[HIGH COURT OF AUSTRALIA.]

FENTON . . . . . APPELLANT;
DEFENDANT,

AND

PERPETUAL TRUSTEE COMPANY (LIMITED) AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1940.

SYDNEY, *Aug.* 13, 14.

MELBOURNE, *Oct.* 17.

Starke, Dixon, and McTiernan JJ.

*Accumulations—Income—Contingent interest—Infants—Power of maintenance—Void accumulation—Conveyancing Act* 1919-1938 (*N.S.W.*) (*No.* 6 *of* 1919—*No.* 30 *of* 1938), *sec.* 31.

By his will a testator gave his residuary estate upon trust out of the net income thereof to pay annuities to his three sisters, and upon further trust to invest the surplus income and to accumulate it at compound interest until the death of the last survivor of the annuitants. He then directed his trustee upon the happening of such last-mentioned event to stand possessed of the residuary trust funds, with accumulations, subject to certain anterior trusts, in trust for the children of the annuitants living at the period of distribution and the issue of such children dying before that period as one class and as tenants in common in equal shares "with power for the" trustee "at its discretion to apply during the minority of any object of this present trust the whole or any part or parts of the share of each such object whether vested or contingent for his or her maintenance, education and advancement in life or otherwise for his or her benefit." The testator died on 23rd December 1916, and the period allowed for accumulation by the *Thellusson Act* (*Conveyancing Act* 1919-1938 (N.S.W.), sec. 31) expired on 23rd December 1937. One of the annuitants was still living. The class in remainder included certain infants, some of whom applied to the trustee for maintenance.

*Held* that the maintenance clause authorized the trustee to apply the surplus of the current income towards the maintenance, education and advancement of the infants, and to the extent that it was so applied the *Thellusson Act*

did not operate to alter the direction in the will, but left it to take effect according to the intention of the testator.

Decision of the Supreme Court of New South Wales (Full Court): *Perpetual Trustee Co. (Ltd.)* v. *Fenton*, (1940) 40 S.R. (N.S.W.) 382; 57 W.N. (N.S.W.) 121, affirmed.

APPEAL from the Supreme Court of New South Wales.

By his will the testator, Thomas Pinder Chapman, who died on 23rd December 1916, gave devised and bequeathed all his real and personal estate not otherwise disposed of to his executor and trustee, Perpetual Trustee Co. (Ltd.), upon trust to convert and invest and stand possessed of the trust moneys and the investments from time to time representing the same, thereinafter referred to as "the residuary trust funds," upon trust out of such funds to pay annuities of varying amounts to his three named sisters, and upon further trust to invest the surplus income which after satisfying the annuities and all expenses incident to the execution of the trusts created by the will should from time to time remain in the hands of the trustee and to accumulate at compound interest the same until the death of the last survivor of the testator's said three sisters. The testator directed the trustee upon the happening of the last-mentioned event, referred to as the period of distribution, to stand possessed of the said residuary trust funds with the accumulations thereof, but subject to such of the principal trusts contained in the will anterior to the trust for accumulation as should be then subsisting, in trust for the children or reputed children of his said three sisters living at the period of distribution and the issue whether legitimate or not then living of such children or reputed children dying before that period all the objects aforesaid to be treated as one class and to take as tenants in common in equal shares not according to the stocks but according to the number of individuals comprising the class with power for the trustee at its discretion to apply during the minority of any object of this present trust the whole or any part or parts of the share of each such object whether vested or contingent for his or her maintenance, education and advancement in life or otherwise for his or her benefit.

The three annuitants survived the testator but two of them had since died. Their respective annuities had been paid and satisfied. The surviving annuitant, Lizzie Annie Fenton, aged sixty-two years, had not any, but the deceased annuitants had, issue. This issue, which was very numerous and included several infants, consisted of children, grandchildren and great-grandchildren, and formed the class to take ultimately the residuary estate of the testator.

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The income of the estate had always been more than sufficient to provide for the annuities. The approximate value in December 1939 of (*a*) the investments representing the surplus income accumulated up to and inclusive of 23rd December 1937, was £10,710; and (*b*) the original capital, was £8,455.

Up to the date of the taking out in December 1939 of the originating summons referred to hereunder no sums had been expended by the trustee under the power of maintenance contained in the will.

Requests for maintenance of infants contingently interested in the residuary trust funds had been received by the trustee.

The surviving annuitant, who represented the next of kin of the testator and Jean Owen, an infant, who represented all persons who were or might become beneficially interested in the residuary trust funds mentioned in the will, were the defendants to an originating summons taken out by the trustee in the equitable jurisdiction of the Supreme Court of New South Wales for the determination of certain questions arising under the will.

The court declared, so far as material to this report, that the power conferred on the trustee by the will to apply the whole or any portion of the vested or contingent share of an infant beneficiary for his maintenance did not cease on the termination of a period of twenty-one years from the death of the testator, and that the trustee in the exercise of that power, and subject to the payment of the annuity to the surviving annuitant, should apply, firstly, the current income of the residuary trust funds and of the accumulations of income of such funds made during the period of twenty-one years from the date of the death of the testator and, secondly, after the exhaustion of such current income, the accumulations, and, thirdly, the corpus of the residuary trust fund, and that subject to the payment of the annuity the balance of current income of the residuary trust funds and of the accumulations accruing during the remainder of the life of the surviving annuitant and not applied in the exercise of the power of maintenance would pass as on the intestacy of the testator: *Perpetual Trustee Co. (Ltd.)* v. *Fenton* (1).

The Full Court of the Supreme Court, by majority, dismissed an appeal by the surviving annuitant (2).

From that decision the surviving annuitant appealed to the High Court, the respondents to the appeal being the trustee and the other defendant to the originating summons.

(1) (1940) 57 W.N. (N.S.W.) 85.
(2) (1940) 40 S.R. (N.S.W.) 382; 57 W.N. (N.S.W.) 121.

*Maughan* K.C. (with him *Henchman* and *Riley*), for the appellant. The proper process to follow when the *Thellusson Act* is involved is, firstly, to ascertain what is the true construction of the will independently of that Act; secondly, to ascertain how the provisions of the will are affected or altered by that Act; and, thirdly, to ascertain who takes under those provisions as so affected or altered. A consideration of this matter independently of the Act shows that the testator has given to each of a number of potential beneficiaries a share in a fund to be *in esse* at a future date for distribution at that date amongst such of the beneficiaries as shall then be living, and the share is to be ascertained by looking at that gift. The testator nowhere gave to any beneficiary income as it accrued due, but he gave it to his trustee to be accumulated. Those provisions in the will are definite and unambiguous. Under the *Thellusson Act* income which, as here, accrues in respect of a residuary fund after the expiration of twenty-one years from the date of the death of the testator passes to the next of kin (*Gray* on *Perpetuities*, 3rd ed. (1915), p. 544; *Jarman* on *Wills*, 7th ed. (1930), vol. 1, pp. 364, 365). No beneficiary under the will has a contingent share of income at any stage: the interest given is a share of a fund to be distributed at a future date. The rule in *Bective* v. *Hodgson* (1) is subject to the prohibition against accumulation; this was recognized in *In re Taylor*; *Smart* v. *Taylor* (2). Further, the rule does not apply when the testator himself, as here, has stated what is to be done with the intermediate income (*Weatherall* v. *Thornburgh* (3)). The remarks of *James* L.J. in that case (4) are a correct statement of the law. Even if the gift should fail for any reason, if the testator has given the income between the date of his death and the date of distribution, the doctrine of *Bective* v. *Hodgson* (5) has no application (*In re Townsend's Estate*; *Townsend* v. *Townsend* (6)). The *ratio decidendi* in *In re Reade-Revell*; *Crellin* v. *Melling* (7) was that the intermediate income did not go under the rule in *Bective* v. *Hodgson* (5) to the ultimate beneficiaries. Questions similar to those now before the court were considered in *Perpetual Trustee Co. Ltd.* v. *Public Trustee* (8) and *Blair* v. *Curran*; *Curran and Perpetual Trustee Co.* (*Ltd.*) v. *Blair* (9). The word "share" does not include income of residue whether accumulated or not. There is no way of ascertaining what is

(1) (1864) 10 H.L.C. 656, at pp. 664, 665 [11 E.R. 1181, at pp. 1184, 1185].
(2) (1901) 2 Ch. 134, at p. 136.
(3) (1878) 8 Ch. D. 261, at pp. 271, 272.
(4) (1878) 8 Ch. D., at pp. 268, 269.
(5) (1864) 10 H.L.C. 656 [11 E.R. 1181].
(6) (1886) 34 Ch. D. 357, at p. 361.
(7) (1930) 1 Ch. 52.
(8) (1922) 23 S.R. (N.S.W.) 1; 39 W.N. (N.S.W.) 246.
(9) (1939) 62 C.L.R. 464, at pp. 501, 508, 537.

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the share of a minor in any instalment of income after the expiration of the twenty-one years' period. *Combe* v. *Hughes* (1) is a case on the rule in *Lassence* v. *Tierney* (2); it has nothing to do with this case or with *Bective* v. *Hodgson* (3) and is the converse of *Perpetual Trustee Co. Ltd.* v. *Public Trustee* (4). The decision in *In re Hawkins*; *White* v. *White* (5) has no application to this case: the point involved in that case was whether certain released income fell into residuary capital or residuary income. In *Pride* v. *Fooks* (6) it was held that a direction by a testator to his trustee to apply the income for the maintenance and education of certain children took precedence over a direction to accumulate; that case is the converse of this case.

*Murray-Prior* (*David Wilson* with him), for the respondent trustee.

*Mason* K.C. (with him *Stephen*—for *Hicks*, on military service), for the infant respondent. The power vested in the trustee to maintain may be exercised over any funds in the hands of the trustee which it holds in trust contingently for any infant. To the extent to which the trustee did exercise that power and thereby prevent accumulation the *Thellusson Act* has no application. Upon the proper construction of the will, apart from the *Thellusson Act*, it is clear that the testator intended that certain persons who were alive at the date of the death of the last surviving annuitant should take the whole estate, that is, capital, income and accumulated income, subject only to provision being made for the annuitants. The class is a contingent class, because the members thereof were required to be alive at the date of the death of the last surviving annuitant, but what they take is the residuary trust funds and the income arising in the meantime and so far as that income is not used for the maintenance, education and advancement of certain specified children it will be accumulated. The power—it is not in the nature of a trust—to maintain and educate is exercisable at any time during the minority of the children. To the extent that that power is exercised the income is not accumulated and is outside the operation of the *Thellusson Act* (*In re Deloitte*; *Griffiths* v. *Deloitte* (7); *Pride* v. *Fooks* (8)). By creating this power the testator avoided

(1) (1865) 2 DeG.J. & S. 657 [46 E.R. 531].
(2) (1849) 1 Mac. & G. 551 [41 E.R. 1379].
(3) (1864) 10 H.L.C. 656 [11 E.R. 1181].
(4) (1922) 23 S.R. (N.S.W.) 1; 39 W.N. (N.S.W.) 246.
(5) (1916) 2 Ch. 570.
(6) (1840) 2 Beav. 430 [48 E.R. 1248].
(7) (1926) Ch. 56.
(8) (1840) 2 Beav., at pp. 438, 440 [48 E.R., at pp. 1251, 1252].

an intestacy. The provision in the will with regard to accumulation should not be given any priority over the provision with regard to maintenance; they are both contained in the same will and effect must be given to both provisions. The contingent share is in the residuary trust funds and in the income whether accumulated or not; the maintenance clause is more or less a direction not to accumulate in so far as the income is required for maintenance.

*Maughan* K.C., in reply. The word "share" refers to a share of a fund to be in existence at a future date, that is, when the last annuitant dies. It is not a share of, and does not carry, income as it accrues due from time to time. Income so accruing is by reason of the *Thellusson Act* removed from the provisions of the will as from the end of the twenty-one years' period and must be dealt with in accordance with the provisions of that Act, that is, it must go to the next of kin. The remarks of *James* L.J. in *Weatherall* v. *Thornburgh* (1) were approved in *In re Deloitte*; *Griffiths* v. *Deloitte* (2). The only share a minor takes under this will is an interest in a fund to be ascertained at a future date; that fund has now been ascertained.

*Cur. adv. vult.*

Oct. 17.

The following written judgments were delivered:—

STARKE J. Thomas Pinder Chapman, who died in 1916, made a will whereby he gave his real and personal estate, not otherwise disposed of, to Perpetual Trustee Co. (Ltd.) upon trust to convert and invest and stand possessed of the trust moneys and the investments for the time being representing the same (called "the residuary trust funds") upon trust out of the residuary trust funds to pay annuities to three named sisters and upon further trust to invest the surplus income which (after satisfying the annuities and all expenses incident to the execution of the trusts of his will) should from time to time remain in the hands of the trustee company and to accumulate at compound interest the same until the death of the last survivor of the three sisters. And he directed the company upon the happening of this event (referred to as the period of distribution) to stand possessed of the said residuary trust funds with the accumulations thereof in trust for the children and reputed children of his sisters living at the period of distribution and the issue whether legitimate or not then living of such children or reputed children dying before that period all the objects aforesaid to be treated as one class and to take as tenants in common in equal

(1) (1878) 8 Ch. D., at p. 268. (2) (1926) Ch., at p. 62.

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shares not according to the stocks but according to the number of individuals comprising the class, with power for the company at its discretion to apply during the minority of any object of this present trust the whole or any part or parts of the share of each such object, whether vested or contingent, for his or her maintenance, education and advancement in life or otherwise for his or her benefit.

The will expressly provides for the accumulation of the surplus income and the destination of the corpus of the trust fund and the accumulations. It is therefore unnecessary, I think, to set forth the rules or statutory provisions which otherwise would govern the right to the intermediate income from the future or contingent gift to the children of the testator's sisters and the issue of such children or of the application of such income to the maintenance education or advancement of infants contingently entitled thereto.

But the accumulations directed by the will cannot transcend the limits allowed by the *Thellusson Act*, 39 & 40 Geo. III. c. 98 (now *Conveyancing Act* 1919-1932 (N.S.W.), sec. 31), which in the present case was the term of twenty-one years from the death of the testator on 23rd December 1916. A provision which exceeds those limits is good for such period of accumulation as might lawfully have been directed and void only for the residue. Again, *Thellusson's Act* " was not intended to operate, and does not operate, to alter any disposition made by the testator, except his direction to accumulate. Striking that out, everything else is left as before, and all the other directions of the will . . . are to take effect according to the true construction of the will, unaltered by the effect of the statute " (*Eyre* v. *Marsden* (1); *Weatherall* v. *Thornburgh* (2)).

This brings us to the consideration of the power conferred by the testator's will to maintain, educate and advance infants contingently entitled under the will. The power is to apply the whole or any part or parts of the share, whether vested or contingent, of each object of the trust. The direction, however, to accumulate beyond the period allowed by the *Thellusson Act* was null and void. Between the period when the accumulation ceased and the period of distribution under the will a gap, it was said, was created by the *Thelluson Act* in the dispositions made by the testator and there was nothing in the will which carried the income, the accumulation of which was forbidden, into the share or shares of the infants contingently entitled under the will (*Weatherall* v. *Thornburgh* (3)). The argument was answered by a reference to the decision of Lord *Langdale*

(1) (1838) 2 Ke. 564, at p. 574 [48 E.R. 744, at p. 749].

(2) (1878) 8 Ch. D., at p. 271.

(3) (1878) 8 Ch. D. 261.

in *Pride* v. *Fooks* (1), which, he said in *Conolly* v. *Farrell* (2), was not much litigated and that he did not therefore look upon it as a very high authority. However, Lord *Langdale* in *Pride* v. *Fooks* observed: "The Act which prevents accumulations applies only to that which was meant to be accumulated—to the residue after the purposes which continue lawful are answered; not to anything which it was within the duty or the legal competence of the trustee to do, as against the accumulation if the accumulation had been allowed to proceed" (3). In *Theobald* on *Wills* (See 3rd ed. (1885), p. 414, and 7th ed. (1908), p. 616) the case is cited for this proposition: "Where there is a direction to accumulate income with a discretionary power to apply any part of the income towards the maintenance of infants, the power of maintenance continues after the period of accumulation limited by the *Thellusson Act* has expired." But the passage disappears from the eighth edition (1927). The reasoning of Lord *Langdale* was developed by the learned Chief Justice of the Supreme Court of New South Wales in the present case. "The share of the objects of the power," he said, "is a share in the residuary trust funds with the accumulations thereof. The form of the residuary gift is such that each member of the contingent class for the time being in existence acquires a contingent share in the surplus of each parcel of income as it accrues, but, by reason firstly, of the express trust for accumulation, and secondly, of the form of the gift, the share cannot be paid over to him or applied for his immediate benefit, except by virtue of the power. To the extent, but only to the extent, that it cannot be so paid over or applied but must be accumulated, his contingent share of income is divested by the *Thellusson Act* and passes as on intestacy. To the extent that it can be so paid or applied, the Act is inoperative. The power enables their contingent shares of income, as they accrue, to be applied for the benefit of infant beneficiaries. Since the exercise of the power after the period of twenty-one years in no way involves any accumulation of income . . . the power is exercisable as to the contingent share of income accruing after that period, notwithstanding that to the extent that the power is not exercised those shares necessarily pass as on intestacy" (4).

The power is a discretionary trust for the benefit of infants contingently entitled and an authority to the trustee to pay over the surplus income to the infants so entitled notwithstanding the trust

(1) (1840) 2 Beav. 430 [48 E.R. 1248].
(2) (1845) 8 Beav. 347, at pp. 351, 352 [50 E.R. 136, at p. 138].
(3) (1840) 2 Beav., at p. 441 [48 E.R. at p. 125].
(4) (1940) 40 S.R. (N.S.W.), at pp. 391, 392; 57 W.N. (N.S.W.), at p. 123.

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to accumulate. This trust attaches itself to and forms part of the share or shares of each of the infants contingently entitled. To the extent that the surplus income is paid over or applied for the maintenance, education and advancement in life of the infants contingently entitled and is not accumulated, the *Thellusson Act* does not operate to alter the direction in the will and leaves it to take effect according to the intention of the testator. Consequently, in my judgment, the conclusion reached by the majority of the learned judges in the Supreme Court of New South Wales was right. This discretionary trust or power is not, I should add, obnoxious to the rule against perpetuities because, as *Williams* J. observed, the ultimate gift will vest in possession on the death of the last survivor of the three sisters. But if the period of accumulation had extended beyond the time prescribed for the vesting of executory interests by the rule, the direction for accumulation would have been void *in toto*. *Jarman* on *Wills*, 7th ed. (1930), p. 279, note *u*, suggests that the decision in *Pride* v. *Fooks* (1) with reference to the power of advancement seems contrary to this principle, but the rule against perpetuities has no application to the present case for the reason already mentioned.

The appeal should be dismissed.

DIXON J. This appeal does not appear to me to depend upon a question of principle but rather to turn upon the precise meaning and application of the maintenance clause.

What the *Thellusson Act* makes void, after the permitted period, is only the direction to accumulate income. Dispositions which cannot operate independently of the void direction for accumulation must fail by consequence, but otherwise the provisions of the will or settlement are unaffected. The income " so directed to be accumulated " is, according to the terms of the statute, to " go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed." But who that person is or those persons are must be discovered primarily from the will or settlement, by considering the effect produced upon the limitations, powers and dispositions of that instrument when the direction to accumulate is treated as spent or no longer effective, at the expiration of the period allowed by the Act. If, on that footing, there remain valid gifts or powers, whether express or implied, which, when given their true effect, are applicable to the whole or any part of the released income, then they are to be applied accordingly, and only in so far as they do not extend is there any

(1) (1840) 2 Beav. 430 [48 E.R. 1248].

question of intestacy. "The statute . . . was not intended to operate, and does not operate, to alter any disposition made by the testator, except his direction to accumulate. Striking that out, everything else is left as before, and all other directions of the will as to the time of payment, substitution, or any contingencies, are to take effect according to the true construction of the will, unaltered by the effect of the statute" (per Lord *Langdale* M.R., *Eyre* v. *Marsden* (1)).

In the present case no one denies that the direction to accumulate ceased to have any valid operation on 23rd December 1937, that is, twenty-one years after the death of the testator, and no one denies that the class who, on the terms of the will alone, would take the fund and the accumulations thereof cannot be ascertained or closed before the period of distribution, a contingent event, so that a lacuna in the disposition of income is created the completeness of which can be qualified by nothing but the maintenance clause. Apart, therefore, from that clause the intermediate income must be distributed as upon an intestacy. But among the presumptive members of the class to take are a number of infants and if, under the power to maintain, the trustees may intercept income which otherwise would be subject to the now invalid direction to accumulate, the trustees have a discretion to apply the released income to the maintenance of the infants so that only the surplus would be distributable as on an intestacy. It follows that the question is whether the maintenance clause is so framed that it can operate only upon income which has been accumulated pursuant to the direction in the will or on the contrary attaches not only to accumulations of income but to income as it arises and before it has been actually subjected to the process of accumulation the continuance of which the *Thellusson Act* forbids.

This question appears to me to be entirely one of interpretation and to depend upon the form of the provisions of which the clause forms a part.

The material portion of the will begins by directing a sale and conversion and the investment of what are called the residuary trust funds. Out of the net income the trustees are directed to pay three annuities and to invest the surplus income and to accumulate the same at compound interest until the death of the last surviving annuitant, which is to be the period of distribution. On that event they are to stand possessed of the residuary trust funds with the accumulations thereof for a class composed of the children then living of the annuitants and the issue then living of those of

(1) (1838) 2 Ke., at p. 574 [48 E.R., at p. 749].

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such children who should then be dead as tenants in common in equal shares *per capita*. Then the provision goes on as follows: "with power for the" (trustees) "at their discretion to apply during the minority of any object of this present trust the whole or any part or parts of the share of each such object whether vested or contingent for his or her maintenance education and advancement in life or otherwise for his or her benefit."

The effect or operation of the power thus expressed must be considered in the first instance apart altogether from the invalidity of the direction to accumulate. While that direction remained effectual, would the trustees have exceeded their authority if they took a proportion of current income as it accrued or arose in their hands and without more applied it for the maintenance, education or advancement of an infant contingently entitled to a share? Or, on the other hand, was the power of the trustees in strictness confined to raising whatever was required for maintenance from the residuary trust funds and the income which, in fulfilment of the direction to accumulate, the trustees had already capitalized or in some definitive way "accumulated"?

If they were confined to the latter course, no part of the operation of the maintenance clause is independent of the accumulation the direction for which is invalidated by the *Thellusson Act*, and accordingly the income accruing after 23rd December 1937 is released not only from the direction to accumulate but also from the power of maintenance and is applicable to no purpose under the will but must be distributed as on an intestacy. In favour of this interpretation of the clause, it is said that, before the power can be exercised in favour of an infant who is an object of the trust, a definite part or proportion of an entire fund consisting of original corpus and of accumulations of income must be notionally ascertained and allocated to him as his share, that is, presumptive share, and against that definite part the expenditure for maintenance must be thrown. To this it may be answered that among beneficiaries entitled to a fund equally *per capita*, a contingent share can mean no more than that arithmetical proportion of the whole which one will receive if he survives and no additional object of the trust comes into existence and none dies before the period of distribution. Clearly there is no appropriation or segregation of assets. The share is an arithmetical proportion only. What ground is there for regarding current income as it arises or accrues as outside the application of the arithmetical proportion unless and until some overt and definitive step is taken by the trustees whereby the income is accumulated? It must always be borne in mind that it is the accumulation of income,

its withdrawal from current use and enjoyment, that the *Thellusson Act* is aimed at. "The Act which prevents accumulations applies only to that which was meant to be accumulated—to the residue after the purposes which continue lawful are answered; not to anything which it was within the duty or the legal competence of the trustee to do, as against the accumulation if the accumulation had been allowed to proceed; a great difference is indeed effected in the parties who are interested to oppose any application of the income which would otherwise have accumulated, but no difference in the power or duty to apply the income in a mode directed by the will, which continues lawful" (per Lord *Langdale* M.R. in *Pride* v. *Fooks* (1), a case in which the same or a similar question arose but on provisions more clearly supporting the view that the power to maintain operated in priority to the direction to accumulate).

The interpretation of the power of maintenance, etc., which limits its application to corpus and accumulations of past income and excludes from its operation current income as it arises appears to me artificial and more verbal than real. The purpose of the power is to enable the trustee to use for the immediate advantage of the *cestui que trust* what otherwise would be withheld until the period of distribution and the consequent vesting of his interest.

The more natural application to give the power is as an authority covering corpus and income and attaching to income as and when it arises. It thus authorizes the trustee to apply towards the maintenance, etc., of an infant a proportion of current income corresponding to his contingent share instead of withholding it for accumulation.

In my opinion the conclusion of the majority of the Supreme Court is right and the appeal should be dismissed.

The appellant under the decree was appointed to represent the next of kin and having regard to the nature of the question possibly stood in a different position from a beneficiary appealing in his own interest entirely from a decision given upon a trustee's originating summons. We would, I think, be justified in ordering that the respondents' costs (the trustee's as between solicitor and client) be paid not personally by the appellant but out of the estate, to be retained out of the released income which, subject to the power of maintenance, would be distributable among the statutory next of kin.

McTiernan J. I agree that the appeal should be dismissed. I concur in the reasons of *Dixon* J. and in the order proposed by him.

(1) (1840) 2 Beav., at p. 441 [48 E.R., at p. 1252].

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*Appeal dismissed. Order that the respondents' costs of the appeal be taxed, those of the trustee as between solicitor and client, and paid out of the estate. Order that such costs, in the administration of the trusts of the will, be thrown against and borne by, so far as the same may extend, the balance of the current income arising from time to time during the remainder of the life of the appellant which under the decretal order of 8th April 1940 would pass as on an intestacy and that the trustee be at liberty to retain such balance of income accordingly.*

Solicitors for all parties, *Gordon, Garling & Giugni*, Young, by *H. C-M. Garling & Garling.*

J. B.