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IN THE PRIVY COUNCIL

No.26 of 1958

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

12 MAR 1960

25 RUSSELL SQUARE  
LONDON, W.C.1.

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES

55562

IN THE MATTER OF THE TRUSTS OF THE WILL and  
CODICIL of GEORGE HARRIS of Ultimo Sydney in  
the State of New South Wales, Esquire deceased.

B E T W E E N

BEATRICE ALEXANDRA VICTORIA DAVIES,

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... (Defendant) Appellant

and

PERPETUAL TRUSTEE COMPANY (LIMITED), (PLAINTIFF)  
NINA EVA VIDA JONES, MARY EILEEN HARRIS, THE  
PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES  
LIMITED, THE UNIVERSITY OF SYDNEY and HER  
MAJESTY'S ATTORNEY GENERAL in and for the  
State of New South Wales.

... (Defendants) Respondents

CASE FOR THE APPELLANT

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RECORD

1. This is an appeal by Special leave of Her  
Majesty in Council from a judgment of the Supreme  
Court of New South Wales (Pring, Gordon J.J. and  
Langer Owen, A.J.) given on the 14th June, 1919  
and the Decretal Order thereon dated the 26th  
September, 1919 upholding a decision of His  
Honour Mr. Justice Harvey, a Judge of that Court  
sitting in Equity that the following devise is a  
valid charitable devise:

p. 52  
p. 31

p. 39  
p. 25

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"I give and devise Block 70B upon which  
stands Ultimo House to the Presbyterians the  
descendants of those settled in the Colony  
hailing from or born in the North of Ireland to  
be held in trust for the purpose of establishing  
a college for the education and tuition of their  
youth in the standards of the Westminster  
Divines as taught in the Holy Scriptures."

p. 14 1.8

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p. 1 The decision of Harvey, J. was given upon the hearing of an Originating Summons brought by the Trustees of the Will and Codicil of George Harris (deceased) for the determination of a number of questions, including the question whether or not a devise in the above terms made by the testator by a Codicil dated the 3rd April, 1895, to his Will dated the 18th April, 1894 was a valid charitable devise. The Appellant is the representative of the next-of-kin of the said testator George Harris. 10

p. 9 1.16 2. By his Will the testator devised the said Block 70B to his wife for her life and thereafter to his nephew John Harris for life and thereafter to the next surviving eldest son of his brother John for life until the death of the last survivor of his nephews the sons of his brother John and then to his heir at law bearing the name of Harris.

p.13 1.40 By the said Codicil the said testator 20  
p.14 1. 7 revoked the said devise to his heir at law and substituted the devise set out in paragraph 1 hereof. He also revoked several provisions of his Will as to the destination of the ultimate residue of his estate and devised that residue to the college, to be founded pursuant to the said devise, directing that it be "held at interest and this latter added to the income annually".

p.14 1.35  
p.14 1.36

The last of the life tenants interested 30  
in the said Block 70B died on the 19th April, 1957. The value of the said Block 70B at that date was £53,000 and the value of the said residue was £286,750.

p.26 1.31 3. Upon the hearing of the Originating Summons Harvey, J. held that the effect of the Codicil was to subject the devise of Block 70B to the prior life estates created by the Will in favour of the widow and the said nephews of the testator and that the said devise was a valid charitable trust. In his judgment His Honour said that the "trust for founding a Presbyterian College is a good charitable trust being an immediately vested remainder waiting only for the determination of the antecedent life estates of the sons of John Harris". 40

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p.26 1.27  
p.17 1.48  
and  
p.18 11.1-4

4. Counsel for certain of the defendants (who were also among the next-of-kin of the

testator) and Counsel for the University of Sydney submitted that the trust set out in paragraph 1 hereof was void for uncertainty and not charitable as being confined to a restricted class. These submissions were replied to by counsel for the Attorney-General. Following the Attorney-General's address, His Honour made the following note:

10           "Marsh v. Attorney-General Tudor page 102.           p.22 l.19  
Subject to affidavit by Attorney-General as to Presbyterian children. I answer 10a in affirmative as being vested remainder for a good charitable object. 10b I hold that the life estates in the 2 properties created by the will are not revoked by the Codicil. Question 10c S.O. generally."

The questions referred to by His Honour in that note were in the following form in the Originating Summons:

20           "10(a) Are the devises of "Block 70B" and of           p. 4 l. 5  
'the northern portion of Block 47B' contained in the Codicil valid devises?

(b) If so, are the said respective devises subject to any and, if so, what prior estates?

(c) If the devise of Block 70B is valid, by whom should the said land be held in trust, and who should take the necessary steps to establish the said college?"

30           The above note was made by His Honour on the 18th December, 1918, His Honour expressed his reasons for judgment on these questions as follows:

40           "I have already held that the effect of the           p.17 l.41  
Codicil is to revoke both devises in the Will in favour of the Testator's heir at law but that the life interests in Ultimo House in favour of his widow and nephews and the life interests in the residuary real estate in favour of his nephews are not disturbed by the Codicil. I have also held that the trust for founding a Presbyterian College is a good charitable trust being an immediately vested remainder waiting only for the determination of the

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antecedent life estates of the sons of John Harris. When this remainder falls in it will become necessary to settle a scheme for the administration of this trust."

p.15  
p.25 1.1

An affidavit was sworn by one William Wood on the 19th December, 1919 and it appears from His Honour's further note that this affidavit was put into evidence before him. That Deponent stated that he was the Financial Secretary of the Presbyterian Church of Australia in the State of New South Wales, that he had occupied that

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p.15 1.35

position for over twenty five years and that he had an intimate knowledge of the affairs and constitution of the Presbyterian Church in that State. He then deposed to the fact that "amongst the members of the Presbyterian Church in this State in the year 1897 there were numerous persons descendants of Presbyterian settlers in this State, and hailing from or born in the North of Ireland, and at the present time there are still a considerable number of adherents or members of the said Church similarly descended." This was the only affidavit and the only evidence before His Honour as to the existence or otherwise of persons of the class required by that devise but His Honour was apparently of the opinion that it satisfied the condition which he had imposed in answering question 10(a) in the affirmative.

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5. The Appellant contends that the evidence provided by this affidavit is so vague and unsupported by evidence of the sources from which the Deponent received his information as to be of no assistance in determining whether the trust in the Codicil was capable of taking effect. Furthermore the Appellant contends that such evidence could not be effective to dispose of the contention that the devise was void for uncertainty. In any event the affidavit could have been of little assistance as the qualifications of the persons described in the affidavit are very different from the qualifications required by those who are to benefit under the devise in the Codicil.

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6. One of the Defendants, Matthew James Harris, (not being a representative of the next of kin, although one of that class) who is now represented by the Respondent the Permanent Trustee Company of New South Wales Limited,

appealed from the judgment of Harvey, J. to the Full Court of the Supreme Court by Notice of Appeal dated the 13th February, 1919. Two of the grounds of the Notice of Appeal asserted: p.29

10 (1) That Harvey, J. was in error in holding that the devise of Block 70B contained in the Codicil to the Will of the testator in trust for establishing a college was a good charitable trust as being an immediately vested remainder waiting only for the determination of the antecedent life estates of the testator's widow and the sons of John Harris and p.30 1.33

(2) That His Honour should have held that such last mentioned devise and also the devise in the said Codicil of the residue of the sum realised from his estate to the said college were invalid. p.30 1.41

20 Other grounds in the Notice of Appeal related to decisions made by Harvey, J. on other questions raised in the Originating Summons which are not relevant to the present appeal.

7. The Appeal was argued before Pring, Gordon, J.J. and Langar Owen, A.J. and Judgment was delivered by Langar Owen, A.J. for the Court on the 14th June, 1919. p.31 1.29

In relation to the two grounds of appeal set out above, Langar Owen, A.J. in the course of his reasons said:

30 "A further question has been raised as to the effect of the devise by the Codicil of the property referred to as Block 70B, and of the residue of his estate. Mr. Justice Harvey held that this amounted to a trust for the founding of a Presbyterian College, and it is a good charitable trust for the purposes mentioned in the Codicil, and we agree with him. We think that it should be construed as a devise for the benefit of p.33 1.46

40 Presbyterians descended from those settled in New South Wales hailing from or born in the North of Ireland to be held by trustees for the purpose of establishing a college for the education of their youth according to certain religious standards. It is not a devise to or for the Presbyterian Church of Australia as constituted by the Presbyterian Church of Australia Act 1900. It is a devise for the benefit of certain individuals who are

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Presbyterians, and who come within a certain description, and the object is to afford facilities for religious education. It may be that, when the time arises for carrying this charitable trust into effect, it may be found impracticable to do so. In that event there is nothing in our decision and there should be no expression inserted in the decree to prevent the beneficiaries under the Will and Codicil from contending that the cy-pres doctrine is not applicable to these devises. The declaration submitted to us by counsel for the parties interested seems to us to safeguard their interests, and should be inserted in the decree". 10

p.39 8. The decree of the Court as subsequently engrossed and dated the 26th September, 1919 so far as relates to the said devise, is in the following terms:

p.40 1.32 "The devises of Block 70B and of the 'Northern portion of Block 47B' contained in the said Codicil are valid charitable devises for the respective purposes therein mentioned but this declaration is without prejudice to the right of the beneficiaries or any of them under the said Will to contend that the Cy-pres doctrine is not applicable to these devises or either of them if the said purposes are incapable of taking effect when the respective funds become available for the said purposes". 20 30

p.34 1.12 The Appellant does not dispute the construction placed upon the devise by the Supreme Court that is to say, that "It is a devise for the benefit of certain individuals" but contends that that construction having been placed upon it there is no room for holding that the devise is charitable.

9. The Appellant submits that the words "Presbyterians" and "those" are so vague and uncertain in meaning as to raise inconsistencies in the possible tests which they postulate for the discovery of those who are to benefit under the gift and that the devise in the Codicil is therefore void for uncertainty. 40

10. Upon the assumption that the trust is a charitable trust the Appellant further submits that it displays merely a particular charitable intent (albeit vague and uncertain)

and that the trust being uncertain fails absolutely. The statement by Uthwatt J. (as he then was) in Re Gott (1944 Ch.193) to the contrary, it is submitted, is too wide, not supported by the authorities from which His Lordship sought to draw the principles he relied upon, at variance with dicta in decisions of the House of Lords, and ought not to be affirmed.

10 11. The Appellant further submits that in any case the devise lacks the element of public benefit necessary to render it charitable. The common quality which unites the prospective beneficiaries into a class is essentially personal to each of them; it being their relationship to identifiable persons (granting a sufficient degree of certainty to the words employed). Such persons are not merely the accidental components of a class chosen by a testator to particularize a charitable intention, but are invested with such qualifications as to require their descendants to exhibit individual characteristics.

20 The advantages offered by the devise are not extended to the community at large or to any significant section of it as such (even though, perhaps, actually available to a few of such community) but are restricted to a selected few. Those few are selected not only by the satisfaction of one qualification (be it public or personal) but, upon one possible interpretation of the testator's words, by being (a) the youth (b) of Presbyterians (c) who are descendants (d) of those Presbyterians (e) settled in the colony (f) before the date of the testator's death and alive at his death (g) and hailing from (h) or born in (i) the North (j) of Ireland. Here is qualification upon qualification each serving as it follows upon the other to further restrict and limit the prospective beneficiaries and which at the outset excludes all the youth in the area generally, even those youths who are children of descendants of Presbyterians (upon any meaning of the word) with the exception of those few individuals who have the particular personal qualifications.

30 40 It is submitted that a beneficiary would have to establish his relationship to a specific propositus before being eligible.

12. In support of her submission that the devise if not charitable fails absolutely, the Appellant relies, inter alia, upon the operation of the rule

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against remoteness of vesting.

p.26 l.31 )  
p.40 l.44 )

It was held by both Harvey, J. and the Full Court that the revocation by the Codicil of the devise in favour of the testator's heir at law did not disturb the life estates granted by the will to the testator's widow and to the sons of his brother John Harris. The life estates granted to those sons other than the testator's nephew John Harris were contingent remainders dependent upon the survival of each son longer than each of his brothers older than himself. At the testator's death his brother John Harris, the father of the nephews granted life interests under the will, was still living. It is submitted that if the devise in the Codicil is not a charitable devise then it could only take effect as a gift to a class, which class is not to be ascertained until after the death of the last surviving son of the testator's brother John Harris. It is submitted that as the testator's brother could have had more sons, after the death of the testator, whose interests would not necessarily have vested in possession within twenty one years after the termination of a life in being at the testator's death, and, a fortiori, the interest of the last determine within that time, the period at which the class of persons who are described as descendants would be ascertained would not necessarily be within the period of a life in being at the testator's death or twenty one years thereafter.

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Furthermore it is submitted that if the gift be construed to be a gift for the endowment of a society, that the society according to its form would be perpetual and that the purpose for which the devise was made prevents the members of the society from alienating or dealing with it. It is therefore submitted that the gift (not being charitable and being so construed) would be bad.

The Appellant humbly submits that her Appeal should be allowed for the following, among other

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REASONS

1. Because the devise of Block 70B in the Codicil to the Testator's Will is not charitable being not for the benefit of a sufficiently public section of the community.
2. Because the devise is not expressed with such certainty as to be valid.



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3. Because the devise if not charitable is for a class of persons and is void for repugnancy to the modern rule against perpetuities.
4. Because the devise is so framed as to tend towards a perpetuity by rendering the property inalienable.

D.E. HORTON

No.26 of 1958

IN THE PRIVY COUNCIL

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ON APPEAL  
FROM THE SUPREME COURT OF NEW  
SOUTH WALES

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re TRUSTS of the WILL and  
CODICIL of GEORGE HARRIS  
Deceased

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BETWEEN

D A V I E S

— and —

PERPETUAL TRUSTEE COMPANY  
LIMITED and OTHERS

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CASE FOR THE APPELLANT

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