

1967/23

1.

IN THE PRIVY COUNCIL

No. 18 of 1967

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES in its
Equitable Jurisdiction in Suit instituted by
Originating Summons No. 754 of 1964

I N T H E M A T T E R 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

10

- and -

PERPETUAL TRUSTEE COMPANY LIMITED (Plaintiff) Respondent

TRUSTEE 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

20

FOR DEAF AND BLIND CHILDREN

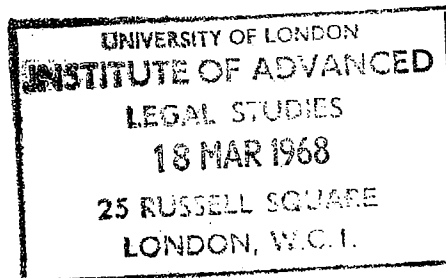
THE SALESIAN SOCIETY INCORPORATED

STEPHEN deBONO

BRIAN deBONO and

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

- and -

PERPETUAL TRUSTEE COMPANY LIMITED
(Plaintiff) Respondent

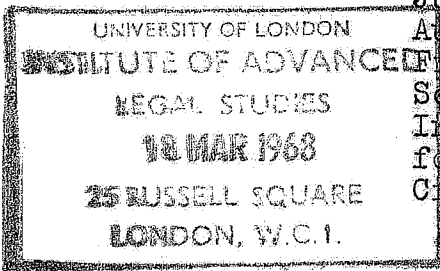
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C A S E FOR THE RESPONDENT PERPETUAL TRUSTEE
COMPANY LIMITED

Record

pp. 172-9 1. These are appeals from a decretal order of the Supreme Court of New South Wales made on the 27th July 1966, by Mr. Justice Jacobs exercising the jurisdiction of the Court.

pp. 1-5 2. The said decretal order was made in a suit instituted by an originating summons in which this respondent Perpetual Trustee Company Limited was plaintiff and in which, after amendment pursuant to an order of the Court made on 27th July 1966, 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, The Salesian Society Incorporated, Royal New South Wales Institution for Deaf and Blind Children, Vera Caroline Le Cras, Stephen de Bono, Brian de Bono and The



Attorney General for New South Wales were Defendants.

3. The originating summons was taken out for the determination of a number of questions arising in the course of administration of the estate of Edmund Richard Emil Resch late of Sydney in the State of New South Wales who died on 2nd October, 1963.

10 4. The suit was heard on the 6th to 9th inclusive, and the 13th to 15th inclusive days of December 1965.

5. After his Honour had delivered judgment and made the decretal order in accordance with it the defendant Vera Caroline Le Cras moved the Supreme Court of New South Wales for leave to appeal to Her Majesty's Privy Council from that part of the judgment and decretal order which:

20 (a) answered Question 1 in the originating summons and declared that the answer to that question was "YES", and,

(b) failed to answer Question 2 in the originating summons and declared that that question did not arise

30 and the defendants Far West Childrens Health Scheme, The Spastic Centre, and Royal New South Wales Institution for Deaf and Blind Children moved the Supreme Court for leave to appeal to Her Majesty's Privy Council from the whole of the judgment and decretal order except so far as they made provision for the costs of the parties.

6. On 26th August 1966, Mr. Justice Street exercising the jurisdiction of the Court gave conditional leave to appeal

pp.180-7

40 (1) to the said Vera Caroline Le Cras from that part of the said decretal order which declares that the direction in the Will of the said deceased contained to pay two-thirds of the net income of the residue of his real and personal estate to the Sisters

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of Charity as in the said Will provided is a valid bequest, and,

- (2) to the said Far West Children's Health Scheme, The Spastic Centre and Royal New South Wales Institution for Deaf and Blind Children as asked.

pp. 188-190

7. Final leave to appeal in both appeals was granted by the Supreme Court of New South Wales on 16th December 1966.

8. The late Mr. Resch left the following testamentary documents:

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pp.12-26

(a) A Will dated 5th December, 1960.

p.27

(b) A First Codicil dated 22nd May, 1962.

pp.28-9

(c) A Second Codicil dated 24th September, 1962.

pp.30-31

(d) A Third Codicil, in the Codicil described as a First, dated 5th September, 1963.

Probate in common form of all these documents was granted to this respondent by the Supreme Court of New South Wales on 7th November, 1963.

p.7 Ll.10-31

p.8 Ll.1-26

9. The value of Mr. Resch's estate, after payment of duties and liabilities, is approximately \$A8,000,000. His estate included 930,481 Stock Units of \$A2 each in the capital of Tooth & Co. Limited.

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FIRST QUESTION

p.3 Ll.22-28

10. The first question asked in the originating summons related to the validity of a bequest in the Will of the deceased of two-thirds of the net income of his residuary estate "to the 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".

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p.174 Ll.23-31

p.145 Ll.18-42

pp.146-155

11. By the decretal order, against which this appeal is made, it was declared that this bequest is a valid charitable bequest. The reasons of his

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Honour Mr. Justice Jacobs for making this declaration are set forth in his judgment.

p.156 Ll.1-29

12. The appellant Vera Caroline Le Cras is the sole next-of-kin of the deceased entitled to any real or personal property as to which he died intestate.

p.8 Ll.27-44
p.9 L.1

10 13. The appellants Far West Childrens Health Scheme, The Spastic Centre and Royal New South Wales Institution for Deaf and Blind Children are respectively incorporated according to the law of New South Wales. By the Will of the deceased they, together with "Boys' Town" are entitled in equal shares to one-third of the net income of Mr. Resch's residuary estate, and they are also entitled to the other two-thirds of the said net income upon the determination of the interest therein of the Sisters of Charity.

p.21 Ll.17-33
p.22 Ll.1-4

20 14. The respondent Trustees of the Sisters of Charity of Australia are a body corporate constituted by the Roman Catholic Church Communities' Lands Act, 1942-1948 of the Legislature of New South Wales and as such are trustees for the Pious Congregation of the Religious Sisters of Charity of Australia. Under that Act they have power to acquire by bequest or otherwise any personal property and to deal with and dispose of moneys at any time vested in them.

30 15. The respondents Edna Mavis Skewes, Alice Nolan Elphick and Frederick McDonough are respectively the Reverend Mother General for the time being of the Sisters of Charity in New South Wales, the Reverend Mother Rectress for the time being of St. Vincent's Hospital, Sydney, and the honorary treasurer for the time being of that Hospital, and as such they are by virtue of the St. Vincent's Hospital Act, 1912, of the Legislature of New South Wales trustees of all land at the time of that Act belonging to that Hospital or thereafter acquired for similar purposes, including land more particularly described in the Second Schedule to the Act upon which St. Vincent's Private Hospital was then and is now erected.

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pp.11 Ll.13-15
p.40 Ll.32-38
p.41 Ll.1-3
p.95 Ll.32-35
p.131 Ll.22-3

p.131 Ll.4-19

16. The respondent The Salesian Society

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Incorporated is the trustee constituted by the Roman Catholic Church Communities' Lands Act, 1942-1948, for the unincorporated congregation of male religious formed within the Roman Catholic Church and called the Society of St. Francis de Sales. The institution referred to in the Will of the deceased as "Boys" Town of Engadine" is conducted by the Society on land vested in the Salesian Society Incorporated. The Salesian Society Incorporated has powers under the Act referred to to acquire by bequest or otherwise personal property and to dispose of moneys at any time vested in it. 10

17. For the purpose of assisting the Privy Council this respondent Perpetual Trustee Company Limited wishes to be heard upon these appeals in relation to the first question to put any relevant arguments or submissions not put by the other parties interested and to put before the Privy Council the submissions contained in paragraphs 18 to 40 inclusive of this case which it is submitted are relevant to the consideration by the Privy Council of this matter. 20

18. There is no evidence that St. Vincent's Private Hospital is incorporated or has any constituent document and its general purposes are to be determined by reference to the nature of the institution and the services it provides and the persons by whom and the manner in which it is conducted. A consideration of these matters shows the following. 30

p.46 Ll.15-18

19. St. Vincent's Private Hospital is an institution providing accommodation for persons needing surgical or medical attention other than the treatment of infectious diseases.

p.52 Ll.12-30

p.53 Ll.1-17

p.54 Ll.15-18

p.58 Ll.9-23

p.82 Ll.25-26

p.83 L.1

p.87

p.89 Ll.8-29

p.91 Ll.7-32

p.92 Ll.1-2

p.93 Ll.34-38

p.94

20. It appears that St. Vincent's Private Hospital provides accommodation for the public at large. Admission is granted only upon the request of a medical practitioner but there is no restriction imposed upon the medical practitioners who may make requests. Admission is independent of religious beliefs. 40

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21. It appears that the institution is conducted by a congregation of religious women, namely the Pious Congregation of the Religious Sisters of Charity of Australia (hereinafter called the Sisters of Charity) who are bound by vows of poverty and it is conducted by them presumably to give effect to what is stated in their constitutions as being the special end of the congregation, namely, that its members labour seriously in works of spiritual and corporal mercy, including the care of the sick in general and private hospitals for the salvation and consolation of their neighbours. A number of members of the congregation nurse and supervise in the hospital and in return receive no material benefit other than their maintenance.
22. It appears further that the Hospital is not conducted for the financial gain of any person or persons. It falls within the third of the three classes of hospitals referred to in the judgment of Mr. Justice Jacobs as being found in New South Wales, namely, hospitals in which considerable fees are charged but which are not conducted by private individuals for private gain but are conducted by organizations, usually religious bodies.
23. It appears further that fees are charged for accommodation at St. Vincent's Private Hospital, that those fees are much the same as fees charged at other hospitals in New South Wales falling into the third of the classes referred to by his Honour, and that the charge for more than one half of the beds in the Hospital is less than the average "cost" per day of maintaining a patient in the Hospital calculated without reference to the services rendered by the Sisters of Charity in the Hospital or to any allowance for rent or certain other items usually taken into account in calculating costs.
24. It further appears that as at the date of death of the testator the ward rate of fee at St. Vincent's Private Hospital was £4.10.0. per day and the highest charge for a private room was £6.7.0. per day as compared with the charge of £3.0.0. per day required by the Hospitals Commission of New South Wales by virtue of the
- p.35 Ll.1-26
p.37 Ll.11-19
- p.54 Ll.2-6
p.98 Ll.14-32
p.99 Ll.1-9
p.100 Ll.22-32
p.101
p.107 Ll.36-38
p.108 Ll.1-9
p.45 Ll.4-29
p.196-7
p.81 Ll.17-20
- p.101 Ll.9-13
p.154 Ll.2-17
- p.53 Ll.18-23
p.58 Ll.24-30
p.59
p.60 Ll.1-12
p.121 Ll.32-36
pp.123-127
p.151 Ll.13-30
p.152 Ll.1-7
- p.59 Ll.23-27

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- p.66 Ll.13-18 powers conferred upon it by the Public Hospitals Act, 1929-1959, to be made, subject to means, for accommodation in the public ward of a public hospital in New South Wales and the charge of £5.16.0. per day required by the Commission to be made for a private room where this had been set aside at such a hospital. The public hospitals required to make these charges are the hospitals comprising the first of the three classes referred to by Mr. Justice Jacobs in his judgment. 10
- p.48 Ll.30-31 25. It appears further that St. Vincent's Private Hospital is an approved hospital under the National Health Act 1953-1962, of the Parliament of the Commonwealth of Australia. Approval under that Act is given only after an application to that end and application must have been made by the Sisters of Charity for the approval of this Hospital. By virtue of that Act, where a person who is himself a contributor to, or who is the dependant of a contributor to, a hospital benefits fund conducted by a hospital benefits organization registered under that Act receives treatment at St. Vincent's Private Hospital, there is payable to the patient or the hospital by the Commonwealth of Australia an amount of £1.0.0. per day and by the hospital benefits organization an amount of not less than 16s. per day. 20
- p.154 Ll.18-23 26. Mr. Justice Jacobs says in his judgment; "There must also be taken into account the Hospital Benefits schemes whereby for a small contribution a large part of the cost of hospitalization in such a hospital is met by the Commonwealth Government and by the officially recognised Hospital Fund". An example of the extent to which the costs of hospitalization may be met by such a scheme is shown by a consideration of the brochure tended in evidence at the hearing of this suit and marked Exhibit 8 and published by the Medical Benefits Fund of Australia Limited, a hospital benefits organization registered under the National Health Act, 1953-1962, which conducts a hospital benefits fund of the kind referred to in paragraph 25 of this case. From this brochure it appears that a contributor to that organization in return for the weekly contributions set out hereunder may obtain 30
- p.225 40

benefits each week for up to seven weeks in any period of one year amounting to the sums set out opposite the contributions respectively:

1s.6d.	{single contributor}	£19.12. 0
4s.0d.	{single contributor}	£40.12. 0
3s.0d.	{family contributor}	£19.12. 0
8s.0d.	{family contributor}	£40.12. 0

10 In the case of a family contributor the benefit is payable where either the contributor or an eligible dependent of his is admitted to any approved hospital.

27. At the date of death of the deceased amounts paid by a tax payer resident in Australia to a hospital benefits fund for the personal benefit of the tax payer or his spouse or child were an allowable deduction for the purpose of arriving at the taxable income of the tax payer. See section 82HA of the Income Tax and Social Services Contribution
20 Assessment Act, 1936-1962.

28. In practice St. Vincent's Private Hospital serves persons of average means. Its fees are within the range of persons of moderate means who take advantage of the benefits to be obtained under the National Health Act, 1953-1962.

p.53 Ll.18-23

29. At the date of death of the deceased the basic wage in the State of New South Wales was £A15.3.0. per week for males and £A11.7.6. per
30 week for females.

30. The Parliament of the Commonwealth of Australia by enactment of the National Health Act, 1953-1962, has for the benefit of the community in general provided a scheme to assist the provision of hospital facilities for the treatment of the sick which contemplates the complementary operation of the Hospital benefits schemes referred to in paragraph 25 of this case.

40 31. It is submitted that these considerations suggest that the purposes of St. Vincent's Private Hospital are the provision of hospital

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accommodation for the community in general in order to give effect to an intention of charity or benevolence.

32. It is further submitted that these purposes fall within the fourth of the classes described by Lord Macnaghten in Commissioners for Special Purposes of Income Tax v. Pemsel (1891) A.C. 531 at 583 because:

- (a) the provision of hospital accommodation is for the benefit of the community, and 10
- (b) since the relief of the impotent is one of the heads of charity mentioned in the preamble to the Statute of Charitable Uses (43 Eliz. c.4) and the hospital is conducted to give effect to an intention of charity or benevolence the purposes of St. Vincent's Private Hospital are within the spirit and intendment of the Statute.

See Williams' Trustees v. Inland Revenue Commissioners ((1947) A.C. 477 at 455); 20
Congregational Union of New South Wales v. Thistlethwayte (87 C.L.R. 375 at 445); Perpetual Trustee Co. (Ltd.) v. St. Luke's Hospital ((1939) S.R. (N.S.W.) 408 at 417).

33. In order to be charitable within the fourth head of Lord Macnaghten's classification a gift must proceed from an altruistic or benevolent or philanthropic motive. See Barby v. Perpetual Trustee Co. (Ltd.) (58 C.L.R. 316 at 324); 30
Commissioners for Special Purposes of Income Tax v. Pemsel ((1891) A.C. 531 at 557-9, 571-2);
Webb v. Oldfield ((1898) 1 I.R. 431 at 446);
Commissioners of Inland Revenue v. The Falkirk Temperance Cafe Trust ((1927) S.C. 261 at 271).
 Relief of poverty in the limited sense of lack of money is not, however, an essential element of a charitable purpose within this class. See In re Hobourn Aero Components Ltd.'s Air Raid Distress Fund ((1946) Ch. 194 at 206,210). For such a purpose a sufficient motive is the desire to 40
 render assistance to persons who are in need of it through some cause other than lack of money. See Attorney-General v. National Provincial Bank ((1924) A.C. 262 at 267); Re Hillier ((1944) 1 All

E.R. 480 at 481)

34. The express exclusion of the poor from the benefit of a gift may indicate that the gift proceeds from a motive other than charity and accordingly that it is not charitable in the legal sense. See In re Macduff ((1896) 2 Ch. 451). But if there is no express restriction of the persons who are to be benefited having this effect an altruistic or benevolent or philanthropic motive may appear for the gift even though the poor may not or cannot in fact directly benefit by it. See Verge v. Somerville ((1924) A.C. 496).

35. In this case the motive for the gift takes its colour from the institution to which the gift is made and it is submitted that even if it be assumed that the poor cannot benefit from the services provided by St. Vincent's Private Hospital it nevertheless appears that the gift was made from altruistic, benevolent or philanthropic motives because it is from motives such as these that the institution is conducted.

36. In the Statute of Elizabeth the purpose described as the relief of the impotent is not restricted to the poor impotent. See In re Chaplin ((1933) Ch. 115); Re Hillier ((1944) 1 All E.R. 480); In re Lewis ((1955) 1 Ch. 104). Poverty is not co-extensive with destitution and through participation in the benefits of the National Health Scheme St. Vincent's Private Hospital may be used by persons who can be adequately described as poor. See In re de Carteret ((1933) 1 Ch. 103). By virtue of its approval under the National Health Act it becomes part of the legislative scheme referred to in paragraph 30 of this case providing for the care of the sick throughout the community and for the benefit of the community generally.

37. A purpose which is otherwise charitable does not necessarily lose that quality merely because payments are made by the recipients of benefits it provides. If the receipt of payment is merely incidental to the effectuation of the charitable purpose and is not a separate and independent purpose of the activity being carried on, the activity will retain its charitable character. See Salvation Army (Victoria) Property Trust v.

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Fern Tree Gully Corporation (85 C.L.R. 159); Commissioners of Inland Revenue v. The Falkirk Temperance Cafe Trust ((1927) S.C. 261). This is a question of fact: see Brighton College v. Marriott ((1926) A.C. 192 at 204); and it is suggested that in the circumstances of this case the charging of fees is incidental only to the carrying out of the purposes of St. Vincent's Private Hospital.

- pp. 38-39
p.45 Ll.4-18
p.81 Ll.1-8
p.97 Ll.24-32
p.98 Ll.1-13
38. The significance of the charging of fees, it is submitted, is to be considered not only in relation to the manner in which St. Vincent's Private Hospital is conducted but also in relation to the fact that St. Vincent's Private Hospital is conducted by the same community of the Sisters of Charity as St. Vincent's Public Hospital under the control of the one Mother Rectress and, except in so far as separate accounts are kept for each, both are parts of the one establishment. St. Vincent's Public Hospital is subsidized by the Hospital's Commission of New South Wales by virtue of powers conferred by the Public Hospitals Act, 1929-1959. 10
- p.39 Ll.3-7
p.61 Ll.4-19
pp.62-64
39. It is submitted that if the proper conclusion of fact is that the purposes of St. Vincent's Private Hospital are the provision of hospital accommodation not for the community generally but for the persons whom it in fact serves, that is to say persons of average means, that is a charitable purpose because such persons are an appreciably important class of the community, they are not an irrelevant class in relation to hospital accommodation, and a desire to benefit such persons indicates an intention of charity or benevolence. 30
- p.35 Ll.1-26
p.36 Ll.6-13
40. It is stated that amongst other reasons for the establishment of St. Vincent's Private Hospital was the fact that its establishment adjacent to St. Vincent's Public Hospital would provide a means of rewarding members of the honorary medical staff of the Public Hospital by providing them with a hospital to which they might have admitted private patients 40

10 under their care, and further that the intention of the Sisters of Charity at the time of establishment of the private hospital was that such profits as might accrue from it should be applied primarily to the support of the public hospital and secondly to the other charitable works of the Sisters of Charity as defined in their Constitution. It is submitted that these facts would not alter the quality of the motives from which St. Vincent's Private Hospital is conducted or make the charging of fees there other than ancillary to the to the purposes of the hospital.

41. This respondent Perpetual Trustee Company Limited therefore humbly submits to such order as the Privy Council sees to make upon these appeals so far as they relate to the answer to Question 1. in the originating summons herein.

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SECOND QUESTION

42. The second question in the originating summons herein arises only in the event of the gift to St. Vincent's Private Hospital being declared to be invalid. As asked in the summons the question was:

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"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?"

43. His Honour Mr. Justice Jacobs held that this question did not arise.

p.156 L.30

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44. In the event of there being argument in the Privy Council as to the entitlement to income which in consequence of the invalidity of the gift to the Sisters of Charity is not specifically disposed of this respondent Perpetual Trustee Company Limited does not seek to be heard except for the purpose of respectfully submitting that the declaration made should in terms refer to the destination of so much of the net income of the residuary estate of the deceased as would have been payable to the

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Sisters of Charity if the gift to them had been valid and for the purpose of submitting any relevant arguments not submitted by parties interested in this question.

THIRD AND FOURTH QUESTIONS

- p.28 Ll.10-22 45. By the second codicil to his Will, which codicil was dated 24th September, 1962 the deceased directed his 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 Section 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." 10
- p.30 Ll.5-6 46. The third codicil to the Will of the deceased, which codicil was dated 5th September, 1963, and was therein described as "a first codicil to the last Will and testament of me Edmund Resch", containing a disposition as follows: 20
- p.30 Ll.18-24 "I Direct my Trustee out of the income arising from the residue of my real and personal estate to hold an annuity of Two thousand pounds (£2,000) 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". 30
- p.9 Ll.2-8
p.129 Ll.2-3 47. At all material times Karla de Bono was and she still is alive and married.
- p.4 Ll.2-8 48. The third question in the originating summons herein asked whether by the codicil to his Will dated 5th September 1963, being the codicil referred to in paragraph 46, the testator 40

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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? These three codicils are set forth in the Record.

p.27
pp.28-29
pp.30-31

49. The fourth question in the originating summons asked whether Stephen de Bono was entitled to an annuity during his lifetime of £2,000 per annum or £4,000 per annum?

p.4 Ll.9-18

10 50. His Honour Mr. Justice Jacobs heard argument on both these questions together. In his judgment his Honour said that question 3 as asked was one proper only for the Court of Probate and he therefore did not answer that question as asked but in lieu of doing so he declared that the provisions of the third codicil did not render ineffective the whole of the provisions of the first and second codicils. He answered question 4 to the effect that Stephen de Bono was entitled
20 to an annuity of £4,000 per annum.

p.166 Ll.31-32
p.167 Ll.1-25

51. If question 3 were to be answered as asked in the affirmative the interests of children of Karla de Bono not born at the date of the originating summons but who might be born prior to 24th September, 1972, would be affected.

52. It is submitted that his Honour Mr. Justice Jacobs correctly stated the function of a Court of construction when he said the question for the Court was "whether as a matter of construction the provisions of the third codicil render
30 ineffective the whole or any of the provisions of the first and second codicils."

p.159 Ll.59-60
p.160 Ll.1-3

53. It is submitted by this respondent Perpetual Trustee Company Limited that revocation in the sense of exclusion from the documents containing testamentary dispositions in a question proper only for the Probate Court. See In re Hawksley's Settlement ((1934) Ch. 384) and other cases such as Whicker v. Hume (7 H.L.C. 124 at 143, 156); Kidd v. North (2 Ph. 91 at 97); In re Barrance ((1910) 2 Ch. 419).
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54. If cases such as McLeod v. McNab ((1891) A.C. 471); In re Baker ((1929) 1 Ch. 668); and In re Pearson ((1963) 1 W.L.R. 1358) when

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correctly considered are to be taken as deciding that a Court of construction when ascertaining the intentions of a testator as to the disposition of his property may exclude from consideration any document admitted to probate if it is submitted that they should not be followed.

55. There is no express inconsistency between the first and second codicils or either of them and the third codicil. Full effect may be given to all dispositions contained in the codicils. 10

56. It is submitted that the terms of the third codicil do not indicate an intention of the part of the deceased that it should be in substitution for the first and second codicils or either of them. Such an indication of intention is not to be found in the deceased's description of the third codicil as a "first" codicil or in the confirmation by it of the Will without reference to the first or second codicils.

p.161 Ll.48-
53
p.163 Ll.1-2

57. It is submitted further that the gift by the third codicil of an annuity of £2,000 to Stephen de Bono does not indicate an intention that the third codicil should be in substitution for the second codicil because there is nothing in the context of these documents to rebut the presumption referred to by his Honour Mr. Justice Jacobs that in such cases the second legacy or annuity is intended to be cumulative upon the first and not in substitution for it. 20

p.164 Ll.4-9

58. If upon the proper construction of the third codicil the annuity to Stephen de Bono therein contained is intended to be substitutional and not cumulative, it is submitted that only so much of the second codicil should be held inoperative as is necessary in order to give effect to that intention, that is to say so much of it as gives an annuity of £2,000 to Stephen de Bono. A Court of Probate in a case of partial inconsistency between two successive testamentary documents will hold that the latter instrument revokes the earlier as to those parts only where they are inconsistent and it is submitted that an analogous rule should be applied here and that Mr. Justice Jacobs was correct in stating that the same principle lies behind the rule 30 40

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applied by the Probate Court and the rule of construction applied by a Court of construction. See Kidd v. North (2 Ph. 91: 41 E.R. 876).

59. Further it is submitted that Mr. Justice Jacobs was correct in holding that there was a purpose in the third codicil beyond the repetition of matters dealt with in the first and second codicils so that there were reasons for making it even though the first and second
10 codicils were in existence.

p.164 Ll.14-31
p.165
p.166 Ll.1-30

60. It is submitted that his Honour was correct in holding that it could not be inferred that the testator intended to revoke provisions in the second codicil the subject matters of which were not dealt with by the third codicil.

p.166 Ll.14-30

61. This respondent Perpetual Trustee Company Limited therefore humbly submits that this appeal against so much of the judgment and decree herein as declines to answer question 3
20 in the originating summons but in lieu thereof declares that the provisions of the third codicil do not render ineffective the whole of the provisions of the first and second codicils should be dismissed for the following, amongst other,

R E A S O N S

- (1) BECAUSE the judgment and decree were correct.
- (2) BECAUSE the only question which could be determined in this suit was the construction
30 of the documents admitted to probate.
- (3) BECAUSE the third codicil is not inconsistent with the whole or any part of the first and second codicils.
- (4) BECAUSE the third codicil does not indicate an intention that it should be in substitution for the first and second codicils or either of them.

62. This respondent Perpetual Trustee Company Limited submits to such declaration as the Privy
40 Council sees fit to make in relation to the appeal

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upon question 4 in the originating summons.

FIFTH QUESTION

- p.12 Ll.15-18 63. The fifth question in the originating summons herein arises out of a bequest in the will of the deceased in these terms:
- "I Give Devise and Bequeathunto Brian De Bono a son of Karla De Bono my cameras, projectors films and other photographic appliances and my watches (other than my calendar watch) chains studs and other personal jewellery." 10
- p.12 L.14 The deceased had earlier in the will disposed of his calendar watch.
- p.9 Ll.9-50
p.10 Ll.1-32 64. At the date of his death the deceased was the owner of the items of jewellery and the jewels and other chattels more particularly described in paragraph 7 of the affidavit of John Sanders sworn herein the 12th March 1965. Some of the jewellery was of the type normally used or worn by men and some of the type normally used or worn by women. Other items were indeterminate from this point of view. 20
- p.4 Ll.19-25 65. The fifth question in the originating summons herein asked whether the bequest to Brian de Bono of "other personal jewellery" included;
- (a) only jewellery related to the testator's personal use and enjoyment; or
- (b) some other and if so what jewellery?
- p.168
p.169
p.170 Ll.1-15 66. His Honour held that the word "personal" could not be limited to the person of the deceased and that personal jewellery was a phrase apt to describe jewellery appropriate for wearing on the person as distinct from jewellery, ornamental to a chattel or place. He held further that the words "other personal jewellery" extended to all personal jewellery owned by the deceased without distinction between those items which he used himself upon his person and those which he did not, and hence to all the items referred to in Mr. Sander's affidavit 30

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except the calendar watch and chain specifically bequeathed, two small silver dishes and a number of loose precious and semi-precious stones.

67. This respondent Perpetual Trust Company Limited does not seek to be heard upon the appeal relating to the fifth question in the originating summons unless at the hearing of the appeal it appears that there are relevant arguments which have not been submitted to the Privy Council.

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~~R. J. KENNY~~
P. V. GYLES

No.18 of 1967
IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE SUPREME COURT OF NEW SOUTH
WALES IN ITS EQUITABLE JURISDICTION

IN THE MATTER of THE TRUSTS of THE
WILL of EDMUND RICHARD EMIL RESCH

A. B E T W E E N:

VERA CAROLINE LE CRAS Appellant

- and -

PERPETUAL TRUSTEE COMPANY
LIMITED and OTHERS Respondents

- and -

B. B E T W E E N:

FAR WEST CHILDREN'S HEALTH SCHEME
and OTHERS Appellants

- and -

PERPETUAL TRUSTEE COMPANY and
OTHERS Respondents

C A S E FOR THE RESPONDENT
PERPETUAL TRUSTEE COMPANY LIMITED

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