[HIGH COURT OF AUSTRALIA.]

WOOD . . . . . APPELLANT;
DEFENDANT,

AND

JAMES AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1954.

PERTH, *Oct.* 19, 20;

SYDNEY, *Dec.* 15.

Dixon C.J., McTiernan and Kitto JJ.

Assurance—Life policy—Effected by husband on his life—For benefit of wife of assured should amount of assurance become payable during her lifetime—Gift over in event of wife predeceasing assured to such of children of assured as should survive him—Death of wife and subsequent re-marriage of assured—Assured dying leaving second wife and children of first marriage—Rights of second wife—Married Women's Property Act 1892 (*W.A.*), *s.* 11.

The husband effected a policy of assurance on his life under the provisions of the *Married Women's Property Act* 1892 (W.A.). The policy was expressed to 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 the assured ". The wife died and the husband married again. The husband died leaving surviving him his second wife and three children of his first marriage. There were no children of the second marriage.

Held, by *Dixon* C.J. and *Kitto* J. (*McTiernan* J. dissenting), that the beneficiary described in the policy as the " wife of the assured " was the assured's wife at the date of the policy. The policy moneys accordingly went to the children.

Decision of the Supreme Court of Western Australia (*Dwyer* C.J.) affirmed.

APPEAL from the Supreme Court of Western Australia.

Arthur Hilton Wood died on 2nd June 1953. Probate of his will was granted to Mary Josephine Wood the executrix named in the will on 29th July 1953. The deceased was married twice. His first wife Irene Wood died on 4th March 1941. He subsequently

married his second wife Mary Josephine Wood and she survived him, as did three children of his first marriage. There were no children of the second marriage.

On 24th December 1931 the deceased effected a policy of life assurance on his own life for the sum of £2,000 with the Mutual Life & Citizens Assurance Co. Ltd. The policy which was made under the provisions of the *Married Women's Property Act* 1892 (W.A.) contained the following clause:—"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 the assured".

An originating summons in which the second wife was named as defendant was issued by the three children of the first marriage, the respondents to this appeal, for the determination of the following question:—"On the true construction of a policy of assurance dated 24th December 1931 issued by The Mutual Life and Citizens' Assurance Company Limited to Arthur Hilton Wood are the plaintiffs or the defendant beneficially entitled to the proceeds thereof".

Dwyer C.J. held that the proceeds of the policy belonged to the children.

From that decision Mary Josephine Wood the second wife appealed to the High Court.

T. S. Louch Q.C. (with him *P. L. Sharp*), for the appellant. When a wife and children of the assured are together made the beneficiaries of a policy the class of children includes children whom the assured may have of a second wife: *Jones* v. *McNeil* (1); *D.* v. *T.* (2). The prima facie rule of construction is that a limitation to a wife of a married person refers to that person's existing wife and not to any subsequent wife: *In re Coley*; *Hollinshead* v. *Coley* (3). But this prima facie rule is not applicable to a policy of assurance expressed to be for the benefit of the wife of the assured and the children of the assured: *In re Browne's Policy*; *Browne* v. *Browne* (4). In such a case the probability is that the assured intends to benefit his family considered as such. It is clear that had there been children of the second wife such children would in the event of that wife predeceasing the assured take with the other children. There is nothing to justify an interpretation the effect of which would be to exclude the second wife in the event of her

(1) (1899) 25 V.L.R. 434.
(2) (1901) 7 A.L.R. 79.
(3) (1903) 2 Ch. 102.
(4) (1903) 1 Ch. 188.

H. C. OF A. 1954. WOOD v. JAMES.

surviving the assured but to include her children in the event of her predeceasing the assured. [He referred to *In re Griffiths' Policy* (1); *In re Parker's Policies* (2); *Prescott* v. *Prescott* (3); *Robb* v. *Watson* (4); *In re Collier* (5); *In re Reynolds*; *Reynolds* v. *Commissioner of Taxes* (*Vict.*) (6); *Cousins* v. *Sun Life Assurance Society* (7); *Lodge* v. *Dowie* (8); *In re Best* (9); *Perpetual Trustee Co.* (*Ltd.*) v. *Tindal* (10); *Re Watson, Petitioners* (1944) unreported, but referred to by *MacGillivray* on *Insurance Law* (4th ed.) (1953), pars. 1308, 1316; *Lort-Williams* v. *Lort-Williams* (11).]

R. I. Ainslie, for the respondent. The trust in favour of the children is contingent upon their surviving the assured. If this were not so the children would take a vested interest immediately upon the death of the assured's wife and immediately upon the happening of this event the trust in favour of the wife of the assured would fail: *Perpetual Trustee Co. Ltd.* v. *Tindal* (10). Under the present policy the assured's children by his first marriage obtained a contingent interest in the proceeds of the policy upon the death of their mother. The interest of each child was then contingent upon she or he surviving the assured, but it was not contingent upon the happening of any other event. In particular the interest then taken was not to be divested by reason of the assured marrying again. The trust here was not for the wife and children and it cannot therefore be considered as a trust for "the family". *In re Browne's Policy*; *Browne* v. *Browne* (12) is distinguishable for this reason. Under the present policy the wife is the primary object and if she survives the assured the children get nothing. *In re Collier* (5) and *Robb* v. *Watson* (4) cannot since the decision of the Court of Appeal in *Cousins* v. *Sun Life Assurance Society* (7) be regarded as good authority. Had the present policy not made the wife's interest contingent upon her surviving the assured she would have taken an immediate vested interest which on her death would have passed to her personal representatives. [He also referred to *In re Reynolds*; *Reynolds* v. *Commissioner of Taxes* (*Vict.*) (6); *Lodge* v. *Dowie* (8); *In re Best* (9).]

T. S. Louch Q.C., in reply.

Cur. adv. vult.

(1) (1903) 1 Ch. 739.
(2) (1906) 1 Ch. 526.
(3) (1906) 1 I.R. 155.
(4) (1910) 1 I.R. 243.
(5) (1930) 2 Ch. 37.
(6) (1931) V.L.R. 254.
(7) (1933) Ch. 126.
(8) (1935) 36 S.R. (N.S.W.) 52; 53 W.N. 47.
(9) (1935) 36 S.R. (N.S.W.) 58; 53 W.N. 44.
(10) (1940) 63 C.L.R. 232.
(11) (1951) P. 395.
(12) (1903) 1 Ch. 188.

The following written judgments were delivered :—

DIXON C.J. AND KITTO J. This is an appeal from an order of the Supreme Court of Western Australia (*Dwyer* C.J.) made on the hearing of an originating summons for the construction of a policy of life assurance.

The policy was upon the life of one Arthur Hilton Wood, who was called therein the assured, and it was taken out by him on 24th December 1931. It recited the acceptance of a proposal which had been made by the assured to effect an assurance under the provisions of the Act of Parliament mentioned in the schedule " for the benefit of the beneficiary set forth in the schedule should such beneficiary survive the assured ". The engagement of the company which issued the policy was, on proof of the death of the assured, of his age, and of the claimant's title, and upon delivery of the policy duly discharged together with the last premium receipt, to pay to the trustee or trustees under the provisions of the Act the amount of £2,000 together with bonuses (subject to deduction of any moneys due to the company) " for the benefit of the beneficiary set forth in the schedule should such beneficiary survive the assured ". The schedule contained a paragraph headed " Beneficiary ", in these terms : " 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 the assured ". The policy was expressed to be subject to a number of privileges, conditions and guarantees endorsed upon it, but there is nothing to affect the question we have to consider, either in the provisions so referred to or (as the parties agree) in the proposal and declaration which were made the basis of the policy.

At the date of the policy the assured had a wife, Irene Wood, and three children. Irene Wood died on 4th March 1941, and the assured thereafter married a second time. There was no child of either marriage save the three who have been mentioned. The assured died on 2nd June 1953 and was survived by his second wife and by all three of his children. The widow claimed to be beneficially entitled to the proceeds of the policy on the ground that she answered the description of " the wife of the assured " at the date when the policy matured. Her claim was denied by the children, who contended that in the context " the wife of the assured " meant the person who was the wife of the assured when he took out the policy, namely their mother Irene Wood, and that as the

H. C. OF A. 1954. WOOD v. JAMES. Dixon C.J. Kitto J.

amount of assurance did not become payable in the lifetime of Irene Wood the benefit of the policy belongs to them.

In the Supreme Court the learned Chief Justice construed the policy in accordance with the contention of the children, and from his decision the widow now appeals. The argument before us has required an examination of a number of cases in which problems of the same general description have been considered by courts in the United Kingdom and in this country. It may be said at once that nothing turns upon any differences between s. 11 of the *Married Women's Property Act* 1892 (W.A.) under which the policy here in question was effected, s. 94 of the *Life Assurance Act* 1945-1950 (Cth.), and the corresponding legislative provisions applying to the policies upon which the cases referred to were respectively decided. So far as material, they all provide 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, or of his children or of his wife and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys 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 subject to his debts.

It is the Act which creates the trust, but it does so by operating upon the policy, and accordingly it is from the policy alone that the beneficial interests to be taken under the trust are to be ascertained. The language of the Act does not affect the construction of the policy: *In re Seyton*; *Seyton* v. *Satterthwaite* (1); *Cousins* v. *Sun Life Assurance Society* (2). It is no doubt material to bear in mind that a man who effects a policy on his life and avails himself of the statutory method of creating a trust with respect to it is engaged in procuring for one or more members of his immediate family a sum of money to be available at his death as a fund immune from the claims of his creditors. There is an obvious probability that his primary concern in entering into a transaction of this character is to make a provision for persons whom he contemplates as needing financial assistance upon his death. But the recognition of this probability brings no nearer to solution the question whether the wife for whose benefit a policy is expressed to be effected is the wife at the date of the policy or a future wife. The question remains whether the assured intended by effecting the policy to provide for the event of his then wife being widowed by his death, or was thinking impersonally of any widow he might leave.

As a matter of common experience, a married man who undertakes the burden of premiums in order to produce at his death a

(1) (1887) 34 Ch. D. 511, at p. 514. (2) (1933) Ch. 126, at p. 139.

fund for the benefit of someone to whom he refers as his wife is much more likely to be contemplating the wife he then has than to be thinking in the abstract of any wife who may survive him, including a hypothetical future wife whom he may marry in the event of his existing marriage being terminated by death or divorce. Generally speaking, his intention is that if he should predecease his existing wife she shall be provided for in the same way as she would have been if she herself had effected a policy on his life. In the policy we have here to consider, the probability that the assured intended to provide for the wife to whom he was married at the date of the policy is greatly strengthened by the fact that the nomination of " the wife of the assured " as the beneficiary of the policy is made conditional by the addition of the words " should the amount of the assurance become payable during her lifetime ". Not only would these words be rendered completely redundant by an interpretation of " the wife of the assured " as meaning the wife who survives the assured whoever she may be, but they are actually inconsistent with such an interpretation ; for they plainly imply that the wife who is intended is one who may in fact fail to survive the assured.

Moreover it is an established rule of construction that prima facie a limitation to the wife of a married person refers to that person's existing wife and not to any subsequent wife that person may have : *In re Drew*; *Drew* v. *Drew* (1) ; *In re Coley* ; *Hollinshead* v. *Coley* (2) ; *In re Harper* ; *Trustees Executors & Agency Co. Ltd.* v. *Harper* (3). This rule has special weight in the case of a disposition by a married man in favour of his own wife. In *In re Browne's Policy* ; *Browne* v. *Browne* (4) however, *Kekewich* J., after describing the presumption as rather one of common parlance and commonsense than of law, declined to apply it in construing a policy expressed to be for the benefit of the assured's wife and children. His Lordship gave two reasons. First, he qualified his acceptance of the presumption by saying that it was countervailed, in the case of an instrument intended to make provision for a wife after her husband's death, by the consideration that in all probability he intended to provide for her who survived him and for that reason stood in need of provision. The second reason was that the assured probably intended to provide for all his children including children of a second wife, and if the latter were let in there was no good reason for excluding their mother. As to the first reason, it may be observed at once, as *Mann* J. said in *In re Reynolds* ; *Reynolds* v.

(1) (1899) 1 Ch. 336, at p. 339.
(2) (1903) 2 Ch. 102.
(3) (1940) A.L.R. 178.
(4) (1903) 1 Ch. 188, at p. 190.

H. C. OF A. 1954. WOOD v. JAMES. Dixon C.J. Kitto J.

Commissioner of Taxes (*Vict.*) (1) that the object, in the sense of the purpose of the trust, can only be ascertained by first construing the trust instrument itself, and this throws one back upon the words describing the beneficiary. But in any case, where a policy is expressed to be for the benefit of the assured's wife alone if living at his death, the probability, as already pointed out, is not that he intended to provide for her who should survive him, but that he intended to provide for the wife he knew in the event of her surviving him. This no doubt explains why *Joyce* J. in *In re Griffiths' Policy* (2) dealing with a policy effected for the benefit, not of the wife and children together, but of the wife alone if she should survive the assured, quoted *Kekewich* J.'s statement of the general presumption but did not go on to quote the words in which he stated his first reason for treating the presumption as displaced in the case he was considering.

As to the second of the reasons which led *Kekewich* J. to his conclusion, no doubt it will often be true that where the wife and children of the assured are together made the beneficiaries of a policy, the class of children referred to includes children whom the assured may have by a future wife : see *Jones* v. *McNeil* (3) with which may be contrasted *Boyd* v. *National Mutual Life Association Australasia Ltd.* (4). The inference may perhaps be drawn in such an event that in joining his wife with his children the assured was thinking, not in terms of identified individuals, but in terms of the family group the members of which were likely to have a common need of financial provision at his death, and that therefore " his wife ", like " his children ", should not be understood as limited in its reference to the person who filled the description at the date of the policy. But this mode of reasoning has no application in a case where the wife alone is designated as the primary object of the provision made by the policy and the children are given nothing unless the wife happens to die before the policy matures. There is no context in such a case to displace the presumption that the wife in existence at the date of the policy is intended.

A contrary view was taken in *In re Collier* (5). In that case *Clauson* J. accepted the opinion expressed by *Kekewich* J. in *In re Browne's Policy* (6) that the probability in the case of a life assurance policy is that the intention of the assured is to provide for the wife who should survive him. In this his Lordship was much influenced by his impression that the object of the legislation was to enable a

(1) (1931) V.L.R. 254, at p. 261.
(2) (1903) 1 Ch. 739, at p. 742.
(3) (1899) 25 V.L.R. 434.
(4) (1921) V.L.R. 465.
(5) (1930) 2 Ch. 37.
(6) (1903) 1 Ch. 188.

husband to provide for his widow on his death. Because he took that view of the Act, he went on to hold, following an Irish case of *Robb* v. *Watson* (1) that a husband was not enabled by the Act to confer the benefit of a policy upon any wife of his unless she should survive to become his widow. The Court of Appeal, however, took a different view in *Cousins* v. *Sun Life Assurance Society* (2), disapproving *Robb* v. *Watson* (1) and preferring a contrary decision of the Irish courts in *Prescott* v. *Prescott* (3). The judgments clearly deny *Clauson* J.'s conception of the object of the legislation, the Master of the Rolls describing it as being " to enable a trust to be created appropriating policy moneys to the spouse or children of the assured without his going to the trouble of executing a trust deed ": *Cousins* v. *Sun Life Assurance Society* (4) ; see also *In re Reynolds ; Reynolds* v. *Commissioner of Taxes* (*Vict.*) (5), per *Macfarlan* J. The decision was that there was nothing in the Act to prevent effect being given to an intention declared in a policy to benefit the assured's wife existing at the date of the policy, whether she should survive the assured or not, and that accordingly when the policy identified that wife as the beneficiary to take absolutely she took an immediate beneficial interest which would pass to her legal personal representatives as part of her estate in the event of her predeceasing the assured. The case establishes that the Act contains nothing to require the conclusion that a wife is outside the contemplation of a " beneficiary " clause unless she becomes the widow of the assured, and that for purposes of construction such a clause is to be assimilated, not indeed to a will, the construction of which may be affected by its ambulatory character, but to a trust deed, which takes effect upon execution and is construed accordingly. Since *Cousins' Case* (6) no valid reason remains for declining to apply to a " beneficiary " clause the rules which have become accepted for the construction of dispositive instruments generally, including the rule that a limitation to the wife of a married man prima facie refers to his existing wife.

The rule has been applied in several cases decided since *In re Browne's Policy* (7) in which policies have been expressed to be for the benefit of the assured's wife alone, without additional words of identification. The leading case is *In re Griffiths' Policy* (8) in which *Joyce* J. held that the reference to the assured's wife was to the wife existing at the date of the policy, where the words used were " for the benefit of his wife or if she be dead between his

(1) (1910) 1 I.R. 243.
(2) (1933) Ch. 126.
(3) (1906) 1 I.R. 155.
(4) (1933) Ch. 126, at p. 133.
(5) (1931) V.L.R. 254, at p. 262.
(6) (1933) Ch. 126.
(7) (1903) 1 Ch. 188.
(8) (1903) 1 Ch. 739.

H. C. OF A. 1954. WOOD v. JAMES.

children in equal proportions ". In *Lodge* v. *Dowie* (1), *Nicholas* J. followed this decision, and similarly construed a policy expressed to be for the absolute benefit of " the wife of the assured should she become the assured's widow, failing which for the absolute benefit of such of the children of the assured as shall survive the assured and attain the age of twenty-one years " : (see also *In re Best* (2)). In an unreported case of *Re Watson, Petitioners* (1944), cited in *MacGillivray* on *Insurance Law* (4th ed.) (1953), art. 1316, Lord *Patrick* came to a similar conclusion on the construction of a policy " for the benefit of his (the assured's) wife in the event of her surviving him and failing her for the benefit of his children born or to be born or any of them ".

Both reason and authority support the decision of *Dwyer* C.J. The appeal should be dismissed.

McTIERNAN J. On 24th December 1931, a policy was granted to Arthur Hilton Wood on his own life by the Mutual Life & Citizens Assurance Co. Ltd. When the policy was granted the assured had a wife and three children. The recital in the policy states that it was effected pursuant to a proposal to effect a policy under the *Married Women's Property Act* 1892 (W.A.) " for the benefit of the beneficiary set forth in the schedule should such beneficiary survive the assured ". The policy moneys are expressed by the policy to be payable to the trustee or trustees under the provisions of the Act of Parliament mentioned above " for the benefit of the beneficiary set forth in the schedule should such beneficiary survive the assured ". The part of the schedule in which the beneficiary is set forth is as follows : " Beneficiary. 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 the assured ". The policy came within this Act because it was effected on the life of the assured and was expressed to be for the benefit of his wife, or failing her taking, for the benefit of his children. For these reasons the policy also came within s. 94 of the *Life Insurance Act* 1945-1950 (Cth.), which is expressed to have a retrospective operation. The Act, whether it is the former or the latter, applying to the policy, gave it the force of a declaration of trust appropriating the policy moneys to the " beneficiary " therein named

(1) (1935) 36 S.R. (N.S.W.) 52 ; 53 W.N. 47.

(2) (1935) 36 S.R. (N.S.W.) 58 ; 53 W.N. 44.

without the execution by the assured of a trust deed. The Act of West Australia and s. 94 of the Commonwealth Act which, for all purposes that are now material, are the same in substance, adopt the principle contained in s. 11 of the *Married Women's Property Act* 1882 (45 & 46 Vict. c. 75). It was decided in the case of *Cousins* v. *Sun Life Assurance Society* (1), that " objects " in this section means purposes. The word has this meaning in the Act of West Australia and in s. 94 of the Commonwealth Act. Section 11 of the English Act of 1882 replaced s. 10 of the English Act of 1870.

The name of the wife for whose benefit the policy was effected is not mentioned in the policy, nor are the names of the children who would be entitled to the policy moneys should they not become payable during her lifetime. The assured's wife who was living when the policy was effected died on 4th March 1941. Subsequently, the assured married the appellant and she was the wife of the assured at the time of his death. The assured had no other children than the three children living when the policy was effected and they all survived him. The assured died on 2nd June 1953.

The question is whether upon the true construction of the policy the trust which it created of the policy moneys enured for the benefit of the appellant upon her marriage to the assured. The company granted the policy to effectuate the proposal of the assured for a policy to be effected under the Act for the benefit of the " beneficiary " which the company " set forth " in the schedule. Does the policy show that the assured intended to make a provision for any wife who should survive him or only for the wife who was alive when he effected the policy ? A wife would equally require a provision for her support whether she was the wife then living or a future wife. It is conceded that children born after the issue of the policy whether the children of the wife then living or of a future wife would, if they survived the assured, share equally in the policy moneys, for the reason that the provision which is made for the assured's children, if it should take effect, is intended for the benefit of a class whose members are to be ascertained, and all persons who answer to the description of children of the assured who survive him would belong to that class. However, as regards the beneficiary described as the wife of the assured, it is said that she was ascertained at the time the policy was granted and was the wife of the assured then living.

In the case of a will the rule of construction is that " prima facie where the wife of a person is spoken of by a testator and that person is married at the date of the will, in the absence of any context the

(1) (1933) 1 Ch. 126, at p. 137.

H. C. OF A. 1954. WOOD v. JAMES. McTiernan J.

wife existing at the date of the will is the person intended to take ". The rule was enunciated in these words in the case of *In re Drew*; *Drew* v. *Drew* (1). There was sufficient context there to take that case out of the general rule. One element in that case was that income was to be applied to the maintenance of " B. H. D., his wife and children ". *Stirling* J. said: " I think that there the testator clearly means ' any wife '. I cannot believe that it was the intention of the testator that, though the children of the second wife were to be provided for, the second wife herself was not to have a share if the trustees thought fit " (2). However, in the present case, the trust created by the will is not expressed to be for the benefit of the wife of the assured and of his children. It is a trust primarily for the benefit " of the wife of the assured " should the policy moneys become payable during her life. The events are the surrender of the policy or his death. Clause 8 (d) provides for the policy having a cash surrender value. Only if the wife of the assured be dead when the policy moneys become payable, are his children intended to take. The re-marriage of the assured did not affect the trusts created by the policy under the statute. A will is revoked by a subsequent marriage and the re-marriage of a testator could not produce a question like the present one. In the case of a will a question of who was the intended object of the testator's bounty may arise where a person to whose wife a gift is made subsequently remarries. Often the answer which should be given to the question could be that the testator intended to benefit the wife who was known to him but not a stranger who was unknown to him. The answer to the question would, of course, turn upon the construction of the will. The presumption that a married man who refers to his wife intends his wife at that time was described by *Kekewich* J. in *In re Browne's Policy* (3) as one of commonsense and he said that it is a recognized rule of construction. The presumption applies to a policy. Its weight in the construction of the present policy is lessened by a consideration which led *Kekewich* J. to his conclusion in that case. He said this: " But, in construing an instrument intended to make provision for a wife after the husband's death, this seems to lose weight, and is countervailed by the consideration that he in all probability intended to provide for her who survived him, and for that reason stood in need of the provision. A similar line of reasoning points to the conclusion that he intended to benefit all the children, which is strengthened by the reflection that he cannot reasonably be supposed to have intended to benefit only

(1) (1899) 1 Ch. 336, at p. 339.
(2) (1899) 1 Ch., at pp. 341, 342.
(3) (1903) 1 Ch. 188.

the children living at the date of the policy to the exclusion of after-born children by the then existing wife. The claim of the children by the second wife to share in the policy moneys is, I think, unanswerable; and if they are let in I fail to see any good reason for excluding their mother" (1). In that case the policy was effected by the assured on his own life and was expressed to be "for the benefit of his wife and children in conformity with the provisions of the *Married Women's Property Act* 1882 (45 & 46 Vict. c. 75)." *Kekewich* J. held that according to the true construction of the policy by "his wife and children" the assured intended "his surviving wife (if any) and his surviving children, whether by his then living or any after-taken wife".

The policy in the case of *In re Griffiths' Policy* (2) left no room for the countervailing consideration which led *Kekewich* J. to his conclusion in the previous case. It was effected under the *Married Women's Property Act* 1870 on the life of the assured and was expressed to be "for the benefit of his wife, or if she be dead between his children in equal proportions". *Joyce* J. referred to the presumption mentioned above. He said: "In this particular case I think the presumption is stronger, because the words are, 'if she be dead', and those words seem to point to the wife who was living when the policy was effected" (3). The words of the present policy seem to me to point to the wife of the assured living when the policy moneys become payable. If that be so the context excludes the presumption mentioned above. In the case of *In re Parker's Policies* (4), it was held that an after-taken wife was within the *Married Women's Property Act* 1870, s. 10. The policies in the case were expressed to be for the widow and children of the assured. It was argued that by the word "widow" the assured intended his wife living at the date of the issue of the policies if she survived and became his widow. *Swinfen Eady* J. held that "widow" meant "the person who at the death of the husband shall become the widow". He added: "It is conceded that children by a future wife are included, and yet the argument would restrict the benefits to the present wife if she becomes the widow, and at the same time admit to them the children of a future wife" (5). It seems that little weight was attached to the presumption that a married man when speaking of his wife must prima facie mean his wife at the time. Another case is *In re Collier* (6). The words of the policy which was effected by a married man in pursuance of the *Married*

(1) (1903) 1 Ch., at p. 190.
(2) (1903) 1 Ch. 739.
(3) (1903) 1 Ch., at p. 742.
(4) (1906) 1 Ch. 526.
(5) (1906) 1 Ch., at p. 530.
(6) (1930) 2 Ch. 37.

H. C. OF A. 1954. WOOD v. JAMES. McTiernan J.

Women's Property Act 1870 were "for the benefit of his wife". The wife predeceased the assured and he died without having remarried. The question was whether the interest taken by the wife during her husband's lifetime was contingent or vested. *Clauson* J. held that the wife's interest was contingent. He applied the reasoning of *Kekewich* J. in *In re Browne's Policy* (1) upon the construction of the policy but he also proceeded upon another ground founded upon the object of the Act. In the result he held that the words of the policy meant for the benefit of the wife who should survive the assured and become his widow. The view that the interest of a wife was made contingent by the Act itself was called in question in the case of *Cousins* v. *Sun Life Assurance Society* (2). The case was concerned with two policies each of which stated that it was issued "for the benefit of Lilian Cousins, the wife of the life assured, under the provisions of the *Married Women's Property Act* 1882". The Court of Appeal decided that she took a vested interest in the policy from the time that it was effected. The decision of *Clauson* J. in the previous case was not expressly overruled because it was given under the 1870 Act. But the views expressed by *Clauson* J. as to the operation of that Act are deprived of authority in a case under the 1882 Act. *Lawrence* L.J. said: "Under the 1882 Act a policy effected by a man on his own life, and expressed to be for the benefit of a named wife, operates in my judgment as a valid declaration of trust *inter vivos* in favour of the wife, giving her a vested absolute beneficial interest in the policy and the moneys thereby assured from the time when the policy is effected. In *In re Adam's Policy Trusts* (3), which was a case of a policy effected under the 1870 Act by a married man on his own life for the benefit of his wife and children, *Chitty* J. said (4): 'The view I take of the policy is this: it is a declaration of trust operating *inter vivos*, and is a good declaration of trust . . . It appears to me that the effect of the policy and the Act taken together is to constitute a declaration of an executed trust, and that all the Court has to do is to express its view of the construction of the two instruments taken together. Now upon the policy being effected the settlor does not reserve to himself any power of appointment; therefore this is not an executory trust, but a trust declared on the face of the instrument. The question then is, what is the true construction of the instrument?' In my opinion the passage which I have quoted applies to a policy effected under the 1882 Act, with the result, in the present case, that as the plaintiff has

(1) (1903) 1 Ch. 188.
(2) (1933) Ch. 126.
(3) (1883) 23 Ch. D. 525.
(4) (1883) 23 Ch. D., at p. 527.

declared in the policy that it is effected for the benefit of his named wife simpliciter, that wife takes an absolute beneficial interest in the policy. The plaintiff might, no doubt, have effected a policy under s. 11 for the benefit of his wife if she should survive him (as was the case in *Cleaver* v. *Mutual Reserve Fund Life Association* (1) and as was the case in *Re Fleetwood's Policy* (2)), or he might have taken out a policy for the benefit of any wife who might survive him and become his widow (as was held to have been the case in *In re Browne's Policy* (3)), but that is not what he has done here. He has chosen to effect a policy simply for the benefit of his then living wife, and has thus created a trust, of which it cannot be said that its purpose came to an end, or that, in the words of the section, there was no longer any object of the trust remaining to be performed when his wife died in his lifetime; there being a vested interest in the wife that interest passed on her death to her executors as part of her estate" (4). *Hanworth* M.R. in distinguishing *In re Browne's Policy* (3) said: "The policy in question was not expressed to be in favour of a named wife, and it was decided upon the construction of that policy that the wife indicated there was some person who fulfilled the qualification of a wife who survived the husband who had taken out the policy . . . In the present case, which arises under the Act of 1882 and where there is a persona designata, the wife indicated by name, an absolute interest is taken by her by virtue of the statute and a trust created in her favour" (5). That case lays down the principle that "you are referred to the policy itself to ascertain the objects of the trust which the Act says is created by the policy, and must also look at the policy for the purpose of finding the interests which those objects take in the policy money": per *Romer* L.J. (6). While the case decides that a policy under which a wife takes a vested interest is within the Act, it does not decide that a policy giving a contingent interest is not. *Romer* L.J. said: "I cannot find the remotest indication that the husband intended the wife's interest to be contingent on her surviving him. If he had so wished nothing was easier than for him to have said so in the policies themselves. In my opinion, therefore, there was a trust created in favour of the named wife, Lilian Cousins" (7). In the present case the husband intended the wife's interest to be contingent on her surviving him and the policy is not effected in favour of a named wife. Of course it is not to be deduced from the case that unless the wife living at the

(1) (1892) 1 Q.B. 147.
(2) (1926) 1 Ch. 48.
(3) (1903) 1 Ch. 188.
(4) (1933) Ch., at pp. 137, 138.
(5) (1933) Ch., at p. 135.
(6) (1933) Ch., at p. 139.
(7) (1933) Ch., at p. 140.

H. C. OF A. 1954. WOOD v. JAMES. McTiernan J.

date of the policy is indicated by name she takes only a contingent interest. Nor is it to be deduced that a future wife, if any, would take no interest unless the word " wife " is defined by the policy to include a future wife. It has not been decided that the assured must do such an embarrassing thing in order to provide for the possibility that he might remarry. But it seems clear that if the wife living at the date of the policy is named she takes a vested interest and a future wife, if any, would not take an interest in the policy moneys. *Kekewich* J. really applied in the case of *In re Browne's Policy* (1) the counsel of perfection upon which the Court of Appeal acted in *Cousins* v. *Sun Life Assurance Society* (2). He said: " Turning to the Act, I find little assistance in the language used, which really throws me back on the proper construction of the policy " (3). I do not gather from the judgments of the Court of Appeal that they disagreed with his construction. I would decide this case upon reasoning similar to that used by *Kekewich* J. I think it is appropriate for a number of reasons. The wife of the assured is not indicated by name. It is not effected " for the benefit of his named wife simpliciter ". The words " the wife of the assured " are capable of referring to the assured's surviving wife. The policy grants an interest to " the wife of the assured " intended to be contingent upon her surviving him. The children by a future wife are upon the construction of the policy included in the description of the " beneficiary " of the policy. For these reasons I would answer the question in the originating summons in favour of the appellant and allow the appeal.

Appeal dismissed with costs.

Solicitors for the appellant, *Maxwell & Lalor.*
Solicitors for the respondents, *Stone, James & Co.*

F. T. P. B.

(1) (1903) 1 Ch. 188.
(2) (1933) Ch. 126.
(3) (1903) 1 Ch., at p. 190.