[HIGH COURT OF AUSTRALIA.]

A'BECKETT AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

THE TRUSTEES EXECUTORS AND AGENCY CO. LTD. AND OTHERS . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, 1907, *Sept.* 26.

1908, *Feb.* 24, 25, 26; *March* 27.

Griffith C.J., Barton and Isaacs JJ.

Settlement—Trustee and cestui que trust—Appointment—Gifts out of specific fund—Gift of residue—Abatement—Proceeds of sale—Rescission—New appointment—Revocation—Substituted gifts—Construction.

In execution of the powers reserved by a marriage settlement, a revocable appointment was made by deed whereby the appointors, the husband and wife, directed the trustees to hold the net purchase money already received and to be received in respect of a certain contract of sale upon trust, on the death of the survivor of the appointors, as to three several sums of £15,000 for each of three of their daughters, and as to £12,500 for their fourth daughter (to whom had already been advanced £2,500), and as to the "remainder" one moiety to each of their two sons. The contract of sale referred to was of certain land subject to the settlement, and was for a sum of £100,000, of which £20,000 had already been paid. The deed also contained appointments of two pieces of land, which had been bought out of the £20,000, one to a daughter and the other to a son. The contract of sale was subsequently rescinded on the purchaser paying a further sum of £20,000.

Held, by *Griffith* C.J. and *Barton* J., that, in the events which had happened, the principle that, where a person disposing of a sum among different persons acts on the assumption that he is dealing with a fund of specific amount, and gives part of the fund to one or more persons and the residue to another, if the fund falls short, all the gifts abate proportionately, would not apply, and therefore the sons would get nothing under the gift of the "remainder."

Page v. *Leapingwell*, 18 Ves., 463, distinguished.

By *Isaacs* J. That principle would have applied to the appointment as it stood before the rescission of the contract of sale, and what happened afterwards would not alter the construction of the appointment.

Out of the balance of the £40,000 paid in respect of the contract of sale, other lands were afterwards purchased, and certain advances were made to one of the appointors and to some of the beneficiaries, leaving a balance of £7,600. The appointors then made a new appointment whereby they revoked the appointments of the prior deed as to the net purchase money therein referred to, "but so far only as may be necessary to the validity of the directions and appointments hereinafter contained and not further or otherwise." They then appointed the land the subject of the contract of sale to their four daughters equally as tenants in common; they appointed a sum of £1,000 (part of the £40,000) to one daughter; they revoked the appointment of the land appointed to one daughter and appointed it to one of the sons; they revoked the residuary appointment, "but so far only," (as before); they appointed two other pieces of land to a son and daughter respectively; they appointed all debts due by one of the settlors to one of the sons with a gift over to the other; they appointed all debts owing by either son to that son; and they appointed that the trustees should stand possessed of the moneys in their possession or under their control subject to the trusts of the settlement "of which no other appointment is made" by the first deed "or by these presents" upon trust as to two-thirds to one son and as to one-third to the other. Each of these appointments was to take effect on the death of the survivor of the appointors.

Held, by *Griffith* C.J. and *Barton* J. (*Isaacs* J. dissenting), that, having regard to the known state of the trust fund, under the second deed the appointment to the two sons of the moneys in the hands or under the control of the trustees &c. could only apply to the £7,600, that no other appointment of that sum was made by either deed, or within the meaning of the second deed, and therefore that the two sons were entitled to it in the proportions of two-thirds and one-third to the exclusion of the daughters.

Judgment of *Hood* J. reversed.

APPEAL from the Supreme Court of Victoria (*Hood* J.).

The Trustees Executors and Agency Co. Ltd., who sued as trustees of the marriage settlement of William Arthur Callander àBeckett, deceased, and his wife Emma àBeckett, deceased, and of two deeds of appointment dated respectively 10th September 1889 and 9th February 1900, made by Mr. and Mrs. W. A. C. àBeckett, instituted proceedings by originating summons to obtain the opinion of the Supreme Court on certain questions arising under such settlement and deeds of appointment. The defendants were William Gilbert àBeckett and Arthur Heywood St. Thomas

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àBeckett, sons of Mr. and Mrs. W. A. C. àBeckett, and Emily àBeckett Backhouse, Emma Minnie Boyd, Constance Matilda Brett, and Ethel Beatrice Ysobel Chomley, daughters of Mr. and Mrs. W. A. C. àBeckett. The questions asked by the summons were as follow:—

"1. (Generally). Upon what trust or trusts should the fund consisting of the sum of £7,600 together with interest accrued thereon and representing so much of the sum of £37,500 received under the contract of sale to the General Land and Savings Co. Ltd. as is not represented by other properties or funds specifically appointed by the said deeds be held?"

(This question was at the hearing amended by striking out the words "consisting of the sum of £7,600.")

"2. (In particular). Does the appointment of the lands in the said contract of sale comprised which appointment is by the said deed dated 9th February 1900 made to the defendants the daughters of the said deceased namely E. àB. Backhouse, E. M. Boyd, C. M. Brett and E. B. Y. Chomley entirely take the place of and stand in substitution for the appointment of £57,500 by the said deed dated 10th September 1889 made to the said defendants the said daughters?

"3. (In particular). Are the defendants (both sons and daughters) in respect of the said fund consisting as aforesaid entitled to share proportionately according to their interests in the purchase moneys under the said contract of sale as set forth and determined by the said deed dated 10th September 1889 and if so what is the amount of each proportionate share?

"4. (In particular). Should the said fund consisting as aforesaid be held in trust for the defendants the said daughters only and in proportions corresponding to the proportions in which the sum of £57,500 was appointed to them by the said deed dated 10th September 1889?"

The provisions of the two deeds and the other material facts are sufficiently set out in the judgments hereunder.

The summons was heard by *Hood* J., who ordered and declared that the four daughters were, to the exclusion of the two sons, entitled to the fund together with interest accrued thereon, representing so much of the sum of £37,500 received under the

contract of sale to the General Land and Savings Co. Ltd. as was not represented by other properties or funds specifically appointed by the deeds of 10th September 1889 and 9th February 1900, and that the daughters as between themselves were entitled to share in the said fund and interest in proportions corresponding to the proportions in which the sum of £57,500 was appointed to them by the deed dated 10th September 1889.

The two sons W. G. àBeckett and A. H. St. T. àBeckett now by special leave, (*àBeckett* v. *Backhouse* (1)), appealed to the High Court.

Mitchell K.C. and *Guest*, for the appellants. The insertion in the deed of 9th February 1900 of the words "but so far only as may be necessary to the validity of the several directions and appointments hereinbefore and hereinafter contained and not otherwise or further" was for the purpose of preserving the validity of advances made on the assumption that the deed of 10th September 1889 was effectual. Whatever was the object of those words, the appointment of all moneys in the hands or under the control of the trustees and of which no other appointment was made is an appointment "hereinafter contained." That appointment can only refer to the uninvested and unappointed balance of the money received under the contract of sale, for the trustees never had, nor could they have, any other money in their hands, inasmuch as money received by them in respect of sales of land by them was subject to the same directions as the land itself. The money received as deposit on a purchase is not purchase money if the sale is not completed; therefore, the sale to the General Land and Savings Co. having fallen through, there was no purchase money to which the deed of 10th September 1889 could apply. Assuming the moneys in question are subject to the deed of 10th September 1889, the appellants are entitled to have an abatement all round. The case falls within the principle of *Page* v. *Leapingwell* (2), viz., that where a settlor, in dealing with an ascertained sum, makes a gift of part of the fund to one or more persons, and gives the residue to another, all the gifts

(1) 4 C.L.R., 1334. (2) 18 Ves., 463.

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will be treated as specific and, if the fund falls short, all the gifts will abate proportionately. See *Walpole* v. *Apthorpe* (1).

[ISAACS J. referred to *In re Tunno*; *Raikes* v. *Raikes* (2).]

In that case there was no division into fractions or aliquot parts, but there is here. See also *Wilson* v. *Kenrick* (3); *Baker* v. *Farmer* (4); *Wright* v. *Weston* (5); *Ashburner* v. *Macguire* (6).

[ISAACS J. referred to *Higgins* v. *Dawson* (7); *Robertson* v. *Broadbent* (8); *In re Maddock*; *Llewelyn* v. *Washington* (9).]

Pigott, for the respondent trustees.

Weigall K.C. (with him *Arthur*), for the other respondents. By the deed of 10th September 1889 the gift of the residue of the proceeds of sale was not a specific legacy. The appointors were not then dealing with a fund of a specified amount. It was not known what the amount would be, for there would be deductions in respect of commission &c., from the amount of the purchase money. The appellants were only intended to have what should be left after payment of the legacies to the daughters. There was no division into aliquot parts: *De Lisle* v. *Hodges* (10); *In re Tunno*; *Raikes* v. *Raikes* (11).

[ISAACS J.—The facts in *In re Phillips*; *Eddowes* v. *Phillips* (12) are very similar to those in regard to the deed of 10th September 1889, and it was held that, though there was a gift of residue, the division was into aliquot parts.]

The intention to divide a fund into aliquot parts must be clearly manifest on the face of the document itself, and that is not so in the present case. That being so, and the fund being by reason of the sale falling through reduced to £40,000, which is less than the total amounts specifically given to the daughters, the appellants are not entitled under the deed of 10th September 1889 to any of the fund. The deed of 9th February 1900 made no difference in this respect. The intention expressed by that deed was that everything specifically dealt with by it should go

(1) L.R. 4 Eq., 37.
(2) 45 Ch. D., 66.
(3) 31 Ch. D., 658, at p. 661.
(4) L.R. 3 Ch., 537, at p. 540.
(5) 26 Beav., 429.
(6) 2 Wh. & T.L.C., 6th ed., p. 106.
(7) (1902) A.C., 1.
(8) 8 App. Cas., 812.
(9) (1902) 2 Ch., 220, at p. 228.
(10) L.R. 17 Eq., 440.
(11) 45 Ch. D., 66, at p. 69.
(12) 66 L.J. Ch., 714.

as it directed, but that everything not specifically dealt with should go as directed by the deed of 10th September 1889. In other words, the deed of 9th February 1900 relieved from the trusts of the deed of 10th September 1889 all the things which were specified in the later deed, but otherwise left the earlier deed to operate. In any event the Court should make it a condition that the appellants should not seek to recover any money paid away by the trustees in reliance upon the judgment appealed from.

Mitchell K.C. in reply.

[GRIFFITH C.J. referred to *In re Walpole's Marriage Settlement*; *Thomson* v. *Walpole* (1); *Reresby* v. *Newland* (2).]

Cur. adv. vult.

The following judgments were read :—

March 27.

GRIFFITH C.J. The question for determination in this case arises upon the construction of a deed of appointment dated 9th February 1900, made in execution of the powers reserved by a settlement dated 11th August 1859 executed in pursuance of antenuptial articles entered into on the marriage of Mr. and Mrs. W. A. C. àBeckett, by which real and personal property was conveyed to trustees upon trust, *inter alia*, after the death of Mr. and Mrs. àBeckett, for such uses for the benefit of the children of the marriage as they should by deed jointly appoint. The parties, other than the respondent company, are the children of the marriage. The deed contained a covenant to bring after-acquired property into settlement, but, so far as appears, no property ever became subject to the covenant.

By a revocable deed of appointment dated 10th September 1889 reciting a previous revocable deed of 29th October 1884, and further reciting that under the provisions of the original settlement a sum of £2,500 had been applied by the trustees of the settlement for the benefit of the respondent Mrs. Brett, all the appointments made under the former deed were revoked "so far as the same are by law revocable having regard to the herebefore recited advancement" to Mrs. Brett. The deed then

(1) (1903) 1 Ch., 928. (2) 2 P. Wms., 93.

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proceeded to appoint various portions of the trust estate. The first appointment was of lands to the appellants as tenants in common in fee, with gifts over in certain contingencies. The second was as follows:—"The trustees or trustee for the time being of the said settlement shall from and immediately after the decease of the survivor of them the said W. A. C. àBeckett and Emma àBeckett stand possessed of the net purchase moneys already received and to be hereafter received in respect of the contract of sale dated 30th June 1888 to the General Land and Savings Co. Ltd. of allotment 3 of section 4 City and Parish of Melbourne upon the trusts following that is to say—As to the sum of £15,000 part thereof Upon trust for E. àB. Backhouse her executors administrators and assigns As to the sum of £15,000 other part thereof Upon trust for E. M. Boyd her executors administrators and assigns As to the sum of £12,500 other part thereof Upon trust for C. M. Brett her executors administrators and assigns such last mentioned sum to be in addition to the sum of £2,500 already applied for her benefit as hereinbefore mentioned As to the sum of £15,000 Upon trust for the said E. B. Y. àBeckett her executors administrators and assigns As to one moiety of the remainder of the said purchase moneys Upon trust for the said W. G. àBeckett his executors administrators and assigns And as to the other moiety thereof Upon trust for the said A. H. St. T. àBeckett his executors administrators and assigns But in case either of them the said W. G. àBeckett and A. H. St. T. àBeckett shall predecease the survivor of them the said W. A. C. àBeckett and Emma àBeckett without leaving issue then the moiety to which the son so dying would have been entitled had he survived both his parents shall be held in trust for the other of such sons."

The third appointment was to the appellants and the respondent Mrs. Brett as tenants in common of so much of two parcels of land as might be found to be subject to the trusts of the settlement. The fourth appointment was of a piece of land at Gembrook to the appellant W. G. àBeckett; the fifth of a piece of land at Prahran to the respondent Mrs. Backhouse, if living at the death of the survivor of the appointors, with a gift over to the appellant W. G. àBeckett. Then followed a residuary

appointment of the residue of the trust premises, whether consisting of real or personal estate, to the appellants as tenants in common. All the appointments were revocable.

The purchase money payable under the contract of 30th June 1888, and intended to be dealt with by the second appointment, was £100,000, of which £20,000 had been received at the date of the deed of 1889, leaving £80,000 outstanding less incidental charges. Both the Gembrook and the Prahran land had been purchased out of the £20,000, whilst other portions of the money had been applied in advances to beneficiaries in accordance with the terms of the settlement. There was, however, a conflict between the appointments of the whole fund and the appointment of those lands which represented part of it. The whole of the settled property was in fact comprised in these appointments. The third appointment did not take effect, as the land to which it applied was found not to be subject to the trusts of the settlement.

In June 1891 a further sum of £20,000 was paid by the purchasers under the contract of June 1888, but in July 1893 the contract was rescinded by mutual consent, upon the terms that the vendors, the trustees of the settlement, should retain the £40,000 already received by them as well as retaining the land. The effect was that the land was unappointed otherwise than by the residuary appointment. It may be open to discussion whether under these altered circumstances the appointment of the fund of about £100,000 still subsisted as to so much of the £40,000 actually received as had not been expended in the purchase of land appointed by the same deed. Assuming that it did, the question would arise whether the shares of the several beneficiaries should abate in accordance with the principle followed by *Sir William Grant* M.R., in the case of *Page* v. *Leapingwell* (1), or whether the gifts to the daughters (amounting to £57,500), which would more than exhaust the actual fund, should be first satisfied subject to abatement amongst themselves, but leaving no part of it to the appellants, who, however, would obtain the land under the residuary appointment.

In one view of the present case it is necessary to determine

(1) 18 Ves., 465.

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this question, and as its determination will throw considerable light upon the construction of the deed of February 1900, I will deal with it at this stage. The principle underlying the decision of *Sir William Grant* M.R. is that, when a person, disposing of a fund amongst different persons, acts upon the assumption that he is dealing with a fund of specific amount, and then makes a gift of part of the fund to one or more persons, and gives the residue to another, then, if the fund falls short, all the gifts must abate proportionally. In that case the word used to describe the rest of the fund was "overplus." In the present case the word used is "remainder." It is sometimes said that in such a case the gift of the residue is regarded as a "specific" gift. But there is no magic in these words. The rule is a rule of common sense applied in order to give effect to the intention of the donor, and only applies to demonstrative legacies. It cannot be pressed to purposes for which it is not designed, or so as to defeat the intention of the donor, or, I think, if the diminution of the fund is the donor's own act. In the present case I cannot doubt that the intention of the appointors was to distribute the specific fund, which, as was expected, would represent the land contracted to be sold, amongst all their children in definitely allotted proportions, and not to give any preference to the daughters over the sons. And if, by reason of subsequent events, the sum representing the expected fund had fallen short—if, for instance, the trustees had taken a mortgage upon the land for the balance of the purchase money and had afterwards sold it at a price insufficient to make up the whole £100,000—the gift to the sons and daughters would, in order to give effect to the intention of the settlor, have had to abate proportionally. But I think that this intention was contingent upon the whole fund, whatever its actual amount might be, being got in and becoming available for distribution. When that contingency failed it is impossible to say that an intention to be inferred from one state of facts ought to be inferred as applicable to facts essentially different, or to hold that the donors intended that the sons should still share in the fund which represented part of the purchase money, and should also take the whole of the land under the residuary appointment. In my opinion, therefore, if

the appointment of the fund contained in the deed of 1889 continued in force at all after the rescission of the contract of sale, the gifts to the daughters would have had to abate proportionally, but the gift to the sons would have been treated as residuary for all purposes, and would have failed.

The application of this doctrine would not, in the actual facts, have brought about equality in abatement even between the daughters, since Mrs. Brett had already received £2,500 in full, which she was not required to bring into account, and the Gembrook land and the Prahran land, bought out of the fund, had been appointed to the appellant W. G. àBeckett and the respondent Mrs Backhouse respectively. But any argument to be derived from these circumstances would seem rather to negative the continued efficacy of the appointment than to exclude the application of the rule.

In order to determine the amount of the residue of the fund originally intended to be divided between the appellants some deductions would have had to be made from the full sum of £100,000 in respect of the amounts expended in buying the Gembrook and Prahran lands, as well as in respect of any sum paid out of the purchase money for commission and expenses, and the actual aliquot shares of the several beneficiaries in the diminished fund would depend on the total so ascertained. If the whole sum of £100,000 had been available, the distribution would have been in 80ths, 12 parts going to each of three daughters, 10 to the fourth, and 17 to each of the sons. In the actual circumstances the proportionate share of the daughters would have been somewhat larger and those of the sons somewhat smaller, but for convenience we may speak of the division as into 80ths. Under the altered circumstances the division among the daughters would have been in 23rds.

This being the state of affairs, and the deed of September 1889 no longer operating to give effect to the intention of the appointors when they executed it, the deed of 9th February 1900 was executed. In the meantime other land had been bought out of the fund, and some payments had been made out of it by way of loans or advances to W. A. C. àBeckett and to beneficiaries. The

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balance of the fund, represented by cash and government securities, amounted to about £7,600.

This deed, which purports to be indorsed upon or annexed to the deed of September 1889, first recited that since the execution of that deed the contract of sale of 30th June 1888 had been rescinded and the lands comprised in it had become re-vested in the trustees of the settlement and were held upon the trusts of the settlement subject to the terms of the prior appointment "so far as applicable thereto," and that the appointors were desirous of revoking and altering "in manner and to the extent hereinafter appearing" the appointments made under the former deed of appointment, and subject thereto of finally releasing the power of appointment. The appointors then revoked, "but so far only as may be necessary to the validity of the directions and appointments hereinafter contained and not further or otherwise," the directions and appointments in the deed of September 1889 contained as to the net purchase money then already received and to be thereafter received under the contract of sale of 30th June 1888, and made eight several appointments, which, so far as material, were as follows:—

First: They appointed the lands which had been the subject matter of the contract of sale to the four daughters (respondents) in equal shares as tenants in common in fee without liability to give credit for or bring into account the amount of any advances theretofore made to them or for their benefit.

Second: They appointed a sum of £1,000 (which was in fact part of the £40,000) to the respondent Mrs. Chomley.

Third: They revoked the appointment of the Prahran land to the respondent Mrs. Backhouse, and appointed it to the appellant W. G. àBeckett.

Next came, introduced by the words "and these presents further witness," a revocation of the residuary appointment in the deed of September 1889 "but so far only as may be necessary to the validity of the several directions and appointments hereinbefore or hereinafter contained and not further or otherwise," immediately followed by five other appointments, as if intended to be in substitution for it. They were as follows:—

Fourth: The appointors appointed another piece of land at

Prahran, which had in the interval been bought out of the £40,000, to the respondent Mrs. Backhouse in fee.

Fifth: They appointed other lands, which had also in the interval been bought out of the same money, to the appellant A. H. St. T. àBeckett in fee.

Sixth: They appointed all moneys, which at the death of the survivor of them might be due to the trustees of the settlement by W. A. C. àBeckett (being other part of the same £40,000), to the appellant W. G. àBeckett if then living, but otherwise to the appellant A. H. St. T. àBeckett.

Seventh: They appointed all moneys, which at the death of the survivor of the appointors might be due to the trustees of the settlement by the appellants or either of them, to those appellants respectively so that such appointment should operate as a release.

Eighth: They appointed that from the decease of the survivor the trustees should stand possessed of the moneys then in their possession or under their control subject to the trusts of the settlement "of which no other appointment is made by the said within written deed of appointment of the 10th September 1889 or by these presents" upon trust as to two-thirds for the appellant W. G. àBeckett and as to one-third for the appellant A. H. St. T. àBeckett.

It is upon this last appointment that the question now arises for our determination. The appellants contend that it governs the fund of £7,600 already referred to, together with any other moneys which might by any chance be recovered for the trust in respect of expenditure (if any) improperly made by the trustees.

The respondents (other than the company who merely submit the matter for decision) contend that, as these sums form part of the £40,000, the appointment of the purchase moneys contained in the deed of September 1889 still governs them, and that they are entitled to the whole, or, alternatively, to a share bearing the same proportion to the whole as the £57,500 intended to be appointed by the deed bears to the whole sum intended to be appointed.

It is not in dispute that there was in fact no residuary trust fund upon which the eighth appointment could operate unless it applied to these moneys. As a matter of construction, I am of

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opinion that the appointment of February 1900 was not intended to, and did not in law, operate as an appointment of any funds not then actually subject to the settlement. But it was intended to be a complete disposition of all the funds so subject, and the investments representing them.

The appointors must, I think, be taken to have known of what the trust estate consisted, and *primâ facie*, some effect must be given to every part of the deed. If, however, the eighth appointment does not extend to these moneys it is altogether inoperative, since the deed in fact specifically appointed all the rest of the trust estate not included in unrevoked appointments made by the deed of 1889.

We can only ascertain the intention of the appointors from the words they have used, paying due regard to the subject matter. If we place ourselves in the position of the appointors under the circumstances already stated, and look at the matter from their point of view, there can be no doubt that the dominant intention was to make a fresh distribution of that asset of the settled property which at the time of the first appointment consisted of a sum of £20,000 and an expected further sum of £80,000, and at the time of the second deed consisted of the land which had been contracted to be sold, and a sum of £40,000 or investments representing it. The appointors did not, however, desire to disturb anything that had been lawfully done in accordance with the terms of the first deed while it subsisted in force. I do not stop to inquire whether they could do so. They accordingly appointed the land to the daughters to the exclusion of the sons, appointed specifically so much of the property in question as was represented by land or by debts owing to the trust estate, and then appointed to the sons the moneys which might "then," *i.e.*, at the death of the survivor, be in their hands. The word "then" shows that they contemplated that at the decease of the survivor the trustees would, or at least might, have some such moneys in their hands. They evidently, therefore, intended by those words to deal with an actual asset of the estate. In order to give effect to this disposition as well as the others, they revoked all the appointments in the first deed so far as was necessary. Now, in order that this final appointment should

have any effect, it was necessary that the appointments of the sums of £12,500 and the three sums of £15,000 (if they still subsisted) should, so far as they continued to affect the sum of £7,600, be revoked. Is there, then, anything in the language of the appointment of the moneys inconsistent with this view?

The first and second deeds contained specific appointments of land which represented part of the £40,000, and of moneys representing all the rest of it except the sum of £7,600. It seems to have been contemplated that this sum might be still further reduced before the death of the survivor by loans to W. A. C. àBeckett or the sons. Whether this could or could not be done without a breach of trust is not material to the present question.

The words "of which no other appointment is made" must mean "no appointment operating as an appointment of these moneys, *i.e.*, of moneys to be at the death of the survivor in the hands of the trustees." Upon a strictly literal construction this disposition is meaningless, for the first deed appointed the whole of the settled estate, either specifically or as a residue. The literal construction must then be rejected if any other is possible without doing violence to the words. I think another construction is fairly open. It was clearly intended that this new appointment should at any rate supersede the former residuary appointment so far as regarded moneys in the hands of trustees. There was no residuary real estate, and there could not be any other residuary moneys. The residue of moneys was given to the same persons, but in different proportions. We are thus one step advanced towards finding a meaning for the word "other," which must, if it is to have any effect at all, mean "inconsistent with giving effect to this present appointment." It cannot, therefore, include the residuary appointment in the first deed so far as that related to moneys. We are forced thus to the conclusion that the words "no other appointment" mean "no specific appointment inconsistent," &c. The word "specific" is not in the deed, and I use it in the sense of "descriptive" or "demonstrative." Is, then, the suggested continued appointment of the fund of £7,600, more or less, in 23rds, such a descriptive or demonstrative appointment as to fall within the words "other appointment" in the sense intended by the appointors? I think

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not. The continuance of that appointment was, as I have shown, just as inconsistent with giving effect to the new appointment of "moneys" "then" in the hands of the trustees as the old residuary appointment was. I think that the meaning of the words "other appointment" is an appointment which, in the events that had happened, (*i.e.* at the date of the deed), operated as an appointment of property definitely earmarked by actual description of the property itself in its existing conditions. These attributes no longer attached to the appointment of money to the daughters by the first deed. In the events that had happened that appointment had come to operate, if at all, merely as an appointment of a small residue of a fund of which the greater part, and possibly the whole, was specifically appointed by the second deed.

In the light of these facts, and bearing in mind that, unless the appellants' view is accepted, the residuary appointment of moneys was, and must have been known to the appointors to be, wholly inoperative, I am compelled, as a matter of construction, to the conclusion that the appointment of the purchase money by the first deed does not fall within the words "other appointment" in the sense in which they were used by the appointors in the second. This is the only construction which will give full effect to the whole deed, including the residuary appointment, and is, indeed, the only one which will give any effect at all to that appointment. For these reasons I think that the funds now in question were appointed by the second deed to the appellants to the exclusion of the daughters.

BARTON J. I have had the advantage of reading and considering the judgment which the Chief Justice has delivered. To my mind the course of reasoning therein followed is clear and convincing. The consequent construction of the two deeds of appointment brings the words of the donors in their true meaning into harmony with their intentions so far as the subject matter, the dealings with the funds, and the purchases of lands thereout in the interval between the two deeds, the consequent changes in the trust estate, and the surrounding circumstances assist us in the ascertainment of those intentions.

I therefore agree in the conclusions at which His Honor has arrived.

ISAACS J. The first contention of the appellants, namely, that the moneys, representing the purchase money fund and not otherwise specifically appointed, belong to the sons exclusively, cannot in my opinion be supported. The words relied on in the deed of 1900 do not, in my judgment, amount to a revocation of the appointment in the earlier deed. In the deed of 1889 there is an express appointment of these moneys, the appointment purporting to deal with the whole of them; of this there is no express absolute revocation, but it is argued that the appointment in the later deed supersedes that in the first as being inconsistent with it. The second appointment, however, is couched in language that cannot, as I conceive, bear the suggested interpretation. It speaks of moneys "of which no other appointment is made by the said within written deed of appointment of 10th September 1889 or by these presents." If these moneys are specifically appointed by either deed, they do not fall within the terms of this particular appointment. In fact, as I have already said, they were originally specifically appointed by the deed of 1889, and although I appreciate much of the argument as to the fairness of the suggested disposition and the probable desires of the settlors, I am unable to bend their language so as practically to reverse its plain ordinary meaning. In *Roddy* v. *Fitzgerald* (1), Lord *Wensleydale* said of a will:—"The first duty of the Court expounding the will is to ascertain what is the meaning of the words used by the testator. It is very often said that the intention of the testator is to be the guide, but the expression is capable of being misunderstood, and may lead to a speculation as to what the testator may be supposed to have intended to write, whereas the only and proper inquiry is, what is the meaning of that which he has actually written? That which he has written is to be construed by every part being taken into consideration according to its grammatical construction and the ordinary acceptance of the words used, with the assistance of such parol evidence of the surrounding circumstances as is admissible, to place the Court in the position of the testator."

(1) 6 H.L.C., 823, at p. 876.

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That I take to be the guiding rule in this case. Unless the later appointment is inconsistent with the first, there is no revocation of the earlier appointment, that being explicitly saved except so far as is necessary to effectuate the later appointments, and the moneys received as for purchase money being by the very words of the second deed recognized as still having their original character.

I do not stop to investigate what I may call the collateral arguments, based on extrinsic circumstances, such as, on the one side the depreciation in value of the land, and on the other the probable reasons—such as advances to the sons—for not revoking out and out the first appointment, because, whatever the motive, it was not done, and that appointment was left to stand except so far as it might be inconsistent with the new appointments; and as the language of the new appointment relied on cannot, in my judgment, be held to comprise the moneys now in controversy, it does not confer the right claimed by the sons. This view, if correct, would end the first contention. Now the words of the appointment, moneys "of which no other appointment is made by the said within written deed of appointment of 10th September 1889 or by these presents," are in themselves clear. If moneys as such are at the designated time in the hands of the trustees, and are not found to be specifically appointed by either deed, then this appointment operates. I think I may appropriately quote the words of Lord *Halsbury* L.C. in *Higgins* v. *Dawson* (1):—"One does not doubt that, where you are construing either a will or any other instrument, it is perfectly legitimate to look at the whole instrument—and, indeed, you must look at the whole instrument—to see the meaning of the whole instrument, and you cannot rely upon one particular passage in it to the exclusion of what is relevant to the explanation of the particular clause that you are expounding. That is perfectly true as a general proposition; but I ask myself here what other words—what part of the will, what provision other than the one I am construing, reflects any light on, or gives the smallest interpretation to, the particular words which I am called upon to expound."

I should refer to what is urged in opposition to this view,

(1) (1902) A.C., 1, at p. 3.

namely, that it gives no meaning to the words of the appointment relied on by the appellants. In the first place, I think such a meaning may be given, this particular appointment is of moneys which the trustees for the time being shall after the decease of the surviving appointor *then* have in their hands or under their control.

In the marriage settlement there was a covenant by W. A. C. àBeckett that, if his wife or he in her right should become entitled to any real or personal property of the value of £20 or upwards, it should be conveyed or assigned to the trustees upon the trusts of the settlement. This might have happened; but further, if it were the case that no other meaning than the one suggested by the appellants could be given to the words, that meaning appears to me too contradictory to the words to be the true one. I again apply the words of Lord *Halsbury* L.C. in *Hunter* v. *Attorney General* (1) quoted by him in *Higgins* v. *Dawson* (2):—"That certainly would be a strange mode of construing a will, that because you cannot find what else he must have intended to be done with his money except something of that nature, although it is admitted that there are no words in the will to convey the intention which it is suggested he had in his mind, you can invent provisions and impose conditions which the testator himself has not introduced." As Lord *Davey* said in the same case (3) that would be making a will for the testator and not interpreting the words he had used. That is what I feel here.

Looking at the frame of the second deed, I find it is broken up into sections. First, the recital of the rescission of the contract of sale, and of the desire to revoke, and alter in manner and to the extent thereinafter appearing, the appointments made by the first deed, and subject thereto of extinguishing the power of revocation, and then a series of provisions of distinct subject matters each introduced by the words "and these presents witness."

The first of the series is the limited revocation of the purchase money fund, followed by an appointment of the lands which have

(1) (1899) A.C., 309, at p. 317. (2) (1902) A.C., 1, at p. 6.
(3) (1899) A.C., 309, at p. 322.

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revested, these apparently being treated as cash, and the daughters not being required to give credit for advances, and as part of the same subject matter £1,000 given to Mrs Chomley. Up to this point there is no revocation respecting the purchase money actually received. Then follow a number of specific appointments each introduced by the words referred to. Again, as a separate matter with the same verbal introduction, is the limited revocation of the residuary appointment in the first deed. Needless to say the purchase money fund did not come within the original residuary appointment, and the second deed treats it as still not within that appointment. But immediately after that limited revocation, and apparently consequent thereon, are a number of directions and appointments of land and money. Doubtless the moneys, like some of the lands which were specifically appointed by these deeds, represent part of the original purchase money fund, but just as the Gembrook land, for instance, though bought out of that fund was treated separately, so apparently the moneys lent, though coming out of that fund too, were for this purpose and rightly or wrongly treated separately and were specifically appointed as if they would have otherwise fallen under the residuary claim. At all events the appointors were explicitly stating what properties represented by the purchase money fund were to be disposed of differently from the original disposition. Following upon these appointments comes the particular provision relied on by the appellants treating these moneys on the same footing. These considerations seem to me material when considering the intention of the appointors as discoverable from the deed itself.

Looking back to the express recognition in the second deed of the continued appointment of the purchase money fund except as modified by the appointment of the later deed, and looking also to the severance of the various subject matters dealt with by the later deed as well as to the unambiguous words of the appointment relied on by the appellants, I am not able to yield to the argument that the first appointment is entirely revoked, and the whole of the existing purchase money given to the sons exclusively. I ought not to overlook the view presented that the absence of an express total revocation is due to the

appointors' desire to protect advances already made. The answer to that I conceive to be twofold. First, it would have been easy to say so; and next, the appointors, when they did intend to protect such advances notwithstanding a revocation, have expressly said so, as where in the earlier deed they so provided with regard to the advancement to Mrs. Brett.

Then comes the other extreme question whether the daughters are exclusively entitled. Now I am clearly of opinion that the case originally fell within *Page* v. *Leapingwell* (1). The principle is stated by *Chitty* L.J. in *In re Phillips*; *Eddowes* v. *Phillips* (2); in these terms:—"Where a settlor is dealing with a sum which is ascertained or fixed, or, having the control of a fund, he treats it as a fund of that character, and there is an apportionment, then the principle of *Page* v. *Leapingwell* (1) applies."

With regard to the apportionment, no distinction in principle could have been made between the present case and *Page* v. *Leapingwell* (1). As to the definiteness of the fund, the language of the settlors leads me to the conclusion that they were then dealing with the sum as being of £100,000—knowing there would be deductions for the commission of £2,500, and the necessary ordinary expenses, and perhaps the amount invested in property afterwards specifically appointed—as a fixed and ascertained sum; and they obviously proceeded to apportion it as on that basis. It was suggested that they contemplated a possibility of the actual receipts falling short of the agreed sum, and therefore regarded the fund as indefinite.

I cannot read their words in that way, and if such an eventuality had been present to their minds, I should have expected some further and contingent provision in the event of the purchaser for any reason failing to pay the full amount of purchase money.

The original intention still stands good unless altered by the second deed. I do not think the partial failure of the fund, arising even from an external act of the appointors, could alter what would otherwise be the legal construction of the deed; and the second deed only limits the extent of the fund, which is to be

(1) 18 Ves., 463.

(2) 66 L. J. Ch., 714, at p. 716.

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subject to the appointment. Within those limits *Page* v. *Leapingwell* (1) applies in my opinion. If, however, it does not, it seems to me, in the absence of complete revocation, the daughters should get the whole existing portion of the fund exclusively.

GRIFFITH C.J. The order appealed from will be varied by substituting a declaration that the appellants are entitled, to the exclusion of the respondent daughters, to the fund in question. When special leave to appeal was given we were told that the appellants would not have desired to appeal but for the fact that they were led to believe that the trustees were under the judgment making large claims against them in respect of moneys said to have been paid to them by the trustees, and they asked for leave to appeal in order to protect themselves to that extent. So far as the judgment related to £7,600 they were content. In the meantime, however, the greater part of that sum had been divided amongst the daughters in accordance with the order of the Supreme Court. When leave to appeal was given the appellants undertook not to claim a refund of any moneys paid over by the trustees to any of the daughters after 7th March 1907 and before the notice of motion for special leave was given to them, if this Court on the hearing of the appeal should think it just that such moneys should not be refunded, and also to indemnify the trustees against any payments properly made by them under the order: *àBeckett* v. *Backhouse* (2). The Court think it is just that these moneys should not be refunded, and that the undertaking should be given. The appellants must indemnify the trustees in accordance with their undertaking. The costs of all parties must be paid out of the fund, as between solicitor and client.

Appeal allowed. Order appealed from varied.

Solicitors, for the appellants, *Snowden, Neave & Demaine.*

Solicitors, for the respondents, *Hamilton, Wynne & Riddell; Blake & Riggall.*

B. L.

(1) 18 Ves. 463.

(2) 4 C.L.R., 1334, at p. 1337.