H. C. OF A. 1927.

KOGARAH COUNCIL v. ROCKDALE COUNCIL.

local authorities for the purpose of enforcing or securing the provisions of such an Act.

But I think that the order should be affirmed, and the appeal dismissed.

POWERS J. concurred in the judgment of *Isaacs* J.

Appeal dismissed with costs.

Solicitors for the appellants, *Salwey & Primrose.*

Solicitors for the respondent, *Morgan & Morgan.*

B. L.

[HIGH COURT OF AUSTRALIA.]

McQUADE . . . . . APPELLANT;
DEFENDANT,

AND

MORGAN AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1927.

SYDNEY, *April* 11, 20; *May* 6.

Knox C.J., Isaacs, Higgins, and Rich JJ.

Deed of Appointment—Construction—Gift of income after appointor's death—Gift over on appointee charging his interest—Charge given and released before appointor's death—Determination of interest—Forfeiture.

The donee of a power of appointment appointed, by a deed-poll, that the trustees should after her death hold the property appointed upon trust for her four children for their maintenance during their minority and after their respectively attaining twenty-one to pay them the whole of the income in equal shares. It was then declared that "in case any of the said children . . . shall become bankrupt or do or suffer any act or thing whereby the

said income or his or her interest therein or any part thereof shall be charged or encumbered or become vested in or payable to any other person or persons the said trustees . . . shall during the remainder of the life of such child whose interest shall have so determined apply the share or shares of income to which such child would have been entitled as the same shall from time to time be received for or towards the maintenance of the said child or the maintenance of his or her issue," &c. After the deed of appointment was executed the appellant, one of the children, charged his interest as collateral security for the payment of money advanced to him on mortgage and, before the death of the appointor, the mortgagee released by deed the mortgagor and all his interest.

Held, by *Knox* C.J., *Higgins* and *Rich* JJ. (*Isaacs* J. dissenting), that upon the charge being given the interest appointed to the appellant became forfeited. The rule as stated in *Jarman on Wills*, 6th ed., p. 1499, that no forfeiture is incurred if the charge is got rid of before the interest falls into possession, is too widely stated; the rule is not applicable where no ambiguity can be found in the forfeiture clause.

Decision of the Supreme Court of New South Wales (*Harvey* C.J. in Eq.) affirmed.

APPEAL from the Supreme Court of New South Wales.

By a deed-poll dated 4th April 1901 Emily Carleton McQuade, pursuant to a power of appointment given to her by the will of her father, Charles Carleton Skarratt, over a one-eighth share of his residuary estate (called in the will his "residuary trust funds"), appointed that the trustees of that estate should from and after her death hold that share upon trust for her named children in equal shares, to be used subject to the limitations thereinafter contained at the discretion of the trustees during the minorities of the children for their maintenance, education and advancement in life respectively, and the whole of the income of their respective shares to be paid to the children after they respectively should attain the age of twenty-one years or marry under that age, and if more than one in equal shares. The deed then proceeded:—"It is hereby declared that in case any of the said children of the said Emily Carleton McQuade shall become bankrupt or do or suffer any act or thing whereby the said income or his or her interest therein or any part thereof shall be charged or encumbered or become vested in or payable to any other person or persons the said trustees or trustee shall during the remainder of the life of such child whose interest shall have so determined apply the share or shares of income to which such child would have been entitled

H. C. OF A. 1927.

McQUADE v. MORGAN.

as the same shall from time to time be received for or towards the maintenance of the said child or the maintenance of his or her issue or to invest the same in manner aforesaid or such portion thereof as may be available for the benefit of such child or for the benefit of such issue in equal shares or if there shall be no issue It is hereby declared that the said trustees or trustee shall apply the income to which such child would have been entitled in case his or her income had not determined between such of the said children as shall then be living and entitled to receive the same in equal proportions," &c. On 1st October 1912 Frederick Carleton McQuade, the son of Emily Carleton McQuade, executed a memorandum of agreement under seal whereby he charged all his right, title and interest under the will of Charles Carleton Skarratt with the repayment of all moneys for the time being owing by him to Daisy Skarratt. On 20th July 1916 Daisy Skarratt by deed discharged Frederick Carleton McQuade and all his share, estate, right, title and interest under the will of Charles Carleton Skarratt from payment of all principal moneys and interest owing under the agreement of 1st October 1912. On 21st June 1923 Emily Carleton McQuade died.

An originating summons in the Supreme Court of New South Wales was taken out by Mary Ellen Morgan and Minnie Thelma Long Innes, two of the daughters of Emily Carleton McQuade; the defendants being Frederick Carleton McQuade, Emily Carleton Holderness (another daughter of Emily Carleton McQuade) and Kelso King, Percy Vernon McCulloch and Charles Henry Skarratt Keigwin, the three trustees of the will of Charles Carleton Skarratt. The only material question asked by the summons was: "Whether upon the true construction of the said deed-poll . . . the defendant Frederick Carleton McQuade by the execution of the memorandum of agreement dated 1st October 1912 and made between him and one Daisy Skarratt has forfeited the whole or any part and, if so, what part of his interest in (a) the said original one-eighth share" &c. The originating summons was heard by *Harvey* C.J. in Eq., who, on 23rd August 1924, made a decretal order declaring that Frederick Carleton McQuade had forfeited the whole of his interest in the original one-eighth share of Emily Carleton McQuade in the residuary trust funds.

From that decision Frederick Carleton McQuade now appealed to the High Court.

Other material facts are stated in the judgments hereunder.

Flannery K.C. (with him *S. A. Thompson*), for the appellant. A forfeiture was not incurred upon the execution by the appellant of the document of 1st October 1912. The rule stated in *Jarman on Wills*, 6th ed., p. 1499, applies, namely, that no forfeiture is incurred if the charge is got rid of before the interest falls into possession. If the Court finds general words which are applicable to events which happen before the period of distribution and to events which happen after that period and also finds a general intention to protect the appointee, the Court will follow the cases which limit the operation of the words to the event which happens after the period of distribution. There is an ambiguity as to when the forfeiture is to be made effective so as to divert the interest from the appointee. The Courts have treated a charge such as that in this case in the light of events that have happened, unless there have been words in the instrument which prevent them from doing so. [Counsel referred to *White* v. *Chitty* (1); *Lloyd* v. *Lloyd* (2); *Samuel* v. *Samuel* (3); *Robertson* v. *Richardson* (4); *In re Loftus-Otway*; *Otway* v. *Otway* (5); *In re Forder*; *Forder* v. *Forder* (6); *In re Baker*; *Baker* v. *Baker* (7); *In re Mair*; *Williamson* v. *French* (8).]

David Wilson, for the respondents Mary Ellen Morgan and Minnie Thelma Long Innes, and *Wickham*, for the respondent Emily Carleton Holderness, supported the view put for the appellant.

Nicholas, for Dorothy May McQuade, an infant, who, by an order of the Supreme Court, was added as a party during the hearing of the appeal. The declaration made by *Harvey* C.J. in Eq. is the proper one. The question turns on the construction of the deed of appointment. No rule of construction has been laid down which deals with words such as those in this deed. The rule that where words of futurity are used the Courts, in endeavouring to carry out what they see is

(1) (1866) L.R. 1 Eq. 372.
(2) (1866) L.R. 2 Eq. 722.
(3) (1879) 12 Ch. D. 152, at p. 158.
(4) (1885) 30 Ch. D. 623.
(5) (1895) 2 Ch. 235.
(6) (1927) W.N. 12.
(7) (1904) 1 Ch. 157.
(8) (1909) 2 Ch. 280.

H. C. OF A. 1927. McQUADE v. MORGAN.

the intention of the appointor or testator, will give those words a past significance, does not apply here. The question of futurity does not arise. The Court should not speculate as to the motives of the appointor (*Auger* v. *Beaudry* (1); *Gutheil* v. *Ballarat Trustees, Executors and Agency Co.* (2)). This Court is not bound by the decisions by which the Court of Appeal in England has held itself to be bound. The appointor has enumerated a series of events upon the happening of which a defeasance is to take place and those events are alternative. The words of the deed are wider than in any of the cases which are relied on by the appellant, and are not capable of two interpretations. [Counsel referred to *In re Baker*; *Baker* v. *Baker* (3); *In re Evans*; *Public Trustee* v. *Evans* (4); *In re Mair*; *Williamson* v. *French* (5); *In re Loftus-Otway*; *Otway* v. *Otway* (6); *Trappes* v. *Meredith* (7); *Robertson* v. *Richardson* (8).]

[ISAACS J. referred to *In re Sibbald*; *Hyman* v. *Sibbald* (9).]

Henry and *McDonald*, for the respondent trustees, adopted the arguments of *Nicholas*.

Flannery K.C., in reply.

[HIGGINS J. referred to *Rochford* v. *Hackman* (10); *Joel* v. *Mills* (11).]

Cur. adv. vult.

May 6.

The following written judgments were delivered:—

KNOX C.J. AND RICH J. By deed-poll dated 4th April 1901 Emily Carleton McQuade exercised a power of appointment given to her by the will of her father, Charles Carleton Skarratt, in favour of her four children, of whom the appellant is one. The appointment was subject to a condition expressed in the following words: "It is hereby declared that in case any of the said children of the said Emily Carleton McQuade shall become bankrupt or do or suffer any act or thing whereby the said income or his or her interest

(1) (1920) A.C. 1010, at p. 1013.
(2) (1922) 30 C.L.R. 293, at p. 306.
(3) (1904) 1 Ch. 157.
(4) (1920) 2 Ch. 304, at p. 321.
(5) (1909) 2 Ch. 280.
(6) (1895) 2 Ch. 235.
(7) (1871) L.R. 7 Ch. 248, at p. 251.
(8) (1885) 30 Ch. D., at p. 627.
(9) (1904) 23 N.Z.L.R. 805.
(10) (1852) 9 Ha. 475.
(11) (1857) 3 K. & J. 458.

therein or any part thereof shall be charged or encumbered or become vested in or payable to any other person or persons the said trustees or trustee shall during the remainder of the life of such child whose interest shall have so determined apply the share or shares of income to which such child would have been entitled as the same shall from time to time be received for or towards the maintenance of the said child or the maintenance of his or her issue or to invest the same in manner aforesaid or such portion thereof as may be available for the benefit of such child or for the benefit of such issue in equal shares."

On 1st October 1912 the appellant by deed charged the interest so appointed with the repayment of a sum owing by him on mortgage, and notice of the charge was in the year 1912 given to the trustees of the will of the said Charles Carleton Skarratt. On 20th July 1916 the charge was released by deed. Emily Carleton McQuade died on 21st June 1923. The question for decision is whether the appellant has incurred a forfeiture of the interest appointed to him by the deed of April 1901. The solution of this question depends on the true construction of the provision set out above. Mr. *Flannery* admits that, but for the provision for forfeiture, the effect of the deed executed by the appellant on 1st October 1912 would have been to create a charge upon the interest of the appellant in the income which was the subject of the deed of appointment. It would seem to follow that the appellant has done an act whereby his interest in that income has been charged, and has therefore brought himself within the forfeiture clause. But it is said that although the appellant did charge his interest he did not do so within the meaning of the clause in question, because the charge which he gave was released before any income became payable to him under the appointment. This contention is founded on a number of decisions—*White* v. *Chitty* (1); *Lloyd* v. *Lloyd* (2); *Samuel* v. *Samuel* (3); *In re Loftus-Otway*; *Otway* v. *Otway* (4); *In re Mair*; *Williamson* v. *French* (5), and *In re Forder* (6)—the result of which is said to be that it is a canon of construction of forfeiture clauses such as that

(1) (1866) L.R. 1 Eq. 372.
(2) (1866) L.R. 2 Eq. 722.
(3) (1879) 12 Ch. D. 152.
(4) (1895) 2 Ch. 235.
(5) (1909) 2 Ch. 280.
(6) (1927) W.N. 12.

H. C. OF A. 1927.

McQUADE v. MORGAN.

Knox C.J. Rich J.

now under consideration that references to charges or encumbrances should be read as applying only to charges or encumbrances operative at the time when income becomes immediately payable to the beneficiary. The decisions in all the cases above referred to—except possibly *In re Forder* (1), the only available report of which is a short statement in the *Weekly Notes*—seem to us to fall short of laying down any such canon of construction. In all the other cases the question seems to have been treated as one of the construction of the particular instrument under consideration. Construing the forfeiture clause in the present case according to the ordinary meaning of the words used, it covers every charge created after 4th April 1901 by any of the beneficiaries over his or her interest in the income. The words are not ambiguous nor are they, in our opinion, reasonably open to more than one meaning. We agree with the learned Chief Judge in Equity in thinking that the rule as stated in *Jarman on Wills*, 6th ed., p. 1499, that no forfeiture is incurred if the charge is got rid of before the interest falls into possession, is too widely stated, and that there is no room for the application of that rule where, as in the present case, no ambiguity can be found in the words of the forfeiture clause. In *Auger* v. *Beaudry* (2) Lord *Buckmaster* said:—"The gift over, therefore, only too often does not carry out what, if speculation were permitted, it would be reasonably certain that the testator wished, and it is these considerations that have sometimes led the Courts to attempt so to read the words as to make the will conform to what it is confidently believed must have been the testator's intention. If the words are so ambiguous as to leave room for such construction, or if there are other words to help the meaning, it is one which no doubt the Courts would readily adopt. But, whatever wavering from the strict rule of construction may have taken place in the past, it is now recognized that the only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will. Human motives are too uncertain to render it wise or safe to leave the firm guide of the words used for the uncertain direction of what it must be assumed that a reasonable man would mean." Applying these observations

(1) (1927) W.N. 12.

(2) (1920) A.C., at pp. 1013, 1014.

to the case now under discussion, we can find no reason for adopting such a construction of the forfeiture clause as would create a forfeiture only in case income actually payable to the beneficiary became liable to be intercepted, because we agree with the learned Chief Judge in Equity in thinking that the language in the present clause is not open to such a limited construction.

For these reasons we are of opinion that the appeal should be dismissed.

ISAACS J. The learned Judge from whom this appeal comes, after referring to the accepted rule of construction in connection with clauses forfeiting reversionary property, thought the language of the clause in this case was not open to the limited construction reached by that rule. He said: "It is not well drawn, but it clearly indicates that if the interest of any child is charged or encumbered, his interest is to determine." With respect, I cannot agree. The rule of construction referred to is, as stated, that, even although an interest is actually charged or encumbered—that is, by an act purporting to charge it—yet if the charge is got rid of before the interest falls into possession, no forfeiture takes place. That is to say, although according to the literal signification of the words, forfeiture would by the mere act of charging take place, yet according to the rule it has that effect only prima facie (per *Wood* V.C. in *Lloyd* v. *Lloyd* (1)). If, *notwithstanding the event literally occurs* and notwithstanding its prima facie effect, it is got rid of before, at the earliest, the interest falls into possession, that is, as the Vice-Chancellor said in the same case, "in time to intercept the property before it passed into other hands than those of the legatee," the rule says that the prima facie effect is destroyed, and the forfeiture avoided. It is, therefore, quite insufficient to say that merely because the reversionary interest is charged or encumbered the matter is concluded.

I think it only fair to the learned Judge from whom this appeal comes to say that he has in another case stated the rule as I understand it. In *Permanent Trustee Co.* v. *Cormack* (2) his Honor said: "Forfeiture clauses are always construed with reference to

(1) (1866) L.R. 2 Eq., at p. 724. (2) (1920) 21 S.R. (N.S.W.) 1, at p. 6.

H. C. OF A. 1927.

McQUADE v. MORGAN.

Isaacs J.

the known object of the clauses, the object being to preserve the life or other interests." It is impossible to state the matter more clearly than it appears in the judgment of *Fry* J. in *Hurst* v. *Hurst* (1), namely: "The true *principle* established by the cases to which I have referred, so far as they are applicable to the present case, appears to me to be this, that if a charge or a bankruptcy, or any other impediment to the personal reception of the income *has been created, but has been validly extinguished before the period of distribution* or the period at which the right to receive any portion of the money has accrued, *there is no forfeiture.*" The learned Judge applied that principle, and found a forfeiture as appears at p. 288 of the report, because the instrument was, even by the concession in argument "in force . . . a fortnight or three weeks during which Mrs. Hurst had an actual right to the reception of the rents and profits." That, of course, is the imperative distinction between that case and this. It is, therefore, quite insufficient to say, merely because a reversionary interest is charged or encumbered—assuming it to be so—that the matter is concluded by the express words of the clause. *Metcalfe* v. *Metcalfe* (2) is, in its general groundwork, a direct authority to the contrary. The words of the corresponding clause were, to say the least, as precise and minute as in this case. The "interests" forbidden to be "charged" were, in my opinion, wider than in this case. Yet the Court (*Lindley*, *Bowen* and *Fry* L.JJ.), though holding with reluctance that the "event" as literally described took place, did not hold that as decisive. *Lindley* L.J. said (3): "That being so, the next question is whether there was such a state of circumstances that the gift over took effect." That is the precise question that, in my opinion, arises here. How it should be answered depends, of course, on the circumstances of each case. In *Metcalfe's Case* it was answered in the affirmative. The test put by *Fry* L.J. in that case is thus stated (4): "The *time*, therefore, at which we must regard the rights of the parties is the time at which it first becomes the duty of the trustees of the will to make a payment." That the Lord Justice calls "the critical time." So that the *nature* of the event does not complete the

(1) (1882) 21 Ch. D. 278, at p. 288.
(2) (1891) 3 Ch. 1.
(3) (1891) 3 Ch., at p. 5.
(4) (1891) 3 Ch., at p. 7.

inquiry: it needs to be seen at what *time* it operated so as to defeat the testator's manifest and dominant intention. Applying that test here, the question is admittedly in the negative. What is necessary in order to overcome the rule is some language of the instrument indicating that, even if the charge is got rid of before the interest falls into possession, the forfeiture shall take effect. *That is what is meant by absence of ambiguity in the sense relevant to this case.* In *Durran* v. *Durran* (1) *Vaughan Williams* and *Romer* L.JJ. make perfectly clear what is the relevant sense of "ambiguity." *Neville* J., in *In re Mair*; *Williamson* v. *French* (2), in a few lines enunciates both the rule of construction and what is needed to override it. As to the first, he says:—"The Court must look at the object of these forfeiture clauses. It cannot help knowing that the object is to preserve the life interest and nothing else." As to the second, he says:—"It may be that in some cases words are used which compel the Court to hold that a forfeiture has been incurred *though the life interest has been preserved.* There are no such words here." No such indication was or could be suggested in this case. Every word in the clause is consistent with the full application of the rule. To refuse to apply the rule in this case is virtually to abolish it. The effect of so doing must be carried into many instruments of this nature because they are framed in reliance on the rule. Even so recent a work as *Key and Elphinstone* (1923), 11th ed., vol. 2, p. 898, recognizes it. After about sixty years of recognition, many titles must rest upon the rule.

No one, of course, would deny the force of the general proposition that instruments must be interpreted by their own words. But rules of law and construction must have their force also. The general proposition does not annihilate the rule in *Shelley's Case* (3), nor in my opinion does it exclude the rule of construction referred to in the absence of clear words to the contrary. Here there is not a single syllable to exclude it, and so this case, if determined in favour of the respondent, cannot but be a precedent of a very disturbing kind. A very close analogy is found in the judgment of the Privy Council in *Towns* v. *Wentworth* (4). There it is said: "In order to

(1) (1904) 91 L.T. 819, at pp. 820, 821.
(2) (1909) 2 Ch., at p. 282.
(3) (1581) 1 Rep. 93b.
(4) (1858) 11 Moo. P.C.C. 526, at p. 543.

H. C. OF A. 1927. McQUADE v. MORGAN. Isaacs J.

determine the meaning of a will, the Court must read the language of the testator in the sense which it appears he himself attached to the expressions which he has used, with this qualification, that when a rule of law has affixed a certain determinate meaning to technical expressions, that meaning must be given to them, unless the testator has by his will excluded, beyond all doubt, such construction."

It is true we are not now concerned with a rule of law or a technical expression. But we are concerned with a recognized rule of construction, and with what has for broadly sixty years come to be regarded as a technical clause. Sometimes what I have called a rule of construction is referred to as a "doctrine" or a "principle"; as, for instance, in *Ancona* v. *Waddell* (1), in *Hurst* v. *Hurst* (2), in *Metcalfe's Case* (3), and in the various cases collected in *Loftus-Otway's Case* (4). Lord *Hatherley* himself, in *Lloyd's Case* (5), calls it "the true principle of construction." In *Metcalfe's Case* (6) *Bowen* L.J. calls it "this construction of forfeiture clauses." But whatever other term may be used, it is true, as Lord *Blanesburgh* (then *Younger* L.J.), speaking of the doctrine of *Trappes* v. *Meredith* (7), said in *In re Evans*; *Public Trustee* v. *Evans* (8): "It is now a definite rule of construction." His Lordship, referring to the forfeiture clause then before the Court, said: "This clause is one of a class in which the Courts by a series of decisions accepted as sound by the House of Lords, and *in order to give effect to what is conceived to be a testator's manifest intention*, have felt themselves at liberty to reject, at least in one very important respect, the literal construction of his words," &c. "The manifest intention of the testator" is also a phrase used by the Privy Council in *Gibbons* v. *Gibbons* (9). In *Re Spearman*; *Spearman* v. *Lowndes* (10), *Kekewich* J., after referring to *White* v. *Chitty* (11), bears testimony to the practice of the Court in construing clauses of forfeiture. He says:—"From the terms of clauses of that description the Court has again and again in

(1) (1878) 10 Ch. D. 157, at p. 161, per *Hall* V.C.
(2) (1882) 21 Ch. D., at p. 288, per *Fry* J.
(3) (1891) 3 Ch., at pp. 5, 6, per *Lindley* L.J. and *Bowen* L.J.
(4) (1895) 2 Ch., at pp. 242-243.
(5) (1866) L.R. 2 Eq., at p. 723.
(6) (1891) 3 Ch., at p. 6.
(7) (1871) L.R. 7 Ch. 248.
(8) (1920) 2 Ch., at p. 322.
(9) (1881) 6 App. Cas. 471, at p. 480.
(10) (1900) 82 L.T. 302, at p. 303.
(11) (1866) L.R. 1 Eq. 372.

many cases construed the meaning of the parties in this way: Not that there should be simply some event happen which would entitle a trustee in bankruptcy or other assignee in law to receive the property, but that really it should be diverted from its original channel—diverted from the beneficiaries under the will or settlement—and come to the hands of some person, a stranger, who is to use it, not in their favour, but adversely to them by applying it to entirely different purposes. That, I repeat, is the construction which has been put on those clauses again and again." If the learned Judge meant, as I understood he did mean, by "coming to the hands of some person, a stranger," to include the coming within reach of his hands if he chose to take, then I think that exposition is in perfect accordance with, and strongly confirmatory of, the view I have taken of the reported cases referred to. So that it is clear to demonstration that the "series of cases" referred to are regarded, not as simple instances of ordinary literal construction, but as instances of the application of a rule of construction—or, what is the same thing, a recognized judicial doctrine or principle—to a well recognized class of clauses. Testators and settlors and their legal advisers are naturally guided by what the Courts have laid down on the subject. Where it is so easy to follow the course pointed out by judicial utterances, namely, to negative the application of the rule, it is, in my opinion, the proper course, by analogy to *Towns* v. *Wentworth* (1), to follow what is there said, namely, to require unambiguous negation before abandoning the general rule. More particularly is that so when the rule ascertains prima facie what in the case cited, and in a passage immediately following the one quoted, is called, "the main purpose and intention" of the testator or settlor, which governs particular expressions insufficiently unambiguous to control it. No such expression is found here.

I am tempted to stop at that point, because what I have said appears to me decisive. But respect for the contrary opinion and anxiety to maintain so far as I can the force of a rule devised and accepted to carry out to the full a testator's manifest intention prompt me to deal further with the position. It is law, both ancient and modern, that a forfeiture clause is to be read strictly in favour

(1) (1858) 11 Moo. P.C.C. 526.

H. C. OF A. 1927.

McQUADE v. MORGAN.

Isaacs J.

of preserving rights (*Fraunces's Case* (1); *In re Clark*; *Clark* v. *Clark* (2)). *Wood* V.C., in *Lloyd's Case* (3), said that the Court endeavours "to prevent *the property* passing into hands other than those which the testator intended should receive it," and "if the circumstances of the case admit, the Court will endeavour to interpret the language in favour of the legatee, for whom the testator has intended to make as extended a provision as he can."

I shall presently state why I think the clause, interpreted as if there were no special indications of the settlor's intention, should be read in favour of the appellant. But it may be well to mention what I consider a very important indication outside the clause itself. The deed in which it occurs recites how and why it came to be inserted, and its purpose. There is first a recital of a provision in the will of Charles Carleton Skarratt as to a daughter's share, and giving a daughter a power of appointment "*with the like provisions* and upon the like ultimate trust in favour of the children of such daughter failing appointment *as in the said will declared respecting the shares of the testator's sons*," &c. Then follows a recital of the "provisions" referentially included in the power as to limitations of the sons' shares. They are lengthy, and I shall content myself with stating that they provide that the sons' shares do not vest absolutely, but determine upon events which, if the shares were absolute, would cause income as to which a beneficiary had *an interest in possession* to be diverted to, or charged or encumbered in favour of, some other person. It is obvious that except on the construction contended for by the appellant, the provisions would not be "like," but very different. That is apparent on a very little consideration. The rule of construction is not founded on an arbitrary notion. It rests on a fundamental consideration representing the very substance of protective trusts such as that before us. It is repeatedly expressed by Judges of great eminence. The principle is that in framing such limitations a testator or settlor is concerned only with this, "that the property intended for the objects of his bounty shall not pass to a stranger" (*Wood* V.C. in *White* v. *Chitty* (4)). "The testator's object being that the legacy shall be a personal benefit to the legatee,

(1) (1609) 8 Rep. 89b, 90b.
(2) (1926) Ch. 833.
(3) (1866) L.R. 2 Eq., at p. 724.
(4) (1866) L.R. 1 Eq., at p. 376.

and not payable to any other person, why should you not give effect to that object, even supposing the expressions may be capable of some other interpretation? I think the principle laid down by Lord *Hatherley* is a sound one, and that it is *a guiding rule, in deciding these cases*, not to construe ambiguous expressions otherwise than for the purpose of securing that which it is obvious, from the expressions themselves, it was the intention of the testator to secure, namely, that the bequest should enure to the personal enjoyment and benefit of the legatee" (per *Jessel* M.R. in *Samuel* v. *Samuel* (1). See also *Metcalfe* v. *Metcalfe* (2) and *In re Mair* (3).

Nothing could be more precise or comprehensive than "bankruptcy." It covers every possible interest. In a sense it causes immediate vesting of every interest the bankrupt has. But then comes the rule of construction which considers *time* and says it must for forfeiture purposes be a bankruptcy which endures until "the critical time" and affects the beneficiary's interest as one in possession, at the earliest. Consequently one cannot, in this case, ride off on the word "interest" (whatever that means), or the word "charged" or the word "encumbered" (whatever they mean). And the reason you cannot ride off is that there is nothing which says unambiguously that, even if they are got rid of before the interest falls into possession, so that not even for a moment has there been any interception of the right of the beneficiary to personally benefit by the gift, he is still to lose it altogether.

What a complete negation of the settlor's intention the opposite view contends for! Because it is said her intention was that as far as she could secure it, her son was to have the personal right to his share of income, and that it should not be enjoyed by anyone else, therefore, even when there is no possible danger of that intention failing, he is still to be deprived of it! To prevent so senseless a result—unless the clause is to be regarded as one of penalization rather than protection—Lord *Hatherley* not only formulated the fundamental principle, but in *White* v. *Chitty* (4) he applied it, as I would express it, both up and down. First, to secure the testator's object that no one else should enjoy his bounty, the Court gave a

(1) (1879) 12 Ch. D., at p. 159.
(2) (1891) 3 Ch., at pp. 6-7, per *Bowen* and *Fry* L.JJ.
(3) (1909) 2 Ch., at p. 282, per *Neville* J.
(4) (1866) L.R. 1 Eq. 372.

H. C. OF A. 1927.

McQUADE v. MORGAN.

Isaacs J.

liberal interpretation to the words "shall be declared bankrupt," making them include a past bankruptcy which was not wholly past, but extended into the necessary period of futurity. Next, in order to secure the testator's object that his named beneficiary should not lose the bounty intended for him personally, the bankruptcy, not having had the effect of even possibly intercepting the income, did not make a forfeiture. The first point of application has not always commanded the complete approbation of Judges. But still it is firmly entrenched as accepted, not merely by the Court of Appeal in England (apart from prior references, see per Lord *Blanesburgh*, then *Younger* L.J., in *In re Evans* (1)), but also by the Privy Council (*Gibbons* v. *Gibbons* (2)). We were invited to say that it is wrong. I must confess that, however greatly I might admire the courage that would be needed to do so, I should be unable to emulate it.

But once concede that the doctrine of *Trappes* v. *Meredith* (3) is to stand, what does that connote? It cannot stand without its foundation. And so it carries with it a clear consequence, namely, to "give effect," as Lord *Blanesburgh* says, "to what is conceived to be a testator's manifest intention," that is, I apprehend, unless the words of the instrument unambiguously forbid it. For it must not be overlooked that, as I have said, a bankruptcy is the most instant and sweeping of all charges, encumbrances, and alienations, and, if voluntary, is the most decisive act that can be done of the nature guarded against. How are *White* v. *Chitty* (4) and the series of cases to be discarded when a minor "charge" is effected? Lord *Hatherley's* words in *Trappes* v. *Meredith* (5) are in point.

What, then, is there here to forbid the application of the fundamental principle stated? I have already shown that the rule of construction referred to is reinforced, if that were necessary, by the previous recitals. These show that the "conceived intention" is the declared intention. But let us take all the possible words for the opposite view. An "act or thing" whereby the "income of any part thereof" shall be charged or encumbered, or become vested in or payable to any other person is not unambiguously made to include an act or thing operating beyond the rule of construction.

(1) (1920) 2 Ch., at pp. 322-323.
(2) (1881) 6 App. Cas., at p. 480.
(3) (1871) L.R. 7 Ch. 248.
(4) (1866) L.R. 1 Eq. 372.
(5) (1871) L.R. 7 Ch., at p. 252, last 8 lines.

If you discard the rule and take the literal terms, you can easily say, no limit of time being fixed, the "act or thing" is referable to any future act or thing. But the point is, you are not at liberty to discard the rule as to time unless the words are intractably inconsistent with it. For instance, if you discard the rule, a charge already given and operating at first as a simple personal contract in respect of a mere expectancy, and remaining uncancelled until the expectancy is realized and becomes a reversionary interest or an interest in possession, would have the very effect sought to be avoided by the testator, an effect which Lord *Hatherley* avoided. But that only shows one danger of the respondent's argument. Further, if you discard the rule, you might read the word "charged" and the word "encumbered" as extending to the personal equity of the parties. But, as I understood Mr. *Flannery* to urge, with the rule, you do not so read them. You read them in their strict sense as affecting the property itself; for it is *his own property* that the testator wishes to protect from the hands of strangers, and not what is still only an interest expectant awaiting the determination of the precedent estate. In *Samuel* v. *Samuel* (1) *Jessel* M.R., speaking of a clause which for this purpose is the same, says: "Now there can be no doubt whatever that a charge created in the lifetime of the tenant for life, paid off in the lifetime of the tenant for life, does not come within those words." Of course, a reversionary interest may be charged or encumbered in the sense that if and when the interest falls into possession the bargain can be enforced against the property. But that present possible effect is not the danger the settlor aims to avert. He aims to avert the actual danger of *his own property*, or what represents his own property, being diverted. And it is only by an extension of meaning that "charge" includes anything more than an act binding that property. In *In re Potts*; *Ex parte Taylor* (2), Lord *Esher* M.R. says:—"A charge is a well known thing. If one man owes a debt to another, a creditor of the latter can, by bringing in the debtor, charge the debt in his hands so as to prevent him from paying it to his own creditor, and oblige him to pay it to the creditor who obtains the charge. Why is that a charge? Because it charges the debt in the hands of the man

(1) (1879) 12 Ch. D., at p. 156.

(2) (1893) 1 Q.B. 648, at p. 658.

H. C. OF A. 1927.

McQUADE v. MORGAN.

Isaacs J.

who has to pay it." Lord *Wrenbury* (when *Buckley* J.) said in *In re Baker*; *Baker* v. *Baker* (1): "What I have to ascertain is whether there was a moment of time at which he" (the beneficiary) "gave some one a right to receive part of his share." The learned Judge meant, as his judgment shows, that the mortgagees had a right to the money itself. A charge may require for its effective protection some further step in order, as *Buckley* J. said in *In re Dallas* (2), to "give him a right in rem against the fund as distinguished from a right against the conscience of the assignor of the fund." But where the assignor has not, and may never have, the fund; where it is only an expectant fund; where the only interest the assignor has is a right to have a trust performed, so that his expectant interest, if it falls into possession, may have its proper value: it is idle to talk of a right *in rem*, or of a charge on any property whatever.

In *Illingworth* v. *Houldsworth* (3) Lord *Macnaghten* said: "A specific charge, I think, is one that without more fastens on *ascertained and definite property or property capable of being ascertained and defined.*" A charge, then, is strictly a charge that *binds the property* said to be charged. It is true that a personal obligation to charge is sometimes spoken of as a charge. But that is true only to the extent that it can be enforced against the property. And, while a life interest is reversionary only, there cannot be such a charge on property, the interest may never fall into possession, the property is still that of another, and may never belong to the person agreeing to charge it when it becomes, if ever, his property. Such a bargain is outside the testator's object, as already stated. Equally impossible is to encumber it, or vest it, or pay it. The expressions "charged," "encumbered," "vested in" and "payable to" are all gradations in alienation—but all referable to the *testator's property* when within the ownership, in fact or law, of the beneficiary.

I have so far not added anything as to the phrase "interest therein." Taken by itself, it would include the beneficiary's reversionary interest in the "said income," which means the total income of the settled share. Read with the context, I do not think

(1) (1904) 1 Ch., at p. 160. (2) (1904) 2 Ch. 385, at p. 396.
(3) (1904) A.C. 355, at p. 358.

it does. In my opinion, coming as it does between " income " and part thereof, it means " share of the said income," that is, the interest in possession in the income ; and " part thereof " means part of the income or part of the beneficiary's share of that income. But assuming that " interest therein " includes the reversionary interest, and that is the highest it can be put, then, besides the rule as to time, it is always present in bankruptcy, and it is here controlled in its effect by the graduated scale of alienation " charged," " encumbered," " vested in " or " payable to " and by the terms of the subsequent directions. Her subsequent directions are that on the determination " the trustees . . . shall *during the remainder of the life of such child* whose interest shall have so determined apply the share or shares of income to which such child *would have been entitled* as the same shall from time to time be received for or towards the maintenance of the said child," &c. That shows (1) that the consequence is to commence immediately ; (2) that the consequence is to be the immediate application of income to the maintenance of the child ; (3) that the income so applicable is at once receivable, and so from time to time thenceforth. When we add to those considerations the powerful effect of the recited power under which the appointment is made, and remember the utter absence of a single word affecting the *time* effect of the rule of construction, it appears to me a very clear case against forfeiture.

I would add that the judicial reasoning in two other cases are in accord with the views I have expressed—namely, a decision of *Clauson* J. in *In re Forder* (1) and a decision of the late Sir *Joshua Williams* in *In re Sibbald* ; *Hyman* v. *Sibbald* (2).

The appeal should, in my opinion, be allowed.

HIGGINS J. The learned primary Judge has, on this originating summons, given two decisions—one on 2nd April, the other on 23rd May 1924. The only appeal is from the second decision—the answer to question 4 of the summons, with the consequences of that answer ; and the only argument addressed to us is on the question whether the appellant Frederick Carleton McQuade, son of Mrs. McQuade, and grandson of the testator Charles Carleton Skarratt,

(1) (1927) W.N. 12.

(2) (1904) 23 N.Z.L.R. 805.

H. C. OF A. 1927.

McQUADE v. MORGAN.

Higgins J.

has "forfeited" the whole of his interest in his mother's one-eighth share appointed to him by her deed-poll of 4th April 1901.

The word "forfeited" is not used in the deed-poll; but I take the meaning of the order to be that Mr. Frederick Carleton McQuade's life interest has determined.

Now, if I confine my attention to the deed-poll only, and the effect of its words as a matter of construction, I have come to the conclusion that the decision is right. This is purely a question of construction, of the meaning of the words: and it appears to me to be best to consider first what is the natural meaning, to an unsophisticated mind, of the words used before considering the cases which have been cited for or against the appellant.

Mrs. McQuade, the donee of the power, appoints that the trustees shall, after her death, hold her one-eighth share under her father's will upon trust for her four children named—three daughters and one son—for their maintenance, &c., during minority, and after they respectively attain twenty-one, &c., to pay them (or the survivors) the whole of the income in equal shares. But Mrs. McQuade qualifies this gift as follows: "It is hereby declared that in case any of the said children . . . shall become bankrupt or do or suffer any act or thing whereby the said income or his or her interest therein or any part thereof shall be *charged* or *encumbered* or *become vested in or payable to any other person* or persons the said trustees . . . shall *during the remainder of the life of such child* whose interest *shall have so determined* apply the share or shares of income to which such child would have been entitled as the same shall from time to time be received for or towards the maintenance of the said child or the maintenance of his or her issue," &c.

I need not, for the present purpose, consider the destination of the son's income during the remainder of his life; or the destination of the capital on his death. It has to be remembered, however, when they come to be considered, that so far as the trusts declared by the deed-poll are found to be invalid, Mrs. McQuade, by her will of 6th January 1920, has, as in pursuance of her powers, supplemented the deed-poll.

It will be noticed that in the words which I have quoted from the deed-poll, there is no direct provision for the termination (or

determination) of the interest of a child whose interest is charged, &c.; but it is obvious that after the words "person or persons" there is implied some such phrase as "his or her interest during the remainder of the child's life shall be determined and the trustees," &c. All the arguments have been conducted on this assumption.

What has occurred is as follows: During Mrs. McQuade's life she enjoyed the whole income of her one-eighth share in Mr. Skarratt's residuary trust funds; and during her life, on 1st October 1912, her son "charged" all his interest under his grandfather's will in favour of his aunt, then Miss Daisy Skarratt, as collateral security for the payment to her of money advanced by her under a mortgage of his farm in New York State. Then, by a deed dated 20th July 1916, Miss Skarratt released from the mortgage the mortgagor and all his said interest as in consideration of all sums of money owing under the security having been (as the release stated) repaid. Mrs. McQuade, the first life tenant of the one-eighth share, died on 21st June 1923. The position, therefore, is that the charge was not only given, but was released, during the life tenancy of Mrs. McQuade; so that both events happened before Mr. Frederick Carleton McQuade, or his sisters, became entitled to receive any of the income of the share. Mr. Frederick Carleton McQuade's proportion of the income did not become payable to him till after the charge was released, and therefore could not even become payable to any chargee or person claiming under him. So that if the case for forfeiture rested on the words "shall become payable to any other person or persons," it would apparently fail. But the case rests on other words. There are four alternatives stated, any one of which operates to determine Mr. McQuade's interest in the income, and one alternative is if he do any act or thing whereby his interest shall be "charged": why should we refuse to give effect to this alternative? The interest of the beneficiary in the income was to end if and when he charged the interest, whether any money was paid, or payable, under the charge or not.

It is trite law that although a power of alienation is incident to life interests as well as to absolute interests, yet a life interest may be made determinable on voluntary alienation, either by being limited until alienation or by an express gift over on alienation.

H. C. OF A. 1927.

McQUADE v. MORGAN.

Higgins J.

It is also clear that the charging or other alienation on which the interest is to cease may be an event which takes place during a preceding life interest (*Sharp* v. *Cosserat* (1); *Re Muggeridge's Trusts* (2)); and there is nothing in this deed-poll to limit the time of fatal charge or other alienation to the time when the income is payable to the beneficiary.

The case of *Hurst* v. *Hurst* (3) appears to me to be directly in point in all circumstances other than the fact that there was in that case no intervening prior life interest. In *Hurst* v. *Hurst* there was a trust to permit rents to be received by H. for life, and then to convey to his children on attaining twenty-one; but with a proviso that if H. charged or encumbered the property the gift to him should be absolutely forfeited, and the gift to his children should at once take effect. In 1869 H. charged his life interest in favour of W. W. accepted the charge; but on learning shortly after of the clause of forfeiture repudiated the security, and H. gave him other security. *Fry* J., whose decision was affirmed by the Court of Appeal, held that the clause of forfeiture took effect on the mere execution of the charge; and that the disclaimer by W. could only operate *ab initio* where there had been no assent to the instrument. As *Jessel* M.R. said during the argument, if a mortgagee accepts a mortgage, no subsequent disclaimer has any effect. "That giving up the charge does not make it any the less a charge" (4). It was contended that as there were no children *in esse* at the time of the charge the forfeiture did not take effect; but even if the gift over were void *ab initio* that did not prevent the property from passing from H. (*Rochford* v. *Hackman* (5)). *Lindley* L.J. said that "a proviso prohibiting the charging of a life estate means in fact to prohibit anything purporting to charge it"; and all the Judges repudiated the argument-in-a-circle, that as the estate was determined by the charge, the provision for forfeiture could never operate.

But the case of *Samuel* v. *Samuel* (6) must be considered. The actual decision in that case turned on the construction of the particular will, but does not in the least clash with *Hurst* v. *Hurst* (3); but

(1) (1855) 20 Beav. 470.
(2) (1860) John. 625.
(3) (1882) 21 Ch. D. 278.
(4) (1882) 21 Ch. D., at p. 292, per *Jessel* M.R.
(5) (1852) 9 Ha., at pp. 481-483.
(6) (1879) 12 Ch. D. 152.

there were certain remarks made *obiter* by *Jessel* M.R. as to a principle which had been laid down by a Lord Chancellor (*Hatherley*) in relation to forfeiture by bankruptcy, and which "binds me," as the Master of the Rolls said, "to come to the same conclusion, even if the words were more difficult to deal with than they are" (1). The testator gave his residue to his wife for life, and after her death to his son "if at the decease of my . . . wife *he shall not* . . . *have been declared bankrupt* . . . or *have* . . . *done* any other act, matter or thing which would make such ultimate surplus payable . . . to or vested in or chargeable for the benefit of any other person or persons in case such surplus had been given to him absolutely and without any condition or contingency." The Master of the Rolls held, on the construction of the will, that the condition on which forfeiture of the residue was to occur must exist at the death of the wife, the life tenant; and that a charge created during her life but paid off before she died, did not satisfy the condition. As he said "He" (the son) "did not do anything by which *at the death of the wife* the moneys were charged or payable to anybody else." The Master of the Rolls also considered that the son *had never charged* the property at all—a reason quite sufficient in itself for holding that there was no forfeiture. But the Master of the Rolls went on to consider a series of cases bearing on forfeiture for bankruptcy. There was no bankruptcy in the case before him, and his observations, however weighty, must be treated as *obiter*. In these cases words such as "in case the legatee *shall become* bankrupt" were held to include the words "in case he should *be* bankrupt" (at the period of distribution, &c.); so that words of *futurity* relating to bankruptcy were held to include a pending, or *existing*, bankruptcy. This straining of the meaning of plain words led, as usual, to the straining of other words; and the Courts had ultimately to hold that if the bankruptcy were annulled before the first receipt of money under the gift, no forfeiture had occurred (*Manning* v. *Chambers* (2); *Seymour* v. *Lucas* (3); *White* v. *Chitty* (4); *Trappes* v. *Meredith* (5); *Ancona* v. *Waddell* (6)). The Master of the Rolls was sitting as a single

(1) (1879) 12 Ch. D., at p. 158.
(2) (1847) 1 DeG. & S. 282.
(3) (1860) 1 Dr. & Sm. 177.
(4) (1866) L.R. 1 Eq. 372.
(5) (1871) L.R. 7 Ch., at p. 251.
(6) (1878) 10 Ch. D. 157.

H. C. OF A. 1927.

McQUADE v. MORGAN.

Higgins J.

Judge, and not in the Court of Appeal; and he was obliged to find room for these decisions in a survey of the relevant law (see *In re Parnham's Trusts* (1)); but in *Metcalfe* v. *Metcalfe* (2) the Court of Appeal, though all its members disapproved of *Trappes* v. *Meredith* (3), followed that case unwillingly, being bound by it. In *In re Chapman*; *Perkins* v. *Chapman* (4), the Court of Appeal refused to apply the cases relating to bankruptcy to other grounds for forfeiture (e.g., marriage to a cousin between the will of the testator and his death); and their decision was affirmed by the House of Lords (5). Such are the usual premonitions of a falling structure. At all events, under the circumstances, I think it my duty to decline to apply the cases as to bankruptcy to the case of a voluntary charge. Indeed, this Court is not bound to follow even the decisions of the English Court of Appeal.

As for the passage in the 6th edition of *Jarman on Wills*, p. 1499, I concur with *Harvey* C.J. in Eq. that the proposition there laid down is too broadly stated; and that all depends on the construction of the particular instrument. The case of *In re Forder* (6) was a case of bankruptcy; and the report of the will is too condensed for me to draw any confident inference.

The provisions which have been discussed relate only to the time of Mr. Frederick Carleton McQuade's life. Since the order of *Harvey* C.J. in Eq., a child has been born to Mr. McQuade (1st March 1927). The learned Judge said: "In the event of his having issue the question would arise whether the discretionary trust is not wholly void as it would permit the trustees to apply the whole income to non-objects of the power of appointment." Moreover, the supplementary provisions of appointment contained in Mrs. McQuade's will of 1920 will probably have to be considered. Under the deed-poll the trustees are directed to pay the capital after Mr. Frederick Carleton McQuade's death to his issue in equal shares on attaining the age of twenty-one years, &c. At present, the best course seems to be to confine our attention to the conditions determining the life interest, leaving all further questions open for future decision at the proper time.

(1) (1876) 46 L.J. Ch. 80.
(2) (1891) 3 Ch. 1.
(3) (1871) L.R. 7 Ch. 248.
(4) (1904) 1 Ch. 431.
(5) (1905) A.C. 106.
(6) (1927) W.N. 12.

I am of opinion that the decision as to forfeiture is right, and that the appeal should be dismissed.

H. C. OF A. 1927.

McQUADE v. MORGAN.

Appeal dismissed with costs.

Solicitors for the appellant, *Marsland & Co.*

Solicitors for the respondents, *McElhone & McElhone.*

B. L.

[HIGH COURT OF AUSTRALIA.]

WALL . . . . . APPELLANT;

AND

THE KING; EX PARTE KING WON . . . RESPONDENTS

AND

THE KING; EX PARTE WAH ON . . . RESPONDENTS.

[No. 1.]

ON APPEAL FROM THE SUPREME COURT OF THE NORTHERN TERRITORY.

H. C. OF A. 1927.

MELBOURNE, *Mar.* 7, 18.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Powers, Rich and Starke JJ.

High Court—Jurisdiction—Appeal from Supreme Court of Northern Territory—Habeas Corpus—Competent Court—Issue of writ discharging prisoner from custody—Prohibited immigrant—Prisoner held on warrant of commitment—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 73—*Supreme Court Ordinance* 1911-1922 (*N.T.*) (*No.* 9 *of* 1911—*No.* 10 *of* 1922), *secs.* 4, 21—*Supreme Court Act* 1856 (*S.A.*) (*No.* 31 *of* 1855-1856), *sec.* 7—*Immigration Act* 1901-1925 (*No.* 17 *of* 1901—*No.* 7 *of* 1925), *secs.* 3, 5.

Held, by *Knox* C.J., *Gavan Duffy*, *Powers*, *Rich* and *Starke* JJ. (*Isaacs* and *Higgins* JJ. dissenting), that sec. 21 of the *Supreme Court Ordinance* 1911-1922 (N.T.) does not confer upon the High Court jurisdiction to entertain an appeal from an order made by the Supreme Court of the Northern Territory for the issue of a writ of habeas corpus discharging a prisoner from custody.