[HIGH COURT OF AUSTRALIA.]

DAVIES . . . . . APPELLANT;
DEFENDANT,

AND

THE PERPETUAL TRUSTEES EXECUTORS AND AGENCY COMPANY OF TASMANIA LIMITED AND ANOTHER . . . RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1935.

MELBOURNE, *May* 2, 3.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Will—Construction—Gift of income for "maintenance education and benefit" of daughter until she attain twenty-one—Gift of income to daughter for life on attaining majority—Balance of income accumulated during daughter's minority—Daughter entitled thereto.

The testator directed his trustee to apply the income from a fund for the "maintenance education and benefit" of his daughter until she should attain twenty-one, and thereafter to pay her the income for life, with a gift over of the capital after her death. The trustees applied the income for the maintenance, education and benefit of the daughter until she attained twenty-one, and at that time had an accumulated balance of interest in their hands.

Held that the daughter was entitled to the accumulated balance of interest which the trustees had received during her minority.

Decision of the Supreme Court of Tasmania (*Crisp* J.) reversed.

APPEAL from the Supreme Court of Tasmania.

By his will the testator, Charles Reginald Davies, appointed the Perpetual Trustees Executors and Agency Co. of Tasmania Ltd. as trustee and executor of his estate, and after bequeathing certain

articles of personal estate gave and devised all his real estate and the residue of his personal estate to the company upon trust to sell and to hold the proceeds upon trust in the first place to pay his funeral and testamentary expenses and a legacy of £10. The testator then directed the company to divide the balance of the net proceeds of sale into two equal parts which he called "the first part" and "the second part." He directed the first part to be invested and the income therefrom to be paid to his widow for life, and after her death he directed that the first part should fall into and form part of the second part. He then directed the company to invest the second part "and to pay and apply the interest or income to be from time to time received in respect thereof to or for the maintenance education and benefit" of his daughter, Patricia Sarah Davies, "until she shall attain the age of twenty-one years with power to my trustees at their absolute discretion to pay the said interest or income" to his widow "to be applied by her as last aforesaid without liability to account and from and after the date on which my said daughter shall attain the age of twenty-one years I direct the company to pay the income of the second part to my daughter the said Patricia Sarah Davies for and during the term of her life," with a disposition over of the second part after her death.

The testator died on 14th January 1925 leaving him surviving his widow, Edith Davies, and his daughter, Patricia Sarah Davies, who attained the age of twenty-one on 13th January 1935.

The company administered the testator's estate as directed by him, and from time to time during the minority of Patricia Sarah Davies applied for her maintenance, education and benefit portion of the interest or income of the second part in the manner directed by the testator, and accumulated the unexpended interest or income arising from the second part during the minority of Patricia Sarah Davies, such accumulations amounting with interest to the sum of £2,597 6s.

The company took out an originating summons for the purpose of ascertaining whether Patricia Sarah Davies was entitled to the accumulations of the unapplied income of "the second part" of the testator's estate. Patricia Sarah Davies was joined as a defendant and the summons was by order served upon Cecil Bertram

H. C. OF A. 1935.

DAVIES v. PERPETUAL TRUSTEES EXECUTORS AND AGENCY CO. OF TASMANIA LTD.

Davies as representing persons entitled to benefit under the trusts of the will upon the death of the defendant. The summons was heard by *Crisp* J. who decided that Patricia Sarah Davies had only the right to be maintained until she was twenty-one, and that she was not entitled to the accumulated income which, he held, followed the capital fund.

From this decision Patricia Sarah Davies now appealed to the High Court.

Latham K.C. (with him *Clarke*), for the appellant. The whole interest or income from the second part was to be applied for the maintenance, education and benefit of the appellant. No discretion is left to the trustees. It is not a question, as the learned Judge of first instance considered, of whether the appellant's interest was vested. *Crisp* J. proceeded on the assumption that this was a discretionary power to apply the whole or part of this sum towards the maintenance, education and benefit of the appellant. "Benefit" is the widest word that can be used to describe the testator's intention. It is a gift upon trust to pay the income to the appellant (*Jarman* on *Wills*, 7th ed. (1930), vol. II., p. 860; *Hanson* v. *Graham* (1); *Williams* v. *Papworth* (2)). *Crisp* J. was wrong, first in directing his mind to the question of vesting, and secondly in deciding the case on the assumption that this was a provision in which the trustees had a discretion to apply the whole or part of the income for the maintenance of the appellant. It is a direction, not a power or authority.

Smith, for the trustee company.

Baker, for the respondent Cecil Bertram Davies. *In re Humphreys*; *Humphreys* v. *Levett* (3) is distinguishable. In that case there was no reference to maintenance or benefit. *Hanson* v. *Graham* (4) is also distinguishable. There a lump sum had been lifted out of the residue. The gift is limited to particular purposes for the benefit of the infant. It was the duty of the trustees, in collaboration with

(1) (1801) 6 Ves. Jun. 239, at p. 249; 31 E.R. 1030, at p. 1035.
(2) (1900) A.C. 563, at p. 567.
(3) (1893) 3 Ch. 1.
(4) (1801) 6 Ves. Jun. 239; 31 E.R. 1030.

her mother, to determine what was reasonably necessary for the needs of the infant, and then the mother was at liberty to expend the money as she should think fit (*M'Donald* v. *Bryce* (1); *In re Peek's Trusts* (2); *Barber* v. *Barber* (3); *Conveyancing and Law of Property Act* (47 Vict. No. 19), sec. 47).

THE COURT delivered the following judgment:—

The question which came before *Crisp* J. and is now before us on appeal is whether the appellant is entitled to the accumulations of the unapplied income of what is called in the will under consideration "the second part" of the testator's estate. These accumulations represent so much of the income of "the second part" as was not applied for the appellant's maintenance, education and benefit. The testator divided the balance of the net proceeds of his estate into two parts. The trusts relating to "the first part" do not concern us. The relevant trusts as to "the second part" are a direction to invest it and to pay and apply the interest or income therefrom "to or for the maintenance education and benefit" of the appellant during her minority "with power to the trustees at their absolute discretion to pay the said interest or income to my wife to be applied by her as last aforesaid without liability to account." Upon the appellant attaining her majority the trustees were directed to pay the income of "the second part" to her for and during the term of her life. No question arises with regard to the vesting of the corpus or principal of "the second part." Therefore we lay out of consideration the cases referred to in the judgment of the learned primary Judge. And sec. 47 of the *Conveyancing and Law of Property Act* (47 Vict. No. 19) does not apply, because a contrary intention is expressed in the will. No rule of law applies. It is merely a question of the intention of the testator which must be gathered from the language of the will. His intention was to make an absolute gift to the appellant throughout her life of the whole of the income of "the second part." During her minority that income was to be applied for her benefit by the trustees or by her mother. "The word 'applied' does not import

(1) (1838) 2 Keen 517; 48 E.R. 726.
(2) (1873) L.R. 16 Eq. 221, at pp. 224, 225.
(3) (1838) 3 My. & Cr. 688; 40 E.R. 1091.

H. C. OF A. 1935.

DAVIES v. PERPETUAL TRUSTEES EXECUTORS AND AGENCY CO. OF TASMANIA LTD.

Rich J.
Starke J.
Dixon J.
Evatt J.
McTiernan J.

a power of selection: it simply means 'devoted to' or 'employed for the special purpose of.'" And the words 'maintenance, education and benefit' are "equivalent to 'for the benefit of'" (*Williams* v. *Papworth* (1)). All that is left to the trustees or her mother is to determine in what manner the income may be best employed. There is no indication in the will that any unapplied part of the income should be accessory to the capital of "the second part." What is given is not so much of the interest and income as shall be necessary for maintenance, but the whole interest and income. The income became, as it fell due, the absolute property of the appellant. For these reasons we think the appeal should be allowed; the order made by the learned Judge should be varied by substituting in lieu of the declaration in it a declaration that the appellant is entitled to the accumulations in question, and that the trustees should pay them to her. The costs of all parties to this appeal should be allowed as between solicitor and client and paid out of the accumulations.

Appeal allowed. The order made by the Supreme Court varied by substituting for the declaratory portion thereof a declaration that the appellant is entitled to the moneys in question and an order that the respondent company as such trustee do pay the same to the appellant. The costs of all parties to this appeal to be allowed and taxed as between solicitor and client and be paid out of the accumulation of income.

Solicitors for the appellant, *Murdoch, Cuthbert & Clarke.*

Solicitors for the respondent company, *Dobson, Mitchell & Allport.*

Solicitors for Cecil Bertram Davies, *Finlay, Watchorn, Baker & Turner.*

H. D. W.

(1) (1900) A.C., at p. 567.