6, 1959

No. 26 of 1958.

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF NEW SOUTH WALES.

IN THE MATTER of the WILL AND CODICIL of GEORGE HARRIS of ULTIMO SYDNEY in the State of New South Wales, Esquire, deceased.

BETWEEN

BEATRICE ALEXANDRA VICTORIA DAVIES (Defendant) . . . . . *Appellant*

AND

PERPETUAL TRUSTEE COMPANY (LIMITED) (Plaintiff), and 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 Respondent

THE ATTORNEY-GENERAL IN AND FOR THE STATE OF NEW SOUTH WALES.

RECORD.

1. This is an appeal from part of a decretal order made on appeal to it by the Full Court of the Supreme Court of New South Wales (Pring and Gordon, JJ., and Langer Owen, A.J.), on 26th September, 1919. pp. 39–43.

2. The appeal is brought by special leave of the Privy Council granted on 3rd June, 1958. p. 52.

3. The appeal to the said Full Court was from a decretal order made by the Supreme Court of New South Wales in Equity (Harvey, J.), on 20th December, 1918. pp. 25–28.

4. The decision of Harvey, J., was given in a suit instituted by originating summons filed on 26th October, 1918, wherein John Harris was the Plaintiff and Reginald William Sydney Harris, Matthew James pp. 1–5.

Harris, William Henry Harris, Ada Mary Harris, Matilda Duff Harris, The University of Sydney, and His majesty's Attorney-General in and for the State of New South Wales were Defendants.

5. The originating summons submitted to the Court for determination certain questions arising in the construction of the will and codicil of George Harris (hereinafter referred to as the testator) who had lived at Ultimo, Sydney, in the State of New South Wales and who died on
pp. 1–5. 21st January, 1897. The originating summons is set out at pages 1–5 of the Record of Proceedings herein. The testator's last will was dated 18th April, 1894, and the codicil thereto was dated 3rd April, 1895. These
pp. 9–14. last-mentioned documents are set out at pages 9 to 12, 13 and 14, respectively of the Record of Proceedings herein.

6. Probate of the said will and codicil was on 5th April, 1897, granted by the Supreme Court of New South Wales in its Probate jurisdiction to the widow of the deceased, Matilda Duff Harris, who was the sole executrix and trustee named in the said codicil. The said Matilda Duff Harris was trustee of the testator's estate until 9th September, 1918. By indenture of appointment of new trustee dated 9th September, 1918, and executed by the said Matilda Duff Harris, she retired from the said trusts and John Harris (the younger), the Plaintiff in the said suit, was appointed in her stead.

7. At the time of his death the testator owned considerable real and personal property, including real estate known as Block 70B, Ultimo Estate, in the City of Sydney. Prior to the commencement of the said suit, the said Block 70B was resumed by the Government of the State of New South Wales and the moneys received therefor were paid into Court.

8. The property the subject of this Appeal comprises the said Block 70B and the ultimate residue of the testator's estate.

9. The devise of Block 70B was contained in the said codicil and was in the following terms :—

> " I give and devise Block Seventy B 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."

10. Certain successive life estates in the said Block 70B were created by the said will and codicil. The last of the life tenants interested in the proceeds of sale thereof, namely, the said John Harris (the younger), died on 19th April, 1957, at which time the said gift fell into possession.

11. (A) The said gift of the ultimate residue of the testator's estate was contained in the said codicil and was in the following terms :—

> " And the residue of the sum realised from my Estate I devise to the above-named College to be held at interest and this latter added to the income annually."

(B) It was decided by the Full Court in the proceedings the subject of this appeal that the said gift of the ultimate residue extended to the proceeds of sale of realty only, and that the testator's residuary personal estate was not disposed of.

12. The Full Court decided in the said proceedings that the income arising from the said residuary real estate until the death of the said John Harris (the younger) passed to relatives of the testator and not to the College referred to in the said gift. The said gift of ultimate residue therefore fell into possession on 19th April, 1957.

13. The value of the proceeds of sale of Block 70B is approximately £53,000 and the value of the ultimate residue the subject of the said gift is approximately £286,750.

14. If the said devise of Block 70B is not a valid devise, it will fall into and follow the destination of the gift of ultimate residue above-mentioned, and if the gift of ultimate residue is not a valid gift the property the subject thereof will pass to the persons entitled as on an intestacy of the testator.

15. The persons so entitled were the testator's widow, the said Matilda Duff Harris, his brother John Harris (the elder) who died on 11th November, 1911, his brother Matthew Harris (afterwards Sir Matthew Harris) who died on 15th June, 1917, his sister Margaret Harris who died on 28th May, 1926, and the six children of his brother William Henry Harris, who predeceased the testator, dying on 13th October, 1893. Of the said six children of William Henry Harris, two, namely, William Henry Harris and Ada Mary Harris, were Defendants to the said suit. For the purposes of the said suit the Defendant Matilda Duff Harris was appointed to represent all persons entitled to share in the estate of the testator according to the Statutes of Distribution.

16. Harvey, J., before whom the originating summons first came, held, *inter alia*, that the said devise of Block 70B was a valid charitable devise for the purposes therein mentioned, but that the said devise was subject to prior life estates in favour of the widow and certain nephews of the testator, the sons of his brother John. It appears from His Honour's notes that arguments were addressed to His Honour that the said devise was bad as offending against the rule against remoteness of vesting and that it was invalid as a charitable gift (A) because it was in favour of too restricted a class, (B) because the charitable intention evinced therein was particular and (C) because it was void for uncertainty. The argument as to uncertainty was apparently that the devise was for a particular charitable college not then in existence, and that the objects of the college were too uncertain. His Honour rejected the arguments and held that there was a vested remainder for a good charitable object. pp. 17, 18. p. 21. p. 22.

17. There was before His Honour affidavit evidence tendered on behalf of the Attorney-General as to the number of persons the descendants of Presbyterians settled in New South Wales. This affidavit appears at

pp. 15, 16. pp. 15 and 16 of the Record of Proceedings herein. So far as appears, this evidence was not attacked in any way, and no countervailing evidence was adduced.

p. 17. 18. His Honour's judgment on this question appears at p. 17 of the Record of Proceedings herein, and is as follows :—

> " I have already held that the effect of the 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 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."

19. His Honour's notes do not contain any reference to an argument
p. 20. as to the validity of the gift of ultimate residue. His Honour held, however, that the gift in the codicil of " all my real estate and property " (of which the said gift of ultimate residue formed part) did not include the testator's personal estate but extended only to his residuary real estate.
p. 20. His judgment in relation to this question appears at p. 20 of the Record of Proceedings herein and is as follows :—

> " It follows from this that so far as the Will alone is concerned except for the provision made for his wife and the 21 years' accumulation of the balance of the income the testator made no provision as to his residuary personal estate. As to his residuary real estate part from his wife's provision and the 21 years' accumulation of the balance of the income no provision was made until the death of the last survivor of his widow sister and brothers.
>
> The last question is whether the Codicil catches the residuary personal estate and the rents and profits of both realty and personalty which were undisposed of by his will. This depends upon the meaning of the words ' all my real estate and property.' For several reasons I think these words are limited to real estate."

20. Other questions were decided by His Honour which are not material to the present appeal. The decretal order made by His Honour
pp. 25–28. appears at pages 25 to 28 of the Record of Proceedings herein.

21. On 13th February, 1919, Matthew James Harris, a nephew of the testator and one of the defendants to the originating summons appealed
p. 30. to the Full Court of the Supreme Court of New South Wales. Grounds 9 and 10 of his Notice of Appeal were as follows :—

> " 9. That His Honour 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.

10. 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."

22. A notice of cross appeal was filed on behalf of the University of Sydney but it is not material to the present appeal.

23. The said Full Court in the said appeal ordered that the said Appellant Matthew James Harris as one of the executors of the said Sir Matthew Harris deceased be and he was thereby appointed to represent " the statutory next-of-kin of the testator " for the purposes of the twelfth and thirteenth grounds stated in the Notice of Appeal. These grounds did not raise questions the subject of this appeal. p. 40.

24. The said Full Court declared, *inter alia*, that the said devise of Block 70B was a valid charitable devise for the purposes therein mentioned but added that this declaration was—" Without prejudice to the right of the beneficiaries or any of them under the said will to contend that the *cy-près* doctrine has no application to (the said devise) if the said purposes are incapable of taking effect when the respective funds become available for the said purposes." p. 40.

25. The said Full Court further declared that " The said devise of Block 70B in the said codicil is subject to the prior life estates therein given by the said will in favour of the widow and certain nephews of the testator, the sons of his brother John." p. 40.

26. The said Full Court further declared that the corpus of the residuary personal estate of the testator (subject to the life estate of the testator's widow therein) was not effectually disposed of by the said will and codicil and passed as on the intestacy of the testator. The Decretal Order on Appeal of the said Full Court appears at pages 39 to 43 of the Record of Proceedings herein. The said Decretal Order on Appeal provided, *inter alia*, that in certain events not material to the present appeal there could be further proceedings in the suit before the Court of first instance. p. 42. pp. 39–43. p. 42.

27. The joint judgment of the said Full Court dealt with the validity of the devise of Block 70B in a passage appearing at page 34 of the Record of Proceedings herein. p. 34.

28. The Full Court did not deal in its judgment, nor is there any reference in the decretal order made by it, to the validity of the gift of residue afore-mentioned.

29. The Court dealt with a question relating to the property the subject of the said residuary gift in a passage in its judgment which appears at page 35 of the Record of Proceedings herein. p. 35.

30. On 21st November, 1919, the said suit was amended so as to add Margaret Harris, the above-named sister of the testator, as a defendant.

pp. 46–47. 31. The said Matilda Duff Harris died on 6th September, 1920, and an order was made by the said Supreme Court (Street, J.) on 20th August, 1921, purporting to revive the suit against the other defendants but no defendant was added in lieu of, nor was any defendant appointed to represent, the said Matilda Duff Harris.

pp. 47–49. 32. On 8th September, 1921, the said Supreme Court ordered that the said decretal order on appeal be amended by substituting the words " persons other than the parties to this suit who would be entitled on an intestacy of the above-named George Harris deceased," for the words " statutory next-of-kin " where appearing therein, and by making other consequential amendments.

33. On 28th April, 1958, the said Supreme Court (Roper, C.J., in Eq.) ordered, *inter alia*, that the Appellant herein, Beatrice Alexandra Victoria Davies, be added as a defendant to the suit and that she be appointed to represent, *inter alia*, the persons entitled as on an intestacy of the testator, and that the suit be revived. His Honour's order is more pp. 50–51. fully set out at pages 50 and 51 of the Record of Proceedings herein.

34. John Harris the above-named plaintiff died on 19th April, 1957, and his executor Perpetual Trustee Company (Limited) was thereafter added as plaintiff in the said suit.

pp. 52–54. 35. On 3rd June, 1958, the Privy Council granted to the Appellant herein special leave to appeal from the judgment of the said Full Court that the said devise of Block 70B was a valid charitable devise.

36. The Respondent the Attorney-General in and for the State of New South Wales respectfully submits (A) that the said devise is a valid charitable gift, and (B) that the above-mentioned gift of ultimate residue is a valid charitable gift.

37. The Respondent the Attorney-General submits that the said gifts are valid charitable gifts as being (A) for the advancement of education, and (B) for the advancement of religion, within the classification in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* ([1891] A.C. 531).

38. It is submitted that the devise is essentially one for the purpose of establishing a College to provide for education, which education is to accord with certain religious principles. The residuary gift is a gift to the College directed to be established.

39. It is submitted that if a gift is for charitable purposes only it does not fail for uncertainty. In the present case it is submitted that the gifts are only for purposes which are charitable. Even if, as the Appellant will contend, there is difficulty in determining who are the persons eligible to attend the College, the fact remains that the gifts are wholly for educational and religious purposes.

40. (A) The residuary gift is to the College direct without the interposition of trustees (other than the trustee or trustees of the will).

(B) In the case of the devise any difficulty which may exist in determining who are or were the trustees appointed to receive the gift is immaterial. The testator clearly did not intend that all the persons who would answer the description " the presbyterians the descendants of those settled in the Colony hailing from or born in the North of Ireland," were to be trustees. It is not therefore possible to say that the operation of the gift was intended by the testator to depend upon a literal compliance with his direction with regard to the appointment of trustee. It is submitted therefore that compliance with the direction with regard to who are to be the trustees will not be treated as an indispensable condition of the devise. It is submitted that if necessary the Court will appoint trustees to give effect to the testator's purpose.

(C) In the alternative, it is respectfully submitted that the position is now governed by s. 23 of the Presbyterian Church (New South Wales) Property Trust Act, 1936, which is as follows :—

> " Whenever by any will deed or other instrument any property real or personal has been or shall be devised bequeathed given granted released conveyed or appointed or has been or shall be declared or directed to be held for or upon trust for or for the benefit of the Presbyterian Church of Australia in the State of New South Wales or any congregation of such church or any fund institution activity or service thereof respectively or shall be recoverable by or payable to the said church or any congregation thereof or by or to any such fund institution activity or service or for the religious social educational or charitable work of the church or be receivable by or payable to any officer or official thereof respectively for the benefit of the church generally or any of its funds institutions activities or services or that of any congregation the said will deed or instrument shall be construed and shall operate and take effect as though the Trustees were named therein and the acknowledgment or receipt of the Trustees under seal executed in accordance with section eight hereof or in writing of a majority of the Trustees or of any person authorised by resolution of the Trustees to receive the same shall be a sufficient discharge and complete exoneration to the person or persons liable to pay deliver or transfer any such property under such will deed or instrument and all such property so devised bequeathed given granted released conveyed or appointed or declared or directed to be held in trust as aforesaid shall be held and dealt with by and be under the direction and control of the Trustees subject to the trusts declared concerning the same in any such will, deed or instrument so far as the same are capable of taking effect and the Trustees may call for and require payment transfer conveyance and delivery of the same to them."

41. (A) The persons entitled to attend the College are the youth of a class of presbyterians, namely those presbyterians who are the descendants of persons who, having come from or been born in the North of Ireland, settled in New South Wales.

(B) The test can be expressed another way by saying that those entitled to attend are young persons descended from those presbyterians who settled in New South Wales, and who were born in the North of Ireland or came from the North of Ireland.

(C) An alternative construction is that those eligible are, simply, Presbyterian youth.

42. It is submitted that whichever construction is adopted, the result, so far as the validity of the gifts is concerned, is the same.

43. If there is found (to take an example) a young person descended from a presbyterian born in Ireland, it is possible that a difficulty may arise as to whether the ancestor was born in the North of Ireland or in some other part thereof. This does not go to the validity of the gift but at the most to a question of applying the words of the codicil to particular facts. Such difficulties might well never occur. It is submitted that tests, such as that laid down in *Clavering* v. *Ellison* (1859) (7 H.L.C. 707) with regard to conditions subsequent, are quite inapplicable.

44. The testator's reference to " the standards of the Westminster Divines as taught in the Holy Scriptures " does not mean he intended that they were to be taught nothing else. Rather was he indicating the moral and religious principles upon which their education should be based or the moral and religious precepts they should be taught. It is submitted that the standards of the Westminster Divines are clear and ascertainable. This appears, for example, from s. 14 of the Presbyterian Church Property Management Act of 1881, which is in the following terms :—

> " Except as herein otherwise provided the several powers authorities privileges and rights vested in and conferred upon the Trustees elected or appointed by virtue and in pursuance of the several Acts of Council eight William the Fourth number seven fourth Victoria number eighteen and the ' Presbyterian Church Act of 1865 ' shall be vested in and enjoyed by the several bodies of Trustees respectively constituted under the provisions of this Act Provided always that the several powers privileges and advantages conferred upon the said General Assembly by the ' Presbyterian Church Act of 1865 ' and confirmed by this Act shall cease and determine unless the said General Assembly shall continue its adherence to the doctrines of the Westminster Confession of Faith and to the constitution government and discipline of the Presbyterian Church."

The judgments in *General Assembly of Free Church of Scotland* v. *Overtoun* ([1904] A.C. 515, especially at pp. 637, 645, 646, 649, 656, 673, 685, 688, 694, 700 and appendix E thereto, at pp. 730–734) also support this submission.

45. It is submitted that for many years prior to and at the date of the testator's will, and thereafter, Presbyterianism was a recognised religion in New South Wales, and the word " Presbyterian " was commonly

used in New South Wales as a noun to describe persons who were members or adherents of the Presbyterian Church. This appears, it is submitted from the following sources :—

(A) The evidence, in the suit, of William Wood. pp. 15, 16.

(B) The following, among other, Statutes :—

Presbyterian Church Trustees Act of 1855.

Presbyterian Church Act of 1865.

Presbyterian Church Property Management Act of 1881.

Presbyterian Church Property Management Amendment Act of 1894.

(C) The decision of the Privy Council in *Lang* v. *Purves* (1862) (15 Moo. P.C. 389).

46. (A) Neither the Appellant nor any other beneficiary has made application to any Court pursuant to the reservation made by the Full Court in its Decretal Order on Appeal, which is referred to in paragraph 24 of this Case, so as to raise a question as to whether the directions of the testator in relation to the said devise became impracticable or impossible of execution. No such reservation was ever made in relation to the said gift of ultimate residue.

(B) If it became material in any such application, the Attorney-General would argue that the testator had a wider purpose than the particular method chosen by him, and that such purpose can and could have been readily carried out. The Attorney-General would rely, *inter alia*, upon such cases as *Brantham* v. *East Burgold* (1794) (cited 2 Ves. 388) ; *Glasgow College* v. *Attorney-General* ((1864), 1 H.L.C. 800) ; *Re Robinson* ((1923), 2 Ch. 332) ; *Attorney-General* v. *Perpetual Trustee Company (Limited)* (1940) (63 C.L.R. 209).

(C) It is submitted that if the property ever became devoted to charity, no subsequent impracticability or impossibility, whether total or partial, would cause the devise to fail so that the property would pass to non-charitable objects.

47. There is nothing to show that the gifts do not contain the necessary element of public benefit.

48. In the case of an educational establishment to be brought into existence by the terms of a trust, it would not matter were the persons to be benefited few in number. The Founder's kin cases show that preference to the relatives of the testator or donor can validly be insisted upon (see *Re Compton* [1945] Ch. 123), and many valid charitable gifts for educational purposes have been of direct benefit to very few persons. Such is the case, for example, when a scholarship is to be given to one person once every three years.

49. Even if the matter were to be tested by mere numbers there is nothing on the fact of the gifts to indicate that the direct beneficiaries would not be numerous. The only evidence goes to show, at least, that p. 16. they would be drawn from a reasonably large section of the community.

50. The cases show that public benefit is lacking where there is some requirement of relationship to or personal connection with a particular person or connection with a company, but these factors are wholly absent in the present case.

51. The Respondent the Attorney-General in and for the State of New South Wales therefore respectfully submits that the appeal should be dismissed with costs for the following, among other

REASONS

(1) THAT the decision appealed from is correct.

(2) THAT the said gifts are valid charitable gifts.

(3) THAT the said gifts are wholly for charitable purposes and cannot fail for uncertainty.

(4) THAT the purposes of the said gifts are sufficiently certain.

(5) THAT the said gifts have the necessary element of public benefit.

GORDON WALLACE.

R. W. FOX.

No. 26 of 1958

In the Privy Council

ON APPEAL

from the Supreme Court of New South Wales

IN THE MATTER of the WILL AND CODICIL of GEORGE HARRIS of ULTIMO SYDNEY in the State of New South Wales, Esquire, deceased.

BETWEEN

BEATRICE ALEXANDRA VICTORIA DAVIES (Defendant) . . . *Appellant*

AND

PERPETUAL TRUSTEE COMPANY (LIMITED) (Plaintiff) **and 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 Respondent

THE ATTORNEY GENERAL IN AND FOR THE STATE OF NEW SOUTH WALES

BELL, BRODRICK & GREY,
The Rectory,
29 Martin Lane,
London, E.C.4,
Solicitors for the Appellant.

LIGHT & FULTON,
24 John Street,
London, W.C.1,
Solicitors for the Respondent Her Majesty's Attorney-General in and for the State of New South Wales.

The Solicitors' Law Stationery Society, Limited, Law and Company Printers, Oyez House, Breams Buildings, E.C.4. BL3561-61911