[HIGH COURT OF AUSTRALIA.]

MARTHA EVELYN GILBERT, LAVINIA KILMARTIN, ROSE ANN PALMER, AND ALMA ELEANOR LOUISA STANTON,
PLAINTIFFS,
. APPELLANTS;

AND

SARAH ANN STANTON, RHEUBEN STANTON, ALFRED STANTON, JOSEPH ROBERT STANTON, SUSAN ISABEL NICHOLLS, ROBERT HARVEY, ARTHUR DAVIES, THE TASMANIAN LOAN GUARANTEE AND FINANCE COMPANY LIMITED, THE PERPETUAL TRUSTEES EXECUTORS AND AGENCY COMPANY OF TASMANIA LIMITED, AND HECTOR ROSS (CURATOR OF INTESTATE ESTATES),
DEFENDANTS.
. RESPONDENTS.

ON APPEAL AND CROSS-APPEAL FROM THE SUPREME COURT OF TASMANIA.

Power of appointment—Good faith—Fraud on power—Benefit to appointor.

Notwithstanding the rule that the appointor under a power must at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any object beyond the purpose and interest of the power, when an arrangement, in pursuance of which the appointment of a reversionary estate is made, is such that in substance the appointee gets the full value of the reversion, the fact that the appointor derives a benefit corresponding to the value of his life estate is not sufficient to invalidate the appointment.

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HOBART, *March* 1, 2, 3,

Griffith C.J., Barton and O'Connor JJ.

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By indenture of settlement, property consisting of about 247 acres of unimproved land was settled on S. A. S., a married woman, for life with restraint on anticipation, and with remainder to such of her children as she should appoint, and in default of appointment to her children absolutely. S. A. S. had four sons and six daughters. In exercise of the power, she appointed at various times three several portions of the land to three of her sons, leaving a portion of 35 acres unappointed, but her intention to appoint this portion to her fourth son John William was well known to her family. By deed of 1st December, 1891, S. A. S. purported to mortgage the rents of the whole of the property comprised in the settlement to one Harvey to secure an advance by him of £450, £135 of which was applied for the purpose of paying off her debts, £280 for the purpose of erecting a new dwelling upon, and further sums in improving, the 35 acres. In March, 1898, Harvey whose debt then amounted to about £440 asked for payment. At this time the 35 acre block was under lease for a term of four years to John William and and another at a rental of £120 per annum, but the rent was then in arrear to the extent of about £130. On 16th April, 1898, S. A. S. executed a deed of appointment of the 35 acres in favour of her son J. W. An order of the Supreme Court was obtained on 28th April, 1898, removing the restraint on anticipation, and on 3rd May, 1898, she and J. W. executed a mortgage in fee to the defendants The Tasmanian Loan Guarantee and Finance Co. to secure £500 the receipt of which was acknowledged by both mortgagors. In a suit to impeach the appointment as a fraud on her power, the Supreme Court of Tasmania held on the evidence that it was not proved that the appointment was executed with a view to the giving of the mortgage.

Held, reversing on this point the finding of the Supreme Court of Tasmania, that, on the written and uncontradicted evidence, the appointment and the mortgage formed parts of one transaction ; but

Held, affirming the decision of the Supreme Court of Tasmania, but on different grounds, that having regard to all the facts, including the age of the tenant for life, the debt due by the appointee, and the fact that a large sum had been expended by the appointor since the date of the settlement in improving the settled property which might have been charged upon the land in the hands of the appointee in favour of other objects of the power, the plaintiffs had failed to establish affirmatively that the mortgage money was not distributed between the mortgagors with due regard to the respective interests of the appointor and appointee.

Held, further, reversing the decision of the Supreme Court of Tasmania, that, the appointment to J. W. being a valid exercise of the power, he had a good title to the estate in remainder, and that his mortgage to the Finance Co. could not be impeached on grounds not raised by the Bill.

APPEAL and Cross-appeal from an order of the Supreme Court of Tasmania dated 6th May, 1904, in a suit to set aside an appointment under a power as made in fraud of the power, and a conse-

quent mortgage made by the appointee and alleged to be taken by the mortgagee with notice of the facts establishing the fraud.

The facts of the case are fully set forth in the judgment of the Court.

Waterhouse, (with him *Dobson*), for appellants. The appointment was fraudulent inasmuch as it was not made for the benefit of the appointee, but to raise money for Mrs. Stanton. The appointment should therefore be set aside and also the two mortgages made thereunder.

The rule is that which was applied in *Topham* v. *Duke of Portland* (1) in which it was laid down by *Romilly* M.R., that where the donee of the power and the appointee agree that if the appointment be made, the appointee will deal with the fund appointed in a manner foreign to the purpose for which the power was intended, the appointment is void. It is not necessary to prove a direct bargain. It is sufficient to show such a bargain from circumstantial evidence: *Humphrey* v. *Olver* (2). The deed of appointment, the application for release from restraint on anticipation, the subsequent mortgage and the lease were all one transaction, and one of the immediate objects is to benefit the appointor. This is sufficient to invalidate the deed of appointment: *Duggan* v. *Duggan* (3); *In re Huish's Charity* (4). In *Cockcroft* v. *Sutcliffe* (5) it was found as a fact that the appointor derived no benefit from the appointment. But here the appointor obtained a benefit. She obtained by means of it an accommodation enabling her to pay a subsisting debt, which had been refused her on the security of her life interest alone. There is a distinction between the exercise of a power of appointment by deed and by will. In the case of a power exercised by will mere proximity in point of time of one or more transactions to the appointment will not form a ground for invalidating such transactions: *Pares* v. *Pares* (6). But where the exercise of such power by will is followed by a subsequent appointment by which a fraud was attempted, the will being an ambulatory instrument, would be

(1) 32 L.J., Ch., 81.
(2) 28 L.J., Ch., 406.
(3) L.R. 7 Ir., 152.
(4) L.R. 10 Eq., 5.
(5) 25 L.J., Ch., 313.
(6) 33 L.J., Ch., 215.

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invalidated by the subsequent fraudulent transaction: *In re Kirwan's Trust* (1). To render an appointment fraudulent in which the appointor stipulates for his own benefit, it is not necessary that it should be wholly for the benefit of the appointor: *Jackson* v. *Jackson* (2). Where an appointor stipulates for a contingent benefit for himself, but added to the sum appointed by him a sum greater than the contingent benefit, the Court upheld the appointment: *Cooper* v. *Cooper* (3). Before the Court can uphold such an appointment as this, it must be shown that the fraudulent part is severable from the rest. Here no severance is possible. Where a donee of a power appointed the fund to one of the objects of the power on an understanding that the latter was to lend the fund to the former, although on good security, the appointment was held bad: *Arnold* v. *Hardwick* (4).

Crisp, for respondent the Curator of Intestate Estates representing the estate of Sarah Ann Stanton (deceased). Mrs. Stanton admits the invalid exercise of the power and has no interest in the event. The Finance Co. should pay the costs of the Curator. [He cited *In re Marsden's Trust* (5)].

Lodge, for respondents other than the Curator of Intestate Estates. The question is—would the appointment have been made whether the appointor's debts had been paid off or not: *Cooper* v. *Cooper* (6). The evidence of settled intention on the part of the appointor to make this appointment is important. Provision had been made for all the other sons and two daughters leaving only one son and three daughters unprovided for. The only land not dealt with, out of which provision could be made, was the 35 acres. There was evidence that it was the appointor's intention since 1886 to appoint the property to John William; and it was an understood thing also that the three daughters were to be provided for out of this property. There is also evidence that at the time of the appointment John William promised his mother to make provision for his sisters. What was actually done was

(1) 25 Ch. D., 373.
(2) Dr., 91; 7 Cl. & F., 977.
(3) L.R. 5 Ch., 203.
(4) 7 Sim., 343.
(5) 28 L.J., Ch., 906.
(6) L.R. 5 Ch., 203.

always intended by the appointor, and understood by all concerned to be her intention.

The evidence of a bargain is inconclusive. An inference of fraud must not be drawn except on very strong evidence. Mrs. Stanton brought a very substantial contribution into the mortgage. At that time she had rent reserved under the lease amounting to £80 per annum, which was to go to payment of interest and reduction of the debt. Before the mortgage her life estate was not charged in any way, nor could she at that time bind it. A bill of sale had been executed by her in favour of one Harvey, but the appointee was also under a substantial obligation to Harvey, being his lessee and at the time in arrears with his rent. The loan on mortgage of the appointed property settled the debt to Harvey, £280 of which was incurred in building a house on the property. By the mortgage the appointor charged her life interest up to the hilt. The real intention of the appointor was to benefit the appointee. The appointment was made at a time when it was of great benefit to the appointee and also incidentally of some benefit to the appointor. This cannot invalidate the exercise of the power: *In re Huish's Charity* (1). In *In re Kirwan's Trusts* (2) the bargain was read as containing a term that, if the appointee did not perform her undertaking, the will would be revoked. In *Humphrey* v. *Olver* (3), the appointor was reluctant to made the appointment, and was only induced to do so on condition of herself receiving a large benefit. That case is in no way like the present one. A *bonâ fide* appointment is good where made to an object of the power with a view to the immediate settlement of the appointed property with the approbation of the appointee: *Pryor* v. *Pryor* (4). *Palmer* v. *Wheeler* (5), and *Wellesley* v. *Mornington* (6) are both distinguishable from the present case in the interests reserved to the appointor. The fact that under the provisions of an appointment some persons who are not objects of the power may take interests in the appointed fund is not sufficient of itself to invalidate the appointment. Nor does the fact that the donee of the power may derive

(1) L.R. 10 Eq., 5.
(2) 25 Ch. D., 373.
(3) 28 L.J., Ch., 406.
(4) 32 L.J., Ch., 731.
(5) 2 Ball & B., 29; and on appeal, 2 DeG. J. & S., 205.
(6) 2 K. & J., 143.

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a benefit under the appointment necessarily render the appointment invalid: *Roach* v. *Trood* (1).

As to the cross appeal, the Court below held the appointment good, and the mortgage bad so far as it purported to bind anything more than the life interest of Mrs. Stanton. If the appointment is good, the mortgage is good. A deed cannot be set aside on a slender inference as to the maker's intention. The amount of £100 each decreed to be paid to the two plaintiffs and the defendant Susan Isabel Nicholls should be reduced to £50 each by reason of the codicil of Sarah Ann Stanton. This codicil should be referred to by the Court, although not put in evidence in the Supreme Court.

[*Per Curiam.*—We do not think, even if the codicil could be looked at, it would affect the matter.]

Waterhouse in reply. The test suggested in *Cooper* v. *Cooper* (2) must be applied. Would the appointment have been carried out whether there was a bargain for the benefit of the appointor or not? If not, then the appointment is bad. On the authority of *In re Turner's Settled Estates* (3), although the terms of the bargain are reasonable, yet if the appointor gets something more than he is entitled to, the appointment is bad. What the appointor gave was her life estate; what she got was £450. The values must be considered at the time of the appointment. What she gave depended on her expectation of life, and it has been shown she was in very bad health. It cannot be said that what she gave was equivalent to what she got. The £280 spent by the life tenant was for the purpose of providing a comfortable home for herself and John William for the rest of their lives, and not merely to benefit the estate.

Lodge cited *In re Montague* (4) and *Frith* v. *Cameron* (5).

Cur. adv. vult.

(1) 3 Ch. D., 429, at p. 440.
(2) L.R., 5 Ch., 203.
(3) 28 Ch. D., 205.
(4) (1897) 2 Ch., 8.
(5) L.R. 12 Eq., 169.

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Sydney, April 19th.

The judgment of the Court was read by

BARTON J. This is an appeal from the judgment of the Supreme Court of Tasmania in a suit to set aside a deed of appointment on the ground that it was executed for the benefit of the appointor in pursuance of an arrangement between the appointor and the appointee, and that the appointment was therefore in fraud of the power. The suit was, in accordance with the practice of that State, heard by the Full Court on oral evidence, and the Court held, upon the facts, that the alleged arrangement was not proved. They regarded the case as resting on the evidence of one witness, who, in their opinion, was unreliable. They, however, directed that the deed impeached should be varied in several particulars to the prejudice of some of the respondents. From this decree there were cross appeals.

By an indenture of settlement dated 5th October, 1872, two blocks of land, containing respectively 212 acres and 35 acres, were conveyed to trustees upon trust to pay the rents and profits to Sarah Ann Stanton for life for her separate use without power of anticipation, and after her death upon trust for "the child or such one or more exclusively of the others or other of her children if more than one in such shares and with such future and executory or other trusts for the benefit of the said children or some one or more of them with such provisions for their maintenance, education and benefit, and upon such conditions and with such restrictions" as she should by deed or will appoint, and in default of appointment in trust for all her children who being sons should attain 21 or being daughters should attain that age or marry. Sarah Ann Stanton was then the wife of John Stanton, and had four sons, Rheuben, Alfred, Joseph, and John William, and six daughters. All the children attained 21. One of the daughters died in March, 1891, without issue. By deed poll dated 28th October, 1887, Sarah Stanton appointed 72 acres, part of the 212 acres, to her son Joseph in fee subject to her own life interest. By an indenture dated 26th November, 1894, she appointed two pieces of land containing respectively 39 acres and 31 acres, being other portions of the 212 acres, to her son Rheuben in fee subject to a term of years reserved to herself. By another indenture dated 12th January, 1897, she appointed the remainder of the 212 acres to her son

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Alfred, also subject to a term of years reserved to herself. At the date of the settlement of 1872 the whole of the land comprised in it was bush land, uncultivated, and of little value, although it has since acquired considerable value for the cultivation of fruit. Sarah Stanton and her husband resided on the block of 35 acres, which is the subject-matter of this suit, and John William, who was their youngest son, resided with them. In 1891 she and her husband were indebted to one Cane in the sum of £135 which was secured, as was supposed, by a deposit of the settlement and title deeds, and in that year they requested one Harvey, to whom they were also indebted, to pay off Cane and make them an advance of £280 for the purpose of erecting a new dwelling house upon the 35 acres, which he agreed to do upon receiving proper security. Accordingly, a deed dated 1st December, 1891, and made between John Stanton of the first part, Sarah Stanton of the second part, and Harvey of the third part, was executed, which purported to mortgage the accrued and future rents of the whole of the property comprised in the settlement together with all the furniture, farming stock, implements and other personal property of the mortgagors to Harvey to secure the repayment to him on demand of £450 with interest at 10%. The attempted appointment of the future rents was of course ineffectual, but the security seems to have been given and accepted in good faith, and on the assumption that it was valid. There was evidence that, besides the sum of £280 which was expended on the erection of a new dwelling house upon the 35 acres, other portions of the money advanced by Harvey were expended upon it in improvements. There was abundant evidence that it had for many years been the fixed intention of Sarah Stanton that the land should go after her death to John William. The other sons had been already provided for as above stated. She had, indeed, in a will executed by her in September, 1886, appointed the 212 acres to her three eldest sons in equal shares, and had appointed the 35 acres to John William subject to a charge of £50 in favour of each of her six daughters. This intention was well known to al the members of her family. In March, 1898, Harvey, whose debt then amounted to about £440, asked for payment. At this time the 35 acre block was under lease for a term of four years to John William and one Gilbert,

her son-in-law, at a rent of £120 or £125 per annum, which was to be paid to Harvey in reduction of his debt, but the rent was then in arrear to the extent of about £130. Sarah Stanton was desirous of paying off the debt, and on 8th March she went with John William to Hobart to make arrangements for raising the necessary loan. She there saw the manager of the defendants, the Tasmanian Loan, Guarantee and Finance Co., and received some encouragement, but having consulted a medical adviser and being advised by him to return home, she did so, leaving John William to continue the negotiations for the loan. In the result she executed a deed of appointment of the 35 acres, dated 16th April, in favour of John William in fee subject to her own life estate, and they joined in executing a deed of mortgage, dated 3rd May, to the defendants the Finance Co. to secure £500, expressed to be paid to them, and the receipt of which they thereby acknowledged. The mortgage debt was made repayable by two instalments of £50 each, payable respectively on 31st March, 1899, and 31st, March 1900, the balance being payable on 31st March, 1901. Interest at 8%, reducible to 7% on punctual payment, was to be payable half-yearly on the balance due from time to time, but the total liability on the mortgage was not to exceed £600. The mortgagors jointly covenanted to pay in the manner above stated.

The £500 thus raised was applied, after payment of the mortgagee's costs, in discharge of the debt due to Harvey, and the balance, £15, was paid to John William by way of loan from his mother. On 3rd May John William and Gilbert surrendered their existing lease. By a lease dated 4th May Sarah Stanton demised the land to John William for a term of seven years at a rent of £80 per annum, and he appears to have promised verbally to pay her a further sum of £20 per annum. By a deed of the same date the Finance Co. confirmed the lease, and Sarah Stanton appointed them her attorneys to receive the rent, which was in fact collected by them and applied in reduction of the mortgage debt. In December, 1903, the debt had been reduced to about £230. At John William's death in 1901 his rent was in arrear to the extent of £135.

For the purpose of enabling Sarah Stanton to give an effectual

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security an order was obtained from a Judge in Chambers empowering her to bind her separate estate notwithstanding the restraint on anticipation. John William died on 16th May, 1901, intestate, and administration of his estate was granted to the defendants the Perpetual Trustees Co. Ltd.

On 7th March, 1902, they executed a second mortgage of John William's estate in the land to the defendants the Finance Co., to secure a sum of £250 which was borrowed by the Trustees Co. under an order of the Court for the purpose of discharging John William's debts, including the £15 due to his mother and the £135 arrears of rent. On 3rd November, 1903, the plaintiffs, who are four of the surviving daughters of Saran Ann Stanton, filed their bill of complaint against Sarah Ann, Rheuben, Alfred, Joseph, Susan Nicholls the fifth surviving daughter, the Curator of Intestate Estates as representing the estate of the deceased daughter, the trustees of the settlement, the Finance Co. and the Perpetual Trustees Co. By their bill the plaintiffs, after setting out the facts, charged that the appointment was not executed for the sole purpose of benefiting John William as the object of the power, but was executed for the purpose of enabling the debts of Sarah Ann and her husband to be paid out of the moneys to be raised by a mortgage of the 35 acres, that John William did not receive any benefit from the mortgage or the moneys raised thereby, and that the appointment should be set aside; and by the prayer of the bill they claimed a declaration that the deed of appointment was a fraudulent and invalid exercise of the power of appointment and that it might be set aside, with consequent relief against the defendants the Finance Co., who were charged with notice of the trusts of the settlement and of the fraud. The bill did not make any case or claim for rectification of the appointment or mortgage. By the decree, dated 6th May, 1904, which is prefaced by a recital that "the Court doth not think fit to make any order as to the specific relief sought by the bill," it was declared that at the time of the execution of the deed of appointment Sarah Ann Stanton intended that it should be subject to a provision for raising a portion or sum of £100 for each of two of the plaintiffs and the defendant Susan Nicholls, and it was ordered that on the decease of Sarah Ann Stanton those sums

should be raised by the defendants the Perpetual Trustees Co. out of the land, and paid to the beneficiaries with interest at 5% per annum, which was to be charged upon the land in priority to any mortgage thereon and might be raised by mortgage. The decree further ordered that the land should stand discharged from the Finance Co.'s first mortgage except as to Sarah Ann Stanton's life estate. From this decree both the plaintiffs and the defendant companies have appealed, but the defendants the Trustees Co. do not press their appeal. The reasons for the judgment were fully stated in Court by *Clark* J. at a later date. The learned Judges, while agreeing that the allegations contained in the bill, if conclusively established, would support a decree in accordance with the power of the bill, thought that the proof of those allegations was very largely dependent upon the evidence of Gilbert, who is the husband of one of the plaintiffs, and who acted with John William in the negotiations which led to the preparation and execution of the deed of appointment and subsequent mortgage. The Court thought that the evidence of the defendant Sarah Ann, on which the plaintiffs also relied, and which was taken *de bene esse* in consequence of her age and infirmity, was inconsistent with the evidence of Gilbert, and that the evidence of both was contradicted on material points by the evidence of witnesses for the defendants. They then proceeded to examine the evidence of the witness Gilbert in detail, comparing it with the other evidence in the case, and arrived at the conclusion that his testimony was unreliable. They were unable to find any other evidence of the alleged bargain between John William and his mother. They therefore thought that the plaintiffs had failed to establish their case on this point. We will deal later with the reasons for their adverse judgment against the Finance Co.

This Court is very reluctant to differ from the conclusions arrived at by learned Judges upon a question of fact which depends upon the credibility of witnesses examined orally before the Court. If, therefore, there were no more in the case, we should be content to rest our judgment on this part of the case on this ground. But the appellants maintain that the documentary evidence and undisputed facts establish conclusively that the execution of the

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deed of appointment and the subsequent mortgage to raise money to be applied in payment of the debt of Sarah Ann Stanton and her husband were parts of the same transaction, and show that the appointment would not have been executed if John William had not, concurrently with his mother's agreement to execute it, agreed to execute the mortgage of his estate in remainder for her benefit. It is necessary, therefore, to examine the undisputed facts more fully. It appears from them that a day or two after 8th March, John William signed and left with the Finance Co. an application for a loan upon a printed form which began thus: "I, J. W. Stanton of Port Cygnet offer the property which I value at £1500 described in accompanying proposal as security for a loan of £500 to be advanced to me from the funds of the Tasmanian Loan Guarantee and Finance Co. Ltd. for three years at 7%." Then followed a statement to the effect that the applicant deposited a fee of £2 2s. for a valuation fee, and an undertaking to execute a mortgage, with other usual stipulations. At the foot opposite the word "Name" was written "J. W. Stanton," opposite the word "Address" "Port Cygnet," and opposite the word "Occupation" "Farmer." It was signed "John Wm. Stanton." The accompanying "proposal" gave as the name of the applicant "John William Stanton," as his occupation "Orchardist," and as his address "Cradoc Road, Port Cygnet." The schedule of property at the foot of the proposal described the land in question as situated at Cradoc Road and containing an area of 35 acres 3 roods 12 perches, with a frontage of about 25 chains, and the improvements upon it as consisting of a dwelling-house with six rooms and attic built of wood, with an apple house and two sheds. The spaces for giving other particulars were left blank. The proposal contained no statement of the title of the applicant to the land, and it is by no means clear that in making this application he intended to make it for himself. The circumstances seem rather to suggest that he was acting as agent for his mother. On 14th March the valuator of the company made his report upon the application, in which he valued the property at £1000, and certified that the buildings and improvements ought to be insured for £280. The application and valuation came in due course before the directors of the company, and on 18th March their

solicitor, Mr. Simmons, was instructed to prepare a mortgage. He thereupon procured the title deeds, and on examination found of course that John William, the nominal applicant, had no title. Gilbert, and John Stanton, the father, apparently on the same day, called on him, when according to the contemporaneous entry in his diary he explained to them the difficulty in the way of title, pointing out that Sarah Ann had only a life estate with power of appointment to one or more of her children, and advised them fully how the difficulty could be met. He did not say what advice he gave, but it is suggested that he must have advised that it was necessary either to execute an appointment in favour of one or more of the children or to obtain the concurrence of all. He denied that he suggested an appointment to John William. On 24th March John William and Gilbert came to Mr. Simmons's office and gave him instructions to prepare a deed of appointment from Mrs. Stanton to John William. The deed was prepared on the same day, and was executed on 16th April, the delay having been occasioned by the restraint on anticipation of the life estate. On 30th March Mr. Simmons sent a clerk to Port Cygnet to see John William and explain to him that his mother could not give security over her life estate without an order of the Court. On the following day he received a telegram from Mrs. Stanton instructing him to obtain the necessary order. The application was made on 28th April and granted. In support of it Mrs. Stanton made an affidavit, in which, after stating the settlement and the appointment, she said that she was desirous of mortgaging her life interest in the land, and that her son John William was willing to join with her in mortgaging the land in order to raise £500 to enable her to discharge her debt to Harvey and the costs incidental to the proposed loan. In the meantime Mr. Simmons had seen John William and conferred with him "as to carrying out the mortgage to the Finance Co.," and had handed him the appointment "and fully instructed him as to getting the same completed," and he also conferred with him as to the lease for seven years before mentioned. On 2nd May he attended the mortgagors at Port Cygnet, read over the mortgages to them, and attested their execution. John William being dead, his version of the transaction cannot be obtained, but upon these facts, and

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entirely irrespective of Gilbert's evidence, it is almost impossible to hold that the appointment was unconnected with the mortgage, or to suppose that the promise of John William to give the mortgage was not, in part at least, the inducement which led his mother to execute the appointment in his favour: or, to put it in other words, to suppose that the power of appointment would have been exercised at that time but for the desire to discharge Harvey's supposed security and John William's promise to join in a mortgage for that purpose. The learned Judges, dealing with another part of the case, which it will be necessary to discuss more fully in considering the cross-appeal of the Finance Co., were of opinion that John William did not intend when he executed the mortgage to bind his interest in the land, but executed it merely as a matter of form to enable his mother to give a good security upon her life interest. At present it is sufficient to say that we are unable to concur in this view.

The general rule relied on by the appellants, and as to which there is no doubt, is, as expressed by Lord *Westbury* L.C. in *Duke of Portland* v. *Topham* (1), "that the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and interest of the power.)" In the same case Lord *St. Leonards* said: "A party having a power like this must fairly and honestly execute it without having any ulterior object to be accomplished. He cannot carry into execution any indirect object, or acquire any benefit for himself, directly or indirectly." Does then the fact that the appointment in this case was so intimately associated with the mortgage necessarily bring the case within the prohibition? Or may the *primâ facie* inference of invalidity be rebutted by the circumstances of the case? It must be remembered that the appointor was tenant for life in possession of the estate, and, although she was not just then in good health, her life estate may have been of considerable value. Moreover, since the date of the settlement

(1) 11 H.L.C., 32, at p. 54.

she had expended over £300 upon the land in permanent improvements. In *M'Queen* v. *Farquhar* (1), the case was this: By a settlement the land in question was settled to the use of A. for life, with remainder to the use of his wife for life, with remainder to the use of such of his children as he should by deed or will appoint. By deed of 15th July, 1771, A. appointed the land to his eldest son Robert (apparently the only son of age) subject to the life estates. By indentures of lease and release dated 30th and 31st August in the same year, reciting the settlement and appointment, the father, the mother, and Robert in consideration of a sum of £8000 expressed to be paid to all of them conveyed the land to one T. It appeared from the abstract of title that A. had before the execution of the appointment entered into a contract with T. for the sale of the estate to him, and had obtained an adverse opinion from counsel on the question whether he could make a title without making an appointment to the son of age. The appointment was then made. T.'s successor in title having contracted to sell the land, it was objected by the purchaser that upon these facts the appointment by A. to his son Robert appeared to have been made under a previous agreement between them, and that if the father derived any benefit from that agreement, which seemed probable, or even made a previous stipulation that his son should join him in the sale, which there was the strongest reason to apprehend, it would have been a fraudulent execution of the power. Lord *Eldon* said (2), "It is clear, if nothing appeared, but, that the father and mother, seised for their lives, with such a power, appointed in favour of their son in fee, and afterwards by a transaction, separate from, or connected with, the transaction of the power, supposing, their intention had been to give the entire benefit of the reversion to their eldest son, after such appointment, either by previous or subsequent contract, to which the son was a party, they had sold the estate for £8000, the full value, and upon the face of the instruments that money appeared to have been paid to the three, in law and equity that would have been a payment to them according to the interests they had in the estate." He proceeded to point out that mere suspicion of fraud was insufficient,

(1) 11 Ves., 467.

(2) 11 Ves. 467, at p. 479.

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saying (1): "The Court would go a great way, and would make great havoc amongst titles, by holding, that, afterwards, at a considerable distance of time, or immediately, (for there must be regard to the intervening circumstances) as such a transaction took place parties, who might take improper advantages in their dealings upon the estate, they must prove, that they did not." And, after referring to the facts in detail, he added: "It does not appear, that the estate sold for less than its value; that the son got less than the value of his reversionary interest. But the estate becoming his absolutely by the appointment, he by an instrument, affected by nothing but the contents of it, as the owner of the reversion accedes to the purchase; conveys with his father and mother, in consideration of £8000; and the parties, taking the conveyance, pay the money to the father, the mother, and the son; to be dealt with according to their respective interests: that is, according to their rights in the land; and though the contract with Trefusis was only to substitute money for the estate, there was nothing to show, that the son was not to receive a due proportion of the money, when the contract was afterwards executed by the deed; in which he joins; and with his father and mother receives all the money."

This case appears to establish three principles: (I.) That it is no objection to an appointment of a reversionary estate by the tenant for life that he has entered into an agreement with the intended appointee that the estate shall afterwards be sold and the purchase money divided between them in proportion to the value of their respective interests; (II.) That, when upon a conveyance of land by the owners of the life estate and the estate in remainder the purchase money is expressed to be paid to them jointly the presumption is that it is paid to them in proportion to their respective interests in the land; and (III.) That the burden of proof in such a case lies on those who set up the case of fraud.

Cockcroft v. *Sutcliffe* (2) was a case in which a tenant for life with a power of appointment among his children appointed to two of them, and then joined with them in a mortgage, the money being expressed to be paid to all of them. It appeared that it had been arranged that the father should enter into partnership with the two appointees in a business on equal shares, to be carried on

(1) 11 Ves., 467, at p. 480. (2) 25 L.J. Ch., 313.

upon the settled property, for which purpose the trustees of the settlement granted a lease to the father. It was further agreed that for the purpose of carrying on the business a sum of £800 should be raised on the security of the father's bond, a mortgage of the fixtures used in the business, and a mortgage by the sons of their interest in the estate in settlement. In order to facilitate this arrangement the father appointed the estate to the two sons subject to his life interest, and they executed a mortgage of their reversionary interest accordingly. *Wood* V.C., after stating the rule of law and referring to *M'Queen* v. *Farquhar* (1), from which he quoted Lord *Eldon's* words, "There was nothing to show that the son was not to receive a due proportion of the money, when the contract was afterwards executed by the deed," proceeded (2): "I think, seeing that the father does throw into this matter, clearly and manifestly for the sons' benefit, for starting them in life, considerable property of his own, I am entitled to look upon it as Lord *Eldon* looked upon it in *M'Queen* v. *Farquhar* as if the money was raised according to the respective rights of all the parties interested in the property." Finally he said on this part of the case: "As to the substance of the case, all the authorities justify me in holding it to be a *bonâ fide* appointment. In the cases which have been cited as to the possibility of the father getting a benefit in the manner suggested, through this mortgage, there is nothing to prevent my upholding the appointment." This case is authority for the further principle that, when the arrangement in pursuance of which the appointment of a reversionary estate is made is such that in substance the appointee gets the full value of the reversion, the fact that the appointor derives a benefit corresponding to the value of his life estate is not sufficient to bring the case within the rule. It further establishes that regard is to be had to the substance rather than to the form of the transaction.

In *Cooper* v. *Cooper* (3), *James* V.C., after remarking that the case was "an illustration of a class of cases in which rules laid down by the Court of Chancery for the prevention of fraud are endeavoured to be strained, upon technical grounds, so as to produce fraud in such a way that one sometimes cannot help

(1) 11 Ves., 467, at p. 481.

(2) 25 L.J. Ch., 313, at p. 315.

(3) L.R. 8 Eq., 312.

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wishing that there was a Court of Equity for the purpose of correcting the dealings of the Court of Chancery in these matters," went on to say that in that case, fortunately, he was able to deal, not with any technical rule, but with the substance and truth of the case, which he proposed to do, and came to the conclusion on the facts that, although the appointor in form obtained a small contingent benefit for himself from the appointed property, there was no corrupt fraudulent or sinister purpose whatever on the part of the appointor, that the appointment was made by him in honest execution of his power and substantially for the benefit of his daughter the appointee. On appeal (1), the decision was affirmed, but on different grounds. Lord *Hatherley* L.C. did not "see his way to break in upon the rule that the donee of a power cannot stipulate for any benefit for himself with reference to the exercise of the power; and that if he does so, the whole appointment is vitiated by the consideration that he has not made it with the simple intention of providing for the children." He put the question, "Would the appointment have been made but for the condition?" and found himself upon the facts able to answer the question affirmatively. This case therefore does not help the respondents. On the other hand, not being a case of an appointment of a reversionary interest, it does not affect the principles established by the cases of *M'Queen* v. *Farquhar* (2) and *Cockroft* v. *Sutcliffe* (3.) In *Re Huish's Charity* (4), Lord *Romilly*, after referring to these two cases, said: "The meaning and the good sense of the rule appears to be, that if the appointor, either directly or indirectly, obtain any exclusive advantage to himself, and that to obtain this advantage is the object and the reason of its being made, then that the appointment is bad; but that if the whole of the transaction taken together shows no such object, but only shows an intention to improve the whole subject-matter of the appointment for the benefit of all the objects of the power, then the exercise of the power is not fraudulent or void, although by the force of circumstances such an improvement cannot be bestowed on the property which is the subject of the appointment without the appointor to some extent participating therein."

We proceed to apply these principles to the present case. In

(1) L.R. 5 Ch., 203.
(2) 11 Ves., 467.
(3) 25 L.J. Ch., 313.
(4) L.R. 10 Eq., 5, at p. 9.

March, 1898, the value of the life estate was uncertain. The rental value of the land was taken at £80. The tenant for life in fact lived for six years longer. She was indebted to the extent of £440, of which sum more than £300 had been expended in permanent improvements which would enure to the benefit of the person who ultimately became entitled to the remainder. She had not, of course, as tenant for life any lien upon the land for the value of the improvements, but there can be no doubt that she had power, on appointing the land to any of her children, to charge it with a corresponding sum to be distributed amongst the other children, so as in effect to recoup the amount by which her personal estate would have been diminished if the debt remained unpaid at her death. On the other hand, about £130 of the debt consisted of rent which John William ought to have paid to Harvey. Substantially, therefore, the whole of the debt consisted either of moneys which John William was bound to pay or moneys with which she could effectually charge the reversionary interest. In the absence of evidence it would be presumed that the mortgage money was distributed between the tenant for life and the remainderman in proportion to their respective interests. We know, however, how it was actually disposed of. £130 of it went in payment of John William's debt, and practically the whole of the residue in payment of Sarah Stanton's debt. If her expectation of life were valued at six years (as it turned out), the value of her life estate, having regard to the lease of 4th May at £80 per annum, would have been apparently more than £300. Let us suppose for a moment that it was valued at £320, and that she desired to apply the whole value in payment of her debt, and that John William, on the other hand, desired to raise and pay the £130 for which he was responsible, (and which in the event turned out to be approximately the actual burden cast on the reversion) these two sums making up the total liability to Harvey. And suppose, further, that it was agreed that the necessary amount to defray the costs of a mortgage should be included in the sum to be borrowed and borne proportionally. Could it be affirmed under these circumstances that the mortgage money was not divided between the mortgagors with a proper regard to the value of their respective interests?

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Or suppose that the mother had called John William's attention to the fact that if she carried out her known intention to appoint the land in his favour he would be getting the advantage of the moneys expended on improvements to the exclusion of his sisters, and had insisted that he should undertake to make the sum so expended a charge upon the land as a condition of making the appointment, and he had accepted the position, and had suggested that the same purpose would be better served by his joining in a mortgage to raise the money and pay the debt in his mother's lifetime; in this view could it be contended that the money was not properly distributed? Or again, suppose that John William had accepted, as an honourable obligation incumbent upon himself, the debt incurred for the improvement of the property which was to be his, in which view practically the whole of the £440 would have been regarded as his debt as between himself and his mother. In this view Sarah Stanton would have received not more, but much less, than her proportional share of the mortgage money. In our opinion, if any of these states of facts had existed, or any state of facts analogous to them, the presumption, which, as Lord *Eldon* says, arises from the payment of the purchase money to both the mortgagors, would not be rebutted. And the circumstance that the parties may have taken an erroneous view of the value of their respective interests would not, even if proved, affect this result. Both parties were of full age, no case of undue pressure is set up, and there can be no reason why they should not have come to a mutual understanding as to the respective values of the life estate and the reversion, or as to the amounts which they recognized as being fairly due by each of them in respect of the debt, or as to the amounts which should be regarded as charged upon their respective interests. It has been already pointed out that, John William being dead, his version of the negotiations between himself and his mother cannot be obtained. And it may be said that there is no evidence to support either of the hypotheses above suggested. There is some evidence (on which indeed the Court acted in another part of the case) that Sarah Ann desired that John William should undertake a burden of £300 in favour of his sisters, but this seems to have been in addition to the charge to be imposed upon the land by the mort-

gage. But it is not necessary that the exact terms of the bargain should have been specifically formulated. Both parties were familiar with the facts, and must be taken to have had them in their minds during the negotiations. And, if the result was such that if it had been arrived at on arithmetical or actuarial principles it would have been fair, a Court of Justice is not justified in holding the bargain fraudulent on the conjecture that the parties did not themselves realise how fair it was. For those reasons we are of opinion that the plaintiffs have failed to discharge the burden of proof incumbent upon them. In the result we agree with the conclusion of the Supreme Court on this point, but not for the same reasons. The plaintiffs' appeal therefore fails.

We pass now to the cross appeal. The decree as already stated directed that the defendants the Perpetual Trustees Co., the administrators of John William, should after the death of the tenant for life raise out of the 35 acres the sum of £300 with interest at 5% for the benefit of three of the daughters, and that these sums should be charged on the land in priority to any charge thereon. The appellants the Trustees Co. do not press their appeal from this part of the decree, and it is therefore unnecessary to express any opinion with regard to it. It must, apparently, be taken to have been made as against them by consent. But the decree went on to order that the 35 acres should stand discharged from the Finance Co.'s first mortgage except as to the estate of the tenant for life. Now, as soon as it is established that the appointment was good, it follows that John William had a good title to the estate in remainder, and that his mortgage of the estate is valid unless successfully impeached on some independent ground. The learned Judges, as already stated, were apparently of opinion that he did not intend to mortgage his own interest in the land, and did not understand that he was doing so. What they say on this point is that they "cannot find any reliable evidence outside of the mortgage itself that he did." But, with respect, this is putting the onus on the wrong party. If the fact could be established, it might, perhaps, in a suit brought for that purpose, be ground for rectifying the mortgage, or even for setting it aside as to the estate in remainder. The

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difficulties in the way of a successful prosecution of such a suit are obvious. The plaintiffs' bill, however, contained no suggestion of such a case. If it had done so, the mortgagees would, at least, have had an opportunity of directing their evidence to the point. This is, of itself, sufficient to show that this part of the decree cannot be supported. It is right, however, to say that we are unable to discover upon the evidence any proof that would justify a Court in setting aside or rectifying the first mortgage as against the Finance Co. There is no evidence that John William did not know that he was executing a mortgage, or that the Company had any reason to suppose that he did not fully understand its contents. The cross appeal on this point must therefore be sustained. The defendants, the Perpetual Trustee Co., by their answer formally submitted for the decision of the Court the question whether any and what provision should be made for the daughters out of John William's estate, but the Finance Co. did not join in the submission. The plaintiffs have failed to establish any case against them in respect of either of their mortgages, and they now claim the priority to which they are manifestly entitled.

The bill did not impeach the security upon the life estate, but related exclusively to the estate in remainder. As against the Finance Co., the plaintiffs have failed to establish any case entitling them to relief of any sort. They were not necessary parties as to the relief given, although not prayed in the bill, against the Trustees Co. The bill ought therefore to have been dismissed as against them simpliciter, and the declarations objected to should have found no place in the decree.

With regard to costs, the Court ordered that the costs of all parties, except the defendants' costs, should be paid by the Trustees Co. out of the estate in remainder, and that the costs of the defendant Co. should be paid out of John Williams' estate and effects.

Mr. Lodge for the trustees offered to agree to an order against them as administrators to pay the plaintiffs costs and those of the defendant Susan Nicholls of the bill and answer and such further costs as would have been incurred by an inquiry as to the amount of provision that should be made under the submission in their

answer already mentioned. This is clearly the most to which they were entitled. We think, therefore, that the decree should be varied by dismissing the bill with costs as against the defendants the Finance Co., by substituting for the declaration that the charge of £300 shall have priority over any mortgages or charges thereon, a declaration that such charge shall be subject to any valid mortgages or charges, by omitting the declaration that the 35 acres shall stand discharged from the first mortgage, and the directions as to costs, and by substituting a direction that the costs of the plaintiffs and the defendant Susan Nicholls be taxed in accordance with Mr. Lodge's offer and paid by the defendants the Trustees Company out of John William Stanton's estate.

Plaintiffs' appeal dismissed. Defendants Finance Company's cross-appeal allowed and Bill dismissed with costs as against them. Decree varied as to plaintiffs' costs as against the defendants.

Solicitors for appellants, *Dobson, Mitchell & Allport.*

Solicitors for respondents other than Sarah Ann Stanton, *Simmons, Crisp & Simmons.*

Solicitors for respondent Sarah Ann Stanton, *Crisp & Crisp.*

H. E. M.