App. 79 W.N. 260

[HIGH COURT OF AUSTRALIA.]

MICHAEL . . . . . APPELLANT;
DEFENDANT,

AND

CALLIL AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 15, 16.

SYDNEY, *Dec.* 13.

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

Will—Trust for conversion—Power to postpone—Residuary personalty—Wasting asset—Income or capital—Apportionment—Rule in Howe v. Lord Dartmouth—Assignment to testatrix by beneficiary under another will of right to receive income for life.

By her will M. specifically bequeathed certain chattels and devised and bequeathed the whole of her real and the residue of her personal estate (thereafter in the will referred to as "my trust estate") to her trustees on trust to distribute personal effects as directed, and to convert into money such part of the estate as should be required to pay debts, &c., and certain legacies specified. The will then set out the legacies and a specific devise. It directed the trustees to stand possessed of "the rest and residue of my trust estate" in trust to convert the same into money and after payment of debts, &c., to invest the proceeds in securities authorized by law and to accumulate the income therefrom during the lifetime of W. (clause 11). It empowered the trustees "notwithstanding the directions to accumulate contained in clause 11 . . . if they in their absolute discretion think fit so to do to advance out of the income of my residuary trust estate" during the life of W. stipulated maximum weekly sums (amounting in all to £18 a week) for the maintenance benefit and welfare of W.'s wife, a granddaughter and a grandson, and such sum as in their discretion they thought fit for the maintenance and benefit of W. during his life and directed the trustees to invest all income not so applied in authorized securities (clause 12). It directed the trustees on the death of W. to stand possessed "of my residuary trust estate," subject to the payment of £5 a week to W.'s widow, upon trust for life tenants and remaindermen. It empowered the trustees to postpone conversion "of

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my trust estate or any part thereof for such period as they shall in their absolute discretion think fit" and to "retain my trust estate in the same investments in which it is invested at the date of my death." M.'s husband, A., had predeceased her leaving a will by which he left his residuary estate on trust to pay the income thereof to M. for life and after her death to their son, W., for life. W. survived M. During M.'s life W. had become bankrupt, and M. had purchased from his trustee in bankruptcy his future life interest in A.'s estate. This interest was the most valuable asset in her estate; apart from it the estate had no substantial source of income. The periodical payments received by M.'s trustees on account of W.'s life interest were treated by them as income of M.'s residuary estate and applied accordingly. Otherwise the income of the estate would not have been sufficient for the payments contemplated by clause 12 of the will.

Held, by *Rich*, *Starke*, *Dixon*, *McTiernan* and *Williams* JJ., that the moneys received by the trustees on account of W.'s life interest were "income of my residuary trust estate" within clause 12 of the will and were properly applied by them in the manner thereby provided without any such apportionment as would have been appropriate if the terms of the will had permitted the application of the rule in *Howe* v. *Lord Dartmouth*, (1802) 7 Ves. 137 [32 E.R. 56], or *In re Chesterfield's* (*Earl*) *Trusts*, (1883) 24 Ch. D. 643 (*Latham* C.J. being of opinion that the moneys in question were capital in the hands of the testatrix's trustees and that the case was one for the application of the rule in *In re Chesterfield's* (*Earl*) *Trusts*, (1883) 24 Ch. D. 643.)

Decision of the Supreme Court of Victoria (*Martin* J.) varied.

APPEAL from the Supreme Court of Victoria.

Martha Michael died on 18th July 1939 leaving a will by which she specifically bequeathed certain chattels and devised and bequeathed the whole of her real and the residue of her personal estate "(hereinafter called 'my trust estate')" to her trustees on trust to distribute her personal effects among persons named and to "convert into moneys such part of my trust estate as shall be required to pay my just debts funeral and testamentary expenses . . . probate and estate duties . . . and the legacies and payments hereinafter bequeathed and directed to be paid and to pay such debts duties expenses legacies and payments." The will then provided for certain specific legacies and a specific devise. It proceeded as follows: "11. I direct my trustees to stand possessed of the rest and residue of my trust estate in trust to sell realise and convert the same into money and after payment of my just debts funeral and testamentary expenses the probate and estate duties payable upon my estate to invest the proceeds thereof in securities authorized by law to trustees and to stand possessed of such investments in trust to accumulate the income therefrom during the lifetime of my son

Wadya. 12. Notwithstanding the directions to accumulate contained in clause 11 of this my will I empower my trustees if they in their absolute discretion think fit so to do to advance out of the income of my residuary trust estate during the lifetime of my son Wadya for the maintenance benefit and welfare of the persons hereinafter mentioned the following sums : (*a*) Such sum not exceeding five pounds per week as they in their absolute discretion shall determine for my daughter-in-law Myrtle " (Wadya's wife) " until her death ; (*b*) Such sum not exceeding three pounds per week as they in their absolute discretion shall determine for my granddaughter Roma for her life ; (*c*) Such sum not exceeding ten pounds per week as they shall in their absolute discretion deem fit for my grandson Alec during the lifetime of his father Wadya ; (*d*) Such sum as they shall in their absolute and uncontrolled discretion think fit for the maintenance and benefit of my son Wadya during his life. I direct my trustees to invest all income not applied by them as aforesaid in securities authorized by law to trustees. 13. Upon the death of my said son Wadya I direct my trustees to stand possessed of my residuary trust estate in trust to pay out of the income therefrom the sum of five pounds per week to my daughter-in-law Myrtle and to pay the residue of the income to my granddaughter Roma for life and upon the death of the said Roma I direct my trustees to stand possessed of my residuary trust estate together with all accumulated income " upon trust for the children of Roma with gifts over to testatrix's grandson Alec and others in the event of Roma's death without issue. " 14. I empower my trustees : (*a*) To grant leases and accept surrenders of leases and to grant and acquire easements in respect of my real estate ; (*b*) To postpone the sale realisation and conversion of my trust estate or any part thereof for such period as they shall in their absolute discretion think fit ; (*c*) To manage my real estate in as full and effectual a manner as if I were present acting in my own person and to carry out all necessary repairs and improvements thereto. 15. I authorise my trustees to raise any part or parts of the then expectant presumptive or vested share of any child or grandchild of mine in my trust estate under the trusts herein contained and to pay or apply the same for the advancement benefit maintenance and welfare in life generally of such child or grandchild in such manner as my trustees shall think fit and declare that this power shall be in addition to the powers conferred upon my trustees by ss. 31 and 32 of the *Trustee Act*, 1928. 16. I empower my trustees to vary and transpose any investments made by them and at any time to realise upon any part of my trust estate and re-invest the proceeds of such realisation in any investments whatsoever that to my trustees seem fit anything to the con-

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trary in this will notwithstanding without being responsible for any loss arising therefrom. I also empower my trustees to retain my trust estate in the same investments in which it is invested at the date of my death."

The testatrix's husband, Assid Michael, had died in 1925, leaving a will by which he left his residuary estate on trust to pay the income thereof to her for life and after her death to their son, Wadya, for life. During the life of the testatrix, Wadya (who survived the testatrix) became bankrupt, and she bought from his trustee in bankruptcy his future life interest in his father's estate. This interest was the most valuable asset in her estate; otherwise the estate had no substantial source of income. The periodical payments received by the testatrix's trustees on account of Wadya's life interest in his father's estate were treated by them as income of the testatrix's residuary estate and applied accordingly under clause 12 of the will. Without these moneys the income of the residuary estate would not have been sufficient to permit the payments contemplated by clause 12.

F. A. L. and G. Callil, the executors and trustees of the testatrix, applied to the Supreme Court of Victoria by originating summons for the determination of questions which, so far as here material, were substantially as follows:—

1. Did the periodical sums received by the estate of the testatrix from the estate of her husband under the assignment of Wadya's life interest constitute "income" within the meaning of testatrix's will?

2. Did the whole of such moneys form part of the corpus of her estate?

3. (*a*) Was it the duty of the plaintiffs to apportion such moneys between corpus and income?

(*b*) If yes to part (*a*), upon what principle should such apportionment be made?

The defendants to the summons were Roma Dowling, Myrtle Michael, Alec Michael, Wadya Michael and Salem Fakhry (who was sued as representing himself and all persons, other than the named defendants, interested in the residuary estate).

The summons came before *Martin* J., who answered the questions as follows:—1. No. 2. No. 3. (*a*) Yes. 3. (*b*) By valuing the right to receive moneys from the estate of Assid Michael as at the date of the death of the testatrix and allowing four per centum on such value to be available for distribution as set out in clause 12 of the will.

From this decision Alec Michael appealed to the High Court, joining all other parties to the summons as respondents to the appeal.

Sholl, for the appellant. The rule in *Howe* v. *Lord Dartmouth* (1) does not apply where the will shows an intention to the contrary. Such an intention appears from the will now in question. The moneys received on account of Wadya's life interest are not of a capital nature but are wholly income. The capital asset of testatrix's estate is Wadya's equitable life estate ; it is the tree which bears the fruit : Cf. *In re Fisher* ; *Harris* v. *Fisher* (2). These moneys are therefore " income of my residuary trust estate " within clause 12 of the will and applicable accordingly pending conversion. (The " trust estate " referred to throughout the will is the whole of the property given to the trustees in the preamble to the will.) It appears from the terms of the will and the condition of the estate to have been intended that these moneys should be applied in specie under clause 12. Where, as in the present case, there is a trust to convert, an absolute discretion to postpone conversion and a discretion to retain the estate in an unconverted state, the inference is that the tenant for life (or similar beneficiary) is to receive the income in specie pending conversion unless the powers to postpone and retain are merely incidental and for convenience in administration. This case is not affected by the decision in *In re Chaytor* ; *Chaytor* v. *Chaytor* (3) ; there the will was interpreted, rightly or wrongly, as not giving anything except income from the proceeds of conversion. Under clause 11 of the present will the income to be accumulated is that of " such investments "—literally, of the invested proceeds of conversion only. The expression in clause 12, " income of my residuary trust estate," is wider unless, having regard to clauses 14 and 16, " investments " in clause 11 is given an extended meaning to make it conform with clause 12. That to give this extended meaning to clause 11 would be more likely to effectuate the intention of the testatrix is shown by clauses 13 (there, again, the reference is to " my residuary trust estate," not to " investments "), 14 (sub-clauses (a) and (c) are clearly intended to operate through the administration of the estate), 16 (the phrase " trust estate " is used to include unconverted assets, and the class of authorized investments is enlarged despite clause 11). [He referred to *Theobald* on *Wills*, 9th ed. (1939), pp. 447-452, 455 ; *Underhill's Law of Trusts and Trustees*, 8th ed. (1926), pp. 241-249, 253, 254, particularly pp. 244, 248, 249 ; *Lewin* on *Trusts*, 14th ed. (1939), pp. 235, 236 ; *Hanbury's Modern Equity*, 3rd ed. (1943), pp. 206-209 ; *Jarman* on *Wills*, 7th ed. (1930), pp. 1193-1219, especially p. 1201 ; *In re Inman* ; *Inman* v. *Inman* (4) ;

(1) (1802) 7 Ves. 137 [32 E.R. 56].
(2) (1943) Ch. 377 : See, particularly, pp. 386, 387.
(3) (1905) 1 Ch. 233 : See pp. 234, 238-240.
(4) (1915) 1 Ch. 187, at p. 191.

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In re Nicholson; *Eade* v. *Nicholson* (1); *In re Bates*; *Hodgson* v. *Bates* (2); *In re Wilson*; *Moore* v. *Wilson* (3); *Gray* v. *Siggers* (4); *In re Thomas*; *Wood* v. *Thomas* (5); *In re Chesterfield's (Earl) Trusts* (6); *Beavan* v. *Beavan* (7).] Moreover, this is not the ordinary case of tenant for life and remaindermen. Assuming the receipts to be income, no question of apportionment arises where (as in this case) the trustees have an absolute discretion to apply all or any of the income for the benefit of various individuals, and there is no life tenant in the sense in which that expression is used in the equitable rules relating to apportionment. If, contrary to the appellant's contention, the sums in question are wholly corpus, then they are apportionable, as received, between capital and income on the same principle as reversionary interests.

Hudson K.C. (with him *Voumard*), for the respondent trustees. The trustees join in the submission of the appellant. To treat the sums in question as income is in accordance with the manifest intention of the testatrix. That intention should not be frustrated by the application of rules laid down in cases decided on other wills. [He referred to *Perrin* v. *Morgan* (8); *Bate* v. *Hooper* (9).] If the case is thought to be one for apportionment, the rule in *In re Chesterfield's (Earl) Trusts* (10) is the appropriate rule. [He referred to *Underhill's Law of Trusts and Trustees*, 9th ed. (1939), p. 270.]

Spicer, for the respondent Fakhry. Advances can be made under clause 12 of the will only out of the income of the residuary estate of the *testatrix*, only out of the income of the estate of which she died possessed. There is nothing in the will to say that income of Assid Michael's estate is to be treated, when it comes into the estate of the testatrix, as income of her estate. The will discloses no such intention as will exclude the rule in *Howe* v. *Lord Dartmouth* (11). The character of Wadya's interest in Assid's estate must be examined. The question which has to be determined is what is the asset that Wadya's interest represents. This cannot be answered simply by saying that the "asset" is the right to receive payments from time to time, that that right is the "tree" and the payments are the "fruit." Wadya had no right to enjoy in possession the property from which Assid would have been entitled to receive income. The

(1) (1909) 2 Ch. 111, at p. 117.
(2) (1907) 1 Ch. 22.
(3) (1907) 1 Ch. 394, at p. 398.
(4) (1880) 15 Ch. D. 74, at p. 77.
(5) (1891) 3 Ch. 482.
(6) (1883) 24 Ch. D. 643.
(7) (1853) 24 Ch. D. 649 (*n.*).
(8) (1943) A.C. 399, at pp. 406, 408, 414, 417, 420.
(9) (1855) 5 DeG. M. & G. 338 [43 E.R. 901].
(10) (1883) 24 Ch. D. 643.
(11) (1802) 7 Ves. 137 [32 E.R. 56].

payments made by Assid's trustees on account of Wadya's interest are of necessity made by them out of what in their hands is income of the estate they administer, but it by no means follows that the sums payable to Wadya, or, in the events which have happened, to the trustees of the testatrix, are income in the hands which receive them. Such sums cannot be treated as income unless the will clearly expresses the intention that they should be so treated. The present will does not express this intention; on the contrary, its provisions are inconsistent with this intention, and the sums in question must be regarded as capital of the estate of the testatrix. If the sums received were to be applied under clause 12, the whole of Wadya's life interest could be exhausted during his life, and there would be no point in the direction to accumulate contained in clause 11 of the will or in the elaborate scheme in clause 13 in relation to the residuary estate after Wadya's death. Moreover, it is to be noticed that clause 13 provides for both life tenants and remaindermen; this case, therefore, is not to be distinguished from the apportionment cases on the ground (if it is a ground of distinction) that no question as between tenants for life and remaindermen arises. The reported decision which is nearest to the present is *In re Hey's Settlement Trust*; *Hey* v. *Nickell-Lean* (1), which distinguishes *Neville* v. *Fortescue* (2) on the construction of the will; *Alcock* v. *Sloper* (3) and *In re Sherry* (4) are likewise distinguishable. In so far as *In re O'Hagan*; *O'Hagan* v. *Lloyds Bank Ltd.* (5) is to the contrary, it must be regarded as having been wrongly decided. Accordingly, the apportionment rule should be applied to Wadya's life interest regarded as an asset in the estate of the testatrix. [He referred to *In re Payne*; *Westminster Bank Ltd.* v. *Payne* (6); *Andrews* v. *National Trustees, Executors & Agency Co. of Australasia Ltd.* (7).]

Roma Dowling and Wadya Michael submitted to any order the Court might make.

Myrtle Michael did not appear.

Sholl, in reply. *Neville* v. *Fortescue* (2), *Alcock* v. *Sloper* (3), *In re Sherry*; *Sherry* v. *Sherry* (8) and *In re O'Hagan* (9) are indistinguishable from the present case and should be followed in preference to *In re Hey's Settlement Trust* (1), which is only a decision on the meaning of the word "property" in a particular will; in so far as

(1) (1945) 61 T.L.R. 334.
(2) (1848) 16 Sim. 333 [60 E.R. 902].
(3) (1833) 2 My. & K. 699 [39 E.R. 1111].
(4) (1913) 2 Ch. 508: See p. 510.
(5) (1932) W.N. (Eng.) 188.
(6) (1943) 169 L.T. 365.
(7) (1936) 56 C.L.R. 1, at pp. 6, 11.
(8) (1913) 2 Ch. 508.
(9) (1932) W.N. (Eng.) 188.

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it may be relevant here, it is based on *Crawley* v. *Crawley* (1) (in which no reasons were given and which is inconsistent with *In re O'Hagan* (2)), *In re Whitehead*; *Peacock* v. *Lucas* (3) (which merely decided that income of a legacy fund already segregated was not income of residue under the will there in question) and *In re Fisher* (4), the judgment in which makes it clear that it does not affect the present case. *Scoble* v. *Secretary of State for India* (5) supports the view that the sums in question are income; so, also, *Re Slater*; *Slater* v. *Jonas* (6) and *Re Aste*; *Mossop* v. *Macdonald* (7) (which are on the same lines as *In re Inman* (8)) and *In re Wythes*; *West* v. *Wythes* (9). If *In re Chesterfield's (Earl) Trusts* (10) is considered applicable, it can be extended to future unascertained sums (*Beavan* v. *Beavan* (11); *In re Hollebone*; *Hollebone* v. *Hollebone* (12)). On this basis clause 16 of the will would not apply and, therefore, would not exclude apportionment.

Cur. adv. vult.

Dec. 13. The following written judgments were delivered:—

LATHAM C.J. Assid Michael, who died on 30th April 1925, by his will left his residuary real and personal estate upon trust to pay the income thereof to his wife Martha Michael for her life and after her death to his son Wadya for life. The income was duly paid to Mrs. Michael in accordance with the directions contained in the will. During her life her son Wadya became bankrupt, and she bought from his trustee in bankruptcy his future interest in his father's estate. Mrs. Michael died on 18th July 1939. Her trustees have, under the assignment made to her by Wadya's trustee, received about £2,570 per annum from Assid Michael's estate. Under Mrs. Michael's will the trustees had a discretion to advance out of the income of her residuary trust estate during the lifetime of Wadya to specified persons sums not exceeding £18 per week and such sums as they should think fit for the maintenance and benefit of Wadya during his life. The trustees have applied a substantial part of the moneys received from Assid Michael's estate in making these payments. The question now arises whether they were right in treating the moneys so received as income of the estate of their testatrix.

The assigned interest of Wadya which belonged to Mrs. Michael was plainly a wasting asset. Upon an application by originating

(1) (1835) 7 Sim. 427 [58 E.R. 901].
(2) (1932) W.N. (Eng.) 188.
(3) (1894) 1 Ch. 678: See pp. 684, 685.
(4) (1943) Ch. 377.
(5) (1903) 4 Tax Cas. 478, 618: See pp. 619, 622.
(6) (1915) 113 L.T. 691.
(7) (1918) 118 L.T. 433.
(8) (1915) 1 Ch. 187.
(9) (1893) 2 Ch. 369.
(10) (1883) 24 Ch. D. 643.
(11) (1853) 24 Ch. D. 649 (*n*).
(12) (1919) 2 Ch. 93, at pp. 96-98.

summons, the Supreme Court of Victoria (*Martin* J.) applied the rule in *Howe* v. *Lord Dartmouth* (1). Under this rule where residuary personal estate is given in succession the assumption is, in the absence of evidence of contrary intention, that it was intended that the beneficiaries should enjoy the same thing in succession. In order to give effect to that intention, the rule is that the trustees are required in the interests of a beneficiary for life to realize such parts of the trust property as consist of reversions or future interests and, in the interest of beneficiaries in remainder, to realize any wasting assets. The money realized must be laid out in permanent investments, and the person entitled for life then receives the income earned by those investments. Applying this rule, *Martin* J. decided that the moneys received by the trustees were not all income nor all corpus, and that the moneys should be apportioned between corpus and income by valuing the right to receive moneys from the estate of Assid Michael as from the date of the death of the testatrix and allowing four per cent of such value to be available for distribution as directed by the will during the life of Wadya.

An appeal is brought to this Court. It is contended for the appellant and for the trustees that the trustees acted rightly in dealing with the moneys in the manner stated and, alternatively, that, at least, the apportionment should not be as determined by the learned Judge (*Meyer* v. *Simonsen* (2)), but that the principle of *Howe* v. *Lord Dartmouth* (1) should be applied in the manner adopted in *In re Chesterfield's* (*Earl*) *Trusts* (3). If the rule in the latter case is applied an inquiry is directed as to the sum which, put out at a proper rate of interest on the date of the testator's death and accumulating at compound interest calculated at that rate with yearly rests, would, with accumulations of interest, have produced on the day of receipt of moneys by the executor or trustee the amount actually received. A sum so ascertained is to be treated as capital, and the residue of the sum received as income.

The property of Mrs. Michael at the time of her death consisted of a house at Windsor, the purchased interest of Wadya Michael in his father's estate, £1,011 cash, and other assets of the value of about £400.

By her will the testatrix devised and bequeathed the whole of her real and the residue of her personal estate (after certain specific legacies) to her trustees upon trust to distribute certain personal effects, to convert into money such part of the estate as was required

(1) (1802) 7 Ves. 137 [32 E.R. 56].
(2) (1852) 5 De G. & Sm. 723 [46 E.R.1316].
(3) (1883) 24 Ch. D. 643.

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to pay debts, and to pay certain legacies. The house property was specifically devised. Clause 11 of the will is as follows :—

"I direct my Trustees to stand possessed of the rest and residue of my trust estate in trust to sell realise and convert the same into money and after payment of my just debts funeral and testamentary expenses the probate and estate duties payable upon my estate to invest the proceeds thereof in securities authorised by law to Trustees and to stand possessed of such investments in trust to accumulate the income therefrom during the lifetime of my son Wadya."

The clause contains a plain direction to convert residuary personalty. It is a provision requiring the investment of the proceeds of conversion for the purpose of producing income for the estate. The income from such investments is to be accumulated during the lifetime of Wadya Michael. The provision in terms expressly applies only to the income of the investments made as the result of the conversion directed.

Clause 12 is as follows :—

"Notwithstanding the directions to accumulate contained in Clause 11 of this my Will I empower my Trustees if they in their absolute discretion think fit so to do to advance out of the income of my residuary trust estate during the lifetime of my son Wadya for the maintenance benefit and welfare of the persons hereinafter mentioned the following sums :—

(*a*) Such sum not exceeding Five pounds per week as they in their absolute discretion shall determine for my daughter-in-law Myrtle until her death ;

(*b*) Such sum not exceeding Three pounds per week as they in their absolute discretion shall determine for my granddaughter Roma for her life ;

(*c*) Such sum not exceeding Ten Pounds per week as they shall in their absolute discretion deem fit for my grandson Alec during the lifetime of his father Wadya ;

(*d*) Such sum as they shall in their absolute and uncontrolled discretion think fit for the maintenance and benefit of my son Wadya during his life.

I direct my Trustees to invest all income not applied by them as aforesaid in securities authorised by law to Trustees."

This clause deals with the whole of the income of the residuary trust estate, whether derived from investments in securities authorized by law (see clause 11) or from other investments. The clause contemplates a possible expenditure of £18 per week, with an additional sum which may be paid to Wadya. It is argued for the appellant that, in view of the character and extent of the assets

which the testatrix had when she died, the mention of such a sum shows that she must have intended that the moneys from Assid Michael's estate should all be available to the trustees for disposition as income under the provisions of clause 11. On the other hand, it is pointed out that the making of any " advances " under the clause is completely discretionary and that the amounts mentioned are not fixed amounts but maximum amounts.

Clause 13 provides that, upon the death of her son Wadya, the trustees are to stand possessed of the residuary trust estate upon trust to pay £5 per week to a daughter-in-law Myrtle and the residue of the income to a granddaughter Roma for life. Upon the death of Roma the trustees are directed to stand possessed of the residuary trust estate, together with all accumulated income, upon trust for such of the children of Roma as shall be living at the death of Roma and, if more than one, in equal shares, with a provision that if Roma should die without leaving any issue surviving her, a grandson of the testatrix should receive the income during his lifetime, and that after his death his children should take, with ultimate provisions for the event of the grandson dying without leaving issue surviving him.

The provisions contained in clause 13 operate only after the death of the son Wadya, that is, they become effective only when the largest asset of the estate, namely Wadya's assigned interest in Assid Michael's estate, has disappeared. An argument has been founded upon these provisions to the effect that the elaborate provisions contained in clause 13 contemplated the existence of a substantial estate after the death of Wadya, showing that it was not intended that the trustees should treat the whole of the income from Assid Michael's estate as available for distribution among those interested for life.

Thus clause 12 is relied upon by the appellant to show an intention in his favour, and clause 13 is relied upon by the remaindermen as showing an intention in their favour. Neither argument is conclusive, and in my opinion the Court must approach the case upon the basis that the testatrix has not clearly provided that, whether or not moneys received from Assid Michael's estate were strictly income of her estate, they should be treated as being such income.

Clause 14 empowers the trustees to postpone sale, realization and conversion for such period as they shall in their absolute discretion think fit.

Clause 16 is as follows :—

" I empower my Trustees to vary and transpose any investments made by them and at any time to realise upon any part of my trust

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estate and re-invest the proceeds of such realisation in any investments whatsoever that to my Trustees seem fit anything to the contrary in this will notwithstanding without being responsible for any loss arising therefrom. I also empower my Trustees to retain my trust estate in the same investments in which it is invested at the date of my death."

Under this clause the trustees may retain existing investments and may invest in any investment whatever without being responsible for loss. Such a provision does not entitle trustees to be reckless: *Smethurst* v. *Hastings* (1); *In re Turner*; *Barker* v. *Ivimey* (2). But it does give the trustees a power to retain the interest in Assid Michael's estate instead of selling it.

If the terms of the will show that the testatrix intended moneys received from Assid Michael's estate to be distributed under clause 12, effect must, of course, be given to that intention. But in my opinion the will contains no positive specific direction that such moneys are to be available for such distribution. Can it, however, be held that these moneys fall within the general term " the income of my residuary trust estate " in clause 12 of the will ? The principal contention for the appellant is that those moneys are such income, and that they may accordingly be applied for the maintenance &c. of the persons named in that clause. The clause applies only " during the lifetime of my son Wadya," and the interest of Wadya in his father's estate ceases with his death. Thus, if all the moneys received by Mrs. Michael's trustees from Assid Michael's trustees are income as claimed, there may be nothing left for the beneficiaries under clause 13 after Wadya's death.

In my opinion, the moneys received from the trustees of Assid Michael's estate, though income in their hands, are capital of Mrs. Michael's estate. It is, I should think, obvious that, for purposes of probate duty, the right of Mrs. Michael to receive those moneys during the life of Wadya would have to be valued as at her death, and that duty would have to be paid upon the then present value of the probable future payments. It would be strange if those payments could then be treated, not as themselves constituting capital assets of the estate, but as income of capital assets. There is no capital asset which can be regarded as producing these moneys as income. When the question was put to counsel " Of what capital asset are these moneys the income ? " the only reply was " Of the right to receive the moneys." It might as well be said that wages payable under an ordinary contract of employment are income from a capital asset,

(1) (1885) 30 Ch. D. 490. (2) (1897) 1 Ch. 536.

namely, the right created by the contract to receive wages. In this case the whole asset consists of the right to receive the moneys in question. If a man owns £1,000 Government stock bearing interest, the stock is the capital and the interest is the income. If he has let his land to a tenant, he owns the reversion to which the rent is incident. The reversion is his capital asset and the rents are his income. If he owns shares, the shares are his capital and the dividends are his income. But in the present case there is no capital asset owned by Mrs. Michael's trustees of which the moneys received from Assid Michael's estate can be regarded as the income. These moneys, when received, are not income of her residuary estate—they are actually part (nearly the whole) of her residuary estate. This is a case which, in this respect, is exactly the same as *In re Payne* (1), where *Uthwatt* J. said: "It is not possible to point to any property of which the intestate was possessed when he died and to predicate of the annual sums that they are income arising from that property since the intestate's death. There was not and is not any tree belonging to the intestate of which the annual payments are the fruits" (2). In *In re Hey's Settlement Trusts*; *Hey* v. *Nickell-Lean* (3), *Cohen* J. said that in such a case, where "the annual payments constitute the asset forming part of the testator's estate and not the fruit of an asset forming part of the estate" (4), the payments are analogous to terminable annuities and should be so treated. Such annuities were treated in *Crawley* v. *Crawley* (5) as wasting assets, to be sold, or treated as sold, only the income of the proceeds going to a life tenant. The rule established by this case was applied in *Hey's Case* (3) by *Cohen* J., who dealt with and distinguished other cases which, it was suggested, deprived *Crawley's Case* (5) of authority. *Crawley's Case* (5) appears to me to be sound in principle, though the principle upon which it is based would not be applicable where an intention was shown in a will that the actual moneys received from a wasting asset should go to a person interested for life. In the absence of such an intention, the application of the rule in *Howe* v. *Lord Dartmouth* (6) which was made in *Crawley's Case* (5) is ordinarily a fair and reasonable method of adjusting interests in wasting property as between life tenant and remainderman.

If then the moneys received from Assid Michael's estate are capital, what are the respective rights of those to whom the property is given in succession?

(1) (1943) 169 L.T. 365.
(2) (1943) 169 L.T., at p. 366.
(3) (1945) 61 T.L.R. 334.
(4) (1945) 61 T.L.R., at p. 337.
(5) (1835) 7 Sim. 427 [58 E.R. 901].
(6) (1802) 7 Ves. 137 [32 E.R. 56].

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As already stated, the interest of Mrs. Michael's estate in Assid Michael's estate is plainly a wasting asset—it disappears with Wadya's life—and it is also a future interest—a right to payments *in futuro*.

The rule in *Howe* v. *Lord Dartmouth* (1) requires a trustee to be impartial, not favouring a beneficiary who is interested for life at the expense of any one interested in remainder or vice versa. The rule says that, where residuary personalty is settled by will for the benefit of persons who are to enjoy it in succession, it is the duty of the trustees to convert into property of a permanent and income-bearing character those parts of it which are of a future or reversionary nature (in the interests of the tenant for life) and those parts of it which consist of wasting assets (in the interests of the persons interested in remainder). Adjustment should prima facie be made between successive beneficiaries upon this basis, so that a tenant for life would be entitled only to receive, not the possibly very large but temporary income from a disappearing security, leaving perhaps nothing for a remainderman, but the income which he would have received if there had been a due conversion into authorized securities.

It is well settled that " the rule must be applied unless upon the fair construction of the will you find a sufficient indication of intention that it is not to be applied ; the burden in every case being upon the person who says the rule of the Court of Chancery ought not to be applied to the particular case " : *Macdonald* v. *Irvine* (2). Thus the intention of the testator is the important matter and the courts have been ready to exclude the application of the rule by discovering a contrary intention of the testator ; for example, some indication that the testator intended the beneficiary for life to have whatever income might actually be produced by his estate. But this intention must clearly appear in order to exclude the rule. I have already stated the reasons for my opinion that there is no specific direction in the will that moneys received from Assid Michael's estate are to be available to be treated as income of the estate of the testatrix. But it still may be the case that the will discloses an intention that particular moneys should go to the tenant for life without any adjustment in favour of the remainderman. It is contended for the appellant that, in this case, the power to postpone conversion and to retain investments sufficiently discloses such an intention, so that the rule in *Howe* v. *Lord Dartmouth* (1) is excluded.

If there is no trust for conversion, but a power to retain the testator's property as at his decease *or* to sell it at the discretion of

(1) (1802) 7 Ves. 137 [32 E.R. 56]. (2) (1878) 8 Ch. D. 101, at p. 124.

the trustees, the rule is excluded : *Gray* v. *Siggers* (1) ; *In re Wilson* ; *Moore* v. *Wilson* (2).

If, pending the conversion, there is a gift to the tenant for life of the income actually produced by existing investments, the rule is excluded. In *Alcock* v. *Sloper* (3), the court clearly enunciated the general rule in the following words : " where a testator limits his residuary property to one for life, with remainder over, it is *prima facie* to be intended that the testator means that the same property which is given to the tenant for life should go to those entitled in remainder ; and if any part of the residue be of a wasting nature, as long annuities or leasehold estate, in order to effect this general purpose of the testator such wasting property must be sold and converted into permanent property " (4). But this prima-facie rule was displaced by evidence of contrary intention, even in the case of terminable annuities. A life interest was given to the testator's wife and conversion was postponed till after her death. For this reason the rule was excluded. If there had been no direction for postponement of conversion the rule would have been applied. *In re Sherry* ; *Sherry* v. *Sherry* (5) is a case where there was a discretionary trust (not a direction) for conversion with a provision showing a clear intention that the widow of the testator should have the actual rents, profits and income of his estate while it remained unconverted.

There may be a specific reference to the income of particular investments which shows that the testator intended that the actual income of those investments should be enjoyed by the life tenant—as, for example, in *In re Inman* ; *Inman* v. *Inman* (6), where the trustees were empowered to postpone conversion and specifically to permit personal estate invested at the decease of the testator upon any stocks, funds or securities whatsoever yielding income to continue in the same state of investment so long as they should think fit. It was held that this provision showed an intention that the trustees should retain certain shares which were held to be stocks within the meaning of the will, and that the tenants for life were entitled to receive in specie all the dividends from the shares. See *Halsbury's Laws of England*, 2nd ed., vol. 33, p. 118.

But the rule does apply where there is a trust for conversion, and in such a case the rule is not excluded by a discretionary power to postpone conversion, or by a power to retain existing investments : *In re Woods* ; *Gabellini* v. *Woods* (7) ; *In re Chaytor* ; *Chaytor* v.

(1) (1880) 15 Ch. D. 74, at p. 77.
(2) (1907) 1 Ch. 394.
(3) (1833) 2 My. & K. 699 [39 E.R. 1111].
(4) (1833) 2 My. & K., at pp. 701, 702 [39 E.R., at p. 1113].
(5) (1913) 2 Ch. 508.
(6) (1915) 1 Ch. 187.
(7) (1904) 2 Ch. 4.

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Chaytor (1); and see *Halsbury's Laws of England*, 2nd ed., vol. 14, p. 370.

In the will of Mrs. Michael there is an express direction to convert, with a power to postpone conversion and a power to retain existing investments. In *In re Inman* (2) it was said by *Neville* J. that where there was a discretion to postpone conversion, the question which arose was whether the testator intended that the power to postpone should be exercised for the benefit of the tenant for life, or merely for the more convenient realization of the estate. In the former case the rule in *Howe* v. *Lord Dartmouth* (3) does not apply. In the present case there is nothing to show in any decisive manner whether the power to postpone was given for more convenient administration or for the benefit of the life tenant. The power is given in conjunction with powers to grant leases and to manage real estate, and would appear to be given merely for the more convenient management of the estate, without any particular regard to the possibly competing interests of any persons interested in the estate. No certain conclusion can be drawn as to the intention of the testator from the existence of the power to postpone.

As already stated, the onus is on those who seek to exclude the application of the rule in *Howe* v. *Lord Dartmouth* (3). There is, in the present case, a definite direction to convert with power to postpone conversion and a power to retain existing investments. The direction to convert requires the application of the rule, and the power to postpone and power to retain do not, under the authorities to which I have referred, exclude the application of the rule. Therefore, in my opinion, the rule in *Howe* v. *Lord Dartmouth* (3) should be applied. The rule is not an absolute rule to be applied mechanically, and it may be modified to meet varying circumstances. In the present case the annual receipts derived from Assid Michael's estate are very large as compared with any income that could be expected to be derived by way of interest upon the proceeds of a sale of the right to receive future payments during Wadya's life. Where the income is abnormally large and there cannot be immediate conversion without loss or damage to the estate the rule in *In re Chesterfield's (Earl) Trusts* (4) may be applied. In the present case the rule in *In re Chesterfield's (Earl) Trusts* (4) appears to me to be fairer to the various interests concerned than that applied by the learned Judge, and accordingly, in my opinion, the appeal should be dismissed, but the order of the Supreme Court should be varied by substituting for the answer to Question 3 (*b*) the following :—

(1) (1905) 1 Ch. 233.
(2) (1915) 1 Ch. 187.
(3) (1802) 7 Ves. 137 [32 E.R. 56].
(4) (1883) 24 Ch. D. 643.

"By ascertaining the respective sums which, put out at Four per centum per annum on the date of the death of Martha Michael deceased, and accumulating at compound interest calculated at that rate with yearly rests, would, with the accumulations of interest, have produced, at the respective dates of receipt, the amounts actually received; the aggregate of the sums so ascertained being treated as corpus of the estate of Martha Michael deceased, and applied accordingly, and the residue being treated as income and available for distribution as set out in paragraph 12 of the Will."

RICH J. This appeal is concerned with the administration of the estate of a testatrix, Martha Michael. Her husband had, by his will, given his residuary estate to his trustees upon trust to pay the income to his wife for life, and after her death to his son Wadya for life, but his interest to fall into ultimate residue upon any attempt to alienate, with ultimate remainders over. The wife survived the husband, Wadya's life interest in remainder was sequestrated in her lifetime, and she bought it in the year 1927. By her will made in 1939 (the year of her death), she directed her trustees to convert the residue of her estate into money, to invest the proceeds in securities authorized by law to trustees, and to stand possessed of such investments in trust to accumulate the income therefrom during Wadya's life, but with power, at their absolute discretion, to advance out of the income of residue during his life for their maintenance benefit and welfare certain small weekly sums to three named persons and such sum as they should in their absolute and uncontrolled discretion think fit for the maintenance and benefit of Wadya during his life. She directed her trustees to invest all income not so applied in securities authorized by law to trustees. Upon Wadya's death, the trustees were to hold the residuary trust estate, together with all accumulated income, upon trusts for persons for life with remainders over. She empowered her trustees to postpone the conversion of her trust estate or any part thereof for such period as they should in their absolute discretion think fit. By clause 16, she also empowered her trustees, *inter alia*, to realize upon any part of her trust estate and re-invest the proceeds in any investments whatsoever that to them seemed fit anything to the contrary in the will notwithstanding, and to retain her trust estate in the same investments in which it was invested at her death.

Apart from certain property worth about £4,000, the only property which she possessed at her death, and only substantial source of income of her estate, was the life interest of her son Wadya under

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her husband's will, which had been acquired by her by purchase and fell into possession when her own life interest terminated. The income receivable by her estate in respect of this life interest averaged about £2,500 a year.

The questions which arise for determination are whether payments received and receivable by the trustees in respect of Wadya's life interest since the death of the testatrix should be treated in the administration of her estate as income or corpus of her residuary estate, or partly income and partly corpus. There is no express provision on the point in the will, and the questions must therefore be resolved by the implications of the relevant provisions of the will.

The first point to be noted is that income which a testator is entitled to receive as assignee of an estate *pur auter vie* is income of his residuary estate if it is not otherwise disposed of, and is therefore subject to any dispositions of the income of residue made by the will.

The next point is this. Where by will property is given in such a way as to indicate that the testator must have intended it to be preserved in such a state as to admit of its being enjoyed by persons in succession, it is the duty of the personal representatives to give effect to this intention. Where it is given, not specifically but included in a general gift of residue, to tenants for life and remaindermen, and some of the property so included is of a wasting or residuary nature, or not in an authorized state of investment and therefore to this extent hazardous or perishable, the intention which I have mentioned is prima facie to be attributed to the testator and effect must be given to it. This is done by converting the property in question into money, investing it in authorized investments, and paying the income of these investments to the life tenant. Pending investment, he is entitled as from death to a reasonable rate of interest calculated upon the value of the property. The rule as to this presumption and the duty of giving effect to it is known as the Rule in *Howe* v. *Lord Dartmouth* (1). But the presumption is only prima facie. It cannot exist at all unless there is something capable of giving rise to it, and, if there is, it may be rebutted by indications of contrary intention. Thus, if the property is given specifically, this indicates that it is intended to be enjoyed in specie. It is for this reason that there is no such presumption in the case of realty. All gifts of realty once were, and for some purposes still are, regarded as specific. Again, if there is no clear indication of intention of enjoyment in succession, as where the gift is not for life with remainders over but vested subject to divesting, the presumption is weakened if not negatived. And it may be negatived, in cases in which it would

(1) (1802) 7 Ves. 137 [32 E.R. 56].

otherwise prevail, by any indication of intention which is inconsistent with it. Authorities are very numerous, and I do not propose to examine them. To treat all as having been correctly decided, and to be necessary stepping stones, would make the path to a correct solution as difficult as Christian's progress through the Slough of Despond, and likely to lead to a similar result. What is here necessary is to ascertain the testatrix's intention so far as this is discoverable from the particular will now before us. The beneficial dispositions of her residue call for the accumulation of the income of residue during a life and then the holding of residue in trust for life tenants with remainders over. Such dispositions give rise prima facie to the presumption of intention identified as the Rule in *Howe* v. *Lord Dartmouth* (1), and this presumption is reinforced by the initial express direction for conversion and investment. The mere power to postpone conversion would not rebut the presumption. Of itself, it is only a machinery provision doing little more than express what would otherwise be implied. But the express power to retain the trust estate in the same investments in which it is invested at the testatrix's death, contained in clause 16 which from its language is evidently intended to be an overriding provision, not only, in the present will, neutralizes the trust for conversion and reduces it to the level of a power, but expressly negatives any such duty to convert as would otherwise arise by virtue of the presumption, and therefore negatives the presumption. When it is seen that, during the period of accumulation, the trustees are invested with a discretion which enables them to apply the whole income of residue for the benefit of the son Wadya, and that the interest *pur auter vie* was the only substantially income-producing item in her residuary estate at her death, I think that to treat the Rule in *Howe* v. *Lord Dartmouth* (1), or that Rule supplemented by *In re Chesterfield's (Earl) Trusts* (2), as applicable to the present case would be to raise a presumption contrary to the apparent intention of the instrument. In my opinion, therefore, the trustees are under no legal duty to effect a conversion of the interest *pur auter vie* which would deprive them of the power to retain, expressly conferred upon them by clause 16 of the will, and the uncontrolled discretion to make advances out of the income of the residuary estate which is conferred by clause 12. To treat clause 16 as having only a qualified operation, subordinate to the trust for conversion, and incapable of removing the beneficial dispositions from the operation of the Rule in *Howe* v. *Lord Dartmouth* (1), is not in my opinion justified by the language of the present will, and would be tantamount to beginning with the Rule

(1) (1802) 7 Ves. 137 [32 E.R. 56]. (2) (1883) 24 Ch. D. 643.

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and endeavouring to fit the will to the Rule, instead of beginning with the will and seeing whether it necessitates recourse to the Rule.

I am of opinion, therefore, that the first question in the originating summons should be answered in the affirmative, and Questions 2 and 3 (*a*) in the negative.

STARKE J. Assid Michael by his will gave devised and bequeathed his real and personal estate, subject to a devise of certain property at Mentone, unto his trustees upon trust to pay the income therefrom unto his wife for life and from and after her death to pay the income to his son Wadya for life. During the lifetime of his mother the estate of Wadya was sequestrated in bankruptcy and in the year 1927 she acquired by assignment from the trustee in bankruptcy all the right, title and interest of Wadya under the will and in the estate of his father, Assid Michael.

The mother died on 18th July 1939 leaving a will whereby she devised and bequeathed the whole of her real and the residue of her personal estate (called her trust estate) unto trustees to hold subject to and upon certain trusts, which it is unnecessary to state at length, but she directed her trustees to stand possessed of the rest and residue of her trust estate in trust to sell, realize and convert the same into money and after payment of her just debts, funeral and testamentary expenses, probate and estate duties, to invest the proceeds in securities authorized by law to trustees and to stand possessed of such investments in trust to accumulate the income therefrom during the lifetime of her son Wadya and upon the death of her granddaughter to stand possessed of her residuary trust estate together with all accumulated income upon trust for her children with gifts over in certain events. Notwithstanding the directions to accumulate contained in her will the testatrix empowered her trustees in their absolute discretion during the lifetime of Wadya to advance out of the income of her residuary estate for the maintenance benefit and welfare of her daughter-in-law and grandchildren various weekly sums not exceeding certain fixed amounts and also for her son such sum as her trustees in their absolute and uncontrolled discretion thought fit for the maintenance and benefit of her son during his life. And she directed her trustees to invest all income not applied by them in securities authorized by law to trustees. The son, I understand, is still alive, but in the event of his death the testatrix directed her trustees to pay out of the income of her residuary estate a certain sum per week for her daughter-in-law and to pay the residue of the income to her granddaughter for life. And she empowered her

trustees to retain her trust estate in the same investments in which it was invested at the date of her death.

The interest of her son Wadya in his father's estate, which the testatrix had acquired, was the most valuable asset in her estate. The income which she in her lifetime received under her husband's will amounted approximately to £2,500 per annum. After her death the trustees of her husband's will paid to her trustees the income payable to Wadya under his father's will pursuant to the assignment already mentioned. The amount was considerable and a substantial part was applied or advanced towards the maintenance, benefit and welfare of the persons mentioned in the testatrix's will. Indeed without that income the provisions of the testatrix's will for those purposes could not have been carried out in the manner contemplated by her. It is plain enough that the sum paid to the trustees of the testatrix's estate by the trustees of her husband's estate was the income given to Wadya under his father's will. It was payable and it was received as income. But the duty of the testatrix's trustees in respect of those moneys depends upon her will. That income and the income producing interest were part of the testatrix's " trust estate " the rest and residue of which she directed her trustees to sell, realize and convert into money and after payment of debts &c. to invest the proceeds in securities authorized by law to trustees and to stand possessed of such investments upon the trusts already mentioned.

Now " where a residue is given upon trust for sale and investment, and the income is then given to a tenant for life, the tenant for life is, in the absence of proper directions, only entitled—at any rate, so far as personalty is concerned—to such income as the estate would produce when converted and invested in accordance with the directions of the will " (See *Theobald* on *Wills*, 9th ed. (1939), p. 447). Here, however, there is no tenant for life, but a trust for accumulation during the life of the testatrix's son Wadya with discretionary powers to make advances out of the income of her residuary trust estate for the purposes mentioned in her will and upon the death of her granddaughter upon trust as to her residuary estate together with all accumulations for her granddaughter's children with gifts over in certain events.

Let it be assumed that a similar rule is prima facie applicable to such a trust. Still the testatrix empowers her trustees to retain her trust estate, which as already mentioned, includes the income and the income producing interest which she acquired under the assignment from the trustees in bankruptcy of Wadya's estate in the same investments in which it was invested at the date of her death. A power

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" to postpone a sale or to retain securities unconverted will not alter the rights of tenant for life and remainderman." But it is " a question of construction in each case whether the power to postpone or retain is merely ancillary to the trust for conversion or is a power to continue or retain permanently. In the latter case the inference is that it is for the benefit of the tenant for life, and if what is given to him is the income of the converted and unconverted property or the income of the securities representing the estate, he will be entitled to the income of securities retained " (*Theobald* on *Wills*, 9th ed. (1939), pp. 448-449). In my opinion the power given to the testatrix's trustees in the present case authorizes them to retain her estate in the same state as they found it at her death for an indefinite period, not as ancillary to the trust for conversion and sale, but for the maintenance, benefit and welfare of her daughter-in-law, her grandchildren and her son during his lifetime. Consequently the moneys or income actually received by the testatrix's trustees from the trustees of her husband's estate may be applied for those purposes in the manner provided in clause 12 of her will.

The result is that the appeal should be allowed.

DIXON J. The chief asset of the estate of the testatrix is the life interest of her son Wadya in his father's estate. She had acquired it from her son's trustee in bankruptcy, knowing that it would fall into possession when she died and her prior life interest, upon which her son's was expectant, came to an end.

The limitations of her will involve successive interests in residue, and the question upon the appeal is how the revenues her estate derives, during the life of her son, from that of her husband are to be treated for the purpose of the successive interests. She has not limited her residue to life tenant and remainderman. What she has done is to direct an accumulation of income during the life of her son Wadya but, notwithstanding that accumulation, to empower her trustees in their discretion to make certain advances out of the income of residue during her son's life for the maintenance, benefit and welfare of the persons she names. As might be expected, one object of the power is her bankrupt son's wife, but in her case the amount is limited by a weekly maximum. Her son is another object, but for him no maximum is fixed. She had two grandchildren and they, too, are objects of the power of advancement, but subject to weekly maxima.

The terminating nature of Wadya's life interest whence so much of the revenues of the estate arises has been considered to raise a question whether there ought not to be an adjustment for the purpose of

ascertaining the income to be accumulated or applied under the power to advance.

The will contains express directions to convert, an express power to postpone conversion for such period as the trustees think fit, and an express power to retain the trust estate in the investments in which it was invested at the date of the death of the testatrix.

The case is treated as if it were one in which personalty is bequeathed upon trust to convert and the proceeds of conversion are to be held for life tenant and remainderman with the consequence that there must be an adjustment between them in respect of such a terminating or wasting asset as the assigned life interest of Wadya under his father's will. It does not appear that Wadya's life interest is personalty, and, in any case, I doubt whether the rule of administration invoked is applicable where there is no life owner and nothing more than a direction during a named life to accumulate income, subject to discretionary powers of advancement, with future limitations of corpus, including the accumulations, on the dropping of the life.

Upon the assumption, however, that the rule is applicable to successive limitations of such a character, a preliminary question is raised, namely, whether the periodical sums derived by the estate of the testatrix from the estate of her husband under the assignment of her son Wadya's life interest therein ought not to be regarded as received by her estate as capital ? If in some way they bear the stamp of capital as they come into her estate, then, it is said, whatever the interpretation of the trusts of income, the only contribution the sums can be called upon to make to income would be by an adjustment upon the footing that future payments of capital are falling in periodically. In other words, the case would not be one for applying the rule to protect the remainderman from the consequences of delay in converting an income-bearing asset of a wasting description, but one for insuring that the life tenant obtains some benefit in respect of future receipts of capital.

I am not able to agree in the view that, in the estate of the testatrix, the receipts from the assigned life interest of Wadya in his father's estate have the inherent character of capital. To my mind Wadya's life interest is income-producing property. The income it produces is what the tenant for life or his assigns are entitled to receive in respect of the interest for life under the will creating it. Just as those receipts would have come to the hands of Wadya as income, so they are received as income by his assigns. It may be true that some particular assign is bound upon receiving them to apply them as capital. But that is because of his special situation,

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not because of the character of the money as it comes to him. For example, under the rule that, if income-bearing personalty of a wasting description is subject to an express or implied trust for conversion, there must be an adjustment between tenant for life and remainderman in respect of income derived pending conversion, the very question is how much of what the trustee receives as income must be treated as capital enuring for the benefit of the remainderman. It will be found that this is recognized in most of the cases relied upon for the contention that the distributions of income by the husband's estate are contributions of capital to that of the testatrix. *Shadwell* V.C. in *Crawley* v. *Crawley* (1), when he says that, until the executors could sell the annuity in that case, they must invest the payments and that the interest on the investments would be payable to the tenants for life of the residue and the capital of the investments would form part of the capital of the estate, does not appear to me to be deciding that annuity payments do not have an income character. What he is saying is that, in fairness to the remainderman, they must be capitalized. *Stirling* J. in *In re Whitehead*; *Peacock* v. *Lucas* (2) states the question before him as whether the income from the particular fund is income payable to the tenant for life under the will or capital which ought to be invested, so that only the income arising from the investments would be payable to the tenant for life. In *In re Fisher*; *Harris* v. *Fisher* (3) it is true that *Bennett* J. regarded all the policy moneys, there in question, as capital receipts of the estate, whether consisting of a lump sum, or periodical payments, and in *In re Payne*; *Westminster Bank Ltd.* v. *Payne* (4) *Uthwatt* J., though deciding the matter more on the terms of the will before him, also examined the inherent characteristics of the contractual receipts under consideration in that case. But these cases merely illustrate the rather obvious fact that what comes into the hands of a trustee may form a capital receipt or an income receipt according to its nature, quite apart from the way that, under the trust instrument, he must apply it. In *Re Hey's Settlement* (5), *Cohen* J. appears to me rather to treat *Crawley* v. *Crawley* (1) and *Re Whitehead* (6) as proceeding upon the intrinsic nature of the moneys coming into the estate and not upon the effect on their application of the provision of the will, which is clearly a mistake, at all events, in the latter case. However correct his actual order may have been, it is not easy to follow his treatment of the authorities. In particular, it does not appear to me at all strange that

(1) (1835) 7 Sim. 427 [58 E.R. 901].
(2) (1894) 1 Ch. 678, at p. 683.
(3) (1943) Ch. 377.
(4) (1943) 169 L.T. 365.
(5) (1945) 61 T.L.R., at pp. 336-338.
(6) (1894) 1 Ch. 678.

neither *Crawley* v. *Crawley* (1) nor *In re Whitehead* (2) were cited in *In re Sherry* (3), to the facts of which I should not regard them as applicable. Indeed, I think that in *In re Sherry* (3), *Warrington* J., and apparently counsel before him, took it as going without saying that distributions of income in respect of an estate *pur autre vie* belonging to a deceased person bore their character of income in coming into the latter's estate.

In my opinion, the present case is similar and involves the question whether the remainderman is entitled to an adjustment in respect of what the estate receives as income from a wasting asset. It is not a case in which the rule is to be applied in the interests of persons in the position of a tenant for life in respect of periodical payments of capital receivable over an uncertain term after the deceased's death.

Regarding the appeal in this way, the question becomes one of interpretation depending on the presence in or absence from the will of sufficient indications of an intention that the actual income of the unconverted estate should be used for the accumulation and for the power of making advances. It is in this way that *Martin* J. treated the case. Although I fully concur in his Honour's approach to the matter, I find myself unable to agree in his conclusion upon the particular will.

I shall not restate the material provisions of the instrument. They are referred to in other judgments. It will be enough to mention the chief considerations which influence me. But, before doing so, it may be useful to point out that the basal reason for the rule, the applicability or inapplicability of which is in question, is that, prima facie, when conversion is expressly or impliedly required, the tenant for life should not, pending conversion, receive more than the income which he might expect to derive if conversion had taken place. Accordingly, you begin with the trust for conversion and look for indications which confirm or rebut the inference that it was on the basis of conversion that the tenant for life was intended to enjoy income. A power to postpone conversion for the business reason of enabling the trustees to sell to better advantage will not weaken the inference. But a power to postpone may be so framed as to make it appear that actual or notional conversion was not the root assumption on which successive interests were limited. It is for this reason that references are made in the cases to postponement for the benefit of the life tenant. Again, a power to retain the form of investment in which the estate is found may be so framed as to amount to making it an authorized investment just as if conversion had taken place and that would be a strong indication.

(1) (1835) 7 Sim. 427 [58 E.R. 901].
(2) (1894) 1 Ch. 678.
(3) (1913) 2 Ch. 508.

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The features of the present case which have influenced me are the following :—

(1) There is here an express power of postponement of conversion for such period as the trustees in their absolute discretion think fit.

(2) There is an express power of retaining " my trust estate " in the same investments in which it was invested at the date of death. It covers permanent retention and appears equivalent to constituting existing forms of investment authorized investments.

(3) The words " my trust estate " are defined as the whole of the real and the residue (that is, after excluding furniture &c.) of the personal estate. The direction or power to advance is " out of the income of my residuary trust estate," an expression covering income of unconverted assets.

The direction to accumulate consists of a trust to convert, " my trust estate," to invest the proceeds in authorized securities, to stand possessed of the investments on trust to accumulate income. The difference between the way the latter is expressed and the former weakens the inference to be drawn from the terms of the power to advance, but it is clear that they must refer to the same class of income and the more probable interpretation is to treat the language of that power as showing the real intention.

(4) The power to advance named maximum weekly sums which could not be met unless there was a very substantial income and that is without taking into account advances to Wadya, or providing a surplus for accumulation. The application of the rule for adjustment would make the income insufficient for the purpose of the power.

(5) The trusts after the death of Wadya, when compared with those to operate during his lifetime, suggest that some reason must exist for the testatrix at that stage giving substitutional interests in income to her grandchildren where before they had contemporaneous interests under the power of advancement. Such a reason is supplied by the supposition that she knew the income of her estate would be greatly diminished by Wadya's death.

(6) The assigned interest of Wadya is by far the most important asset of her estate.

The foregoing considerations appear to me to have a cumulative weight in showing that the will of the testatrix proceeds on the basis that the advancements and the accumulations are to be found out of the actual income of the residuary estate, whether converted or not.

I am, therefore, of opinion that it is not a case for the application of the rule requiring adjustment between tenant for life and remainderman of convertible residuary personalty.

I think the appeal should be allowed.

McTIERNAN J. The residue of the estate of the testatrix includes an interest for life which her son took under her husband's will. The testatrix had acquired this interest in her lifetime. It is not an authorized security and it is an interest which is wearing out. The will of the testatrix contains a trust for the conversion of the residue, called " the rest and residue of my trust estate," and the investment of the proceeds in authorized securities. There is a direction to accumulate the income therefrom during her son's lifetime. Besides, there is an express power given to the trustees to postpone conversion of " my trust estate or any part thereof for such period as they shall in their absolute discretion think fit." The question is how much, if any, of the moneys received by the trustees of the testatrix on account of her son's life interest is available to carry out the trusts with respect to income in clause 12. I do not repeat its provisions. These trusts are to " advance out of the income of my residuary estate." In my opinion the entire receipts on account of such life interest are income of the residuary estate of the testatrix and are available in specie in the hands of the trustees to carry out those trusts. The question whether those receipts are wholly in the nature of income is open to different answers upon the authorities cited. It seems to me that upon the true construction of this will the words " the income of my residuary estate " apply to those receipts and they are entirely such income for the purposes of this will. The familiar analogy of the tree and its fruit is, I think, in point here : the interest acquired by the testatrix is comparable with the tree and the moneys received on account are comparable with the fruit of that tree. I am also of the opinion that pending conversion the trustees are under the will empowered to apply in specie the entire moneys received on account of this interest in carrying out the trusts which are declared by the testatrix with respect to the income of her residuary estate. The contrary view is that it is necessary to apply the rule in *Howe* v. *Lord Dartmouth* (1), to adjust the rights of the persons first entitled to share in the income of the residuary estate and those entitled in succession to them. If this rule applied there would be available to the trustees no more than a sum equivalent to interest at a rate allowed by the court on the capital value of the life interest, for the purpose of discharging the above-mentioned trusts of the income of the residuary estate. Referring to the rule in *Howe* v. *Lord Dartmouth* (1), *North* J. approved in *In re Pitcairn* ; *Brandreth* v. *Colvin* (2) of what *Romilly* M.R. said about the rule in *Morgan* v. *Morgan* (3) : " This rule has been

(1) (1802) 7 Ves. 137 [32 E.R. 56].
(2) (1896) 2 Ch. 199.
(3) (1851) 14 Beav. 72 [51 E.R. 214].

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since affirmed, as often as it has been referred to, and is unquestionably the law. But the testator may take the case of any particular bequest out of this rule ; and the effect of the latter cases has been to allow small indications of intention to prevent the application of the rule. The question here, as in similar cases, is one of construction, whether the testator has, in this will, expressed his intention, that this rule shall not apply to this particular case. It is urged by the petitioners that the burden of proof does not lie upon them more than on the respondents. and that being a question of construction, it is for the Court to look into the will and discover the testator's real meaning. In one sense, this is certainly true ; but still, in my opinion, the rule of law is that, unless there can be gathered from the will some expression of intention that the property is to be enjoyed in specie, the rule in *Howe* v. *Lord Dartmouth* (1) is to prevail. It is therefore incumbent on the persons contesting the application of that rule, and on the Court which forbids that application, to point out the words in the will which exclude it, and if this cannot be done, the rule must apply. The reported decisions on the subject are useful, as they form a guide to enable the Court to ascertain what directions contained in a will are properly considered to be an expression by the testator of his intention that this rule is not to apply " (2).

In the present case the testatrix has given authority to her trustees to make the advances specified in clause 12 out of the income of her residuary estate. These dispositions of this income are intended to take effect during the postponement of the conversion of the residue, if the trustees in the exercise of their discretion postpone conversion. Under clause 12 the trustees are authorized to apply in specie the income of her son's life interest which is income of the residuary estate in order to make the advances of income specified in that clause. It follows, I think, that, although the son's life interest is a wasting asset and an unauthorized investment, the question of applying the rule in *Howe* v. *Lord Dartmouth* (1) for the purpose of adjusting the rights of persons interested in the income of the son's life estate is one that could not arise. Furthermore, it is a fair inference from the terms of the will that the testatrix gave power to the trustees to postpone conversion for the benefit of her son and his wife and children. If it were necessary to adopt either *In re Inman* (3) or *In re Chaytor* (4) as a guide to the interpretation of this will, I should apply the former case. I think that the questions should be answered : (1) Yes ; (2) No ; (3) (*a*) No. The appeal should, in my opinion, be allowed and the costs of all parties be paid out of the estate ; the trustees' costs as between solicitor and client.

(1) (1802) 7 Ves. 137 [32 E.R. 56].
(2) (1896) 2 Ch., at pp. 204, 205.
(3) (1915) 1 Ch. 187.
(4) (1905) 1 Ch. 233.

WILLIAMS J. This appeal relates to the construction of the will of Martha Michael who died on 18th July 1939. Under the will of her husband, who died on 30th April 1925, the testatrix was entitled to an estate for life with remainder to her son Wadya for life. Wadya became bankrupt and the testatrix purchased his life estate in remainder from his trustees in bankruptcy. By her will, which was made on 21st February 1939 and is divided into paragraphs, the testatrix devised and bequeathed her real and personal estate to her trustees upon the trusts therein set out. After bequeathing some small pecuniary legacies, giving certain directions with respect to her grave, and specifically devising her property in High Street, Windsor, the testatrix by paragraph 11 directed her trustees to stand possessed of the rest and residue of her estate in trust to convert the same into money, and after payment of her debts, funeral and testamentary expenses and probate and estate duties, to invest the proceeds thereof in securities authorized by law, and to stand possessed of such investments in trust to accumulate the income therefrom during the lifetime of Wadya. By paragraph 12 the testatrix, notwithstanding the direction to accumulate contained in clause 11, empowered her trustees, in their absolute discretion, during the lifetime of Wadya, to advance out of the income of her residuary trust estate certain sums for the maintenance, benefit, and welfare of the persons therein mentioned, and directed her trustees to invest all the income not so applied in securities authorized by law to trustees. These sums amounted to £18 per week, and in addition the trustees were empowered to pay such sums as they should in their absolute and uncontrolled discretion think fit for the maintenance and benefit of Wadya during his life. By paragraph 13 she directed her trustees, after the death of Wadya, to stand possessed of her residuary trust estate, subject to the payment of an annuity to his widow, upon trust for life tenants and remaindermen as therein mentioned. By paragraph 14 (*b*) she empowered her trustees to postpone the conversion of her trust estate or any part thereof for such period as in their absolute discretion they thought fit, while by paragraph 16 they were empowered to retain the trust estate in the same investments in which it was invested at the date of death. The assets comprised in the estate of the testatrix at the date of her will and death, apart from the specifically devised property in High Street, Windsor, were land valued at £1,200, personal property valued at £550, and Wadya's life interest under his father's will. The assets comprised in the father's estate were two freehold hotel properties in Melbourne valued at £46,250, subject to mortgages totalling £21,150. The rents from these hotels constituted the income of his estate, which his trustees, after

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providing for the interest on the mortgages and other outgoings, paid to the testatrix. The net rents amounted to £2,570 per annum and were her sole source of income.

Since the date of death the trustees of the will of the testatrix have received from the trustees of the husband's estate, in respect of Wadya's life interest, the sum of £13,739, of which they have applied a substantial part towards the purposes set out in paragraph 12, and the matter for determination is whether the trustees were authorized by the will to do so.

The first question that arises is whether the payments received by them from the trustees of the estate of her husband were income or capital. By purchasing Wadya's life interest the testatrix had acquired the right, upon the determination of her own life estate, to receive from the trustees of her husband's estate the income of that estate during Wadya's life. At the date of death the capital value of this asset was the value of the present right to be paid this income. As the right to this income would cease upon his death, these payments were terminable payments of the same nature as the rents of a leasehold estate, or the dividends on shares in a company formed to work a wasting asset such as a mine. If by her will the testatrix had created life estates and remainders the question would have arisen how this income should be disposed of as between the persons entitled in succession. Unless the will had provided that the purchase of such an interest should be an authorized investment, or that the trustees should be authorized to retain any investments which she had at the date of death and pay the income thereof to the tenant for life, then, if there had been an express trust for conversion or an implied trust for conversion under the rule in *Howe* v. *Lord Dartmouth* (1) it would have been necessary, pending conversion, to ascertain the capital value of the asset at one year after the date of death and pay the life tenant four per cent on that value, and accumulate and invest the balance of the income in authorized investments for the benefit of the remaindermen; or alternatively, to invest the income in authorized investments and pay the life tenant the income of the investments: *Crawley* v. *Crawley* (2); *In re Whitehead* (3). The payments received from the estate of the husband would have been payments of the income of a terminable asset and would have been received by the trustees of the will of the testatrix as income. The life tenant would not have been entitled to this income because it would not have been the income from an authorized investment. But these payments would not be capital

(1) (1802) 7 Ves. 137 [32 E.R. 56].
(2) (1835) 7 Sim. 427 [58 E.R. 901].
(3) (1894) 1 Ch. 678.

in the estate of the testatrix any more than the rents of a leasehold estate or dividends from shares in a company owning a wasting asset would be capital. In *Alcock* v. *Sloper* (1) and in *In re O'Hagan*; *O'Hagan* v. *Lloyds Bank Ltd.* (2) the tenants for life were held to be entitled to terminable annuities. In the last-mentioned case *Clauson* J., as he then was, said that " it was well settled that a terminable annuity ought to be treated as property which, though terminable, was to be treated as part of the testator's estate producing income " (3), and in *In re Sherry*; *Sherry* v. *Sherry* (4) *Warrington* J., as he then was, held that payments in respect of a life interest similar to the present life interest were income. The reason why the life tenants were entitled to the income in these three cases was that in *Alcock* v. *Sloper* (1) the trust was not an immediate trust for conversion but a trust to convert after the death of the tenant for life so that the tenant for life was entitled to the income of the residuary estate, and therefore to the terminable annuities, while in *In re O'Hagan* (2) and *In re Sherry*; *Sherry* v. *Sherry* (4) there was an express direction that pending conversion the life tenant should be entitled to the income of the unconverted assets. On the other hand, in *Crawley* v. *Crawley* (5), while there was no express trust to convert, there was an implied trust under the rule in *Howe* v. *Lord Dartmouth* (6), so that the interest upon the accumulations, though received by the estate as income, had to be invested and accumulated and therefore treated as capital as between life tenant and remaindermen; and in *In re Whitehead* (7) the same result followed because there was an express trust to convert so that the income had to be dealt with in the same manner. *Stirling* J., as he then was, said that the principles of *Crawley* v. *Crawley* (5) applied so that the *income* accrued on the fund must be treated as capital and invested (8), and that there was nothing in the will which showed that the intention was that the tenant for life should receive this *income* as income (9). These cases are authorities which show, to my mind, that the payments in the present case were received by the trustees as income.

But Mr. *Spicer* relied on two decisions: *In re Payne* (10) and *In re Hey's Settlement Trust* (11), which he said indicated the contrary. *Payne's Case* (10) appears to have been decided upon the terms of the particular will, but I find it difficult to draw so fine a distinction as his Lordship did between the phrases " income of my estate " and

(1) (1833) 2 My. & K. 699 [39 E.R. 1111].
(2) (1932) W.N. (Eng.) 188.
(3) (1932) W.N. (Eng.), at p. 118.
(4) (1913) 2 Ch. 508.
(5) (1835) 7 Sim. 427 [58 E.R. 901].
(6) (1802) 7 Ves. 137 [32 E.R. 56].
(7) (1894) 1 Ch. 678.
(8) (1894) 1 Ch., at p. 684.
(9) (1894) 1 Ch., at p. 685.
(10) (1943) 169 L.T. 365.
(11) (1945) 61 T.L.R. 334.

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"income derived from my estate." In *Hey's Case* (1) the will, which created a life estate and remainders, contained a trust for conversion with a power to postpone conversion and directed that pending conversion "the income of property actually producing income" should be applied as income, and negatived the rules in *Howe* v. *Lord Dartmouth* (2) and *Allhusen* v. *Whittel* (3). During the life of the tenant for life there was a resulting trust to the estate of the testator of certain income of the settlement. On the question whether this income was received by the trustees of the will as income or capital his Lordship refused to follow *In re O'Hagan* (4) and *In re Sherry*; *Sherry* v. *Sherry* (5) and did not refer to *Alcock* v. *Sloper* (6), which does not appear to have been cited. He purported to follow *Crawley* v. *Crawley* (7) and *In re Whitehead* (8) as authorities that such income when so received was a payment of capital. In my opinion, for the reasons already stated, *In re Whitehead* (8) is not, as his Lordship considered, opposed to but is consistent with *Alcock* v. *Sloper* (6), *In re O'Hagan* (4) and *In re Sherry*; *Sherry* v. *Sherry* (5), and *Hey's Case* (1) is not one which we ought to follow.

The will of the testatrix can be divided into two periods of time. The one before and the other after Wadya's death. In the first period there is a trust for conversion of the residue and to invest the net proceeds in trust investments, and to stand possessed of the investments in trust to accumulate the income. There is also power for the trustees to postpone conversion and power to retain the trust estate in the same investments in which it was invested at the date of death. The trust to accumulate read completely literally would appear only to refer to the income of authorized investments in which the trustees had invested the proceeds of conversion. On this construction there is no express direction to accumulate the income of investments in which the trust estate was invested at the date of death. But paragraph 11 relates to the whole residuary estate and the trust to convert and invest the proceeds of conversion must be read in conjunction with the provisions for postponement and retention. So read the direction to accumulate refers to the whole income of residue whether derived from the investment of the proceeds of conversion or from retained investments.

This construction is assisted by paragraph 12. It is open to argument that the words in this paragraph "income of my residuary estate" refer to two categories of income, namely income of the

(1) (1945) 61 T.L.R. 334.
(2) (1802) 7 Ves. 137 [32 E.R. 56].
(3) (1867) L.R. 4 Eq. 295.
(4) (1932) W.N. (Eng.) 188.
(5) (1913) 2 Ch. 508.
(6) (1833) 2 My. & K. 699 [39 E.R. 1111].
(7) (1835) 7 Sim. 427 [58 E.R. 901].
(8) (1894) 1 Ch. 678.

investment of the proceeds of conversion as the only income directed to be accumulated on the strict literal reading of paragraph 11 and also income as to which on this reading there is no express trust for accumulation. But the natural grammatical construction of the words in the context of the paragraph as a whole is, I think, that the income referred to is the same as that directed to be accumulated in paragraph 11. This construction is also assisted by the words " or accumulations as aforesaid " in paragraph 16 because these accumulations are the accumulations under the express trust, and when the testatrix was providing that residue should include income accumulated during Wadya's lifetime it would be most unlikely that she did not intend to refer to the whole of the income of residue not applied under the discretionary trust, but intended to refer only to part of the income, namely, the income of the proceeds of conversion invested in authorized investments not applied under this trust, and to omit the income received from retained investments and not so applied but accumulated (up to a period of 21 years) under an implied trust.

When the language of the will is read in the light of the circumstances, it becomes even more apparent that this is the correct construction. The asset of overshadowing value in the estate of the testatrix is Wadya's life interest. The first period (although the accumulation could not in law exceed 21 years) is made conterminous with the continuance of this interest; and discretionary payments up to but not exceeding £18 and in addition an undefined sum to be paid to Wadya are authorized out of the income of the residue. The testatrix could hardly have intended that such an interest would be sold, so that, unless this was the income intended to be accumulated (and there could not have been any other income worth accumulating), little effect could have been given to this discretion for many years after her death, and presumably the testatrix did not intend that Wadya and his wife and children should starve in the meantime.

There is, therefore, an express trust to accumulate the whole income of residue however invested during Wadya's lifetime. As the payments made in respect of Wadya's life interest are income they are within the trust for accumulation, and therefore part of the income out of which the trustees can make the distributions authorized by paragraph 12. In these circumstances no room is left for the application of the rule in *Howe* v. *Lord Dartmouth* (1) in any of its branches, even assuming (and on this point I express no opinion) that the rule applies to a case where the contest does not arise between life

(1) (1802) 7 Ves. 317 [32 E.R. 56].

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tenants and remaindermen but between the right of the trustees during the life of a person to make discretionary payments out of the income of residue and those entitled to residue after his death, or where the income although terminable consists of rents (a fact not known to his Honour).

After Wadya's death the estate is given to life tenants and remaindermen. At this stage the conventional rules relating to unauthorized investments as between life tenants and remaindermen would apply but it would be difficult to find an unauthorized investment in face of the extraordinarily wide scope of paragraph 16. Cf. *Khoo Tek Keong* v. *Ch'ng Joo Tuan Neoh* (1). But we are not concerned with this period.

For these reasons, I would allow the appeal.

Appeal allowed. Order of Supreme Court varied by striking out the answers to questions 1, 2, 3 (*a*) *and* 3 (*b*), *and by substituting the following answers* :—1. *Yes.* 2. *No.* 3. (*a*) *No. Costs of all parties of appeal to be paid out of the corpus of the estate, those of the trustees as between solicitor and client. Order to lie in office until consent of Myrtle Michael to be bound by this order is filed.*

Solicitors for the appellant, *Stewart & Dimelow.*
Solicitors for the trustees, *Corr & Corr.*
Solicitor for the respondent Fakhry, *K. C. Rankin.*

E. F. H.

(1) (1934) A.C. 529, at p. 535.