GDT.C6.

Judgment 1, 1959

IN THE PRIVY COUNCIL No.26 of 1958

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

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 (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

RECORD OF PROCEEDINGS

BELL BRODRICK & GRAY,
The Rectory,
29, Martin Lane,
Cannon Street,
London, E.C.4.
Solicitors for Appellant
(Defendant)

LIGHT & FULTON,
24, John Street,
London, W.C.1.
Solicitors for Her Majesty's
Attorney General for New
South Wales Respondent
(Defendant)

IN THE PRIVY COUNCIL No.26 of 1958

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

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 (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

RECORD OF PROCEEDINGS

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IN THE PRIVY COUNCIL No.26 of 1958

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FROM THE SUPREME COURT OF NEW SOUTH WALES

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 (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

RECORD OF PROCEEDINGS

No. 1.

ORIGINATING SUMMONS AS AMENDED, RE-AMENDED AND FURTHER AMENDED

In the Supreme Court of New South Wales in Equity

No. 1.

Originating Summons as amended, re-amended and further amended.

26th October, 1918.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY No.7654 of 1918

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.

BETWEEN:-

JOHN HARRIS Plaintiff

- and -

REGINALD WILLIAM SYDNEY HARRIS, MATTHEW JAMES HARRIS, WILLIAM HENRY HARRIS, ADA MARY HARRIS, MATILDA DUFF HARRIS, THE UNIVERSITY OF SYDNEY, HIS MAJESTY'S ATTORNEY-GENERAL in and for the State of New Scuth Wales and MARGARET HARRIS Defendants

In the Supreme Court of New South Wales in Equity

No. 1.

Originating Summons as amended, re-amended and further amended.

26th October, 1918 - continued.

And by Order of Revivor dated the 20th day of August 1921. In the Matter of the Trusts of the Will and Codicil of George Harris, deceased, etc.

BETWEEN:-

JOHN HARRIS Plaintiff

- and -

REGINALD WILLIAM SYDNEY HARRIS, MATTHEW JAMES HARRIS, WILLIAM HENRY HARRIS, ADA MARY HARRIS, THE UNIVERSITY OF SYDNEY, HIS MAJESTY'S ATTORNEY GENERAL in and for the State of New South Wales and MARGARET HARRIS Defendants

AND by Order of Revivor dated the 28th April 1958

BETWEEN:-

PERPETUAL TRUSTEE COMPANY (LIMITED) Plaintiff

- and -

BEATRICE ALEXANDRA VICTORIA DAVIES THE PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES LIMITED MARY EILEEN HARRIS NINA EVA VIDA JONES THE UNIVERSITY OF SYDNEY and HER MAJESTY'S ATTORNEY GENERAL in and for the State of New South Wales Defendants

L E T REGINALD WILLIAM SYDNEY HARRIS of George Street, Sydney aforesaid, Agent MATTHEW JAMES HARRIS of Hunter Street, Sydney aforesaid, Solicitor, WILLIAM HENRY HARRIS of Cheltenham near Sydney, Gentleman, ADA MARY HARRIS of Lang Road, Sydney, Spinster, MATILDA DUFF HARRIS of Annandale, Sydney, Widow, THE UNIVERSITY OF SYDNEY and HIS MAJESTY'S ATTORNEY-GENERAL in and for the State of New South Wales and MARGARET HARRIS of William Henry Street, Ultimo, Spinster within eight days after service of this summons upon them respectively inclusive of the day of such service cause appearance to be entered for them respectively to this summons which is issued upon the application

of John Harris of College Street, Sydney, aforesaid Medical Practitioner, who claims to be the sole Trustee of the above mentioned Will and Codicil for the determination of the following questions, namely:-

1. Whether the trust for the accumulation of the income of the estate of the said testator contained in the said Will is void and if so to what extent?

2. When does the interest to be derived from the investment of accumulated income begin to be payable to the nephews and nieces of the Testator mentioned in his said Will?

3. If such interest is not yet payable to such nephews and nieces of the Testator to whom is the said interest payable at the present time?

4. In the event of the death of any such nephew or niece to whom is the share until then enjoyed by such nephew or niece in the said income thereafter payable?

5. (a) Is the Defendant William Henry Harris included in the class "My nephews the sons of my brothers"?

   (b) Are the daughters of William Henry Harris deceased included in the class "my nieces the daughters of my said brothers"?

6. Subject to the interest of the widow of the Testator in three fourths of the income of his Estate, to whom does the residuary estate of the said Testator now belong?

7. If such residuary estate is not yet indefeasibly vested in any person or persons, to whom is the income of such residuary estate (other than the amount payable to the widow) payable at the present time?

8. (a) Are both devises in the Will of the said Testator to the Testator's heir at law revoked by the Codicil?

   (b) If not which devise is so revoked?

In the Supreme Court of New South Wales in Equity

No. 1.

Originating Summons as amended, re-amended and further amended.

26th October, 1918 - continued.

9. Does the property the devise of which has been revoked by the Codicil fall into residue or how otherwise does it pass under the said Will and Codicil?

10. (a) Are the devises of "Block 70B" and of "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?

AND for the following Orders, namely:-

11. That the Defendant Reginald William Sydney Harris may be appointed to represent for the purposes of this suit the children of John Harris deceased.

12. That the Defendant Matthew James Harris may be appointed to represent for the purposes of this suit the children of Sir Matthew Harris deceased.

13. That the Defendant Ada Mary Harris may be appointed to represent for the purposes of this suit all the daughters of William Henry Harris deceased.

14. That the Defendant Matilda Duff Harris may be appointed to represent for the purposes of this suit all persons entitled to share in the estate of the Testator according to the Statutes of Distribution.

15. That the University of Sydney may be appointed to represent for the purposes of this suit all Institutions interested in the "residue of such fund with any accumulations" mentioned in the said Will.

16. That the costs of all parties of this suit as between Solicitor and Client may be paid out of the estate of the said Testator.

AND for such further or other orders and directions as the nature of the cause may require.

APPEARANCE may be entered at the Office of The Master in Elizabeth Street

Equity Supreme Court Sydney.

Dated the 26th day of October, One thousand nine hundred and eighteen.

L. D. Deane
Chief Clerk in Equity.

This Summons is taken out by Bradley, Son & Maughan of 60, Margaret Street, Sydney, the Solicitors for the above-named Trustee.

NOTE: If any Defendant does not enter an appearance within the time or at the place above-mentioned such order will be made or proceedings taken as the Judge thinks fit and expedient.

In the Supreme Court of New South Wales in Equity

No. 1.

Originating Summons as amended, re-amended and further amended.

26th October, 1918 - continued.

No. 2.

AFFIDAVIT OF JOHN HARRIS

No. 2.

Affidavit of John Harris,

11th November, 1918.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY No.7654 of 1918

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.

BETWEEN:- JOHN HARRIS Plaintiff

- and -

REGINALD WILLIAM SYDNEY HARRIS and OTHERS Defendants

On the Eleventh day of November One thousand nine hundred and eighteen JOHN HARRIS of Sydney in the State of New South Wales, Medical Practitioner, being duly sworn, makes oath and says as follows:-

1. I am the Plaintiff herein.

2. George Harris late of Ultimo House, Ultimo, in the City of Sydney, duly made and executed his

In the Supreme Court of New South Wales in Equity

No. 2.

Affidavit of John Harris,

11th November, 1918

- continued.

last will and testament bearing date the eighteenth day of April One thousand eight hundred and ninety four and a Codicil thereto bearing date the third day of April One thousand eight hundred and ninety five a true copy of the said Will and Codicil is hereunto annexed marked with the letter "A".

3. The said George Harris died on the twenty first day of January One thousand eight hundred and ninety seven without having altered or revoked his said Will and Codicil except in so far as the said Will was altered by the said Codicil and Probate of the said Will and Codicil was on the fifth day of April One thousan. eight hundred and ninety seven granted by this Honourable Court in its Probate Jurisdiction to the Defendant Matilda Duff Harris widow of the said deceased the sole Executrix named in the said Codicil.

4. The said Defendant Matilda Duff Harris acted as Trustee in the said estate until the ninth day of September last past.

5. By Indenture of Appointment of New Trustee dated the ninth day of September One thousand nine hundred and eighteen between the said Matilda Duff Harris of the one part and myself of the other part the said Matilda Duff Harris retired from the Trusts and I was appointed Trustee of the said Will and Codicil in her place.

6. Various parts of the real estate of the said Testator have been resumed by the City Council, the Railway Commissioners, and by the State of New South Wales and the remaining real estate consists of parts of Blocks 17, 25, 43, 47B and 52 of Ultimo in the City of Sydney, such blocks being almost entirely built on and comprising mostly warehouses, factories and residential terraces. Some of the properties in the said Blocks are subject to weekly tenancies but large parts of the said blocks are subject to building leases for terms up to fifty years expiring at different periods from the year one thousand nine hundred and twenty seven to the year one thousand nine hundred and sixty two. The total unimproved capital value of the said real estate is one hundred and sixty thousand pounds.

7. The balance of the said estate, other than the special fund hereinafter mentioned in paragraph 10, consists of the sum of Twenty nine thousand one

hundred and forty nine pounds eight shillings and eight pence invested in Government Stocks and representing the balance of the proceeds of sale of personalty owned by the said Testator and the purchase money paid on the resumptions above-mentioned and a small cash balance at the bank.

8. The property known as Ultimo House occupying Block 70B of the Ultimo Estate was resumed by the State Government and the purchase money therefore amounting to Fifty one thousand six hundred and thirty nine pounds was in the year One thousand nine hundred and fourteen paid into the office of this Court and is invested in War Loan and the income thereof is paid to the said Matilda Duff Harris.

9. By decree of this Honourable Court dated the twenty second day of February One thousand nine hundred and one made by His Honour Mr.Justice A.B. Simpson in a suit number 8691 of 1899 Harris v. Harris and Others, in which the said Matilda Duff Harris was Plaintiff and myself and others Defendants which suit was instituted for the purpose of ascertaining and declaring the true construction of the Will of the said Testator George Harris deceased, His Honour made the following declarations inter alia:- "The Plaintiff is entitled during her life to three fourths of the income of the residuary estate of the said Testator for her separate use and further that the remainder of the income of the said estate should be accumulated until the fund so accumulated reached the amount of Twenty five thousand pounds or until the expiration of twenty one years from the death of the said Testator". In the said suit none other of the questions now raised in this summons was decided.

10. In pursuance of the directions in the said Will contained and of the said declaration in the said suit one fourth of the residuary income of the said estate has been accumulated and invested from time to time in Government Stocks of the State of New South Wales and the amount standing to the credit of this accumulated fund on the twenty first day of January one thousand nine hundred and eighteen being twenty one years after the death of the said Testator was nineteen thousand

In the Supreme Court of New South Wales in Equity

No. 2.

Affidavit of John Harris,

11th November, 1918

- continued.

four hundred and seventeen pounds ten shillings and ten pence. The annual income on the said last mentioned sum amounts to Seven hundred and eight pounds.

11. The said Testator George Harris left no issue him surviving.

12. The said Testator George Harris had three brothers, namely:- John Harris the elder who survived the said Testator and died on the eleventh day of November one thousand nine hundred and eleven Matthew Harris (afterwards Sir Matthew Harris) who survived the said Testator and died on the fifteenth day of June one thousand nine hundred and seventeen and William Henry Harris the elder who predeceased the said Testator having died on the thirteenth day of October one thousand eight hundred and ninety three also one sister Margaret Harris of Ultimo aforesaid who is still alive.

13. The said John Harris the elder had eight children all of whom are now alive and amongst whom are myself and the Defendant Reginald William Sydney Harris.

14. The said Sir Matthew Harris had eight children now living amongst whom is the Defendant Matthew James Harris and one son who survived the Testator George Harris but has since died.

15. The said William Henry Harris the elder had one son the Defendant William Henry Harris and five daughters all now living of whom one is the Defendant Ada Mary Harris.

SWORN by the Deponent on the day first above mentioned at Sydney, before me) JOHN HARRIS.

F. Lynne Rolin

A Commissioner for Affidavits.

No. 3.

In the Supreme Court of New South Wales in Equity

No. 3.

Will of George Harris.

18th April 1894

WILL OF GEORGE HARRIS

I, GEORGE HARRIS of Ultimo House, Harris Street, Ultimo in the City of Sydney in the Colony of New South Wales Esquire DO hereby revoke all Wills Codicils and other testamentary dispositions made by me at any time heretofore and do publish and declare this to be my last Will and Testament as follows I GIVE AND BEQUEATH to my dear wife Matilda Duff Harris all my household furniture effects carriages and stock for her own use and benefit I ALSO BEQUEATH to my said wife the sum of Three hundred pounds which I direct to be paid to her for immediate use directly after my death and subject to the payment of all my just debts funeral and testamentary expenses I GIVE AND DEVISE all that my mansion house with the grounds attached thereto now in my occupation and known as Ultimo House situate in Block Seventy B Ultimo Estate in the City aforesaid to my said wife Matilda Duff Harris for and during the term of her natural life and upon the decease of my said wife then to my nephew John Harris son of my brother John Harris for and during his natural life and upon the decease of my said nephew to the eldest or next surviving eldest son for life of my said brother John Harris until the death of the last survivor of my said nephews sons of my brother John Harris then to my heir at law bearing the name of Harris I GIVE AND DEVISE all those portions of land known as Blocks Five B and Ten D of the Ultimo Estate to my brother John Harris his heirs and assigns for ever I give and devise all the residue of my Estate real and personal whatsoever and wheresoever to my brothers John Harris and Matthew Harris and to my nephew the said John Harris TO HOLD the same unto and to the use of my said brothers and nephew their heirs executors administrators and assigns according to the nature of the same respectively UPON THE TRUSTS hereinafter declared that is to say upon trust that they my said brothers and nephew hereinafter called my Trustees do and shall collect the income of my Estate of every description, and thereout pay three-fourths of such income in each year by even monthly payments to my wife Matilda Duff Harris for her separate and inalienable use

In the Supreme Court of New South Wales in Equity

No. 3.

Will of George Harris.

18th April 1894 - continued.

for her life free from marital control and for the maintenance and education of all our children until the youngest child shall attain the age of twenty one years and to divide the residue of such income between my sister Margaret Harris for her inalienable and separate use and benefit free from marital control and to my brothers John Harris, Matthew Harris and my said nephew John Harris in equal shares and upon the attaining of majority of the youngest of my children upon trust to pay one half of the annual income of my said Estate to my said wife Matilda Duff Harris for her separate inalienable use for her life free from marital control and out of the residue of the income of my said estate to divide into equal shares and to pay to each of my children annually the sum of One hundred pounds in monthly payments and the remainder of such residue if any after this last direction to divide between my said sister Margaret Harris for her separate and inalienable use for benefit free from marital control and to each of my brothers John Harris, Matthew Harris and my said nephew John Harris share and share alike during the life of my said wife And at her death to divide my real estate into as many parts or shares of equal value as nearly as may be conveniently be as there shall be children of mine then living or as shall have departed this life leaving lawful issue then living and to convey and assure one share to each child of mine and to and between the lawful issue of any such deceased child by lot to be drawn by or on behalf of each child or family of children according to the stocks and whereas it may happen that a convenient equal division may not readily be made I empower my trustees to assess a sum to be paid by the drawer or drawers of any excessive lot or lots to the drawer or drawers of any deficient lot or lots for equality of partition and to define the time and mode of such payment But in case of my death without lawful issue born in my lifetime or in due time thereafter then subject to the provision hereinbefore made for my dear wife Matilda Duff Harris during her life I direct my Trustees to accumulate the income of my said Estate which shall from year to year remain until the sum of twenty five thousands is saved and then out of the INTEREST to be obtained by the investment of the said accumulated income to pay the same in equal sums or shares per annum by even quarterly payments to each of my nephews the sons

of my brothers during their lives and to each of my nieces the daughters of my said Brothers who shall attain the age of twenty one years And in the cases of my said nieces I direct it shall be for her or their separate and inalienable use and benefit for life free from all marital control and after the deaths of my said nephews and nieces respectively and after satisfying this provision I desire and direct that the residue of such fund with any accumulations accruing shall be equally divided in equal shares and portions and One share presented to each of the following Institutions: The Sydney University the sum to be invested at interest and the latter devoted to giving Bursaries or Scholarships in the Department of Science to encourage new Discoveries and in the Department of Chemistry and Geology for the study and better development of these Sciences, The Presbyterian College of Saint Andrews the sum to be invested at interest and the latter to be devoted to giving Bursaries and Scholarships for the encouragement in the better and improved study by the native born Students of Divinity of the Old and New Testament Scriptures and also to the greater improvement of the said Students of Divinity in both reading and elocution to the Prince Alfred Hospital the sum to be invested at interest and the latter devoted to the furnishing and maintenance of beds for the use and benefit and comfort of poor patients and upon the death of my said wife sister and brothers and without my having left lawful issue I give and devise all those portions of my estate at Ultimo known respectively as portions of Block Two B Eleven B Seventeen Twenty five Forty three Forty seven B Fifty two and Fifty four and the portions of land reclaimed by me situate opposite Block Fifty two fronting the extension of Gipps Street and the Pyrmont Bridge Company's road and forming part of the Ultimo Estate to my nephews the said John Harris Walter George Harris Henry Victor Harris Reginald William Sydney Harris and Lionel Herbert Matthew Harris sons of my brother John Harris share and share alike by lot each for their lives and after the death of each one the share of the deceased one shall be divided amongst the survivors or survivor in like manner until the death of the last survivor of my said nephews then to my heir at law lawfully begotten bearing the name of Harris I devise all Estates vested in me upon any trusts or by way of mortgage with their rights

In the Supreme Court of New South Wales in Equity

No. 3.

Will of George Harris.

18th April 1894 - continued.

members and appurtenances unto my said Trustees their heirs executors and administrators according to the nature of the same respectively upon the trusts and subject to the equities subsisting therein at the time of my decease respectively I empower my trustees to compound compromise adjust arbitrate and settle all claims by or upon my estate at their discretion and to allow credit with or without security and if with security then with such usual or unusual security as they may please I declare it shall be lawful for my Trustees from time to time to demise and lease all such portions of my estate as they shall think fit upon building or other leases for such time not exceeding Fifty years and upon and subject to such conditions as they shall think fit and proper and to accept surrender of leases I DECLARE that it shall be lawful for my Trustees from time to time as necessity arises to repair and keep in repair all house property belonging to my estate and to sign seal and deliver any deed or deeds of conveyance for lands sold before my decease or as have been or may be resumed for Public purposes from my estate and to give receipts for all moneys obtained from same I declare that in case the Trustees hereby appointed or to be appointed as hereinafter mentioned or if any or either of them shall depart this life decline or become incapable to act or desire to be discharged from the trusts of this my will before the same shall be fully performed then and so often as it shall so happen it shall be lawful for the surviving or continuing trustees or trustee or the executors or administrators of the last survivor with the consent in writing of my said wife during her life and after her death at the discretion of such trustees or trustee executors or administrators to appoint one or more person or persons to be a trustee or trustees in the place of the trustee or trustees so dying declining becoming incapable or desiring to be discharged as aforesaid AND thereupon the said trust Estate shall by all proper Conveyances and Transfers be vested in such new trustees or trustee solely or jointly with the surviving or continuing trustee or trustees as the case may require and such new trustees or trustee shall have the same powers and authorities as if they or he had been originally appointed trustees or trustee of this my Will I declare that every receipt given by the trustees acting in the discharge of the trusts of this my

In the Supreme Court of New South Wales in Equity

No. 3.

Will of George Harris.

18th April 1894 - continued.

will for any moneys payable to them by virtue of this my will shall absolutely exonerate the persons taking the same respectively from the moneys therein expressed to be received ALSO that the said trustees shall not be responsible the one for the other or others of them or for the signing of receipts for the sake of conformity or for any involuntary loss And it shall be lawful for them to reimburse themselves respectively and to allow to their Co-
10 trustees respectively their costs and expenses incurred in discharging the trusts hereby in them reposed I APPOINT my said brothers John Harris and Matthew Harris my said nephew John Harris the EXECUTORS and my wife the said Matilda Duff Harris EXECUTRIX of this my last Will and Testament and Guardians of my children during their respective minorities IN WITNESS whereof I have to this my last Will and Testament set my hand at Sydney the Eighteenth day of April One thousand eight hundrer
20 and ninety four

SIGNED AND DECLARED by the said Testator as and for his last Will and Testament in the presence of us present at the same time who in his presence at his request and in the presence of each other have hereunto subscribed our names as witnesses hereto:- G. HARRIS.

30 H. B. BRADLEY,
SOLICITOR, SYDNEY.
F. G. MORRIS.

No. 4.

No. 4.

Codicil to Will.

3rd April 1895.

CODICIL TO WILL

I, GEORGE HARRIS of Ultimo House, Ultimo in the City of Sydney in the Colony of New South Wales do make this CODICIL to my last Will and Testament dated the Eighteenth day of April One thousand
40 eight hundred and ninety four I HEREBY REVOKE the devise in my Will made in favour of my heir at law I REVOKE the appointment of Executors and Trustees

In the Supreme Court of New South Wales in Equity

No. 4.

Codicil to Will, 3rd April 1895 - continued.

and I APPOINT instead of my dear wife Matilda Duff Harris during her life to be the sole Trustee and Executrix to execute the trusts of my said Will and this my Codicil and after her death I APPOINT my nephew John Harris son of my brother John during his life to be that sole Trustee and Executor and after his death the various legatees to whom my property is devised 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 I give and devise the Northern portion of Block Forty seven B say three hundred feet to Murray Street and Three hundred feet to Pyrmont Street Ultimo as a site to be used in the erection and building of a District Dispensary and receiving Hospital for the use of the Presbyterian and Protestant Poor I direct that after the deaths of my said wife and nephew and of the last succeeding nephew that all my real estate and property shall be realised and sold and out of the amount that Ten thousand pounds be given and devoted towards the building of the above mentioned hospital and Two thousand pounds to be invested at interest so that the annual interest will go to the annual income thereof Two thousand pounds each to the aged Ministers fund and the Home Mission of the Presbyterian Church the amounts to be invested at interest and this latter used as annual subscriptions to each Fund And the residue of the sum realised from my Estate I devise to the abovenamed College to be held at interest and this latter added to the income annually

IN WITNESS whereof I have hereunto set my hand this Third day of April One thousand eight hundred and ninety five.

SIGNED by the said GEORGE HARRIS the Testator in our presence of and in his presence and in the presence of each other at the same time subscribe our names as witnesses - G. HARRIS.

H.H.B. BRADLEY,
Solicitor, Sydney.

William Garbutt.

PROBATE was granted to MATILDA DUFF HARRIS on the Fifth day of April in the year of our Lord One thousand eight hundred and ninety seven.

THIS and the six preceding sheets comprise the copy Will and Codicil of George Harris marked "A" referred to in the annexed Affidavit of John Harris sworn herein at Sydney this Eleventh day of November A.D. 1918 before me

F. Lynne Rolin

A Commissioner for Affidavits.

In the Supreme Court of New South Wales in Equity

No. 4.

Codicil to Will, 3rd April 1895 - continued.

No. 5.

AFFIDAVIT OF WILLIAM WOOD

No. 5.

Affidavit of William Wood, 19th December, 1918.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY No. 7654 of 1918

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.

BETWEEN:- JOHN HARRIS Plaintiff

- and -

REGINALD WILLIAM SYDNEY HARRIS and OTHERS Defendants

ON this Nineteenth day of December One thousand nine hundred and eighteen WILLIAM WOOD of Sydney in the State of New South Wales Financial Secretary of the Presbyterian Church of Australia in the State of New South Wales, being duly sworn makes oath and says as follows :-

1. I have occupied the position of Financial Secretary of the Presbyterian Church Office for the State of New South Wales for over twenty five years past and as such have an intimate knowledge of the affairs and constitution of the Presbyterian Church in this State

2. Amongst the members of the Presbyterian Church in this State in the year One thousand eight

In the Supreme Court of New South Wales in Equity

No. 5.

Affidavit of William Wood, 19th December, 1918 - continued.

hundred and ninety seven there were numerous persons descendents 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.

SWORN by the Deponent on the day first above mentioned at Sydney) WILLIAM WOOD.

Before me
John Stuison, J.P.

No. 6.

Judgment of His Honour Mr. Justice Harvey dated 20th December 1918.

No. 6.

JUDGMENT OF HIS HONOUR MR.JUSTICE HARVEY

IN THE SUPREME COURT OF
NEW SOUTH WALES

Coram:- HARVEY J.

FRIDAY, 20th December, 1918.

RE GEORGE HARRIS'S WILL.

JUDGMENT OF HIS HONOUR MR. JUSTICE HARVEY

This is an originating summons for the construction of the Will of George Harris. The Will is a difficult one to construe as the Testator has left the ultimate dispositions very vague and capable of a variety of interpretations.

The initial trusts of the Will in the events that happened are clear. The Testator devised Ultimo House to his widow for life after her death to the sons of his brother John Harris successively for life and on the death of the last of these sons to his heir at law bearing the name of Harris. His residuary real and personal estate he devised to his Trustees upon trust to collect the income. In the event of his death without issue (which happened) he directed that subject to a certain provision for his widow for life out of the income his Trustees were to accumulate the income of his estate which should from year to year remain until the sum of £25,000 was obtained and then out of the interest to be obtained by the investment of the said accumulated income to pay the same in

equal sums or shares per annum to the sons and daughters of his brothers who shall attain 21. The difficulties in the Will are caused by what follows:- "and after the deaths of his said nephews and nieces respectively and after satisfying this provision" he directed that the residue of such fund with any accumulations accruing should be equally divided and one share each presented to the Sydney University St. Andrew's College and Prince Alfred Hospital the sum in each case to be invested at interest and the interest applied for certain purposes; and upon the death of his wife sister and brothers and without his having left lawful issue he gave and devised certain specific real estate, which in fact included all his residuary real estate, to five named nephews the sons of his brother John Harris share and share alike for their lives and to the survivors or survivor of them until the death of the last survivor and then to his heir at law bearing the name of Harris.

By a Codicil he revoked the devise in favour of his heir at law; he gave and devised 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; he gave and devised a parcel of his other real estate as a site to be used for a District Dispensary and Hospital for the use of the Presbyterian and Protestant poor; he directed that after the deaths of his wife and nephew and of the last succeeding nephew that all his real estate and property should be realised and sold and out of the amount that £10,000 be devoted to building the hospital; then followed other charitable gifts amounting to £6,000 and the residue of the sum realised from his estate he devised to the above-named College.

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

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No. 6.

Judgment of His Honour Mr. Justice Harvey dated 20th December, 1918 - continued.

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. I have also held following the decision of the late Chief Judge in Equity in 1901 that the Testator's widows's provision during her life was intended to be three-quarters of the income of the Testator's residuary estate. The widow is still alive with the result that the trust for accumulation has up to the present only applied to the remaining one-quarter of the income. These accumulations on the 21st January 1918 being 21 years from the Testator's death amounted only to £19,417. By virtue of the Thellusson Act the trust for accumulation cannot continue after the date but it is estimated that the fund would have amounted to £25,000, the sum directed to be raised, in a further period of five or six years. Upon this portion of the Will the question arises what becomes of the income which is released from the trust for accumulation, viz., the interest of the accumulated fund and the income of the residuary estate not required for the widow's provision. In my opinion the judgment of Turner L.J. in Oddie v. Brown supplies the answer in part. This income from the 21st January 1918 until the date at which the £25,000 would have been accumulated passes as on an intestacy. When that date arrives the income of the £19,417.10.10 will be payable to such of the children of the Testator's brothers as are then alive and are of the age of 21 years. I have already held that the children of all the Testator's brothers are included in this gift. Mr.Teece contends that the judgment of Turner L.J., in the case I have referred to is inconsistent with the judgment of the Lord Chancellor in the same case and that the latter is the judgment that should be followed. At first sight there does undoubtedly appear to be an inconsistency. The Lord Chancellor does say that the intestacy extends from the expiration of the period of 21 years until the death of the last of the life tenants, and not merely until the period when the stipulated amount would have been raised. In my opinion His Lordship expressed himself in that way owing to the circumstances of the particular case it being practically certain that the life tenants would all die before the stipulated period would be arrived at. If this is

not so I confess I am unable to follow the reasons for the decision. It does not appear that Turner L.J. considered he was stating the law in any different manner from the Lord Chancellor and his judgment is absolutely clear and distinct and the grounds of it quite intelligible. Adopting it to the present case it is this: the Testator has given nothing to his nephews and nieces until the period arrives when £25,000 would have been accumulated therefore they must wait till then before they receive anything. The Thellusson Act stops the accumulation after 21 years and prevents any further accumulation and the interest which is released from the trust for accumulation being the income of the residue goes to the next of kin. With that exception the trusts of the Will are not disturbed.

The next question is what exactly is the interest given to the Sydney University, St.Andrew's College and Prince Alfred Hospital. This depends upon the meaning of the words "and after the death of my said nephews and nieces respectively and after satisfying this provision the residue of such fund with any accumulations accruing shall be equally divided". The use of the word "respectively" appears to me to be an insuperable objection to holding that the nephews and nieces take the income of the £19,417 with benefit of survivorship. When the Testator wishes to create that kind of interest as in the case of the residuary realty given to the five sons of John Harris he makes that intention quite clear. In the present case the Testator appears to me to indicate that as each nephew or niece of the class died his or her share of the income should go to the three Institutions. By the words "the residue of such fund with any accumulations accruing" the Testator appears to me to have meant the fund and all interest of the fund which up to the period of the death of the last of tne nephews and nieces should not have been paid to the nephews and nieces. The word "accumulation" on any interpretation of the clause is an inapt expression. The only accumulations provided for by the Will are those which constitute the fund itself. The word must mean "interest" i.e. moneys which would be accumulations if they were not paid away. I do not feel justified in holding that it means rents and profits of the residuary estate after the £25,000 has been accumulated which is the meaning Mr.Jordan seeks to give

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No. 6.

Judgment of His Honour Mr. Justice Harvey dated 20th December, 1918 - continued.

the word. The Testator's language appears to me to indicate that he was thinking only of accumulations of the fund.

I hold that the three institutions are entitled only to the fund of £19,417 on the death of the last of the nephews and nieces with a right in the meantime to stand in the shoes of each member of the class who dies and to receive his or her share of the income of the fund.

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 apart 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. In the first place I think that is the primary meaning of the expression; secondly the property he is dealing with is property capable of being "realised and sold" which would not ordinarily apply to money in hand or cash at bank; thirdly the Codicil appears only to have been framed with the object of altering the Trustees and of revoking the devises to his heir at law and nominating fresh objects of those devises; fourthly the property is to be sold at the death of his widow and last succeeding nephew indicating that the property in question was that in which his widow and nephews successively took life estate under his Will i.e. the residuary real estate. The final words of the Codicil do not in my opinion carry the matter any further; the words "the residue of the sum realised from my estate" are referential words equivalent to "my said estate".

In the result I hold that subject to the payment to the widow of three-quarters of the income of the real estate during her life there is an

intestacy as to the income of the residuary real estate from the 21st January 1918 until the death of the last survivor of the Testator's widow, sister, and brothers. Subject to the payment of three-quarters of the income of the residuary personal estate to the widow during her life there is an intestacy as to the corpus and income of the residuary personal estate from the 21st January, 1918. There is also an intestacy as to the income from the accumulated fund of £19,417 from the 21st January 1918 until the period arrives when the accumulations of the balance of income of the residuary real and personal estate subject to the widow's life provision of three-quarters of the income would have accumulated to £25,000.

No. 7.

JUDGE'S NOTES OF HIS HONOUR MR. JUSTICE HARVEY

MONDAY 9th DECEMBER, 1918.

Maughan for Plaintiff.

Leverrier K.C.)
Davies) for R.W.S. Harris

Innes K.C.)
S.A.Thompson) for M.J. Harris

Jordan for University of Sydney

Teece for Matilda Duff Harris.

Knox K.C.)
Weston) for Ada M. Harris

Bethune for Attorney-General.

Manning, R.K. for W.H. Harris.

Affidavit John Harris 11th November 1918

QUESTION (10a)

LEVERRIER: The gift 70B for Presbyterians is a bad gift as being too remote. It is a gift to a class of persons to be ascertained at the death of a possible person not in existence at the date of Testator's death - a nephew might come into existence after Testator's death.

Halsbury, L. of E. Page 184.

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No. 7.

Judge's Notes of His Honour Mr. Justice Harvey,

9th December, 1918 - continued.

It is bad because if it is a charitable gift it is far too restricted a class, viz:- The youth of Presbyterians immigrating from the North of Ireland.

INNES TO THE COURT:

KNOX TO THE COURT:

Attorney-General v. Powell. 11 N.S.W. Equity 263.

I refer to Attorney-General v. Stuart 14 Equity, Prior v. Moore 1901 1 Ch. 936.

JORDAN TO THE COURT

The gift is bad because the charitable intention is particular. Fowler v. Attorney-General 1909 2 Ch. 1.

18th December, 1918.

WEDNESDAY, 18th DECEMBER, 1918.

JORDAN: The gift for the Presbyterian College is void for uncertainty. First. It is for a particular charitable College not yet in existence. Secondly. Objects too uncertain.

BETHUNE TO THE COURT.

Marsh v. Attorney-General Tudor p.102. Subject to Affidavit by Attorney-General as to Presbyterian children.

I answer 10a in affirmative as being a vested remainder for a good charitable object.

10(b) I hold that the life Estates in the two properties created by the Will are not revoked by the Codicil.

Question 10 (c) S.O. Generally.

Question 1.

JORDAN: My clients are not bound by the Decree of the Court of 22nd February 1901 - We contend widow is only entitled to half income not three-quarters. I hold following decision of the C.J. in Equity that Mrs. Harris entitled to three-quarters income for her life and declare accordingly.

5(a)(b)

R.K.MANNING for son Deceased Brother. My client is included. My Brothers on page 3 means all my brothers.

Bolin v. Bolin. 3 Sim. 492.

WESTON for daughter of deceased brother. Adopts same argument.

I hold that the son and daughters of W. H. Harris share -- Question 6 as regards residuary personalty.

Oddie v. Brown. 4 Dej. & J. 179.

The income receivable after the 21 years until the period when £25,000 would have been received goes to the next of kin as undisposed of.

The nephews and nieces to take include all who came afterwards into existence. There is a joint tenancy and any in existence take the whole fund.

Re Pritchard 6 S.R. 353.

Re Telfoir 86 L.T. 496.

Such fund means the £25,000. The residuary gift in the Codicil only covers property which was given to the heir-at-law. It does not cover any personal property as to which he died intestate by the Will.

INNES TO THE COURT

My real Estate and property only means real Estate.

MANNING TO THE COURT.

Buchanan v. Harrison 31 L.I. Ch. 74.

Belamy v. B. 35B. 469.

Belamy v. B. 2 Ch. 138.

THURSDAY, 19th DECEMBER, 1918

MANNING CONTINUING

If the nephews and nieces do not take accrued

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18th December, 1918 - continued.

19th December, 1918.

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No. 7.

Judge's Notes of His Honour Mr. Justice Harvey,

19th December, 1918 - continued.

shares as members of the class there is an intestacy as to the shares of those which have died subject to the trust for accumulation. There is an intestacy as to personal Estate not specifically bequeathed and as to the rents and profits of Real Estate devised to sons of John Harris up to the death of wife sisters and brothers.

WESTON TO THE COURT.

TEECE TO THE COURT.

Intestacy as to rents and profits of the whole Estate except so far as required for widows provision until the death of his last surviving nephew or niece.

The gift to nephews and nieces of the accumulated fund fails.

The Lord Chancellor in Oddie v. Brown clearly says so --

The failure of the gifts extends to the whole income until the fund is distributable.

In this respect he and Lord Justice Turner do not agree.

Elborne v. Goode 14 Sim. 165.

There is an intestacy -- The interest of the charities is not accelerated.

JORDAN TO THE COURT.

With any accumulation accruing with any interest accruing after satisfying the foregoing provisions.

That is equivalent to a gift of corpus except as to the real Estate specifically given -- as each nephew dies his share of income goes to the University by virtue of the words "respectively" and "residue" of such fund.

BETHUNE TO THE COURT.

The residuary gift in the Codicil catches everything.

Affidavit William Wood 19th December 1918.

I answer 8(a) Yes --

C.A.V.

FRIDAY, 20th DECEMBER, 1918.

Written Judgment delivered. Representative orders as asked. All costs as between Solicitor and Client out of the Estate Plaintiff's Solicitors authorised to act for Matilda Duff Harris William Henry Harris and Ada Mary Harris.

In the Supreme Court of New South Wales in Equity

No. 7.

Judge's Notes of His Honour Mr. Justice Harvey - continued.

20th December, 1918.

No. 8.

No. 8.

Decretal Order dated 20th December, 1918.

DECRETAL ORDER

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY) No.7654 of 1918

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.

BETWEEN:- JOHN HARRIS Plaintiff

- and -

REGINALD WILLIAM SYDNEY HARRIS, MATTHEW JAMES 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 Defendants

FRIDAY the twentieth day of December One thousand nine hundred and eighteen.

This Suit instituted by Originating Summons coming on to be heard before the Honourable John Musgrave Harvey a Judge of the Supreme Court sitting in Equity on the ninth, eighteenth and nineteenth days of December instant WHEREUPON and upon hearing read the said Originating Summons the

In the Supreme Court of New South Wales in Equity

No. 8.

Decretal Order dated 20th December, 1918 - continued.

Affidavit of the Plaintiff sworn herein on the eleventh day of November last the Affidavit of William Wood of Sydney sworn herein on the nineteenth day of December instant and the Decree made by this Court in its equitable jurisdiction on the twenty second day of February One thousand nine hundred and one in the suit Harris v. Harris and others numbered 8691 of 1899 AND UPON HEARING what was alleged by Mr. Maughan of Counsel for the Plaintiff by Mr. Leverrier K.C., and Mr. Wyndham Davies of Counsel for the Defendant Reginald William Sydney Harris by Mr. Innes K.C., and Mr.S.A.Thompson of Counsel for the Defendant Matthew James Harris by Mr. R.K. Manning of Counsel for the Defendant William Henry Harris by Mr. Knox, K.C. and Mr. Weston of Counsel for the Defendant Ada Mary Harris by Mr. Teece of Counsel for the Defendant Matilda Duff Harris by Mr. Jordan of Counsel for the Defendant The University of Sydney and by Mr. Bethune of Counsel for the Defendant His Majesty's Attorney General THIS COURT DID ORDER that this cause should stand for judgment and the same standing in the paper for judgment this day THIS COURT DOTH DECLARE that both devises to the heir-at-law of the Testator contained in the Will of the Testator were revoked by the Codicil thereto AND THIS COURT DOTH FURTHER DECLARE that 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 that the said devise of "Block 70B" is subject to the prior life estates in favour of the widow and certain nephews of the Testator the sons of his brother John and that the said devise of "the northern portion of Block 47B" is subject to the prior life estates of the said nephews of the Testator AND THIS COURT DOTH FURTHER DECLARE that the Defendant William Henry Harris is included in the class "my nephews the sons of my brothers " and that the daughters of William Henry Harris deceased are included in the class "my nieces the daughters of my said brothers" AND THIS COURT DOTH FURTHER DECLARE that the trust for accumulation of income contained in the said Will is void in so far as it purports to direct any such accumulation after the twenty first day of January One thousand nine hundred and eighteen AND THIS COURT DOTH FURTHER DECLARE that the said Matilda Duff Harris the widow of the Testator is entitled during her life to three fourths parts of the income of the residuary

real and personal estate of the Testator AND THIS COURT DOTH FURTHER DECLARE that (a) the corpus of the residuary personal estate of the said Testator (subject to the said life estate of the widow) and (b) one fourth part of the income of the residuary personal estate accruing after the twenty first day of January One thousand nine hundred and eighteen and (c) one fourth part of the income of the residuary real estate accruing between the twenty first of January One thousand nine hundred and eighteen and the death of the Testator's widow, and (d) the income of the whole of the residuary real estate after the death of the said Testator's widow and until the death of the Testator's sister, Margaret Harris should she survive the said widow and (e) the income of the present accumulated fund of Nineteen thousand four hundred and seventeen pounds ten shillings and ten pence accruing between the said twenty first day of January One thousand nine hundred and eighteen and the date at which Twenty five thousand pounds would have been accumulated if the said trust for accumulation had been good in toto are not effectually disposed of by the said Will and Codicil and pass as on intestacy to the next of kin of the Testator according to the Statutes of Distribution AND THIS COURT DOTH FURTHER DECLARE that from the date on which the said sum of Twenty five thousand pounds would have been accumulated as aforesaid the income of the present accumulated fund will belong to each of the children of the brothers of the Testator as are then alive and on their respectively attaining the age of twenty one years during their respective lives AND THIS COURT DOTH FURTHER DECLARE that upon the death of any such child as last mentioned his or her share of such income will be divisible into three equal parts between the University of Sydney, St. Andrews College and Prince Alfred Hospital until the death of the last survivor of such children AND THIS COURT DOTH FURTHER DECLARE that upon the death of the last survivor the said accumulated fund of nineteen thousand four hundred and seventeen pounds ten shillings and ten pence will be divisible between the said three last mentioned institutions equally for the respective purposes in the said will mentioned AND THIS COURT DOTH ORDER that the Defendant Reginald William Sydney Harris be and he is hereby appointed to represent for the purposes of this suit the children of John Harris deceased AND that the Defendant Matthew James

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Decretal Order dated 20th December, 1918 - continued.

Harris be and he is hereby appointed to represent for the purposes of this suit the children of Sir Matthew Harris deceased and that the Defendant Ada Mary Harris be and she is hereby appointed to represent for the purposes of this suit all the daughters of William Henry Harris deceased and that the Defendant Matilda Duff Harris be and she is hereby appointed to represent for the purposes of this suit all persons entitled to share in the Testator's estate according to the Statutes of Distribution and that the Defendant the University of Sydney be appointed to represent for the purposes of this suit all Institutions interested in "the residue of such fund with any accumulations" mentioned in the said Will AND THIS COURT DOTH FURTHER ORDER that it be referred to the Master in Equity to tax and certify the costs of all parties of this suit as between Solicitor and Client and that the said costs when so taxed and certified as aforesaid be paid by the Plaintiff out of the estate of the said Testator to the respective parties or to their respective Solicitors AND THIS COURT DOTH AUTHORISE the Solicitors for the Plaintiff to act also for the Defendants William Henry Harris, Ada Mary Harris and Matilda Duff Harris AND THIS COURT DOTH FURTHER ORDER that the consideration of any further question arising upon the said Originating Summons be adjourned generally AND all parties are to be at liberty to apply as they may be advised.

Passed 5th March A.D. 1919.

W.A.P.

Entered same day

R.T.C.S.

Sgd. W.A.Parker,

Master in Equity.

In the Full Court of the Supreme Court of New South Wales.

No. 9.

Notice of Appeal by Defendant Matthew James Harris dated 13th February, 1919.

No. 9.

NOTICE OF APPEAL BY DEFENDANT MATTHEW JAMES HARRIS

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY) No.7654 of 1918

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.

BETWEEN:- JOHN HARRIS Plaintiff

- and -

REGINALD WILLIAM SYDNEY HARRIS and OTHERS Defendants

The thirteenth day of February One thousand nine hundred and nineteen.

TAKE NOTICE that MATTHEW JAMES HARRIS one of the above-named Defendants appeals against the Decretal Order herein of His Honour Mr. Justice Harvey a Judge of the Supreme Court sitting in Equity dated the twentieth day of December One thousand nine hundred and eighteen for the following among other grounds and reasons that is to say:-

1. THAT His Honour was in error in holding that the widow of the said Testator was entitled to three quarters of the income of the residuary estate for her life.

2. THAT upon the true construction of the said Will His Honour should have held that the Widow of the Testator was entitled to one half only of the income of the residuary estate for her life.

3. THAT His Honour was in error in holding that the trust for accumulation of the balance of the income of the residuary real and personal estate was valid.

4. THAT upon the true construction of the said Will His Honour should have held that the said trust for accumulation was void and that the sum of Nineteen thousand four hundred and seventeen pounds (£19,417) being the amount actually accumulated within twenty-one years

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Notice of Appeal by Defendant Matthew James Harris dated 13th February, 1919 - continued.

from the death of the Testator passed to the Testator's next of kin.

5. IF the said trust for accumulation was valid as to the said sum of Nineteen thousand four hundred and seventeen pounds that His Honour was in error in holding that the income of the said accumulated fund would not be payable to the Testator's nephews and nieces until the date at which the accumulations would have reached the amount of Twenty-five thousand pounds (£25,000).

6. THAT His Honour was in error in holding that on the death of each of the Testator's said nephews and nieces his or her share of the income of the accumulated fund was payable to the institutions mentioned in the said Will.

7. THAT His Honour should have held that the Testator's said nephews and nieces were entitled to share the income of the accumulated fund equally between them and that on the death of each of them the survivors were entitled to the income of the whole fund including the share of those dying.

8. THAT on the true construction of the said Will His Honour should have held that the direction that the residue of the said fund of Twenty-five thousand pounds with any accumulations accruing should be equally divided between the institutions named in the said Will meant that the said fund with any interest thereon accruing from the death of the last surviving nephew or niece should be so divided.

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.

No. 9.

Notice of Appeal by Defendant Matthew James Harris dated 13th February, 1919 - continued.

11. THAT His Honour was in error in holding that the effect of the said Codicil was to revoke both the devises in the said Will in favour of the Testator's heir at law.

12. THAT His Honour was in error in holding that the respective life interests in Ultimo House in favour of the Testator's widow and nephews the sons of his brother John Harris in the said Will contained were not disturbed by the said Codicil.

13. THAT on the true construction of the said Will and Codicil His Honour should have held that the said devise of Block 70B on trust for establishing a college in the said Codicil contained was a revocation of the devises in the said Will in favour of the Testator's widow and nephews the sons of his brother John Harris for their respective lives.

Sidney A. Thompson,

Counsel for the said Matthew James Harris.

This notice of appeal is filed by Matthew James Harris of Norwich Chambers Hunter and Bligh Streets Sydney, Solicitor for the Appellant.

No. 10.

No.10.

Judgment of His Honour Mr. Acting Justice Langer Owen for the Court dated 14th June, 1919.

JUDGMENT OF HIS HONOUR MR. ACTING JUSTICE LANGER OWEN FOR THE COURT.

JUDGMENT

On this appeal from Mr. Justice Harvey a number of questions arise as to the construction and effect of the Will and Codicil of the late George Harris.

The first of these questions is whether the Will conferred on the widow of the Testator the right to receive three-fourths of the income of his residuary estate or whether she was only entitled to one half. In a suit instituted in 1900, in which the widow was Plaintiff and those of the

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Testator's relatives whose interests were in conflict with hers were Defendants, this question came before the late Mr. Justice A.H. Simpson then Chief Judge in Equity and by the decree in that suit which is dated the 22nd February 1901, the Court declared that the widow was entitled during her lifetime to three-fourths of the income of the residuary estate and that the remainder of the income should be accumulated until the fund so accumulated reaches the sum of £25,000 or until the expiration of 21 years from the death of the testator. The widow and certain parties who are representative of all the above relatives of the testator are parties to this present originating summons, but the Attorney-General, the University of Sydney, the Presbyterian College of St. Andrews and the Prince Alfred Hospital were not parties to the former suit. In accordance with this decree the trustees of the Will and Codicil paid to the widow three-fourths of the income and accumulated and invested the remaining one-fourth, and on the 21st January, 1918 (being 21 years after the testator's death) these accumulations amounted to £19,417.10.10. It is not contended by the relatives who are opposed to the widow that the Court should now disturb or order the repayment of the payments which have been made to the widow by the Trustees in pursuance of the above decree. All that is contended is that, if this Court is now of opinion that the Will only confers upon the widow the right to one-half of the income in question proper adjustments should be made by the Trustees out of income in hand or out of future income. Mr. Justice Harvey considered that he ought to follow the judgment of the late Chief Judge in Equity - That judgment has not been reported nor have the parties been able to furnish us with the reasons given by the learned Chief Judge in Equity for his decision, but his decision must necessarily carry great weight with any Court and we certainly attach great importance to the view which he has taken of this Will. After careful consideration, however, we feel that his view cannot be supported and that, upon the true construction of the Will, the Testator has, in the events which have happened, only given to his widow the right to receive one-half of the income of the residuary estate. The Testator died without issue and the widow's rights depend on the proper construction of the following expressions appearing in

his Will: "But in case of my death without lawful issue born in my lifetime or in due time thereafter then subject to the provision hereinbefore made for my dear wife Matilda Duff Harris during her life I direct &c." In the earlier part of his Will the Testator had directed his Trustees to collect the income of his residuary estate and thereout to pay three-fourths of such income to his wife "for her life ..." and for the maintenance and education of all our children until the youngest child shall attain 21 years", and to divide the residue of such income among certain relatives. He then proceeds to direct that "upon the attaining of majority of the youngest of my children upon trust to pay one half of the annual income of my estate to my said wife Matilda Duff Harris for her separate Inalienable use for her life". This is followed by a direction to apply the residue of the income for the benefit of his children and his relatives during his wife's lifetime. The question is to which of the above provisions did the Testator refer when he used the expression "subject to the provision hereinbefore made for my dear wife during her life". The first of these provisions appear to us to be one made for the widow and all the Testator's children until the youngest shall attain his or her majority. It is true that he uses the expression "for her life" but we think this means no more than "if she should live so long". It is also true that in a number of authorities relied upon by Counsel for the widow similar bequests have been construed as conferring on the widow the right to the income during her life on failure of children, but these authorities do not decide that such a provision is not one made for the widow and the children. It seems to us that it is the second of these provisions to which the Testator referred. This latter provision is strictly one made for the widow for her life and it is given to her in order to provide for the event of the children not requiring assistance out of the income given to the widow. We think, therefore, that the expression used by the Testator applies more aptly to the second of these provisions and that consequently the widow's interest was confined to one half of the income of the residuary estate. 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 it amounted to a

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trust for founding 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 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 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 arrives 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 Cypres 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.

We also think that Mr.Justice Harvey was right in holding that the respective life estates of the Testator's widow and the sons of John Harris conferred by the Will were not disturbed by the Codicil. There are no words in the Codicil which purport to revoke these interests, the only words of revocation are used in reference to the devise in favour of the Testator's heir at law, and there is nothing in the Codicil which suggests that the prior life estates were intended to be affected. Mr. Maughan for the heir at law concedes that the Codicil does revoke the ultimate devises in favour of his client, and we agree that this is so. It also appears to us to be clear that the devise of Lot 70B contained in the Codicil was not intended to and did not revoke the prior devise or life estates to the widow and the Testator's nephews. The Codicil plainly contemplates that those life estates should remain unaffected.

It was somewhat faintly argued that the residuary personal estates and the rents and profits

of both real and personal estate undisposed of by the Will were included in and passed by the Codicil. On this point also we agree with Mr.Justice Harvey and for the reasons given by him. In our view the expressions used in the Codicil are only apt to include real estate.

The question which gives rise to the greatest difficulty in the construction of this Will and Codicil is that which relates to the accumulation of portion of the income and the beneficial interests created in these accumulations.

The material facts, on this part of the case, are that the Testator's father and mother predeceased him and that when the Testator died two brothers survived him. It is also conceded that at the date of the Testator's death, the University of Sydney, St. Andrew's College and the Prince Alfred Hospital were in existence.

We have already pointed out that the accumulations of one-quarter of the income had produced the sum of £19,417.10.10 at the end of 21 years from the Testator's death, and it is agreed by all parties that if the Trustees had accumulated one-half, instead of one-quarter, of the income, the sum of £25,000 would have been reached long before the 21st January 1918. that is, long before the period of 21 years from the death of the Testator had elapsed.

The Testator, by his Will gave and devised his residuary real and personal estate to Trustees upon trust to collect the income and, after making certain provisions out of such income for his wife, children and certain relatives, he directs his Trustees "to accumulate the income of my said estate which shall from year to year remain until the sum of £25,000 is saved and then out of the interest to be obtained by the investment of the said accumulated income pay the same in equal sums of shares per annum by even quarterly payments to each of my nephews the sons of my brothers during their lives and to each of my nieces the daughters of my said brothers who shall attain the age of 21 years ..... for life ..... and after the death of my said nephews and nieces respectively and after satisfying this provision I desire and direct that the residue of such fund with any accumulations

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accruing shall be equally divided in equal shares and one share presented to each of the following institutions: the Sydney University, the sum to be invested at interest and the latter to be devoted to giving Bursaries etc." Then follows similar dispositions of the remaining shares in favour of St. Andrew's College and the Prince Alfred Hospital.

These dispositions have been attacked as offending the rule against perpetuities and consequently void and it is contended firstly, that the disposition in favour of the Testator's nephews and nieces must fall, and, secondly, that the gifts in remainder fall with them. These points were not argued before Mr. Justice Harvey, and, therefore, we have not the advantage of his judgment to assist us.

We think that the rule which should guide the Court where questions of remoteness are raised is very plainly laid down by Lord Selborne in Pearks v. Mosely 5 A.C., 719 "The rule which has always been applied ..... what would their effect be if there was no law of remoteness?"

There are also certain passages in the third edition of Mr. Gray's work which seem to us to be of assistance and which appear to state the law very clearly. In paragraph 671 the learned author says "When a settler or Testator directs income to be accumulated and it is a condition precedent to the right of enjoying the income that the period fixed for the determination of accumulation should arrive then, if this period may fall beyond the limits of the Rule against perpetuities, the gift of the accumulated income is too remote." Again paragraph 672 states that if the person to whom the accumulated income is to be paid has a vested indefeasible right to the possession of the principal or the accumulations then the direction to accumulate is an illegal restraint on alienation and such person can put an end to the accumulation at any time. In paragraph 674 Mr.Gray continues "if the accumulation is a condition precedent and the time of accumulation is or may be too long the gift of the accumulated fund is bad altogether". It appears to us that the Court, in the present case, has merely to follow these rules and that, if the Court, on construing will, comes to the conclusion that it is a condition precedent to the

gift to the life tenants and those entitled in remainder that the sum of £25,000 shall have been accumulated out of income, then the Court must hold that the gifts must fall for remoteness. Oddie v. Brown 4 De G. & J. 179 does not appear to us to be in conflict with any of the principles laid down by Mr. Gray, nor do we think that it is of much assistance to us in construing the present Will.

It appears to us that the beneficial interests created in favour of the Testator's nephews and nieces amount to life interests for each nephew and each niece who attains the age of 21 years and that on the death of any such nephew or niece the survivors take by implication the whole income during their lives. The case of re Telfair 86 L.T. 496, cited by Mr. Leverrier, seems to us to establish this. The class to take as life tenants consists of all the children of the Testator's brothers who shall attain the age of 21 years and all the members of that class must be ascertained within the limits allowed by the rule against perpetuities.

The institutions which are entitled in remainder were in existence when the Testator died.

The question then arises whether it is a condition precedent to ascertaining the members of the class who take as life tenants that the period fixed for the determination of accumulation should arrive. We think that the members of this class are, by the terms of the will, to be ascertained without reference to the date when the accumulations of income would reach £25,000. No doubt, the Testator contemplated that his Trustees were to accumulate the income until that sum was reached and that they should then apply the income of the accumulated fund for the tenants for life, but the persons he says are to be benefited are not the nephews and nieces who are living when that sum is reached: they are all the children of his brothers who obtain their majorities.

If this be the true construction of what the Testator has said, it follows that this is really a case where a will has directed income to be accumulated for a period which may exceed that allowed by the rule but has conferred the beneficial interests in the accumulation on a class which is

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necessarily ascertainable within the period which the rule allows. In the present case the contingency (i.e. the determination of the accumulations) is not imparted into the description of the class: the class is ascertained apart from and is not dependent upon the happenings of the contingency.

The result then is that the trust for accumulation is good for the 21 years allowed by the Thelusson Act and the beneficial interests both of the tenants for life and of the institutions entitled in remainder are also good.

Having decided that the Testator's nephews and nieces take the whole income of the accumulated fund until the death of the survivor of them, the University of Sydney, St. Andrew's College and the Prince Alfred Hospital are only entitled to the accumulated funds upon the death of such survivor.

In view of the decisions on this appeal the necessary adjustments will have to be made by the Trustees out of income in hand and future incomes. If any questions arise in making these upon which the parties cannot agree, we think these questions should be remitted to the Court of first instance to determine. In carrying out this part of our order the Trustees must not make any adjustment in favour of any person who was a party to the former suit which will have the effect of causing the widow to repay the income which, according to our construction of the will, has been overpaid to her. Those who were represented in that former suit are bound by payments made by the Trustees under the decree of the late Chief Judge in Equity. We have no facts before us which enable us to determine whether there will be any surplus income available after the £25,000 is fully made up and after the matters consequential thereon are adjusted but if there should be any such surplus income we agree with Mr. Justice Harvey that it will go to the next of kin.

The costs of all parties to this appeal should be paid out of the estate as between Solicitor and Client.

P. V. STORKEY,

Associate.

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In the Full Court of the Supreme Court of New South Wales.

No.11.

Decree on Appeal dated 26th September, 1919.

DECREE ON APPEAL

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY) No.7654 of 1918

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.

BETWEEN:- JOHN HARRIS Plaintiff

- and -

REGINALD WILLIAM SYDNEY HARRIS, MATTHEW JAMES 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 Defendants

FRIDAY the Twenty sixth day of September One thousand nine hundred and nineteen.

UPON THE APPEAL of the Defendant MATTHEW JAMES HARRIS the representative for the purposes of this suit of the children of Sir Matthew Harris deceased from the Decree made herein on the Twentieth day of December last by the Honourable John Musgrave Harvey a Judge of this Court sitting in Equity and the cross appeal of the Defendant The University of Sydney from the said decree coming on to be heard before the Honourable Robert Darlow Pring and the Honourable Alexander Gordon Puisne Judges and the Honourable Langer Owen an Acting Judge of this Court on the nineteenth, twentieth, twenty-first and twenty-second days of May last WHEREUPON AND UPON HEARING read the notice of appeal filed on behalf of the said Defendant Matthew James Harris and the notice of cross appeal filed on behalf of the said Defendant The University of Sydney and the printed record of the proceedings filed herein for the purposes of this appeal AND UPON HEARING what was alleged by Counsel for the parties hereto namely Mr. S.A. Thompson and Mr. Sheridan for the Appellant Matthew James Harris, Mr.Maughan for the

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Respondent John Harris, Mr. Leverrier of King's Counsel and Mr. Wyndham Davies for the Respondent Reginald William Sydney Harris, Mr.R.H.Long Innes of King's Counsel and Mr.R.C.Teece for the Respondent Matilda Duff Harris, Mr.Jordan for the Respondent and Appellant by notice of cross appeal The University of Sydney and Mr.Bethune for the Respondent His Majesty's Attorney General in and for this State and no one appearing for the Defendants William Henry Harris and Ada Mary Harris though duly served with notice of this appeal as appears by the admission made before this Court by their Solicitor Mr.J.M.Maugham THIS COURT DID ORDER that the Appellant Matthew James Harris as one of the Executors of the Will of Sir Matthew Harris deceased a brother of the Testator 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 said Notice of Appeal of the said Appellant AND THIS COURT DID FURTHER ORDER THAT this Appeal should stand for judgment AND the same standing in the paper for judgment accordingly on the fourteenth day of June last THIS COURT after consideration of the several grounds stated in the said Notice of Appeal and cross-appeal DOTH DECLARE that upon the true construction of the Will and Codicil of the Testator:

(a) BOTH devises to the heir-at-law of the Testator contained in the Will of the Testator were revoked by the Codicil thereto:

(b) THE devises of "Block Seventy B" and of "the Northern portion of Block Forty-seven B" 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.

(c) THE said devise of Block Seventy B 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

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the sons of his brother John, and the said devise of "the Northern portion of Block forty-seven B" is subject to the prior life estates therein given by the said Will in favour of the said last mentioned nephews of the Testator.

(d) THE trust for accumulation of income contained in the said Will is not void as infringing the rule against perpetuities and was good for the period of twenty one years from the death of the Testator.

(e) SUBJECT to the decree dated the 22nd day of February 1901 and made by His Honor the late Mr. Justice Archibald Henry Simpson Chief Judge in Equity in a suit Number 8691 of 1899 Harris v. Harris and others wherein the Respondent Matilda Duff Harris was Plaintiff and John Harris and others were Defendants and subject to the order hereinafter contained as to adjustment the income of such residuary estate is payable:-

(1) As to one half to the Respondent Matilda Duff Harris for her life.

(2) As to the remaining half during the life of the said Matilda Duff Harris the same is not effectually disposed of by the said Will and Codicil and is payable as on the intestacy of the Testator to his next-of-kin according to the Statutes of Distributions.

(f) THE income derived from the investment of the accumulated fund will be payable in equal shares per annum by even quarterly payments amongst all the nephews and nieces of the Testator the sons and daughters of his brothers John Harris, Sir Matthew Harris and William Henry Harris and the survivors from time to time of such nephews and nieces respectively until the death of the last survivor. After the death of such last survivor the said accumulated fund is to be held by the Trustee or Trustees of the said Will on trust for the Sydney University, The Presbyterian College of Saint Andrew's and the Prince Alfred Hospital in accordance with the provisions of the said Will.

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(g) THE corpus of the residuary personal estate of the Testator (subject to the said life estate of his said Widow) and the income of the whole of the residuary real and personal estate after the death of the said Widow and until the death of the Testator's sister Margaret Harris should she survive his Widow are not effectually disposed of by the said Will and Codicil and pass as on the intestacy of the Testator to his next-of-kin according to the Statutes of Distributions.

AND THIS COURT DOTH FURTHER ORDER that in view of the declaration in paragraph (e) hereof the Respondent John Harris the present Trustee or the Trustee or Trustees for the time being of the said Will do make all necessary adjustments out of the income of the residuary real and personal estate of the Testator in the hands of the said present trustee and undistributed on the fourteenth day of June last and all future income of the said residuary estate in order to effectuate the trust contained in the said Will for accumulation but that in so doing the said Trustee or Trustees must not make any adjustment in favour of any person who was a party to the said suit No.8691 of 1899 which will have the effect of causing the said Matilda Duff Harris to repay the income which in accordance with the said Declaration in paragraph (e) hereof has been overpaid to her under the said decree dated the 22nd day of February 1901.

AND THIS COURT DOTH DECLARE that all persons who were parties directly or by representation in the said Suit No.8691 of 1899 are bound by the payments made out of the income of the said residuary real and personal estate by the Trustee of the said Will to the Widow in pursuance of the said decree made therein.

AND THIS COURT DOTH FURTHER ORDER that in the event of the persons interested being unable to agree as to the proper adjustments to be so made by the said Trustee or Trustees as aforesaid this suit be remitted to the Court of first instance for the proper determination of such adjustments AND THIS COURT DOTH FURTHER ORDER that it be referred to the Master in Equity to tax as between Solicitor and Client and certify the costs of all parties to this appeal and that the certified amount of such

taxed costs be paid by the said Trustee or Trustees of the said Will and Codicil out of the Estate of the Testator as follows namely the costs of the Appellant to the said Matthew James Harris the costs of the Respondents John Harris, William Henry Harris, Ada Mary Harris and Matilda Duff Harris to them respectively or their Solicitors Messrs.Bradley Son and Maughan, the costs of the Respondent Reginald William Sydney Harris to him or his Solicitor Mr.A.B.Davies, the costs of the Respondent and Appellant by notice of Cross Appeal The University of Sydney to such body or its Solicitors Messrs.Sly & Russell and the costs of the Respondent His Majesty's Attorney General to Mr. J.V. Tillett, Crown Solicitor AND THIS COURT DOTH FINALLY ORDER that this decree shall bear date as of the date of settlement by the Master in Equity of the Minutes thereof AND all parties are to be at liberty to apply as they may be advised.

In the Full Court of the Supreme Court of New South Wales.

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Passed 15th October A.D. 1919

W.A.P.

Sgd. W.A.Parker

Entered same day

Master in Equity.

R.T.C.S.

No. 12.

DECRETAL ORDER BY HIS HONOUR MR.JUSTICE HARVEY

In the Supreme Court of New South Wales in Equity

No.12.

Decretal Order by His Honour Mr. Justice Harvey dated 12th December, 1919.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY } No.7654 of 1918

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.

BETWEEN:- JOHN HARRIS Plaintiff

- and -

REGINALD WILLIAM SYDNEY HARRIS, MATTHEW JAMES 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 Defendants

In the Supreme Court of New South Wales in Equity

No.12.

Decretal Order by His Honour Mr. Justice Harvey dated 12th December, 1919 - continued.

AND BY AMENDMENTS

BETWEEN:- JOHN HARRIS Plaintiff

- and -

REGINALD WILLIAM SYDNEY HARRIS MATTHEW JAMES HARRIS WILLIAM HENRY HARRIS ADA MARY HARRIS MATILDA DUFF HARRIS THE UNIVERSITY OF SYDNEY HIS MAJESTY'S ATTORNEY-GENERAL in and for the State of New South Wales and MARGARET HARRIS Defendants

FRIDAY the Twelfth day of December One thousand nine hundred and nineteen.

This suit instituted by originating summons coming on to be further heard before the Honourable John Musgrave Harvey a Judge of the Supreme Court sitting in Equity on the twenty first and twenty eighth days of November last whereupon and upon hearing read the further questions in the said originating summons added in pursuance of the order of the Full Court made the twenty sixth day of September last on appeal from the decretal order made herein on the twentieth day of December One thousand nine hundred and eighteen by the said Honourable John Musgrave Harvey, the said Orders of the Full Court and of the Honourable John Musgrave Harvey and the Affidavit of the Plaintiff John Harris sworn the tenth day of November One thousand nine hundred and nineteen and filed herein on behalf of the Plaintiff THIS COURT DID ORDER that the title to the suit be amended by adding Margaret Harris the sister of the above-named Testator in his Will mentioned as a Defendant herein and the said amendment being made accordingly AND UPON HEARING what was alleged by Mr. Maughan of King's Counsel (with whom was Mr. Weston of Counsel) for the Plaintiff Mr.Leverrier of King's Counsel (with whom was Mr. Wyndham Davies of Counsel) for the Defendant Reginald William Sydney Harris, Mr. S.A. Thompson of Counsel for the Defendant Matthew James Harris, Mr. J. M. Maughan Solicitor for the Defendants William Henry Harris and Ada Mary Harris, Mr. Teece of Counsel for the Defendant Matilda Duff Harris, Mr. Jordan of Counsel for the Defendant University of Sydney and Mr. H.H.Mason of Counsel for the Defendant Margaret

In the Supreme Court of New South Wales in Equity

No.12.

Decretal Order by His Honour Mr. Justice Harvey dated 12th December, 1919 - continued.

Harris THIS COURT DID ORDER that this cause should stand for judgment and the same standing in the paper for judgment this day THIS COURT DOTH DECLARE that for the purpose of making the accumulated fund mentioned in the said order of the Full Court up to the sum of Twenty five thousand pounds the Plaintiff as trustee of the Will and Codicil of the above-mentioned Testator or other the trustee or trustees of the said Will and Codicil for the time being should impound so much of the Defendant Matilda Duff Harris' share of the income of the residuary real and personal estate of the said Testator due and payable to her from and after the twenty sixth day of September last and of the interest of the said Defendant in the corpus of the residuary real and personal estate as may be necessary to bring the amount of the said accumulated fund up to twenty-five thousand pounds, but that the Plaintiff or such other trustee or trustees as aforesaid should not for such purpose impound the income of the said accumulated fund, nor any of the shares of income of the residuary real and personal estate distributable among the statutory next of kin of the said Testator other than that payable to the Defendant Matilda Duff Harris AND THIS COURT DOTH FURTHER DECLARE that until the death of the last survivor of the nephews and nieces of the said Testator being the sons and daughters of the Testator's brothers John Harris, Sir Matthew Harris and William Henry Harris, the income arising from the moneys impounded out of the Defendant Matilda Duff Harris' share and interest as hereinbefore directed and from any moneys which the said Defendant shall have recouped to the Plaintiff or other the trustee or trustees for the time being of the Will and Codicil of the said Testator for the purpose of making up the said accumulated fund to the sum of twenty five thousand pounds should be paid to the said Defendant her executors administrators and assigns AND THIS COURT DOTH FURTHER DECLARE that for the purpose of ascertaining what income the said nephews and nieces of the said Testator are entitled to receive under paragraph (f) of the declaration of the Full Court contained in the said order of the Full Court the accumulated fund must be deemed to be as of the sum of £19,417.10.10 and no more, and that the income of so much of the said accumulated fund as exceeds the said sum of £19,417.10.10 should until the death of the last survivor of the said nephews

In the Supreme Court of New South Wales in Equity

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Decretal Order by His Honour Mr. Justice Harvey dated 12th December, 1919 - continued.

and nieces be paid to the Defendant Matilda Duff Harris her executors administrators and assigns AND THIS COURT DOTH FURTHER DECLARE that no portion of the said sum of £19,417.10.10 is to be treated as income distributable amongst the said nephews and nieces of the Testator AND THIS COURT DOTH FURTHER DECLARE that the said nephews and nieces are entitled to receive the income of the said sum of £19,417.10.10 as from the twenty first day of January One thousand nine hundred and eighteen AND THIS COURT DOTH ORDER that for the purposes of the said further questions being questions 17, 18, 19 and 20 in the said originating summons the Defendant Margaret Harris be and she is hereby appointed to represent the statutory next of kin of the Testator other than such as are parties to this suit AND THIS COURT DOTH FURTHER ORDER that it be referred to the Master in Equity to tax and certify as between Solicitor and Client the costs of all parties of this further hearing and that the said costs when so taxed and certified be paid by the Plaintiff or other the trustee or trustees for the time being of the said will and codicil out of the estate of the Testator to the respective parties or to their respective Solicitors AND THIS COURT DOTH LASTLY ORDER that all parties be at liberty to apply as they may be advised.

Passed 22nd May A.D.1920

W.A.P.

Entered same day

R.T.C.S.

Sgd. W.A. Parker

Master in Equity.

No.13.

Order of Revivor by His Honour Mr. Justice Street, dated 20th August, 1921.

No. 13.

ORDER OF REVIVOR BY HIS HONOUR MR.JUSTICE STREET

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY) No.7654 of 1918

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

BETWEEN:- JOHN HARRIS Plaintiff

- and -

REGINALD WILLIAM SYDNEY HARRIS,

MATTHEW JAMES 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 Defendants

In the Supreme Court of New South Wales in Equity

No.13.

Order of Revivor by His Honour Mr. Justice Street, dated 20th August, 1921 - continued.

Saturday the twentieth day of August in the year of Our Lord One thousand nine hundred and Twenty-one.

ON APPLICATION this day made by Mr. J. M. Maughan Solicitor for the above-named Plaintiff and upon reading the Affidavit of JOHN HARRIS sworn the eighteenth day of August instant whereby it appears that since the institution of this Suit the Defendant Matilda Duff Harris has died having appointed the said John Harris Executor of her last Will and Testament Probate whereof has been duly granted by this Court in its Probate Jurisdiction to the said John Harris and that upon such death this Suit became abated I DO ORDER that this Suit do stand revived at the Suit of the Plaintiff but that no further Defendant need be added as a party thereto to represent the Estate of the said Matilda Duff Harris but that the said Suit and all proceedings therein should be carried on and prosecuted by the Plaintiff against the remaining Defendants AND I DO FURTHER ORDER that the costs of this Application be costs in the cause.

K.W. Street,
C.J. in Eq.

No. 14.

ORDER OF THE FULL COURT OF THE SUPREME COURT OF NEW SOUTH WALES

In the Full Court of the Supreme Court of New South Wales.

No.14.

Order of the Full Court of the Supreme Court of New South Wales dated 8th September, 1921.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY) No.7654 of 1918

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

BETWEEN:- JOHN HARRIS Plaintiff

- and -

REGINALD WILLIAM SYDNEY HARRIS MATTHEW JAMES HARRIS WILLIAM

In the Full Court of the Supreme Court of New South Wales.

No.14.

Order of the Full Court of the Supreme Court of New South Wales dated 8th September, 1921 - continued.

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 Defendants

AND BY AMENDMENT

BETWEEN:- JOHN HARRIS Plaintiff

- and -

REGINALD WILLIAM SYDNEY HARRIS MATTHEW JAMES HARRIS WILLIAM HENRY HARRIS ADA MARY HARRIS THE UNIVERSITY OF SYDNEY and HIS MAJESTY'S ATTORNEY-GENERAL in and for the State of New South Wales and MARGARET HARRIS Defendants

Thursday the eighth day of September One thousand nine hundred and twenty-one.

UPON MOTION made herein this day on behalf of the Plaintiff before the Honourable Robert Darlow Pring the Honourable Alexander Gordon and the Honourable John Musgrave Harvey Puisne Judges of the Supreme Court in pursuance of Notice of Motion filed herein on the twenty sixth day of August last WHEREUPON AND UPON HEARING read the said Notice of Motion the Affidavit of Alec Lloyd Bradshaw Johnson sworn herein on the first day of September instant And the Affidavit of John Malbon Maughan sworn herein on the first day of September instant AND UPON HEARING what was alleged by Mr. Weston of Counsel for the Plaintiff by Mr. S.A. Thompson of Counsel for Matthew James Harris and Margaret Harris two of the Defendants and by Mr.Maughan Solicitor for Ada Mary Harris and William Henry Harris two of the Defendants and no one appearing for REGINALD WILLIAM SYDNEY HARRIS THE UNIVERSITY OF SYDNEY and HIS MAJESTY'S ATTORNEY GENERAL in and for the State of New South Wales three of the Defendants although duly served with the said notice of Motion as appears by the said Affidavit of John Malbon Maughan THIS COURT DOTH ORDER that the Decretal Order on Appeal made herein on the Twenty-sixth day of September One thousand nine hundred and nineteen be rectified by substituting for the

No.14.

Order of the Full Court of the Supreme Court of New South Wales dated 8th September, 1921 - continued.

words "statutory next-of-kin of the Testator" contained in the first Order therein the words "persons other than parties to this suit who would be entitled on an intestacy of the above-named George Harris deceased" and by substituting for the words "to his next-of-kin according to the statutes of Distributions" in clause (e)(2) of the first declaration therein the words "as to such remaining half" and by substituting for the words "to his next-of-kin according to the statutes of distributions" in clause (g) of the said Declaration the words "as to the same" and further that the Decretal Order made herein on the Twelfth day of December One thousand nine hundred and nineteen by the Honourable John Musgrave Harvey a Judge of the Supreme Court sitting in Equity be rectified by omitting therefrom the words "Statutory next-of-kin of the said Testator" and substituting therefor the words "persons entitled as on intestacy of the said George Harris deceased" AND THIS COURT DOTH FURTHER ORDER that it be referred to the Deputy Registrar in Equity or to such officer of this Court as the Master in Equity may appoint to tax and certify the costs of all parties of this application as between Solicitor and Client and that such costs when so taxed and certified as aforesaid be paid out of the estate of the above-named George Harris deceased by the Plaintiff or other the Trustee or Trustees thereof in manner following that is to say the costs of the Plaintiff be retained by him or paid to Messieurs Bradley Son and Maughan his Solicitors the costs of the Defendants Matthew James Harris and Margaret Harris to them or to Mr. M.J.Harris their Solicitor and the costs of the Defendants William Henry Harris and Ada Mary Harris to them or to Messrs. Bradley Son & Maughan their Solicitor AND all parties are to be at liberty to apply as they may be advised.

Passed 18th day of October 1921

W.A.P.

Entered same day L.R.

Sgd. W.A. Parker,

Master in Equity.

In the Supreme Court of New South Wales in Equity

No.15.

Order of Revivor of His Honour Mr. Justice Roper, Chief Judge in Equity dated 28th April 1958.

No. 15.

ORDER OF REVIVOR OF HIS HONOUR MR. JUSTICE ROPER CHIEF JUDGE IN EQUITY

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY) No.7654 of 1918

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

BETWEEN:- JOHN HARRIS Plaintiff

- and -

REGINALD WILLIAM SYDNEY HARRIS, MATTHEW JAMES 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 and MARGARET HARRIS Defendants

And by Order of Revivor dated 20th August 1921.

BETWEEN:- JOHN HARRIS Plaintiff

- and -

REGINALD WILLIAM SYDNEY HARRIS, MATTHEW JAMES HARRIS WILLIAM HENRY HARRIS ADA MARY HARRIS THE UNIVERSITY OF SYDNEY and HIS MAJESTY'S ATTORNEY GENERAL in and for the State of New South Wales and MARGARET HARRIS Defendants

Monday the Twenty-eighth day of April in the year of Our Lord One thousand nine hundred and fifty-eight.

UPON APPLICATION made herein on behalf of Beatrice Alexandra Victoria Davies this day in pursuance of Summons filed herein the 16th day of April One thousand nine hundred and fifty-eight WHEREUPON AND UPON HEARING READ the said Summons and the Affidavits of Evan Harris Davies sworn the 16th, 17th and 23rd of April and the Affidavit of David Henry Emert sworn the 18th day of April and the four several Affidavits of John Harris sworn the

In the Supreme Court of New South Wales in Equity

No.15.

Order of Revivor of His Honour Mr. Justice Roper, Chief Judge in Equity dated 28th April 1958 - continued.

16th day of April One thousand nine hundred and fifty-eight and all filed herein AND UPON HEARING what was alleged by Mr. Horton of Counsel for the Applicant I DO ORDER (1) that Beatrice Alexandra Victoria Davies be appointed to represent the persons other than parties to this suit entitled on an intestacy of the above-mentioned George Harris deceased and be added as a Defendant (2) Beatrice Alexandra Victoria Davies be appointed to represent the children of John Harris (deceased) (3) Beatrice Alexandra Victoria Davies be appointed to represent the estate of Margaret Harris (deceased) as a beneficiary of the said Margaret Harris and (4) Nina Eva Vida Jones be appointed to represent the daughters of William Henry Harris deceased AND I DO FURTHER ORDER that this suit do stand revived at the suit of the Perpetual Trustee Company (Limited) the legal representative of the Plaintiff against Beatrice Alexandra Victoria Davies, as representing the children of John Harris deceased, the estate of Margaret Harris deceased and the persons other than parties to this suit entitled upon an intestacy of the said George Harris deceased, the Permanent Trustee Company of New South Wales Limited as the legal representative of the Defendant Matthew Harris deceased, Mary Eileen Harris as the legal representative of William Henry Harris deceased, Nina Eva Vida Jones as representing the daughters of William Henry Harris (senior) deceased, the University of Sydney and Her Majesty's Attorney-General in and for the State of New South Wales and be in the same plight and condition as the same was in at the time of the abatement thereof and that all proceedings in this suit be carried on and prosecuted by the said Perpetual Trustee Company (Limited) against the said Beatrice Alexandra Victoria Davies, the Permanent Trustee Company of New South Wales Limited, Mary Eileen Harris, Nina Eva Vida Jones, the University of Sydney and Her Majesty's Attorney-General in and for the State of New South Wales AND I DO FURTHER ORDER that it be referred to the Deputy Registrar in Equity or to such officer of this Court as the Master in Equity may appoint to tax and certify the costs of the applicant of this application AND that such costs when so taxed and certified as aforesaid be paid out of the said estate to the applicant or her Solicitor within fourteen days after service upon Perpetual Trustee Company (Limited) of an office copy of the certificate of such taxation AND all parties are to be at liberty to apply as they may be advised.

E.D.Roper,
Chief Judge in Equity.

In the Privy Council

No.16.

Order in Council granting Special Leave to Appeal to Her Majesty in Council. dated 3rd June 1958.

No. 16.

ORDER OF THE PRIVY COUNCIL GRANTING SPECIAL LEAVE TO APPEAL

At the Court at Buckingham Palace

The 3rd day of June, 1958

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRESIDENT — MR.GEOFFREY LLOYD
MR.SECRETARY LENNOX-BOYD — MR.MAUDLING

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 19th day of May 1958 in the words following, viz.:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition and a Supplemental Petition of Beatrice Alexandra Victoria Davies in the matter of an 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 Petitioner (Defendant) and (1) Perpetual Trustee Company (Limited) (Plaintiff) (2) Nina Vida Jones (3) Mary Eileen Harris (4) The Permanent Trustee Company of New South Wales Limited (5) the University of Sydney and (6) the Attorney-General in and for the State of New South Wales (Defendants) Respondents setting forth (amongst other matters): that this is a Petition for special leave to appeal from a Judgment of the Supreme Court of New South Wales upholding a decision of that Court sitting in Equity that the following devise was a valid charitable devise:-

'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.':

that this devise was made by one George Harris by a Codicil dated the 3rd April 1895 to his Will dated 18th April 1894 and after his death on 21st January 1897 both the Will and Codicil were duly admitted to Probate: that the Petitioner represents and is one of the next-of-kin of the Testator: that by his Will the Testator devised Block 70B to his wife for life and thereafter to his nephew John Harris for life and thereafter to the next surviving eldest son of his brother for life until the death of the last survivor of his nephews sons of his brother John and then to his heir at law bearing the name of Harris: that by the Codicil the Testator revoked the devise to his heir at law and substituted the devise already set out and also revoked certain provisions of his Will as to the destination of the ultimate residue of the estate and devised that residue to the college to be founded pursuant to the said Codicil: that the last of the life tenants interested in Block 70B and in the residue of the estate died on 19th April 1957 the value of the said Block 70B at that date being £53,000 and the value of the residue £286,750 so that if the said devise is void an intestacy as to a property of a total value of at least £339,750 will ensue: that in 1918 upon an Originating Summons brought by John Harris (now deceased and now represented by his Executor the first Respondent) the trustee of the Will and Codicil (the parties including one representative of the next-of-kin of the Testator) for determination of certain questions the Supreme Court of New South Wales sitting in Equity 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 nephews of the Testator and that the said devise was a valid charitable trust: that one of the Defendants to the Originating Summons - not being a representative of the next-of-kin of the Testator - appealed to the Full Court of the Supreme Court and that Court delivered Judgment on the 14th June 1919 and passed a Decree dated 26th September 1919 in the following terms:

'The devise of "Block Seventy B" and of "the Northern portion of Block Forty-seven B" contained in the said Codicil are valid charitable devises for the respective purposes therein mentioned but this declaration is without prejudice

In the Privy Council

No.16.

Order in Council granting Special Leave to Appeal to Her Majesty in Council, dated 3rd June 1958 - continued.

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':

AND HUMBLY PRAYING Your Majesty in Council to grant the Petitioner special leave to appeal from the Judgment of the Supreme Court of New South Wales dated the 14th June 1919 and its Decree dated the 26th September 1919 or for such further or other Order as to Your Majesty in Council may seem just:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support and on behalf of the Attorney General in and for the State of New South Wales no one appearing at the Bar on behalf of the other Respondents Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute her Appeal against the Judgment of the Supreme Court of New South Wales dated the 14th day of June 1919 and the Decree of that Court dated the 26th day of September 1919 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same".

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor or Officer administering the Government of the State of New South Wales and its Dependencies in the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W.G. AGNEW.

IN THE PRIVY COUNCIL No.26 of 1958

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

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 (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

RECORD OF PROCEEDINGS

BELL BRODRICK & GRAY,
The Rectory,
29, Martin Lane,
Cannon Street,
London, E.C.4.
Solicitors for Appellant
(Defendant)

LIGHT & FULTON,
24, John Street,
London, W.C.1.
Solicitors for Her Majesty's Attorney General for New South Wales Respondent
(Defendant)