[HIGH COURT OF AUSTRALIA.]

THE PUBLIC CURATOR OF QUEENSLAND . APPELLANT;
DEFENDANT,

AND

THE UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED AND OTHERS . RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1922.

BRISBANE, *June* 13, 14, 21.

Knox C.J., Higgins and Gavan Duffy JJ.

Will—Construction—Bequest of residue—Beneficiaries in Germany—Directions for transmission—Rule against perpetuities—Remoteness—Condition—Immediate vesting in interest.

A testator, who made his will and died in Queensland during the War, leaving real and personal property there, after making certain dispositions directed his trustee to stand possessed of the remainder of the residuary trust funds in trust to pay the same to the German consul at Brisbane when duly appointed, such consul to remit the funds to Germany to be applied partly in payments to persons, and partly to objects of a charitable nature, in Germany. No appointment of a German consul had been made; and no such appointment might be made during lives in being and twenty-one years after.

Held, that, on the proper construction of the will, the testator intended to make an immediate gift of such residuary trust funds; that on his death the gift vested in interest, though not in possession, and that the direction to pay to the German consul referred merely to the means by which the money should be conveyed to the beneficiaries; and that, therefore, the gift was not void as infringing the rule against perpetuities.

Decision of the Supreme Court of Queensland: *In re Mitchner; Union Trustee Co. of Australia* v. *Attorney-General for the Commonwealth*, (1922) S.R. (Qd.), 39, reversed on this point.

APPEAL from the Supreme Court of Queensland.

By his will, dated 21st April 1918, William Mitchner, who died in Queensland on 1st June 1918, provided (*inter alia*) as follows: "I hereby declare that my trustee shall stand possessed of the remainder of the . . . residuary trust funds in trust to pay the same from time to time as and when the same shall be available to the German consul for the time being at Brisbane . . . when such consul shall have been duly appointed and my trustee shall have been duly authorized in that behalf by the Attorney-General of the State of Queensland or the Attorney-General of the Commonwealth of Australia with written instructions to the said German consul to remit the said trust funds to my Ferdinand Tautz of Dresden Saxony in Germany his executors or administrators the parish priest for the time being of the Roman Catholic Church at Lewin in Germany and the police magistrate for the time being at Lewin aforesaid to be expended by them the said Ferdinand Tautz his executors or administrators and the said parish priest and police magistrate in the manner following:—" Then followed directions for the application of the funds in favour of (so far as material) German nationals and German charities. The testator left real and personal estate in Queensland.

The Union Trustee Co. of Australia and Hubert Gladstone Deacon, the executors and trustees of the will, commenced an action in the Supreme Court on 22nd April 1920, by writ of summons on which was indorsed a claim for the determination of certain questions arising in the estate of the testator. The defendants to the action were the Attorney-General for the Commonwealth, the Public Trustee (Commonwealth), the Attorney-General for the State of Queensland, the Public Curator of Queensland, and (to represent certain beneficiaries under the will and the testator's next of kin) four other persons.

With the concurrence of the parties a special case was stated for the opinion of the Supreme Court upon a number of questions arising on the will; and in answer to certain of the questions the Full Court decided that the trusts declared by the testator with reference to the remainder of his residuary trust funds were void as infringing the rule against perpetuities: *In re Mitchner*; *Union*

H. C. OF A. 1922.

PUBLIC CURATOR (QD.) v. UNION TRUSTEE CO. OF AUSTRALIA LTD.

Trustee Co. of Australia v. *Attorney-General for the Commonwealth* (1).

From this decision the Public Curator of Queensland (who represented the above-named Ferdinand Tautz, his executors or administrators, and the parish priest and the police magistrate and the beneficiaries resident in Germany, for the purpose of obtaining the opinion of the Court upon the construction of the will) appealed to the High Court.

Other facts appear in the judgments hereunder.

The appeal now came on for hearing, and the Court stated that argument must be confined solely to the question whether the residuary bequest was void, as the High Court, having no original jurisdiction in this matter, could not determine questions which had not been considered in the Supreme Court.

E. A. Douglas (with him *Salkeld*), for the appellant. The provisions of the will relating to the consul and the trustee do not constitute a condition upon the happening of which the gifts to German charities or nationals depend. The appointment of a German consul in Brisbane is not a condition affecting the vesting of the gifts: the provision merely sets out the mode of transfer chosen by the testator. If that mode is unavailable at the present time owing to the non-existence of the consul, the Court will direct the trustees to hold the funds until an appointment is made, or will direct the transfer to be made through existing official channels. Nor is the authorization by the Attorney-General of the Commonwealth a condition on which the gifts depend: the provision merely amounts to a reservation that payment must be made in legal manner, having regard to the existence of a state of war. The licence of the Attorney-General was not regarded as a condition in *Attorney-General* v. *Downing* (2) or *Attorney-General* v. *Bishop of Chester* (3). In construing the language of the will the Court will consider the circumstances existing when it was made: it was impossible at that time to transmit money to German nationals (see *Trading with the Enemy Act* 1914-1916, sec. 3 (1A); *Manual of Emergency War Legislation*, p. 147; *Rules of Court* (Qd.) as of 29th October 1914). The testator, knowing the difficulty, made provision

(1) (1922) S.R. (Qd.), 39.
(2) (1767) Wilm. Notes, 1, at p. 24.
(3) (1785) 1 Bro. C.C., 444.

for postponing payment until payment could be lawfully made. The clause requiring authorization was directed to that state of facts. But the vesting was not postponed: the gift was immediate, was subject to no condition; and the intention to benefit charities is clear (*Chamberlayne* v. *Brockett* (1)). The testator desired administration to be completed within three years, and if a consul is not appointed within that time the Court should direct the mode of conveyance. The only matter dependent upon future or uncertain events is the particular mode of transfer, and a direction of that nature or concerning the application of charitable funds is not a condition (*In re Swain*; *Monckton* v. *Hands* (2); *Tyssen on Charitable Bequests*, 2nd ed., pp. 153 *et seq.*; *Martin* v. *Margham* (3); *In re Gyde*; *Ward* v. *Little* (4); *Sinnett* v. *Herbert* (5); *Lewin on Trusts*, 6th ed., chap. 29). Payment to the consul is merely the proposed mode for conveyance; equity will supply a trustee, and it will also rectify the absence of the indicated mode of conveyance by directing other appropriate means. As there is an absolute intention to give to charitable purposes and nothing is left uncertain but the mode of carrying that intention into effect, the Court will give effect to the intention (*In re Willis*; *Shaw* v. *Willis* (6); *Attorney-General* v. *Stephens* (7); *Moggridge* v. *Thackwell* (8); *In re Geck*; *Freund* v. *Steward* (9)). The Court will prefer an interpretation which ousts the rule against perpetuities (*Martin* v. *Margham* (3); *Martelli* v. *Holloway* (10); *Godefroi on Trusts*, 3rd ed., p. 907). The rule against perpetuities has no application when a testator has directed the fund to be sent to a foreign country and invested in real property there (*Fordyce* v. *Bridges* (11); *Halsbury's Laws of England*, vol. XXII., p. 312).

Webb S.-G. (with him *Macrossan*), for the Attorney-General of Queensland.

Stumm K.C. (with him *Hart*), for the executors of the will.

(1) (1872) L.R. 8 Ch., 206.
(2) (1905) 1 Ch., 669.
(3) (1844) 14 Sim., 230.
(4) (1898) 79 L.T., 261.
(5) (1872) L.R. 7 Ch., 232.
(6) (1921) 1 Ch., 44, at p. 47.
(7) (1834) 3 My. & K., 347.
(8) (1802) 7 Ves., 36.
(9) (1893) 69 L.T., 819, at p. 821.
(10) (1872) L.R. 5 H.L., 532, at p. 548.
(11) (1847) 2 Ph., 497, at p. 515.

H. C. OF A. 1922.

PUBLIC CURATOR (QD.) v. UNION TRUSTEE CO. OF AUSTRALIA LTD.

Henchman, for the Attorney-General for the Commonwealth. The gift is immediate: on the testator's death the whole devolved to the trusts and charities declared. The direction to pay to the consul when authorized is not a condition precedent but a machinery clause for giving effect to the gift in a proposed manner which would avoid any suggestion of trading with the enemy. The German consul is a mere conduit pipe. The testator's desire for prompt administration is expressed in the will, and is inconsistent with a conditional gift. On a strict reading of the clause the condition (if any) applies to payment to the transmitting medium and not to the beneficiaries named. Even if the gifts to German nationals fail, those to German charities are valid; for the will discloses a general charitable intention, and it is immaterial that the particular mode of carrying out the intention fails (*Chamberlayne* v. *Brockett* (1); *In re Bowen*; *Lloyd Phillips* v. *Davis* (2); *In re Willis*; *Shaw* v. *Willis* (3)). *In re Lord Stratheden and Campbell* (4), relied on in the Court below, is distinguishable; for there the right to receive the money as well as the right of enjoyment was conditioned. The Court favours vesting (*In re Wrightson*; *Battie-Wrightson* v. *Thomas* (5); *Duffield* v. *Duffield* (6)).

Macgregor, for the respondents the next of kin of the testator. On a literal construction of the will the remainder of the residue is not payable to the beneficiaries until the happening of two events which may not happen within the time prescribed by the law against perpetuities; the gift is therefore void (*In re Lord Stratheden and Campbell* (4)). The word "when" *primâ facie* connotes contingency in a bequest of personalty (*In re Francis*; *Francis* v. *Francis* (7); *In re Bewick*; *Ryle* v. *Ryle* (8); *Halsbury's Laws of England*, vol. XXII., par. 640; vol. IV., par. 297; *In re White's Trusts* (9); *Thomas* v. *Thomas* (10)).

Douglas, in reply. If the will is ambiguous the Court will favour

(1) (1872) L.R. 8 Ch., at pp. 210-211.
(2) (1893) 2 Ch., 491, at p. 494.
(3) (1921) 1 Ch., at pp. 54-56.
(4) (1894) 3 Ch., 265.
(5) (1904) 2 Ch., 95.
(6) (1829) 3 Bli. (N.S.), 260, at p. 331; 1 Dow & Cl., 268, at p. 311.
(7) (1905) 2 Ch., 295.
(8) (1911) 1 Ch., 116.
(9) (1886) 33 Ch. D., 449, at p. 453.
(10) (1902) 87 L.T., 58.

a construction supporting a vesting (*Taylor* v. *Graham* (1); *Tyssen on Charitable Bequests*, 2nd ed., pp. 184-189).

Cur. adv. vult.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. The question raised by this appeal is whether the residuary bequest contained in the will of William Mitchner, made 21st April 1918, is valid. This bequest is in the following words : [The clause above set out was here stated, and the judgment continued :—] This passage is followed by elaborate directions as to the manner in which the fund in question is to be expended or applied by the persons to whom it was to be remitted. It is sufficient for the purpose of this opinion, without repeating these provisions in detail, to point out that the fund is to be applied partly in payments to individuals and partly to objects of a charitable nature in Germany, that directions are given for the expenditure of portions of the fund within limited periods ranging from four to seven years, and that the will contains an expression of the testator's desire that his trustees shall, if possible, complete the administration of his estate within three years from the date of testator's death, and a direction that the receipts of the German consul shall be a sufficient discharge for all moneys paid to him under the will. There is no gift over on failure of payment to the German consul or on failure of the further disposition of the funds in the prescribed manner. By a codicil the testator declared that none of them, the said Ferdinand Tautz, his executors or administrators, or the said parish priest or the said police magistrate, should be in any sense whatsoever considered as executors or trustees of his will. The property comprised in the residuary gift is of considerable value, and represents the greater part of the estate of the testator.

A special case having been stated for the determination by the Supreme Court of numerous questions arising on the will of the testator, that Court decided (*inter alia*) that the trusts declared by the testator with reference to the remainder of his residuary trust fund were void ; and it is against this decision that this appeal is brought.

(1) (1878) 3 App. Cas., 1287, at p. 1297.

H. C. OF A. 1922.

PUBLIC CURATOR (QD.) v. UNION TRUSTEE CO. OF AUSTRALIA LTD.

Knox C.J. Gavan Duffy J.

The Supreme Court was of opinion that according to the literal construction of the will the remainder of the residuary trust funds was not to be paid over by the trustees of the will until a German consul at Brisbane had been duly appointed, and that, as that event might not happen within the time prescribed by the rule against perpetuities, the gift failed. In other words, the gift was held to be dependent on the condition that a German consul at Brisbane should be duly appointed. The appellant contends that the other provisions for the disposition of this fund show that the intention of the testator was to devote it unconditionally to the purposes to which he directed it to be applied, the direction for payment to the German consul amounting, in the circumstances existing when the will was made, to no more than an indication of the method which the testator thought should be adopted in order to transmit the money to the persons in Germany to whom he had entrusted its application. It was urged on his behalf that if the words used were capable of this meaning they should be so construed, both in order to avoid an intestacy and because the disposition in question was mainly in favour of charitable objects.

It is not easy to be certain about the real intention of the testator as evinced by his will, but it is important to remember that the will was made while war conditions existed, and when, though a testator might make bequests to German nationals, money could not legally be transmitted to Germany without the permission of the Crown. On the whole, we think that on a proper construction of the words of the will the testator intended to make an immediate gift of the remainder of his residuary trust funds; that on his death this gift vested in interest though not in possession, and that the directions with respect to the German consul have reference only to the means by which the money should be conveyed to them.

In our opinion the appeal should be allowed.

HIGGINS J. The only appeal in this case is from the declaration as to the residuary funds intended for German charities and persons, that the gift is void as infringing the law against perpetuities. The Public Curator of Queensland, as representing the German trustees who are to expend the funds in Germany, and the Attorney-General

for the Commonwealth and the Public Trustee for the Commonwealth, concur in so limiting the appeal; and we have no power to consider anything else in the order made by the Supreme Court of Queensland on the special case. We cannot interfere with the order so far as it interprets and applies the *Treaty of Peace*.

The words of the gift have been stated. It is said that according to the literal construction of the will the funds have to be remitted to the German trustees by the German consul in Brisbane when he is appointed, and not otherwise; and that as the appointment may possibly not happen within the limit of time prescribed by the law against perpetuities—within a life or lives in being and twenty-one years after—the gift to the German trustees is void. In other words, because the particular machinery which the testator prescribed for remitting the funds to the German trustees may not be available within that limit of time, the gift is wholly void.

No case has been cited to us in which the law against perpetuities has been applied under similar or analogous circumstances. In *In re Lord Stratheden and Campbell* (1) there was a clear condition annexed to the substance of the gift. There was a bequest of an annuity to a volunteer corps "on the appointment of the next lieutenant-colonel." There was no gift except on the express condition; and as it was possible that a lieutenant-colonel might never be appointed, or might not be appointed within the allowed limit of time, the gift failed. In the present case the condition—if there is a condition—is not annexed to the gift itself, but to the mode of remitting. Apart from the mode of remitting, the gift to the German trustees, and the trusts on which they are to expend the funds, are unconditioned. The words used are words appropriate only to a gift which is vested in interest in the recipients or objects as from the death of the testator, although the actual expenditure prescribed may be necessarily postponed. The German trustees are to distribute £600 among Tautz and his family; to invest £1,000 for Elizabeth Conrad for life, &c.; to expend £7,000 within four or five years from the testator's death in the erection of an educational institution at Lewin; and so forth. The purchase of lands for a farm, flour-mill and hotel, and the completion thereof for the upkeep of the

(1) (1894) 3 Ch., 265.

H. C. OF A. 1922.

PUBLIC CURATOR (QD.) v. UNION TRUSTEE CO. OF AUSTRALIA LTD.

Higgins J.

institution, &c., are to take place within seven years from the death. The trustees of the will are, if possible, to complete the administration of the estate within three years from the death. The gift is a gift of residue, and there is no gift over if the funds are not remitted through the German consul; and there is no gift of the income to other persons or objects until such remission. For the purposes of enjoyment and transmission the actual income of any property until sale or conversion is to go to the same beneficiaries as income of the proceeds of sale and conversion would go. The testator provides that receipts given to the trustees of the will shall be "sufficient" discharges for all moneys paid to the consul; but he does not say that they shall be the *only* discharges. I cannot feel any doubt that if the German trustees came to Brisbane and demanded from the trustees of the will payment of the funds, saying "There is no need to remit to Germany at all—we shall give you a receipt," the trustees of the will would be compelled by the Court to pay over the funds. Those who are solely and absolutely entitled to receive money from trustees are entitled to ignore the specific mode and time of payment directed by the testator, to "break the trust," as it is called, and to claim immediate payment without the delay and formalities prescribed by the will (*Saunders* v. *Vautier* (1); *Harbin* v. *Masterman* (2), and other cases).

At the date of the will and codicils and of the death of the testator (1st June 1918) the War still continued; and the *War Precautions Acts* and the King's proclamations made it illegal and impossible to send money to Germany. Evidently the testator—with that foresight and calculation of future contingencies so characteristic of men of his country—made his arrangements so as to facilitate the execution of his will; but he did not show in his will any intention to make the particular mode of remitting which he prescribed a condition precedent to the vesting of the gifts in interest. The law as to wills, especially such a will as the present, favours vesting; and the Courts are astute to adopt such an interpretation of the words as will prevent them from treating directions as conditions precedent to the vesting of a gift in interest. It is not every direction

(1) (1841) 4 Beav., 115; Cr. & Ph., 240.

(2) (1894) 2 Ch., 184; (1895) A.C. 186.

in a will that the Courts will enforce as a trust; for instance, the Courts have refused to enforce at the instance of the solicitor a clear direction in a will that a certain solicitor "shall be the solicitor to my estate." So, too, a direction to employ a certain person as agent to collect rents of property given was not enforced at the instance of the agent (*Shaw* v. *Lawless* (1); and see *Finden* v. *Stephens* (2)). A trust must be associated with property, and rights to property. As *Story* said (*Contracts*, vol. I., sec. 296), "trusts are, therefore, equitable interests *in property*, based on confidence, over which Courts of equity alone have full jurisdiction." The *Wills Act* enables every person to devise, bequeath or dispose of "by his will" all his real estate and all his personal estate (*Succession Acts* (Qd.), sec. 36); but it does not seem to enable him to create a trust merely to pay his funds to a person who is merely an agent to remit to the true objects of the gift; and in *Brown* v. *Burdett* (3) *Bacon* V.C. treated a trust to block up the rooms of a house for twenty years as invalid, and held that there was an intestacy as to the house for the term. If the funds were handed direct to the German trustees instead of to the German consul, neither the German trustees nor the beneficiaries under the German trusts could show any loss occasioned by the (alleged) breach of trust.

But, whatever may be the proper effect to be given to the words "in trust to pay" the funds to the German consul "when such trustee shall have been duly appointed" (and when the trustees shall have been duly authorized by the Attorneys-General), with written instructions to the German consul to remit to the German trustees, the gifts for Germany are by this will vested in interest as from the testator's death, and the appointment of the German consul is not made a condition precedent to that vesting; it is at most, a condition precedent to the paying of the funds to him for remitting to Germany.

In my opinion, this appeal must be allowed.

Appeal allowed. Judgment of Supreme Court varied by substituting for the word "void"

(1) (1837-8) 5 Cl. & Fin., 129.
(2) (1846) 2 Ph., 142.
(3) (1882) 21 Ch. D., 667.

H. C. OF A. 1922.

PUBLIC CURATOR (QD.) v. UNION TRUSTEE CO. OF AUSTRALIA LTD.

in the declaration in answer to Questions (f) to (x) the word "valid." Case remitted to Supreme Court to make such further order as may be necessary accordingly. Costs of all parties as between solicitor and client to be paid out of the testator's estate.

Solicitor for the appellant, *R. J. S. Barnett*, official solicitor to appellant.

Solicitors for the respondents, *Chambers, McNab & McNab*; *H. J. H. Henchman*, Acting Crown Solicitor for Queensland; *W. A. Douglas*; *R. McCowan*.

J. L. W.

Cons *Western Australia* v *Wardley Aust Ltd* (1991) 102 ALR 213

Cons *Western Australia* v *Wardley Australia Ltd* (1991) 21 IPR 321

Disd *Gregg* v *Tasmanian Trustees Ltd* (1997) 73 FCR 91

Cons *Krakowski* v *Eurolynx Properties Ltd* (1995) 69 ALJR 629

Appl *Belan* v *Casey* (2003) 57 NSWLR 670

Adopted *Stewart, Re* [2004] 1 NZLR 354

Appl *David Grant & Co Pty Ltd* v *Westpac Banking Corp* (1995) 69 ALJR 778

Refd to *Baulderstone* v *Workcover & Male* (1995) 64 SASR 519

[HIGH COURT OF AUSTRALIA.]

THE CROWN . . . . . APPELLANT;
RESPONDENT,

AND

McNEIL AND ANOTHER . . . . . RESPONDENTS.
PETITIONERS,

H. C. OF A. 1922.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

MELBOURNE, *March* 9-10, 13-17, 20.

PERTH, *July* 27.

Crown—Liability of—Breach of contract by Crown—Petition—Time for filing petition—Fraud of servants of Crown preventing knowledge of breach of contract—When time begins to run—Crown Suits Act 1898 (*W.A.*) (62 *Vict. No.* 9), *secs.* 5 (2), 32, 33, 36, 37—*Mining Development Act* 1902 (*W.A.*) (2 *Edw. VII. No.* 20), *secs.* 19, 20, 21, 29.

KNOX C.J., ISAACS AND STARKE JJ.

Part III. (secs. 22-37) of the *Crown Suits Act* 1898 (W.A.) provides for the enforcing of claims against the Crown by a petition and proceedings thereon