One further point is worth noting. It would seem clear that the Court of Appeal gave two *rationes decidendi* for their decision in *Best v. Fox*, one of them being that no action lies in respect of an interference with *consortium* unless that interference results in a total loss thereof. Hence if the matter again comes before the Court of Appeal, they will almost certainly regard this point as concluded by authority in that Court, even though the House of Lords left the matter open.[17] In the past, the High Court has suggested that it will follow clear decisions of the Court of Appeal, even though it disagrees with them, in order to achieve a consistent interpretation of the common law throughout the British Comonwealth;[18] but more recent decisions have shown a departure from this rigid position.[19] The instant decision is in harmony with the recent trend, and may perhaps indicate that the Court is modifying its views. It may be that the true position of the Court is that it will follow the English interpretation of the common law only if it regards that interpretation as being settled. This would be consistent with its attitude, as expressed in *Piro v. W. Foster & Co. Ltd.*[20] towards decisions of the House of Lords.

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[17] Cf. *Denman v. Brise* [1949] 1 K.B. 22, 26-8, *per* Tucker L.J.

[18] See *Sexton v. Horton* (1926) 38 C.L.R. 240; *Waghorn v. Waghorn* (1942) 65 C.L.R. 289; *Wright v. Wright* (1948), 77 C.L.R. 191; *Powell v. Powell* (1948) 77 C.L.R. 521. See also Cowen, 'Binding Effect of English Decisions upon Australian Courts', (1944) 60 *Law Quarterly Review*, 378; Parsons, 'English Precedents in Australian Courts', (1949) 1 *University of Western Australia Annual Law Review*, 211; Stone, 'A Government of Laws and Yet of Men: Being a Survey of Half a Century of the Australian Commerce Power' (1950) 25 *New York University Law Review* 51, 459-60 (reprinted (1950) 1 *University of Western Australia Annual Law Review*, 461, 468-9).

[19] *Koop v. Bebb* (1951) 84 C.L.R. 629; *Watts v. Watts* (1953) 89 C.L.R. 200.

[20] (1943) 68 C.L.R. 313.

CHARITABLE TRUSTS — GIFT OF INCOME IN PERPETUITY

Re Williams[1]

A testator gave the residue of his estate to trustees upon trust to pay the income arising therefrom to the Bendigo Base Hospital for ever. The plaintiff hospital took out an originating summons which included the question whether this gift passed the corpus of the property to the hospital. It was held that it did not. The terms of the will excluded the operation of the rule that a perpetual gift of income passes the corpus of the gift.

In 1841 the case of *Saunders v. Vautier*[2] decided that if a delayed gift of corpus was made to an individual, the individual could claim

[1] *Re Williams (Deceased), Bendigo and Northern District Base Hospital of Bendigo v. Attorney-General* [1955] A.L.R. 255. Supreme Court of Victoria; Dean J.

[2] (1841) 4 Beav. 115.

the corpus immediately on becoming *sui juris*. The case of *Wharton v. Masterman*[3] extended the rule in *Saunders v. Vautier* to gifts to a charity. This rule is a rule of law and cannot be excluded by the expression of any contrary intention on the part of the testator.

Another rule developed by the law was that where a gift of income is made in perpetuity to an individual then that gift is held to transfer the corpus immediately. This, however, is a rule of construction and its operation can be excluded by a contrary intention of the testator.[4] This rule differs from the rule in *Saunders v. Vautier*, both in the factual situations to which it applies, and also in the nature of that application.[5] The Full Court of the Supreme Court of Victoria, in the case of *In the Will of Wright*,[6] decided that this rule did not apply in a situation where a gift of income in perpetuity was made to a charity. The basis for this conclusion was the fact that such an application was unnecessary, since the rule was designed to obviate avoidance of the gift by reason of its offence against the rule against perpetuities,[7] which does not apply to gifts to charity.[8] This decision was followed by Herring C.J. in *In re Godfree*.[9] However, some months after the decision in *In re Godfree*, the High Court of Australia in *Congregational Union of New South Wales v. Thistlethwayte*[10] held that the rule would apply to a gift of income in perpetuity to charity, so as to pass the corpus of the gift. Dixon C.J., McTiernan, Williams and Fullagar JJ. reiterated the proposition that the rule was only a rule of construction; the corpus passing 'unless there is a clear intention expressed or implied from the will that the beneficiary is not to take more than the income'.[11]

In *re Williams* Dean J. accepted the fact that the *Congregational Union* case took precedence over the decisions in *Wright's* case and *re Godfree*, but this acceptance was coloured with some dislike of the decision in the *Congregational Union* case, both on principle and on the weight therein attached to the English decision of *In re Morgan*.[12] On the principle of *stare decisis* Dean J. was faced with the fact that the corpus would pass to the plaintiff hospital 'unless there was a clear intention' to the contrary.

[3] [1895] A.C. 186.

[4] This doctrine would seem to have first been applied in the case of *Phillips v. Chamberlaine* (1798) 4 Ves. Jun. 51.

[5] This distinction was *not* recognized by any of the five counsel in *In the Will of Wright* [1917] V.L.R. 127.

[6] [1917] V.L.R. 127.

[7] Probably this was also the *raison d'être* of the rule in *Saunders v. Vautier*.

[8] The rule here referred to is the rule directed against restrictions on free alienation. A gift to charity must still vest within the perpetuity period.

[9] [1952] V.L.R. 353.

[10] (1952) 87 C.L.R. 375.

[11] (1952) 87 C.L.R. 375, 440. It was held by Kitto J., as had been suggested *arguendo* in *Wright's* case, that the rule was a rule of law.

[12] [1893] 3 Ch. 222. It was pointed out by Dean J. that the matter was not fully considered in this case.

To an examination of the will and the surrounding circumstances Dean J. now directed himself. It should be here pointed out that His Honour evinced (it is submitted rightly) an obvious desire to prevent the rule applying so as to pass the corpus to the hospital, and to implement the desires of the testator.

The judge held that the *Congregational Union* case does not preclude the notion that the fact of the beneficiary being a charity is a matter which may properly be considered in ascertaining the intention of the testator. On the terms of the will, His Honour suggested that the following facts indicated 'contrary intention':

1. The use of the expression 'income' itself. This was held to be insufficient as it is this very word itself that attracts the operation of the rule.

2. The use of the words 'interest' and 'dividends'. Also held insufficient on the authority of *Elton v. Sheppard*,[13] *Adamson v. Armitage*.[14] *Haig v. Swiney*,[15] and *Phillips v. Chamberlaine*.[16]

3. The apparent desire of all testators making such provisions to pass the income only. This was considered with sympathy, but was held, in the light of the *Congregational Union* case to be insufficient without other support.

4. The contrast between a residuary gift of income to the charity and the prior absolute and immediate bequests and devises. This, when coupled with a consideration of the nature of the beneficiary, was held by Dean J. to be sufficient to exclude the rule and prevent the passing of the corpus. It is submitted that this is rather artificial, since in most cases of testamentary disposition a similar situation would arise – namely, several absolute gifts and then a gift of income in perpetuity to charity.

However a better purpose will be served by examining the wider basis for this decision. Obviously Dean J. thought the decision in *Wright's* case more easily defended on principle than that in the *Congregational Union* case; and this for several reasons. (a) There is no need to pass the corpus here, for the rule against perpetuities will not avoid a gift of income in perpetuity to a charity. (b) Why should the testator be unable to guard, by simple means, against an improvident use of the capital? (c) Provisions of this kind have always been respected by those who administer them. (d) A decision that the gift was one of corpus would be disturbing to beneficiaries and testators alike. It is submitted that these considerations carry much weight, especially since they were not discussed in the *Congregational Union* case.

Estimating the position of *re Williams* in the development in the law is no easy task. On a first reading of the case it would seem that the operation of the rule was excluded simply on the construction

[13] (1781) 1 Bro. C. C. 532.
[14] (1815) 19 Ves. Jun. 416.
[15] (1823) 1 Sim. & St. 487.
[16] (1798) 4 Ves. Jun. 51.

of the will. But it is submitted that on looking deeper, it will be seen that the case has attempted to circumvent the decision in the *Congregational Union* case, by an extended interpretation of the phrase 'unless there is a clear intention to the contrary expressed or implied from the will that the beneficiary is not to take more than the income'.

P. R. JORDAN

INSURANCE – INTERPRETATION – WIFE OF THE ASSURED

Wood v. James[1]

One Wood effected a policy of insurance upon his own life. The policy was expressed to be 'for the benefit of the beneficiary set forth in the schedule should such beneficiary survive the assured'. The schedule provided that 'this policy is effected under the provisions of the Married Women's Property Act 1892 West Australia and shall be for the absolute benefit of the wife of the assured, should the amount of assurance become payable during her lifetime, failing which for the absolute benefit of such of the children of the assured as shall survive him . . .'

At the date of the policy, the assured had a wife but she died in 1941 and he later remarried, this latter wife surviving him on his death in 1953. The widow of the assured took out an originating summons claiming the policy moneys. The three children by his former wife opposed the claim. The Supreme Court of Western Australia (Dwyer C.J.) held that the children were entitled to the policy moneys. On appeal the majority of the High Court (Dixon C.J. and Kitto J.) affirmed the decision. The description of the beneficiary applied to the woman who was the wife of the assured at the date of the policy and not to a wife whom he had afterwards married.

The majority observed that the Married Women's Property Act 1892, s. 11 (Western Australia) created a trust here only by operating on the policy. Accordingly it was from the policy that the beneficial interests taken under the trust were to be ascertained.[2] The basic question was 'did the assured intend, by effecting the policy, to provide for the event of his then wife being widowed by his death, or was he thinking impersonally of any widow he might leave . . .?'[3]

There is an established rule of construction that *prima facie* a

[1] [1955] A.L.R. 107. High Court of Australia; Dixon C.J., McTiernan and Kitto JJ.

[2] S. 11 provides, in substance, that a policy of assurance effected by a man upon his own life and expressed to be for the benefit of his wife and/or his children shall create a trust in favour of the objects therein named, and the money payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the assured or be available to satisfy his debts.

[3] [1955] A.L.R. 107, 109.