[HIGH COURT OF AUSTRALIA.]

CRANE . . . . . APPELLANT;
DEFENDANT,

AND

CRANE AND OTHERS . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Sept.* 26, 27.

SYDNEY, *Nov.* 22.

Latham C.J., Dixon and McTiernan JJ.

Will—Construction—Vesting—Gift of fund to children as class—Children's shares payable on attaining twenty-one years or marriage—Period of ascertainment of class—Gift over of lapsed shares.

A testator, by his will, left his residue on trust to pay the income thereof for the education maintenance and support of the children of his brother A, during their respective minorities and from and after A's son or sons respectively attaining twenty-one years and from and after A's daughter or daughters respectively attaining that age or marrying under that age in trust for them absolutely share and share alike. The will further provided that "if the legacies or shares payable to any of the legatees hereinbefore named shall lapse such lapsed legacies or shares shall vest in my brothers" A and B absolutely share and share alike. The will empowered the trustees at their discretion to raise the whole or any part or parts of the vested or presumptive shares of any nephew or niece of the testator and apply the same for his or her advancement, preferment or benefit.

At the date of the testator's death in 1932, A was a widower with three children. The eldest of these children attained the age of twenty-one years in 1939. In 1937 A re-married and in 1942 a child was born of this marriage.

Held, That the class of children to share in the gift was closed in 1939 when A's eldest child attained twenty-one years and that therefore the child of A's second marriage was not entitled to participate.

Andrews v. *Partington*, (1791) 3 Bro. C.C. 401 [29 E.R. 610], applied.

Iredell v. *Iredell*, (1858) 25 Beav. 485, and *Bateman* v. *Gray*, (1868) L.R. 6 Eq. 215, discussed.

Decision of the Supreme Court of South Australia (*Napier* C.J.): *In re Crane, Deceased*, (1949) S.A.S.R. 1, affirmed.

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APPEAL from the Supreme Court of South Australia.

Arthur Crane died on 30th March 1932 leaving a will dated 24th April 1930 whereof he appointed George Joseph Crane and Reginald Leo Heuzenroeder to be executors and trustees. G. J. Crane and R. L. Heuzenroeder duly proved the will in the Supreme Court of South Australia on 11th May 1932. The will directed the trustees to stand possessed of the residue of the estate " in trust to pay the income thereof to the guardian or guardians of the children of my brother George Joseph Crane for their education maintenance and support during their respective minorities and from and after the son or sons of the said George Joseph Crane respectively attaining the age of 21 years and the daughter or daughters of the said George Joseph Crane respectively attaining that age or marrying under that age in trust for them absolutely share and share alike and if there shall be only one child then in trust for that one only provided always that if any child of the said George Joseph Crane shall die before coming into possession of his or her share under this will leaving a child or children him or her surviving who being a son shall attain the age of 21 years or being a daughter shall attain that age or marry under that age then and in every such case the lastmentioned child or children shall take (and if more than one equally between them) the share which his or her parent would have taken under this will if such parent had attained the age of 21 years." The will also provided :—" 5. If the legacies or shares payable to any of the legatees hereinbefore named shall lapse then and in that case such lapsed legacies or shares shall vest in my brothers George Joseph Crane and Charles Samuel Crane absolutely share and share alike. 6. My trustees may at their discretion raise the whole or any part or parts of the vested or presumptive shares of any nephew or niece of mine under this will and apply the same for his or her advancement preferment or benefit as my trustees shall think fit."

At the date of the will, and at the date of the death of the testator, George Joseph Crane was a widower with three children, Gordon Jack Crane (born 20th June 1918), Marjorie Jean Crane (born 2nd November 1921) and Ronald Arthur Crane (born 24th February 1929). On 31st March 1937 George Joseph Crane re-married. On 19th June 1939 his son Gordon Jack Crane attained twenty-one years. On 11th October 1941 Marjorie Jean Crane died under the age of twenty-one and unmarried. On 9th July 1942 William Clement Crane, a child of George Joseph Crane's second marriage was born.

The trustees George Joseph Crane and Reginald Leo Heuzenroeder issued an originating summons out of the Supreme Court of South

Australia the defendants to which were Gordon Jack Crane, Ronald Arthur Crane, William Clement Crane and Charles Samuel Crane, a brother of the deceased.

The originating summons which asked for the determination of various questions was heard by *Napier* C.J. who made a declaration that upon the true construction of the will and in the events which had happened :—

1. Gordon Jack Crane was entitled to payment of a one-third share of the corpus of the residuary trust moneys and the investments for the time being representing the same, together with the income accruing on that share since he attained the age of twenty-one years.

2. A one-third share of the corpus of the said fund (being the share which Marjorie Jean Crane would have taken if she had attained the age of twenty-one years or married under that age) was payable to the testator's brothers, the plaintiff George Joseph Crane and the defendant Charles Samuel Crane, together with the income accruing on that share since the death of Marjorie Jean Crane.

3. The remaining one-third share of the corpus of the said fund would be payable to the defendant Ronald Arthur Crane if and when he attained the age of twenty-one years, and in the meantime the income thereof was payable to his guardian for his education, maintenance and support.

4. The defendant William Clement Crane was not entitled to share either in the income or in the corpus of the said fund.

From this decision William Clement Crane appealed to the High Court.

F. G. Hicks, for the appellant. The class is not fixed at the majority of Gordon Jack Crane who reached twenty-one before William Clement Crane was born. There is an advancement clause which excludes the rule in *Andrews* v. *Partington* (1) :—see also *Theobald* on *Wills*, 10th ed. (1946), pp. 235, 236 ; *In re Poe* (2) ; *In re Carter* (3). The rule does not apply to gifts of income. The class does not close on the attainment of twenty-one by the child ; it remains open until the possibility of further children is excluded (*Halsbury's Laws of England*, 2nd ed., vol. 34, pp. 268 et seq. especially at p. 271). The rule in *Andrews* v. *Partington* (1) is

(1) (1791) 3 Bro. C.C. 401 [29 E.R. 610].
(2) (1942) I.R. 435.
(3) (1911) 30 N.Z.L.R. 707.

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excluded where corpus must be kept intact to provide maintenance, nor is it applicable to bequests of income (*Re Wenmoth's Estate* ; *Wenmoth* v. *Wenmoth* (1) ; *In re Stephens* ; *Kilby* v. *Betts* (2)). The rule does not apply unless necessary (*Knight* v. *Knight* (3)). *Napier* C.J. thought that the gifts to children vested on the eldest child attaining twenty-one years, subject to a liability to be divested. This is incorrect. Where there is a sum, the income of which is not given in aliquot shares, the gift does not vest until the condition is satisfied. There is a separate vesting in the case of each child (*Re Rogers* (4) ; *Re Parker* ; *Parker* v. *Parker* (5) ; *Re Coleman* ; *Henry* v. *Strong* (6)). The words " before coming into possession " mean " before being entitled to receive payment " (*Capel* v. *Capel* (7) ; *Re Blackwood* (8)). He also cited *Re Grimshaw's Trusts* (9) ; *Derry* v. *Briant* (10) ; *Iredell* v. *Iredell* (11) ; *Bateman* v. *Gray* (12) ; *Re Courtenay* (13) ; *Gimblett* v. *Purton* (14) ; *Re Deloitte* ; *Griffiths* v. *Allbeury* (15) ; *Permanent Trustee Co. of N.S.W. Ltd.* v. *King* (16) ; *Gardner* v. *James* (17).

C. T. Hargrave, for the respondent Gordon Jack Crane. The appellant's argument goes so far as to say that, if there is a maintenance or an advancement clause, the class must be kept open, but in *Andrews* v. *Partington* (18) itself, there was a maintenance clause. *Seale-Hayne* v. *Jodrell* (19) shows that clause 5 refers to the class of persons mentioned in clause 4. Prima facie the rule in *Andrews* v. *Partington* (18) applies in the circumstances set out in the will. The appellant must show that the rule is excluded, and this he has failed to do. His argument regarding the income is unsupported by authority.

G. V. Culshaw, for the respondent Charles Samuel Crane adopted *C. T. Hargrave's* argument and referred to *Re Turney* (20) and *Jarman* on *Wills*, 7th ed. (1930) p. 771.

Cur. adv. vult.

(1) (1888) 37 Ch. D. 266.
(2) (1904) 1 Ch. 322.
(3) (1912) 14 C.L.R. 86.
(4) (1944) 1 Ch. 297.
(5) (1880) 16 Ch. D. 44.
(6) (1888) 39 Ch. D. 443, at p. 451.
(7) (1936) 36 S.R. (N.S.W.) 658 ; 53 W.N. 248.
(8) (1948) V.L.R. 360.
(9) (1879) 11 Ch. D. 406.
(10) (1862) 2 Dr. & Sm. 1 [62 E.R. 521].
(11) (1858) 25 Beav. 485 [53 E.R. 772].
(12) (1868) L.R. 6 Eq. 215.
(13) (1905) 74 L.J. Ch. 654.
(14) (1871) L.R. 12 Eq. 427.
(15) (1919) 1 Ch. 209.
(16) (1930) 30 S.R. (N.S.W.) 318, at p. 326 ; 47 W.N. 116, at p. 118.
(17) (1843) 6 Beav. 170 [49 E.R. 790].
(18) (1791) 3 Bro. C.C. 401 [29 E.R. 610].
(19) (1891) A.C. 304, at p. 305.
(20) (1899) 2 Ch. 739, at p. 744.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from an order of the Supreme Court of South Australia (*Napier* C.J.) interpreting the will of the late Arthur Crane who died on 30th March 1932. The will contained a direction that the testator's trustees should stand possessed of his residuary trust moneys—" In trust to pay the income thereof to the guardian or guardians of the children of my brother George Joseph Crane for their education maintenance and support during their respective minorities and from and after the son or sons of the said George Joseph Crane respectively attaining the age of twenty one years and the daughter or daughters of the said George Joseph Crane respectively attaining that age or marrying under that age in trust for them absolutely share and share alike and if there shall be only one child then in trust for that one only Provided always that if any child of the said George Joseph Crane shall die before coming into possession of his or her share under this will leaving a child or children him or her surviving who being a son shall attain the age of twenty one years or being a daughter shall attain that age or marry under that age then and in every such case the lastmentioned child or children shall take (and if more than one equally between them) the share which his or her parent would have taken under this will if such parent had attained the age of twenty one years."

At the time of the testator's death his brother G. J. Crane had three children, one of whom, a daughter, died before attaining twenty-one. One son attained twenty-one on 19th June 1939; the other son was born on 24th February 1929 and therefore has not attained the age of twenty-one years. The testator's brother, who was a widower at the time of the testator's death, married again and the appellant William Clement Crane was born on 9th July 1942. The first question which arose upon the will was whether the appellant was entitled to an interest in the income or the corpus of the residuary trust moneys.

There is a rule of convenience generally referred to as the rule in *Andrews* v. *Partington* (1), according to which where there is a gift to a class of children at twenty-one or marrying under that age the class is fixed when a child attains twenty-one or marries, and no child born afterwards can take. The gift of the corpus in the present case clearly falls within the terms of the rule. It is a gift to the sons of G. J. Crane respectively attaining the age of twenty-one and the daughter or daughters respectively attaining that age or marrying under that age in trust for them absolutely share and share alike.

(1) (1791) 3 Bro. C.C. 401 [29 E.R. 610].

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The application of the rule of convenience, however, is naturally excluded if the provisions of the will show that the testator intended the corpus to be withheld from distribution after the time when a member of the class had become entitled to call for his share. Thus if there is a provision for maintenance out of income which is such as to require the retention of the corpus in the hands of the trustees (in order to provide the income) during a period after a member of the class has attained twenty-one or married under that age, such a provision prevents the application of the rule of convenience. Similarly, a provision for advancement might be expressed in such terms as to show that the share of a donee was to be held in the hands of the trustees, notwithstanding that, apart from that circumstance, the class would have been fixed without possibility of extension under the rule. The appellant contends that provisions in the will relating to maintenance and advancement exclude in this case the application of the rule.

The direction with respect to the payment of income for education, maintenance and support has already been quoted. It is contended for the appellant that that direction creates a trust under which the whole of the income of the corpus is to be paid for the education &c. of any minor child or children of G. J. Crane so long as they or any of them are minors and, if daughters, unmarried. In my opinion the words relating to the disposition of income will not bear this construction. The trust is a trust to pay the income for the education &c. of the children " during their respective minorities." It is in my opinion clear that there is no gift of the whole of the income for the benefit of minor children. On the contrary there is a direction to apply the income derived from the share of each child for the benefit of the child during his or her minority, or if a daughter, until she marries under that age. When that event happens the child takes a share in the corpus absolutely, and the trustees are no longer entitled to control the disposition of the income of that share. The income thereafter belongs to the child who has become the absolute owner of the share in the corpus.

It is further contended for the appellant that clause 6 of the will shows that the rule of convenience cannot properly be applied. Clause 6 is in the following terms :—" My trustees may at their discretion raise the whole or any part or parts of the vested or presumptive share of any nephew or niece of mine under this will and apply the same for his or her advancement preferment or benefit as my trustees shall think fit."

It is argued that the power to make an advancement out of " the vested or presumptive share " of nephews or nieces shows that there

may be a share of one of the children of G. J. Crane which is vested but out of which an advancement may be made. An advancement can be made only if the property is retained in the hands of the trustees. It is therefore argued that the reference to " vested share " in clause 6 shows that the corpus must be retained in the hands of the trustees even after the point of time at which the class would have been closed under the rule in *Andrews* v. *Partington* (1). Therefore, it is contended, the class should not be held to be fixed at that time but should be held to remain open so as to let in children, such as the appellant, born after one of the children of G. J. Crane has attained the age of twenty-one years, or, if a daughter, has attained that age or married.

This argument is supported by referring to the provision that if a child shall die before " coming into possession of his or her share " leaving a child or children who attain twenty-one or being a daughter marries under that age, that child or children shall take the share which the parent would have taken if the parent had attained the age of twenty-one years. This provision shows, it is contended, that the children of G. J. Crane take only contingent interests until they attain twenty-one or being daughters marry under that age, so that the reference to advancement in clause 6 necessarily refers to advancement in the case of a child who has attained twenty-one years of age or if a daughter has married under that age. If this is the true interpretation of the will it shows that the testator contemplated the retention of the corpus in the hands of the trustees beyond the time when, according to the rule in *Andrews* v. *Partington* (1) the class would become fixed.

Napier C.J. held that clause 6 was a subsidiary clause which should not be allowed to control and modify the otherwise clear and definite principal provision that the children " respectively " should take their shares " absolutely " when they attained twenty-one or if daughters married under that age. Accordingly he found a meaning for the word " vested " in clause 6 by holding that the word meant vested subject to being divested in the event of the death of a child under twenty-one or if a daughter before marrying under that age. I realise that this construction deprives " vested " of any significance as distinct from " presumptive " where those words appear in clause 6. But the construction approved by the learned Chief Justice is possible and produces a reasonable and practical result, whereas the contrary view would have the consequence that none of the children would be entitled to call for their shares as long as G. J. Crane was alive and as long as any son born

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to him was under twenty-one or any daughter born to him was under that age and unmarried. To ascribe such an intention to the testator is inconsistent with the gift to the children " respectively " and " absolutely " at twenty-one, or, if daughters, marrying under that age. Accordingly I agree with the Chief Justice that clause 6 does not exclude the application of the rule in *Andrews* v. *Partington* (1).

A further question decided in the Supreme Court related to the disposition of the share of the daughter of G. J. Crane who died unmarried under twenty-one years of age. If, however, the appellant is not within the class of children who take (as in my opinion is the case) he has no interest in the decision of this question and the Court should not deal with it.

In my opinion the appeal should be dismissed.

The decision of the Court is that the appeal fails. The appellant is an infant who appeared in the Supreme Court by a guardian *ad litem*. The guardian *ad litem* was not a party to the appeal, but no objection to the appeal was taken by any of the other parties on this ground though they were fully informed as to the facts. The question upon which the appeal was brought to this Court was one of difficulty, arising from the terms of the will. One of the respondents was also an infant In all the circumstances the members of the Court are agreed that it is proper to order that the costs of the appeal of all parties be paid out of the testator's estate, those of the trustees as between solicitor and client.

DIXON J. This appeal concerns the ascertainment of the objects of a class gift. It is the gift of residue contained in the will of Arthur Crane, who died on 30th March 1932. His last will was made two years before his death. Among other relatives he left a brother named George Joseph Crane him surviving. The class gift in question is a residuary bequest of corpus in favour of the children of George Joseph Crane attaining twenty-one or being daughters marrying under that age. At the date of the will and at the date of the death of the testator his brother George Joseph was a widower with three young children,—Gordon Jack born 20th June 1918, Marjorie Jean born 2nd November 1921 and Ronald Arthur born 24th February 1929. Gordon Jack became twenty-one on 20th June 1939 and *Napier* C.J. has decided that when this happened the class closed, so that no children of George Joseph born after that date could be objects of the class gift. In fact George Joseph re-married and by his second marriage he had

(1) (1791) 3 Bro. C.C. 401 [29 E.R. 610].

issue William Clement born on 9th July 1942. William Clement Crane now appeals from the decision excluding him from participation. A further question was decided by *Napier* C.J. The will contains a provision for the case of legacies or shares lapsing. The lapsed legacy or share is to vest in the testator's two brothers George Joseph and Charles Samuel in equal shares George Joseph's daughter Marjorie Jean died on 11th October 1941 in her twentieth year. *Napier* C.J. decided that her death caused a lapse upon which the provision operated. Thus the consequence of her death was not that the shares of the other members of the class were increased but that her share passed to the testator's two brothers. The appellant William Clement also attacks this decision. But his interest in the question arises only if he succeeds upon the first question and makes good his claim to be included within the class as one of the objects of the gift. In my opinion he fails in making good this claim. I agree in the decision of *Napier* C.J. that the class closed on the eldest child of George Joseph Crane reaching the age of twenty-one, so that no child born thereafter could be an object of the gift, and I agree in the reasons which his Honour gave for that decision.

The case is governed by the well-known rule of construction or of convenience, relating to the ascertainment of the objects of a postponed class gift. If a fund is bequeathed to a class so that when each member attains a specified age or fulfils some other condition attached to the gift he is enabled to call for his share, only those may take who are in existence when the first member reaches that age or fulfils the prescribed condition and those who come into existence afterwards are excluded. The class is then closed and although the numbers who ultimately share may be diminished by reason of the failure of one or more of them to attain full age or comply with some other condition on which the title to participate may be contingent, the numbers cannot be enlarged by the birth of additional persons who if born earlier would have been eligible for membership of the class. The rule applies alike to limitations which merely postpone payment until attainment of the specified age or fulfilment of the given condition and to limitations which make vesting contingent thereon.

The purpose of the rule is to enable those members of a class who have qualified so that they have an interest vested in possession to enter at once into enjoyment of their shares. This could not be done if the class were kept open so long as it were possible that other children might be born and become members. As long as the parent lived the class might be increased by the birth of further

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children and the share of existing children diminished accordingly. As the share would thus be unascertainable and the minimum amount even could not be fixed no payment could be made, until the parent died, to those whose interests were otherwise vested in possession. To avoid this consequence a construction is given to such bequests which will make further accession to the class impossible once the conditions have been satisfied giving any child a share vested in possession. Until this event children are let in and by their number the minimum share is fixed which each will take. But, by the death of any of them before qualifying for a vested interest by attaining the given age or satisfying the conditions attached to the gift, the size of the proportionate share may afterwards be enlarged. "The rule of the court has gone upon an anxiety to provide for as many children as possible with convenience. Therefore any coming in esse before a determinate share becomes distributable to anyone is included" (per Lord *Eldon*, *Barrington* v. *Tristram* (1)). It would be highly inconvenient if there were no such principle of construction and the shares of children were left unascertainable throughout the whole life of their parent because of the possibility of accession to the class by future births. It is a rule of convenience. But, it has been repeatedly pointed out, the rule resolves an inconsistency of intention disclosed by the testator's dispositions. He intends that every child who attains the given age shall have his share but he intends that he shall have it before, on the literal words of the limitation, it is possible to ascertain the objects who fall within the class. "You must either sacrifice the direction that gives a right to distribution at twenty-one or sacrifice the intention that all the children shall take. The court has in such cases decided in favour of the eldest child taking at twenty-one as the will directs, and sacrificed the intention that children shall take" (per *Wigram* V.C., *Mainwaring* v. *Beevor* (2)). "When the rule is adopted the solution arrived at is the result of an endeavour by the court to reconcile two apparently inconsistent directions, the one that the whole class of children shall take and the other that the fund shall be divided at a moment when the whole class cannot be ascertained" (per *Buckley* J., *In re Stephens*; *Kilby* v. *Betts* (3): cf. per *Astbury* J., *In re Chartres* (4)). But the rule cannot be applied if the will expresses an intention which is inconsistent with the idea of the first child who satisfies the conditions attached to the gift calling for his share. Such an

(1) (1801) 6 Ves. 345, at p. 348 [31 E.R. 1085, at p. 1087].
(2) (1849) 8 Hare 44, at p. 49 [68 E.R. 266, at p. 268].
(3) (1904) 1 Ch. 322, at p. 328.
(4) (1927) 1 Ch. 466, at pp. 474, 475.

inconsistent intention may be found in a provision postponing the distribution of any share until, for example, the youngest child for the time being attains twenty-one. It has been found in maintenance or advancement clauses framed in such a way as to show that the fund was to be kept together notwithstanding that the share or shares of a member or members of the class had vested in possession and maintenance or advancement was to be allowed thereout beyond that period (*Bateman* v. *Gray* (1); *Re Courtenay* (2)).

The decision of *Napier* C.J. in the present case is attacked by the appellant on the ground that the provisions of the will contain indications of this character to exclude the application of the rule. In order to understand the matters upon which reliance is placed it is necessary to state somewhat more fully the material provisions of the will. It is enough to begin with the trusts of the residuary trust moneys. The first trust is to pay the income thereof to the guardian or guardians of the children of the testator's brother George Joseph Crane for their education maintenance and support during their respective minorities. Next comes a trust "from and after the son or sons of the said George Joseph Crane respectively attaining the age of twenty-one years and the daughter or daughters of the said George Joseph Crane respectively attaining that age or marrying under that age in trust for them absolutely share and share alike." It is convenient to state at this point the use which the appellant makes of these provisions. It is not denied on his behalf that if the trust of corpus stood alone it would be governed by the rule. Nor could it be denied. For the words "from and after" combining as they do with the word "respectively" make it clear that as each child attained twenty-one or, being a daughter, married under that age, he or she became absolutely entitled to an equal share. Unless the rule were applied it would be necessary to postpone until the death of George Joseph Crane the ascertainment of the persons to take and the enjoyment of the gift by all of them would be deferred till that event. In other words it is an ordinary instance of the need of the rule of convenience to resolve the apparent inconsistency of the intentions of the will. What the appellant does say is that the earlier or first trust for the payment of income to the guardians of the children for their education maintenance and support means that the whole income, that is the income from the whole fund, must be devoted to that purpose so long as there was any child under twenty-one and, I suppose, so long as there was a possibility of a child coming into being. If this were right it would found an inference that no

(1) (1868) L.R. 6 Eq. 215. (2) (1905) 74 L.J. (Ch.) 654.

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distribution was to be made until the youngest child of George Joseph came of age and so rebut the conclusion that as each child attained full age or, if a daughter married sooner, he or she was to become absolutely entitled to a share for which he or she might call. But in my opinion it is not the correct interpretation of the trust. The application of the income for the education, maintenance and support of any child is to stop at the end of that child's minority. So much is made clear by the words "respective minorities." Then ensues the trust of corpus which is to arise from and after the very event. The intention appears to me to be clear that income for the maintenance, education and support of each child should cease and his absolute right to his share of corpus should arise as and when he came of age. It would be a slavish literalness to give the words "the income thereof" a meaning which would demand the application of the income of the whole fund to one child, for example, the older children having attained twenty-one, so that in the meantime they received neither income nor corpus.

An argument was advanced that the rule does not apply to trusts to pay income to a class and therefore that the first trust of the present will was not subject to the rule, with the consequence that in interpreting the will we began with a trust for all possible members of the class. The argument is misconceived. How the rule applies to trusts for the payment of income is explained in *Re Morley*; *Morley* v. *Williams* (1), by *Jordan* C.J. in the following passage:— "Where it is income which is directed to be divided amongst persons who take contingently, there is no reason why the class should not be closed to any extent necessary to admit of a division being made of each parcel of income as it becomes available, but there is no reason why it should be closed to any greater extent. Hence as each successive parcel of income is received, the class is ascertained for purposes of division of that parcel by taking all the persons who are then members or possible members of the class."

A point made for the appellant is that the words "or daughters" after "daughter" shows that the testator contemplated the possibility of further children. For when his will was penned Marjorie Jean was the only daughter. Be it so. It establishes no more than that it is a class gift and not a reference to the existing children who in fact had been named earlier in bequests of specific pecuniary legacies. This no one disputes.

Qualifying the trust of corpus is a proviso containing a substitutional gift in case any child of George Joseph Crane should die

(1) (1935) 35 S.R. (N.S.W.) 102, at p. 106; 52 W.N. 55, at p. 57.

before coming into possession of his or her share under the will leaving a child or children him or her surviving who being a son should attain the age of twenty-one or being a daughter should attain that age or marry under that age. In such an event the last-mentioned child or children are to take the share which his or her parent would have taken under the will if such parent had attained the age of twenty-one years. It is to be noticed here that the corresponding opposite of taking a share at twenty-one is "dying before coming into possession of his or her share." This might be used to confirm the view that actual payment was intended on coming of age; but no doubt the words "coming into possession" mean obtaining an interest vested in possession. But even on this view the proviso tends to support the conclusion that on attaining full age a distinct and separate distributable share in corpus is considered to belong absolutely to the child. This view may also be taken of a clause which follows. It is numbered 5 in the will and is that under which it has been held that the testator's two brothers take the share of Marjorie Jean. It is unnecessary to set it out. But for the appellant considerable reliance is placed on the use of the word "vest" in clause 6, which contains a power of advancement. The clause is as follows:—"My trustees may at their discretion raise the whole or any part or parts of the vested or presumptive share of any nephew or niece of mine under this will and apply the same for his or her advancement preferment or benefit as my trustees shall think fit."

It is said that the word "vested" can only apply to the share of a son of George Joseph who has attained twenty-one or of a daughter who has attained that age or married. If such a share could be called for at once by the legatee, a power of advancement would be superfluous. The use of the word therefore shows, so it is said, that the will intends that the fund must be maintained intact until the youngest child attains twenty-one. This in my opinion places too great a burden upon the use of the word. Plainly enough the clause is in common form and the expression "vested or presumptive" is used for no other purpose than to make it clear that whether the share is vested or not the power of advancement attaches to it. It may be remarked that the whole clause shows that the fund is treated as severed into aliquot portions and not as an aggregate, and further that the whole of any such aliquot share may be exhausted upon the object or presumptive object. That is a consideration telling in favour of its being distributable.

But on behalf of the respondents a further answer was put forward to the appellant's contention based on the word "vest."

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That answer is that upon the true interpretation of the whole will the interest of a child of George Joseph Crane who had not yet attained the age of twenty-one or being a daughter married was not contingent but was a vested interest liable to be divested on death before attaining that age or marrying as the case might be. Accordingly the word " vest " is accurately used in clause 6. The considerations advanced in support of this interpretation of the bequest are of much the same kind as those which led the Court of Appeal in *Re Turney* (1), to hold that the grandchildren in that case took vested but defeasible interests in the legacy and not contingent interests : cf. *Armytage* v. *Wilkinson* (2). I am not able to adopt this construction of the bequest. The words importing contingency are strong and the considerations pointing towards vesting are not as persuasive as those in *Re Turney* (1). But nevertheless I agree in the observation made by *Napier* C.J. upon the words " the vested or presumptive share of any nephew or niece." His Honour said (3) :—" If these words were used with a full appreciation of their significance, the explanation may be that the draftsman regarded all the shares as vesting, when the first child attained 21, subject to divesting, in the event of death before ' coming into possession.' The power given by clause 6 is subsidiary to the dispositions in clause 4, and I am not prepared to use the inference from the word ' vested,' in clause 6, to control the clear meaning of clause 4, which directs the trustees to stand possessed of the fund in trust for each of the children ' absolutely ' as he or she respectively attains 21."

Much reliance was placed for the appellant upon two decisions of Lord *Romilly* M.R. in support of the view that the words " vested or presumptive share of any nephew or niece " showed that the power of advancement was to continue beyond the time when the eldest nephew attained twenty-one or the eldest niece attained that age or married, so that no share could fall into possession on that event. The first of the two decisions is *Iredell* v. *Iredell* (4). In that case the language of the provisions of the will afforded rather strong reasons for denying the application of the rule of convenience. The limitation was to grandchildren of the testatrix, sons and daughters of the three named sons respectively, on attaining twenty-one or in the case of daughters on marrying under that age. It was expressed to be in favour of such grandchildren " whether born in my lifetime or after my death." While such words are not

(1) (1899) 2 Ch. 739.
(2) (1878) 3 App. Cas. 355, at pp. 372-374.
(3) (1949) S.A.S.R., at p. 5.
(4) (1858) 25 Beav. 485 [53 E.R. 722].

in themselves enough to rebut the rule, they form a consideration that must be taken into account. The bequest was followed by a power to apply for the benefit of a grandchild any part not exceeding a half of the property to which he or she should for the time being be entitled either absolutely presumptively or in expectancy. The power expressly applied whether the grandchild had or had not attained twenty-one as the case might be " and notwithstanding any liability of any share of such grandchild in the said trust funds respectively to be lessened in amount by the subsequent addition to the class entitled to the entire fund or any aliquot part thereof."

There was a maintenance clause in a similar form. When the references to possible accessions to the class and consequent lessenings of the share are combined with the fact that maintenance and advancement are authorized out of shares to which the beneficiary is absolutely entitled the inference is almost inevitable that the testatrix intended that the fund should be kept together so that all grandchildren " born after my death " should be let in and that the class should not close while any possibility remained of its numbers increasing. The decision appears to me to be quite distinguishable from the present case and to fall far short of establishing as a general proposition that if a maintenance or an advancement clause refers to " vested " shares, that is enough to exclude the rule of convenience.

The second decision of Lord *Romilly* relied upon is *Bateman* v. *Gray* (1). The will in that case directed an appropriation or residue to answer annuities and subject thereto divided the fund into two moieties. A life interest in one moiety was bequeathed to the testator's sister. There was then a trust of both moieties to a class of children of one nephew and two nieces " now born or hereafter to be born who shall attain the age of twenty-one." The trust was immediately followed by a discretionary trust to apply the income arising from the presumptive share or respective shares of every or any such child for the maintenance or education of the child, the unapplied portion to be accumulated. There was then an advancement clause authorizing the application of any part not exceeding " one-half of the capital of the vested or presumptive share or respective shares of any child or children of my said nephew or nieces for his her or their advancement in life." The question whether the class of children to take was ascertained or closed when the eldest of the children attained twenty-one came before the Master of the Rolls first in 1861. The learned judge then decided,

(1) (1868) L.R. 6 Eq. 215.

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so far as the report shows without stating his reasons, that the class was fixed and ascertained when the eldest attained twenty-one: *Bateman* v. *Gray* (1). But in 1865 after the eldest child had attained twenty-one another child was born and on behalf of that child a petition for rehearing was presented. Lord *Romilly* then reversed his previous decision (2). He is reported as saying only that the word "vested" was very strong and he did not see how in the face of it the declaration he had made could be supported. It seems to have been a case where first thoughts were best. For, although the provisions of the will were perhaps not entirely favourable to the application of the rule, there do not appear to have been sufficient indications to the contrary to exclude the rule either in the composite description of the class, or the general tenor of the maintenance clause or the specific reference to "vested" in the maintenance clause. In *Gimblett* v. *Purton* (3), *Malins* V.C. said that the rule "ought not to be frittered down by such a decision as that in *Bateman* v. *Gray* (2) where the rule is evaded because there was a power of advancement to children out of vested shares." After a reference, not a very favourable reference, to *Iredell* v. *Iredell* (4), which he distinguished, the Vice-Chancellor said:—" . . . even if there were a clause for advancement similar to that which is found in *Bateman* v. *Gray* (2) I should have declined to follow the decision of the Master of the Rolls in that case, as it tends to throw a doubt upon a rule which is as well settled as any rule of interpretation in the courts."

Notwithstanding these observations, *Kekewich* J. in *Re Courtenay* (5), followed Lord *Romilly's* two decisions. But after citing what *Malins* V.C. had said *Kekewich* J. said:—" If I were at liberty to do so, I should be inclined to follow the decision of Vice-Chancellor *Malins*; but it is impossible for me now to do so. The two first-named cases were decided as long ago as 1858 and 1868, and it is too late now to question them."

Nevertheless in *Re Deloitte*; *Griffiths* v. *Allbeury* (6) the Court of Appeal declined to follow *Bateman* v. *Gray* (2), of which *Eve* J. said that it was obvious that it is not satisfactorily reported. The court distinguished *Iredell* v. *Iredell* (4), *Swinfen-Eady* M.R. saying "that was a very strong case on the facts." In this state of authority there is, I think, no reason to attach more significance

(1) (1861) 29 Beav. 447 [54 E.R. 700].
(2) (1868) L.R. 6 Eq. 215.
(3) (1871) L.R. 12 Eq. 427, at pp. 430, 431.
(4) (1858) 25 Beav. 485 [53 E.R. 722].
(5) (1905) 74 L.J. Ch. 654, at p. 655.
(6) (1919) 1 Ch. 209.

than we think that in the particular context it should bear to the fact that a maintenance or advancement clause is expressed to extend to vested shares. Speaking generally it will not be enough to displace the application of the rule unless some sufficient indication is disclosed of an intention that the fund is to be kept together or that the shares of those attaining twenty-one are not the subject of immediate enjoyment.

In my opinion the appeal should be dismissed with costs.

McTiernan J. I also agree that the appeal should be dismissed.

Appeal dismissed. Costs of all parties to the appeal out of the estate; those of the trustees as between solicitor and client.

Solicitor for the appellant: *F. G. Hicks.*

Solicitors for the respondents: *Cleland, Teesdale Smith & Harris; Knox & Hargrave; Elliott Johnston; Gunson & Culshaw.*

C. C. B.