

IN THE PRIVY COUNCIL

No. 18 of 1967

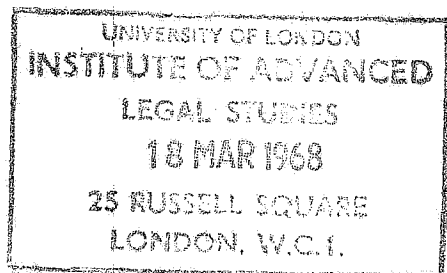
ON APPEALS from the Supreme Court of New South Wales
in its Equitable Jurisdiction in Suit instituted
by Originating Summons No. 754 of 1964

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

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

- and -

PERPETUAL TRUSTEE (Plaintiff)
COMPANY LIMITED Respondent



TRUSTEES OF THE SISTERS OF CHARITY OF AUSTRALIA
EDNA MAVIS SKEWES
ALICE NOLAN ELPHICK
FREDERICK McDONOUGH
FAR WEST CHILDREN'S HEALTH SCHEME
THE SPASTIC CENTRE
ROYAL NEW SOUTH WALES INSTITUTION FOR
DEAF AND BLIND CHILDREN
THE SALESIAN SOCIETY INCORPORATED
STEPHEN de BONA
BRIAN de BONO 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

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

CASE FOR THE INFANT RESPONDENTS

STEPHEN de BONO AND BRIAN de BONO

RECORD

1. These appeals (which are consolidated by Order made by the Supreme Court of New South Wales (Street J.) on 26th August 1966 granting conditional leave to appeal) are brought pursuant to an Order made by the said Supreme Court (Street J.) on 16th December 1966 granting final leave to appeal to Her Majesty in Council from certain parts of a Decretal Order made by the said Supreme Court (Jacobs J.) on 27th July 1966 in a suit instituted by Originating Summons for the Determination of certain questions relating to the true construction of the Will and three codicils of Edmund Richard Emil Resch deceased (hereinafter referred to as "the Testator"). 10

2. Neither the Respondent Stephen de Bono nor the Respondent Brian de Bono is interested in that part of the said Decretal Order from which the Appellant Vera Caroline Le Cras appeals. 20

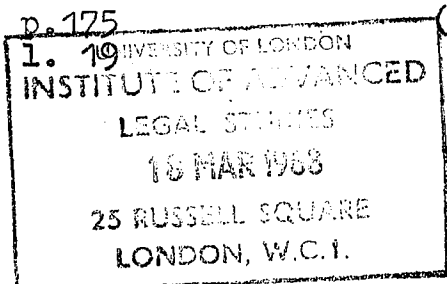
3. Neither the Respondent Stephen de Bono nor the Respondent Brian de Bono is interested in those parts of the said Decretal Order from which the Appellants Far West Children's Health Scheme, The Spastic Centre and Royal New South Wales Institution for Deaf and Blind Children appeal, except -

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(a) That part of the said Decretal Order which declares (in lieu of answering Question 3 of the Originating Summons) that upon the true construction of the said Will and codicils and in the events which have happened the provisions of the third codicil to the said Will do not render ineffective the whole of the provisions of the first and second codicils thereto (which the Respondent Stephen de Bono is interested to maintain, but in which the Respondent Brian de Bono is not interested). 30 40

p.175

(b) That part of the said Decretal Order which declares (in answer to Question 4 of the Originating Summons) that upon the true construction of the



said Will and codicils and in the events which have happened the Defendant Stephen de Bono is entitled to receive out of the income of the residue of the real and personal estate of the said Testator an annuity during his lifetime of Four thousand pounds (£4,000) per annum (which the Respondent Stephen de Bono is interested to maintain, but in which the Respondent Brian de Bono is not interested).

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(c) That part of the said Decretal Order which declares (in answer to Question 5 of the Originating Summons) that upon the true construction of the said Will and codicils and in the events which have happened the bequest to Brian de Bono contained in the said Will of "other personal jewellery" does not include only jewellery related to the personal use and enjoyment of the said Testator but includes all those of the items referred to in Paragraph 7 of the affidavit of John Sanders sworn herein the twelfth day of March One thousand nine hundred and sixty five particulars of which are set out in the second schedule to the said Decretal Order (which the Respondent Brian de Bono is interested to maintain, but in which the Respondent Stephen de Bono is not interested).

p.175 1.26

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pp.178-9

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SUBMISSIONS IN SUPPORT OF THE
DECLARATION IN THE DECRETAL
ORDER MADE IN ANSWER TO QUESTION
3 OF THE ORIGINATING SUMMONS

4. The evidence of the Testator's Solicitor Mr. Herbert Moore Aspinall in his Affidavits of 13th and 14th December, 1965, was inadmissible and was rightly rejected by Jacobs J. for the reasons he gave. (See also Sir James Wigram's "Examination of the Rules of Law Respecting the Admission of Extrinsic Evidence in Aid of the Interpretation of Wills", 4th Ed., paras. 120 and 121 (20) (pages 98, 99 and 100-1 citing Hurst v. Beach 5 Madd. 351; and Farrer v. St. Catherine's College, Cambridge, L.R. 19 Eq., 19. In the

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p.133
p.138
p.157
ll.16-35

RECORD

latter case probate had been granted of a revoked will to which there were two codicils which were not revoked).

p.160 1.59

p.161 1.7

5. Jacobs J. was correct when he said the question which he had to determine in answering Questions 3 and 4 of the Originating Summons was whether as a matter of construction, the provisions of the third codicil rendered ineffective the whole or any of the provisions of the first and second codicils either because they were inconsistent with the provisions of those codicils or because they were mere repetition. In re Hawksley's Settlement (1934) Ch. 384 was rightly decided and was correctly applied by Jacobs J., to the problem posed for solution by Questions 3 and 4 of the Originating Summons. (See particularly (1934) Ch. pp. 397-8.)

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6. It is established as a general principle of construction that where a testator has made a will and has subsequently made one or more codicils thereto having respectively a proper force of their own, a further codicil which expressly confirms the will, even by reference to its date, without reference to the intermediate codicils is presumed to have been intended to confirm also the intermediate codicils (see Jarman on Wills, 8th ed., Vol. 1, p.214). This presumption follows from the nature of a codicil as forming a constituent part of the will to which it belongs; so that to confirm a will is in effect to confirm it as modified by codicils belonging to and forming part of it (see Jarman loc. cit.; Crosbie v. Macdoul 4 Ves. 610 at 616; Green v. Tribe 9 Ch. D. 231 at 234).

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7. This presumption is only rebutted by a subsequent codicil which evinces a clear intention to revoke the intermediate codicil in accordance with "the well-known principle of the case of Doe v. Hicks, 8 Bing. 475, that a clear gift is not to be revoked except by clear words." (Per Lord Selborne L.C. (sitting for the M.R.) in Farrer v. St. Catherine's College, Cambridge, L.R. 16 Eq. 19 at 23. See also Green v. Tribe, 9 Ch. D. 231 at 237; Follett v. Pettman, 23 Ch. D. 337 at 342).

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McLeod v. McNab, (1891) A.C. 471, to which Jacobs J. was referred, was a case in which the question was whether a particular testamentary paper, which had been revoked, was revived by a subsequent codicil referring to it by date and should therefore be admitted to probate.

10 8. Both revocation and revival of testamentary papers or any part thereof are dealt with by statutory provisions which, so far as relevant, are in the following terms:

20 "No will or any part thereof shall be revoked otherwise than ... by another will executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed..." (emphasis supplied) - Section 17, Wills Probate and Administration Act 1898-1954 (New South Wales).

"No will or any part thereof which is in any manner revoked shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same ..." (emphasis supplied) - Section 19, Wills Probate and Administration Act 1898-1954 (New South Wales).

30 9. The only matters appearing on the face of the third codicil in the present case which are indicative in any way of a possible intention that the first and second codicils should not have effect are the following:-

pp.30,159

(a) The description of the third codicil in the first line and in the attestation clause thereof as "a first codicil".

40 (b) The reference at the commencement of the third codicil to the original will by date and the express confirmation at the end of the document of "my said Will".

RECORD

(c) The inclusion in the third codicil of the declaration that the trusts in the Will to pay "all my just debts funeral and testamentary expenses and all duties in anywise payable in connection with my estate" out of residue, should "include all duties in anywise payable in connection with my notional estate", whereas in the first codicil there was a direction to the 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 ..."

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10. It is submitted: 20

(a) That it would be a matter of sheer speculation to infer from any or all of the matters mentioned in paragraph 9 above that by executing the third codicil the Testator intended either to revoke the first and second codicils or to revive the original will free from the modifications created by the first and second codicils; 30

(b) That the provisions of the third codicil do not disclose a clear intention to revoke such codicils or either of them;

pp.30 1.24
to 31 1. 5
p.16 11.12-
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(c) Moreover the express revocation by the third codicil of the condition attached to the gifts in the will of annuities to Jean, Valentine, and Denise Heaton shows that the Testator had the matter of revocation in his mind and that he was careful to express in clear terms the provisions of the will he intended to revoke. 40

pp.156-167
1.31
p.175 1.12

11. It is therefore submitted that for the reasons stated above, and also for the reasons given by Jacobs J. the declaration made in lieu of answering Question 3 of the Originating

Summons is correct.

RECORD

SUBMISSIONS IN SUPPORT OF THE DECLARATION
IN THE DECRETAL ORDER MADE IN ANSWER TO
QUESTION 4 OF THE ORIGINATING SUMMONS

p.175 1.19

10 12. It is established as a general principle of construction that where a testator in each of two separate testamentary instruments has given a legacy or annuity simpliciter i.e. without expressing any motive, (whether of the same or different amounts) to the same person, there is, subject to any contrary intention appearing on the face of the instruments, a presumption that the two gifts are intended to be cumulative (see Jarman op. cit. Vol. 2 pp. 1104-5, 1114; Hurst v. Beach 4 Madd.351; Radburn v. Jervis 3 Beav. 450 at 457; Cresswell v. Cresswell 6 Eq. 69 at 76).

20 13. There is in the present case no indication in the Will and codicils of an intention that the annuity given to the Respondent Stephen de Bono by the third codicil should be substituted for the annuity given to the said Respondent by the second codicil; and it is submitted that the evidence of Herbert Moore Aspinall in his affidavits of the 13th and 14th December, 1965, were rightly rejected by Jacobs J. (see Hurst v. Beach, supra).

pp.133 and
138

30 14. It is therefore submitted that for the reasons expressed above and also for the reasons given by Jacobs J. the declaration made by His Honour in answer to Question 4 of the Originating Summons is correct.

pp.164 1.14
to 166 1.30

SUBMISSIONS IN SUPPORT OF THE DECLARATION
IN THE DECRETAL ORDER IN ANSWER TO QUESTION
5 OF THE ORIGINATING SUMMONS

p.175 1.26

40 15. It is submitted that the ordinary meaning of "personal jewellery" is articles for personal use or adornment by or of persons of either sex. There is nothing in the Testator's Will and codicils to suggest that the use of the word "personal" limits the meaning further to jewellery for the Testator's own personal use or adornment (i.e. personal jewellery customarily

RECORD used or worn by him, or which the Testator was accustomed to use or wear). Indeed there is a reasonably clear indication in the will that the word "personal" is intended to include articles used or worn by both men and women, viz. in the use in combination of the words "my watches" and "other personal jewellery". Included among the watches owned by the Testator at the date of his death were three ladies' watches (items 7, 13, and 45 in paragraph 7 of the Affidavit of John Sanders), one at least of which had been inherited by him from his wife (see paragraph 7 of the Affidavit of John Sanders) who died in 1959 (see paragraph 4 of the Affidavit of Karla de Bono).

p.12 ll. 17-18

p.9 ll.22, 29-30

p.10 ll. 26-27

p.10 ll. 33-37

p.129 1.8

p.175 1.26

16. It is therefore submitted that for the reasons expressed above and also for the reasons given by Jacobs J. the declaration made in answer to Question 5 of the Originating Summons is correct.

CONCLUSION

17. The Respondents Stephen de Bono and Brian de Bono submit that the declarations made by the Supreme Court of New South Wales in Equity in answer to Questions 3, 4 and 5 of the Originating Summons are correct and that the appeal of the Appellants Far West Children's Health Scheme, The Spastic Centre and Royal New South Wales Institution for Deaf and Blind Children, insofar as it seeks to challenge the said declarations, should be dismissed, for the following amongst other:

R E A S O N S

- (a) Because upon the true construction of the Will and codicils of the Testator and in the events which have happened the provisions of the third codicil to the said Will do not render ineffective the whole of the provisions of the first and second codicils thereto.
- (b) Because upon the true construction of the said Will and codicils and in the events which have happened the Respondent Stephen de Bono is entitled to receive out of the income of the residue of the real and personal estate of the Testator an annuity

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during his lifetime of £4,000 per annum on the protective trusts declared by Section 45 of the Trustee Act, 1925 (New South Wales).

RECORD

10 (c) Because upon the true construction of the said Will and codicils and in the events which have happened the bequest to the Respondent Brian de Bono contained in the said Will of "other personal jewellery" does not include only jewellery related to the personal use and enjoyment of the Testator but includes all those of the items referred to in paragraph 7 of the Affidavit of John Sanders sworn in the suit the 12th March, 1965 particulars of which are set out in the second schedule to the Decretal Order in the suit.

pp.178-9

20 (d) Because the reasons given by His Honour Mr. Justice Jacobs for making the declarations in answer to Question 3, 4 and 5 in the Originating Summons are correct.

G.P. Stuckey

(M.H. McLelland)

per G.P. Stuckey

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

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,
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, BRIAN de BONO 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

TRUSTEES OF THE SISTERS OF CHARITY OF AUSTRALIA,
EDNA MAVIS SKEWES, ALICE NOLAN ELPHICK,
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INCORPORATED, VERA CAROLINE LE CRAS, STEPHEN
de BONO, BRIAN de BONO and THE ATTORNEY GENERAL
FOR NEW SOUTH WALES (Defendants)
Respondents

CASE FOR THE INFANT RESPONDENTS
STEPHEN de BONO and BRIAN de BONO

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