follows:- 10
- p.35,1.5-7 "(a) To relieve the pressing demands of the public for admission to the General Hospital.
- p.35,1.12-17 (b) To cater for those unwilling to enter a public hospital but willing and desirous of having hospital accommodation with more privacy and comfort than were possible in the General Hospital. 20
- p.35,1.19-26 (c) To provide an opportunity to members of the honorary medical staff of the General Hospital to admit for treatment under their care in the private hospital their patients who are reluctant to enter the General Hospital and were capable of paying and willing to pay reasonable and proper fees for admission and treatment in a private hospital". 30
- p.36,1.7-13, 26-28 (d) It was the original intention and purpose of the establishment of "St. Vincent's Private Hospital" as deposed to on behalf of the Sisters of Charity that it should be conducted in such a way that profits would be made therefrom which would be applied primarily to the support of the general or public hospital known as "St. Vincent's Hospital" and secondly to 40

RECORD

other works of the Congregation.

- (e) Considerable profits or surpluses of revenue over expenditure have been made from the inception of the private hospital and at all times it has been self-supporting.

p.36,1.20-22

p.61, 1.5-6

The surplus moneys of the said Hospital were disposed of as follows:-

10	Net contribution to the maintenance account of the general hospital from 1910 to 1934 -	\$24,900. 0. 0)	p.77,1.18-25
	Net contribution to the building account of the general hospital from 1910 to 1934 -	8,795.17. 7)	
20	Amounts paid from the private hospital building account for the purpose of purchasing properties for the purpose of the general hospital between 1937 and 1950	20,014.12. 3	p.74,1.26-30
30	Amount paid from the private hospital building account for the purpose of the purchase of a vacation home for the Sisters at Leura, New South Wales in 1952	6,000. 0. 0	p.75, 1.28-31
	Contributions from the funds of the private hospital to the general funds of the Congregation between 1922 and January 1965	20,246. 0. 0	p.69,1.14-35
	Credit balance of the private hospital building account as at the 30th June 1964	79,978.10. 0	p.49,1.22-24

RECORD

p.49,1.7-12)
 p.58,1.7-8)
 p.76,1.23-29)
 p.78)

Overall surplus of the
 private hospital
 working account
 balances for the years
 1944-1965 inclusive £51,744. 5. 6

p.46,1.6-10

(f) Of the Sisters who constitute the House which conducts both the general and private hospitals only four to six of them are employed in nursing and supervisory duties in St. Vincent's Private Hospital. All other staff of the private hospital are salaried employees and include forty one trained nurses, (excluding holiday relief staff), nineteen trainee nurses and four nurse aides. 10

(g) All medical treatment of private hospital patients is provided by medical practitioners engaged by the patients themselves; the salaried medical staff of the general hospital does not, except in cases of extreme emergency, provide any medical treatment for patients in the private hospital. 20

p.57,1.20-29
 Exhibit 10,
 p.226

(h) From time to time patients have been treated in the private hospital either free of charge or at reduced fees. For example, between January, 1957 and 1965 twenty four patients (of whom 12 were members of the Order, one was a nun of another Order, two were priests, one was a member of the lay staff of the General Hospital and one was a benefactor of the Hospital) were treated free of charge, 24 patients were treated without fees other than the amount received from the patients' Medical and Hospital Benefits Fund refund leaving an amount of £867.13.11 in fees waived by the Hospital and 6 patients were 40

RECORD

treated at fees reduced by a total of £111.15.11. Between 1st September, 1961 and 31st August, 1964, 7,109 patients were admitted to St. Vincent's Private Hospital.

p.52,1.27-29

p.53,1.7-9

- 10 (i) The scale of fees charged by the Hospital has varied from year to year. In 1964 it ranged from £4.15.0 per day to £7.6.0 per day. These fees were similar to those charged by other private hospitals within the Metropolitan district of Sydney such as St. Luke's Hospital, Royal Prince Alfred Hospital (Gloucester House) and the Mater Misericordiae Private Hospital. pp.58-60
- (j) The Private Hospital contains 82 "beds" consisting of 36 single rooms, 3 double rooms, 6 three-bed wards, 3 six-bed wards and 4 balcony beds. p.46,1.2-5
- 20 8. Hospitals in New South Wales commonly fall within one of the three descriptions following:-
- (a) Public or general hospitals similar in character to the "public hospital" known as "St. Vincent's Hospital".
- (b) Private hospitals or nursing homes conducted by private individuals for private profit.
- 30 (c) Hospitals which may or may not be described as "private hospitals" in which substantial fees are charged for accommodation and nursing services but which are conducted by organisations usually of a religious character and not for the private gain of private individuals. These hospitals are conducted generally in a similar way to St. Vincent's Private Hospital, although the extent to which a particular hospital of this description may admit persons for treatment without charge or at reduced charges may vary considerably.
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RECORD

9. There are in operation in New South Wales a number of "hospital benefit schemes the conduct of which is supervised under the provisions of Part VI of the National Health Act, 1953-1965 of the Commonwealth of Australia. Organisations conducting such schemes are registered under the provisions of that Act. Such schemes provide, in return for periodic contributions made by persons who elect to become members, for payment of an amount of not less than \$1.60 (plus the Commonwealth subsidy of \$2 per day hereinafter described) for each day on which that member receives hospital treatment in an "approved hospital" within the meaning of those words in the National Health Act, 1953-1965. (All "public hospitals" as described in paragraph 8 (a) of this Case are approved hospitals as also is St. Vincent's Private Hospital. Benefits of greater amounts may be obtained by members in consideration of varying rates of periodic contributions. Registered hospital benefits organisations receive a maximum hospital benefit payable by the Government of the Commonwealth of Australia of \$2.00 for each day of hospital treatment in an approved hospital of a member of that registered organisation. The maximum benefits payable to members of such organisations are determined by reference to the scale of contributions which the member has elected to adopt. They are not limited to the amount of the actual hospital charges incurred by the member.
10. It has at all stages been conceded that the gifts to Far West Children's Health Scheme, The Spastic Centre, Boys' Town and Royal New South Wales Institution for Deaf and Blind Children are valid charitable gifts.
11. At the hearing the Appellants Far West

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p.48,1.30-32

Exhibit 8,
p.225

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Exhibit 8

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Children's Health Scheme, The Spastic Centre and Royal New South Wales Institution for Deaf and Blind Children, in addition to supporting the submissions made on behalf of the Appellant Vera Caroline Le Cras on Question (1), submitted on Question (1):-

- (a) The gift is one upon trust for the general purposes of St. Vincent's Private Hospital.
- 10 (b) The gift being one for purposes would be void for uncertainty unless charitable.
- (c) The purposes are expressed as being those of an institution but St. Vincent's Private Hospital is not a body corporate or unincorporate, as it has no constitution. The land and buildings are owned by Trustees and operations are carried on by a community of the Roman Catholic Church.
- 20 (d) What the Testator had in mind was the activities of a particular hospital and not the persons who might benefit from its profits. Moreover he pointed clearly to the activities which distinguish the Hospital as a private hospital. He envisaged the continuance of that which he knew and provided for its endowment. He was careful not to give income to the Sisters of Charity or to the public hospital or simply to "St. Vincent's Private Hospital". That the activity is central to what the Testator had in mind is apparent from the cesser of the gift upon the Sisters of Charity ceasing to carry the activity on.
- 30 (e) The Testator intended that the gift be used for the activities carried on by the Sisters under the name of St. Vincent's Private Hospital, that is to say the accommodation, care and treatment of the sick people availing themselves of the services offered.
- 40 (f) There is no legal limit to the purposes

p.37, 1.31-
p.38 1.5

RECORD

for which the profits of St. Vincent's Private Hospital can be devoted. There is no trust affecting profits.

- (g) The purposes, in the sense mentioned, are not charitable purposes because, inter alia, of the following features:-
- (i) St. Vincent's Private Hospital has at all times been conducted for and at a commercial profit. 10
 - (ii) Admission to St. Vincent's Private Hospital is limited to persons who can pay the fees, and the fees are fixed so as to include a margin of profit. In 1964 such fees ranged from \$66.50 per week to \$102.20 per week or £26.12.0 (approx.) to £40.17.6 (approx.), when the basic wage in New South Wales was approximately \$31.50 per week or £12.12.0. 20
 - (iii) There is no provision for the adjustment of fees according to means and there is no provision for poor patients.
 - (iv) St. Vincent's Private Hospital is not conducted by a public body. 30
 - (v) St. Vincent's Private Hospital is not customarily or to any substantial degree supported by public subscriptions or donations.
- (h) It is well established that a Hospital, although it cares for the sick, may not be a charity. 40
- (i) There is here no element of poverty

to support the gift as charitable and the gift can only, if at all, be charitable as falling within the fourth class "other purposes beneficial to the community".

- (j) The cases show that a gift for the relief of sick persons is not charitable unless the poor as well as the rich can benefit therefrom.
- 10 (k) "Poor" and "rich" are relative terms, but the persons who can afford the fees of St. Vincent's Private Hospital are not poor in the relevant sense. See Ballarat Trustees Executors & Agency Co. v Federal Commissioner of Taxation (1950) 80 C.L.R. 350.
- 20 (l) There is no decided case in which a gift for the relief of the sick has been held to be charitable although the poor are excluded. The cases tend against such a result.
- (m) If the services of a hospital are limited to patients who can afford the fees, there is an absence of the necessary element of public benefit.
- (n) Question (l) should be answered in the negative.
12. Jacobs J. by his judgment delivered on the 26th day of July 1966, held that the gift to St. Vincent's Private Hospital was a valid gift for charitable purposes. In reaching this conclusion His Honour held as follows:-
- 30 (a) A gift for the purposes of a hospital is prima facie a valid gift because prima facie it is a gift for the relief of the impotent; and it matters not that it is not limited to or primarily intended for the relief of poverty. pp.147-148
- 40 (b) The words "aged impotent and poor" in the preamble to the Statute of Elizabeth are p.147

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used disjunctively.

p.148

(c) Such a gift for the purposes of a hospital may in any particular case lose its prima facie charitable character "because of something in the nature of its constitution or operation which reveals a lack of those elements of public purpose and of public benefit which are essential in the case of every charitable trust".

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p.148

(d) The elements which would, thus, destroy the charitable character of such a gift are -

(i) that the hospital is carried on for purposes of private gain; or

(ii) that the hospital is not "open to the public or such a class of the public as is of its nature sufficient to invest the activity with the necessary element of benefit to the public".

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p.152,1.15-
p.153,1.8

(e) Although any profit or surplus which St. Vincent's Private Hospital may accumulate need not be and has not always been used for the purposes of St. Vincent's Private Hospital or of St. Vincent's Hospital as a whole, since the profit results from what is prima facie a charitable purpose or activity and since it accrues to a charitable body, namely the Sisters of Charity, the fact of the profit does not destroy the charitable purpose.

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p.155,1.8-11

(f) That in the circumstances presently existing in New South Wales and having regard to the scale of fees

charged in St. Vincent's Private Hospital no class of persons is excluded from admission to the hospital "so that it may be said that the public nature of the activity is lost; nor are the poor excluded".

p.155,1.31-
p.156,1.2

p.145,1.14-
1.19

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(g) That the class of persons intended to benefit from the conduct of St. Vincent's Private Hospital is not defined by financial capacity and thus is not selected by reference to an irrelevant consideration. Rather the class is limited only by the practical fact that some persons may not be able to pay the fees charged but this is merely part of the nature of the purpose - a hospital which charges fees.

(h) Accordingly, the gift is a valid gift for charitable purposes.

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13. The Appellants Far West Children's Health Scheme, The Spastic Centre and Royal New South Wales Institution for Deaf and Blind Children respectively submit that a trust for the benefit of sick persons is not necessarily charitable and to say that such a trust is prima facie charitable is to say nothing more than that it fulfils one requirement of a charitable trust. The phrase in the preamble to the Statute of Elizabeth is "the relief of the aged impotent and poor". "Relief" is an important element and it points not merely, if at all, to the cure of disease but to the provision of medical and nursing assistance to those not in a position, financially, to obtain it for themselves. Nor is it correct to take too much from judicial statements that the words "aged impotent and poor" are to be read disjunctively. The purpose of those statements has been to negative submissions that the three conditions must co-exist. They do not justify the conclusion that to benefit the aged, or the sick, is charitable, regardless of the financial condition of the persons concerned. The contrary has been held to be the case: Taylor v. Taylor (1910) 10 C.L.R. 218; Congregational Union of New

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South Wales v. Thistlethwayte (1952) 87 C.L.R. 375. The critical test is not whether the person or body treating the sick carries on its activities for private gain, but whether the sick are offered treatment which because of financial limitations they could not otherwise obtain. The cases show that it is not fatal that the benefit extends to some sick who can afford to pay, but it is quite another thing to say that there is a good charitable gift when all, or most, of the sick have to be able to afford the treatment they receive.

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Where, as in the present case, the benefit is limited to those who can afford to pay, there is necessarily an insufficient element of public benefit to enable the gift to come within the fourth head enunciated by Lord Macnaghten in Commissioners for Special Purposes of Income Tax v. Pemsel (1891) A.C. 531 at 583; Re MacDuff (1896) 2 Ch. 451 at 464; Verge v. Somerville (1924) A.C. 496 at 504; Needham v. Bowers (1888) 21 Q.B.D. 436; St. Andrew's Hospital v. Shearsmith (1887) 19 Q.B.D. 624.

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It is submitted that the purpose, intention and nature of the activity exclude the poor from benefit.

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p. 155

14. The conclusion of Jacobs J. that "since the hospital serves people of average means, its scale of fees being within the range of persons of moderate means who are mainly members of approved hospital contribution funds under the National Health Act, 1953-1962" no "class of persons is excluded so that it may be said that the public nature of the activity is lost" and "the poor are not excluded" is, it is respectfully submitted, erroneous and inconsistent with the undisputed evidence.

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The fact that the hospital serves people of average means (if that be

correct) is, it is submitted, inconsistent itself with the conclusion of the learned Judge that the poor are not excluded. The class of the public properly described as "the poor" is different from the class of persons which is properly described as "persons of average means".

15. The Appellants respectfully submit that it is irrelevant to consider what is done with the profits from St. Vincent's Private Hospital. The Testator did not make a gift to the person or persons who might receive those profits or to purposes beyond those of the Private Hospital. His gift was for the benefit of St. Vincent's Private Hospital. The gift is limited to cease upon the Sisters of Charity ceasing to conduct the Private Hospital. But unless the purposes for which the Private Hospital is conducted are altered the gift (if valid) inevitably will benefit the persons or purposes that receive the profits of the Private Hospital.
16. There is no legal obligation binding upon or recognised by the Sisters of Charity to devote surpluses arising from the Private Hospital to charitable purposes. The only sanction which could bind the Sisters as to the purposes for which these profits are applied is to be found in their spiritual vows and in the canon law of the Roman Catholic Church. The congregation reserves to itself the right to alter its constitution from time to time and regards itself as bound, by canon law, to alter it as the canon law made from time to time requires. There are no trusts, charitable or otherwise, controlling the Sisters in the application of their general property. Neither the Attorney-General nor any other person has any right to control the application of moneys which have become part of the general property of the congregation.
17. The second question requires an answer only if the first question is answered in the negative.

RECORD

The Appellants Far West Children's Health Scheme, The Spastic Centre and Royal New South Wales Institution for Deaf and Blind Children contend that in answer to the second question it should be declared that the two-thirds share of residue in respect of which the gift of the income thereof was expressed to be made for the "general purposes of St. Vincent's Private Hospital" passes to the said three Appellants and the Salesian Society Incorporated for the purposes of Boys' Town in equal shares absolutely or alternatively the said Appellants and the said Salesian Society Incorporated are entitled to the income of the said two-thirds share of residue in equal shares. It is submitted that if the gift to the Sisters of Charity fails, the gift to the four mentioned charities is accelerated.

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18. It is submitted that the gift accelerates on a principle analogous to that whereby a vested remainder is accelerated if it follows a life estate which fails. In the present case the gift to the four charities is in no way contingent either upon the earlier gift taking effect or on any other event. The four said charities are in existence, are ascertained and are ready to take the instant that the earlier gift ceases. It was, it is submitted, the manifest intention of the Testator to give the income of this two-thirds part of residue to the said four charities absolutely, subject only to the interest of the Sisters of Charity for a period of two hundred years or until such time as they should cease to conduct St. Vincent's Private Hospital, whichever period should be the shorter.

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19. The principles of acceleration relied upon by the Appellants, Far West Children's Health Scheme, The Spastic Centre and Royal New South Wales Institution for Deaf and Blind Children,

are stated in Tompkins v. Simons (1931) 44 C.L.R. 546, 562; In re Hodge (1943) Ch.300, Re Flower's Settlement Trusts (1957) 1 All E.R. 462, Jarman on Wills 8th Ed. 732; Lomax v. Holmeden (1732) 2 P.Wms.176; 24 E.R. 1019; Gore v. Gore (1722) 2 P.Wms. 28; 24 E.R. 629; Gray on Perpetuities 4th Ed., para 209. A remainder after a term of 500 years has been held to be valid; see Gore v. Gore (1722) 2 P.Wms.28; 24 E.R. 629. Congregational Union of New South Wales v. Thistlethwayte (1952) 87 C.L.R. 375 at 436-7.

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20. It is submitted that the gift in remainder is a good gift and does not fail because of the failure of the prior gift to the Sisters of Charity. It is submitted that it is a good gift because although it is a gift of income in perpetuity to charities and is subject to the modern rule against perpetuities, it is vested within the meaning of that rule from death and the vesting is not affected by the fact that the gift may succeed a long term of years or that the prior gift may be terminable on a condition; see Halsbury's Laws of England 3rd Ed., Vol.29 at p.284; Gray on Perpetuities, 4th Ed., para. 209. Furthermore, the prior gift does not fail for remoteness or as contrary to the old rule against perpetuities; see Re Hubbard (1963) Ch. 275; Re Buckton's Settlement Trust (1964) Ch. 497; Jarman on Wills 8th Ed. at p.366; Macpherson v. Maund (1937) 58 C.L.R. 341; Congregational Union of New South Wales v. Thistlethwayte 87 C.L.R. 375 at 436, 7.

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THE THIRD AND FOURTH QUESTIONS

21. In these questions a determination is sought as to the effect of the codicil of the 5th day of September, 1963 the last codicil in point of time, upon the two earlier codicils dated the 2nd day of May, 1962 and the 24th day of September, 1962, and in particular whether the direction in the last codicil to the Trustee to hold an annuity of £2,000.0.0 per annum on protective trusts for the benefit of the Respondent Stephen de Bono is a direction for payment in addition to or in

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substitution for the annuity of £2000.0.0 payable to the said Respondent pursuant to the provisions of the codicil of the 24th day of September, 1962.

- 22. The codicil of the 22nd day of May, 1962, is in the following terms:

p.27

"THIS IS A FIRST CODICIL to the last Will and Testament of EDMUND RESCH of Darling Point near Sydney in the State of New South Wales, Gentleman (which Will bears date the fifth day of December, 1960) I HEREBY DIRECT my said Trustee out of the capital of my estate to pay any stamp duty death duty estate duty and other duties which may be or become payable at any time and from time to time in respect of any declaration of trust settlement or other trust document executed by me and in respect of any gifts made by me during my lifetime AND in all other respects I confirm my said Will in WITNESS whereof I have hereunto set my hand this twenty-second day of May in the year of Our Lord One thousand nine hundred and sixty-two.

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SIGNED by the said Testator as and for a first Codicil to his last will and testa ment in the presence of us present at the time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses

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- 23. The Codicil of the 24th day of September, 1962 is in the following terms:

pp.28-29

"THIS IS A SECOND CODICIL to the last Will and Testament of me EDMUND RESCH of Darling Point near Sydney in the State of New South Wales, Gentleman (which Will bears date the fifth day of December One thousand nine hundred and sixty)

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I HEREBY DIRECT my said Trustee out of the income arising from the residue of my real and personal estate to hold the following Annuities payable quarterly on protective trusts as Declared by Sec. 45 of the Trustee Act 1925 for the benefit of the respective annuitants hereinafter mentioned namely: for STEPHEN GEORGE de BONO a son of Karla de Bono of Darling Point aforesaid the sum of TWO THOUSAND POUNDS per annum during his life and for each child of the said Karla de Bono born after the date hereof but within a period of ten years after that date the sum of TWO THOUSAND POUNDS per annum during his or her life AND I AUTHORISE AND DIRECT my said Trustee as far as practicable to raise the whole or any part of the moneys required to pay duties in anywise payable in connection with my estate by mortgage or overdraft or to otherwise howsoever and to repay the amounts so borrowed out of capital other than my stock in Tooth & Co. Limited and/or income as and when my said Trustee may think fit to the intent that my stock in Tooth & Co. Limited shall not be sold but shall be preserved intact as far as practicable AND in all other respects I confirm my said Will and first Codicil IN WITNESS whereof I have hereunto set my hand this twenty-fourth day of September in the year of our Lord One thousand nine hundred and sixty-two SIGNED by the said Testator as and for a second Codicil to his last Will and Testament in the presence of us present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses:

24. The Codicil of the 5th day of September, 1963, is in the following terms:

"THIS IS A FIRST CODICIL TO THE LAST WILL AND TESTAMENT of me EDMUND RESCH of Darling Point near Sydney in the State of

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New South Wales, Gentleman which Will bears date the fifth day of December one thousand nine hundred and sixty WHEREAS by my said Will I GAVE DEVISED AND BEQUEATHED the residue of my real and personal estate unto my Trustee UPON TRUST to pay thereout all my just debts funeral and testamentary expenses and all duties in anywise payable in connection with my estate NOW I HEREBY DECLARE that such trust shall include all duties in anywise payable in connection with my notional estate AND I DIRECT my Trustees out of the income arising from the residue of my real and personal estate to hold an annuity of TWO THOUSAND POUNDS (£2000) per annum payable quarterly on protective trusts as declared by Section 45 of the Trustee Act 1925 for the benefit of STEPHEN de BONO a son of Karla de Bono AND WHEREAS by my said Will I DIRECTED that if any moneys were owing to me at the time of my death by VALENTINE EDWARD JOSEPH HEATON in respect of certain advances made by me to him and other payments made by me on his account my Trustee should withhold payment of each of the annuities payable under my said Will to JEAN HEATON VALENTINE HEATON and DENISE HEATON as therein mentioned and WHEREAS the said Valentine Edward Joseph Heaton has since died NOW I HEREBY REVOKE the provisions contained in my said Will whereby I directed that my Trustee should withhold payment of the said annuities to the said JEAN HEATON VALENTINE HEATON and DENISE HEATON respectively in the same manner in all respects as they would have been payable if my said Will had not contained any restrictions on

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the payment thereof on account of the mortgage debt owing to me by the said Valentine Edward Joseph Heaton AND in all other respects I confirm my said Will IN WITNESS whereof I have hereunto set my hand this fifth day of September in the year of our Lord One thousand nine hundred and sixty-three

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SIGNED by the said Testator as and for)
 a First Codicil to his last Will and)
 Testament in the presence of us)
 present at the same time who at his)
 request in his presence and in the)
 presence of each other have hereunto)
 subscribed our names as witnesses:)

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25. The Supreme Court did not answer the third question but declared in lieu that the provisions of the Third Codicil did not render ineffective the whole of the provisions of the First and Second Codicils. The Supreme Court answered Question 4(a) in the negative and Question 4(b) in the affirmative. In short the Supreme Court held that the direction in the Codicil of the 5th day of September, 1963 is a direction for a payment in addition to the annuity payable pursuant to the Codicil of the 24th day of September, 1962.

EVIDENCE

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26. At the hearing before the Supreme Court two affidavits sworn, one on the 13th day of December, 1965 and one on the 14th day of September, 1965 by Herbert Moore Aspinall were tendered. Jacobs J. reserved his decision upon whether the evidence contained in these affidavits was admissible and in the course of his judgment held that it was not admissible.

pp.133-137
 pp.138-139

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27. The said Herbert Moore Aspinall deposed to the following matters:
- (a) That he had acted as solicitor for the deceased during his lifetime and drew his Will and the three above-mentioned Codicils.

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- (b) That on the 12th January, 1961, he handed the original Will to the deceased who said that he would lodge it with the Respondent Perpetual Trustee Company Limited.
- (c) That upon the execution of the Codicil of the 22nd day of May, 1962, the deceased instructed him to retain the Codicil until he called for it.
- (d) That on the 20th day of September, 1962, he received instructions to draw the Second Codicil and subsequently on the 24th day of September, 1962 he attended upon the deceased who informed him that he had left an annuity of £2,000. per annum to Edmund de Bono by his Will and that he would do the same for Stephen de Bono and any other child of Karla de Bono. That subsequently on the same day he read over to the deceased the Second Codicil and after its execution retained it. 10
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- (e) That on the 8th day of October, 1962 he attended upon the deceased and on his instructions on the following day forwarded the two Codicils to the said Respondent Perpetual Trustee Company Limited.
- (f) That before the 21st day of June, 1965 he made a social call on the deceased at his residence and that the deceased in course of conversation said that it was his intention to leave the Respondent Stephen de Bono a legacy of £2,000. per annum as he wanted to treat the de Bono boys alike. That at the time of this conversation the existence of the two earlier Codicils had gone out of his, the Deponent's mind, that he thought the provision of £2,000. per annum for the Respondent Stephen de Bono had still to be made and that he had 30
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completely forgotten about the existence of the two earlier Codicils and did not remember them again until they came to light after the deceased's death.

- 10 (g) That on the 21st day of June, 1963, he received instructions to draw a Codicil providing that duties on any notional estate left by the deceased be paid out of his estate, that the restrictions made by the Will of the deceased in relation to the annuities to Mrs. Heaton and her children be deleted and that an annuity of £2,000. per annum be given to the said Respondent Stephen de Bono.
- 20 (h) That the Codicil of the 5th September, 1963 was drafted by him after reference to parts of the deceased's Will but without reference to or thought of the earlier Codicils.
- 30 (i) That on the 5th day of September, 1963 he attended upon the deceased at his residence when the Codicil was read over to the deceased and executed by him and that on that occasion the deceased did not have either of the two earlier Codicils before him and no mention was made of either, nor did he have the Will before him and no mention was made of it except during the reading of the Codicil to the extent that the Will was mentioned in the Codicil.

40 28. The Appellants Far West Children's Health Scheme, The Spastic Centre and Royal New South Wales Institution for Deaf and Blind Children, respectfully submit that the evidence contained in the two said affidavits of Herbert Moore Aspinall is admissible for the following reasons, inter alia:-

- (a) to reconcile inconsistencies between the Codicils in that:
- (i) the Codicil of the 22nd day of May,

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1962, directed that certain duties including death and Estate duty payable in respect of any declaration of trust settlement or other trust document executed by the deceased and in respect of any gifts made by him during his lifetime should be paid out of the capital of his estate whereas the Codicil of the 5th day of September, 1963 provided that the residue of the deceased's real and personal estate should be held upon trust to pay all duties in anywise payable in connection with his notional estate. There is thus an inconsistency as to the source of payment in the case of death and estate duty payable on the deceased's estate.

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(ii) As evidence of surrounding circumstances.

29. Jacobs J. by his judgment delivered on the 26th day of July, 1966 made the declaration beforementioned and answered Question (4) in the manner beforementioned for the following reasons:

(a) That there are two relevant principles of construction. Firstly when a Codicil confirms a Will and there have been intermediate Codicils between the Will and that confirming Codicil, the confirmation of the Will and the Codicil is construed in the absence of any contrary indication in the language of the Codicil as a confirmation of the Will as altered by those intermediate Codicils. Secondly, where a legacy is given by one testamentary instrument and another legacy, even of exactly the same amount, is given by another testamentary instrument, it is presumed in the absence of indications in the instrument to the

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contrary that the second legacy was intended to be cumulative upon the first and not in substitution for it.

10 (b) Although there are a number of features about the Third Codicil which raise the query whether it is appropriate as a Third Codicil to the Will rather than a First Codicil as it describes itself these various features were not sufficient as an expression of intention to rebut the presumptions raised by the two rules of construction referred to.

20 (c) Accordingly, in the result, the Respondent Stephen de Bono was entitled both to the annuity provided by the Codicil of the 24th day of September, 1962 and to the annuity provided by the Codicil of the 5th day of December, 1963.

30 30. The Appellants Far West Children's Health Scheme, The Spastic Centre and Royal New South Wales Institution for Deaf and Blind Children respectfully submit that the answer to these questions depends primarily upon ascertaining the intention of the Testator. Unless, when by the Codicil of the 5th day of September, 1963, he republished his Will, he also intended to republish the two earlier Codicils, these two Codicils have been superseded: See Chichester v. Quatrefages (1895) P.186: Re the Estate of Bryan (1907) P. 126.

40 It is clear from the terms of the Codicil of the 5th day of September 1963 that it was intended by the Testator to be treated as the only Codicil to his Will. In the first place it is described both by way of introduction and in the attestation clause as "a First Codicil" to his Will. Secondly it refers only to the Will and not to any earlier Codicil and expressly confirms only the Will. This is by way of contrast with the terms of the Second Codicil of the 24th day of September, 1962 which expressly

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confirms both the Will and the First Codicil of the 22nd day of May, 1962. Thirdly the provisions of the Codicil of the 5th day of September, 1963 are inconsistent with the provisions of the Codicil of the 22nd day of May, 1962 in that they provide for the payment of death and estate duties from a different source. Fourthly, as was pointed out by Jacobs J. in his judgment, the terms of the Codicil so far as duties are concerned are in part repetitive and therefore, unless the last Codicil stands alone, in part otiose. It is submitted that these matters combine to form sufficient ground for disregarding the earlier Codicils; see McLeod v. McNab (1891) A.C. 471; Re Baker (1929) 1 ch. 668; Re Pearson (1963) 1 W.L.R. 1358.

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31. The Appellants respectfully submit that it was clearly the intention of the Testator that the annuity in favour of Stephen de Bono contained in the Codicil of the 5th day of September, 1963, should be in substitution for that contained in the Codicil of the 24th day of September, 1962. This intention appears from the following facts:

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- (a) The annuities are identical.
- (b) The Testator both by way of introduction and in the attestation clause described the Codicil of the 5th day of September, 1963 as a First Codicil to his Will.
- (c) The Codicil of the 5th day of September, 1963, confirms only the Will and not any earlier Codicil. This can be contrasted with the express statement confirming an earlier Codicil contained in the Codicil of the 24th day of September, 1962.

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(d) The annuity in the Codicil of the 5th day of September, 1963, stands with provisions which were, it is submitted, intended to be in substitution for provisions contained in the earlier Codicil of the 22nd day of May, 1962, in that they are inconsistent with the earlier provisions.

10 (e) As was pointed out by Jacobs J. in his judgment, other terms in the Codicil are repetitive of terms contained in the Codicil of the 22nd day of May, 1962 and would therefore suggest that the provisions of the Codicil of the 5th day of September, 1963 were intended to be in substitution for the provisions of the earlier Codicils.

20 Further it is submitted that if there is a prima facie presumption that the annuities should be construed as being cumulative the above facts are sufficient to rebut the presumption; see Halsbury's Laws of England, 3rd Ed., Vol. 39, para. 1644.

30 32. If the aforementioned affidavits of the said Herbert Moore Aspinall are admitted in evidence, as the Appellants submit they should be, it becomes even more apparent that it was the Testator's intention that the Codicil of the 5th day of September, 1963, should be the only Codicil to this Will. Inter alia, it would appear that at some time prior to the 21st day of June, 1963, the Testator had completely forgotten that he had made provision by way of a legacy of £2,000 per annum for the Respondent Stephen de Bono and that this state of mind persisted up to and during the time when he made the Codicil of the 5th day of September, 1963, when his intention was to provide for the Respondent Stephen de Bono an annuity of a total amount of £2,000 per annum.

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33. It is therefore submitted by the Appellants that the third question should be answered by a declaration that by the Codicil to his Will

RECORD

which Codicil was dated the 5th day of September, 1963, the Testator revoked the provisions of the two Codicils dated the 22nd day of May, 1962 and the 24th day of September, 1962 respectively and that the fourth question should be answered (a) in the affirmative and (b) in the negative.

34. Alternatively it is submitted that the third question is not one proper to be dealt with by the Supreme Court in its Equitable Jurisdiction, the matter being one for the Supreme Court in its Probate Jurisdiction. 10

THE FIFTH QUESTION

- p.12, 1.15-18
35. By his Will the Testator gave and bequeathed unto the Respondent Brian de Bono "my cameras projectors films and other photographic appliances and my watches (other than my calendar watch) chains studs and other personal jewellery". 20

- pp.9-10
36. At the date of his death the Testator's estate included the following items:
- | | | |
|--------|---|----|
| B x 1 | 1 Diamond Bracelet | |
| B x 2 | 1 Pair of square cut
Diamond Clip Brooches | |
| B x 3 | 1 Pair Diamond Clip Earrings | |
| B x 4 | 1 Square Cut Diamond
Bracelet | 30 |
| B x 5 | 1 Pair of Diamond Cluster
Earrings | |
| B x 6 | 1 Diamond Bracelet | |
| B x 8 | 1 Large 14.59 Carat
Diamond Ring | |
| B x 9 | 1 Diamond Platinum Brooch | |
| B x 10 | 1 Diamond Necklace | |
| B x 11 | 14 Drop Diamond Pendant | |
| B x 12 | 1 Single Stone Diamond
Brooch | 40 |
| B x 14 | Small Wedding Ring | |
| B x 15 | 1 Pair Gold Diamond
Ear Clips | |

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	B x 16	1 Jade Pendant
	B x 17	1 Gold and Diamond Flower Brooch
	B x 18	1 Gold Bracelet
	B x 19	1 Gold Bracelet
	B x 20	1 Black Evening Bag with Diamond Clip Ornament
	A 22	2 Gold Coin Fobs
10	A 23	1 Set of 3 Diamond Studs and 6 Buttons
	B 24	1 Long Crystal Necklace
	B 28	1 Small Gold Mesh Bag
	B 31	1 Small Part Diamond Brooch (5 Diamonds missing)
	A 32	1 Silver Cigarette Case
	A 44	1 Double Gold Sovereign Case
	B 34	1 Small Gold Locket and Part Gold Bangle
20	C 35	1 Gold Medal
	B 36	1 Gold Locket
	C & B 37	1 Gold Buckle and 1 Gold Wedding Ring
	A 40	1 Opal Tie Pin
	A 41	1 Opal Tie Pin
	A 42	1 Pearl Tie Pin
	C 43	1 Small box containing 4 small gold pencils
	A 46	1 Set of 3/15 ct. Gold Pearl Studs

30 Those items in the list with a cross against them represent jewellery which belonged to the Testator's wife and which the Testator inherited from her. The items marked with the letters "A" and "B" are respectively male and female jewellery. Those marked with "C" represent loose cut opals and diamonds and other jewels and it is not clear whether they were for male or female wear.

40 37. By the fifth question a determination was sought as to whether by the phrase "other personal jewellery" the Testator meant to give only jewellery related to his personal use and enjoyment or other jewellery as well.

EVIDENCE

38. An affidavit was sworn on the 6th day of

pp.128-129

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- December, 1965 by Karla de Bono the mother of the said Respondent Brian de Bono in which she deposed, inter alia, that the jewellery referred to in the abovementioned list was kept more often than not in a safe deposit box at the Testator's Bank, but from time to time he used to go to the Bank and bring the whole or part of the jewellery home with him where he would keep it for various periods of time. 10
39. Jacobs J. by his judgment held that the word "personal" cannot be limited to the person of the Testator and that the phrase "personal jewellery" is used to describe jewellery appropriate for wearing on the person as distinct from jewellery which is ornamental to a chattel or a place. His Honour accordingly held that all items set out in the abovementioned list passed under this bequest. 20
40. The Appellants submit that the phrase "other personal jewellery" must be read in its context. Following upon the words "my watches (other than my calendar watch) chains studs" "other personal jewellery" means "my other personal jewellery". If the Testator had said "my other jewellery" or "my jewellery" all the items which His Honour held to have been included in the gift might have been included. Again if the Testator had said "other personal jewellery which belongs to me", the secondary meaning to which His Honour referred might have applied. But the phrase "my personal" has a well recognised meaning in a number of contexts. It means "that personal to me" in the sense of that personally used and enjoyed by me. See in particular Joseph v. Phillips (1932) A.C.348 at 352. 30 40
41. The Appellants respectfully submit that the fifth question should be answered (a)

in the affirmative, and that there should be a declaration that the bequest to Brian de Bono contained in the Will of the other.

42. The Appellants respectfully submit that the decision of the Supreme Court upon all the questions submitted is erroneous and ought to be reversed and that the questions should be answered as follows:

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(1) No.

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(2) Upon trust for the Appellants Far West Children's Health Scheme, The Spastic Centre and Royal New South Wales Institution for Deaf and Blind Children and the Respondent The Salesian Society Incorporated for the purposes of Boys' Town in equal shares absolutely or alternatively upon trust to pay the income thereof to the said Appellants and the said Respondent in equal shares.

(3) Yes or alternatively in so far as the Codicil of the 24th day of September, 1962 provided for the payment of an annuity of £2,000 to the Respondent Stephen de Bono.

(4) (a) Yes.

(b) No.

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(5) (a) Yes. That it should be further declared that the items in the abovementioned list marked "B" and items 26, 27, 29 and 30 are excluded from the gift.

For the following, amongst others,

REASONS

- (1) Because the gift of two-thirds of the income of the Testator's residuary estate "for the General purposes of

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St. Vincent's Private Hospital" is not a gift for charitable purposes and is invalid.

- (2) Because the gift to the Sisters of Charity fails and the gift of residue to the three Appellants and the Salesian Society Incorporated on behalf of Boys' Town is accelerated.
- (3) Because the gift in the Codicil of the 5th day of September, 1963 is merely repetitive or alternatively this last Codicil revokes the earlier Codicils. 10
- (4) Because the phrase "other personal jewellery" has in its context a well recognised meaning and refers solely to jewellery personally used and enjoyed by the Testator.

RUSSELL FOX

C.S.C. SELLER

IN THE PRIVY COUNCIL

ON APPEALS 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. B E T W E E N :

VERA CAROLINE LE CRAS
(Defendant) Appellant

- and -

PERPETUAL TRUSTEE COMPANY
LIMITED (Plaintiff) Respondent
TRUSTEES OF THE SISTERS OF
CHARITY OF AUSTRALIA
& OTHERS (Defendants) Respondents

AND

B. B E T W E E N :

FAR WEST CHILDREN'S
HEALTH SCHEME &
OTHERS (Defendants) Appellants

- and -

PERPETUAL TRUSTEE COMPANY
LIMITED (Plaintiff) Respondent
TRUSTEES OF THE SISTERS OF
CHARITY OF AUSTRALIA
& OTHERS (Defendants) Respondents

CASE FOR THE APPELLANTS
FAR WEST CHILDREN'S HEALTH SCHEME
AND OTHERS

LAWRANCE MESSER & CO.,
16, Coleman Street,
London, E.C.2.

Agents for:

R.M. MACLEAN,
Bull's Chambers,
28 Martin Place,
Sydney, Australia.