Appl
Annandale,
Re [1986] 1
QdR 353

[HIGH COURT OF AUSTRALIA.]

THE PERPETUAL TRUSTEE COMPANY (LIMITED) . . . . . } APPELLANT;
PLAINTIFF,

AND

TINDAL AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

THE PUBLIC TRUSTEE AND ANOTHER . APPELLANTS;
DEFENDANTS,

AND

THE PERPETUAL TRUSTEE COMPANY (LIMITED) AND OTHERS . . . } RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1940.

SYDNEY, *April* 5, 8; *June* 28.

Latham C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Insurance—Life—Policy effected by husband on his life—Expressed to be for benefit of named wife—Gift over to named son in event of wife predeceasing husband—Wife and son predeceasing husband—Son's absolute interest—Failure of trusts—Power of appointment reserved by assured—Non-exercise of power—Proceeds of policy—Distribution—Life, Fire and Marine Insurance Act 1902 (*N.S.W.*) (*No.* 49 *of* 1902), *secs.* 8-10.

High Court—Appeal—Division of opinion—Majority for allowing appeal but not for any particular order—Judiciary Act 1903-1939 (*No.* 6 *of* 1903—*No.* 43 *of* 1939), *sec.* 23 (2).

Secs. 8-10 of the *Life, Fire and Marine Insurance Act* 1902 (N.S.W.) do not contain anything which makes survival of the assured a condition attaching to any interest given to a wife, or husband, or children by a policy effected under the legislation.

A life-assurance policy described the persons to whom the policy moneys were payable as "the wife of the person assured if she shall survive the person assured—if she shall predecease the person assured—his son, B." The wife predeceased the assured. The son predeceased both the wife and the assured

Held that the interest of B in the policy moneys was not contingent on his surviving his father or his mother and became absolute on the death of his mother: therefore the policy moneys were payable to the personal representative of B.

Cousins v. *Sun Life Assurance Society*, (1933) Ch. 126, followed.

Decision of the Supreme Court of New South Wales (*Nicholas* C.J. in Eq.), on this point, affirmed.

A policy of assurance effected by a husband on his life provided that "the amount of assurance . . . shall be for the benefit of the wife and children of the assured . . . subject to the provisions of the *Life, Fire and Marine Insurance Act* 1902 (N.S.W.), and shall be payable as follows, namely:—(*a*) to the beneficiary" A "(wife of the assured should she become his widow absolutely . . . (*b*) failing which to" B "son of the assured (if he survive and attain the age of twenty-one) or to such other children of the assured as the assured may by way of substitution appoint." Four of the children of the marriage, B, C, D and E, were alive at the date of the policy. The wife and all the children except E predeceased the assured. B attained the age of twenty-one years but predeceased the wife and the assured, who did not appoint any of his other children in substitution for B.

Held:—

(1) By *Latham* C.J., *Dixon* and *Evatt* JJ. (*Rich* and *Starke* JJ. dissenting) that the power of appointment set forth in the policy was in the nature of a trust; and by *McTiernan* J., that the policy created an executed trust for the benefit of the wife, if she survived the assured: if not, for the benefit of his children, including all children living at the date of the policy. No appointment having been made under clause *b*, the interest of none of the children was divested.

(2) (*a*) By *Latham* C.J., *Evatt* and *McTiernan* JJ., that the proceeds of the policy should be distributed between E and the personal representatives of C and D. (*b*) By *Rich* J., that the proceeds of the policy should be distributed between E and the personal representatives of the other children of the assured. (*c*) By *Starke* J. (in a judgment which in the circumstances appearing hereunder was withdrawn), that the proceeds of the policy were payable to the personal representative of the assured. (*d*) By *Dixon* J., that E was entitled to the whole of the proceeds of the policy.

Decision of the Supreme Court of New South Wales (*Nicholas* C.J in Eq.), on this point, reversed.

Upon an appeal to the High Court there was a majority in favour of allowing the appeal but there was not a majority in favour of all the terms of any particular order to be substituted for that of the Supreme Court. The difficulty which arose owing to doubts as to the applicability of sec. 23 (2) of the *Judiciary Act* 1903-1939 was solved by one of the justices withdrawing his judgment and thus leaving a majority of the court in favour of a particular order.

H. C. OF A. 1940.

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

APPEAL from the Supreme Court of New South Wales.

On 3rd May 1916 Charles Frederick Tindal of "Bona Vista," Armidale, grazier, effected a life policy on his own life with the National Mutual Life Association of Australasia Ltd. for the sum of five thousand pounds payable at death. The policy provided, *inter alia*, that if the annual premiums were duly paid "the association shall pay the wife of the person assured if she shall survive the person assured—if she shall predecease the person assured—his son Charles Henry Tindal . . . the sum of five thousand pounds or such other sum as shall" be payable at the death of the assured. The bonuses payable at the date of his death amounted to the sum of two thousand nine hundred and ten pounds.

He also effected, on 1st June 1916, a life policy on his own life with the Mutual Life and Citizens' Assurance Co. Ltd., the amount of the assurance being the sum of five thousand pounds payable at death. So far as material the policy provided as follows:—"Beneficiary. The amount of assurance and all bonuses and additions thereto shall be for the benefit of the wife and children of the assured in terms of the proposal and declaration . . . and subject to the provisions of the *Life, Fire and Marine Insurance Act* 1902 (N.S.W.) and shall be payable as follows, namely:—(*a*) to the beneficiary Caroline Edith Tindal (wife of the assured) should she become his widow absolutely . . . (*b*) failing which to Charles Henry Tindal son of the assured (if he survive and attain the age of twenty-one) or to such other children of the assured as the assured may by way of substitution appoint." At the date of the death of the assured the bonuses payable in respect of this policy amounted to the sum of two thousand five hundred and eighty-two pounds eighteen shillings.

The assured died on 8th October 1938, his wife having predeceased him. There were six children of the marriage one only of whom, namely, Arthur Willoughby Tindal, survived the assured, although, in addition, three other children, namely, Archibald Arthur Tindal, Louis Nicholas Lindsay Tindal and Charles Henry Tindal, were living at the date the two policies mentioned above were respectively effected, the son last mentioned having attained the age of twenty-one years.

The assured did not in respect of the secondly mentioned policy either by will or otherwise appoint any of his other children in substitution for Charles Henry Tindal, who predeceased him.

Perpetual Trustee Co. (Ltd.), to which company probate of the assured's will and codicils had been granted, took out an originating summons for the determination by the Supreme Court, in its equitable jurisdiction, of the question: Who, in the events which have happened, was entitled to the proceeds of the two several policies?

The defendants to the summons were Arthur Willoughby Tindal, the surviving child of the assured; Charles Sholto Tindal, a representative and beneficiary of the estate of Charles Henry Tindal, deceased; the Public Trustee, as administrator *cum testamento annexo* of the estate of Louis Nicholas Lindsay Tindal, deceased; and Hilda Dorothy Tindal, sole beneficiary under and executrix of the will of her husband Archibald Arthur Tindal, deceased.

Nicholas C.J. in Eq. held that the proceeds of the policy effected with the National Mutual Life Association of Australasia Ltd. belonged to the estate of Charles Henry Tindal, deceased, and that the proceeds of the policy effected with the Mutual Life and Citizens' Assurance Co. Ltd. belonged to Arthur Willoughby Tindal.

From that decision the Perpetual Trustee Co. (Ltd.) appealed, and the Public Trustee and Hilda Dorothy Tindal cross-appealed, to the High Court.

The relevant provisions of the *Life, Fire and Marine Insurance Act* 1902 (N.S.W.) appear in the judgment of *Latham* C.J. hereunder.

Wallace, for the appellant. The intention of the legislature as expressed in secs. 8, 9 and 10 of the *Life, Fire and Marine Insurance Act* 1902 (N.S.W.) is that only surviving members of an assured person's family should benefit. The object of sec. 8 is that the wife and children shall benefit personally and the strong implication is that they shall not receive any benefits unless they survive to receive them. The legislature did not intend that a benefit should accrue to the estate of a child who predeceases the assured. Having regard to sec. 10 the legislature must have intended that the family to be benefited means the members of the family group who are alive at the relevant period of distribution, that is, when the assured person

H. C. OF A. 1940.

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

dies (*Robb* v. *Watson* (1)). As the assured's wife and son Charles Henry Tindal predeceased him there is a resulting trust to the assured's estate (*In re Collier* (2)). *In re Browne's Policy* ; *Browne v. Browne* (3) seems to be the only case in which the court has decided in favour of a second wife : See *Lodge* v. *Dowie* (4) and *In re Best* (5). In *Cousins* v. *Sun Life Assurance Society* (6) the wife was designated by name. That case is distinguishable because the words used in the statutory provision there under consideration are different from the words used in sec. 10 of the *Life, Fire and Marine Insurance Act* 1902. Also, as regards the policy effected with the Mutual Life and Citizens' Assurance Co. Ltd. there is a resulting trust and the moneys fall back in the estate of the assured. The donees of the benefit were simply two people contingently with a superimposed power of appointment. The two people did not fulfil the condition, and the power of appointment was not exercised, therefore there is a resulting trust. The important words in this policy are " shall be payable as follows." The word " survive " means " survive the time when the moneys shall be payable." Alternatively, it means " survive the widow." The power contained in the policy is not a power in the nature of a trust, nor is there any indication of an intention to create a trust. The true construction appears in *Re Reynolds* ; *Reynolds* v. *Commissioner of Taxes* (*Vict.*) (7). That construction should be preferred to the reasoning given by the Court of Appeal in *Cousins* v. *Sun Life Assurance Society* (6).

Hooton, for the respondent, Charles Sholto Tindal. The policy effected with the National Mutual Life Association of Australasia Ltd. is clearly a policy within the scope of the statute although it does not in so many words purport to have been issued according to or in pursuance of the statute (*Mutual Life Insurance Co. of New York* v. *Pechotsch* (8) ; *In re Fleetwood's Policy* (9) and *In re Gladitz* ; *Guaranty Executor and Trustee Co. Ltd.* v. *Gladitz* (10)).

(1) (1910) 1 I.R. 243.
(2) (1930) 2 Ch. 37.
(3) (1903) 1 Ch. 188.
(4) (1935) 36 S.R. (N.S.W.) 52 ; 53 W.N. (N.S.W.) 47.
(5) (1935) 36 S.R. (N.S.W.) 58 ; 53 W.N. (N.S.W.) 44.
(6) (1933) Ch. 126.
(7) (1931) V.L.R. 254, at p. 262.
(8) (1905) 2 C.L.R. 823.
(9) (1926) Ch. 48.
(10) (1937) Ch. 588.

The effect of sec. 9 of the *Life, Fire and Marine Insurance Act* 1902 is that a trust is created immediately upon the policy being effected; the purposes of the trust are to be ascertained primarily from the terms of the policy, including any document incorporated therein: See sec. 10. The assured intended that the benefits under this policy should go to the named son, or his estate, provided only that the assured was not survived by his wife. The words of sec. 10 negative the implication that even a named child is unable to take unless he survives the assured. The policy expressly provides that the wife was to take only if she survived the assured. The position under this policy is covered by *Cousins* v. *Sun Life Assurance Society* (1). Upon the wife predeceasing the assured the interest in the policy moneys given to Charles Henry Tindal became absolute and being transmissible passed to his estate.

Henry, for the respondents, the Public Trustee and Hilda Dorothy Tindal. These respondents are not concerned in the policy effected with the National Mutual Life Association of Australasia Ltd. except as being interested in residue. As to the other policy, in the events which have happened the beneficiaries thereunder are the estate of Archibald Arthur Tindal, the estate of Louis Nicholas Lindsay Tindal, and Arthur Willoughby Tindal. They take by reason of the failure of the prior gift, firstly, to the widow, secondly, to Charles Henry Tindal; and by reason of the failure of the assured to appoint this fund away from the other children. The condition of survivorship, so far as the children are concerned, is not present in the trusts declared under the policy. The general law and the default provisions of sec. 10 are similar in effect. As soon as the policy was effected there were trusts created, firstly, in favour of the wife, an event which failed; secondly, in favour of Charles Henry Tindal, which also failed; and, thirdly, in favour of the other children or as he might appoint, so that the children at that time took an interest which was liable to be defeated by any one of three events. The power which occurred under the policy or under the Act was a power which was reserved in the assured himself. That power was exercisable by him by deed at any time, or

(1) (1933) Ch. 126.

H. C. OF A. 1940.

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

by will, which distinguishes this case from such cases as *Re Isaac Himmelhoch (Deceased)* (1) and *In re Weekes' Settlement* (2). It was not a mere power, but was a power in the nature of a trust. The court did not hold in *Mutual Life Insurance Co. of New York* v. *Pechotsch* (3) that the surrender moneys were to be handed over regardless of cost: See also *Gibb* v. *Australian Mutual Provident Society* (4). Following the failure to appoint the usual consequences apply—whether under the general law or under sec. 10—all the children take in default of appointment and in this case it is unnecessary to consider whether *In re Hughes*; *Hughes* v. *Footner* (5) is right, following *Farwell* on *Powers*, 3rd ed. (1916), p. 528, which applies *Burrough* v. *Philcox* (6) as an inflexible rule, or whether *In re Combe*; *Combe* v. *Combe* (7) and *In re Weekes' Settlement* (2) are correct statements of the law. As a matter of construction the assured intended his other children to take, reserving to himself a power of appointment; he reserved to himself a power of substitution amongst his other children: See *In re Llewellyn's Settlement*; *Official Solicitor* v. *Evans* (8). That power was personal to the assured; it cannot be exercised by the court (*Longmore* v. *Broom* (9)).

Kitto, for the respondent, Arthur Willoughby Tindal. This respondent adopts what was addressed to the court by Mr. *Henry* to show that the power given by the policy was in the nature of a trust; this matter is also discussed in *Underhill* on the *Law of Trusts and Trustees*, 9th ed. (1939), pp. 17, 25. Failing his wife the assured was concerned to provide only for his children. The words "other children" do not mean all the other children living at the date of the policy; they mean the children other than Charles Henry Tindal who might survive the assured, or, alternatively, who might survive the widow. It is not a class sufficiently extensive to include all the assured's children whether they did or did not survive. The word "substitution" expresses the intention of the assured to

(1) (1928) 29 S.R. (N.S.W.) 90; 45 W.N. (N.S.W.) 173.
(2) (1897) 1 Ch. 289.
(3) (1905) 2 C.L.R. 823.
(4) (1922) 23 S.R. (N.S.W.) 19; 39 W.N. (N.S.W.) 235.
(5) (1921) 2 Ch. 208.
(6) (1840) 5 My. & Cr. 72 [41 E.R. 298].
(7) (1925) Ch. 210.
(8) (1921) 2 Ch. 281.
(9) (1802) 7 Ves. Jun. 124 [32 E.R. 51].

provide that members of his family would get a real benefit in the sense that they would be the actual recipients of the money, that is, that the policy moneys should go to such of his children who should survive him and be there to receive such moneys (*In re Llewellyn's Settlement* (1); *In re Browne's Policy* (2)). The judgments in *Cousins* v. *Sun Life Assurance Society* (3) emphasize that the gift in that case was a gift to a *persona designata*. But where there is a class gift a different question arises. If on the true construction of the class itself it is contingent then there is not any need to import a condition of surviving the assured; the condition may be the very thing on which the class is constituted. This respondent is the only person who answers the description contained in the policy. *In re Browne's Policy* (4) and *In re Weekes' Settlement* (5) are the opposites of this case. It appears on the face of the policy that the assured was providing for the personal enjoyment of his children. Sec. 10 is entirely neutral on this matter, or, alternatively, it applies only if the policy gives a mere power which has not been exercised.

Wallace, in reply. The policy effected with the Mutual Life and Citizens' Assurance Co. Ltd. does not fall within the words used in sec. 10. The distinction which can arise is shown in *In re Willis*; *Shaw* v. *Willis* (6). In respect of the other policy, see *MacGillivray* on *Insurance Law*, 2nd ed. (1937), p. 714.

Cur. adv. vult.

June 28

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a decretal order made by the Supreme Court of New South Wales in Equity (*Nicholas* C.J. in Eq.) determining questions affecting interests under two life-assurance policies to which the *Life, Fire and Marine Insurance Act* 1902 of New South Wales (see secs. 8, 9, and 10) applies. The policies were effected in May and June, 1916, by the late Charles Frederick Tindal for the benefit of his wife and children in the manner stated in the policies. At that time his wife was alive and

(1) (1921) 2 Ch. 287.
(2) (1903) 1 Ch., at p. 190.
(3) (1933) Ch. 126.
(4) (1903) 1 Ch. 188.
(5) (1897) 1 Ch. 289.
(6) (1921) 1 Ch. 44, at p. 46.

H. C. OF A. 1940.

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

Latham C.J.

he had four children. One of these children died in September 1916, and another in 1918. A son, Charles Henry Tindal, died in May 1926. The wife of the assured died in December 1926. The assured died in 1938. One child, Arthur Willoughby Tindal, is still alive. Charles Henry Tindal had attained the age of twenty-one years before 1916.

The *Life, Fire and Marine Insurance Act* 1902, secs. 8 and 9, correspond to provisions which are contained in the English *Married Women's Property Act* 1882, sec. 11. Sec. 8 provides as follows:— "A policy of insurance by any man on his own life, effected before or after the passing of this Act, and expressed to be for the benefit of his wife or of his children, or of his wife and children, or any of them, and a policy of insurance effected by any woman on her own life, and expressed to be for the benefit of her husband or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects named therein, and the moneys payable under any such policy shall not, as long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts" with a proviso which is immaterial in the present case. By virtue of this section a provision which would otherwise be only contractual in character may take effect as a declaration of trust, though no such declaration is otherwise made by the husband or wife who takes out the policy: See *Cleaver* v. *Mutual Reserve Fund Life Association* (1). Sec. 9 enables the assured to appoint a trustee of the moneys payable under the policy.

The first policy, issued by the National Mutual Life Association of Australasia Ltd., provides that if the annual premiums are duly paid the association "shall pay the wife of the person assured if she shall survive the person assured—if she shall predecease the person assured—his son, Charles Henry Tindal, within one calendar month after the death of the person assured on this policy being delivered up duly discharged the sum of five thousand pounds or such other sum as shall then be payable hereunder."

The wife of the assured did not survive the person assured and therefore she did not take any interest under the policy. As she predeceased the assured person, the condition upon which Charles

(1) (1892) 1 Q.B. 147, at pp. 151, 152.

Henry Tindal took an interest was satisfied so far as the terms of the policy were concerned. *Nicholas* C.J. in Eq. held that the declaration of trust in favour of the son Charles Henry Tindal became absolute on the death of the testator's wife in the lifetime of the testator.

It is argued for the appellant that the son's interest was contingent upon him surviving the assured. The only condition to which his interest is expressed to be subject is that the assured's wife shall predecease the assured. That condition was fulfilled and, on the words of the policy alone, it is impossible to introduce a further condition, namely, that the son shall survive his father.

But it is further argued that the declaration of trust became a declaration of trust only by virtue of the statute and that the effect of sec. 8 is that such a trust can be effective only in favour of a person who survives the assured. A strict application of the suggested rule would bring about the result that no declaration in a policy (though expressed to be for the benefit of a wife and children or of a husband and children) could operate as a trust under the statute if it were expressed in such terms as to purport to give an interest to any such persons in spite of the fact that they might not survive the assured. The cases of *Robb* v. *Watson* (1) and *In re Collier* (2) are relied upon to support the contention. These cases, however, were considered and, in effect, overruled in *Cousins* v. *Sun Life Assurance Society* (3), a decision of the Court of Appeal upon a test case. The earlier cases were formally distinguished on the ground that they related to the *Married Women's Property Act* of 1870, whereas *Cousins' Case* (3) related to the Act of 1882. But the reasoning in the latter case is inconsistent with the grounds upon which the earlier decisions were based. It was held in *Cousins' Case* (3) that, where a husband effected policies of insurance on his life in favour of his wife named therein, the wife took an immediate vested interest by virtue of the *Married Women's Property Act* 1882, sec. 11, and that her interest was not contingent upon her surviving her husband. This decision relates to the construction of a statute affecting proprietary dispositions, and it should obviously be followed

(1) (1910) 1 I.R. 243. (2) (1930) 2 Ch. 37.
(3) (1933) Ch. 126.

H. C. OF A. 1940. PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL. PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.). Latham C.J.

by this court unless the court were quite satisfied that it was wrong. I see no reason for doubting the decision, which is in accordance with the decision of the Full Court of Victoria in *In re Reynolds* (1): See also *In re Fleetwood's Policy* (2) and *In re Gladitz* (3).

For these reasons I agree with *Nicholas* C.J. in Eq. that the contingency of surviving the assured is not imported into the trust contained in the first policy in favour of Charles Henry Tindal.

The second policy in respect of which questions arise was issued to Charles Frederick Tindal by the Mutual Life and Citizens' Assurance Co. Ltd. on 1st June 1916. Under this policy the company became bound to pay £5,000 (with participation in profits) upon the death of the assured for the benefit of the "beneficiary named in the schedule."

The schedule included the following clause: "Beneficiary. The amount of assurance and all bonuses and additions thereto shall be for the benefit of the wife and children of the assured in terms of the proposal and declaration above mentioned and subject to the provisions of the *Life, Fire and Marine Insurance Act* 1902 New South Wales and shall be payable as follows, namely:—(*a*) to the beneficiary Caroline Edith Tindal (wife of the assured) should she become his widow absolutely her receipt to be a good discharge; (*b*) failing which to Charles Henry Tindal son of the assured (if he survive and attain the age of twenty-one) or to such other children of the assured as the assured may by way of substitution appoint."

Caroline Edith Tindal, the wife of the assured, predeceased him, and so did not become his widow and therefore did not become entitled. Par. *b* of the clause gives an interest to Charles Henry Tindal qualified first by the words "failing which" and secondly by the words "if he survive and attain the age of twenty-one." It has been contended on behalf of the representatives of his estate that the latter words should be construed as meaning "if he live to attain the age of twenty-one" (as in fact he did). I agree with *Nicholas* C.J. in Eq. that the words cannot fairly be so construed. The words "failing which" refer to failure of Mrs. Tindal to take an interest. The condition upon which Mrs. Tindal

(1) (1931) V.L.R. 254.
(2) (1926) Ch., at pp. 53, 54.
(3) (1937) 1 Ch. 588.

was to take an interest was "should she become his widow." Accordingly, Mrs. Tindal would fail to take an interest in either of two cases: (i) if, still being married to the deceased, she predeceased him, and (ii) if, though she survived him, she did not become his widow at the time of his death because she was not then married to him. The word "survive" in par. *b* should be related to the failure of Mrs. Tindal to take an interest, upon which failure the operation of par. *b* is dependent. Accordingly, in my opinion, the word "survive" means "be alive at the time of such failure, whenever that failure may occur."

The failure of Mrs. Tindal to take an interest occurred when she predeceased the testator, but at that time Charles Henry Tindal had died and therefore he had not, in my opinion, "survived" so as to fulfil the condition upon which he took an interest.

The next question relates to the interpretation of the words "or to such other children of the assured as the assured may by way of substitution appoint." These words give to the assured a power of appointment among children other than C. H. Tindal. That power of appointment has not been exercised. It is argued on the one hand that it is a mere power of appointment, and that the clause is not effective to give any interest to the other children of the assured. On the other hand it is contended that the power is not a mere power of appointment, but is a power in the nature of a trust, and that, in default of exercise of the power, there is a gift to the other children equally. Upon the former view there would be either a resulting trust to the assured or sec. 10 of the *Life, Fire and Marine Insurance Act* might be applicable. That section is in the following terms:—"Subject to any provisions expressed in any policy referred to in section eight of this Act, the person effecting such insurance shall have power to appoint by deed or will what shares or interests in the moneys secured thereby shall accrue to each of the persons for whose benefit the insurance was expressed to be made. In default of such appointment, or so far as the same does not extend, then, subject as aforesaid, children expressed in any such policy shall be entitled in equal shares; and when a wife or husband is expressed to be benefited together with a child or children, such wife or husband shall be entitled to the whole for life,

H. C. OF A. 1940.

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

Latham C.J.

and such child or children in equal shares shall be entitled to the remainder."

It will be observed that the section is introduced by the words "Subject to any provisions expressed in any policy." Accordingly, before the section can be applied so as to bring about the result (in the present case) of giving the policy moneys to the children in equal shares, it is necessary to construe the provisions contained in the policy. Full effect must be given to those provisions before the section can be applied.

It was held by *Nicholas* C.J. in Eq. that the words in question created a trust and that the "other children" took interests under an implied gift. But his Honour held that the class of "other" children was limited to children who survived the longest liver of Charles Henry Tindal and his wife. The only child who so survived was Arthur Willoughby Tindal, and therefore he was held to be entitled to the whole of the policy moneys.

The appellant argues that the words in question create a mere power which has not been exercised and that there is a resulting trust in favour of the policy holder. The representatives of the two children other than C. H. Tindal, both of whom predeceased the testator, have lodged a cross-appeal, contending that they are entitled, with Arthur Willoughby Tindal, under a gift to the children other than C. H. Tindal.

I agree with *Nicholas* C.J. in Eq. that the words in question do not merely create a power of appointment. The trusts for Caroline Edith Tindal and C. H. Tindal are contained in the description of them as beneficiaries and in the provision that the policy moneys shall be payable to them in certain events. The trust for "other" children is identical in character in these respects. The provision is that the policy moneys shall be payable to such other children as the assured may appoint. These clear words of gift bring the case within the category dealt with in the leading case of *Brown* v. *Higgs* (1). In *In re Weekes' Settlement* (2) the distinction between cases of a gift to a class with a power of selection in some person and a mere power of appointment was clearly stated. *Romer* J.

(1) (1800) 5 Ves. 495 [31 E.R. 700]; (1803) 8 Ves. 561 [32 E.R. 473].
(2) (1897) 289.

said : " Where you can find that the power is only a power to select, the gift being to a class, of course, if the power is not executed the class take " (1). The provision which was under consideration in *In re Weekes' Settlement* (2) was held to create a mere power and not to vest any interest in the members of the class in whose favour the power could be exercised. The reason for the decision is stated in the following words : " This is not a case of a gift to the children with power to the husband to select, or to such of the children as the husband should select by exercising the power " (3). The present case is exactly such a case—it is a gift to such other children as the assured may select by exercising a power of appointment. Therefore, in the present case, there is a gift to the class consisting of the " other " children, but coupled with a power of selection or distribution.

Some criticism has been directed against some of the reasoning in *In re Weekes' Settlement* (2)—see *Farwell* on *Powers*, 3rd ed. (1916), p. 530, but see also *In re Llewellyn's Settlement* (4) and *In re Combe* (5) ; but there is no difference of opinion as to the correctness of the positive proposition that where there are words of gift to a class with a power to appoint among the class and no gift over in default of appointment (as in this case) there is a gift to the class (*Halsbury's Laws of England*, 2nd ed., vol. 25, p. 598 ; *Sugden* on *Powers*, 8th ed. (1861), p. 597, and case there cited of *Bellasis* v. *Uthwatt* (6)—a case of a gift to the settlor's children in such manner as he should appoint).

The children other than Charles Henry Tindal who were alive at the time when the policy was taken out were Archibald Arthur Tindal, Louis Nicholas Lindsay Tindal, and Arthur Willoughby Tindal. In my opinion there is a gift to these three children. The fact that the former two children predeceased the assured is, in my opinion, immaterial, because the provision in the policy operates from the beginning as a gift to the class mentioned. The power of appointment is not required to be exercised by will, and accordingly " the objects of the power will take even if they predecease the donee, unless upon the true construction of the instrument creating

(1) (1897) 1 Ch., at p. 294.
(2) (1897) 1 Ch. 289.
(3) (1897) 1 Ch., at p. 292.
(4) (1921) 2 Ch., at pp. 290, 291.
(5) (1925) Ch. 210.
(6) (1737) 1 Atk. 426 [26 E.R. 271].

H. C. OF A. 1940.

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

Latham C.J.

the power the objects of it are required to be living at a deferred period, in which case the implied gift in default will also be to those persons only " (*Jarman* on *Wills*, 7th ed. (1930), vol. 2, p. 630, and cases there cited—especially *Wilson* v. *Duguid* (1))—and see *In re Llewellyn's Settlement* (2). I will later give my reasons more fully for taking this view. I propose first to deal with the view which commended itself to *Nicholas* C.J. in Eq.

The learned judge held that the " other " children who could take under the gift must be children who survived the longer liver of their mother and father. The statute does not impose such a condition (*Cousins' Case* (3)), and I am unable to discover in the words of the policy any justification for limiting the class of other children in the manner suggested. A requirement of survival is associated in express terms with the interest of Caroline Edith Tindal and also with the interest of Charles Henry Tindal. There is no express provision relating to survival in the case of the " other " children.

If there were, as in *Re White's Trusts* (4) (as to which see *Wilson* v. *Duguid* (5)), any words to " point to personal enjoyment by the objects of the power " at a particular time, the gift would be a gift to persons who were alive at that time. But there are no such words in the present case.

It is contended, however, that some condition as to survival should be implied. *Nicholas* C.J. in Eq. was of opinion that there was an implied condition that only such of the other children as survived their mother and also survived C. H. Tindal were the objects of the implied gift. Another view would require them to survive C. H. Tindal only, so as to let in children who died after C. H. Tindal but before their mother. If the principle upon which the implication of the suggested condition rests is that only living children who would personally enjoy the proceeds of the policy are included within the class, then only children who survived the assured could take, and the children who survived their mother or C. H. Tindal or both would be excluded if they died before the policy matured at the death of the assured. The varying character

(1) (1883) 24 Ch. D. 244.
(2) (1921) 2 Ch. 281.
(3) (1933) Ch. 126.
(4) (1860) Johns. 656 [70 E.R. 582].
(5) (1883) 24 Ch. D., at p. 251.

of these suggested implications raises a preliminary doubt as to whether any condition of survival should be implied.

In my opinion there is no ground for importing into the gift any condition relating to survival of "other" children. This case falls within the principle stated in *Halsbury's Laws of England*, 2nd ed., vol. 25, p. 598: "If the instrument itself gives the property to a class, but gives to a named person a power to appoint in what shares and in what manner the members of the class shall take, the property vests in all the members of the class until the power is exercised, and they all take in default of appointment." In *Farwell* on *Powers*, 3rd ed. (1916), p. 534, the same rule is stated. Reference has already been made to *Jarman* on *Wills*, 7th ed. (1930), vol. 2, p. 630.

If there were no gift to any class, but only a power to a person to appoint among a class, it would then be necessary to ascertain the persons in whose favour the donee of the power might have appointed and to limit any implied gift to those persons (*Halsbury's Laws of England*, 2nd ed., vol. 25, pp. 598, 599; *Farwell* on *Powers*, 3rd ed. (1916), pp. 536, 537). *Walsh* v. *Wallinger* (1) and *Kennedy* v. *Kingston* (2) provide examples of the application of this principle. In each of these cases the power arose only upon the death of the donee of the power and could be exercised only by the will of the donee. The class in whose favour a gift was implied was therefore limited to persons who could take under the will and who therefore were living when the testator died—See the explanation of these cases in *Lambert* v. *Thwaites* (3).

The power of appointment is a power to appoint "to other children" "by way of substitution." These latter words may mean that the assured could displace C. H. Tindal by appointing to other children. But, in view of the definite preceding gift to C. H. Tindal, I am inclined to the opinion that they enable the assured to make an appointment only to replace him—that is, an appointment to take effect only in the event of both Mrs. Tindal and C. H. Tindal failing to take. Upon either view of the meaning of "by way of substitution" the power is not a contingent power. It is not a

(1) (1830) 2 Russ. & M. 78 [39 E.R. 324].
(2) (1821) 2 Jac. & W. 431 [37 E.R. 692].
(3) (1866) L.R. 2 Eq. 151, at pp. 155, 156.

H. C. OF A. 1940.

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

Latham C.J.

power which comes into existence only when a specified condition (for example, the consent of some person) is fulfilled or when a future or contingent event happens, such as the death or marriage of a person. The power in the present case is presently given to the policy holder. The exercise of the power does not depend upon the happening of any contingency, though an appointment under the power can only take effect after the happening of a contingency, namely, the failure of both Mrs. Tindal and C. H. Tindal to take under the gifts to them. A power of this character "can be well exercised before the contingency happens" (*Farwell* on *Powers*, 3rd ed. (1916), p. 166).

As was said in *Wilson* v. *Duguid* (1), "there is no time limited for the execution of the power" (of appointment), "and it was not more or less his" (in this case, the assured's) "duty to exercise the power just before his death than it was to exercise it at any other time": See also *Lewin* on *Trusts*, 14th ed. (1939), p. 729. Each of the "other" children had an interest in the policy from the date of the creation of the trust, that is, the date of the issue of the policy. The interest of each child was liable to be destroyed in whole or in part by the exercise of the power of appointment if such an exercise excluded him or gave him less than an equal interest with the others. But in the absence of the exercise of the power the interest continued to exist.

The question is one of intention to be ascertained by interpretation of the relevant words. Even when the power of appointment must be exercised by will, the implied gift may, in a particular case, be held to include the representatives of a person who predeceases the donee of the power. The principle is clearly stated in *Lambert* v. *Thwaites* (2), an authority recognized in *Wilson* v. *Duguid* (3) and *In re Llewellyn's Settlement* (4)—See references also in *Farwell* on *Powers*, 3rd ed. (1916), pp. 534 et seq.; *Halsbury's Laws of England*, 2nd ed., vol. 25, pp. 598, 599; *Jarman* on *Wills*, 7th ed. (1930), vol. 2., p. 632. In *Lambert* v. *Thwaites* (2) the gift was to the children of W. in such shares as he should by will appoint. One child died before W. No appointment was made, and it was held

(1) (1883) 24 Ch. D., at pp. 248, 249.
(2) (1866) L.R. 2 Eq. 151.
(3) (1883) 24 Ch. D., at p. 251.
(4) (1921) 2 Ch., at p. 286.

that there was a gift to all the children of W. and that the representatives of the deceased child took his share, even though the power to appoint was a power to appoint by will. *Kindersley* V.C. said :—" In order to determine this question " (that is, whether the representative of a deceased child should take) " it is necessary to bear in mind what has now become an elementary principle in the doctrine of powers, although at one time it was disputed, and indeed held the other way—I mean the principle that the existence of a power of appointment does not prevent the vesting of the property until, and in default of, execution of the power. The exercise of the power will divest the estate ; but until the power is exercised it remains vested in those who are to take in default of appointment. That is now perfectly well settled, and has been so ever since the well-known case of *Doe d. Willis* v. *Martin* (1). But where the instrument contains no express gift over in default of appointment, the difficulty is to determine who are to take in default of appointment. The general principle seems to be this : If the instrument itself gives the property to a class, but gives a power to A to appoint in what shares and in what manner the members of that class shall take, the property vests, until the power is exercised, in all the members of the class, and they will all take in default of appointment ; but if the instrument does not contain a gift of the property to any class, but only a power to A to give it, as he may think fit, among the members of that class, those only can take in default of appointment who might have taken under an exercise of the power. In that case the court implies an intention to give the property in default of appointment to those only to whom the donee of the power might give it " (2). In *Lambert* v. *Thwaites* (3) the gift fell within the first part of this proposition as, in my opinion, it does in the present case. If so, then in this case, as in the cases cited, all the " other " children had interests in the policy (subject to the preceding interests), but they were liable to be deprived of those interests by the exercise of the power. The power not having been exercised, the representatives of the two " other " deceased children are entitled to their shares.

(1) (1790) 4 T.R. 39 [100 E.R. 882]. (2) (1866) L.R. 2 Eq., at p. 155.
(3) (1866) L.R. 2 Eq. 151.

H. C. OF A. 1940

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

Latham C.J.

In my opinion, the decretal order should be affirmed as to the first policy, but, in the case of the second policy, it should be varied by substituting a declaration that the proceeds of the policy are equally divisible between Arthur Willoughby Tindal and the representatives of the deceased children, Archibald Arthur Tindal and Louis Nicholas Lindsay Tindal. The result is that I think that the appeal should be dismissed and the cross-appeal allowed.

The institution of this appeal by the executor of the will of C. F. Tindal was approved by *Roper* J., and all parties should, in my opinion, have their costs of the appeal and of the cross-appeal ratably out of the proceeds of the two policies, the costs of the appellant trustees as between solicitor and client.

All the members of the court agree that the appeal should be dismissed as to the first policy. As to the second policy three justices (*Evatt* and *McTiernan* JJ. and myself) are of opinion that the proceeds should be distributed between the surviving son Arthur and the representatives of the deceased sons Archibald and Louis. *Rich* J. is of opinion that the estate of Charles Henry Tindal should share with them. *Starke* J. is of opinion that the estate of Charles Frederick Tindal is entitled to the whole proceeds, and *Dixon* J. agrees with *Nicholas* C.J. in Eq. that the whole should go to Arthur, and accordingly would dismiss the appeal as to the second policy. The *Judiciary Act* 1903-1939, sec. 23 (2), makes provision for cases of equal division of opinion in appeals from the Supreme Court of a State. In this case five out of six justices are of opinion that the judgment of the Supreme Court with respect to the second policy was wrong, and a question therefore arises as to the effect of sec. 23 (2) in a case where there is a majority for allowing an appeal, but no majority in favour of all the terms of any particular order to be substituted for that of the Supreme Court. It is at least a matter of doubt whether in such a case sec. 23 (2) requires that the decision of the Supreme Court should be affirmed. The difficulty is resolved in the present case by *Starke* J. withdrawing his judgment, thus leaving a majority of the court in agreement with the order which I have proposed.

RICH J. This is an appeal from a decision of *Nicholas* C.J. in Eq. in which he construed certain trusts created by two policies of insurance and the applicability to them of secs. 8 and 10 of the *Life, Fire and Marine Insurance Act* 1902 No. 49, (N.S.W.). Secs. 8 and 9 of this statute first appeared in the *Married Women's Property Act* (N.S.W.), 42 Vict. No. 11, adapted from the English Act 33 & 34 Vict. c. 93, sec. 10. By a later enactment (56 Vict. No. 11), sec. 14 (now sec. 10) was introduced. This section has no counterpart in similar English legislation. The New-South-Wales legislation was consolidated by the Act No. 49 of 1902, the relevant sections of which for the present purpose are secs. 8 and 10. When the policies in question were taken out by the deceased trusts were created, and one turns to the policies to see who are the beneficiaries named and what interests they take in the policy moneys. In the first policy, that of the National Mutual Life Association of Australasia Ltd., under the heading "Special Conditions required if any" appear the words creating the trust—"Beneficiary my wife if she shall survive me—if she shall predecease me—my son Charles Henry Tindal." In the events which happened, both his wife and son predeceased the assured. The learned primary judge held, and I think rightly, that on the death of the assured's wife his son Charles took an absolute interest in the policy moneys, which passed to his personal representative. This conclusion is justified by the decision in *Cousins* v. *Sun Life Assurance Society* (1), which I think we should follow. That decision shows that no implication arises from the statute importing the idea of survival into limitations expressed in such policies. In a will the limitation to Charles Henry Tindal would be construed as depending on one contingency only, viz., the wife's predeceasing the assured. Otherwise it would be treated as a gift in his favour absolutely devolving on his personal representatives in the case of his death before the period of actual enjoyment. There is no reason for giving the limitation any different effect in the policy. The relevant words of the second policy are as follows:—"Beneficiary. The amount of assurance and all bonuses and additions thereto shall be for the benefit of the wife and children of the assured in terms of the proposal

(1) (1933) Ch. 126.

H. C. OF A. 1940.

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

Rich J.

and declaration above mentioned and subject to the provisions of the *Life, Fire and Marine Insurance Act* 1902 New South Wales and shall be payable as follows, namely :—(*a*) To the beneficiary Caroline Edith Tindal (wife of the assured) should she become his widow absolutely her receipt to be a good discharge (*b*) failing which to Charles Henry Tindal son of the assured (if he survive and attain the age of twenty-one) or to such other children of the assured as the assured may by way of substitution appoint." The trusts created by the policies in question call for a consideration of secs. 8 and 10 of the statute to which I have referred. Those sections should be read together. They contemplate two possible classes of case, (i) where the assured takes out a policy which is merely expressed to be for the benefit of his wife and, or alternatively, his children, and (ii) where he takes out a policy which states explicitly exactly what interests his wife and children are to take under it. In the case of the first policy where the assured has been his own conveyancer, sec. 10 (which is to operate subject to any provisions expressed in the policy) is inapplicable, and only the trusts specifically created take effect. In the case of the second policy something analogous to an executory trust is created. In amplification of what I have said I think that the scheme which secs. 8 and 10 of the Act provide is as follows :—A policy of insurance effected by a man " for the benefit of his wife or of his children, or of his wife and children," may be made the subject either of an executed trust in favour of the beneficiaries or of something analogous to an executory trust in their favour. The assured may, if he chooses, specify what interests the beneficiaries are to take. If he does not do so, or in so far as any specification may not extend or be operative, sec. 10 provides a statutory scheme for the execution of the executory trust created by virtue of sec. 8 from the fact that the policy is expressed to be for the benefit of the persons mentioned. At the beginning of the clause in the second policy there stands a general and overriding expression of the intention of the assured that " the amount of assurance and all bonuses and additions thereto shall be for the benefit of the wife and children of the assured." If there were nothing further in the clause this would draw in sec. 10 of the Act under the provisions of which the

moneys secured by the policy would enure for the benefit of the wife for life and after her death for the children of the assured existing at or after the date of the policy. There are, however, particular provisions expressed in the policy in favour of the wife of the assured if she shall become his widow and failing that to his son Charles in an event which did not happen "or to such other children of the assured as the assured may by way of substitution appoint." These particular provisions if they had become operative would have displaced the application of sec. 10 but as they have completely failed room appears to me to be left for the application of sec. 10. I see no reason why trusts which have no operation in the events occurring should entirely displace the application of that section, the purpose of which was to fill the very kind of gap which is left by an inadequate or incomplete expression on the part of the assured. None of these particular provisions became operative unless it can be said that a trust was created by the direction that if the son Charles should not take the policy moneys they should be payable "to such other children of the assured as the assured may by way of substitution appoint." Under an instrument in which, if such a provision were not regarded as operative, no trusts would be created at all, it may well be that the presumable intention of the settlor would be best effected by treating such words, although facultative only in form, as supplying sufficient indication of intention to create a trust in default of appointment. Where, however, as here, the settlor has himself resorted to a form of disposition which itself supplies the trusts which are to be operative in default of any express provision, there is neither justification nor reason for constructing a trust out of such a power. For these reasons the trusts having failed and the power not having been exercised—the court, of course, cannot execute the power nor substitute or select the favoured children—the statutory trust in favour of the wife for life with remainder to the children in equal shares became operative. The wife having died, it follows that the proceeds of the second policy belonged to all the children of the assured, including Charles. It is unnecessary to state in detail the result of the English and Irish cases, but I have examined them. Professor *Gray*, in an interesting and learned article in the *Law Times Journal*, vol. 132, pp.

H. C. OF A. 1940.

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

Rich J.

355, 379, reprinted from the *Harvard Law Review*, contrasts these with the American decisions. We should, however, adhere to the English decisions while they stand and appear to represent the doctrine upon which the Chancery Division is acting. In any event I am not prepared to import into the definition of the class of objects to whom an appointment might be made under the power a restriction by simply implying the bracketed words " if he survive and attain twenty-one." These words are expressed in relation to Charles Henry Tindal only and to him alone do they apply. But if I were of opinion that any trust were to be implied in favour of other children I should suppose that the class of children to take must be ascertained when the power became effective, that is, at the time it arose. It does not become an effective power until the trust to Charles Henry Tindal fails and it is then that the class of possible appointees must be ascertained.

In my opinion the decretal order should be varied by ordering in effect that the proceeds of the policy numbered 286248 A 10/N belong to all the children of the assured.

STARKE J. An originating summons was issued out of the Supreme Court of New South Wales for the determination of the construction of two policies of assurance and of the persons entitled thereunder. The policies were taken out by Charles Frederick Tindal, who died in 1938, on his own life but for the benefit of his wife and children in manner set forth in the respective policies.

One policy was issued in May 1916 by the National Mutual Life Association of Australasia Ltd. and it provided " that if the annual premium . . . shall be duly paid then the association shall pay the wife of the person assured if she shall survive the person assured—if she shall predecease the person assured—his son Charles Henry Tindal . . . the sum of £5,000." It is a policy which on its face was effected under the provisions of the *Life, Fire and Marine Insurance Act* 1902, secs. 8-10 (English *Married Women's Property Act*, sec. 11). It was effected by the assured on his own life and is expressed to be for the benefit of his wife and son because the assurance money is made payable to the wife if she survives the assured and if she predecease the assured then to the son of the

assured (*In re Gladitz*; *Guaranty Executor and Trustee Co. Ltd.* v. *Gladitz* (1)). These provisions create a trust in favour of the wife and son and the moneys payable under such policy do 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 : See sec. 8. · It has been held by the Court of Appeal in England that no implication arises under the *Married Women's Property Act* of 1882 (England) that the benefit given to a wife or child depends upon the wife or child surviving the assured (*Cousins* v. *Sun Life Assurance Society* (2)) —See also *Re Reynolds* (3). It was said, however, that the decision of the Court of Appeal ran counter to the plain intent of the Act and also to decisions such as *Robb* v. *Watson* (4) and *In re Collier* (5). But I think that the decision was right and, in any case, that the construction given by the Court of Appeal to the English Act should be adopted in this court and applied to the New-South-Wales Act, which is in the same terms. This court is not bound by the decisions of the Court of Appeal, but it is of no little importance that the interpretation of like enactments should be uniform unless some manifest mistake appears (*Sexton* v. *Horton* (6) ; *Trimble* v. *Hill* (7) ; *Cowell* v. *Rosehill Racecourse Co. Ltd.* (8)).

The trusts created by the policy and the interests which the beneficiaries take under it can be ascertained from the policy and from the policy alone. The wife of the assured was only entitled to the policy moneys if she should survive the person assured. She did not survive the person assured but died in December 1926 and the contingency on which the policy moneys were given to the wife was not fulfilled and the trust in her favour therefore failed. But in case the wife of the assured predeceased him, the words of the policy are express and explicit : the policy moneys shall be paid to Charles Henry Tindal. The policy operates as a declaration of trust, by force of the Act (sec. 8), in favour of Charles Henry Tindal. The trust is not expressed to be contingent upon Charles Henry Tindal surviving the wife of the assured or the assured himself and there is no indication in the words of the policy of any such intention.

(1) (1937) 1 Ch. 588.
(2) (1933) Ch. 126.
(3) (1931) V.L.R. 254.
(4) (1910) 1 I.R. 243.
(5) (1930) 2 Ch. 37.
(6) (1926) 38 C.L.R. 240, at p. 244.
(7) (1879) 5 App. Cas. 342, at pp. 344, 345.
(8) (1937) 56 C.L.R. 605, at p. 626.

H. C. OF A. 1940.

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

Starke J.

Consequently the trust became absolute on the death of the wife of the assured in his lifetime and persists and remains to be performed in favour of the personal representative of Charles Henry Tindal. The judgment under appeal so declares and must so far be affirmed.

The other policy was issued in June 1916 by the Mutual Life and Citizens' Assurance Co. Ltd. for £5,000. It recites that the assurance was effected in terms of the *Life, Fire and Marine Insurance Act* 1902 (N.S.W.). It was effected by Charles Frederick Tindal on his own life and is thus expressed: "Beneficiary: The amount of assurance and all bonuses and additions thereto shall be for the benefit of the wife and children of the assured in terms of the proposal and declaration . . . and subject to the provisions of the *Life, Fire and Marine Insurance Act* 1902 (N.S.W.) and shall be payable as follows namely:—(*a*) to the beneficiary Caroline Edith Tindal (wife of the assured) should she become his widow absolutely . . . (*b*) failing which to Charles Henry Tindal . . . (if he survive and attain the age of twenty-one) or to such other children of the assured as the assured may by way of substitution appoint."

The wife and children would take the assurance money as joint tenants if the declaration that the assurance should be for the benefit of the wife and children of the assured stood alone (*In re Seyton*; *Seyton* v. *Satterthwaite* (1); *In re Davies' Policy Trusts* (2); *In re Griffiths' Policy* (3)). But it does not stand alone and the benefits given to the wife and children are particularly defined in the provision for payment of the policy moneys. There is the direction to pay the policy moneys to the wife of the assured should she become his widow. But she predeceased the assured and did not become his widow. Consequently the trust in her favour failed. Failing which, there is a direction to pay Charles Henry Tindal, son of the assured, if he survive and attain the age of twenty-one. He attained the age of twenty-one years. But the word "survive" imports that Charles Henry Tindal shall be living at the time of the event which he is to survive or the death of a person whom he is to survive. The trust in favour of Charles Henry Tindal commences with the words "failing which," that is, the trust in favour

(1) (1887) 34 Ch. D. 511.
(2) (1892) 1 Ch. 90.
(3) (1903) 1 Ch. 739.

of the wife of the assured. It is an event that Charles Henry Tindal must survive, namely, the failure of that trust. But he did not do so, for he predeceased the wife of the assured, who herself predeceased the assured. Consequently the trust in favour of Charles Henry Tindal failed. The result is unfortunate, for Charles Henry Tindal married and left a widow and four children surviving who are beneficiaries under his will.

Next there is the direction to pay " or to such other children of the assured as the assured may by way of substitution appoint." The assured did not exercise this power of appointment. The benefit that the " other children " take in the policy moneys is according to the interest, if any, expressed in the policy. The question is whether the words create a mere power or a trust or at least a power in the nature of a trust in favour of the children other than Charles Henry Tindal. The modern cases establish that there is no rule of law that solves the question: it depends upon the construction of the words of the document whether a trust has or has not been created. If a trust has been created, the court will execute it, though the power of appointment has not been exercised (*In re Weekes' Settlement* (1); *In re Llewellyn's Settlement* (2); *In re Combe*; *Combe* v. *Combe* (3)). No doubt the policy declares that the assurance shall be for the benefit of the wife and children of the assured and the clause in which the declaration appears is introduced with the word " beneficiary," but the opening of the beneficiary clause is inconclusive because the following words define particularly the beneficiaries and the interests (if any) and the manner in which they are to take. In form the provision is expressed as a power and not as a trust. It is not in so many words a power to select. It is not given to a stranger but to the assured himself. It contemplates a failure of the benefits conferred upon his wife and son and enables the assured—the father—to make provision for his " other children " by way of substitution in the altered circumstances. On the words of the policy I can find no indication of a trust in favour of the " other children ", but only of the power in the assured to appoint amongst them according to

(1) (1897) 1 Ch. 289. (2) (1921) 2 Ch. 281.
(3) (1925) 1 Ch. 210.

H. C. OF A. 1940.

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

Starke J.

the circumstances of the family and the discretion of the assured. In this view a resulting trust would enure in favour of the personal representatives of the assured (*Cleaver* v. *Mutual Reserve Fund Life Association* (1)).

But there remains for consideration a section in the *Life, Fire and Marine Insurance Act* 1902 which is peculiar to New South Wales. It is sec. 10 and is as follows :—" Subject to any provisions expressed in any policy referred to in section 8 of this Act, the person effecting such insurance shall have power to appoint by deed or will what shares or interests in the moneys secured thereby shall accrue to each of the persons for whose benefit the insurance was expressed to be made. In default of such appointment, or so far as the same does not extend, then, subject as aforesaid, children expressed in any such policy shall be entitled in equal shares ; and when a wife or husband is expressed to be benefited together with a child or children, such wife or husband shall be entitled to the whole for life, and such child or children in equal shares shall be entitled to the remainder." In my opinion the section is inapplicable to the present case. The power to appoint given by the section is subject to any provisions expressed in any policy referred to in sec. 8 of the Act and there is an express power to appoint given by the policy herein in question. The section does not confer an overriding power nor a power cumulative upon any power contained in the policy. Further, the power given by the section is framed as a power of selection amongst objects or a class taking expressly or by implication under the policy. But here the " other children " take nothing under the policy, though a discretionary power was given to the assured—the father—to appoint to them which he has not exercised.

In my opinion the order of the Supreme Court " that the proceeds of the policy in the Mutual Life and Citizens Assurance Co. belong to Arthur Willoughby Tindal " should be set aside and it should be declared that such proceeds are payable to the personal representative of the assured Charles Frederick Tindal.

But the justices differ so much in their opinions with respect to the policy issued in June 1916 by the Mutual Life and Citizens'

(1) (1892) 1 Q.B., at p. 160.

Assurance Co. Ltd. that the withdrawal of some opinion seems necessary if any definite conclusion is to be reached. Four justices of this court and *Nicholas* C.J. in Equity of the Supreme Court are of opinion that the power of appointment set forth in the policy is in the nature of a trust and they differ merely as to the class or persons consisting of " other children," the objects of the power. My brother *Rich* and I do not agree with the view that the power is in the nature of a trust.

Under these circumstances it seems desirable that the view of the majority upon the nature of the power should prevail and that my opinion to the contrary should be withdrawn. Accordingly I withdraw that opinion and give no judgment with respect to the policy issued by the Mutual Life and Citizens' Assurance Co. already mentioned.

A majority is thus obtained for the view of the Chief Justice.

DIXON J. The testator survived his wife and all his children except one, a son named Arthur Willoughby Tindal. But while his wife and four of his sons were still living he effected two policies of insurance upon his own life for the benefit of his wife and children. The policies specifically provide how the policy moneys shall devolve, but in the events that have happened some difficulty has been felt in the application of the respective provisions which they contain, provisions that differ in their terms and effect.

Both policies are governed by the New-South-Wales counterpart of the provisions of sec. 11 of the English *Married Women's Property Act* 1882, namely, secs. 8, 9 and 10 of the *Life, Fire and Marine Insurance Act* 1902. The first policy describes the persons to whom the insurance moneys are payable as " the wife of the person assured if she shall survive the person assured—if she shall predecease the person assured—his son Charles Henry Tindal."

Charles Henry died before his father, the testator, and also before his mother, the latter's wife. The executor of the testator claims that as neither his wife nor Charles Henry survived him the trusts expressed in the policy fail and that there is a resulting trust of the policy moneys to his estate so that they pass according to the dispositions of his will.

H. C. OF A. 1940.

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

Dixon J.

Nicholas C.J. in Eq., from whose decision the appeal comes, rejected this view and held that the policy moneys formed part of the estate of Charles Henry, on the ground that his interest under the policy did not depend on his surviving his father nor his mother but was contingent only on his mother's predeceasing his father. In my opinion this decision is correct. It is now established by *Cousins* v. *Sun Life Assurance Society* (1) that the statutory provisions contain nothing which makes survival of the assured a condition attaching to any interest given to a wife or children by a policy effected under the legislation: See, too, *Re Reynolds*; *Reynolds* v. *Commissioner of Taxes* (*Vict.*) (2).

The question depends therefore entirely upon the construction of the policy. Is there an implication, in the terms in which it is expressed, that Charles Henry shall survive either his mother or the life assured, his father? There is, in my opinion, no ground for such an implication. Even in a bequest to a class upon a contingency you do not import the contingency into the definition of the class so as to exclude those who do not survive the contingency. The policy is not a will, but the form of the provision in favour of Charles Henry in the policy is, as *Nicholas* C.J. in Eq. remarked, not that of a substantive gift but of an alternative original. On any hypothesis, in testamentary provisions in such a form as the present, the second limitation is not construed as impliedly dependent on the donee's surviving the event upon which the first limitation becomes ineffectual, still less the period of distribution.

In the second policy the provision giving rise to the question for decision is contained in part of a schedule describing the beneficiary for whose benefit, according to the body of the policy, the insurance moneys are to be paid. The provision is in the following terms:— "Beneficiary. The amount of assurance and all bonuses and additions thereto shall be for the benefit of the wife and children of the assured in terms of the proposal and declaration above mentioned and subject to the provisions of the *Life, Fire and Marine Insurance Act* 1902 (N.S.W.) and shall be payable as follows, namely: —(*a*) to the beneficiary Caroline Edith Tindal (wife of the assured) should she become his widow absolutely her receipt to be a good

(1) (1933) Ch. 126. (2) (1931) V.L.R. 254.

discharge; (*b*) failing which to Charles Henry Tindal son of the assured (if he survive and attain the age of twenty-one) or to such other children of the assured as the assured may by way of substitution appoint."

Caroline Edith Tindal did not become her husband's widow, so she does not take, and as Charles Henry survived neither of them I think that it is clear that within the meaning of the bracketed words he did not survive and cannot take. To become entitled he must survive his parents and attain full age. The testator did not exercise the power of appointment reserved to him by the remaining words of the provision. But the question is whether, in default of appointment, the provisions contain an implication of a gift to the objects of the power and if so whether survival of the testator is a necessary condition of taking under the implied gift. Where a special power of appointment in favour of a class is given for the purpose of benefiting the objects of the power and there is no gift over in default of appointment, the failure of the donee to exercise the power does not necessarily defeat the expectations of those qualified to take under an appointment. Prima facie an implication is made by which the objects of the power take, in equal shares, the estate or interest which might have been appointed among them. It is of course a question of intention, but the implication will be made if, from the nature or terms of the power or the circumstances, it appears that the settlor or testator meant that it should be incumbent upon the donee to exercise the power confided to him or that the objects should take even if he did not. The court cannot compel the execution of a power of appointment by a donee nor execute it in his stead. "It is an immutable rule, that a non-execution shall never be aided" (*Sugden* on *Powers*, 7th ed. (1845), vol. 2, p. 157, sec. VI., par. 1). But where the power is entrusted to the donee for the purpose of effectuating an intention that the property should devolve upon the objects of the power or some of them according to the donee's discretion, the latter's neglect to exercise the power cannot be allowed to defeat the purpose, which will be carried into effect by the implication of an estate or interest in equal shares among those capable of taking by appointment. Lord *Hatherley* was able to say simply, that it was settled that where there is a power to

H. C. OF A. 1940.

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

Dixon J.

appoint among certain objects and no gift in default of appointment, the court will imply a gift to the objects of the power equally (*Re White's Trusts* (1)). He meant, of course, subject to any contrary intention appearing from the trust instrument. But it seems now that a further qualification is necessary, to the effect that an intention must be collected that the power shall be in the nature of a trust or that the objects shall take in default of appointment.

For the purposes of the present case so much may be conceded. The rule is fully considered by Professor *Gray* in a paper of 1911 (*Harvard Law Review*, vol. 25, p. 1—cf. *Harvard Law Review*, vol. 50, pp. 774, 775), and in *Farwell* on *Powers*, 3rd ed. (1916), pp. 529, 530. Lord *St. Leonards*' discussion of the earlier authorities (*Sugden* on *Powers*, 7th ed. (1845), p. 157, sec. VI.) appears to support the view of both Sir *George Farwell* and Professor *Gray* that the decision and observations of *Romer* J. in *In re Weekes' Settlement* (2) do not follow the current of authority and are inconsistent with the decision of the Court of Appeal in *Re Brierley*; *Brierley* v. *Brierley* (3), a year earlier. The treatment of the decision by Lord *Russell* in *In re Llewellyn's Settlement* (4) and by Lord *Tomlin* in *In re Combe* (5) differs markedly: cf. the judgment of *Sargant* L.J. in *In re Hughes* (6), where *In re Weekes' Settlement* (2) was cited. But in the result text-books generally seem to place the question upon a search for intention without formulating a clear and definite presumption or rule of construction, and the very elaborate statement in the *Restatement of the Law of Trusts*, (1935), vol. I, ch. 2, sec. 27, pp. 89-95, proceeds almost in the same way: cf. *Re Isaac Himmeloch* (7) and *Permanent Trustee Co.* v. *Redman* (8), both decisions of *Harvey* C.J. in Eq.

But whether the doctrine ought to be stated as a definite presumption or rule of construction operating in the absence of some sufficient indication of a contrary intention or more vaguely as a rule governing the effect of a power in the nature of a trust when, in the light of its guidance, an intention to create such a power is

(1) (1860) Johns, at p. 659 [70 E.R., at p. 583].
(2) (1897) 1 Ch. 289.
(3) (1894) 12 R. 55; 43 W.R. 36.
(4) (1921) 2 Ch., at pp. 290, 291.
(5) (1925) Ch., at p. 215.
(6) (1921) 2 Ch., at p. 213.
(7) (1929) 29 S.R. (N.S.W.) 90.
(8) (1917) 17 S.R. (N.S.W.) 60; 34 W.N. (N.S.W.) 28.

independently discovered, the present case appears to me clearly to fall within its application.

The provision in the policy stating that the amount of the insurance shall be for the benefit of the wife and children operates to declare a trust in favour of the wife and children, and the ensuing part of the clause works out and states the manner in which the trust shall be carried into effect. It so operates not merely because of its terms but also as a result of the application to those terms of sec. 8 of the *Life, Fire and Marine Insurance Act* 1902, which says that a husband's policy expressed to be for the benefit of his wife and his children shall create a trust in favour of the objects named therein. No doubt the section does not mean that it shall create a trust in their favour independently of, not according to the limitations, if any contained in the policy. But the question whether the power of appointment forming part of the limitation has the effect of creating a power in the nature of a trust, the operation of the section on the general words, " for the benefit of the wife and children of the assured " is prima facie to show that the whole interest in the insurance is held upon trust for those persons and, unless the context displaces this prima-facie position, the power should be construed as doing no more than pointing out the mode in which the trust is to be effectuated, that is, after failure of the other limitations. There is nothing to repel this presumptive inference. On the contrary, the relation of the objects of the power to the donee, the subject matter of the power, and the terms in which it is expressed, all point strongly to the same conclusion. I think, therefore, that there is an implied trust of the insurance moneys for the object or objects capable of taking under an appointment.

The question then remains: Who constitute that class? Two constructions of the power are put forward. On the one hand it is said that all children are included who were alive at the date of the policy. On the other hand it is contended that the power is confined to children surviving at all events the death of the wife, or the death of the survivor of the wife and Charles Henry, the time, that is, when the power may be said to arise. In my opinion the latter is the true interpretation of the power. To begin with, I think that

H. C. OF A. 1940.

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

Dixon J.

the power to substitute other children is confined to substitution upon or in case of the death of Charles Henry and was not intended to allow the testator to displace Charles Henry though surviving and attaining twenty-one. The primary purpose of the assured was, I think, to provide for his wife if she survived him. If she did not survive him, his next wish was that his son Charles Henry should receive the policy moneys, provided that he attained twenty-one and survived. But lest Charles Henry also should predecease him or should fail to attain full age, he reserved a power to appoint another child or other children in his place. Only in the event of Charles Henry failing to qualify as the payee of the policy moneys, did the assured mean that a substitute should be appointed. It is true that the sub-clause naming Charles Henry as the person to whom the policy moneys should be payable and reserving the power of appointing a child or children by way of substitution is expressed as an alternative. But the alternative intended is dependent not on the making of an appointment but on the failure of the limitation to Charles Henry contained in the first limb of the clause. The result is that the power of appointment has the same meaning and effect as if it ran: "Or if Charles Henry Tindal does not survive and attain twenty-one, to such other children of the assured as the assured may by way of substitution appoint." Only upon the footing that the power has this meaning is it possible to say that it implies or amounts to a trust. For if it means that the assured might displace Charles Henry by substituting another child or other children notwithstanding that Charles Henry fulfilled the condition of surviving and attaining twenty-one, then it would confer a discretionary power to defeat the interest which, upon his mother's death, would vest in Charles Henry. A power authorizing the donee to prefer another person as beneficiary in place of the beneficiary named is one which there could be no duty to exercise. It is not a power in the nature of a trust.

But even if, on that interpretation of the power, a trust could be spelled out, the final result probably would be the same as that which I reach on the opposite interpretation. For, if it were a power to put another child or other children in the place of Charles Henry, though the latter has qualified for a vested interest, then

I imagine the substitute would be subject to the same conditions as Charles Henry whom he displaced, namely, the conditions that he survived and attained twenty-one.

Once it is grasped, however, that the power is to appoint a child or children instead of Charles Henry if, and only if, the interest given to him fails, it necessarily follows that the objects of the trust implied in the power are those children, if any, who survive the failure of the gift to Charles Henry. This appears to me to follow, both as being the plain meaning of the instrument and as a consequence determined by the principles of construction which would be applied if the question arose on a will or settlement. The instrument after all is a life policy by which the assurer undertakes to pay the policy moneys to the persons named or described upon the occurrence of a future event, namely, the termination of the assured's life. It is converted into a trust by force of the statute.

The first matter to be noticed is that the moneys are expressed to be "payable to" the persons taking under the appointment contemplated. The next is that their executors are not mentioned. There is, therefore, a prima-facie indication of an intention that the persons named or described should benefit by way of personal enjoyment. This, of course, conforms with the general purpose of life insurance. For insurances are not usually effected and premiums paid for the benefit of the estates of children of the assured who predecease him. *Cousins' Case* (1) does not decide that, in the construction of a policy, such a manifest consideration must be left out of account. All it decides is that the statute does not restrict the benefit of policies effected under it to beneficiaries who survive the assured and that, when in the policy of assurance limitations are found which according to their ordinary legal meaning give an immediate vested and indefeasible interest, they should be given that effect, notwithstanding that, in the event, the beneficiary dies before the assured.

No doubt it may be said that evidences that personal enjoyment is intended provide a general consideration only in reference to the actual meaning of the instrument. However this may be, the form of the direction creating the power appears to me conclusively to

(1) (1933) Ch. 126.

H. C. OF A. 1940.

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

Dixon J.

exclude as objects of the trust children whom Charles Henry survived. The power and the trust thereby implied arise upon a double contingency, namely, the failure of two prior interests owing to the deaths of the beneficiaries. The language of the power shows that these deaths are regarded as creating a vacancy, so to speak, which is to be filled by the substitution of other children or another child. For the power says "by way of substitution." When death calls for a substitute you go to the living, not to the dead. Further, the very notion of an appointment means a choice among those answering the description of objects, not those who once filled the description but have died. "It is hardly necessary to say that a power to appoint to A does not authorize an appointment to his executors &c. in the event of his predeceasing the donee" (*Jarman* on *Wills*, ch. XIII., note citing *Re Susanni's Trusts* (1); 7th ed. (1930), vol. 1, p. 404; 6th ed. (1910), vol. 1, p. 429).

So far I have relied upon an examination of the meaning of the instrument independently of the rules of construction which would govern the present limitations if they were found in a will or settlement. But an application of the principles for ascertaining the objects of a trust implied from a power to appoint among children when it occurs in a will or settlement would, as it seems to me, necessitate the same conclusion. Under those principles no child could take who had died before the failure of the interest of Charles Henry. There is, of course, no opposition between reasoning from the text and the operation of the established rules. Indeed they depend upon or involve similar, if not the same, considerations. It is therefore, perhaps, neither necessary nor proper to divide the discussion of the effect of the clause into two heads, as I have done, but it is a course which makes for clearness. For the rules governing the ascertainment of a class to take under trusts arising from or connected with powers are not in all respects certain and they depend upon distinctions which, unless they are observed, readily lead to error. The best general statement is, I think, that in *Lewin* on *Trusts*, 13th ed. (1928), pp. 865, 867.

It is as well, however, to begin by pointing out the characteristics of the limitations now in question which are of importance, both positive and negative.

1. It is a future limitation to take effect in possession at the death of the assured. The analogy, therefore, is to be sought in wills or

(1) (1877) 47 L.J. Ch. 65; 26 W.R. 93.

settlements which interpose a life interest before the interest to be appointed or in which that interest can take effect in possession only on the dropping of a life or other future event.

2. The power is not one of division or distribution only as, for instance, in *Lambert* v. *Thwaites* (1), but is one of selection.

3. Nor is there a direct or immediate gift to a class subject to be divested by the exercise of a power, whether of distribution or selection. It is a direction to pay to the children who are appointed. According to the express terms of the power no child has a title unless under an exercise of the power. The trust is, therefore, implied from the power. In *Lambert* v. *Thwaites* (2) *Kindersley* V.C. took a distinction as follows:—"The general principle seems to be this: If the instrument itself gives the property to a class, but gives a power to A to appoint in what shares and in what manner the members of that class shall take, the property vests, until the power is exercised, in all members of the class, and they will all take it in default of appointment; but if the instrument does not contain a gift of the property to any class, but only a power to A to give it, as he may think fit, among the members of that class, those only can take in default of appointment who might have taken under an exercise of the power. In that case the court implies an intention to give the property in default of appointment to those only to whom the donee of the power might give it." The power-trust in the present case falls under the latter class. But the distinction as well as the decision has been the subject of a formidable attack by Professor *John Chipman Gray*, who shows, I think, that it is inconsistent with *Woodcock* v. *Renneck* (3), *Halfhead* v. *Sheppard* (4), *Re Phene's Trusts* (5) and *Carthew* v. *Enraght* (6) (*Harvard Law Review*, vol. 25, pp. 22-26).

4. The power or trust is executory. It depends upon a contingent event or events upon which other interests are defeated or fail. There is no contingent remainder to take effect on the determination of a particular estate or interest. Still less is there a vested remainder

(1) (1866) L.R. 2 Eq. 151.
(2) (1866) L.R. 2 Eq., at p. 155.
(3) (1841) 4 Beav. 190 [49 E.R. 311]; aff. 1 Phil. 72 [41 E.R. 558].
(4) (1859) 1 E. & E. 918 [120 E.R. 1155].
(5) (1868) L.R. 5 Eq. 346.
(6) (1872) 20 W.R. 743.

H. C. OF A. 1940. PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL. PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.). Dixon J.

as in *Lambert* v. *Thwaites* (1) and in *Wilson* v. *Duguid* (2). In the latter case there were life estates to William Duguid and his wife Sarah, a contingent remainder to their children living at their death with a power of distribution and, in the case which happened, of there being no such children, a life estate to Robert Keeling with remainder to his children subject to a power of distribution. As there were no objects for the first contingent remainder to vest in, the limitations were effective to create three life estates and a vested remainder in all the children of Robert Keeling, who did not exercise his power.

5. There is thus a power of appointment becoming effective on a contingent event in favour of a class for the purpose of appointing one or more of the class to an interest that has failed by the death of the object of the prior trusts.

The question which more often than not arises upon limitations to a class including cases where there is a power in the nature of a trust is the converse of the present; it is whether after-born children are included. Perhaps it would not be disputed that if any children had been born after the failure of Charles Henry's interest they would not have been excluded.

Both upon the question of the inclusion of after-born children and the exclusion of children who die before a given event, the general rules for the ascertaining of a class apply to powers, but subject to one modification. The following passage from an article by Professor *Potter* conveniently states the material rules :—" A gift to a class subject to a power of appointment is in principle governed by the same rules as those mentioned above, but is modified by the exclusion of those who could not benefit under the exercise of the power. So, an immediate gift subject to a power will ascertain the class at the date of the testator's death (*Coleman* v. *Seymour* (3)). Where the class gift is subject to a prior limitation and also to a power of appointment, the class will be determined at the determination of the prior limitation, but if a member of the class otherwise in conformity could not take under the power, he will be excluded. So, where there is a direct gift in default of appointment, the class will be

(1) (1866) L.R. 2 Eq. 151.
(2) (1883) 24 Ch. D. 244.
(3) (1749) 1 Ves. Sen. 209 [27 E.R. 987].

ascertained at the date of determination of the prior limitation, but if the gift is by implication . . ., normally only those who are then in existence and have not predeceased this date can take (*Walsh* v. *Wallinger* (1))" (*Encyclopedia of the Laws of England*, 3rd ed., vol. 3, pp. 201, 202).

The primary rule is that those only can take as objects of the implied trusts who qualify as possible appointees under an exercise of the power. "The rule is that none can take, by implication, upon the non-execution of a power, who cannot take under an execution of such power" (per Lord *Langdale* in *Winn* v. *Fenwick* (2)).

But unless there are express words to the contrary, an exercise of the power is confined to those who are in existence at or after the time when the power arises or accrues so that an execution of the power is effective: See *Halfhead* v. *Sheppard* (3).

In the present case no exercise of the power to appoint by way of substitution could become effective until the trust in favour of Charles Henry was defeated by his failure to fulfil the condition of surviving and attaining full age.

This does not mean that the assured as donee of the power could not by deed or will exercise the power in advance in case the contingency occurred. Such a power as that under consideration contemplates an exercise earlier than the event upon which its operation depends. In some contingent powers the happening of the contingency is indispensable even to the exercise of the power; in others an exercise of the power, although made before the contingency, becomes effectual and operative when the event occurs. The power in the present case is one of the latter class. The manner in which such a proleptic appointment operates is shown by *Kindersley* V.C. in *Harvey* v. *Stracey* (4).

When a power occurs or takes effect upon death it is for this reason that the class excludes possible objects who predeceased the life in question. Thus a testamentary power in favour of children is confined to children living at the death of the donee (*Walsh* v.

(1) (1830) 2 Russ. & M. 78 [39 E.R. 324].
(2) (1849) 11 Beav. 438, at p. 440 [50 E.R. 886, at p. 887].
(3) (1859) 1 E. & E., at p. 927 [120 E.R., at p. 1158].
(4) (1852) 1 Drew. 73, particularly at pp. 132, 133 [61 E.R. 379, at p. 402].

H. C. OF A. 1940.

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

DIXON J.

Wallinger (1)). If the power is vested in trustees to appoint on the death of a tenant for life without issue the class does not comprise possible objects who predeceased him (*Re White's Trusts* (2), where, as in the present case, there were indications of an intention that there should be personal enjoyment). *Page Wood* V.C. said: "There is, therefore, strong reason for holding on the tenor of this particular will, if not on general principle, that none of those who predeceased the tenant for life could share in the benefits of an appointment under this power" (3). So, in *Kennedy* v. *Kingston* (4), as to a trust implied from a bequest for life with instructions at the death of the life tenant to divide the legacy in portions as she should choose to her children, *Plumer* M.R. said:—"Then, could it be executed in favour of one who died in her lifetime? The term children is general, but as the power is to be executed at her decease, it must be for the benefit of those then capable of taking. It is, therefore, necessarily confined to children in existence at the time of her death. Therefore none but the two who have survived can take under the power; they are clearly entitled to the sums appointed to them." See, further, *Re Phene's Trusts* (5) and *Carthew* v. *Enraght* (6) and the reservation by *Russell* J. (as he then was) in *In re Llewellyn's Settlement* (7).

To sum up my conclusion; the power, therefore does not become effective before the testator's death, and looking at its evident purpose, it is natural to confine the objects to those children who at all events survive Charles Henry, that is, assuming his death before the testator. The special provision contained in sec. 10 of the New-South-Wales Act to meet the case of policies expressed generally for wife and children or children does not appear to me to apply. Its application is declared to be subject to any provisions expressed in the policy, and on the view I take an operative trust is contained in those provisions. If, contrary to my opinion, there was no such trust, it might well be that the section should be applied.

(1) (1830) 2 Russ. & M. 78 [39 E.R. 324]; Tamlyn 425 [48 E.R. 169].
(2) (1860) Johns. 656 [70 E.R. 582].
(3) (1860) Johns., at p. 660 [70 E.R., at pp. 583, 584].
(4) (1821) 2 Jac. & W., at p. 433 [37 E.R., at p. 693].
(5) (1868) L.R. 5 Eq. 346.
(6) (1872) 20 W.R. 743.
(7) (1921) 2 Ch., at pp. 289, 291.

I am therefore of the opinion that Arthur Willoughby, the only child who survived Charles Henry, is entitled to the insurance moneys under the second policy.

I think that the decision of *Nicholas* C.J. in Eq. was right and the appeal and cross-appeal should be dismissed.

EVATT J. This appeal is concerned with two policies of insurance effected by Charles Frederick Tindal of Armidale on his own life. One policy was taken out with the National Mutual Life Association of Australasia Ltd., and the other with the Mutual Life and Citizen's Assurance Co. Ltd.

It is not disputed that each policy was "expressed to be for the benefit of the wife or children of the said C. F. Tindal," and that, so far as they extend, the provisions of secs. 8 to 10 inclusive of the New-South-Wales *Life, Fire and Marine Insurance Act* 1902 were applicable to each policy.

The first policy provided for the payment of the sum assured to "the wife of the person assured if she shall survive the person assured—if she shall predecease the person assured—his son Charles Henry Tindal." The policy was dated 3rd May 1916. The assured's son (Charles Henry) died in May 1926, his wife died in December 1926, and he himself died in 1938. *Nicholas* C.J. in Eq. has held that the policy moneys passed to the estate of the son Charles Henry.

Mr. *Wallace*, appearing in the interests of the estate of the assured, contended that the purpose of the *Life, Fire and Marine Insurance Act* was to secure the actual enjoyment of the insurance moneys by one member or more of the family of the assured (described in sec. 8) and that such purpose would be defeated if the estate of Charles Henry Tindal took, for then neither the wife nor any of the children of the assured would enjoy any benefit from the statutory trust. This argument is supported by the opinion of *Eve* J. in *Cousins* v. *Sun Life Assurance Society* (1). In that case, the policy was issued under the provisions of the *Married Women's Property Act* 1882 for the benefit of the wife of the life assured. *Eve* J.'s view was that, on the wife's death during the lifetime of the assured, the statutory

(1) (1933) Ch., at p. 130.

H. C. OF A. 1940.

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

Evatt J.

trust failed for want of any continuing subject, and the policy moneys became the property of the assured. But this opinion, although supported by earlier cases, was rejected by the Court of Appeal, *Romer* L.J. stating: "I can see nothing in the Act that would warrant us coming to the conclusion that the husband cannot, by means of this section, provide a vested interest for his wife and his children during his own lifetime but can only provide interests for them contingent on their surviving him" (1).

In view of *Cousins' Case* (2), on the faith of which, no doubt, many thousands of transactions have been entered into, the appellant's contention cannot succeed, whether it is framed as an interpretation of the statute or as an aid to construction of the policy of insurance. To the assured's intention as expressed in the policy there must be given full effect. In the events which have happened, the son Charles Henry Tindal was to take. In principle, *Cousins' Case* (2) excludes the implication of contingencies other than those expressed in the policy, and if the assured intended that the interest of the son was to be contingent upon his surviving his mother or the assured then (to use the words of *Romer* L.J.) "nothing was easier than for him to have said so in the policies themselves" (1).

The proceeds of the second policy were made payable as follows: —"(*a*) to the beneficiary Caroline Edith Tindal (wife of the assured) should she become his widow absolutely her receipt to be a good discharge (*b*) failing which to Charles Henry Tindal son of the assured if he survive and attain the age of twenty-one or to such other children of the assured as the assured may by way of substitution appoint."

In relation to this policy also, the appellant contends that, by reason of the operation of a resulting trust or otherwise, the policy moneys belong to the estate of the assured. But, again, the general principle established in *Cousins' Case* (1) shows that the question must be determined by construing the policy according to its terms, and the court should not be affected by the fact that, by predeceasing the person assured, one or more members of the family is necessarily precluded from personal enjoyment of any benefit intended to be conferred upon him.

(1) (1933) Ch., at p. 140. (2) (1933) Ch. 126.

The insurance is expressed to be for the benefit of the wife and children. The wife was to take only in the event of her surviving the assured. That event did not happen, therefore clause *b* became applicable. Next, the son Charles Henry took only " if he survived and attained the age of twenty-one." In fact, Charles Henry predeceased both his mother and the assured. Therefore he never took any of the moneys. The last specification of those who were to take is " such other children of the assured as the assured may by way of substitution appoint." In fact, the assured made no appointment to any member of this class. One contention is that, in default of appointment, the ultimate gift lapses, and there should be a resulting trust in favour of the assured. In my opinion, the assured plainly intended to ensure that the benefit of the policy moneys should, in the event of both his wife and his son Charles Henry not taking, be enjoyed by the class denominated by the phrase " other children of the assured." In other words, in the contingency contemplated, the class was certainly to take. If that is so, the mere failure of the assured to appoint cannot prevent the gift from being given effect to, and the moneys would have to be treated as though an appointment had been made amongst all members of the class.

But the most difficult question of all remains—who are comprised in the class of " other children " ? It is clear from the word " other " that Charles Henry Tindal is excluded. At the time of the execution of the policy, there were three children of the assured other than Charles Henry. Did this class become reduced in number by reason of the death of any of the three before the time at which it became known that Charles Henry Tindal could not take ? On the whole I think the answer is : No. The fact that the gift to the class is " substitutional " means only that, if Charles Henry does not take, a selected member of the class takes. This affords no assistance in determining whether it is possible for the class to lose any of its original membership. I do not see why, immediately after the execution of the policy, the assured should not have provided against the double event of a failure of the gift to the wife and a failure of the gift to Charles Henry. But this is only another way of saying that while all the three " other " children were alive,

H. C. OF A. 1940.

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

Evatt J.

the assured could have exercised the power of appointment. If so, the conclusion is that the class intended to be benefited comprised the children (other than Charles Henry) living at the time of the policy.

I attach great importance to the word "other" in the phrase "such other children of the assured." It has to be interpreted in the light of the family circumstances existing at the time of the policy. As already pointed out, it necessarily excludes Charles Henry. But it seems to be inclusive as well as exclusive, to mean "all other," and to refer to the family membership when the policy was taken out. On this view the word "other" points to the inclusion of all the children living at the time of the policy with the single exception of Charles Henry: cf. the footnote to *In re White's Trusts* (1).

I agree that sec. 10 of the Act has no application to the case of the present policy for the provisions of the policy so cover the field that the court's function is reduced to one of construing the words used.

In the result, the appeal should be dismissed, and the cross-appeal allowed.

McTIERNAN J. The claimants to the money which is payable under the first policy are the personal representative of the assured and the personal representative of the assured's son, Charles Henry Tindal. The policy, which was effected by the assured on his own life, provided that the insurance company should pay the policy money to his wife, if she should survive him, or, if she should predecease him, to his son, Charles Henry Tindal. By virtue of sec. 8 of the *Life, Fire and Marine Insurance Act* 1902 of New South Wales this provision of the policy became effective as a declaration of trust of the policy money for the benefit of the assured's wife or son. The assured's personal representative claims that, because the wife and son died before the assured, the objects of the trust failed and there was, therefore, a resulting trust of the money in favour of his estate. The son's personal representative, on the other hand, claims that the question whether any interest accrued to the son

(1) (1860) 123 R.R., at p. 278.

depends upon the assured's intention as expressed in the words creating the trust and that upon the true construction of the trust the son derived a transmissible interest in the policy money as soon as the policy came into force. If the case of *Cousins* v. *Sun Life Assurance Society* (1) governs the present case, the claim that in the events which happened the policy money resulted to the assured's estate cannot, on the reasoning in that case, be sustained. In that case the question was: What was the destination of policy money payable under a policy effected by an assured on his own life for the benefit of his wife, who was named in the policy? The question arose under statutory provisions exactly like sec. 8. It was held that the wife took an immediate vested interest which devolved on her death in the assured's lifetime to her personal representative as part of her estate. But it is now contended on behalf of the assured's estate that this case is inapplicable because sec. 10 of the New-South-Wales Act, which has no counterpart in the English Act, shows that it was the intention of the New-South-Wales Act that the benefit of any policy which takes effect as a declaration of trust under sec. 8 should not extend to any person other than the wife or husband or the children of the assured. But sec. 10 is expressed to be subject to any provisions expressed in any policy. The purpose of sec. 8 was to enable a trust to be created by the policy directly appropriating the policy money to the wife or husband, as the case may be, or the children without the assured's having to go to the trouble of executing a trust deed (*Cousins* v. *Sun Life Assurance Society* (2)). Where the provisions expressed in a policy operating as a declaration of trust under sec. 8 give a vested interest in the policy money to the wife or husband of the assured, as the case may be, or the children, sec. 10 does not, it seems to me, convey any legislative intention that the provisions of the policy should not take effect according to their tenor. The question who is entitled to the money under this policy must depend, therefore, upon the construction of the provisions declaring the trust to which the policy money was to be subject. In my opinion, upon the true construction of those provisions, the fund passed to the personal representative of Charles Henry Tindal as part of his estate. I

(1) (1933) Ch. 126.

(2) (1933) Ch., at p. 133.

H. C. OF A. 1940.

PERPETUAL TRUSTEE CO. (LTD.) v. TINDAL.

PUBLIC TRUSTEE v. PERPETUAL TRUSTEE CO. (LTD.).

McTiernan J.

agree with the construction of *Nicholas* C.J. in Eq., who said :—" the best reading I can give to the document is that it is a declaration of trust in favour of the son Charles Henry Tindal which operates absolutely on the death of the testator's wife in the lifetime of the testator. The contingency on which the interest was given to the wife of the testator was not fulfilled and therefore I think that the gift to Charles Henry Tindal was an express gift when the contingency took effect."

In the case of the second policy the provisions which became effective under sec. 8 as a declaration of trust of the policy money are peculiar and more complicated. The claimants to the fund are the assured's personal representative, the personal representatives of sons of the assured who were alive at the date of the policy but predeceased him and, in addition, his only surviving son. The assured's personal representative claims that the fund resulted to the assured's estate ; the other claims are founded on the provisions in the policy constituting the declaration of trust. The surviving son claims that the whole of the money accrues solely to him, while the personal representative of the sons claim that the money accrues in equal shares to the estates which they represent and to the surviving son. The policy expressly declares that the money payable under it " shall be for the benefit of the wife and children of the assured," and then directs that the money shall be payable as follows : " (*a*) to the beneficiary Caroline Edith Tindal (wife of the assured) should she become his widow absolutely her receipt to be a good discharge ; (*b*) failing which to Charles Henry Tindal son of the assured (if he survive and attain the age of twenty-one) or to such other children of the assured as the assured may by way of substitution appoint." The assured's wife did not survive him and Charles Henry did not satisfy the contingency upon which he was to be entitled to the fund and the assured did not appoint the fund among any of his children. There is no direction for the payment of the fund in default of appointment. To whom, then, upon the true construction of the assured's words was the fund to be paid if no appointment was made ? There is not, in my opinion, a resulting trust for the benefit of the assured's estate, because he explicitly declared that the policy money was to be subject to a trust for the benefit of his wife and children. This, in my opinion, was an executed trust of the policy money for the benefit of his wife and children subject to the directions expressed in clauses *a*

and *b*. The word " children " in this declaration of trust extends to include all the assured's children living at the time the policy came into force. Under clause *a* the wife was to be excluded if she did not survive the assured ; if she did, all the children, including Charles Henry, were to be excluded. Similarly, under clause *b* Charles Henry was to be excluded if the contingencies upon which the fund was to be paid to him were not fulfilled ; but if they were, the other children were to be excluded. As neither the wife nor Charles Henry qualified, it follows that all the other children living at the time the policy came into force are entitled to the fund because nothing happened to divest any one or more of them. One or more of them might have been divested in accordance with the assured's intention if he had appointed the fund. But he made no appointment. It follows that the children of the assured other than Charles Henry living at the time the policy came into force are entitled in equal shares to the policy money. These children were Archibald Arthur, Louis Nicholas Lindsay and Arthur Willoughby. The last alone survived the assured. The fund, therefore, should, in my opinion, be equally shared between him and the estates of the other two.

The appeal should be dismissed and the cross-appeal allowed.

Appeal dismissed. Cross-appeal allowed. Decretal order varied by adding after the words in the said decretal order " that upon the true construction of the above-mentioned life policy numbered 286248 A 10/N *with the Mutual Life and Citizen's Assurance Co. Ltd. and in the events which have happened the proceeds of such policy belong to the defendant Arthur Willoughby Tindal " the following words namely " the estate of Archibald Arthur Tindal a son of the above-named Charles Frederick Tindal deceased and the estate of Louis Nicholas Lindsay Tindal another son of the said above-named Charles Frederick Tindal deceased equally." Costs of all parties of appeal and of cross-appeal to be paid ratably out of the proceeds of the two policies mentioned in the order, costs of appellant as between solicitor and client.*

Solicitors for the appellant and all respondents, *Weaver, Gentle & Harrison*, Armidale, by *J. C. Rishworth.*

J. B.