[HIGH COURT OF AUSTRALIA.]

MARKS . . . . . APPELLANT;
DEFENDANT,

AND

TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED AND OTHERS } RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1948.

MELBOURNE, *Oct.* 20, 21.

SYDNEY, *Dec.* 6.

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

Will—Construction—"Vested"—Vested in interest—Vested in possession.

A testator by his will left real property on trusts as to the income in favour of his four children. On the death of the last survivor of the children the trustees were to convert the property and divide the resultant fund into shares, which they were to hold on trusts in favour of the children's children *per stirpes*. As to one of these shares, the first trust was for the child or children of the testator's son, L. B., who, being sons or a son, should attain the age of twenty-one, or, being daughters, should attain that age or marry. A second trust, relating to this as well as to the other shares in the corpus, was directed to the event of the death of a grandchild of the testator under twenty-one leaving lawful issue, in which event the issue were to take the share to which the grandchild would have been entitled. A third trust consisted in a direction that, "if all the children of any of" the testator's four children "shall die before the share hereinbefore respectively mentioned shall have become vested in him or her and without leaving lawful issue," the trustees were to hold the share for the children and the issue of any deceased child of the other or others of the testator's four children in equal shares. The son, L. B., predeceased his sister, E. L., who was the last survivor of the testator's four children. L. B. left only one child, a son, C. B., who died—also before E. L.—without issue after having attained the age of twenty-one.

Held that, in the third trust, the word "vested" meant vested in interest, with the result that the share directed to be held on trust for L. B. vested absolutely and indefeasibly in C. B.

Semble: The word "vesting" means, prima facie, vesting in interest.

Young v. *Robertson*, (1862) 4 Macq. 314, distinguished.

Decision of the Supreme Court of Victoria (*Fullagar* J.) affirmed.

H. C. OF A. 1948.

MARKS v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

APPEAL from the Supreme Court of Victoria.

Lawrence Benjamin by his will gave certain real property in the city of Melbourne to his trustees in trust to dispose of the income in specified "parts or shares" in favour of his four children, Jane Marks, Alice Henochsberg, Elizabeth Leveson and Lawrence Abraham Benjamin (who subsequently changed his surname to Bentley, by which name he is hereinafter referred to). In each case the trust was to pay the income of the share (two fifths in the case of Jane Marks and one fifth in the case of each of the other three) to the child for life and, after the death of any child, to that child's children in equal shares until the death of the testator's last surviving child. If any of the four children died without leaving issue capable of taking, the share was to be held in trust for the other or others of the four children and the issue of any of them who might have died but so that the issue of a child should take only the share which his, her or their parent would have taken. On the death of the last survivor of the four children, the trustees were to convert the property and hold the proceeds (described in the will as the "Property Trust Fund") on trusts for the children's children; the fund was to be divided into fifth parts and disposed of in the same proportions as above indicated in relation to the income; that is, as to two fifths on trust for the children of Jane Marks and one fifth in each of the other three cases. This report is concerned with the one-fifth part which, it was provided, was to be held on trust for such one or more exclusively of the other or others of the children of Lawrence Abraham Bentley in such shares and manner as he might by deed or will appoint. In default of appointment and so far as any appointment made might not extend, the one-fifth part was to be held on trust for all the children or any child of L. A. Bentley who being male attained the age of twenty-one years or being female attained that age or married and if more than one in equal shares. The will proceeded: "In the event of the death of any child of any of the said four persons" (i.e., the testator's four children) "before attaining the age of twenty-one years leaving lawful issue I declare that such issue shall take the share to which his her or their parent would have been entitled and if more than one in equal shares but so that no child or remoter issue of any of the said four persons in whose favour an appointment shall be made as hereinbefore provided shall in default of appointment to the contrary be entitled to share under the provisions lastly hereinbefore contained without bringing the benefit of such appointment into hotchpot and if all the children

of any of the said four persons shall die before the share hereinbefore respectively mentioned shall have become vested in him or her and without leaving lawful issue I declare that my trustees . . . shall hold the said last mentioned part or share upon trust for the children and the issue of any deceased child of the other or others of the said four persons in equal shares but so that such issue shall take only the share which his her or their parent would have taken and if more than one in equal shares and in the event of none of the said four persons leaving children or upon the total failure of the said trusts I direct that the said Property Trust Fund shall sink into and form part of my residuary personal estate."

Jane Marks died in 1909, Alice Henochsberg in 1922 and L. A. Bentley in 1932. He made a will in which he purported to exercise the power of appointment above described, but in the events which happened the appointment was wholly inoperative. He had only one child, a son, Colin, who died in 1945, having attained the age of twenty-one but leaving no issue. During the course of the proceedings described herein Elizabeth Leveson died leaving only one child.

The trustees, namely, the Trustees Executors and Agency Co. Ltd., Rudolph David Benjamin and Ernest Norman Marks, took proceedings by originating summons in the Supreme Court of Victoria, joining as defendants Vera Bentley (mother of Colin Bentley, sued as trustee of the will of L. A. Bentley and executrix of the will of Colin Bentley) and Mark Melbourne Marks (a son of Jane Marks, sued on his own behalf and as representing all persons concerned " other than parties herein ").

The question in the summons was :—

> Upon the proper construction of the will of Lawrence Benjamin deceased and in the events which have happened did the one-fifth part or share in the Property Trust Fund referred to in the will and therein directed to be held upon trust for the children of Lawrence Abraham Benjamin vest absolutely and indefeasibly in Colin Bentley deceased ?

The answer of *Fullagar* J. was that the one-fifth part in question vested absolutely and indefeasibly in Colin Bentley.

From this decision Mark Melbourne Marks appealed to the High Court.

Sholl K.C. (with him *Newton*), for the appellant. " Vested " is a word of flexible meaning ; it has no clear single meaning (*Hawkins* on *Wills*, 3rd ed. (1925), pp. 263 et seq. ; *Taylor* v. *Frobischer* (1),

(1) (1852) 5 De G. & S. 191, at pp. 197, 198 [64 E.R. 1076, at pp. 1079, 1080].

H. C. OF A. 1948. MARKS v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

per *Parker* V.C. ; *In re Edmondson's Estate* (1), per *Page Wood* V.C.). It has not the prima-facie meaning of vested in interest (*Young* v. *Robertson* (2), per Lord *Westbury* (3) ; per Lord *Cranworth* (4)). The last-mentioned case was cited with approval in *Bowman* v. *Bowman* (5) and *Bowers* v. *Bowers* (6), and was followed and applied in *In re MacLean* ; *Devery* v. *MacLean* (7). The provision in the present will which is in contest is the second of the group of three gifts over, the first of which deals with the event of the death of any child of any of the testator's four children before attaining the age of twenty-one leaving lawful issue. For convenience it is proposed to refer to the contested provision as the second gift over. Here " vested " means vested in possession. The second gift over is the only place in the will in which the word is used. When the testator's draftsman wished to provide for the case of death before obtaining a vested interest, in the sense of a transmissible right, he described the actual events in which the gift over would take effect or referred to the absence of persons " capable of taking." The gift here is not of residue but is of a special fund, failure of the dispositions of which will take it back to residue ; therefore, authorities on early vesting of residue are not applicable : e.g., *In the Will of Mudie* ; *Beattie* v. *Mudie* (8), in which the expression was " vested interest " ; so, also, in *Bull* v. *Jones* (9).

[WILLIAMS J. referred to *In re Brailsford* ; *Holmes* v. *Crompton & Evans' Union Bank* (10).]

Richardson v. *Power* (11) proceeded on the view that the intention of the gift over was to avoid an intestacy. [Counsel referred to *Jarman* on *Wills*, 7th ed. (1930), vol. 3, p. 2117 ; *Theobald* on *Wills*, 9th ed. (1939), p. 581 ; *Re Arnold's Estate* (12) ; *King* v. *Cullen* (13) ; *In re Morris* (14).] It is conceded that the gifts to the grandchildren of shares in the corpus of the fund vest in interest at twenty-one or prior marriage. It is also conceded that the second gift over may, if a grandchild has attained twenty-one or married, operate to divest an interest already vested in interest. The first gift over may do the same in certain cases, as will be demonstrated. There is nothing surprising in divesting, in favour of other descendants of the testator, a vested interest from a person who dies

(1) (1868) L.R. 5 Eq. 389, at p. 396.
(2) (1862) 4 Macq. 314.
(3) (1862) 4 Macq., at p. 323.
(4) (1862) 4 Macq., at p. 331.
(5) (1899) A.C. 518, at p. 525.
(6) (1870) L.R. 5 Ch. 244, at p. 248.
(7) (1938) N.Z.L.R. 181.
(8) (1916) V.L.R. 265.
(9) (1862) 31 L.J. Ch. 858.
(10) (1916) 2 Ch. 536.
(11) (1865) 19 C.B.N.S. 780, see pp. 799, 800 [144 E.R. 994, at pp. 1001, 1002].
(12) (1863) 33 Beav. 163 [55 E.R. 329].
(13) (1848) 2 De G & S. 252 [64 E.R. 113].
(14) (1857) 26 L.J. Ch. 688.

without issue. Many gifts over operate in exactly that case, to prevent the possible transmission of the interest to outsiders. Such gifts, it is submitted, are commonplace. The following conclusions follow from examining the gifts over :—(*a*) The first deals (*inter alia*) with death leaving issue before attaining a vested interest (i.e., under twenty-one). It also deals with death under twenty-one, but after attaining a vested interest ; e.g., in case of a female, death after marriage and under twenty-one. This is necessarily so, since the case of death leaving issue (with which this gift over deals) could not occur before marriage. If it applies to appointed shares (and it would seem that it must), it also deals with death under twenty-one, but after attaining a vested interest, in the case of either a male or female to whom a share has been appointed to vest at birth or a less age than twenty-one. Thus, it may in respect of different cases apply before or after vesting in interest (in the latter class operating as a divesting provision). (*b*) The second gift over, if read as referring to vesting in possession at the period of distribution, or to vesting in interest and possession on attaining twenty-one (or, if a female, marrying under that age), if that event occurs after the period of distribution, will likewise operate both before or after vesting in interest, according as the sole grandchild of a *stirps*, or the group of grandchildren of a *stirps*, dying without leaving issue, have or have not attained twenty-one (or, if female, married under that age), at the time of death (in the case of one) or the last death (of a group). *A fortiori*, it can operate as a divesting provision in the case of an appointed share (if it applies to such) and if the appointment prescribes earlier vesting in interest. (*c*) If in the second gift over vesting in interest was intended to be alone referred to, the draftsman should, and normally would, have used corresponding language (as elsewhere in the will) —e.g., " before attaining twenty-one (or marrying under that age) and without leaving lawful issue." (*d*) Neither in the first gift over nor the second is the draftsman setting out to protect or exclude an interest vested under an appointment at an earlier period than twenty-one or (in case of a female) prior marriage. If it is said that in the second gift over he was intending to protect appointed shares, then his intention was not consistent with the first gift over. It would then be necessary to redraw the first gift over to exclude it from affecting appointed shares ; but then, if an appointee died leaving issue, and before attaining a vested interest under the appointment, neither that child nor his issue would take anything. (*e*) There is no complete parallel (as sought to be drawn by *Fullagar* J.) between the first and second gifts over. As he himself points

H. C. OF A. 1948.

MARKS v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

out (though he has confused the four children of testator with their own children), the first deals with the death of *any* grandchild leaving issue; the second with the death without leaving issue of *all* the grandchildren of one *stirps*, not with the death of any one. (*f*) Thus, the plan (apart from appointed shares) is:—(i) If *any* grandchild dies under twenty-one (whether before, or in the case of a married female after, his or her share vests in interest), either before or after the period of distribution, but leaving issue, those issue take. (ii) If any grandchild dies over twenty-one (i.e., after his or her share has indefeasibly vested in interest), before the period of distribution, leaving issue, his or her estate takes at the period of distribution. (iii) If in any *stirps* all the grandchildren die before the period of distribution, without leaving issue, and whether attaining twenty-one (or, if female, marrying under that age) or not—i.e., whether their shares have vested in interest or not—the fund applicable to that *stirps* goes over to the other *stirps*. (iv) If in any *stirps* all the grandchildren die after the period of distribution, and before attaining twenty-one (or, if female, marrying under that age), and without leaving issue, the same result occurs. (v) If in any *stirps* all the grandchildren die without leaving issue, some before the period of distribution, whether attaining twenty-one (or, if female, marrying under that age) or not, and the rest after it, but without attaining twenty-one (or, if female, marrying under that age), the same result occurs. (vi) If in any *stirps*, one or more grandchildren survive the period of distribution, and (before or after the period of distribution) attain twenty-one (or, if female, marry under that age), all grandchildren of that *stirps* who qualify under the primary gift take; and even the subsequent death without leaving issue of those grandchildren, or the prior death without leaving issue of others of the same *stirps* (whose shares have vested in interest), will not take away the shares of any. (vii) If all the grandchildren in all the *stirpes* die, without leaving issue, and without having attained twenty-one (or, if female, married under that age), or, if none of the four children of the testator dies leaving a child (*qu.*, having had a child who can take), the whole fund goes back to residue. (*g*) There is nothing unreasonable or unusual in such a plan. If in the second gift over " vested " is read as " vested in interest " then A and B (being all the grandchildren of one *stirps*) dying under twenty-one and before or after the period of distribution, without leaving issue, would have their shares given over; but C and D (being the grandchildren of another *stirps*) dying over twenty-one, and before or after the period of distribution, without leaving issue, would take their shares; and they would even take, or share in,

the shares of A and B. Indeed, in the example given, if C died over twenty-one without leaving issue, and D under twenty-one without leaving issue, both before the period of distribution, both C and D would still take, or share in, the shares of A and B. Thus, D, dying under twenty-one and without leaving issue, would take or share in the shares of A and B, who died in similar circumstances. There is no reason to insist on such results from a mere canon of construction. The second gift over, in referring to "the children and the issue of any *deceased* child, of the other or others of the said four persons," is in the appellant's favour. "Deceased" refers to the period of distribution: cf. *Cripps* v. *Wolcott* (1). It is thus analogous to "survivor" in *Young* v. *Robertson* (2). Such a construction avoids the consequence of a shifting operation of the gift over in relation to different *stirpes* if the gift over operates on more than one. Even if, as *Fullagar* J. thought, the word refers to shifting dates in different *stirpes*, it is quite consistent with the appellant's contentions to read it in that case as referring to the time (in a particular *stirps*) when the only grandchild or all the grandchildren therein has or have died, without leaving issue, and before reaching both the age of twenty-one (or, if female, prior marriage) and the period of distribution. Thus, the draftsman was looking ahead to a case of a fund which would not come into existence till the period of distribution and was accordingly framing his gifts over with the idea in mind that the grandchildren of testator (children of the four persons) had to reach the period of distribution, as well as attain twenty-one (or, if female, marry under that age), for their shares to vest. It is a question how far he was actually thinking about appointed shares at all. [On the question of the costs of the appeal, if unsuccessful, he referred to *Dunne* v. *Byrne* (3); *In re Birbeck Permanent Benefit Building Society* (4); *Currie* v. *Glenn* (5); *Trustees Executors & Agency Co. Ltd.* v. *Ramsay* (6); *Sharp* v. *Union Trustee Co. of Australia Ltd.* (7).]

Adam, for the respondent trustees.

T. W. Smith K.C. and *Winneke*, for the respondent Vera Bentley.

Counsel for the respondents were not called on.

Cur. adv. vult.

(1) (1819) 4 Madd. 11 [56 E.R. 613].
(2) (1862) 4 Macq. 314.
(3) (1912) A.C. 407.
(4) (1912) 2 Ch. 183.
(5) (1936) 54 C.L.R. 445, at pp. 451, 461.
(6) (1920) 27 C.L.R. 279.
(7) (1944) 69 C.L.R. 539.

H. C. OF A. 1948.

MARKS v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Dec. 6.

The following written judgments were delivered :—

LATHAM C.J. I agree with the reasons for judgment of my brother *Williams*.

STARKE J. Since the order made by *Fullagar* J. on the originating summons in this case the survivor of "the said four persons" mentioned in the will—Elizabeth Leveson, a daughter of the testator—has died. And there is some confusion in the reasons for judgment between "the said four persons"—the children of the testator and the children of those persons—the grandchildren of the testator. But the reasons are just as effective if the appropriate substitutions are made.

In my opinion the learned judge rightly construed the terms of the will in question here. I agree with his reasoning and can add nothing useful to what he has said.

The appeal should be dismissed.

DIXON J. I have had the advantage of reading the reasons of *Williams* J. and I agree in them.

MCTIERNAN J. In this case I agree that *Fullagar* J. correctly interpreted the word "vested" in the clause, the subject of controversy, to mean "vested in interest." I have read the reasons of my brother *Williams* for interpreting the word "vested" in this way. I agree with them and think it is not necessary to add anything.

The appeal should be dismissed.

WILLIAMS J. The question that arises for decision on this appeal is whether the learned judge below was right in declaring that the one-fifth part or share in the Property Trust Fund referred to in the will of Lawrence Benjamin, deceased, and therein directed to be held upon trust for the children of Lawrence Abraham Benjamin vested absolutely and indefeasibly in Colin Bentley. Colin Bentley, who died on 14th December 1945 over the age of twenty-one years without having had issue, was the only child of L. A. Benjamin the son of the testator who died on 26th December 1932, having changed his surname from Benjamin to Bentley. Under the trusts of the will of the testator L. A. Bentley had a special power of appointment over the corpus of this one-fifth part amongst one or more of his children by deed or will which he purported to exercise by his will. But it was not an effective exercise,

so that we are solely concerned with the trusts in default of appointment. These trusts operate from the date of an event which has happened pending the appeal, namely the death of the last survivor of the four of the children of the testator (including L. A. Bentley) who were interested in the income of the fund.

The first trust is a trust of the corpus of the one-fifth part for the child or children of L. A. Bentley who being sons or a son shall attain the age of twenty-one years or being daughters or a daughter shall attain that age or marry and if more than one as tenants in common in equal shares. This is a contingent gift to a child or class of children which vests in interest in the child or children who being a son or sons attain twenty-one or being a daughter or daughters attain that age or marry. Under this trust Colin Bentley, as the sole child of L. A. Bentley, acquired a vested interest in default of appointment in the whole of the one-fifth part of the fund in question when he attained twenty-one.

There are three subsequent trusts of the corpus of the fund relating to all the settled parts which I shall call the second, third and fourth trusts. The second trust relates to the death of a child of a child of the testator under the age of twenty-one leaving lawful issue. It appears to be directed to providing for the children of a grandchild who married and died under twenty-one on the assumption that such a grandchild would not have acquired a vested interest under the first trust. This assumption would be correct in the case of a grandson, but would not be correct in the case of a granddaughter. It is therefore an independent gift to the children of a grandson, but would divest and be substituted for the interest of a granddaughter under the first trust who had married but died under twenty-one leaving children. But this circumstance does not throw any light upon the meaning of the third trust, which is the trust with which we are mainly concerned on this appeal.

The third trust takes effect if all the children of a child of the testator interested in a settled part of the fund shall die (1) before the part shall have become vested in him or her and (2) without leaving lawful issue. It was submitted for the appellant that the words "vested in him or her" mean vested in possession or in other words payable to him or her. It was therefore contended that the trust operated although a child or children of a child of the testator attained twenty-one if male or attained twenty-one or married if female, if that grandchild or all those grandchildren subsequently died prior to the death of the last survivor of the four children of the testator, that is prior to the period of the distribution of the corpus, without leaving lawful issue.

H. C. OF A. 1948.

MARKS v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Williams J.

If this submission is correct, the interest which vested in Colin Bentley on his attaining twenty-one would have been divested when he died without leaving lawful issue on 14th December 1945. Then the capricious result would ensue that interests which vested in the child or children of a child of the testator at twenty-one or on marriage under the first trust in a part of the fund would be divested if that grandchild or all those grandchildren died before the period of distribution without leaving issue, whereas the interests which vested in a great grandchild or great grandchildren under the second trust would not be divested although that great grandchild or all those great grandchildren died before such period. The further capricious result would ensue that where more than one grandchild attained a vested interest in a part of the fund, the share of each grandchild would be divested if all those grandchildren died before such period without leaving lawful issue, but if one of those grandchildren died after such period without leaving lawful issue or before such period but leaving lawful issue, then there would be no divesting of the interests of any of the grandchildren although the others died before the last survivor of the children of the testator without leaving lawful issue.

When the three trusts are read as a whole, it appears to me to be clear that the words "vested in him or her" are intended to refer to the failure of the first trust because a particular part of the fund had not vested in interest in one or more of the children of a child of the testator for the reason that no son of that child had attained twenty-one or daughter of that child had attained twenty-one or married. It appears to me to be equally clear that the words "and without leaving lawful issue" are intended to refer to the failure of the second trust in consequence of the death of all the children of a child of the testator under the age of twenty-one without any of these grandchildren leaving lawful issue, it being overlooked that granddaughters would attain a vested interest on marriage under twenty-one. The third trust would then only operate upon the complete failure of the two preceding trusts because no beneficiary had acquired a vested interest thereunder.

This is, I think, the true meaning of the third trust. The learned judge below and counsel for the appellant on this appeal construed the second and third trusts as gifts over, that is as divesting gifts which had previously vested in interest. But, in my opinion, except to the limited extent in the case of the second trust already mentioned, neither of these trusts operates to divest a previously vested interest. The third trust is not a gift over. It is an independent gift intended to operate and fill the complete

hiatus in a particular part which is left where no interest vests under the two preceding trusts and provide for the destination of the particular part in that event and prevent it lapsing and falling into residue.

Several authorities were cited on the question whether vested means prima facie vested in interest or vested in possession. In particular the case of *Young* v *Robertson* (1), was relied upon by the appellant. There a testator gave the residue of his estate subject to a life interest vested in his wife to his six grandnephews and grandnieces in equal shares and to their respective heirs and assigns declaring that " if any of said residuary legatees shall die without leaving lawful issue before his or her share vest in the party or parties so deceasing, the same shall belong to, and be divided equally, or share and share alike, among the survivors of my said grandnephews and grandnieces equally " (2). The House of Lords applied the rule of construction that words of survivorship in a will should prima facie be referred to the period appointed by the will for the payment or distribution of the subject matter of the gift and held that in the context of that will " vested " meant " vested in possession," so that only those grandnephews and grandnieces who survived the widow acquired indefeasibly vested interests in the residue. But there was no provision in that will, as there is in the present will, making the vesting of the affected interests contingent on the happening of any prescribed event, and the House of Lords was faced with the choice between holding that the testator intended that the gift over should operate only to divest the interests of those grandnephews and grandnieces who predeceased the testator, which was unlikely, or that he intended that the gift over should operate to divest the interests of those grandnephews and grandnieces who died before the period of distribution which was most probable.

The weight of authority would appear to favour the view that in English law vesting means prima facie vesting in interest. But it is unnecessary to examine the authorities because the answer must in every case depend primarily on the context of the particular will. In the present will the word first appears in the third trust which follows two trusts prescribing contingencies upon the happening of which interests are to vest. The context of the will itself therefore gives a meaning to the word and indicates that it is intended to mean vested in interest. If the word is given this meaning the three trusts fit into each other, and operate as a consistent whole.

(1) (1862) 4 Macq. 314. (2) (1862) 4 Macq., at p. 315.

H. C. OF A. 1948.

MARKS v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Williams J.

If the third trust comes into operation in respect of a particular part, the class which benefits is "the children and the issue of any deceased child of the other or others of the four children in equal shares, but so that such issue shall only take the share which his, her or their parent would have taken and if more than one in equal shares." It is not necessary to express a final opinion on the meaning of this provision. But counsel for the appellant submitted that it was a gift to the grandchildren alive at the period of distribution and the issue of those who were then dead and that it was therefore equivalent to a gift to survivors. The words "would have taken" probably mean "would have taken if then living", and this indicates that it is a gift to the children of the other three children of the testator who outlive the period of distribution either in person or by their *stirps*, but the fact that the composition of this class is contingent on its members stirpitally surviving the period of distribution does not appear to throw any light on the question whether the testator intended that the grandchildren who were intended primarily to share in the part should have to survive the double contingency of attaining twenty-one if male or attaining twenty-one or marrying if female and outliving the period of distribution or leaving lawful issue.

Counsel for the appellant even attempted to make the exercise of the power of appointment by a child of the testator over a part in favour of his children subject to the operation of the second and third trusts. But the power is clearly a power to appoint the whole part among one or more of his or her children—that is to say to create a new set of trusts in favour of these grandchildren which are completely to replace the trusts in default of appointment. The donee of the power could appoint the whole share to one child absolutely and indefeasibly at birth and none of the trusts in default of appointment could then have any operation. The will does not therefore, as it was contended, exhibit any general intention that the whole fund should be kept in the family in the sense that only those grandchildren and remoter issue who were alive at the period of distribution could acquire indefeasibly vested interests. But it does exhibit an intention that the children of each of the four children of the testator and their issue should in the first instance enjoy the part appropriated to them, their parent being given a power to appoint the whole of that part to one or more of such grandchildren exclusively, and that in default of appointment or so far as the appointment if made should not extend these grandchildren and their issue should take the whole of the part in accordance with the first and second trusts.

It is only if there are no children of a child of the testator, or if there is a child or children he or she or they all die if male under twenty-one without leaving lawful issue or if female under twenty-one and unmarried, that the particular share becomes divisible among the children and issue of the other children of the testator.

The fourth trust operates in the event of none of the four children "leaving children or upon the total failure of the said trusts," and provides that the fund is then to sink into and form part of the residuary personal estate. It is again unnecessary to express a final opinion on the meaning of this trust. On a literal construction residue benefits if either none of the four children of the testator leaves children that is has children who survive him or her or upon the total failure of the trusts of the fund. But there can only be a total failure of the trusts of the fund if none of the four children has a child who if male attains twenty-one or dies under twenty-one leaving lawful issue or if female attains twenty-one or marries. The words "upon the total failure of the said trusts" would therefore appear to be explanatory of the preceding expression and should perhaps be introduced by the words "or in other words", and to indicate that the reference to the event of none of the four children of the testator leaving children is a compendious way of describing a complete failure by each *stirps* to acquire a vested interest under the preceding trusts. But it could not be said that the first trust failed if a grandchild attained a vested interest thereunder.

For these reasons I am of opinion that his Honour's declaration was right and that the one-fifth part of the Property Trust Fund directed to be held upon trust for the children of Lawrence Abraham Benjamin vested absolutely and indefeasibly in Colin Bentley deceased. His Honour ordered that the costs of all parties as between solicitor and client should be paid out of the Property Trust Fund. It was contended that his Honour should have ordered the costs to be paid out of residue or alternatively out of the one-fifth part of the fund in dispute. The residue of the estate still remains in the hands of the trustees of the will, and it is usual, in the absence of a special statutory provision like that which appears in the *Trustee Act* 1925-1942 (N.S.W.), s. 93 (3), although the only question which arises for determination is the interpretation of the trusts affecting some part of the estate other than residue, to order that the costs be paid out of residue. His Honour's order was therefore unusual. But an order for costs is in the discretion of the primary judge. The questions at issue were questions in which no one but the beneficiaries under the trusts

H. C. OF A. 1948.

MARKS v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

of the fund were interested. All these beneficiaries were interested, so that there was ample justification for his Honour ordering the costs to come out of the fund as a whole, if it was proper that the fund and not residue should bear the costs. In the particular circumstances of the case, I think that the order relieving residue was justified and should not be upset.

For these reasons I would dismiss the appeal. The appellant should pay the cost of the respondents of the appeal.

Appeal dismissed. Appellant to pay respondents' costs of appeal.

Solicitors for the appellant: *Hedderwick, Fookes & Alston.*

Solicitors for the respondents: *Pavey, Wilson, Cohen & Carter*; *Aitken, Walker & Strachan.*

E. F. H.