[HIGH COURT OF AUSTRALIA.]

TEAGUE AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

THE TRUSTEES, EXECUTORS AND AGENCY COMPANY LIMITED AND OTHERS . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 21, 23.

SYDNEY, *Aug.* 9.

Knox C.J., Higgins and Starke JJ.

Will—Direction for accumulation—Thellusson Act—Intestacy as to income—Interests of next-of-kin—Duration of intestacy—Gift after accumulation to grandchildren—Daughter of testator past age of child-bearing—Acceleration of distribution—Period of distribution—Wills Act 1915 (*Vict.*) (*No.* 2749), *sec.* 36.

A testator by his will, after certain specific devises and bequests, gave all the residue of his real and personal estate to his trustee upon trust to sell and convert and to stand possessed of the proceeds upon trust (so far as is material) to invest the same and out of the income to pay certain life annuities, with power to appropriate sufficient sums to answer such annuities, and to stand possessed of the corpus of his residuary estate and the residue of the income to arise therefrom upon trust to invest the same until the youngest of his grandchildren should attain the age of twenty-one years, and upon his or her attaining that age to distribute the same and also the appropriated fund among his grandchildren in equal shares *per capita*. The Supreme Court of Victoria (*Hood* J.) had in 1912 made an order on originating summons declaring that the grandchildren referred to in the will included grandchildren whenever born, that the direction for accumulation was void as to all accumulations required to be made from and after the expiration of twenty-one years from the testator's death, and that there was an intestacy as to the income to arise from and after the expiration of that period and required to be accumulated, and that the trustee "cannot now properly divide amongst the beneficiaries any part of the corpus of the testator's estate nor any part of the income thereof except the dividends, interest and annual income as to which an intestacy is declared."

Subsequently, when all the children of the testator were dead, except a married daughter, who had never had a child and was sixty-nine years of age, and when all the living grandchildren had attained the age of twenty-one years, the Court was asked, under the liberty to apply reserved by the order, whether the trustee could then properly distribute any and what part of the corpus of the testator's estate or of the income thereof. The answer of the Supreme Court was "No, save as already decided by the said order of his Honor Mr. Justice *Hood*."

Held, by *Knox* C.J., *Higgins* and *Starke* JJ., that although the testator's surviving daughter was beyond the age of child-bearing, the Court would not presume that no more grandchildren would be born, since (per *Knox* C.J. and *Starke* J.) the interests of the next-of-kin, or (per *Higgins* J.) the possible interests of living persons, would be defeated by such a presumption.

Held, also, by *Knox* C.J. and *Starke* J. (*Higgins* J. dissenting), that upon the true construction of the will and of the prior declaration of the Supreme Court the intestacy thereby declared continued until the death of the sole surviving daughter.

Held, further, by *Knox* C.J., *Higgins* and *Starke* JJ., that whatever was decided on the originating summons in 1912, whether right or wrong, is final and binding on the parties.

Per Higgins J. :—The direction in the will to accumulate the income being limited to the time that the youngest grandchild *in fact* should attain twenty-one, and not to the time that it can be *ascertained* that the youngest grandchild has attained twenty-one, the trustee cannot under the circumstances safely pay any of the income at present either to the next-of-kin or to the grandchildren ; and the order of 1912 contains nothing to alter or qualify this position. It is the duty of the Court to construe the words of the order so as to be consistent with the words of the will, so far as the words of the order permit such a construction.

Decision of the Supreme Court of Victoria (*Macfarlan* J.) : *In re Stevens* ; *Trustees, Executors and Agency Co.* v. *Teague*, (1922) V.L.R., 771 ; 44 A.L.T., 85, affirmed.

APPEAL from the Supreme Court of Victoria.

By his last will Frederic Perkins Stevens, who died on 17th May 1888, after making certain specific devises and bequests gave all the residue of his real and personal estate (thereinafter called his residuary estate) to his trustee, the Trustees, Executors and Agency Co. Ltd., upon trust to sell and convert the same into money when and as his trustee should deem it most advantageous so to do ; and he declared that his trustee should stand possessed of the net moneys which might arise from such sale and conversion, and also of all moneys of which he might die possessed or entitled to upon trust,

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in the first place to pay his debts and funeral and testamentary expenses and the legacy and probate duty on his estate, in the next place to pay certain pecuniary legacies and in the next place, as to the residue and remainder, to invest the same and out of the dividends, interest and income therefrom to pay certain annuities to his wife, his children and his grandchildren. The will then continued :—"I empower my said . . . trustee to appropriate a sum or sums sufficient in the opinion of my said . . . trustee at the period of appropriation as a fund for answering the several annuities or sums hereinbefore mentioned by investing the same in the manner and upon the securities hereinafter described And I declare that from and after such appropriation the residue of my estate shall be liberated from the trust for payment of the said annuities or sums I direct my said . . . trustee to stand possessed of the corpus of my residuary estate and of the residue of the dividends interest and annual income to arise therefrom and all other moneys for the time being forming part of my estate Upon trust to invest the same at interest until the youngest of my grandchildren shall attain the age of twenty-one years and upon his or her attaining that age to distribute the same and the said appropriated fund subject as aforesaid amongst all my grandchildren in equal shares share and share alike *per capita* and not *per stirpes* I declare that if any of my grandchildren who may survive me shall die before the absolute vesting of his or her share in the trust premises and leaving a widow or husband or children as the case may be the share of such person so dying in the trust premises shall so far as permitted by the law with reference to perpetuities be held by my . . . trustee upon trust for such person as would be interested therein under any statute for the distribution of the estates of intestate persons if such persons so dying had died intestate."

The testator left him surviving his widow, Emma Stevens, who died on 27th September 1911 ; his son, Ernest James Stevens, who died on 3rd March 1922 leaving him surviving eight children, the youngest of whom attained the age of twenty-one years on 20th April 1911, and of whom all except two were born before the date of the testator's death ; his daughter Emily Jane Brodribb, who died on 4th July 1911 leaving her surviving four children, the youngest

of whom attained the age of twenty-one years on 27th December 1906; and his daughter Mary Bridget Cox, who was born on 15th December 1852 and had never had a child.

On 19th March 1912 an originating summons was taken out by the trustee for the determination by the Supreme Court of the following questions (*inter alia*) :—

2. Is the direction contained in the said last mentioned gift of the corpus of the residuary estate in relation to the dividends, interest and annual income to arise therefrom void either wholly or to any and what extent as requiring an unlawful accumulation?

3. Do the references in the said last mentioned gift of the corpus of the residuary estate to the " youngest of the testator's grandchildren " and to " all the testator's grandchildren " mean grandchildren living at testator's death, or do they include grandchildren whenever born ?

5. Is there any intestacy either wholly or in part as to any and which of the gifts or directions above referred to ?

By amendment the following question was subsequently added :—

5 (a). Can the trustee now properly distribute any and what part of the corpus of the testator's estate or of the income thereof and to what parties ?

On 13th May 1913 *Hood* J. made an order answering the above questions as follows :—

2. The direction contained in the final residuary clause of the will for the accumulation of the dividends, interest and annual income to arise from the corpus therein mentioned and which is referred to in question 2 is void as to all accumulation required to be made from and after the expiration of twenty-one years from the testator's death;

3. The references in the said final residuary clause of the will to the " youngest of the testator's grandchildren " and to " all the testator's grandchildren " which are referred to in question 3 include grandchildren whenever born ;

5. There is an intestacy as to all the dividends, interest and annual income which are referred to in question 5 to arise from and after the expiration of twenty-one years

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from the testator's death from the corpus included in the said final residuary clause of the will and by such clause required to be accumulated as therein mentioned;

5 (a). The trustee cannot now properly divide amongst the beneficiaries any part of the corpus of the testator's estate nor any part of the income thereof (other than the annuities by the will provided) except the dividends, interest and annual income as to which an intestacy is declared as set out in the answer to question 5:—*In re Stevens*; *Trustees, Executors and Agency Co.* v. *Teague* (1).

On 19th August 1922 the trustee, pursuant to liberty to apply reserved by the above order, applied to the Supreme Court in substance for a determination of the following question:—

Can and should the trustee now properly distribute any and what part of the corpus of the testator's estate or of the income thereof and to what parties?

The defendants upon the application were Isabel Jane Ada Teague on behalf of herself and all grandchildren of the testator living at his death; Marjorie Ada Hamlyn Harris on behalf of and as representing herself and all grandchildren of the testator born since his death and to be born after the application; Jane Marianne Stevens on behalf of and as representing herself and the other children of the testator's son; and Charles Aspinwall and Frederick Leslie Bruford, being the executors of the will of Emma Stevens deceased, on behalf of and as representing the estate of the testatrix and all others the next-of-kin of the testator.

The application was heard by *Macfarlan* J., who answered the question as follows:—

"No, save as already decided by the said order of his Honor Mr. Justice *Hood*":—*In re Stevens*; *Trustees, Executors and Agency Co.* v. *Teague* (2).

From that decision Isabel Jane Ada Teague, Marjorie Ada Hamlyn Harris and Jane Marianne Stevens now appealed to the High Court.

Other material facts appear in the judgments hereunder.

(1) (1912) V.L.R., 194; 33 A.L.T., 233.

(2) (1922) V.L.R., 771; 44 A.L.T., 85.

Latham K.C. (with him *Ham*), for the appellants Isabel Jane Ada Teague and Marjorie Ada Hamlyn Harris. The Court should act on the presumption that Mrs. Cox will never have a child, with the result that the property may now be distributed among the grandchildren. The rule that the Court will not act on such a presumption where the result will be to deprive living persons of their interests has never been, and should not be, applied where such persons take contrary to the will under an intestacy declared by the Court. The interest of such persons must appear on the face of the will. Sec. 36 of the *Wills Act* 1915 (the *Thellusson Act*) should not be read as incorporated in a will to which it applies, and has nothing to do with the construction of the will. [Counsel referred to *In re Dawson*; *Johnston* v. *Hill* (1); *In re Lowman*; *Devenish* v. *Pester* (2); *In re Hocking*; *Michell* v. *Loe* (3); *Taylor on Evidence*, 11th ed., vol. I., p. 111, sec. 105; *Seton on Decrees*, 7th ed., vol. II., p. 1591.]

[KNOX C.J. referred to *In re Hazeldine's Trusts* (4); *Saunders* v. *Vautier* (5).

[HIGGINS J. referred to *In re Toppin's Estate* (6).]

If no distribution to the grandchildren is now justified, none to the next-of-kin is justified. The direction to accumulate being until the youngest grandchild attains the age of twenty-one years, the uncertainty as to whether the youngest grandchild has attained that age makes it equally uncertain whether the direction to accumulate has ended. The postponement of enjoyment is not occasioned by the direction to accumulate, but by the uncertainty in fact as to whether the youngest grandchild has attained twenty-one years of age. If upon the death of Mrs. Cox it appears that the youngest grandchild has now attained the age of twenty-one years, the grandchildren would be entitled to the fund as from the time when the youngest of them attained that age. The trustee has, in that view, no right or duty to distribute, but the Court may properly authorize the trustee to distribute to the grandchildren subject to security being given by them to repay in the event of Mrs. Cox bearing a child. [Counsel referred to *Mitchell's Trustees* v. *Fraser* (7).]

(1) (1888) 39 Ch. D., 155, at p. 159.
(2) (1895) 2 Ch., 348, at p. 366.
(3) (1898) 2 Ch., 567, at p. 570.
(4) (1908) 1 Ch., 34.
(5) (1841) Cr. & Ph., 240.
(6) (1915) 1 I.R., 198.
(7) (1915) S.C., 350.

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Pigott, for the respondents Aspinwall and Bruford. The rule that the Court will not act on the presumption that a woman past the age of child-bearing will never have children is not limited in the way contended for, but will be applied in all cases where the result of acting upon the presumption will be to deprive living persons of their existing rights (see *Jee* v. *Audley* (1); *In re Dawson*; *Johnston* v. *Hill* (2); *In re Hocking*; *Michell* v. *Loe* (3); *In re White*; *White* v. *Edmond* (4); *In re Thornhill*; *Thornhill* v. *Nixon* (5)). It does not matter that the right of the next-of-kin is given by the operation of the *Thellusson Act*. Under the direction in the will the fund is not to be distributed until the shares are vested in enjoyment, that is to say, until it is definitely ascertained who are the persons presently entitled. The order made by *Hood* J. at a time when all the grandchildren, who were then and are now living, had attained the age of twenty-one years, declared that there was then an actual existing intestacy, and that there should be no distribution except of the income to which the next-of-kin were entitled. That actual intestacy does not expire until it is definitely ascertained who are the persons presently entitled to an immediate distribution of the estate. No order should be made for the return of income paid to the next-of-kin, for that would be indirectly to reverse the decision of *Hood* J. although there has been no appeal from it.

A. H. Davis, for the respondent trustee, referred to *In re Travis*; *Frost* v. *Greatorex* (6).

Ham, in reply.

Cur. adv. vult.

Aug. 9.

The following written judgments were delivered :—

KNOX C.J. The appellants are grandchildren of one Frederic Perkins Stevens, the testator under whose will the questions for decision on this appeal arise, and represent all the grandchildren of the testator. The respondent Company is the trustee of the will and the respondents Aspinwall and Bruford represent the next-of-kin of the testator.

(1) (1787) 1 Cox, 324.
(2) (1888) 39 Ch. D., 155.
(3) (1898) 2 Ch., 567.
(4) (1901) 1 Ch., 570.
(5) (1904) W.N., 112.
(6) (1900) 2 Ch., 541, at p. 549.

By his will the testator, after certain specific devises and bequests, gave all the residue of his real and personal estate to his trustee on trust to sell and convert and to stand possessed of the proceeds on trust, in the first place, for payment of his debts and funeral and testamentary expenses and, in the next place, for payment of certain pecuniary legacies, and as to the remainder to invest the same and out of the income thereof to pay certain life annuities to his widow and children and grandchildren with power to appropriate sufficient sums to answer such annuities. He then directed his trustees to stand possessed of the corpus of his residuary estate and of the residue of the income to arise therefrom and of all other moneys forming part of his estate upon trust to invest the same at interest until the youngest of his grandchildren should attain the age of twenty-one years, and upon his or her attaining that age to distribute the same and the appropriated fund subject to the annuities amongst all his grandchildren in equal shares *per capita*, and he declared that, if any of his grandchildren who should survive him should die before the absolute vesting of his or her share in the trust premises leaving a widow or husband or children, the share of such person so dying should, so far as permitted by the law with reference to perpetuities, be held by his trustee upon trust for such person as would be interested therein under any statute for the distribution of intestate estates if such person so dying had died intestate. The testator died on 17th May 1888, and consequently the period of twenty-one years from the date of his death came to an end on 17th May 1909.

The testator left him surviving his widow and three children—Ernest James Stevens, Emily Jane Brodribb and Mary Bridget Stevens. Mrs. Brodribb died on 4th July 1911 leaving four children, all of whom attained the age of twenty-one before the year 1909 and are now living. Ernest James Stevens died on 3rd March 1922 leaving eight children, of whom the youngest (now Mrs. Harris) attained the age of twenty-one on 20th April 1911. The testator's daughter Mary Bridget (now Mrs. Cox) is still living. She is sixty-nine years of age, and has never had a child.

In March 1912 the trustee applied to the Supreme Court by originating summons for the determination of (*inter alia*) the following questions, namely :—" 2. Is the direction contained in the said

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last mentioned gift of the corpus of the residuary estate in relation to the dividends, interest and annual income to arise therefrom void either wholly or to any and what extent as requiring an unlawful accumulation? 3. Do the references in the said last mentioned gift of the corpus of the residuary estate to the 'youngest of the testator's grandchildren' and to 'all the testator's grandchildren' mean grandchildren living at testator's death, or do they include grandchildren whenever born?" "5. Is there any intestacy either wholly or in part as to any and which of the gifts or directions above referred to?" The summons was subsequently amended by adding the following question, namely: "5(a). Can the trustee now properly distribute any and what part of the corpus of the testator's estate or of the income thereof and to what parties?"

On 13th May 1912 *Hood* J. ordered that these questions be answered as follows, namely:—"2. The direction contained in the final residuary clause of the will for the accumulation of the dividends, interest and annual income to arise from the corpus therein mentioned and which is referred to in question 2 is void as to all accumulation required to be made from and after the expiration of twenty-one years from the testator's death. 3. The references in the said final residuary clause of the will to the 'youngest of the testator's grandchildren' and to 'all the testator's grandchildren' which are referred to in question 3 include grandchildren whenever born." "5. There is an intestacy as to all the dividends, interest and annual income which are referred to in question 5 to arise from and after the expiration of twenty-one years from the testator's death from the corpus included in the said final residuary clause of the will and by such clause required to be accumulated as therein mentioned. 5(a). The trustee cannot now properly divide amongst the beneficiaries any part of the corpus of testator's estate nor any part of the income thereof (other than the annuities by the will provided) except the dividends, interest and annual income as to which an intestacy is declared as set out in the answer to question 5."

No appeal was brought from this order, and it is conceded that that it is binding on the present appellants. It will be observed that over a year before the date of this order all the grandchildren of the testator then in existence had attained the age of twenty-one

years, and no grandchildren have since been born. The trustees interpreted this order as declaring that there was an intestacy as to all dividends, interest and annual income to arise from the residuary estate after the expiration of twenty-one years from testator's death until the time for distribution of the corpus should arrive, and accordingly from time to time distributed such income among the next-of-kin of the testator. On 19th August 1922, shortly after the death of Ernest James Stevens, the appellants, pursuant to the liberty to apply reserved in the order made by *Hood* J., applied to the Supreme Court for the determination of the question whether the trustee could then properly distribute any and what part of the corpus of testator's estate or of the income thereof and to what parties. That application was founded on the contention that as Mrs. Cox, the only surviving child of the testator, was past the age of child-bearing, the youngest possible grandchild of the testator had attained twenty-one and the period of distribution of the corpus had arrived. It was assumed by the parties that under the order of *Hood* J. the income of the residuary estate had been properly paid to the next-of-kin, and the learned Judge who heard the application appears to have accepted this assumption as correct, indeed his decision was founded on the right of the next-of-kin to receive the income and confirmed them in the enjoyment of that right. The order made on the application was that the question be answered "No, save as already decided by the said order of his Honor Mr. Justice *Hood*."

From this order this appeal is brought, the grounds of appeal being, in effect, that the learned Judge was wrong in holding that there could be no distribution while there was a legal possibility of Mrs. Cox having children, that he should have held that the estate should now be administered on the footing that the youngest grandchild had attained twenty-one, and that he was wrong in holding that the interest being enjoyed by the next-of-kin was such as to prevent the application of the presumption that Mrs. Cox is past child-bearing.

The argument before this Court proceeded on these grounds only, and at its conclusion judgment was reserved. Subsequently, and before judgment was delivered, a doubt was suggested from the Bench whether the declaration of intestacy contained in the order

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of *Hood* J. applied to the income of the residuary estate after the date on which the grandchild of the testator who should eventually prove to be the youngest, in fact attained the age of twenty-one, and counsel for all parties were invited to submit observations on this view of the case. It is, of course, conceded that, if the order of *Hood* J. properly construed declares the right of the next-of-kin to receive the income of the residuary estate until the time for distribution of the corpus shall have arrived, the parties to this appeal are bound by that declaration. If, on the other hand, on the true construction of the order it amounts to a declaration that the intestacy as to income ceases on the day on which the grandchild who proves to be the youngest attains twenty-one, the next-of-kin are bound by that declaration. If, however, on the true construction of the order no time is fixed by it as the end of the period during which the next-of-kin are entitled to the income, the question is at large and open for decision by this Court.

What, then, is the true meaning of this order? The declaration of intestacy covers all income "to arise from and after the expiration of twenty-one years from the testator's death from the corpus included in the final residuary clause of the will and by such clause required to be accumulated as therein mentioned." The learned Judge was asked by question 2 whether the direction to accumulate the income of the residuary estate was void either wholly or to any and what extent as requiring an unlawful accumulation. The suggestion of invalidity was obviously based on sec. 35 of the Victorian *Wills Act* of 1890, which reproduces sec. 1 of the *Thellusson Act*, and the point for decision on this question therefore was whether the will of the testator directed an accumulation of income for a period in excess of that permitted by the section. *Hood* J. answered this question by saying that the direction was void as to all accumulation required to be made from and after the expiration of twenty-one years from the testator's death. Then, what accumulation was required to be so made? It is clear that "required" means "directed by the will," and I think it must be taken that the will directed accumulation of the income until the time should arrive for distribution of the corpus of the residuary estate. It is true that the express direction in the will is to accumulate the income "until the youngest of my grandchildren shall attain the age of

twenty-one years" and to distribute the corpus "upon his or her attaining that age."

But *Hood* J. decided, we must assume rightly, that on the true construction of the will all grandchildren of the testator, whether born in his lifetime or after his death, were entitled to share in the gift of residuary corpus; and it follows that there could be no distribution of that corpus in accordance with the terms of the will until (a) it had become impossible for any more grandchildren to come into existence, and (b) the youngest grandchild in existence had attained the age of twenty-one. Putting aside for the present the question whether the impossibility of more grandchildren coming into existence must be a legal impossibility or whether a physical impossibility is sufficient, it is clear that under the disposition of residue contained in the will there could be no distribution of corpus at any rate until the death of Ernest James Stevens, which took place on 3rd March 1922, and that the will directed an accumulation of the income of the residuary estate at least until that event. This appears to me to be established by the dicta and decisions in *Tench* v. *Cheese* (1), *Macpherson* v. *Stewart* (2), *Bective* v. *Hodgson* (3), *Mathews* v. *Keble* (4) and *Weatherall* v. *Thornburgh* (5).

The rule to be deduced from these authorities, to which the attention of *Hood* J. may be taken to have been directed, is that, when a testator directs his property to go in such a course that upon certain contingencies there must be an accumulation beyond twenty-one years, he does direct within the meaning of the *Thellusson Act* that upon those contingencies accumulation shall take place beyond that time. (See *Jarman on Wills*, 6th ed., p. 379; *Gray on Perpetuities*, 2nd ed., pp. 516-517.) On this view I think the answer to question 2 must be construed as a declaration that the direction to accumulate the income of the residuary estate was void as to all income to arise after the expiration of twenty-one years from the testator's death until the time should arrive for distribution of the corpus. The decision in *Mitchell's Trustees* v. *Fraser* (6) was relied on by counsel for the appellants, but in my opinion it tells against them. In that case Lord *Salvesen* accepted the law as being that, where accumulation

(1) (1855) 6 DeG. M. & G., 453.
(2) (1858) 28 L.J. Ch., 177.
(3) (1864) 10 H.L.C., 656.
(4) (1868) L.R. 3 Ch., 691.
(5) (1878) 8 Ch. D., 261.
(6) (1915) S.C., 350.

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is the necessary consequence of the direction given by the will, the *Thellusson Act* applies, and referred to the decision in *Logan's Trustees* v. *Logan* (1), in which the necessary consequence of the testator's dispositions in the events which happened was that no distribution of corpus could lawfully be made until a date more than twenty-one years after the testator's death; and it was held that there was an implied direction to accumulate the surplus income until that time, and that the surplus income after the expiration of the twenty-one years went as on an intestacy. In this case no distribution of the corpus of the fund can lawfully be made until after the death of all the children of the testator. Two of these children survived the period of twenty-one years from testator's death, and one of them is still living, and the accumulation of surplus income until the death of the survivor is a necessary consequence of the dispositions made by the will.

Having thus decided the point raised by question 2 of the originating summons, *Hood* J. in answer to question 5 declared that there was an intestacy as to all the income of the residuary estate to arise from and after the expiration of twenty-one years from the testator's death required by the final residuary clause to be accumulated. Following the line of reasoning outlined above in discussing the meaning of the answer to question 2, I am of opinion that this declaration covers all income of the residuary estate arising after the expiration of twenty-one years from the testator's death until the time for distribution of the corpus shall have arrived, and it seems to me to follow that by the answer to question 5 (a) the approval of the learned Judge was given to the payment to the next-of-kin of such income as it arose. But if this view be not correct, it is, I think, clear that *Hood* J. did not by his order expressly fix any date or event as the end of the period during which the direction to accumulate was to be treated as void. The direction to accumulate is declared to be void as to all accumulation "required to be made" after the expiration of twenty-one years from testator's death. It is necessary, then, to inquire what accumulation is required—i.e., by the will—to be so made. In my opinion, for the reasons already stated, the answer must be that the period of accumulation prescribed by the

(1) (1896) 23 R. (Ct. of Sess.), 848.

will begins at the death of the testator and ends at the time when, on the true construction of the will and in the events which have happened, the corpus of the residuary estate becomes distributable. If the order be interpreted thus, the result will be the same. In either case the position is that, by an order of the Supreme Court which is binding on the appellants, the next-of-kin are entitled to receive the income of the residuary estate from 17th May 1909 until the period for distribution of the corpus shall have arrived, and, as I have pointed out above, it was on the assumption that this was so that *Macfarlan* J. proceeded in making the order now appealed from.

It remains to consider whether that order was rightly made. The argument for the appellants is that, as all the grandchildren of the testator now living have attained twenty-one years and the testator's only living child—a daughter—is past the age of child-bearing, the youngest possible grandchild of the testator has now in fact attained the age of twenty-one, and that accordingly the period during which accumulation is directed by the will has come to an end and the time for distribution of the corpus has arrived.

It is true that in administering estates the Court in certain cases acts on the presumption, or on evidence, that a woman can never have children, but this has never been done where the result would be to deprive a living person of a possible interest or to cut down the interest of a living person in the property in question. In the present case the effect of applying the rule so as to accelerate the distribution of the corpus would be to deprive the next-of-kin of the income to which on my reading of the order of *Hood* J. they have been declared to be entitled. In deciding as he did, *Macfarlan* J. followed *In re Hocking*; *Michell* v. *Loe* (1), and *In re Travis*; *Frost* v. *Greatorex* (2); and the decision and observations in those cases seem to me to be directly in point.

In my opinion the appeal fails, and should be dismissed.

HIGGINS J. This is an appeal from an order made by *Macfarlan* J. on an application made under liberty to apply reserved by an order made on originating summons by *Hood* J. (Supreme Court of Victoria).

(1) (1898) 2 Ch., 567.

(2) (1900) 2 Ch., 541.

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Higgins J.

A testator died on 17th May 1888 leaving a widow and three children—one son and two daughters. By his will he gave his residuary estate and the income thereof upon trust to invest "the same" (corpus and income) at interest "until the youngest of my grandchildren shall attain the age of twenty-one years and upon his or her attaining that age to distribute the same . . . amongst all my grandchildren in equal shares share and share alike *per capita* and not *per stirpes*." The youngest grandchild up to the present is M. A. H. Harris, who attained twenty-one on 20th April 1911. It was held by *Hood* J., on 13th May 1912, that the direction for accumulation was void under sec. 36 of the Victorian *Wills Act* (*Thellusson Act*) as to all accumulations required to be made after twenty-one years from the testator's death. Under that section, the direction for accumulation after the twenty-one years is "null and void"; and the income so long as directed to be accumulated contrary to the section, is to "go to and be received by *such persons as would have been entitled thereto if such accumulation had not been directed.*" The twenty-one years from the death had expired on 17th May 1909.

It was also decided by *Hood* J. in his order (clause 3) that by "the youngest of my grandchildren" the will meant to include grandchildren *whenever born*; and (clause 5) that "there is an intestacy as to all the dividends, interest and annual income . . . to arise from and after the expiration of twenty-one years from the testator's death from the corpus . . . required to be accumulated"; and (clause 5 (a)) that "the trustee cannot now properly divide amongst the beneficiaries any part of the corpus of the testator's estate nor any part of the income thereof . . . except the dividends, interest and annual income as to which an intestacy is declared as set out in the answer to question 5."

Whatever was decided by the learned Judge on the originating summons in 1912 is final and binding on the parties to this appeal; and we have to face the position in the light of the order made on the summons, whether right or wrong. But, as in the case of estoppel, we are bound only by the decision as embodied in the formal order, not by the reasons expressed by the Judge (*Re Allsop & Joy's Contract* (1); *R.* v. *Hutchings* (2)). Since that order, the son of the

(1) (1889) 61 L.T., 213.

(2) (1881) 6 Q.B.D., 300.

testator has died; and the only surviving child of the testator is now Mrs. Cox, a lady who has now attained sixty-nine years. In consequence of these changes, three of the grandchildren ask, on this application: "Can and should the trustee now properly distribute any and what part of the corpus of the testator's estate or of the income thereof and to what parties?"

In 1912 the grandchildren did not, and could not as facts then stood, contend that the youngest grandchild had attained twenty-one, and the order of *Hood* J. therefore assumed that that event, the time for distribution, had not been reached; and it declared that there was an intestacy as to the income *to arise* before the time for distribution. But now, as there can be no more grandchildren unless children be born to Mrs. Cox, it is urged by the appellants that the lady is past child-bearing, and that the corpus and income of the residue is now distributable among the grandchildren.

Now, if (as has been assumed in the argument) *Hood* J. actually decided by his order that the next-of-kin are entitled to receive the income until it can be definitively *ascertained* who is the youngest grandchild, and that he or she has attained twenty-one years, I should accept the argument for the respondents, the next-of-kin, as sound. As *Rigby* L.J. said in *In re Travis*; *Frost* v. *Greatorex* (1), "there is no rule of law that it must be assumed that a lady of a certain age will never have children." According to *In re Hocking*; *Michell* v. *Loe* (2), "no legal proposition can be founded on the impossibility of issue." In that case, *Lindley* M.R. said (3):—"If property is given to A in the event of B having no children, can A claim that property before the death of B? My answer is, No, neither at law nor in equity, unless B's possible child is the only person who can deprive A of the property. When that is the case, the Court of Chancery has ordered funds under its control to be paid to A, when satisfied that B, owing to her age, can have no child. Again, if property is given to A in the event of B having a child, the Court has never gone the length of saying that A can be treated in B's lifetime as having no interest in the property." (See also *P*——— v. *N*——— (4).) In *In re White*; *White* v. *Edmond* (5), *Buckley*

(1) (1900) 2 Ch., at p. 549.
(2) (1898) 2 Ch., at p. 572.
(3) (1898) 2 Ch., at p. 571.
(4) (1896) W.N., 175.
(5) (1901) 1 Ch., 570.

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J. followed this line of distinction, and granted an order to transfer trust property as the Court was not thereby depriving any *living* person of a possible interest. In that case, property was given to trustees for a daughter A for life, and thereafter to children of the daughter who shall attain twenty-one. A was married at the age of twenty-two in 1866, and had one son. Her husband died in 1890, and she had not married again. In 1900 A and her son asked that the property be transferred to them; and the order was granted. For no living person was deprived thereby of a possible interest. But in the present case an order to distribute among the grandchildren would deprive the next-of-kin (or their representatives) of their possible right to the income. Therefore, an order to distribute either income or corpus to the grandchildren could not be made, even if the estate were being administered by the Court.

But are the next-of-kin entitled to receive the income until it is *ascertained* that the youngest child has attained twenty-one years? I propose to consider first the meaning of the will, and then the effect of the order. The will fixes the time for distribution among the grandchildren when the youngest has attained twenty-one in fact, not when it has been *ascertained* that the youngest has attained twenty-one, and, *a fortiori*, not when Mrs. Cox dies without issue (if it should be so) and her death supplies conclusive evidence that there will be no more grandchildren to attain twenty-one since Mrs. Harris attained that age. The occurrence of the fact is quite distinct from knowledge or evidence of the occurrence. If a testator give a legacy to a son "when he has reached the North Pole," the son is entitled to the legacy as from the moment that he reaches the North Pole, although it may not be ascertained for many months that he has reached it; and in such a case the executor has to keep the legacy in suspense, pending ascertainment. Here, if the will be regarded apart from the order, the trustee should not at present pay the income either to the grandchildren or to the next-of-kin. The next-of-kin are entitled to the income until the youngest grandchild attains twenty-one; and, if it turn out that another granchild is born, they are entitled to the income until that grandchild attains twenty-one. But if it turn out that no other grandchild is born, the grandchildren will be entitled to corpus and income as from the time that

Mrs. Harris attained twenty-one. [By the grandchildren who will be entitled I mean those who live till the time for distribution, or have died leaving husband or wife or children before that time. The clause in the will which immediately follows the trust for distribution shows plainly that if a grandchild die before the time for distribution and without having been married, neither the grandchild nor his or her representatives are to share in the distribution. So the attainment of twenty-one by the youngest grandchild is not the only thing that prevents the existing grandchildren from having an absolutely vested interest. The death of Mrs. Cox without children would not necessarily make the estate distributable among the existing grandchildren.] Inasmuch as the direction for distribution among the grandchildren is of the whole fund, corpus and income, and as the Act forbids accumulation as from 1909, and as one cannot say what the testator would have directed as to the income from 1909 onwards if the direction to accumulate is to be treated as void, there is an intestacy as to the income as from 1909 onwards until the youngest grandchild attains twenty-one, but no longer (see *Shaw* v. *Rhodes* (1), affirmed *sub nom. Evans* v. *Hellier* (2)). The question remains, who is the youngest grandchild. The fact is not known; and until it be definitively ascertained, the income should be held in suspense.

I quite accept the view stated by the learned Chief Justice, that when a testator directs his property to go in such a course that upon certain contingencies there must be an accumulation beyond twenty-one years, he does direct an accumulation. In other words, a direction to accumulate may be implied as well as express. The cases cited of *Tench* v. *Cheese* (3), &c., are referred to in *Jarman on Wills*, 5th ed., p. 283, under "Implied trust for accumulation." The case of *Tench* v. *Cheese* is a case of such implied trust for accumulation; so is the case of *Macpherson* v. *Stewart* (4); so is the case of *Mathews* v. *Keble* (5); so is the case of *Evans* v. *Hellier* (2) (see s.c. *sub nom. Shaw* v. *Rhodes* (6)). The case of *Weatherall* v. *Thornburgh* (7) shows that there is a gap in the will as from the expiration of

(1) (1836) 1 Myl. & Cr., 135, at p. 159.
(2) (1837) 5 Cl. & Fin., 114.
(3) (1855) 6 DeG. M. & G., 453.
(4) (1858) 28 L.J. Ch., 177.
(5) (1868) L.R. 3 Ch., 691.
(6) (1836) 1 Myl. & C., 135.
(7) (1878) 8 Ch. D., 261.

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twenty-one years from the death, and that there is an intestacy as to the gap. The case of *Bective* v. *Hodgson* (1) shows that if the personal estate be the subject of an executory gift, the income of the personal estate follows the principal as accessory, and must during the twenty-one years be accumulated and added to the principal. But there is no need for any implication here; the direction to accumulate is express—as express as words can make it; and it is null and void as to the time after the twenty-one years. What I venture to say is that until it be ascertained who is the youngest grandchild the trustee is not—so far as the will is concerned—safe in paying over any of the income either to the next-of-kin or to the grandchildren. "It is incumbent upon the trustee to satisfy himself beyond doubt, before he parts with the possession of the property, who are the parties legally and equitably entitled to it" (*Lewin on Trusts*, 10th ed., p. 388). Probably, however, the trustee, if he do not wish to take the responsibility, could pay the income as it reaches him into Court, under the *Trusts Act* 1915.

Now, to examine the effect of the order of *Hood* J. Clause 5 clearly declares an intestacy as to all income to arise from the expiration of twenty-one years; but it does not say till when. It states the *terminus a quo*, but not the *terminus ad quem*. It cannot mean for ever. It has been assumed at the Bar that the clause means until it has been definitively *ascertained* that there can be no more grandchildren, that the youngest grandchild has attained twenty-one; but this assumption is not justified by the words of the order itself. It is our duty to construe the words of the order so as to be consistent with the words of the will, so far as the words of the order permit us; and there is nothing that I can find in clause 5 to prevent us from treating the intestacy declared as limited, in accordance with the will, to the day that the youngest grandchild *in fact* attained or shall attain twenty-one. Read in that light, the order is a general statement of the law applicable to the case, that from the expiration of twenty-one years from the death, and because of the Act, there is an intestacy as to the income until the youngest grandchild has attained twenty-one. The order, so far, leaves the question quite open—when did or shall the youngest grandchild attain twenty-one?

(1) (1864) 10 H.L.C., 656.

But clause 5 (a) has to be considered: "The trustee cannot now properly divide amongst the beneficiaries any part of the corpus of the testator's estate nor any part of the income thereof . . . except the dividends, interest and annual income as to which an intestacy is declared as set out in the answer to question 5." It will be noticed that this clause 5 (a) is negative in form, and that it does not say that any part of the income can "now" be divided; and that even if a positive permission to divide is to be implied from the words beginning with "except," it is confined to income as to which there is declared intestacy in clause 5. But, as has been shown, clause 5 merely declares an intestacy as to income from 1909 till the youngest grandchild attains twenty-one in fact; it does not declare that there is an intestacy as to the current income unless the youngest grandchild has not attained twenty-one. We are again thrown back on the fact which remains unknown. So the order does not contain anything to deprive the grandchildren of their rights if it turn out—as in all human probability it will turn out—that Mrs. Harris is the youngest grandchild of the testator.

It is not stated in the affidavits, but we are informed by counsel for the trustee, that the trustee has been distributing the income accrued since Mrs. Harris attained twenty-one among the next-of-kin. That would be unfortunate, but we have to act in accordance with the law, and do justice to the grandchildren. It may be that the trustee can get some relief, if necessary, under the *Trusts Act* 1915 (see secs. 66, 67 and 77).

For simplicity, I have not yet mentioned the annuities which are charged on the income, in priority to the grandchildren. It appears from the affidavit that there are two annuities still subsisting—one of £350 per annum to Mrs. Cox, and one of £450 in all to the daughters of the testator's son. The trustee has express power to appropriate from the residuary estate sufficient to answer these annuities, leaving the rest of the estate available for distribution at the proper time. The persistence of the annuities does not affect the present question.

Finally, as to the form of the order. The application is not merely for an answer to a specific question, but for such further or other directions as may seem fit. But the learned Judge (*Macfarlan* J.) has answered the specific question "Can and should the trustee

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now properly distribute any and what part of the corpus of the testator's estate or of the income thereof and to what parties? His answer is "No, save as already decided by the said order of his Honor Mr. Justice *Hood*." In my view of the construction of the will and of the order, this answer is misleading, if it be taken as meaning that the trustee may divide the income among the next-of-kin before it is *known* that the youngest grandchild in fact has in fact attained twenty-one. The proper answer, as a matter of law, is simply No. The trustee should not distribute so long as the contingency of another grandchild being born still remains legally possible. But, as a matter of common sense, it would be better for the next-of-kin to agree to let the corpus and income be paid (subject to the two annuities) to the grandchildren on receiving a satisfactory security or undertaking for a refund in case of another grandchild being born. I have endeavoured to find authority for making an order to this effect; but in view of the words of *Lindley* M.R. in *In re Hocking*; *Michell* v. *Loe* (1), and of the fact that the next-of-kin have a distinct right to the income if the contingency happen, and of the fact that the estate is not being administered by the Court, I should not feel justified in making such an order without the consent of the next-of-kin.

In my opinion, the order should be varied by striking out the words after "No." The order as to the costs below may stand, but the applicants should bear the costs of the appeal. The ground on which they appealed has failed.

STARKE J. The testator, Frederic Perkins Stevens, empowered his trustee to appropriate a sum which should be a sufficient fund for answering certain annuities; and, after such appropriation had liberated the residue of his estate from the trust for payment of the annuities, he directed his trustee to stand possessed of the corpus of his residuary estate and of the residue of the dividends, interest and annual income to arise therefrom and all other moneys for the time being forming part of his estate upon trust to invest the same at interest until the youngest of his grandchildren should attain twenty-one years, and, upon his or her attaining that age, to distribute the

(1) (1898) 2 Ch., 567.

same, and also the said appropriated fund, subject as aforesaid, amongst all his grandchildren in equal shares, share and share alike, *per capita* and not *per stirpes*.

A decision was given in May 1912 by the Supreme Court of Victoria that the references in this clause to the " youngest of the testator's grandchildren " and to " all the testator's grandchildren " include grandchildren whenever born (*In re Stevens*; *Trustees, Executors and Agency Co.* v. *Teague* (1)), and this construction of the will is final and conclusive as between the parties to the proceedings now on appeal to this Court. It follows from the decision that the existing grandchildren of the testator are not entitled to a division of the trust fund to the exclusion of any other grandchildren of his who may hereafter be born (*Mainwaring* v. *Beevor* (2)). It also follows, in my opinion, that the interest of the existing grandchildren in the residuary estate and in the residue of the dividends and annual income directed to be invested until the youngest of the testator's grandchildren shall attain twenty-one is only " prevented from being an absolute interest by the possibility " of other grandchildren " coming into *esse*." In this possibility, therefore, " a direction to accumulate is . . . implied " (*M'Donald* v. *Bryce* (3)). Thus, adapting Lord *Salvesen's* observation in *Mitchell's Trustees* v. *Fraser* (4) upon the case of *Logan's Trustees* v. *Logan* (5), there is no direction, in the strict sense, in the testator's will, to accumulate income beyond twenty-one years from the testator's death for the youngest grandchild who might attain twenty-one years within that period, yet, as that event might not happen within twenty-one years, there is necessarily implied in the will a direction to accumulate in such case, beyond the statutory period fixed by the *Thellusson Act* (*Wills Act* 1915 (Vict.), sec. 36). If that possibility is not excluded by the events which happen within the period of twenty-one years, then there must be an accumulation beyond the period of twenty-one years, and that by force of the testator's will (*Tench* v. *Cheese* (6); *Bective* v. *Hodgson* (7)). And the Supreme Court of Victoria, in

(1) (1912) V.L.R., 194; 33 A.L.T., 233.
(2) (1849) 8 Ha., 44.
(3) (1838) 2 Keen, 276, at p. 284.
(4) (1915) S.C., 350.
(5) (1896) 23 R. (Ct. of Sess.), 848.
(6) (1855) 6 DeG. M. & G., 453.
(7) (1864) 10 H.L.C., 656.

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the case already mentioned, decided that the direction contained in the residuary clause was "void as to all accumulation required to be made from and after the expiration of twenty-one years from the testator's death." Then the Court went on to declare that there was "an intestacy as to all the dividends, interest and annual income . . . to arise from and after the expiration of twenty-one years from the testator's death from the corpus included in the . . . residuary clause of the will, and by such clause required to be accumulated as therein mentioned." Now, this declaration is also binding upon the parties to the present proceedings, but it is not well framed, nor is it easy to understand what was intended by the words "and by such clause required to be accumulated as therein mentioned." I agree with my brother *Higgins* that the declaration does not mark out the period or extent of the intestacy: it states the beginning of that period, but not the end of it. And it really refers us back to the will. The effect of the declaration, however, is that an intestacy subsists from the time when accumulation is stopped by the *Thellusson Act* to the time when accumulation would cease under the directions of the testator's will. Or, in other words, the declaration involves this construction of the will, namely, that "the words of gift clearly denote that the trust" for the grandchildren "is not to arise until the accumulation has ceased as directed." "The consequence is, that there is an hiatus . . . between the period when the accumulation ceases by law, and the period when the accumulation is directed to cease, and there is nothing whatever in the will that catches 'the income' during that interval of time, because the only words relied on for that purpose are words that describe the same thing, namely, the accumulated fund" (*Green* v. *Gascoyne* (1); *Coombe* v. *Hughes* (2)).

What, then, is the period of accumulation directed or required by this will, in the events which have happened? The youngest living grandchild attained the age of twenty-one years in April 1911, but there is still living a married daughter of the testator, some sixty-nine years of age, who has never had a child. It is almost, if not quite, impossible in point of fact that this daughter will now ever have a

(1) (1865) 34 L.J. Ch., 268, at p. 273.
(2) (1865) 34 Beav., 127; 2 DeG. J. & S., 657

child. And, as already pointed out, "the right of the living grandchildren is only prevented from being an absolute interest," on the construction given to this will by the Supreme Court, by the possibility of a child of this daughter "coming into *esse*." "It is only with reference to this possibility that a direction to accumulate is implied." "If there were no such possibility, there would . . . be no implication of a direction to accumulate." Consequently, in my opinion, the intestacy results from the time when accumulation is stopped by the *Thellusson Act*, until the time when this possibility of issue of the testator's daughter can, in point of law, be excluded. Reference was made to the cases in which the Courts have, upon proof that a woman was past child-bearing, ordered as a matter of administration that funds or property be paid over or transferred to a party whose interest in the funds or the property is not absolute. But the interest ignored, so to speak, in this type of case, was that of the possible issue of the woman past child-bearing. The practice has never been allowed to interfere with any subsisting right or interest, or with the chance of any right or interest arising in any other person. The cases are collected in *Daniell's Chancery Practice*, 7th ed., vol. II., p. 1492, and *Seton on Decrees*, 7th ed., vol. II., p. 1591; and see *In re Hocking*; *Michell* v. *Loe* (1); *In re Travis*; *Frost* v. *Greatorex* (2).

The judgment below ought, in my opinion, to be affirmed, and the appeal dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants, *Hedderwick, Fookes & Alston.*

Solicitors for the respondents, *Snowball & Kaufmann*; *H. H. Church.*

B.L.

(1) (1898) 2 Ch., 567.

(2) (1900) 2 Ch., 541.