relationship between herself and the deceased because in order to establish such a claim she would have to rely on an agreement, express or implied, between herself and the deceased, and this she could not do, because to establish such an agreement she would have to rely on an immoral consideration. Two criticisms can be made of this approach. Firstly, assuming that it falls upon the defendant to establish such an agreement, in what way can it be said that she is trying to enforce an illegal contract? The possibility of her continuing to live in sin with the deceased has now been irrevocably removed. The court was concerned, or at least should have been, only with the present effect of a contribution made by the defendant in the past to the establishment of what in fact constituted a joint home. The question of an immoral consideration would no doubt be a bar to a woman attempting to enforce a man's promise to give her a house if she would, in the future, live in sin with him, but this was not the point involved in *Diwell* v. *Farnes*.

Secondly, and more importantly, Willmer, L.J., arrives at the crux of the matter, it is thought, when he points out[26] that, in so far as any question of an immoral consideration is involved in the case, the burden is on the plaintiff, who has instituted an action for recovery of possession, to establish her case and, furthermore, she can only assert such rights as the deceased could have asserted. "Could he (the deceased) have been heard to deny that . . . he and the defendant were engaging in a joint enterprise similar to that of a legally married husband and wife?"[27] He goes on to refer to the conduct of the parties during the twenty years of their acquaintance referring in particular to the letters tendered by the defendant, and concludes that "it seems to me that, had the deceased himself sued the defendant in his lifetime, he would have been estopped from denying that the houses . . . were intended to be purchased and . . . be run by the defendant, as a joint enterprise for the benefit of both of them".[28]

Thus, in conclusion, it is submitted that in reaching the decision which they did the majority in this case were excessively concerned with the dictates of what they believed to be public morality. It is submitted that the approach taken by Willmer, L.J. was the correct approach and that the case was a proper one for the application of the maxim, "Equality is equity". *Jones* v. *Maynard*, *Rimmer* v. *Rimmer* and *In re Dickens* had all shown the utility of this approach. It is true that in *Jones* v. *Maynard* and *Rimmer* v. *Rimmer* the rights of a legally married husband and wife were considered, and while the Court in this case may not have wished to give legal privileges to a mere *de facto* matrimonial relationship, the maxim as applied in *Rimmer* v. *Rimmer* is not confined to the husband and wife relationship, as its application by the Court of Appeal in *In re Dickens* clearly shows. Its application in the instant case would have achieved substantial justice.

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## PERPETUAL CHARITABLE ENDOWMENTS
## *RE LEVY (DEC'D.)*

The interpretation of a testator's intention is the precise object of a court of construction. In this difficult task recourse may be had to the words of the instrument, the surrounding circumstances and rules of construction, in an attempt to give effect to the intention of the testator as this appears from the will. The court faces complex problems where the beneficiary is an individual, but when a charity is a beneficiary the obscure rules applying to charitable trusts[1] and the conflicting interests moving the court on the one hand to effectuate

[26] *Id.* at 640. [27] *Ibid.* [28] *Id.* at 641.

[1] See, *e.g.*, the discussion of House of Lords on the Committee for the reform of the Law of Charitable Trusts, London *Times*, 14th May, 1959.

the gift and on the other to destroy it, make the problem even more complex. At least three conflicting forces run through the decision of the Court of Appeal in *re Levy (dec'd)*:[2] a benevolent attitude towards charitable gifts in general, an attempt to effectuate the testator's intention, and an abhorrence of property becoming inalienable.[3]

In *Levy's Case* a testator by his will established the "Levy Family Charitable Trust" whereby trustees were to stand possessed of the capital and income of the residue of the estate or trust, the income thereof to be divided equally and paid in certain proportions to named charities. A forfeiture clause provided that any beneficiary who questioned or interfered with the operation of the trust should forfeit its interest and the capital and income representing this interest should pass to the trustees for the absolute benefit of the King Edward's Hospital fund, one of the named beneficiaries. The trial judge, Danckwerts, J., in an unreported judgment, held the forfeiture clause invalid; and on this point no appeal was taken. On the question whether each of the charitable beneficiaries was entitled on the construction of the will to call for the capital producing the income bequeathed to them, Danckwerts, J. held that they were. The Court of Appeal, however, reversed this decision.

The Court of Appeal proceeded from the well-settled principle that an indefinite gift of income (without qualification) to an individual entitles that individual to terminate the gift and call for the capital producing the income. The commonsense rationale behind this premise as seen by the Court of Appeal is that an individual is finite and non-perpetual and can enjoy the gift in accordance with the testator's intention only by the beneficiary having power to call for the *corpus*, so that the individual may enjoy not only the income accruing during his life but also the income accruing in the future, without limitation on his disposition of it. "Only by the payment of the *corpus* can the individual get the full benefit and extent of the gift which as a matter of interpretation the testator intended."[4]

Furthermore, perpetual gifts of income to individuals are subject to the rule against perpetuities.[5] Unless on the construction of the instrument there is an intention that the beneficiary shall take the capital of the gift, or, in other words, that the property is not inalienable, then the gift must fail as offending the rule against perpetuities.

In contrast, however, where the beneficiary is a charity a settlor generally intends to benefit a class of beneficiaries both present and future, for a charity unlike an individual can have perpetual existence and is not limited by physical being to enjoyment of income within the space of a lifetime. Further, the rule against inalienability of property does not operate to render void perpetual charitable endowments, for public policy looks benevolently upon charities and charitable donees. Thus the Court of Appeal concluded that, if from the terms of the will the testator intended the gift to be a perpetual endowment, there was no reason why the presumed intention of the testator should be upset by enabling the charity to terminate the endowment and obtain the capital. There was, as the Court of Appeal held, no canon of construction to the effect that the "intended

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[2] *Re Levy (dec'd), Barclay's Bank Ltd.* v. *Board of Guardians and Trustees for the Relief of the Jewish Poor and Others* (1960) 1 All E.R. 42.

[3] In discussing the application of the rule against perpetuities to dispositions to charities the Privy Council in *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875) L.R. 6 P.C. 381 at 395, emphasised the conflict of public policy. "The rule . . . founded upon considerations of public policy . . . to prevent the mischief of making property inalienable, unless for objects which are in some way useful or beneficial to the community."

[4] (1960) 1 All E.R. 42, 46.

[5] There are in effect two rules which are loosely grouped under this heading. The first, a rule against remoteness of vesting or the rule in *Cadell* v. *Palmer* (1833) 1 Cl. & Fin. 372, which does not apply to the endowment of income; the second, the rule against rendering property inalienable, which operates to avoid perpetual endowments to non-charities.

extent of the gift entitles the charitable donee to call for *corpus* and no authority which could support or justify such a conclusion".[6]

The High Court of Australia in *Congregational Union of N.S.W.* v. *Thistlethwayte*,[7] on facts not appreciably different and upon consideration of the same authorities as were cited to the Court of Appeal, had reached a somewhat different conclusion as to the law applicable. In that case the full High Court refused to distinguish between the rules relating to perpetual endowments for individuals and those relating to perpetual charitable endowments. In each case there is a presumption that along with the gift of income the testator intended a gift of capital, and hence a charitable beneficiary could, like an individual beneficiary, call for the *corpus*. Kitto, J. in a vigorous dissenting judgment, although agreeing that no such distinction existed, disagreed as to the status of the rule under discussion. In the learned judge's view the rule was a rule of law and not a rule of construction as the majority of the Court had held.

It is appropriate to note at this point that many cogent reasons exist for distinguishing perpetual endowments to charities from those to individuals. Apart from the commonsense view referred to above which recognizes the non-finite existence of a charity, a gift to a charitable beneficiary is not as a general rule a beneficial gift to the charity but a gift for charitable purposes, and it is these purposes which give the gift its charitable nature. As one writer points out,[8] a perpetual bequest of income to Sydney Hospital is not a beneficial gift to that institution absolutely, but a gift designed to relieve suffering of patients in that institution both now and in the future. Hence, since a charitable corporation takes its gift not beneficially but for charitable purposes on almost all occasions, it would seem impossible for a charity to take advantage of any rule which would make a disposition of income in perpetuity the same as a gift of *corpus*.

We have seen that Kitto, J. held the rule concerning all perpetual endowments to be a rule of law. By this is meant a conclusion which results in every case from the existence of certain conditions which may be called conditions precedent to the rule. It will operate whenever these conditions precedent are present and irrespective of any contrary intention in the instrument. The majority of the High Court, as has been seen, held the rule to be a rule of construction. By this we mean a conclusion which is reached where the testator has himself furnished no sure guide to the interpretation of the will to be construed.[9]

When analysing the law relating to perpetual charitable endowments there are three possibilities to consider. First, that there is a rule of law operating irrespective of the donor's intention that the beneficiary can take an immediate gift of *corpus*. Secondly, that there is a rule, which is only a rule of construction, a *prima facie* rule, which operates where no contrary intention is shown but which gives way to a sufficient indication of contrary intention. Thirdly, that in all cases of this kind the words of the will are paramount and every case is to be examined with regard to the particular intention of the testator as expressed in the particular instrument, without the assistance of any rule of construction.

The first view finds judicial support in the judgment of Kitto, J. in *Thistlethwayte's Case*. There the learned judge said: ". . . a gift of the income of trust property in perpetuity *is* a gift of *corpus*."[10] This view, it is submitted, is due to a wrong identification of the rule relating to charitable endowments with the rule in *Saunders* v. *Vautier*.[11]

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[6] *Id.* at 51.
[7] (1952) 87 C.L.R. 375.
[8] H. A. J. Ford, "Charitable Corporations Taking Income in Perpetuity" (1953) 26 *A.L.J.* 635, 640.
[9] *Coward* v. *Larkman* (1885) 57 L.J. 258, 287ff.
[10] (1952) 87 C.L.R. 375, 447.
[11] (1841) Cr. & Ph. 240.

This latter rule is generally expressed as follows—"where a sole beneficiary's interest in the trust property is vested and he is *sui juris* he may put an end to the trust by directing the trustee to transfer the trust property to him or his nominee, notwithstanding any directions to the contrary in the trust instrument".[12] The case itself dealt with an accumulation for an individual beneficiary, and the principle was held to operate whether or not the intention of the testator was that the enjoyment of the vested gift should be postponed.[13] Hence, a gift to A absolutely with a direction that the enjoyment of the gift be postponed beyond the majority of A (even if the testator expressly or implicitly intends to postpone enjoyment) will entitle A on attaining 21 to call for the whole of the property, and the direction for postponement will be of no effect.

Furthermore, the rule in *Saunders* v. *Vautier* has been expressly held to apply to charities in *Wharton* v. *Masterman*.[14] Here capital was given absolutely to the charitable beneficiary but full enjoyment was postponed until the death of certain annuitants. Pending the termination of the final annuity, an accumulation was directed of any income remaining after the annuities had been paid. The court held that the rule in *Saunders* v. *Vautier* applied equally to charities as it did to individuals and, just as had the beneficiary been an individual and *sui juris*, the accumulation could have been stopped, so too the charity could act in the same manner and call for payment of the surplus income at once. This was the case because the interest taken by the charity was "vested and indefeasible".[15]

Can it then be that a perpetual charitable endowment is a further manifestation of the same rule of law? Clearly if it is, then on the authority of *Wharton* v. *Masterman* the charitable beneficiary could terminate the endowment and call for the *corpus* producing the income. As has been argued, the rule in *Saunders* v. *Vautier* is a rule of law which operates inflexibly on the appearance of certain conditions precedent to produce the result that a beneficiary can call for capital. These conditions precedent are a vested interest in the sole beneficiary, a beneficiary *sui juris* and a postponement of the beneficiary's enjoyment of the absolute gift. By definition a charity is *sui juris*. The perpetual charitable endowment, on the other hand, differs from the *Saunders* v. *Vautier* situation in that there is no absolutely vested gift in the charity, enjoyment of which is postponed. The interest taken by the charity is only an interest in income indefinite in point of duration. Hence the conditions precedent to the rule in *Saunders* v. *Vautier* never arise and some other principle of law must be found to deal with the perpetual endowment.

Against this, however, it can be argued, as Kitto, J. did,[16] that "to say that there is no remainder after the gift of income is simply to say that the gift is a gift of *corpus*". The result of this latter view can only mean that the gift of income is vested in the charitable beneficiary and nothing can be done to postpone the enjoyment of the capital by the beneficiary. However, no court or other judge has been prepared to accept this view or to take it to its logical conclusion, namely that a charitable beneficiary being entitled to call for the capital can do so even where on the terms of the gift there is an express indication that this is not the intention of the donor. If this view is accepted a gift of income to a charitable institution with an express direction that the charity should never have the power to call for capital, would result in the charity being able to defeat the testator's direction by calling for capital. Although such a case awaits decision there is little doubt, on authority, that the testator's intention would

[12] See K. S. Jacobs, *The Law of Trusts in New South Wales* (1958) 415ff. for a short discussion of the rule.

[13] In *Gosling* v. *Gosling* (1859) John. 265-272, it was said that "if the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one".

[14] (1895) A.C. 186.

[15] *Id.* at 194.

[16] (1952) 87 C.L.R. 375, 450.

guide the court to reject this result. The courts, however, have not classified the perpetual endowment, either to an individual or to a charitable beneficiary, as being a rule of law operating inflexibly to give the beneficiary the *corpus*.

In the reports there are many authorities discussing gifts of income to individuals. For example, in *Coward* v. *Larkman*[17] the English Court of Appeal gave a full treatment of the rule as it operates with respect to individual beneficiaries. "It is a rule of construction—that is, only a *prima facie* rule—which disappears at once if a contrary intention is shown."[18] The intention of the testator is therefore paramount.

If the rule dealing with perpetual endowments is not a rule of law can it then be logically argued that it is a part of the rule in *Saunders* v. *Vautier?* To argue that it can, is to argue that a rule of law may at the one time be a rule of law *stricto sensu* (when dealing with the postponement of enjoyment of an absolute interest) and a rule of construction, or something less, when dealing with perpetual endowments. This result, it is argued, is logically impossible.

A more meaningful analysis of the relation between the two rules is to be found in the judgment of the Victorian Supreme Court in *re Wright.*[19] Here it is pointed out that the two rules exist side by side but independent of each other. The first rule, that a bequest of income without limitation of time is *prima facie* a gift of principal, is a rule of construction to effectuate the testator's intention; the second, the rule in *Saunders* v. *Vautier*, a rule of law setting such intention at naught. A beneficiary must bring himself within the operation of the first rule before taking advantage of the second.

Turning from this first classification, which has been rejected by both the Australian High Court and the English Court of Appeal, the choice then lies between whether there is or is not, a rule of construction relating to perpetual charitable endowments which is similar to the alleged rule of construction relating to indefinite bequests of income to individuals. The High Court and the Court of Appeal reached different conclusions on this problem. The Court of Appeal in *re Levy (dec'd)* adopted an argument along similar lines to that of the Victorian Supreme Court in *re Wright*. The High Court, on the other hand, expressly rejected the reasoning in *re Wright*.

The High Court approached the question from the initial premise that where there is a perpetual gift of income to an individual then *prima facie* there is presumed to be a gift of *corpus* to him.[20] The second stage in the argument is the proposition that there is no distinction in law between a charity and an individual with respect to that rule, on the authority of Sterling, J. in *re Morgan.*[21] Therefore a perpetual charitable endowment equally carries the right to *corpus* subject to "sufficiently definite indications of intention to the contrary". The Court of Appeal, while accepting the initial premise, joined issue on the interpretation of *re Morgan*. This case involved a gift of the residue of certain interests and rents subject to annuities to named charitable institutions. The court in holding this gift to be a gift of *corpus* gave no reasons for its decision. In *re Levy (dec'd)* the Court of Appeal, as did the Victorian Supreme Court in *re Williams*, distinguished *re Morgan* on the ground that it was "consistent with the view that an intention to give the *corpus* sufficiently appeared without re-

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[17] (1887) 57 L.T. 258.

[18] An exhaustive list of authorities referring to this rule is impossible but reference should be made to the following: *Coward* v. *Larkman* (1887) 57 L.T. 258, (1888) 60 L.T. 1; *Philipps* v. *Chamberlaine* (1798) 4 Ves. Jan. 51; *Elton* v. *Shepherd* (1781) 1 Bro. C.C. 532; *Adamson* v. *Armitage* (1815) 19 Ves. 415; *Jennings* v. *Baily* (1853) 17 Beav. 118; *Massey Rowen* (1869) L.R. 4 H.L. 288, 295. In *Adamson* v. *Armitage*, one of the earliest authorities, it was said "*prima facie* a gift of the produce of a fund is a gift of that produce in perpetuity, and is consequently a gift of the fund itself, unless there is something upon the face of the will to show that such was not the intention".

[19] (1917) V.L.R. 127, 153.

[20] (1952) 87 C.L.R. 375, 438.

[21] *Re Morgan, Morgan* v. *Morgan* (1893) 3 Ch. 222.

course to any rule of construction when regard was had to the form of the dispositions".[22]

Unhampered by the decision in *re Morgan*, the Court of Appeal in *re Levy (dec'd)* were able to treat the question as devoid of authority and hold that no rule of construction existed with regard to perpetual charitable endowments, but that recourse should be had to the testator's intention without resort to rules of construction.

Despite this difference of opinion both the High Court and the Court of Appeal on similar facts found in favour of the endowment continuing in perpetuity, and frustrated the attempts of the charitable beneficiaries to call for capital contrary to the testator's intention. In *re Levy (dec'd)* the establishment of the "Levy Family Trust" to perpetuate the family name, the intention to benefit persons present and future and the existence of the forfeiture clause, although invalid, enabled the court to hold that on the interpretation of the will as a whole the testator had not intended to make a gift of *corpus* to the charities. In *Thistlethwayte's Case* the High Court held that despite the existence of the rule of construction there were in the will sufficient indications of contrary intention to prevent its operation, and to defeat the beneficiaries' application.

Conflict between the two decisions would arise only where there is either a perpetual endowment to a charity with no further indications of intention or where such contrary intention is too slight to displace the supposed rule of construction, in other words, cases where there is ambiguity concerning intention. A possible reconciliation can be reached by arguing that while, as the High Court held, no different rule applies to individual beneficiaries than to charitable beneficiaries, in the case of charities the fact that the legatee is non-finite and perpetual affords sufficient indication of an intention to exclude the operation of what is, after all, a rule of construction.[23] The difference between the two decisions is then reduced to a mere verbalism.

Finally, in advising those wishing to create endowments in favour of charity, it would be wise to suggest that the perpetual charitable endowment be given upon some condition of defeasance, with a gift over to some one charitable beneficiary (as in *re Levy (dec'd)*) or to some other charity, if the original endowment is made only to one charity. This gift over then provides a sufficient indication of intention as required by the High Court to displace the rule of construction enabling the charity to take the *corpus;* or, should *re Levy (dec'd)* be adopted by the House of Lords or Privy Council, it shows from the terms of the will the testator's intention that the charitable beneficiary is not to take a share of the *corpus.*

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[22](1955) A.L.R. 255. This case followed *Wright's Case* as also by implication did *re Godfree (dec'd)* (1952) V.L.R. 353.

[23] Suggested by Dean, J. in *re Williams* (1955) A.L.R. 255.