

*Privy Council Appeal No. 18 of 1967*

**Vera Caroline Le Cras**            -   -   -   -   -   -        *Appellant*

v.

**Perpetual Trustee Company Limited and others**        -   -        *Respondents*

and

**Far West Children's Health Scheme and others**        -   -        *Appellants*

v.

**Perpetual Trustee Company Limited and others**        -   -        *Respondents*

*(Consolidated Appeals)*

FROM

**THE SUPREME COURT OF NEW SOUTH WALES**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 19TH OCTOBER, 1967

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*Present at the Hearing :*

LORD HODSON

LORD GUEST

LORD DONOVAN

LORD WILBERFORCE

SIR ALFRED NORTH

*[Delivered by LORD WILBERFORCE]*

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These appeals concern a number of questions arising out of the testamentary dispositions of Mr. Edmund Richard Emil Resch. Mr. Resch died on 2nd October 1963 leaving a very considerable residuary estate valued, at the commencement of this action, at approximately \$(A)8 million. The Supreme Court of New South Wales, in its Probate Jurisdiction, on 7th November 1963 admitted to probate four instruments: (1) a will dated 5th December 1960 (2) a "first codicil" dated 22nd May 1962 (3) a "second codicil" dated 24th September 1962 (4) a "first" codicil dated 5th September 1963 which their Lordships will, for convenience, refer to as the third codicil.

The Testator left no widow or issue: his next of kin was his niece, the appellant Vera Caroline Le Cras. He left his residuary estate ultimately to be divided between a number of charitable institutions, but subject to intermediate gifts the validity of one of which is disputed.

On 21st July 1964 the Perpetual Trustee Co. Ltd., the executor and trustee appointed by the will, issued an originating summons raising five questions of construction. These were decided, and, so far as relevant, answered on 27th July 1966 by Jacobs J., exercising the equitable jurisdiction of the Supreme Court of New South Wales. Against his decretal order two consolidated appeals have been brought, one by Vera Caroline Le Cras, the other by three of the charitable institutions interested in the residuary estate. These five questions relate to three distinct issues which their Lordships will consider separately.

1. The First Issue. This relates to the gift contained in the will of the income of the residuary estate. The relevant passage is the following:

“I DIRECT my said Trustee from time to time to pay or apply the income of the residue of my real and personal estate and of the investments for the time being representing the same in paying or discharging all costs charges and expenses of my said Trustee of and incidental to the administration of the trusts of this my Will and subject thereto to pay two third parts of the net income of the said residue and of the investments representing the same to the SISTERS OF CHARITY for a period of two hundred years or for so long as they shall conduct ST. 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-third parts of the said net income to FAR WEST CHILDREN’S HEALTH SCHEME of Manly THE SPASTIC CENTRE of Mosman BOYS’ TOWN of Engadine and ROYAL NEW SOUTH WALES INSTITUTION FOR DEAF AND BLIND CHILDREN of Sydney in equal shares and to pay one-third part of the said net income to the said FAR WEST 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.”

Two questions arise: (a) whether the gift of two thirds of the income to the Sisters of Charity is a valid bequest (b) if not what are the trusts on which this share of income is to be held.

The learned judge decided (under (a)) that the bequest was a good charitable bequest and consequently did not answer (b). Both sets of appellants appeal against this decision, contending that the bequest is invalid. It is common ground that it cannot be upheld, at any rate *in toto*, unless it is charitable.

The gift is to the Sisters of Charity to be applied for the general purposes of St. Vincent’s Private Hospital. The first step must be to ascertain what these purposes are. The evidence establishes the following facts.

St. Vincent’s Private Hospital was inaugurated in 1909, when the present building, called by that name, was converted to that purpose, having previously been used as a Hospice for the Dying. The Hospital was established and has since 1909 been conducted by the Sisters of Charity, a voluntary association or congregation of women, governed by their Constitution under which they devote themselves without reward to good works. The Sisters also conducted in 1909 and still conduct the adjacent St. Vincent’s Hospital which is a public hospital within the Public Hospitals Act 1929–59. The evidence shows that the reason for the establishment of the private hospital was to relieve the pressing demand of the public for admission to the General Hospital which was quite inadequate to the demand upon it. Another reason was that there were many persons who needed hospital nursing and attention who were not willing to enter a public hospital but were willing and desirous of having hospital accommodation with more privacy and comfort than would be possible in the General Hospital. The establishment of an adjacent private hospital would enable the honorary medical staff in the General Hospital to admit for treatment under their care in the private hospital patients who were reluctant to enter the General Hospital and were able and willing to pay reasonable and proper fees for admission and treatment in a private hospital. The private hospital has 82 beds as compared with over 500 in the General Hospital.

The daily charges made by St. Vincent’s Private Hospital are comparable with those made at other similar institutions, one of which

is St. Luke's Hospital. In 1963 they ranged from £31 10s. 0d. to £44 9s. 0d. per week. From time to time patients have been treated free of charge or at reduced fees. There are in force in New South Wales a number of hospital benefit schemes under which, according to the scale of contribution chosen to be made by a member, benefits are payable in respect of treatment in approved hospitals—which would include St. Vincent's Private Hospital. There is a subsidy payable by the Commonwealth of Australia up to \$2.0 per day for each day of hospital treatment in an approved hospital of a member of a scheme. As an example of the scale of benefit obtainable for a specific contribution, for a payment from 11s. to 14s. per week (which covers a wife and any children under 16) a person can obtain hospital benefits from £21–£33 12s. 0d. a week towards hospital charges. Such benefits are payable for 12 weeks in any 12 months.

St. Vincent's Private Hospital has on no occasion in the past and is not now conducted as a profit making enterprise as if it were a commercial venture. It is however the case that on a cash accounting basis, and without allowing for certain overheads or depreciation which would be chargeable if the hospital were run commercially, fairly substantial surpluses have from time to time been made. These have been used, in accordance with the original intentions of the Sisters of Charity, in contributing to the maintenance and building account and the general purposes of the General Hospital and also for the general purposes of the Sisters of Charity.

There was evidence that the close proximity and association between the Public Hospital and the Private Hospital had advantages from the medical aspect. The calibre of the medical staff at the Public Hospital was influenced by the existence of the Private Hospital facilities, and correspondingly patients in the Private Hospital benefited from the existence of special facilities at the General Hospital to which they could be taken if necessary.

Of this evidence, it may be said in the first place, that it establishes with sufficient certainty what "the general purposes of the St. Vincent's Private Hospital" were at the date of death. Although the Private Hospital has no formal constitution and is not governed according to a set of rules, it is shown to have existed for over 50 years and to have been managed consistently and continuously for definite purposes. These purposes were essentially the provision of a certain type of medical and nursing care and treatment for which there is a need and which the General Hospital does not give. It has been part and parcel of these purposes to provide such care and treatment at the lowest cost at which this can practically be done. The question then is, whether the purposes so identified are legally charitable.

A gift for the purposes of a hospital is *prima facie* a good charitable gift. This is now clearly established both in Australia and in England, not merely because of the use of the word "impotent" in the preamble to 43 Eliz. c.4, though the process of referring to the preamble is one often used for reassurance, but because the provision of medical care for the sick is, in modern times, accepted as a public benefit suitable to attract the privileges given to charitable institutions. This has been recognised in the High Court in Australia in *Taylor v. Taylor* (1910) 10 C.L.R. 218 at 227 per Griffith C.J. and *Kytherian Association of Queensland v. Sklavos* 101 C.L.R. 56: in England in *Re Smith's Will Trusts* [1962] 2 A.E.R. 563 (C.A.).

In spite of this general proposition, there may be certain hospitals, or categories of hospitals, which are not charitable institutions (see *Re Smith* u.s.). Disqualifying *indicia* may be either that the hospital is carried on commercially, *i.e.*, with a view to making profits for private individuals, or that the benefits it provides are not for the public, or a sufficiently large class of the public to satisfy the necessary tests of public character. Each class of objection is taken in the present case. As

regards the first, it is accepted that the private hospital is not run for the profit, in any ordinary sense, of individuals. Moreover, if the purposes of the hospital are otherwise charitable, they do not lose this character merely because charges are made to the recipients of benefits—see *Commissioners of Inland Revenue v. The Falkirk Temperance Café Trust* [1927] S.C.261, *Salvation Army (Victoria) Property Trust v. Fern Tree Gully Corporation*, 85 C.L.R. 159 at 173. But what is said is that surpluses are made and are used for the general purposes of the Sisters of Charity. This association, while in a broad sense philanthropic, has objects which may not be charitable in the legal sense. Furthermore its purposes, though stated in its “constitutions” are not limited by law, other than the canon law of the Roman Catholic Church, and under this, they are empowered, and may be obliged, to alter their purposes so as to include other objects which, may not be strictly charitable.

Their Lordships do not consider it necessary to enter upon these latter considerations. For whatever the Sisters of Charity may be empowered to do with regard to their general property, as regards the share of income of the residuary estate, given to them as trustees, they are bound by the trusts declared in the will under which any money received by them must be applied exclusively for the general purposes of the private hospital as above defined. As regards these purposes, it appears, from the evidence already summarised, that the making of profits for the benefit of individuals is not among them. The most that is shown is that, on a cash basis, and without making such adjustments as would be required for commercial accounting, a net surplus is produced over the years which in fact has been applied largely, though not exclusively for hospital purposes. The share of income given by the will must be devoted entirely to the purposes of the private hospital. The character, charitable or otherwise, of the general activities of the Sisters, is not therefore a material consideration.

With regard to the purposes of the private hospital itself, their Lordships would assume that the necessity will probably appear, in the course of due administration of the trusts of the will, to define more precisely the purposes for which the share of income given to the Sisters of Charity may be applied. As was said in *Kytherian Association of Queensland v. Sklavos* “if a charitable object is fairly discernible it is no objection to the validity of the disposition that it fails to prescribe in detail the manner in which the object is to be accomplished. In appropriate cases a scheme may be settled” (101 C.L.R. 56 at p. 66 see also *In re Robinson; Besant v. German Reich* [1931] 2 Ch. 122, 128 per Maugham J. approved, in the High Court, in *Armenian General Benevolent Union v. The Union Trustee Co. of Australia Ltd.* 87 C.L.R. 597, 615). In particular it may be thought desirable to prescribe, no doubt in a flexible manner, whether income may be used for rebuilding, or extending the private hospital, for improving its facilities or reducing its fees. Their Lordships are content to leave this to the trustee of the will, in consultation with the Attorney-General for New South Wales. On the objection now in question they are satisfied that the purposes of the private hospital do not include the making of commercial profits or involve the use of the income for other non-charitable purposes.

Their Lordships turn to the second objection. This, in substance, is that the private hospital is not carried on for purposes “beneficial to the community” because it provides only for persons of means who are capable of paying the substantial fees required as a condition of admission.

In dealing with this objection, it is necessary first to dispose of a misapprehension. It is not a condition of validity of a trust for the relief of the sick that it should be limited to the poor sick. Whether one regards the charitable character of trusts for the relief of the sick as flowing from the word “impotent” (“aged, impotent and poor people”) in the preamble to 43 Eliz. c.4 or more broadly as derived from the conception of benefit to the community, there is no warrant for adding

to the condition of sickness that of poverty. As early as *Pemsel's* case Lord Herschell was able to say:

"I am unable to agree with the view that the sense in which "charities" and "charitable purpose" are popularly used is so restricted as this. I certainly cannot think that they are limited to the relief of wants occasioned by lack of pecuniary means. Many examples may, I think, be given of endowments for the relief of human necessities, which would be as generally termed charities as hospitals or almshouses, where, nevertheless, the necessities to be relieved do not result from poverty in its limited sense of the lack of money."

(1891 A.C.531 at p. 571)

Similarly in *Verge v. Somerville* [1924] A.C.496 Lord Wrenbury, delivering the judgment of this Board on an appeal from New South Wales pointed out that trusts for education and religion do not require any qualification of poverty to be introduced to give them validity and held generally that poverty is not a necessary qualification in trusts beneficial to the community. The proposition that relief of sickness was a sufficient purpose without adding poverty was accepted by the Court of Appeal in *In re Smith* (u.s.). The appellants did not really contest this. They based their argument on the narrower proposition that a trust could not be charitable which excluded the poor from participation in its benefits. The purposes of the private hospital were, they said, to provide facilities for the well to do: an important section of the community was excluded: the trusts could not therefore be said to be for the benefit of the community. There was not sufficient "public element".

To support this, they appealed to some well known authorities. In *Jones v. Williams* (Amb.651) Mr. Ambler attributes to Lord Camden L. C. a definition of charity as a "gift to a general public use, which extends to the poor as well as to the rich"—the gift there was to provide a supply of water, and if that should fail to the Foundling and Lying-in Hospitals. Then in *Re Macduff, Macduff v. Macduff* [1896] 2 Ch. 451 in a general discussion of such expressions as "charitable" or "philanthropic", Lindley L. J. said "I am quite aware that a trust may be charitable though not confined to the poor; but I doubt very much whether a trust would be declared to be charitable which excluded the poor" (*ibid* p. 464).

These words were applied in *Taylor v. Taylor* (10 C.L.R. 218) where Griffith C. J. said "The *prima facie* impression that the words convey to my mind is that the testator intended the establishment of what may be called private lunatic asylums for the benefit of well-to-do persons who could pay for their treatment, or at any rate to include institutions for the exclusive benefit of such persons. If this were the true construction I doubt very much whether the gift could be supported. . . ." But he added "The testator has, however, certainly not expressly excluded the poor from the benefit of this trust and I do not think that this would be a safe ground for holding the gift bad" (u.s. pp. 226-7). Similar language was used by Barton J. (p. 232). Their Lordships accept the correctness of what has been said in those cases, but they must be rightly understood. It would be a wrong conclusion from them to state that a trust for the provision of medical facilities would necessarily fail to be charitable merely because by reason of expense they could only be made use of by persons of some means. To provide, in response to public need, medical treatment otherwise inaccessible but in its nature expensive, without any profit motive, might well be charitable: on the other hand to limit admission to a nursing home to the rich would not be so. The test is essentially one of public benefit, and indirect as well as direct benefit enters into the account. In the present case, the element of public benefit is strongly present. It is not disputed that a need exists to provide accommodation and medical treatment in conditions of greater privacy and relaxation than would be possible in a general hospital and as a supplement to the facilities of a general hospital. This is what the

private hospital does and it does so at, approximately, cost price. The service is needed by all, not only by the well to do. So far as its nature permits it is open to all: the charges are not low, but the evidence shows that it cannot be said that the poor are excluded: such exclusion as there is, is of some of the poor—namely those who have (a) not contributed sufficiently to a medical benefit scheme or (b) need to stay longer in the hospital than their benefit will cover or (c) cannot get a reduction of or exemption from the charges. The general benefit to the community of such facilities results from the relief to the beds and medical staff of the general hospital, the availability of a particular type of nursing and treatment which supplements that provided by the general hospital and the benefit to the standard of medical care in the general hospital which arises from the juxtaposition of the two institutions.

The fact that there are several similar hospitals in New South Wales similar to St. Vincent's Private Hospital adds confirmation to the public need for and benefit from them.

St. Luke's Hospital has already been mentioned as one such similar institution: its character has been the subject of judicial decision. In *Perpetual Trustee Co. (Ltd.) v. St. Luke's Hospital and others* 39 S.R. (N.S.W.) 408 the question was directly raised whether a bequest for the general purposes of the institution was a good charitable gift. The hospital was incorporated as a company limited by guarantee and no doubt there are minor differences as to the facts established, but these are insignificant. Nicolas J. held that the gift was charitable. He followed the High Court decision in *Taylor v. Taylor* (10 C.L.R. 218) and referred to a number of English decisions including *In re Clarke* (such institution . . . as assist(s) or provide(s) for persons of moderate means . . . to have either surgical operations performed together with medical treatment or medical treatment alone on payment of some moderate contribution—1923 2 Ch. 407) and *Commissioners of Inland Revenue v. Trustees of Roberts Marine Mansions* (founding and endowing a home or place where persons requiring rest or change for the benefit of their health might come and where the cost of maintenance was paid by the visitors—43 TLR 270).

Their Lordships are in agreement with this decision: the principles on which it was based apply to this case. They hold therefore that the gift in favour of the Sisters of Charity is a valid charitable bequest.

2. The second issue. This concerns the bequest made in the third codicil dated 5th September 1963 of an annuity of £2,000 per annum on protective trusts for the benefit of the respondent Stephen de Bono. The question is whether or not this is cumulative with a bequest of an annuity of identical amount and character to the same beneficiary made in the second codicil dated 24th September 1962. The learned judge has held that the two gifts are cumulative.

It is necessary to extract the relevant dispositions of the will and the successive codicils.

I. The will, dated 5th December 1960 contained a bequest of an annuity payable quarterly on protective trusts as declared by section 45 of the Trustee Act 1925 "for the benefit of Edmund de Bono a son of the said Karla de Bono" of £2,000 per annum. The will contained certain legacies, specific and otherwise, for the benefit of Brian de Bono, but did not give him any annuity. There was also a trust concerning a house "Sunray" at Leura for the benefit of "children of the said Karla de Bono".

II. The First Codicil to the will dated 22nd May 1962. This contained a direction concerning duties but no other disposition. It confirmed the will.

III. The Second Codicil to the will dated 24th September 1962. This contained a gift of "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 . . . the sum of £2,000 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 £2,000 per annum during his or her life." It confirmed the will and first codicil.

IV. The so-called "First Codicil to the Last Will and Testament" dated 5th September 1963 (the third codicil) contained a gift of an annuity of £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. There was a revocation of a provision in the will concerning certain advances made by the Testator to a beneficiary. Finally there were the words "in all other respects I confirm my said will".

It should be mentioned that the Third Codicil, as well as the first and second codicils, and the will itself contained directions as to the payment of various duties, but in their Lordships' opinion no conclusion can be drawn from comparing or contrasting these and there is no need to set them out.

It being admissible and proper to consider the circumstances in which the Testator was placed at the dates when these dispositions were made, it is relevant to state that at the date of the will Karla de Bono had two young children, Brian and Edmund. Stephen was born after the date of the will, but before the second codicil. It appeared (with reference to the fact that Brian de Bono received no gift of an annuity) that he was a substantial beneficiary under the will of the Testator's wife. These facts, known to the Testator, are properly to be taken into account. In addition use was sought to be made of evidence, in affidavit form, from Mr. H. M. Aspinall, the solicitor who prepared and also witnessed the will and all three codicils. The learned trial judge held that this evidence was inadmissible on the ground that it was directed to showing what the Testator had in his mind rather than to the proof of the surrounding circumstances at the time the relevant instruments were executed. Their Lordships heard no argument upon this matter, being able to reach a conclusion independent of the evidence in question.

In support of the contention that the gifts of the annuities are not cumulative, two arguments were advanced. The first was that the third codicil must be taken to have superseded, or impliedly revoked, the first two codicils. The circumstances leading to this conclusion were said to be that the third codicil is described as a first codicil to the will, no mention being made of the first and second codicils, that it confirms the will, but not the first and second codicils, that the will itself contains a revocation of all wills and testamentary writings at any time theretofore made or executed and that this revocation took fresh effect when the will was republished by the third codicil, and that the third codicil contains directions as to duties which are inconsistent with an intention to preserve those in the earlier codicils. With regard to this argument, their Lordships must make it clear, in the first place that they are, in the present appeals, acting as a court of construction not as a court of probate. All four documents have been admitted to probate and must be construed on that basis, without prejudice, naturally, to any proceedings for revocation which might hereafter be brought in a probate court. The principles which ought to be applied on such a question as this, by a court of construction, as compared with those applicable by a court of probate have been clearly stated by Sir John Nicholl. "In the Court of Probate the whole question is one of intention: the *animus testandi* and the *animus revocandi* are completely open to investigation" (*Methuen v. Methuen* 2 Phillim 416 at 426) and "in a Court of Construction, where the factum of the instrument has been previously established in the Court of Probate, the inquiry is pretty closely restricted to the contents of the instrument itself, in

order to ascertain the intentions of the testator" (*Greenough v. Martin* 2 Add 239 at 243). But the fact that a document has been admitted to Probate, even after consideration of the construction of that and other testamentary instruments, does not prevent a Court of Construction from coming to the conclusion that this document has no operative effect (*In re Hawksley's Settlement, Black v. Tidy* [1934] Ch. 384 at 396 per Luxmoore J.).

As a general principle, their Lordships need do no more than restate their adherence to the "very clear and strong rule" that it is incumbent upon those who contend that a gift in one testamentary instrument is not to take effect by reason of some subsequent instrument to show that the intention to revoke is as clear and free from doubt as the original intention to give (see *Follett v. Pettman* (1883) 23 Ch. D. 337 at page 342 per Kay J. referring to the opinion of Tindal C.J. on behalf of the judges in *Doe v. Hicks* 8 Bing 475). This principle has often been applied to cases where it has been sought to say that an intermediate codicil has been impliedly revoked by a later codicil itself confirming the will (see *Green v. Tribe* 9 Ch. D. 231 citing previous authorities, *Follett v. Pettman* loc. cit.). In their Lordships' opinion it fully applies here. Admittedly circumstances may be shown, from a consideration of the individual documents themselves, why the principle should not be applied—an example often cited is the decision of this Board in *McLeod v. McNab and others* [1891] A.C. 471, but so far from this being the case here, there is one consideration strongly pointing in the other direction (*i.e.*, against an intention to revoke). For the second codicil contains a bequest of an annuity of £2,000 per annum in favour of each child of Karla de Bono born after its date and within 10 years: that this gift should be revoked on a mere implication from such circumstances as have been stated is a proposition which their Lordships are totally unable to contemplate, and this alone provides, in their opinion, a decisive answer against the suggestion that the second codicil is to be treated as revoked or ineffective.

The second argument is one which has given their Lordships more difficulty. It is that, accepting the coexistence of all three codicils, together with the will, the Testator's ultimate intention is to be taken to be to confer on Stephen de Bono a single annuity only of £2,000 per annum. The learned trial judge rejected this submission, basing his judgment, after careful reasoning, on the well-known principle that legacies to the same beneficiary contained in different instruments are presumed to be cumulative. This principle rests upon the perfectly sound basis, which is not to be weakened, that a Testator intends each and every disposition which he makes to take effect where these are not mutually inconsistent. It was stated in emphatic terms by James L. J. in *Wilson v. O'Leary* (L.R. 7 Ch. 448, 454) as a plain rule of law and construction not to be frittered away by a mere balance of probabilities.

Nevertheless there are cases in which Courts have found sufficiently clear indications of an intention not to cumulate successive gifts. Attempts have been made to subsume such cases under a number of rules and even subrules (for example see Theobald on wills 12th Ed. paragraphs 513–517) but such "rules" are in reality little more than ordered lists of examples. Their Lordships may mention, as illustrations only that legacies have been found not to be cumulative from the form or the self-description of the instrument making the second gift; or from the terms of the two gifts—thus "simple repetition, where it is exact and punctual, has been regarded as sufficient proof, that it is only intended for repetition" (*Moggridge v. Thackwell* Ves. jun. 473 per Thurlow L. C.) applied in *Tatham v. Drummond* (1864) 33 L.J. Ch. 438; or where the sums and the motive are the same in both instruments, this has been taken as negating the intention of a double gift (*Hurst v. Beach* 5 Madd. 351). Treating these, and other decided cases, as guiding illustrations, their Lordships must consider the relevant *indicia*.



The most significant is that the gift is of a very considerable annuity to one of several infant children of Karla de Bono. The Testator settled upon the amount of this (£2,000 per annum) in his will, when (Brian de Bono being otherwise provided for) he gave this amount to Edmund de Bono. At the same time he referred to the children of Karla de Bono without discrimination in his gift of income to maintain "Sunray" which his wife had given to be enjoyed by these children. After the date of the will, in 1962, another child, Stephen, is born, and, consistently with the will, an annuity of the same amount is given to him: not only that, but an annuity of the same amount is given to any after born child born within 10 years. Thus a strongly consistent scheme of benefit has been constructed—not merely of casual or routine benefaction through modest pecuniary legacies—but of very substantial annuities, carefully given moreover on protective trusts, to each child, other than the special case of Brian. The intentions thus disclosed are amply strong enough to repel a suggestion that in 1963 the Testator intended to disturb his existing scheme of benefit for the family by doubling the individual annuity given to Stephen. The child in question, aged one year or thereabouts at the date of the second codicil was but a year older at the date of the third; no change in circumstance was shown or suggested to explain so great an addition to his legacy as cumulation would involve. The words of gift are identical in both instruments: the incidents of the gift are the same. It appears a clear case of repetition.

In addition to these arguments, based on the character of the gifts, reliance for the appellants was placed on the self description of the third codicil as a "first codicil" and its exclusive reference to the will. These matters, it was said, tended to show that the Testator when making it, had his attention focussed exclusively upon the will and not upon the intermediate codicils, and that the £2,000 annuity given by the third codicil was intended to supplement the will which gave nothing to Stephen de Bono, rather than the second codicil which gave him £2,000 per annum. There may be some force in these arguments, but since they appear to involve some degree of speculation as to whether the Testator, when making the third codicil, had in mind, or had forgotten, the contents of the second codicil, speculation which is both hazardous and possibly illegitimate in a Court of construction, their Lordships consider it safer not to rely upon them. For the reasons stated however they are of opinion that the legacies are not cumulative and that the appeal on this point succeeds.

3. The third issue is of a simpler character. The will contains a bequest in the following terms:

"I give . . . unto 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."

The Testator possessed a number of watches of no great value and a normal quantity of what may be called masculine jewellery, chains, studs, buttons, tie pins, etc., worth altogether about £400. He also owned and possessed at the date of the will, and at his death, a quantity of valuable jewellery formerly belonging to his wife which she had bequeathed to him. This was valued at about £25,000: the most valuable individual item was a diamond ring valued at £7,250 and there were several other items worth over £1,000. The question is whether they pass under this bequest. If they do not, they fall into the residue and they, or their proceeds of sale pass to the charities.

The learned judge, after stating that he found it very difficult to determine to his satisfaction the meaning of the words in question, decided that the articles in question passed under the specific bequest. His process of reasoning can (their Lordships hope they do justice to a most careful judgment) be summarised by saying that he took the

relevant words *seriatim*: "personal" means pertaining to the person—the jewellery was of this kind; "jewellery"—means jewellery work: this was jewellery: "my" means belonging to me: these articles did. So all tests are satisfied: the articles form part of my personal jewellery.

Each separate step in this argument is difficult to fault, but the question remains whether the bequest is to be interpreted in this articulated manner or whether a more general view of the whole gift is called for. This is no doubt a matter of impression: certainly no authority is of assistance, and their Lordships hesitate to depart from the conclusion reached in such a matter, after argument, by the learned Judge. But though there remains something in each scale their Lordships ultimately find that the balance is decidedly against including these valuable articles in the bequest. The legacy as a whole bears the appearance of a gift of a number of articles, of no great value, individually or collectively, such as a man might appropriately leave to a small boy, who, it is recalled was only about 2 years old, absolutely and free of any trust. It has two limbs, the first is of cameras projectors films and other photographic equipment: the second of watches chains studs and other personal jewellery. The word "other" in the second context suggests an *ejusdem generis* interpretation: so do the references to chains and studs appear to indicate the meaning both of "personal" and of "jewellery". To suppose that so many other articles of a different character and of so different an order of value are casually and incidentally included under this general phrase, seems contrary to the structure of the gift and also out of keeping with the benefactions given to the members of the de Bono family. Their Lordships are therefore of opinion that on this point the appeal succeeds.

The result is that the Decretal Order of Jacobs J. should be varied by deleting therefrom the declarations made by His Honour in answer to questions 4 and 5 of the originating summons and by inserting in lieu thereof (i) a declaration that upon the true construction of the Testator's will Stephen de Bono is entitled to receive out of the income of the residue of the Testator's real and personal estate an annuity of £2,000 per annum during his life time such annuity to be held on protective trusts as declared by section 45 of the Trustee Act 1925; (ii) a declaration that 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 only jewellery related to the personal use and enjoyment of the said Testator and there is to be liberty to apply to the Supreme Court of New South Wales in Equity for identification of such jewellery in case of disagreement.

Their Lordships have carefully considered the incidence of the costs of this appeal. Having regard to the size of the estate, and the nature of the questions raised, arising as they do out of the Testator's elaborate testamentary dispositions, their Lordships are of opinion that in the circumstances the costs both of the appellants and of the respondents in each appeal, as between solicitor and client should be raised and paid out of the Testator's Estate.

Their Lordships will humbly advise Her Majesty accordingly.



In the Privy Council

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Vera Caroline Le Cras

v.

Perpetual Trustee Company Limited and others

and

Far West Children's Health Scheme and others

v.

Perpetual Trustee Company Limited and others

*(Consolidated Appeals)*

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LORD WILBERFORCE