IN THE HIGH COURT OF AUSTRALIA

RENNIE & OTHERS v. PERPETUAL TRUSTEE COMPANY (LIMITED) & OTHERS

SKARRATT v. PERPETUAL TRUSTEE COMPANY (LIMITED) & OTHERS.

V.

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on Friday, 29th April, 1949

H. E. Daw, Gov. Print., Melb.

C.12280/45

(NO. 59 of 1948)

MARY ELLEN RENNIE & ORS. V. PERPETUAL TRUSTEE COMPANY (LIMITED) & ORS.

AND

(NO. 60 of 1948)

JOHN CHARLES SYDNEY SKARRATT V. PERPETUAL TRUSTEE COMPANY (LIMITED) AND VIOLET BRIDGE & ORS.

Appeal No. 59 of 1948, appeal and cross appeal allowed. Decretal order under appeal varied by deleting declarations 1 to 4 inclusive, 7 to 9 inclusive and 13, and inserting in lieu thereof the following declarations: (1) Declare that according to the true construction of the will and codicils of the abovenamed testator Charles Carleton Skarratt, the abovementioned deed poll and the will and codicils of the abovenamed testatrix Emily Carleton MdQuade and in the events that have happened the plaintiff Perpetual Trustee Company (Limited) as trustee of the will and codicil of the said testator does not hold one equal fourth part of the original one-eighth share of the said testatrix in the funds described in the will of the said testator as his "residuary trust funds" upon trust for the defendant Minnie Thelma Long Innes absolutely because such one equal fourth part may to some extent become held upon trust for persons other than the said Minnie Thelma Long Innes during the remainder of her life in the event of her incurring a forfeiture under the terms of the said deed poll and her having no issue alive at any time during this period. (2) Further declare that the plaintiff as such trustee does not hold one equal fourth part of such original one-eighth share upon trust for the defendant Mary Ellen Rennie absolutely because such last mentioned equal one-fourth part may to some extent become held upon trust for persons other than the said Mary Ellen Rennie during the remainder of her life in the event of her incurring a forfeiture under the terms of the said deed poll and her having no issue alive at any time during this period or in the event of her having no issue who attain the age of 21 years or being a daughter marry under that age. (3) Further declare that the plaintiff as such trustee holds one equal fourth part of such original one-eighth share after the death of the defendant Frederik Carleton McQuade (senior) for

for the defendant Dorothy May Hover and the defendant Frederick Carleton McQuade the younger in equal shares as tenants in common absolutely. (4) Further declare that the plaintiff as such trustee holds one equal fourth part of such original one-eighth share after the death of the defendant Emily Carleton Holderness for the defendants Richard William Holderness and Margaret Carleton Holderness in equal shares as tenants in common absolutely. (7) Further declare that the plaintiff as such trustee holds one fourth part of the fractional share which accrued to the original one-eighth share of Emily Carleton McQuade by reason of the death of Thomas Carleton Skarratt after the death of the defendant Minnie Thelma Long Innes in trust for the defendant Michael Hale Long Innes absolutely. (8) Further declare that the plaintiff as such trustee holds one fourth part of such fractional share after the death of the defendant Emily Carleton Holderness for the defendants Richard William Holderness and Margaret Carleton Holderness in equal shares as tenants in common absolutely. (9) Further declare that the plaintiff as such trustee holds one fourth part of such fractional share after the death of Frederick Carleton McQuade senior for the defendants Dorothy May Hover and Frederick Carleton McQuade junior as tenants in common in equal shares absolutely. (13) Further declare that the last mentioned equal one fourth shares will be held after the respective deaths of the defendants Mary Ellen Rennie, Minnie Thelma Long Innes, Emily Carleton Holderness, and Frederick Carleton McQuade senior upon the following trusts - the one-fourth share of Mary Ellen Rennie upon the trusts of the ultimate appointment contained in the deed poll unless she has before or after her death issue who attain 21 or being a daughter marry under that age and in that event upon trust for such of her brother and sisters as may be living from time to time and the survivors and last survivor of them for their lives and his or her life respectively and after the death of the last survivor upon trust for the defendants Dorothy May Hover, Frederick Carleton McQuade junior, Michael Hale Long Innes, Richard William Holderness and Margaret Carleton Holderness in equal shares as tenants in common absolutely - the one-fourth share of Minnie Thelma Long Innes

upon trust for Michael Hale Long Innes absolutely - the one-fourth share of Emily Carleton Holderness upon trust for Richard William Holderness and Margaret Carleton Holderness in equal shares as tenants in common absolutely - and the one-fourth share of Frederick Carleton McQuade, senior, upon trust for Dorothy May Hover and Frederick Carleton McQuade, junior, as tenants in common in equal shares absolutely.

Appeal No. 60 of 1948, appeal dismissed.

Order that the costs of all parties of the two appeals and the cross appeal as between solicitor and client be paid as to three fourths out of the original and accrued shares of Mrs. McQuade in the residuary trust funds of Charles Carleton Skarratt deceased other than the share of Mrs. Theobald rateably according to their respective values and as to one fourth out of the original and accrued shares of Charles Sydney Skarratt other than the share of Mrs. Theobald in the said trust funds rateably according to their respective values.

Liberty to apply.

(No. 59 of 1948)

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JUDGMENT

RICH J.
MCTIERNAN J.
WILLIAMS J.

(No. 59 of 1948)

MARY ELLEN RENNIE & ORS. V. PERPETUAL TRUSTEE COMPANY (LIMITED) & ORS.

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JUDGMENT

RICH J.
MCTIERNAN J.
WILLIAMS J.

We have before us two appeals and a cross appeal from parts of a decretal order made by Roper C.J. in Eq. on 19th November 1948 in a suit instituted by originating summons on 4th March 1948 to determine certain questions relating to the devolution of the residuary estate of C. C. Skarratt (hereinafter called the testator). The testator died on 23rd November 1900 having had issue two sons and six daughters all of whom survived him. By his will made on 22nd December 1897 the testator gave each of his sons and daughters a settled share in his residuary estate. The testator made a codicil to his will on 11th November 1900 but its contents are not material on these appeals. One of his daughters, Mrs. E. C. McQuade died on 21st June 1923. She had issue one son and three daughters, all of whom survived her. The son F. C. McQuade has two children; one daughter Mrs. Long Innes has one child; another daughter Mrs. Rennie (previously Mrs. Morgan) has no children; and the third daughter, Lady Holderness, has two children. It is these three daughters of Mrs. McQuade who are the appellants and her five grandchildren who are the cross appellants in the first appeal No. 59 of 1948 which relates to Mrs. McQuade's share in the residuary estate of the testator. The appellant in the second appeal No. 60 of 1948 is a son of C. S. Skarratt a son of the testator who died on 15th September 1941. An order was made in the suit that this appellant should be appointed to represent for the purposes of the suit all the grandchildren (other than parties to this suit) of the testator. The second appeal relates to the share of C. S. Skarratt in the residuary estate of the testator. This is the third suit instituted by

originating summons brought to determine questions relating to the trusts of the residuary estate of the testator. The first originating summons was filed on 12th December 1923 and in this suit Harvey J. (as he then was) made a decretal order on 23rd May 1924 and as Chief Judge in Equity made a further decretal order on 2nd December 1927. The second originating summons was filed on 28th August 1935 and in this suit Davidson J. made a decretal order on 15th June 1936.

By the material portions of his will the testator declared that his trustees should hold the residuary trust funds upon trust for such of his eight children naming them as being male should attain the age of 21 or being female attain that age or marry (all the children attained vested interests under this clause). The will also provided that if any child of the testator should die in his lifetime leaving a child or children living at his death who being male attained 21 or being female attained that age or married, such grandchild or grandchildren should take by substitution and if more than one in equal shares the share in the residuary trust funds which was given upon trust for such child of his in case he or she should survive him. No child of the testator predeceased him but the presence of this provision in the will explains the inclusion of grandchildren in the accruer clauses of the will.

The testator provided that the shares of sons who attained 21 and of daughters who attained that age or married should not vest absolutely in them but that the trustees should hold their shares both original and accruing upon the trusts therein mentioned. He gave to each son a protected life interest and after his death (subject to a provision for his widow with which we are not concerned) directed that his trustees should hold the share of such son and the income and accumulations thereof in trust for all or such one or more exclusive of the other or others of children or remoter issue of such son (such

remoter issue to be born and take vested interests within 21 years after the death of such son) at such age or time or ages or times in such share if more than one upon such conditions and in such manner as such son should by deed with or without power of revocation or by will or codicil appoint and in default of any and subject to every such appointment in trust for all and every the child or children of such son who being male should attain the age of 21 years or being female attain that age or marry and if more than one in equal shares.

The testator also provided that if there should be no such child or children or remoter issue of such son who should attain a vested interest under the foregoing trusts his trustees should hold one moiety of the share of such son and the income and accumulations thereof upon trust for such person or persons and for such purposes as such son should by will or codicil appoint and should hold the remaining moiety and also so much of the first mentioned moiety as should not be appointed or be exhausted by such last mentioned appointment and the income and accumulations thereof respectively and also every share which should accrue to such share by virtue of this or any other clause of accruer as an accrual or addition to the share or shares of his other children or grandchildren in his residuary trust funds if more than one in the same shares and proportions as their original shares and so that every share which should so accrue and be added to the share or shares of his other children or grandchildren should be held upon the trusts and subject to the powers and provisions therein declared and contained concerning their original shares respectively or as near thereto as circumstances would permit.

The testator provided that the trustees should retain the share of each daughter both original and accruing upon trust to pay the income to her for life for her separate use without power of anticipation and from and after her death, subject to a provision for her husband with which we are not concerned, to hold

the share of such daughter and the income and accumulations thereof upon the like trusts and with and subject to the like powers of appointment (such powers to be exercisable by such daughter whether covert or sole) for the benefit of the children or remoter issue of such daughter and upon the like ultimate trust in favour of the children of such daughter failing the appointment as were therein-before declared respecting the share of each of his sons for the benefit of his children or remoter issue after his decease. Provided always that if there should be no child or children or remoter issue of such daughter who should attain a vested interest under the foregoing trusts his trustees should hold the share of such daughter and the income and accumulations thereof and also every share which should accrue to such share as an accrual or addition to the share or shares of his other children or grand-children in his residuary trust funds if more than one in the same shares and proportions as their original shares and so that every share which should so accrue and be added to the share or shares of his other children or grandchildren should be held upon the trusts and subject to the powers and provisions therein declared and contained concerning their original shares or as near thereto as circumstances would permit.

By a deed poll executed on 4th April 1901 Mrs. McQuade, after reciting these provisions of the will of the testator relating to the original and accrued shares of sons and daughters, appointed and declared that the trustees of the will of the testator from and after her death should hold the share of her the said Emily Carleton McQuade so devised and bequeathed by his will and the income and accumulations thereof upon trust for her four children naming them in equal shares to be used as therein mentioned. Mrs. McQuade made her last will and testament on 6th January 1920. (She also made two codicils thereto but their contents are not material on these appeals). Before making her will Mrs. McQuade would appear to have been advised that she had

only appointed her original share by the deed poll, that the appointment would not include the fractions of any shares of her brothers and sisters which might accrue after the date of the deed, and that by the deed appointments had been made to non objects of the power. Her brother T. C. Skarratt had died on 3rd September 1908 a bachelor and a fraction of his share in the residuary trust funds had thereupon accrued to her original one-eighth share. There were prospects of fractions of other shares accruing in the future. By clauses 23 and 24 of her will Mrs. McQuade purported further to exercise her power of appointment under the will of the testator. Clause 23 refers to the exercise of the power by the deed poll as an exercise of the power in respect of her original one-eighth share and not in respect of accrued shares. This clause purports to be a further appointment of the original one-eighth share so far as it had not been validly appointed by the deed poll. Clause 24 purports to be an original appointment of the accrued share of T. C. Skarratt and of any other shares of her brothers and sisters to accrue in the future. Clause 23 provides that the trustees shall from and after Mrs. McQuade's death hold her original one-eighth share (a) as to one equal fourth part thereof which by the deed poll is appointed in favour of Mrs. Long Innes and her issue upon trust for that daughter absolutely. There is a similar appointment of one fourth part of her original one-eighth share in favour of Mrs. Rennie. The other two one-fourth parts of her original share are not appointed in favour of her son and her other daughter Lady Holderness but in favour primarily of their children respectively and if none of their children attain a vested interest in the case of the son's share in favour of his three sisters and in the case of Lady Holderness' share in favour of her two sisters. Clause 24 provides that the fraction of the share of T. C. Skarratt which had accrued to the original one-eighth share of Mrs. McQuade and the fractions of all shares to accrue in the future should be held upon trust to divide the same into four equal parts, and that

one share should be held in trust for each of the four children of Mrs. McQuade for life with remainder to their children and with ultimate trusts in favour of the survivors of her other children and their children as therein mentioned.

Mrs. McQuade died on 21st June 1923 a widow but survived by her four children. By a decretal order made in the first suit on 23rd May 1924 Harvey J. declared that the deed poll was upon its true construction intended to operate as an appointment not only in respect of the original one-eighth share of Mrs. McQuade in the residuary trust funds of the testator but also in respect of the accrued share in those funds which accrued on the death of T. C. Skarratt. The Court further declared that Frederick Carleton McQuade by the execution of the memorandum of agreement dated 1st October 1912 and made between him and one Daisy Skarratt had forfeited the whole of his interest in the original one-eighth share and in the said accrued share. There was an appeal from this further declaration to this Court but the appeal was dismissed and the decision of the Supreme Court affirmed: McQuade v. Morgan 39 C.L.R. 222. A further decretal order was made by Harvey C.J. in Eq. in this suit on 2nd December 1927 to which we need not refer.

Mrs. L. A. Theobald, a sister of Mrs. McQuade, died a widow without issue on 21st October 1934. This led to the second suit before Davidson J. By a decretal order made on 15th June 1936 His Honour declared inter alia that the part of the original and accrued shares of Mrs. Theobald in the residuary trust funds of the testator which accrued to the share of Mrs. McQuade on the death of Mrs. Theobald was not subject to the exercise of any power of appointment by Mrs. McQuade and passed to her children in equal shares as tenants in common. It will be seen that whereas Harvey J. had held that the fraction of the share of T. C. Skarratt which accrued to the original one-eighth share of Mrs. McQuade was part of the trust funds appointed by the

deed poll or, in other words, that under the will of the testator Mrs. McQuade had power to appoint and had appointed this accruer to her original share, Davidson J. held that the fraction of the share of Mrs. Theobald which accrued to the original one-eighth share of Mrs. McQuade was not subject to the exercise of any power of appointment by Mrs. McQuade or, in other words, that the power of appointment conferred on Mrs. McQuade by the will of the testator did not extend to this accruer to her original share. He declared however that the accrued share in question devolved on the four children of Mrs. McQuade in default of appointment under the will of the testator. With all respect to His Honour we cannot follow this reasoning because it is clear to us that the same property which was subject to the power of appointment passed in default of appointment.

Two powers of appointment were conferred upon the sons by the will of the testator, namely a special power to appoint the share of a son by deed or will amongst his children or remoter issue (such remoter issue to be born and take vested interests within 21 years after his death) and a further general power to appoint a moiety of the share if no children or remoter issue of the son attained a vested interest under the will. It may be that the further general power of appointment is a power to appoint a moiety of the original share only, but the power of appointment conferred on the daughters by the referential trusts is a similar power to the special power conferred on the sons namely a power to appoint her share amongst her children or remoter issue (such remoter issue to be born and take vested interests within 21 years after her death). The shares subject to these special powers of appointment are defined in the will as the shares both original and accruing of sons and daughters, and unless it is these composite shares which are subject to these special powers of appointment, accrued shares would not

pass under an appointment or in default of appointment to their children or remoter issue and there would be an intestacy of the corpus of each accrued share upon the death of each life tenant.

The will specifically provides that an accrued share shall be held upon the trusts and subject to the powers and provisions therein declared and contained concerning original shares and we are of opinion that Harvey J. rightly decided that Mrs. McQuade had power to appoint not only her original one-eighth share but also any accrued shares. We are also of opinion that he rightly decided that the deed poll appointed both the original one-eighth share and the accrued share of T. C. Skarratt. He said "I held, and the decision was not challenged in the High Court, that the deed poll exercising the power of appointment operated not only upon the original but also upon the accrued share". As the deed appointed this accrued share to the extent to which it was a valid exercise of the power, it would seem necessarily to follow that all subsequent accruers were also appointed by the deed to the same extent. There were no accrued shares at the date of the deed, all the accruers were subsequent thereto. The share of T. C. Skarratt accrued in the lifetime of Mrs. McQuade whereas that of Mrs. Theobald accrued after her death. But in our opinion this circumstance is quite irrelevant. There have been two further accruers since the death of Mrs. Theobald, the first on the death of Mrs. M. E. Bridge a widow without issue on 13th October 1939 and the second on the death of Mrs. Tennant also a widow without issue on 30th April 1942. It was contended for the appellants in both appeals that these accrued shares must necessarily devolve in the same manner as Mrs. Theobald's share and that, since all the parties in the present suit were parties or represented by representative parties in the suit heard by Davidson J., the parties to the present suit are estopped from contending that these accrued shares do not devolve in the same manner as the share of Mrs. Theobald. In

our opinion it is clear that the rights of the parties to the accrued share of Mrs. Theobald are determined by the decretal order made by Davidson J. for this is res judicata, but we are equally clear that the parties in the present suit are not estopped from now contending with respect to the accrued shares of Mrs. M. E. Bridge and Mrs. Tennant and any subsequent accruers that a son or daughter of the testator can appoint both his or her original and accrued shares and that the accrued shares of Mrs. M. E. Bridge and Mrs. Tennant are subject to the appointments made by Mrs. McQuade by the deed poll to the extent to which those appointments are valid and the extent to which those appointments are defective to the appointments made by her will. Harvey J. in a suit in which all persons interested were parties or represented by representative parties decided that Mrs. McQuade could appoint the accrued share to T. C. Skarratt. Davidson J. in a suit in which all persons interested were parties or represented by representative parties decided that she could not appoint the accrued share to Mrs. Theobald. All persons interested were before the Court when Harvey J. made the decretal order of 23rd May 1924 and also when Davidson J. made the decretal order on 15th June 1936. As the two orders are inconsistent, it necessarily follows in our opinion that if issue estoppel operates at all it must operate in favour of the earlier decretal order of Harvey J. But we find it unnecessary finally to decide whether there is any such estoppel in the case of accrued shares other than those expressly adjudicated upon for we agree with Harvey J. that the powers of appointment given to the daughters are powers to appoint both original and accrued shares, and that by the deed poll Mrs. McQuade intended to appoint the whole of her share in the residuary trust funds of the testator both original and accruing.

This leads us to the construction of the deed poll for it is the deed which primarily appoints the whole of Mrs. McQuade's share both original and accruing (excluding for the reasons

already mentioned the accruer on Mrs. Theobald's death) and this appointment to the extent to which it is effective prevails over the subsequent appointment by the will of Mrs. McQuade and over the trusts in default of appointment in the will of the testator. The initial trust is for the four children naming them in equal shares. It was contended for the appellants in the first appeal that this was an appointment to the four children absolutely and conferred absolute interests upon them to the extent to which those interests were not cut down by the subsequent engrafted trusts. We were referred to the long line of authorities where the rule of construction now known as the rule in Lassence v. Tierney/ 1 Mac & G. 551 has been discussed and particularly the decisions of the House of Lords in Hancock v. Watson 1902 A.C. 14 and A.G. v. Lloyds Bank 1935 A.C.382, and there are the decisions of this Court in Fisher v. Wentworth 36 C.L.R. 310 and Williamson v. Carter 54 C.L.R. 23. The principle is clear enough but it depends upon there being in the first instance a gift of a separate share severed from the rest of the estate onto which there are engrafted subsequent trusts which fail and it is usually difficult to determine whether the initial words are intended to confer an absolute gift in the first instance or are merely introductory to the operative trusts which follow. In Lassence v. Tierney,/ at p.562 Lord Cottenham pointed out that this intention must be collected from the whole instrument and not from words which standing alone would constitute an absolute gift. In the case of the deed poll the children of Mrs. McQuade only become entitled to vested interests in the income of their respective one-fourth shares on attaining the age of 21 years or marrying under that age, and it would be somewhat anomolous if Mrs. McQuade should have intended her children to have absolutely vested interests in the corpus in their shares at birth when they only acquired vested interests in the income upon the happening of these events. The creation of protected life estates indicates

an intention to place the interest of each child under the appointment beyond the reach of his or her creditors, and the ultimate gift to the other children is also against an intention to give any child an absolute gift in the first instance. The case seems to us to be one in which there is no appropriation of a one-fourth share in the appointed funds to each child of Mrs. McQuade in the first instance but the original words are introductory and the operative trusts are those which prescribe the manner in which each one-fourth share is to be enjoyed. To the extent to which these trusts fail the operative trusts are those in clauses 23 and 24 of the will of Mrs. McQuade and to the extent to which these fail the operative trusts are those in default of appointment contained in the will of the testator. Mrs. McQuade had power to appoint by deed or will to her children and remoter issue born and taking vested interests within 21 years after her death. She died on 21st June 1923 so that only her children and such remoter issue as were born and acquired vested interests on or before 21st June 1944 could be the objects of the power. The deed poll appoints the income of Mrs. McQuade's share to her four children on attaining 21 or marrying in equal shares, but declares that in the case of any of her four children becoming bankrupt etc. the trustees shall during the remainder of the life of such child apply his or her share of income for or towards the maintenance of that child or his or her issue ..... or if there shall be no issue between such of the other children as shall then be living and entitled to receive the same in equal proportions. We agree with Harvey J. that the first of these trusts is invalid because it is an unauthorised delegation of a special power of appointment to the trustees of the will of the testator who are not donees of the power but we cannot agree with counsel for the appellants that the alternative provision where there shall be no issue is merely ancillary and fails with it. This provision is in our opinion an independent and severable trust. Roper C.J. in Eq. thought that this trust would only take effect where there was no issue living at the

date of the forfeiture but in our opinion the trust would operate whenever there was no issue alive during the remainder of the life of a child who had forfeited his or her share. Whilst any such issue was alive the income of this child would be unappointed by the deed and would either be appointed by the will of Mrs. McQuade or pass in default of appointment under the will of the testator. The deed further declares that from and after the death of any of the children of Mrs. McQuade the trustees shall hold the capital in trust for her or his issue in equal shares on attaining 21 or being a daughter marrying under that age. The class of remoter issue intended to benefit under this trust included persons who at the date of the deed might be objects and also persons who might not be objects of the power of appointment. This led Harvey J. to declare in 1924 that the trust was not wholly void but would fail to take effect in respect of such of the issue of the four children as were not objects of the power and that the share of each object would be determined by dividing the property purported to be appointed into as many shares as there were objects and non objects of the power and by giving to each object one of such shares. No grandchildren of Mrs. McQuade attained the age of 21 or being a daughter married before 21st June 1944 so that in the events which have happened this trust entirely failed. But the deed provides in the alternative that if there be no such issue of any of her four children the trustees are to apply the share of that child in augmentation of the share or shares of the survivors of the children of Mrs. McQuade and their issue or of the shares of the issue of such of her children as shall be then dead in equal proportions. Roper C.J. in Eq. thought that the words "if there be no such issue" referred to the death of a child of Mrs. McQuade leaving no such issue her surviving. We cannot agree with this construction. The words "no such issue" mean in our opinion no issue of a child of Mrs. McQuade who attains the age of 21 or being a daughter marries under that age. Upon any such issue attaining that age or marrying before or after the death of that child the

ultimate appointment in the deed becomes inoperative. The eldest child of F. C. McQuade now Mrs. D. M. Hover was married on 16th February 1946 and attained the age of 21 on 1st March 1948, the child of Mrs. Long Innes attained the age of 21 on 23rd July 1948, and the eldest child of Lady Holderness attained the age of 21 on 30th November 1948, so that this appointment cannot operate in respect of the shares of these three children. But Mrs. Rennie has no issue, and it is probable that upon her death the ultimate appointment in the deed poll will operate in respect of her one-fourth share.

Like us, Roper C.J. in Eq. in his reasons for judgment followed the opinion of Harvey J. that the children of the testator had power to appoint both original and accrued shares amongst their children or remoter issue and thought that the deed poll to the extent to which it is effective appointed Mrs.McQuade's original share and the fractions of the shares of her brothers and sisters which accrued thereto. Accordingly we find ourselves in general agreement with his reasons other than his opinion that the words "if there shall be no issue" in the alternative gift upon forfeiture refer to a failure of issue at the moment of forfeiture and that the words "if there be no such issue" in the ultimate appointment refer to a child of Mrs. McQuade who dies without leaving surviving issue who being male attain or have attained the age of 21 years or being a daughter attain or have attained that age or marry or have married.

By his will made on 6th October 1936 C.S. Skarratt exercised the special power to appoint amongst his children and remoter issue such remoter issue to take vested interests within 21 years of his death conferred upon him by the will of the testator and purported to appoint his share of the residuary trust funds of the testator "including all accretions thereof both present and future." The grounds of the second appeal are

that His Honour was in error in holding that the trustees of the will of the testator now hold the fraction of the further share in the residuary funds which accrued to the original share of Charles Sydney Skarratt deceased by reason of the death of Daisy Tennant and will hold all further fractions which may so accrue upon and subject to the same trusts as are declared by the will concerning the accruals to the original share of Charles Sydney Skarratt, and that His Honour should have held that the trustees of the will of the testator now hold the fraction of the further share in the residuary trust fund which accrued to the original share of Charles Sydney Skarratt deceased by reason of the death of Daisy Tennant and will hold all further fractions which may so accrue upon trust for the children of Charles Sydney Skarratt namely Carleton Skarratt, John Skarratt, Noel Weekes, Michael Skarratt (since deceased) and Anthony Skarratt in equal shares as tenants in common absolutely (that is to say that they take in default of appointment under the will of the testator). Accordingly the success of the second appeal therefore depends upon our being of opinion or being bound by the decretal order of Davidson J. to hold that a child of the testator has no power to appoint accrued shares which we are not prepared to do and this appeal therefore fails.

The cross appeal is from those parts of the decretal order which give effect to the view of Roper C.J. in Eq. that the ultimate appointment in the deed poll would take effect where a child of Mrs. McQuade died having had issue who attained 21 or being a daughter married under that age but such issue did not survive that child. We have already said that in our opinion this view is erroneous. The first appeal and the cross appeal therefore succeed.

It remains shortly to express our opinion as to the existing rights in the residuary estate of the testator of the three daughters of Mrs. McQuade. In our opinion each of these

daughters has in the first instance a protected life interest in the income of one-fourth of the original one-eighth share of Mrs. McQuade and in the fraction of the share of any other child of the testator that has accrued or will accrue to that share other than the share of Mrs. Theobald (hereinafter called the funds in question). Should this life estate of Mrs. Long Innes be forfeited she would still have a life estate for the rest of her life in her share of the funds in question under clauses 23 and 24 of the will of Mrs. McQuade while she has issue living. She also has under clause 23 of this will an absolutely vested interest expectant on her death in the corpus of one-fourth of the original one-eighth share of Mrs. McQuade. On the death of Mrs. Long Innes, the one-fourth share in the fractions of other shares which have accrued to the original one-eighth share of Mrs. McQuade (other than Mrs. Theobald's share) will pass under the appointment in clause 24 of the will of Mrs. McQuade to such child or children as may be living 21 years after her death - that is to say to her son M. H. Long Innes absolutely. Should Mrs. Rennie have no issue and her life estate be forfeited then the income of her share in the funds in question would be payable under the deed poll between such brother and sisters who should survive her and be living and entitled to receive the same. If she should have issue she would have an estate for the rest of her life in the income of the funds in question under clauses 23 and 24 of the will. But Mrs. Rennie has not, like Mrs. Long Innes, an absolutely vested interest expectant on her death in one-fourth of the original one-eighth share of her mother because unless she has issue who attain 21 or being a daughter marry under that age her one-fourth share in the funds in question will pass under the ultimate appointment in the deed poll so far as it is effective. If the life estate of Lady Holderness under the deed poll should be forfeited and she have issue living, the income of her one-fourth share in the funds in question for the rest of her life so far as attributalbe to the original one-eighth share of Mrs. McQuade in the residuary estate of the testator

would be divisible under clause 23 of the will of Mrs. McQuade (since such a forfeiture would occur more than 21 years after the death of Mrs. McQuade) between her two sisters as might thereafter be living from time to time and to the survivor of them and upon the death of such survivor to Lady Holderness for the rest of her life; and so far as attributable to accrued shares she would have a life estate in the income of the funds in question under clause 24 of that will. Upon the death of Lady Holderness her one-fourth share of the funds in question would pass under clauses 23 and 24 of that will to R. W. Holderness and M. C. Holderness absolutely.

For these reasons we are of opinion that the decretal order of Roper C.J. in Eq. under appeal should be varied so far as it depends on the two conclusions of His Honour which we have held to be erroneous. In view of the provisions of sec. 93(3) of the Trustee Act 1925 (N.S.W.) we do not disagree with the suggestion of counsel for all parties that the costs of all parties of the two appeals and cross appeal as between solicitor and client should be paid out of the shares original and accrued of Mrs. McQuade and C. S. Skarratt in the residuary estate of the testator, and we consider that it would be fair that these costs should be paid as to three-fourths out of the share of Mrs. McQuade and one-fourth out of the share of C. S. Skarratt. We make the following orders: Appeal No. 59 of 1948, appeal and cross appeal allowed. Decretal order under appeal varied by deleting declarations 1 to 4 inclusive, 6 to 9 inclusive and 13, and inserting in lieu thereof the following declarations: (1) Declare that according to the true construction of the will and codicils of the abovenamed testator Charles Carleton Skarratt, the abovementioned deed poll and the will and codicils of the abovenamed testatrix Emily Carleton McQuade and in the events that have happened the plaintiff Perpetual Trustee Company (Limited) as trustee of the will and codicil of the said testator does not hold one equal fourth part of the original one-eighth share of the said testatrix in the funds described in the will of the said testator as his "residuary trust funds"

upon trust for the defendant Minnie Thelma Long Innes absolutely because the income of such one equal fourth part may become held upon trust for persons other than the said Minnie Thelma Long Innes during the remainder of her life in the event of her thereafter incurring a forfeiture under the terms of the said deed poll and her having no issue alive at any time or times when any portion of such income accrues and further declare that the plaintiff will on the death of the said Minnie Thelma Long Innes hold the corpus of such one equal fourth part upon trust for the said Minnie Thelma Long Innes absolutely. (2) Further declare that the plaintiff as such trustee does not hold one equal fourth part of such original one-eighth share upon trust for the defendant Mary Ellen Rennie absolutely because the income of such equal one-fourth part may become held upon trust for persons other than the said Mary Ellen Rennie during the remainder of her life in the event of her incurring a forfeiture under the terms of the said deed poll and her thereafter having no issue alive at any time or times when any portion of such income accrues and also because such equal one fourth part may on the death of the said Mary Ellen Rennie become in whole or part held upon trust for persons other than the said Mary Ellen Rennie in the event of her having no issue who attain the age of 21 years or being a daughter marry under that age. (3) Further declare that the plaintiff as such trustee holds one equal fourth part of such original one-eighth share after the death of the defendant Frederick Carleton McQuade (senior) for the defendant Dorothy May Hover and the defendant Frederick Carleton McQuade the younger in equal shares as tenants in common absolutely. (4) Further declare that the plaintiff as such trustee holds one equal fourth part of such original one-eighth share after the death of the defendant Emily Carleton Holderness for the defendants Richard William Holderness and Margaret Carleton Holderness in equal shares as tenants in common absolutely. (6) And this Court doth further declare that the interests of the defendants Minnie Thelma Long Innes and Mary Ellen Rennie in the income of their respective one fourth parts of the said original one eighth

share under the said deed poll are respectively liable to determination by the happening of any of the events mentioned in the said deed poll as causing a forfeiture of such interests if thereafter the said respective defendants have no issue alive at any time or times when any portion of such income accrues. (7) Further declare that the plaintiff as such trustee holds one fourth part of the fractional share which accrued to the original one-eighth share of Emily Carleton McQuade by reason of the death of Thomas Carleton Skarratt after the death of the defendant Minnie Thelma Long Innes in trust for the defendant Michael Hale Long Innes absolutely. (8) Further declare that the plaintiff as such trustee holds one fourth part of such fractional share after the death of the defendant Emily Carleton Holderness for the defendants Richard William Holderness and Margaret Carleton Holderness in equal shares as tenants in common absolutely. (9) Further declare that the plaintiff as such trustee holds one fourth part of such fractional share after the death of Frederick Carleton McQuade senior for the defendants Dorothy May Hover and Frederick Carleton McQuade junior as tenants in common in equal shares absolutely. (9A) And this Court doth not see fit at this stage to declare for what persons and upon what trusts the plaintiff as such trustee holds the remaining one fourth part of such fractional share after the death of the defendant Mary Ellen Rennie. (13) Further declare that the last mentioned equal one fourth shares other than that of the defendant Mary Ellen Rennie will be held after the respective deaths of the defendants Minnie Thelma Long Innes, Emily Carleton Holderness, and Frederick Carleton McQuade senior upon the following trusts - the one-fourth share of Minnie Thelma Long Innes upon trust for Michael Hale Long Innes absolutely - the one-fourth share of Emily Carleton Holderness upon trust for Richard William Holderness and Margaret Carleton Holderness in equal shares as tenants in common absolutely - and the one-fourth share of Frederick Carleton McQuade, senior, upon trust for Dorothy May Hover and

Frederick Carleton McQuade, junior, as tenants in common in equal shares absolutely. (13A) And this Court doth not see fit at this stage to declare for what persons and upon what trusts the said equal one-fourth share of the defendant Mary Ellen Rennie will be held after the death of the said defendant. Appeal No. 60 of 1948, appeal dismissed. Order that the costs of all parties of the two appeals and the cross appeal as between solicitor and client be paid as to three fourths out of the original and accrued shares of Mrs. McQuade in the residuary trust funds of Charles Carleton Skarratt deceased other than the share of Mrs. Theobald rateably according to their respective values and as to one fourth out of the original and accrued shares of Charles Sydney Skarratt other than the share of Mrs. Theobald in the said trust funds rateably according to their respective values (including in such costs any reasonable conferences with counsel and attendances of counsel at the Chambers of a Justice with respect to the final form of this order). Liberty to apply.