domicil was conferred to dissolve marriage, the basis of recognition of foreign decrees was expressly extended. With respect, it is difficult to see that such express legislation is necessary if the above premises be correct; it may well have been desirable to include express reference to foreign recognition in the very specialized and temporary war marriage legislation, and the section dealing with extended recognition in the Western Australian Act was probably enacted *ex abundanti cautela*. If the cases cited by O'Bryan J. decided that domicil was the basis for recognition of foreign decrees, a reference to the jurisdiction of the forum was the reason, and there is nothing in the opinions in those cases that leads to the conclusion that the bases for recognition were closed and that domicil was the only conceivable basis for recognition in the future unless the legislature otherwise expressly provided. Here, surely, was a case requiring the application of the notion expressed in the maxim *cessante ratione legis, cessat ipsa lex*.[24] The reason for restricting recognition of foreign decrees to those of the *forum domicilii* was that this was the only forum Victorian courts considered to be competent to determine matters of status. When Victorian law came to concede that a court other than the *forum domicilii* was in certain circumstances competent to make divorce decrees, by allowing a Victorian court to pronounce a decree when it was not the *forum domicilii*, there was no reason to restrict the recognition rule, and it should have been broadened accordingly to permit recognition at least of a decree of a foreign court pronounced in circumstances under which a Victorian court would pronounce a decree. *Fenton v. Fenton* was a case of this class.

An unbending and unsympathetic system of law is as embarrassing and unseemly in the international law sphere as it is inconvenient at home. In the common law system such inelegance should be unnecessary. The great virtue of *Travers v. Holley*, and the reason for the widespread approval of its principle[25] is that it recognizes and manifests the adaptability of the common law. *Fenton v. Fenton*, on the other hand, provides a particularly regrettable example of 'mechanical jurisprudence', adhering to a verbal formula without regard to policy, and in consequence inhibiting the evolution of liberal principles by which the law should be moulded to the requirements of the community.

R. C. TADGELL

[24] *Cf.* Mann (1954) 17 *Modern Law Review*, 79.

[25] *Travers v. Holley* has been recently followed in *Arnold v. Arnold* [1957] 2 W.L.R. 366. It was approved, *obiter*, in *Morris v. Morris* [1955] S.A.S.R. 80.

IN RE WILSON (deceased); EARL OF HUNTINGDON v. McCAUGHEY[1]

Deceased estate – successive equitable owners of interests in estate – payments under Wool Realization (Distribution of Profits) Act 1948 (Cth.)

In 1939, it was agreed by the governments of the United Kingdom and the Commonwealth of Australia that the United Kingdom should, after the deduction of wool required for local manufacture, acquire the entire Australian wool clip for the period of the war and one full wool year thereafter at a stipulated flat rate. By regulation, the Commonwealth government suspended private marketing of wool and substituted a form of compulsory acquisition known as appraisement, by which growers were paid a fixed price for their wool.[2] Normal marketing was resumed in the 1946-47 wool year. A term in the intergovernmental agreement stipulated that any profits obtained by the United Kingdom from re-sale of Australian wool should be divided equally between the two governments. The Commonwealth provided by statute that its share of such profits should be distributed to persons who had supplied shorn wool for appraisement. Alienation of a share or the possibility of a share in distributions under the Act was interdicted.[3] N and M were entitled in equity to two one-sixth undivided shares in part of a deceased estate, comprising a station property, at all material times before 1947, when their interests were assigned for value to the T company.[4] On an originating summons the trustees asked whether moneys received under the Wool Realization Act should be paid to the personal representatives of N and M or to the T company. It was held that the distributions were, for the purposes of the trust, income attributable to the period of receipt, which should be paid to the T company. As the right to participate in distributions arose after the assignment, the statutory prohibition of assignments was irrelevant.

The assignors argued that:

(1) they had been entitled to a proprietary interest in all parts of the trust property, and not merely to a general right against the trustee to have the estate properly administered;

[1] [1957] V.R. 1; [1957] Argus L.R. 473. Supreme Court of Victoria; Hudson J.

[2] The operation of this scheme of acquisition is explained in detail by the High Court in *Ritchie v. Trustees Executors & Agency Co. Ltd.* (1951) 84 C.L.R. 553.

[3] Wool Realization (Distribution of Profits) Act 1948, s. 29: 'Subject to this Act and the regulations, a share in a distribution under this Act, or the possibility of such a share, shall be, and be deemed at all times to have been, absolutely inalienable prior to actual receipt of the share, whether by means of, or in consequence of, sale, assignment, charge, execution, or otherwise.'

[4] N and M having died during the war, the sale to the T company was made by their personal representatives. The death of N and M was not material to the issues in the case.

(2) alternatively, unless the T company established that the assignments to it were wide enough as a matter of construction to include the shares in the distribution, its claim had no basis, and if it did, the purported assignments were invalidated by s. 29.

It was argued that the court should treat the trustees as if they were merely managing agents, *i.e.* that the beneficiaries' right was *in specie* and not merely *in personam,* and that consequently moneys received by the trustees should be distributed to the beneficiaries on whose behalf the wool had been submitted. In *McCaughey v. Commissioner of Stamp Duties,*[5] the Supreme Court of New South Wales had held that for probate duty purposes N had an equitable interest in the trust property concerned in this case which was dutiable. Jordan C.J., delivering the court's judgment, treated the so-called rule in *Lord Sudeley's* case[6] as an exception to a general rule that the beneficiaries in the residuary estate of a deceased person have 'beneficial proprietary interests in each and every item of that estate.'[7] 'Where questions of income tax or *locus* of property in relation to liability to death duties have to be determined, if the estate has not been fully administered, the beneficial interest in the items must be treated as non-existent and the beneficiaries must be regarded as having nothing but a chose in action . . . against the personal representative.'[8]

Although he found it unnecessary to consider the nature of a beneficiary's interest in trust property, Hudson J. accepted the New South Wales court's conclusion in *McCaughey's* case. This appears to involve a rejection of Maitland's strict analysis in terms of rights *in personam* against the trustee.[9] It is difficult to analyse a tracing

[5] (1946) 46 S.R. (N.S.W.) 192. N having died.

[6] *Lord Sudeley v. Attorney-General* [1897] A.C. 11.

[7] (1946) 46 S.R. (N.S.W.) 192, 205.

[8] *Ibid. Lord Sudeley's* case appears to conflict in principle with another House of Lords case, *Cooper v Cooper* (1874) L.R. 7 H.L. 53, in which it was held that next-of-kin had sufficient proprietary interest in land in an unadministered estate to be put to election. Although their Lordships applied the *Sudeley* rule without referring to *Cooper v. Cooper* in *Dr Barnardo's Homes v. Special Income Tax Commissioners* [1921] 2 A.C. 1, attempts have been made to distinguish and explain the two cases in *Vanneck v. Bentham* [1917] 1 Ch. 60, 76; *Baker v. Archer-Shee* [1927] A.C. 844, 862, 866, 871; *Corbett v. Inland Revenue Commissioners* [1938] 1 K.B. 567, 575, 577; *Re Cunliffe Owen* [1953] Ch. 545, 555; *Skinner v. Attorney-General* [1940] A.C. 350; *Nelson v. Adamson* [1941] 2 K.B. 12; *In re Farrell* [1930] V.L.R. 101; *In re Murphy* (1951) S.A.S.R. 28. *Halsbury's Laws of England* (3rd ed., 1956) xvi, 281 draws a distinction between the general title of beneficiaries to residue, and their interests *in specie* which does not arise until the completion of administration. *Cf. Commissioner of Stamp Duties (N.S.W.) v. Perpetual Trustees Co. Ltd.* (1926) 38 C.L.R. 12, 29, 35, 44, 45, 46; *Re Young* [1942] V.L.R. 4; (1941) 47 Argus L.R. 310. See also *Comptroller of Stamps (Vic.) v. Howard-Smith* (1936) 54 C.L.R. 614, 620, *per* Dixon J. Hudson J. doubted the correctness of *Re Young,* which he was unable to reconcile with *McCaughey's* case (1946) 46 S.R. (N.S.W.) 192.

[9] Counsel for the assignees cited, *arguendo, Maitland's Equity* (2nd ed., 1936), 23, 29, 47, 111-112, 115-116. In *Re Williams; National Trustees Executors and Agency Co. of Australia Ltd. v. Brien* [1945] V.L.R. 213; (1945) Argus L.R. 299, the Full Court of the Supreme Court of Victoria expressed doubts as to the correctness of these passages in Maitland. 'Though equity acted only *in personam,* the analogy of

action by a *cestui que trust* consistently with Maitland's thesis. Here, at least, it seems that the courts have recognized some kind of proprietary right possessed by the beneficiary in the trust property.[10]

His Honour did not pursue this point because he regarded *Ritchie v. Trustees Executors & Agency Co. Ltd.*[11] as binding authority compelling him to hold that distributions should be treated as income attributable to the period when they were received. *Ritchie's* case concerned a dispute between the personal representative of the life tenant under a settlement of an interest in trust property (which included a pastoral station) and the remainderman, as to who was entitled to wool distributions under the Act. No problem arose under the original trust, as the same people were entitled to both income and corpus. The High Court held that the payments were income, and that the remainderman was entitled to them, because, although all the wool in question had been tendered for appraisement during the life tenant's lifetime, the distributions were not made until after her death.[12]

The High Court's reasoning was on two grounds. First, after considering the nature of the wool acquisition scheme and the likelihood of additional distributions being made to woolgrowers, it rejected the remainderman's contention that they formed 'an unsought and fortuitous accretion to the estate' and considered them as 'receipts resulting from the operations of growing wool.'[13] This classification, it is submitted, was binding upon Hudson J. The High Court then considered the relevant year to which payments were to be attributed. Because of the mode of settlement and the nature of the income-

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equitable interests to common law property rights becomes in the course of time sufficiently close for these interests to be treated as property rights.' *(Ibid.*, 505, *per* Gavan Duffy and Martin JJ.).

[10] *Re Hallett's Estate* (1880) 13 Ch. D. 696. A number of periodical articles discussing the rights of a *cestui que trust* are listed in *Nathan's Equity Through the Cases* (3rd ed., 1955) 17, n. 22. Maitland disliked the rule in *Clayton's Case* (1816) 1 Mer. 572, and felt that the result in *Re Hallett* was 'inconvenient', but, strangely, he does not appear to have thought it at all inconsistent with his explanation of beneficiaries' rights. *Op. cit.*, 219 ff.

[11] (1951) 84 C.L.R. 553.

[12] In *Commissioner of Taxation of the Commonwealth of Australia v. Squatting Investment Co. Ltd.* [1954] A.C. 182, the Judicial Committee of the Privy Council followed *Ritchie's* case for the purpose of classifying payments under the Act as income or corpus for income tax purposes. 'Their Lordships do not think that the decision in *Ritchie's* case rested upon any equitable principles applicable as between life tenant and remainderman; it rested simply upon the character of the payment—was it capital or income?' ([1954] A.C. 182, 209.) As there was no question of competing interests to be decided in this case, their Lordships' reference to *Ritchie's* case, though in wide language, may be taken as relating to the categorization of wool distributions only. The High Court's decision on the second point in *Ritchie's* case, whether the payments should be treated as income for the period during which wool was submitted for appraisement or for the period in which the payments were made, was based on 'equitable principles applicable as between life tenant and remainderman.' (1951) 84 C.L.R. 553, 581 ff.

[13] (1951) 84 C.L.R. 553, 578. *Quaere*, whether the Act contemplated that payments should be regarded *sui generis*.

producing property, the court implied an intention by the settlor that the remainderman should receive the payments. 'The very criterion by which the question of beneficial right must be tested is to be found in the conceptions governing the ascertainment of the income of a pastoral business for a given year. For that is the basis upon which the settlor must be taken to have proceeded in settling the fund upon the life tenant and remainderman.'[14]

While conceding that in *Wilson's* case there was no such implied intention on the part of a settlor, Hudson J. held that the same considerations, *viz.* the trustees' methods of accounting, should prevail. With respect, it is submitted that this should not be so. The accounting system in *Ritchie's* case was considered relevant by the High Court only because it could be related to the settlor's intentions. The settlor knew what system was used by the trustees, and could be assumed by the court to have settled his interest in the trust estate in accordance with the trustees' accounting practice. In *Wilson's* case there was no settlement, and to permit substantive rights to property in these circumstances to be governed by accounting practices is not how the law should operate. If, for instance, the trustees of Wilson's estate had audited their books and remitted income to beneficiaries every six months, should this be a relevant factor in determining rights to wool payments received during the first half of the year in which the assignment of beneficial interests was made,[15] if it were proved that the normal practice among pastoral stations was to audit annually? Hudson J. did not have to distinguish between the accounting period adopted by the Wilson trustees and the normal period in the pastoral industry, although there is a suggestion that the former should be the relevant period. The assignors argued further that the T company acquired any interest that it had in the trust estate from the assignment in 1947 of 'All that right title estate and interest to which the vendors as trustees aforesaid are now or may hereafter by any means become entitled in one equal half part or moiety of two equal undivided third part shares in [the Australian estate of Wilson.]' Therefore, because of the prohibition imposed by section 29 of the Wool Realization Act, such transfer, if construed so as to include rights or the possibility of rights to distributions, was ineffectual. Hudson J. found it unnecessary to consider this question because he had found that neither N nor M had ever become entitled to beneficial interests in the payments received by the trustees. He added that had he come to

[14] *Ibid.*, 584.

[15] In fact this situation could not have occurred because the first distributions under the 1948 Act were not made until 1949.

a contrary conclusion on this point he would have held the purported assignment invalid.[16]

However, there was no need for N and M to have been entitled to beneficial interests in payments for section 29 to apply. The section also prohibits the alienation of 'the possibility of a share' at all times prior to the actual receipt of such share. As the T company acquired all its beneficial interest in the trust property from N and M, it is difficult upon analysis to conclude but that this was an assignment of the possibility of a share. Otherwise, these words in the Act have no meaning at all where equitable interests of this kind or of the kind in *Ritchie's* case are concerned.[17]

It is to be regretted that the new series of Victorian Reports, in which *In re Wilson* is the first case reported, contain neither a summary of counsel's argument, nor a list of cases cited but not referred to in judgment. Hudson J. found it unnecessary to allude to several lines of argument by counsel which nevertheless should be considered by the practitioner or academic writer referring to the case in the future.[18]

J. D. MERRALLS

TOBIAS v. ALLEN (No. 2)[1]

Evidence Act 1946 (Vic.), ss. 3 (3) and 3 (5)—person interested—exercise of discretion to reject evidence

T and S brought an action under section 56 of the Local Government Act 1946 to recover penalties from A whom they alleged had sat as a councillor of the municipality of M while disqualified under section

[16] In *Perpetual Executors, Trustees and Agency Co. (W.A.) Ltd. v. Maslen* [1952] A.C. 215, the Privy Council held that shares in distributions under the Act in relation to wool supplied by two persons conducting a pastoral business in partnership who had assigned by deed 'all right title and interest in . . . the benefit of all contracts and engagements and book debts . . . together with all other assets of the said business', belonged to the former partners and not to the assignees under the deeds, as such payments were 'a true gift to the supplier of the wool.' See also the dissenting judgment of Fullagar J. in the High Court, accepted by the Privy Council in reversing the decision below: (1950) 82 C.L.R. 101, 117. Fullagar J. held also that a purported assignment of 'proceeds' of certain wool by a woolgrower amounted to an assignment of a share in a distribution subsequently made under the Act in relation to the wool, and that it was invalidated by s. 29: *Poulton v. The Commonwealth* (1953) 89 C.L.R. 540, 567.

[17] It may be argued that the words apply to assignments by beneficiaries after the passing of the Act only, but even this restricted interpretation is excluded by Mr Justice Hudson's holding that a beneficiary has no interest in a distribution until the payment is actually made. It is further submitted that upon construction of s. 29, no distinction can be drawn between assignments of legal and equitable interests in distributions under the Act. It would be odd if the operation of the section could be avoided by a declaration of trust, either voluntarily or for value. *Supra*, n. 3.

[18] The writer acknowledges his debt to Mr H. R. Newton and Mr J. McI. Young, of the Victorian Bar, counsel who appeared in *Wilson's* case, who kindly discussed some aspects of their arguments with him.

[1] [1957] V.R. 221. Supreme Court of Victoria; Sholl J.