agree as to the forms of declaration and order which he has mentioned, and as to the orders and directions with reference to costs and other matters which he has indicated.

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DIOCESAN TRUSTEES OF THE CHURCH OF ENGLAND IN WESTERN AUSTRALIA v. SOLICITOR-GENERAL.

HOME OF PEACE FOR THE DYING AND INCURABLE v. SOLICITOR-GENERAL.

O'Connor J.

Decision of the Supreme Court varied. Case referred to Supreme Court with directions.

Solicitors, for the Diocesan Trustees, *Stone & Burt.*
Solicitors, for the Home of Peace, *Parker & Parker.*
Solicitor, for the Solicitor-General, *Barker*, Crown Solicitor.

H. V. J.

Foll *Cock v Aitken* (1911) 13 CLR 461

Appl *Andco Nominees Pty Ltd v Lestato Pty Ltd* (1995) 17 ACSR 239

Rev *Smith v Cock* (1911) 12 CLR 30

[HIGH COURT OF AUSTRALIA.]

COCK (PLAINTIFF) . . . . . } APPELLANTS;
AND HOWDEN (TRUSTEE OF COCK) }

AND

SMITH AND OTHERS . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 9, 10, 13, 14, 15, 17, 27, 28. *Oct.* 11.

Griffith C.J., O'Connor, Isaacs and Higgins JJ.

Trustee—Discretionary trust—Exercise of discretion—Maintenance of one person under two wills—Contribution—Trust estate entitled to interest in another trust estate—Right of action of beneficiary of first estate against trustees of second estate—Payments attributable to corpus or income.

J.M.S., who died in 1898, by his will devised and bequeathed all his real and personal property to trustees upon trust for sale and getting in with power indefinitely to postpone such sale and getting in. After setting out

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three specific devises the will continued :—"And as to £800 a year during the life of my daughter A.S. upon trust from time to time to apply the same or such part as my trustees may think fit for the personal maintenance and support or otherwise for the personal benefit of the said A.S. or to pay the same or such part as they shall think fit to her or any other person to be so applied without liability on the trustees' part to inquire into the application thereof or at the option of my trustees to pay the whole or such part to my executors to be applied as part of the residue and ultimate surplus hereinafter mentioned." Then followed a trust of an annuity of £500 for the benefit of another daughter and a legacy of £3,000, succeeded by the words "and as to all the residue and ultimate surplus upon trust for," his son V.S. and his daughter L.S. "in equal shares absolutely." The testator appointed his son V.S., his daughter L.S. and W.A. his executors and trustees. L.S., who died in 1903, by her will, after making a specific bequest to her sister A.S., devised and bequeathed all her real, and the rest of her personal estate to her brother V.S. and W.A., whom she appointed her executors and trustees, upon trust for conversion, but directed that her trustees should not sell a certain house during the life of A.S. except with her consent, and that in the meantime they should permit A.S. to reside there. Subject to these trusts she directed that the trustees should stand possessed of the proceeds upon trust for investment, and should stand possessed of the residuary trust moneys and the investments representing them "upon trust after payment thereout of such sum or sums as they shall from time to time in their absolute and uncontrolled discretion think fit to apply in or towards the upkeep of the house before mentioned and the rates, taxes, insurance and other outgoings in respect thereof and in or towards the maintenance and personal support of my said sister during her life . . . to pay the residue of the income of the said trust premises to my nephew C. during his life, and after his death shall stand possessed of the said trust premises and the income thereof subject to such payments aforesaid in trust for all the children of my said nephew who being sons," &c. During the lifetime of L.S. the trustees of J.M.S. applied £400 a year out of the £800 to the maintenance of A.S., who during that time resided with L.S. at the before-mentioned house, all the household expenses being defrayed by L.S. After the death of L.S. the trustees of J.M.S. reduced this amount to £100 and the trustees of L.S. applied £700 a year out of the income of trust estate of L.S. towards the maintenance of A.S. The residuary estate of J.M.S. remained unconverted. An action was brought in the Supreme Court of Victoria by C. against the trustees of the estates of J.M.S. and L.S., alleging that the reduction from £400 to £100 a year was improper and unreasonable, and an unfair exercise of the powers or discretion of the trustees of J.M.S., and that the payments made by the trustees of J.M.S. in respect of the annuity of £800 had been made out of income and not out of capital whereby his interest in the estate of L.S. had been diminished, and asking for consequential relief. At the close of the plaintiff's case judgment was given for the defendants.

Held, by *Griffith* C.J. and *O'Connor* J. (*Isaacs* J. dissenting), (1) that C.

was entitled to bring the action against the trustees of both estates; and (*Isaacs* and *Higgins* JJ. dissenting) (2) that he was entitled to a declaration that for the purpose of determining the income of the estate of L.S. as between C. and his children it should be ascertained what sum would have been required at the death of L.S. to purchase an annuity of £800 during the life of A.S., that one-half of the interest at 5 per cent. per annum upon the sum so ascertained should be deducted in every year from the income of her estate, and that subject to such deduction one-half of the actual net income of the unconverted estate of J.M.S. should be deemed to be income of the estate of L.S. and payable to C. subject to all prior charges upon it; and (3) that on the evidence there had been no proper exercise of their discretion by the trustees of J.M.S. in respect of the annuity to A.S., and therefore that the plaintiff was entitled to a further declaration that the trustees of J.M.S. had been and still were bound in every year to exercise an independent individual discretion as well as their joint discretion as to how much of the £800 should be allowed for the maintenance of A.S. out of the estate of J.M.S., and that in the exercise of that discretion they were bound to have regard to the intention of their testator that the burden of that maintenance should fall equally upon V.S. and L.S., and to the respective rights of the plaintiff and his children under the will of L.S. and to the question what was a fair division of the burden of maintenance between the two estates.

Quære, per Griffith C.J. and *O'Connor* J., whether the equitable doctrine of contribution would not apply between the two estates in respect of the maintenance of A.S.

Per Higgins J.—The plaintiff C. had no actionable grievance for which he could sue the trustees of J.M.S.

Decision of the Supreme Court of Victoria (*Hood* J.) reversed.

APPEAL from the Supreme Court of Victoria.

John Matthew Smith, who died on 21st April 1898, by his will dated 11th March 1896 devised and bequeathed all his real and personal property to trustees—whom he also appointed his executors—viz., his son John Matthew Vincent Smith (hereinafter called Vincent Smith), his daughter Lucy Smith, and Harry Emmerton, solicitor, "upon trust to sell and get in the same but with power to indefinitely postpone such sale and getting in and to dispose of the proceeds in the manner following." Then followed three specific gifts of realty expressed in these words:—"As to my premises . . . . part of Crown Allotment 11 of sec. 5 City of Melbourne . . . . upon trust to pay the net income to my wife for her life . . . and as to my premises

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known as Ludstone Chambers . . . . upon trust for the said J. M. V. Smith absolutely . . . . and as to my premises in Elizabeth Street . . . . upon trust for the said Lucy Smith absolutely." The will then proceeded as follows:—"And as to £800 a year during the life of my daughter Alice Smith upon trust from time to time to apply the same or such part as my trustees may think fit for the personal maintenance and support or otherwise for the personal benefit of the said Alice Smith or to pay the same or such part as they shall think fit to her or any other person to be so applied without liability on the trustees' part to inquire into the application thereof or at the option of my trustees to pay the whole or any part to my executors to be applied as part of the residue and ultimate surplus hereinafter mentioned." Then followed a trust of an annuity of £500 a year for the benefit of another daughter, and a legacy of £3,000, succeeded by the words:—"And as to all the residue and ultimate surplus upon trust for the said J. M. V. Smith and Lucy Smith in equal shares absolutely." By a codicil the testator appointed William Aitken to be an additional trustee and executor of his will. Probate of the will was duly granted to the executors and executrix.

Lucy Smith died on 12th November 1903, and by her will, after a specific bequest to Alice Smith, she devised and bequeathed all her real and the rest of her personal estate to her brother J. M. V. Smith and William Aitken, upon trust for conversion, but directed that her trustees should not sell her house and land known as Castlefield or the furniture in it during the life of Alice Smith except with her consent, and that in the meantime they should permit Alice Smith to reside at Castlefield or with her consent let the property with or without furniture. Subject to these trusts, the testatrix directed that the trustees should stand possessed of the proceeds of conversion upon trusts for investment, and should stand possessed of the residuary trust moneys and the investments representing them "upon trust after payment thereout of such sum or sums as they shall from time to time in their absolute and uncontrolled discretion think fit to pay or apply in or towards the upkeep of my said Castlefield house and property and the rates taxes insurances and other outgoings

in respect thereof and in or towards the maintenance and personal support of my said sister during her life and the payment of the said William Aitken of the annual sum hereinafter directed to be paid to him to pay the residue of the income of the said trust premises to my nephew Charles Matthew Germain Cock during his life and after his death shall stand possessed of the said trust premises and the income thereof subject to such payments aforesaid in trust for all the children of my said nephew who being sons shall attain the age of 21 years or being daughters attain that age or marry under that age in equal shares and if there shall be but one such child the whole to be in trust for such one child." Failing such children there was a gift over to Vincent Smith. The will then contained the following declaration :— "And I declare that the rents profits and income actually received from and after my death from such part of my estate as shall for the time being remain unsold and unconverted shall after payment thereout of all incidental expenses and outgoings be paid and applied to the person or persons and in the manner to whom and in which the income of the moneys produced by such sale and conversion would for the time being be payable or applicable under this my will if such sale and conversion had actually been made but no property not actually producing income which my trustees may in their discretion permit to remain unlet or unproductive shall be treated as producing income or entitling any person to the receipt of income." By the will and by a codicil of 9th November 1903 the testatrix appointed Vincent Smith and William Aitken executors and trustees of her estate. Probate was granted to Aitken, Vincent Smith having renounced. Subsequently on 10th November 1904 Alfred John Noall was appointed a trustee of the estate of the testatrix.

Up to the death of Lucy Smith the trustees of J. M. Smith's estate appropriated only £400 a year out of the £800 for the maintenance of Alice Smith. After Lucy Smith's death, however, the sum of £100 a year only had been so appropriated.

Cock being dissatisfied with the payment of only £100 a year by the trustees of J. M. Smith's estate towards the maintenance of Alice Smith, brought an action against the trustees of J. M.

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Smith's estate, the trustees of Lucy Smith's estate, Alice Smith, and his own infant children, in which he claimed :—

"1. A declaration that the defendants (the executors and trustees of J. M. Smith's estate) have improperly unfairly and and unreasonably and in breach of their duties as executors and trustees of the testator's will made the reduction from the maintenance of the defendant Alice Smith as hereinbefore set forth.

"2. An order that the amount necessary for the maintenance of the defendant Alice Smith or alternatively that at least £400 a year for such purpose should be borne by the testator's estate alone or alternatively by the estates of the testator and the said Lucy Smith proportionately according to their respective amounts and values.

"3. A declaration that the amounts paid and payable out of the testator's estate for the maintenance of the defendant Alice Smith ought to have been and ought hereafter to be borne and paid by and out of the *corpus* of the estate of the testator.

"4. A declaration that all amounts received or to be received by the trustees of the will of Lucy Smith from the trustees of the will of the testator in respect of the said sum of £800 a year or any part thereof is income of the residuary estate of the said Lucy Smith and should be paid to the plaintiff in terms of her said will.

"5. An injunction restraining the defendants William Aitken and Alfred John Noall at trustees of the will of Lucy Smith from doing any of the acts or things mentioned in par. 11 of the statement of claim." [This paragraph is set out in the judgment of *Griffith* C.J. hereunder.]

"6. All necessary accounts and inquiries.

"7. Administration so far as may be necessary for the purposes of the matters and things raised in this action of the estates of the testator and of the said Lucy Smith."

The action was tried before *Hood* J., and at the trial an application was made by the plaintiff for leave to add the trustees of the estate of Lucy Smith as plaintiffs, withdrawing all charges of fraud against them. At the close of the plaintiff's case the learned Judge found against the plaintiff on the merits, but allowed him to amend on the condition of payment of all the costs of and occasioned by the amendment.

From this judgment the plaintiff appealed to the High Court. After the appeal had been instituted the appellant assigned his estate, and by order of *Higgins* J., on 6th August 1909, the trustee of his assigned estate, John McAlister Howden, was joined as a co-appellant. Other facts and material portions of the pleadings will be found in the judgments hereunder.

Duffy K.C., *Mitchell* K.C., and *Hayes*, for the appellant Cock. The plaintiff made out a case which needed answering. The plaintiff was entitled to bring this action against the trustees of J. M. Smith's estate. There is a duty between them and the representatives of Lucy Smith's estate as to the amount to be paid for the maintenance of Alice Smith. If the reduction of the allowance to Alice Smith had been made during the lifetime of Lucy Smith she might have brought an action against the trustees of J. M. Smith to compel them to exercise their discretion. After her death her trustees might bring the action, and on their refusal to do so the plaintiff was entitled to bring it: *Meldrum* v. *Scorer* (1); *Gandy* v. *Gandy* (2). Where trustees have not exercised a discretion given in such terms as those in which the discretion is given to the trustees of J. M. Smith, or have exercised it improperly, the Court will interfere and exercise it for them: *Gisborne* v. *Gisborne* (3); *In re Hodges*; *Davey* v. *Ward* (4); *Tabor* v. *Brooks* (5); *In re Roper's Trusts* (6); *Tempest* v. *Lord Camoys* (7); *In re Bryant*; *Bryant* v. *Hickley* (8); *Feltham* v. *Turner* (9); *Stopford* v. *Lord Canterbury* (10). That would not be so if the discretion were absolute and uncontrolled, but it is so in the case of a discretion such as that which is given to the trustees of J. M. Smith.

[HIGGINS J. referred to *Simpson on Infants*, 3rd ed., p. 250; *In re Brittlebank*; *Coates* v. *Brittlebank* (11).]

In this case the trustees of J. M. Smith have not exercised their discretion at all, for the exercise of a discretion by several trustees must be unanimous; *In re Roth*; *Goldberger* v. *Roth* (12), and

(1) 56 L.T., 471.
(2) 30 Ch. D., 57.
(3) 2 App. Cas., 300.
(4) 7 Ch. D., 754.
(5) 10 Ch. D., 273, at p. 277.
(6) 11 Ch. D., 272.
(7) 21 Ch. D., 571.
(8) (1894) 1 Ch. D., 324.
(9) 23 L.T., 345.
(10) 11 Sim., 82.
(11) 30 W.R., 99, at p. 100.
(12) 74 L.T., 50.

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Aitken never in fact consented to the reduction from £400 to £100; *In re Beloved Wilkes's Charity* (1). If he is to have been held to have joined in exercising the discretion, he did so for wrong reasons, and the Court will interfere. Apart from *mala fides* the Court will control a discretion which is not absolute if it has been exercised improperly in the sense of unfairly or unreasonably. There is a sufficient case made out to call upon the respondents to answer the charge of *mala fides*.

[GRIFFITH C.J. referred to *Duke of Portland* v. *Topham* (2).]

Counsel referred to *Godefroi on Trusts*, 3rd ed., p. 334; *Lewin on Trusts*, 11th ed., p. 750.

[ISAACS J. referred to *Train* v. *Clapperton* (3).]

If the trustees of J. M. Smith do not agree as to what portion of the £800 is to be appropriated to the maintenance of Alice Smith then the whole fund should be applied for that purpose: *Windham* v. *Cooper* (4). The £800 has been taken each year out of the income of the residuary estate of J. M. Smith, whereas it should have been taken out of corpus: *Bulwer* v. *Astley* (5); *In re Muffett*; *Jones* v. *Mason* (6). It is a necessary result from *Cock* v. *Aitken* (7) that this amount should be paid out of corpus. *Wilson* v. *Turner* (8): [*Aldrich* v. *Cooper* (9); and *Deering* v. *Earl of Winchelsea* (10) were also referred to.]

Mitchell K.C. (with him *Starke*), for the appellant Howden.

Weigall K.C. and *Guest*, for the respondent Vincent Smith. The facts are consistent with a perfectly honest and *bonâ fide* exercise of the discretion, and the Court will not in such circumstances interfere: *Godefroi on Trusts*, 3rd ed., p. 603; *Strahan and Kenrick's Digest of Equity*, 2nd ed., p. 106.

[ISAACS J. referred to *Marquis Camden* v. *Murray* (11); *Read* v. *Patterson* (12); *Bound* v. *South Carolina Railway Co.* (13); *Colton* v. *Colton* (14); *Gower* v. *Mainwaring* (15); *In re Gadd*; *Eastwood* v. *Clark* (16): *Theobald on Wills*, 7th ed., p. 462; *Shir-*

(1) 3 Mac. & G., 440.
(2) L.R. 5 Ch., 40.
(3) (1908) A.C., 342.
(4) 24 L.T., 793.
(5) 1 Ph., 422.
(6) 39 Ch. D., 534.
(7) 6 C.L.R., 290.
(8) 22 Ch. D., 521.
(9) Wh. & T.L.C., 6th ed., vol. II., p. 96.
(10) 1 Cox Ch., 318.
(11) 16 Ch. D., 161, at p. 170.
(12) 6 Am. St. R., 877, at p. 885.
(13) 50 Fed. Rep., 853.
(14) 127 U.S., 300, at p. 320.
(15) 2 Ves., Sen., 86.
(16) 23 Ch. D., 134.

ley v. *Fisher* (1); *In re Smith*; *Smith* v. *Thompson* (2); *Underhill on Trustees*, 6th ed., p. 276.]

No neglect of their duty nor any wrongful exercise of their power by the trustees has been shown. A mistaken or foolish exercise of the discretion is not sufficient to justify the Court in interfering. The trustees of J. M. Smith have exercised their discretion as to the £800, for Aitken, although at first he thought £400 a year should be allowed to Alice Smith, at last consented to what the other trustees thought ought to be allowed. No case has ever been made that Aitken was under a mistake of law as to what he could do, that therefore he never really exercised his discretion, and therefore that there was never an exercise of discretion by the trustees of J. M. Smith. The question as to what is capital and income of Lucy Smith's estate is one between the trustees and the beneficiaries of that estate only, and does not concern the trustees of J. M. Smith. All the latter trustees are bound to do is to afford any information to the former trustees to enable them to determine what is capital and what is income: see *Harbin* v. *Masterman* (*No.* 2)(3). The trustees of J. M. Smith, as between themselves and the parties interested, were at liberty to have recourse to any of their funds for the payment of the £800: *Allhusen* v. *Whittell* (4). The only person who could or can sue in respect of the discretionary trust in favour of Alice Smith is she herself.

Davis (with him *Schutt*), for the trustees of Lucy Smith's estate, referred to *Lewin on Trusts*, 11th ed., p. 407; *Perpetual Executors and Trustees Association* v. *Simpson* (5).

Woinarski, for the infant children of the appellant Cock. The £800 a year is an annuity payable out of income of the residue with a right in the trustees to resort to corpus: *Scholefield* v. *Redfern* (6); *Theobald on Wills*, 7th ed., p. 641; *Croly* v. *Weld* (7); *In re Grant*, *Walker* v. *Martineau* (8); *Gover on Capital and Income*, p. 95; *Bulwer* v. *Astley* (9).

(1) 47 L.T., 109.
(2) (1896) 1 Ch., 71.
(3) (1896) 1 Ch., 351.
(4) L.R. 4 Eq., 295.
(5) 27 A.L.T., 179.
(6) 2 Drew & S., 173.
(7) 3 DeG. M. & G., 993.
(8) 52 L.J. Ch., 552.
(9) 13 L.J. Ch., 329.

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[ISAACS J. referred to *Carmichael* v. *Gee* (1).

HIGGINS J. referred to *Boughton* v. *Boughton* (2).]

There is no right in the beneficiaries to an apportionment: *In re Perkins*; *Brown* v. *Perkins* (3); *Ingpen's Executors and Administrators*, p 507.

Duffy K.C., in reply, referred to *Oceanic Steam Navigation Co.* v. *Sutherberry* (4); *Wilson* v. *Turner* (5).

[GRIFFITH C.J. referred to *Fryer* v. *Buttar* (6); *In re Tyler*; *Ex parte Official Receiver* (7).

HIGGINS J. referred to *Saunders* v. *Vautier* (8); *Wharton* v. *Masterman* (9).]

Cur. adv. vult.

The following judgments were read :—

Oct. 11.

GRIFFITH C.J. This is an action brought by the appellant Cock, who is entitled to a life interest under the will of Lucy Smith, against the trustees of her will, the trustees of the will of J. M. Smith, under which she took large benefits and the trusts of which are not yet fully satisfied, another beneficiary under both wills, and the persons entitled in remainder under Lucy Smith's will after the appellant's life estate, claiming a declaration of rights and consequent administration of both estates so far as necessary.

J. M. Smith, who died on 21st April, 1898, by his will dated 11th March 1896, devised and bequeathed all his real and personal property to his son the respondent, J. M. V. Smith (whom I will speak of as Vincent), his daughter Lucy, and the respondent Emmerton, "upon trust to sell and get in the same but with power to indefinitely postpone such sale and getting in and to dispose of the proceeds in the manner following." Then followed three specific gifts of realty expressed in these words: "As to my premises . . . part of Crown allotment 11, of Section 5, City of Melbourne . . . upon trust to pay the net income to my wife

(1) 5 App. Cas., 588.
(2) 1 H.L.C., 406.
(3) (1907) 2 Ch., 596.
(4) 16 Ch. D., 236.
(5) 22 Ch. D., 521, at p. 525.
(6) 8 Sim., 442.
(7) (1907) 1 K.B., 865.
(8) Cr. & Ph., 240.
(9) (1895) A.C., 186, at p. 198.

for her life:" "And as to my premises known as Ludstone Chambers . . . . upon trust for the said J. M. V. Smith absolutely:" "And as to my premises in Elizabeth Street . . . upon trust for the said Lucy Smith absolutely." The will then proceeded as follows: "And as to £800 a year during the life of my daughter Alice Smith Upon trust from time to time to apply the same or such part as my trustees may think fit for the personal maintenance and support or otherwise for the personal benefit of the said Alice Smith or to pay the same or such part as they shall think fit to her or any other person to be so applied without liability on the trustees' part to inquire into the application thereof or at the option of my trustees to pay the whole or such part to my executors to be applied as part of the residue and ultimate surplus hereinafter mentioned." Then followed a trust of an annuity of £500 a year for the benefit of another daughter and a legacy of £3,000, succeeded by the words "And as to all the residue and ultimate surplus upon trust for the said J. M. V. Smith and Lucy Smith in equal shares absolutely." By a codicil the testator appointed the respondent Aitken an additional trustee and executor of his will.

I pause here for a moment to consider the rights and interests of Vincent and Lucy under this will. All the estate not specifically devised or bequeathed was notionally divided into three parts, each of which was indeterminate in amount; (1) So much as was required to satisfy the trust as to £800 a year; (2) So much as was required to satisfy the annuity of £500; (3) The residue after satisfying these two gifts. To this residue Vincent and Lucy were entitled in equal shares. They were also entitled to the usufruct of this residue, not as income of the testator's estate, but as fruits of their own property. And, as it was impossible to ascertain what was the amount of this residue until provision had been made for the other two gifts, so it was equally impossible to ascertain the amount of the usufruct. On the other hand, these gifts were payable out of the whole estate of the testator, corpus as well as income, until conversion. But the postponement of conversion could not affect the rights of Vincent and Lucy, which were vested at the testator's death. They were entitled to accounts of the estate, distinguishing between capital

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and income. The estate not specifically given being thus divided into three parts, no portion of any of them could be finally appropriated in satisfaction of another, although in favour of the beneficiaries of the annuities the residue might be temporarily drawn upon. It follows that no part of the real usufruct of Vincent's and Lucy's part of the estate could be appropriated in payment of these annuities. Mr. *Mitchell* contended that under the circumstances the £800 a year was payable out of corpus only, and that the whole of the income actually derived from the unconverted estate was payable to Vincent and Lucy. But this contention cannot be supported, since part of that income was derived from property which for the time being represented the gift for the benefit of Alice.

In principle the trustees were bound before distributing any part of the residuary estate to retain a sufficient amount to satisfy the annuities, and the real amount of the usufruct of the residuary estate could not be ascertained until this was done, since in theory all the successive payments had been taken out of the testator's estate before the residue was ascertained. But this amount, having been once taken out, could not be taken out again from the usufruct of what was left.

During Lucy's life the trust with respect to the sum of £800 a year was performed by allotting £400 for the benefit of Alice (which was paid to Lucy, with whom she lived and who provided for her) and the remaining £400 fell into the residuary estate as corpus, whether it had been in fact taken from corpus or income of the unconverted estate; and it was so held by this Court in the case of *Cock* v. *Aitken* (1). It is alleged that it was in fact taken from income.

It was the duty of the trustees in each year to exercise their discretion with regard to this sum with a primary regard to Alice's necessities, and when they had exercised this discretion the part of the £800 not applied for her benefit fell back into the estate to become equally divisible between Vincent and Lucy. There were, therefore, three beneficiaries in respect of this annual sum of £800—Alice, Vincent, and Lucy—and each of them was entitled to insist upon a due execution of the trust. If, for

(1) 6. C.L.R., 290.

instance, in any year the trustees failed to exercise their joint discretion, either from disagreement or for any other reason, either of the beneficiaries could have asked the Court to substitute its own discretion. Suppose that, failing to agree, they had paid the £800 into a bank to abide the result of their future exercise of discretion. It is clear that in such a case the Court would execute the discretionary trust. No authority is needed to support this position. It was, indeed, suggested that any one of the beneficiaries invoking the aid of the Court must have shown a pecuniary loss to himself or herself, but that suggestion is manifestly untenable.

Lucy died on 12th November 1903. By her will, made on 6th April 1900, after a specific bequest to her sister Alice, she devised and bequeathed all her real and the rest of her personal estate to her brother Vincent and the respondent Aitken upon trusts for conversion, but directed that her trustees should not sell her house and land at Castlefield or the furniture in it during Alice's lifetime except with her consent, and that in the meantime they should permit Alice to reside at Castlefield, or with her consent let the property with or without the furniture. Subject to these trusts the testatrix directed that the trustees should stand possessed of the proceeds of conversion upon trusts for investment, and should stand possessed of the residuary trust moneys and the investments representing them "upon trust after payment thereout of such sum or sums as they shall from time to time in their absolute and uncontrolled discretion think fit to pay or apply in or towards the upkeep of my said Castlefield house and property and the rates taxes insurance and other outgoings in respect thereof and in or towards the maintenance and personal support of my said sister during her life and the payment to the said William Aitken of the annual sum hereinafter directed to be paid to him to pay the residue of the income of the said trust premises to my nephew Charles Matthew Germain Cock" (the appellant) "during his life and after his death shall stand possessed of the said trust premises and the income thereof subject to such payments aforesaid in trust for all the children of my said nephew who being sons shall attain the age of twenty-one years or being daughters attain that age or marry under that age in equal shares

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and if there shall be but one such child the whole to be in trust for such one child."

The will also contained the following declaration:—"And I declare that the rents profits and income actually received from and after my death from such part of my estate as shall for the time being remain unsold and unconverted shall after payment thereout of all incidental expenses and outgoings be paid and applied to the person or persons and in the manner to whom and in which the income of the moneys produced by such sale and conversion would for the time being be payable or applicable under this my will if such sale and conversion had actually been made but no property not actually producing income or which my trustees may in their discretion permit to remain unlet or unproductive shall be treated as producing income or entitling any person to the receipt of income."

During Lucy's life it was practically immaterial, except perhaps for purposes of income tax, to distinguish whether payments made to her by the trustees of her father's will were corpus or income of her own property. But after her death it became very material, as between the plaintiff and his children, to distinguish betweeen capital and income with regard to any moneys received by her trustees from J. M. Smith's estate. And, since the plaintiff was only entitled to the residuary income of Lucy's estate, it was of importance to him to ascertain its amount, and to see that no undue deductions were made from it. It was consequently necessary, as between the tenant for life and those entitled to remainder, to ascertain what part of the moneys received by Lucy's trustees from J. M. Smith's trustees in any year was to be regarded as income of her property and what part as corpus.

It is a well recognized jurisdiction of the Court to adjust the burden of an annuity as between tenant for life and remainderman. See, for instance, the cases of *Allhusen* v. *Whittell* (1); and *In re Perkins*; *Brown* v. *Perkins* (2). And in my opinion the appellant is entitled to have that question determined. In each year a sum not exceeding £800 was to be taken out of J. M. Smith's estate. If it were taken out of the income yielded by the unconverted estate, which estate, subject to the provision for

(1) L.R. 4 Eq., 295. (2) (1907) 2 Ch., 596.

the £800 and £500 a year, belonged to Vincent and Lucy in equal shares, the amount of the money paid to Lucy's trustees as income was *de facto* diminished to the extent of £400, while if it were taken out of corpus there was no diminution. The case of *Harbin* v. *Masterman* (*No.* 2) (1) establishes the rule that residuary legatees are entitled to a division of the residuary estate if sufficient provision has been made for securing payment of annuities charged upon it. And although, where there is a discretionary trust for conversion, one of several residuary legatees cannot insist upon an immediate conversion and a setting apart of a sufficient fund to answer the annuities, yet, as the Court for the purpose of dealing with the rights of parties having successive interests will not allow a postponement of conversion to affect their substantive rights, I think that for the purpose of adjusting such rights the Court can deal with them on the footing of a sufficient fund having been set aside. I think, therefore, that the appellant was entitled as between himself and his children to insist that the incidence of the burden of each sum so withdrawn from the estate of J. M. Smith should be divided between his children and himself.

If we discard irrelevant facts from consideration, the position, so far as regards the plaintiff's rights, is in principle the same as if J. M. Smith's will had merely contained the discretionary trust as to the £800 a year with a gift of all the residue of his estate to Lucy, and Lucy had died a day after the testator leaving a will in its actual form. The circumstances that there were specific devises and bequests, that there was also a gift of an annuity of £500 a year, that the residue was to be divided between Lucy and Vincent, and that Lucy survived the testator for some years, are all equally irrelevant for this purpose.

If the testator's estate had been converted immediately after his death, it is clear, on the authority of *Harbin* v. *Masterman* (*No.* 2) (1), that Vincent and Lucy would have been entitled to have the residue handed over to them after making sufficient provision for the £800 a year, and the income of Lucy's share of that residue would have been income to which the plaintiff is entitled under her will, subject, of course, to the trust in favour of Alice.

(1) (1896) 1 Ch., 351.

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Delay in actual conversion makes no difference as to their substantative rights.

The case of *In re Perkins*; *Brown* v. *Perkins* (1), shows how an apportionment may be made between tenant for life and remainderman in the case of an annuity charged upon a whole estate the residue of which is given for successive interests. In that case the annuity was not created by the will but was a debt secured by covenant. So in this case the annuity is not created by Lucy's will, but is a charge imposed upon property which is only given to her subject to the charge.

The principle upon which such an apportionment is made is that each sum paid as an instalment of the annuity is regarded as being in reality made up partly of a smaller sum which has been earning income, and partly of the income so earned.

I take leave, however, to express a doubt whether the actual declaration made by *Swinfen Eady* J. in *In re Perkins*; *Brown* v. *Perkins* (1) was quite fair to the tenant for life. The effect of it was that in respect of the first year's annuity one year's interest was charged to her, two year's interest in respect of the second, and so on, until after twenty years, if the annuity were so long payable, 37½ per cent. of the annuity would come out of income, which would consequently be reduced from year to year. A fairer method, I think, would have been to make an equal deduction in each year. (See *In re Dawson*; *Arathoon* v. *Dawson* (2).)

I should add that I do not think that the declaration in Lucy's will as to income or non-income-bearing property has any effect upon the application of these principles.

It follows from what I have said that, as between the plaintiff and his children, the only extent to which the usufruct of Lucy's half share of J. M. Smith's unconverted estate could be reduced in respect of the £800 would be her half share of the interest on a fund sufficient to provide the £800 a year for Alice's life. And, having regard to the decision in *Cock* v. *Aitken* (3), I think that it is important to ascertain what sums of £800 were in fact taken from the income and what from the corpus of the unconverted estate of the testator.

It follows from that decision that the whole £800 was in each

(1) (1907) 2 Ch., 596. (2) (1906) 2 Ch., 211. (3) 6 C.L.R., 290.

year to be disposed of either by way of payments for Alice's maintenance or as an accretion to the corpus of the testator's estate. If, therefore, it was in fact taken from income the amount paid to Lucy's trustees as income of her share of J. M. Smith's estate was effectively reduced by £400, irrespective of the amount actually paid for Alice's maintenance. If, on the other hand, it was taken wholly or in part from corpus, the amount paid to Lucy's trustees as income of her share suffered no actual diminution to the extent to which the £800 was so taken. But, as he was in either event equally liable to bear his share of the burden of £800, the same amount should be deducted from the income of Lucy's estate as between him and his children, whether the £800 was in fact taken from corpus or income of the unconverted estate.

For these reasons I think that the plaintiff was entitled in a suit instituted against the proper parties to an account of the income of the unconverted estate of J. M. Smith and of the amounts from time to time taken from that income and applied to the trusts of the £800 a year. He was also entitled to a declaration that for the purpose of determining the income of Lucy's estate as between himself and his children it should be ascertained what sum would have been required at her death to purchase an annuity of £800 a year for Alice's life, and that one-half of the interest upon the sum so ascertained, calculated at 5 per cent. simple interest from her death, should be deemed to be deducted in every year from the income of her estate, and that, subject to such deduction, one-half of the actual net income of the unconverted estate of J. M. Smith should be deemed to be income of Lucy's estate and payable to the plaintiff, subject, of course, to all prior charges upon it. For this purpose an inquiry would be necessary.

It is said that there is no precedent for such a declaration. Perhaps not; but, as was said of very similar relief in *Harbin* v. *Masterman* (*No.* 2) (1), it is common sense, and is merely an application of recognized doctrines of the Court to new circumstances: see *Fletcher* v. *Stevenson* (2).

In such an action the trustees of Lucy's estate and the plain-

(1) (1896) 1 Ch., 351. (2) 3 Ha., 360, at p. 371.

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tiff's children would, of course, be necessary parties. And for the purpose of ascertaining the actual income of J. M. Smith's unconverted estate and the sum to be notionally set apart from his estate, accounts and inquiries would be necessary, which could not be taken or made in the absence of the trustees of his estate, who would therefore be also proper parties. The costs of such a suit should be borne by Lucy's estate, since the necessity for it arises from the terms of her will.

So far from this declaration being inconsistent with the judgment in *Cock* v. *Aitken* (1) (with which, if I may say so, I entirely agree), it is based upon that judgment.

Hitherto I have dealt only with the plaintiff's rights as appearing upon the construction of the two wills, which is a matter of law. I pass now to consider another branch of the case which depends in part upon questions of fact.

Up to Lucy's death, as already said, £400 a year only had been appropriated out of the £800 for Alice's maintenance. Whatever sum was so taken, the burden fell equally upon Vincent and Lucy, for property, whether corpus or income, which would otherwise have been divisible between them was reduced by that amount, while the unappropriated residue of the £800 fell into residue and was equally divisible between them.

Since Lucy's death, however, the sum of £100 only has been so allotted. It has been always assumed that the total amount that ought to be allotted for Alice's maintenance, including the cost of keeping up Castlefield, is £800 a year, and the balance of £700 a year has been paid by the trustees of Lucy's will from the income of her estate, so reducing the plaintiff's income by that amount.

At this stage it will be convenient again to pause to consider the respective rights and obligations of the parties with regard to the trust for £800 a year in J. M. Smith's will as affected by the alterations in the circumstances caused by Lucy's death. Her trustees succeeded to her rights, and were entitled, as she was, to insist upon a due exercise of the trust as to the £800 per annum to be taken from J. M. Smith's estate. But the question was no longer one of mere academic importance, since the benefit which the plaintiff, whose interests they were bound to regard, would

(1) 6 C.L.R., 290.

gain under Lucy's will would largely depend upon the manner in which the discretion was exercised. It is suggested that, as the trustees of her will might allow any sum they thought fit for the benefit of Alice, the plaintiff must be content with their action whatever it might be. But they were bound in the exercise of their discretion to take all the facts into consideration, including Alice's means of support from other sources, which could not be known until it was ascertained how J. M. Smith's trustees had exercised, or were about to exercise, their own discretion. One important change in circumstances brought about by Lucy's death and her will was that, whereas before her death she had voluntarily charged herself with the task of providing a residence for Alice and maintaining her, receiving a contribution of £400 a year from J. M. Smith's estate, after her death she charged her trustees with the duty of providing a residence for Alice and making such future payments for her maintenance as they might think fit. The intention of the testator J. M. Smith that the burden of Alice's maintenance should fall equally upon Vincent and Lucy was not altered, although it was in the power of the trustees to disregard it. But it was a matter which they were bound to take into consideration with the other facts.

Again, each of the three beneficiaries of the £800 was entitled, as before Lucy's death, to insist on the due execution of that trust. But what had been a mere formal right on Lucy's part became in the hands of her trustees a right coupled with a duty (*scil.* to regard the interests of all the beneficiaries under her will).

It was no longer immaterial, as it had been as between Lucy and Vincent, to determine how the burden should fall, but it became material to see that no undue burden was imposed on either the tenant for life or those entitled in remainder under her will. And another important change in circumstances was occasioned by Lucy's death. Up to that time the primary duty of the trustees of J. M. Smith's will was to have regard to the interests of Alice. When they had done so, any benefit which followed to Lucy and Vincent was merely incidental to the due execution of the trust, and accrued equally to both. But after her death Vincent had a direct pecuniary interest in reducing the

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allotment from J. M. Smith's estate, since any deficiency would probably be made up from Lucy's estate, while any benefit which he gained by a reduction would in that event be accompanied by a very much greater immediate loss to the plaintiff. In the events that happened he gained £150 a year (half of the reduction from £400 to £100), while the plaintiff suffered a reduction of his income to the extent of £300. Such a change in circumstances was, perhaps, not contemplated by the testator.

It is suggested that trustees ought to have sole regard to their own beneficiaries, and to endeavour to do their best for them regardless of the rights of others. Or, to put it in another way, trustees on whom a discretion is conferred for a particular purpose find themselves placed by circumstances not contemplated by the creator of the trust in a position in which they can confer a large pecuniary benefit upon one of themselves at the expense of a pecuniary loss of double the amount to another person, to whom one of the trustees owes a fiduciary duty. We are asked to say that, under such circumstances, the trustees may act on the "good old rule, the wiser plan."

If this is the doctrine of the Court of Chancery, I should be disposed to agree with *James* V.C. (when he was asked to strain a doctrine of the Court so as to work a fraud), to wish, if the argument were sound, that there was a Court of Equity for the purpose of correcting the dealings of the Court of Chancery. But I do not think that it is the doctrine of the Court of Chancery. Honesty and fair dealing are the basis of equitable doctrines. (Cf. *In re Tyler*; *Ex parte Official Receiver* (1)). I think that the real question to be decided in such a case is what is honest and fair. Even if the ordinary rules of honesty and fair play cannot be invoked, I think that the same result follows from the consideration that trustees are subject to the control of the Court. Now, when the Court is called upon to exercise a discretionary power it always takes into account the question of what is fair, and will not, when exercising such a power for trustees who have failed to exercise it, do anything which is manifestly unfair. One element to which the Court always has great regard is the fairness of distribution of the incidence of a

(1) (1907) 1 K.B., 865.

burden as between a tenant for life and remainderman. If a burden or benefit is to fall upon or accrue to an estate limited for successive interests the Court will see that it is fairly distributed between them.

From this point of view the direct pecuniary interest of Vincent in reducing his own contribution became a very relevant fact, having regard to the well known rule formulated in *Duke of Portland* v. *Topham* (1). In that case Lord *Westbury* L.C. said: —"I think we must all feel that the settled principles of the law upon this subject must be upheld, namely, 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 intent of the power) which he may desire to effect in the exercise of the power." Lord *St. Leonards* said (2):—"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." No doubt the application of the rule to the present case was to some extent qualified by the circumstance that Vincent was himself one of the persons charged with the exercise of a discretion the exercise of which might benefit him. But the extent of the qualification is, I think, limited by the necessity for it. After Lucy's death Vincent was bound not to seek any pecuniary benefit to himself from the future exercise of his discretion.

Another important change in circumstances brought about by Lucy's death and the terms of her will was that Alice became entitled to an allowance for maintenance from two funds, the amount to be contributed from each being discretionary, and there being one trustee common to the two funds. In respect of both funds she was a *quasi* creditor. Under such circumstances I think that the equitable doctrine of contribution is applicable.

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

(2) 11 H.L.C., 32, at p. 55.

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As Lord *Redesdale* said in *Stirling* v. *Forrester* (1):—"The principle established in the case of *Deering* v. *Lord Winchelsea* (2) is universal, that the right and duty of contribution is founded in doctrines of equity; it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract, but always in conscience, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. That was the principle of the decision in *Deering* v. *Lord Winchelsea* (2); and in that case there was no evidence of contract."

I do not know of any case in which this rule has been formally applied to a case like the present, but I cannot doubt that it applies, at least to the extent that the trustees of either fund were entitled to insist upon a *bonâ fide* exercise of discretion by the trustees of the other, and that any person beneficially interested in either fund was entitled to call for such exercise by the trustees of both. In *Gisborne* v. *Gisborne* (3) this seems to have been assumed. In *Lucas* v. *King* (4) the Court, on the application of an infant beneficiary entitled to maintenance from two funds, exercised a very similar jurisdiction. I cannot doubt that if the trustees of both wills failed to exercise their discretion Alice could maintain a suit against both, and invoke the discretion of the Court, which would not be exercised in the absence of either. And it seems to me plain that the trustees of either fund, or any beneficiaries who would be prejudiced by a non-execution of the trusts of either, would be equally entitled to invoke the jurisdiction.

These being the respective rights and duties of the parties and the trustees, I proceed to consider the facts to which the law is to be applied.

(1) 3 Bl., 575, at p. 590.
(2) 2 Bos. & Pul., 270.
(3) 2 App. Cas., 300.
(4) 11 W.R., 818.

After Lucy's death half of the £700 unallotted in each year of the £800 taken out of J. M. Smith's estate, and which was divided between Vincent and Lucy's trustees, was treated by the latter as income of her estate, and paid to the plaintiff as part of it, until the decision in *Cock* v. *Aitken* (1), where it was held that the sum formed part of the corpus and not of the income of Lucy's estate. The trustees have since called upon him to refund by instalments the amount so overpaid.

Before any question had been raised as to the plaintiff's right to this sum of £350 a year he had instituted the present suit. The statement of claim, as amended on 14th August 1908 (after the decision in *Cock* v. *Aitken* (1)), after setting out the wills and other formal matters, alleged the reduction of the sum payable to Alice from £400 to £100 a year and submitted (par. 9) "that such reduction was improper and unreasonable and an unfair exercise of the powers of discretion given to them by that will by reason of the following facts and circumstances" with others not material to be mentioned:—

"(*a*) The defendant John Matthew Vincent Smith as one of the said executors and trustees is greatly benefited by the fact of such reduction, as he is under the said will entitled to one-half of the difference between £400 a year the amount previously paid and £100 a year the amount subsequently paid for the purposes aforesaid and his interest and duty therefore conflict.

"(*b*) The defendant Harry Emmerton has since the death of the testator always been and still is the solicitor of the defendant John Matthew Vincent Smith and his interest and duty also conflict and he made or concurred in making such deduction with the object and effect of benefiting his client to the extent aforesaid.

"(*c*) The defendant William Aitken protested against the making of such deduction believing such reduction to be wrong and improper but allowed himself to be overborne by his co-trustees and co-executors in respect of such deduction because he was in the minority and he

(1) 6 C.L.R., 290.

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allowed and still allows such reduction to be made whilst still retaining such belief.

"(*d*) The object and effect of such reduction was and is to throw the additional burden in providing a sufficient sum for the maintenance of the defendant Alice Smith upon the estate of the said Lucy Smith and thereby to substantially reduce the amount of income payable to the plaintiff under the will of the said Lucy Smith deceased."

It then alleged in paragraphs 10 and 11 as follows:—

"10. Since the death of the said Lucy Smith the surviving executors and trustees of the testator's will have treated and dealt with the said annual sum of £800 as income of the testator's estate when in fact it should have been treated as corpus and all payments made by them in respect of such sum were made by them out of income instead of out of corpus and the defendants William Aitken and Alfred John Noall have permitted and are still permitting them so to do without protest or objection to the prejudice and detriment of the plaintiff whose interest under the will of the said Lucy Smith is thereby greatly diminished and in breach of their duty they have not taken and will not take any steps or proceedings against the surviving executors and trustees of the testator's will in respect thereof.

"11. Alternatively the executors and trustees of the will of the said Lucy Smith have paid to the plaintiff (*inter alia*) £350 a year or thereabouts in respect of his interest under that will which amount they have received from the executors and trustees of the testator's will as income of the share to which the said Lucy Smith was entitled under the testator's will and they threaten to and will unless restrained by this Court make good the amount so paid to the plaintiff out of the future income of the residuary estate of Lucy Smith to which he is entitled."

The plaintiff claimed:—

"1. A declaration that the defendants John Matthew Vincent Smith Harry Emmerton and William Aitken have improperly unfairly and unreasonably and in breach of their duties as executors and trustees of the testator's will made the reduction for the maintenance of the defendant Alice Smith as hereinbefore set forth.

"2. An order that the amount necessary for the maintenance of the defendant Alice Smith or alternatively that at least £400 a year for such purpose should be borne by the testator's estate alone or alternatively by the estates of the testator and the said Lucy Smith proportionately according to their respective amounts or values.

"3. A declaration that the amounts paid and payable out of the testator's estate for the maintenance of the defendant Alice Smith ought to have been and ought hereafter to be borne and paid by and out of the corpus of the estate of the testator.

"4. A declaration that all amounts received or to be received by the trustees of the will of Lucy Smith from the trustees of the will of the testator in respect of the said sum of £800 a year or any part thereof is income of the residuary estate of the said Lucy Smith and should be paid to the plaintiff in terms of her said will.

"5. An injunction restraining the defendants William Aitken and Alfred John Noall as trustees of the will of Lucy Smith from doing any of the acts or things mentioned in paragraph 11 of this statement of claim.

"6. All necessary accounts and inquiries.

"7. Administration so far as may be necessary for the purposes of the matters and things raised on this action of the estates of the testator and of the said Lucy Smith."

The case came on for trial before *Hood* J. upon oral and documentary evidence. At the close of the plaintiff's case the learned Judge thought there was no case for the defendants to answer, and gave judgments for the defendants with costs, and this appeal is from his judgment.

So far as the plaintiff's claim rests upon the construction of the two wills it is admitted that this Court is in a position to give final judgment, but so far as it rests upon extrinsic evidence all the Court can do, if it thinks that a *primâ facie* case for relief has been made out, is to remit it to the Supreme Court for further inquiry.

The plaintiff offered evidence to prove that the trustees of J. M. Smith's will, and in particular the defendant Aitken who was a trustee of both wills, had never exercised any real discretion in

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determining what amount should be allowed to Alice from the £800 annually taken out of J. M. Smith's estate. I will afterwards deal with the question whether this point could be raised upon the pleadings.

It is not disputed that the discretion must be exercised jointly by all the trustees, so that if any one of them fails to exercise his discretion, or is incompetent to exercise it, or wilfully or improperly exercises it for his own benefit, there is no valid exercise of the joint discretion at all. In the exercise of the discretion the trustees were bound, first of all, to consider what amount, not exceeding £800, ought to be provided for Alice's benefit from all sources. This being determined, they had next to consider how much of that amount should be provided from J. M. Smith's estate. And, as the only other available source was Lucy's estate, the question was, in substance, how the burden of £800 should be divided between the two estates. The testator had, as already pointed out, expressed his intention that the burden should be equally borne by Vincent and Lucy. Even if Aitken had not been a trustee of both estates I think that the trustees of both were bound to consult each other. And, further, Vincent was bound to avoid all imputation of seeking his own personal interest. I am unwilling to think that he ever consciously did so, but the fact that he did benefit himself at the expense of the plaintiff is a circumstance to be considered. If he consciously did so there was no valid exercise of the discretion by him or at all. Moreover, the trustees were bound to take all relevant facts into consideration. How far, then, has there been a real exercise of joint discretion applied to the relevant facts?

It appeared upon the evidence for the plaintiff that after Lucy's death the plaintiff spoke to Aitken on the subject before probate of her will was granted (which was on 5th February 1904). Aitken said he was going to allow £700 or £750 a year out of her estate for Alice (including the upkeep of Castlefield), and only allow £100 a year out of J. M. Smith's estate. The plaintiff said "What! £100 a year, do you think that fair?" Aitken replied, "No, I don't." Plaintiff said, "Can't you do anything?" Aitken said "No I can't." Plaintiff said, "Did you object?" and Aitken

replied, "They" (*i.e.*, Vincent and Emmerton) "told me that is all they were going to allow, and that is all I know about it."

Shortly afterwards plaintiff told Aitken that he was advised that the trustees must be unanimous and that if he objected "they" (*i.e.*, I suppose, the others) "could not do anything." In June Aitken told plaintiff that his solicitor thought he, Aitken, could not do anything in the matter.

At a later period in the same year plaintiff again approached Aitken on the subject and wished to discuss the situation, but Aitken said "Oh! it is two to one and I've no say in it."

In April 1907 plaintiff spoke to the defendant Noall on the subject, who said he could not see how it was fair and would talk to Vincent about it. Later Noall said he had done so, and that Vincent had said that he did not know anything about it but had left it all to Emmerton. This evidence, however, was probably not admissible, though it was not objected to.

Aitken, who was called as a witness for the plaintiff, gave evidence which tended to show that his co-trustee Emmerton, with whom he was not on speaking terms, had entertained no good will to Lucy in her lifetime.

He deposed that in February 1904 he had a conversation with Vincent, who said that counsel's opinion had been taken, and that Emmerton still thought that only £100 a year should be allowed, adding, "You know I am an interested party, and you are interested, and Mr. Emmerton is neutral, and therefore his opinion should be followed," to which Aitken replied, "I thought this was a feasible way to look at it, and so I gave way." He had thought that £400 a year from each estate would be a fair division.

Aitken also deposed that in May 1904, while he was sole trustee of Lucy's estate (in succession to Vincent, who had renounced), he asked his solicitor to see Emmerton and try if he could not get a further allowance for Alice from J. M. Smith's estate, and that his solicitor told him he had seen Emmerton and explained the whole thing and discussed it with him, and that "he could not but advise us that Emmerton had a perfect right to exercise his discretion as he has done," and added, "After this I never tried to raise the allowance from J. M. Smith's estate as I saw it

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was no use, and this is the reason why no further proceedings were taken by me."

He further deposed that in November 1904 he and his co-trustee Noall were advised by their solicitor that they could do nothing.

At the close of the plaintiff's case the defendants asked for judgment on the ground that no case had been made calling for an answer, and *Hood* J. gave judgment for them. The learned Judge is reported to have said that, although Aitken allowed himself to be overborne in one sense, he was not convinced that he allowed himself to be overborne in the sense alleged in sub-par. (c) of par. 9 of the statement of claim. It is apparent from this observation that that paragraph was taken at the trial as alleging such a submission to what he supposed to be irresistible force as to show that he did not really exercise his discretion at all. The evidence which I have quoted was directed to this point and to nothing else. I am, therefore, of opinion that the statement of claim as it stands should be construed as alleging a failure on Aitken's part to exercise his discretion. But, even if that is not the proper construction, I think that it is a case for amendment to raise that issue. Upon the evidence as it stands, if not contradicted or explained by the defendants, I think the proper inference is that Aitken never concurred with his mind in the proposed division of the burden, but acted in the mistaken belief that he was bound by the majority, of whom one, Vincent, was an interested party. This is not a real exercise of discretion at all.

I think, further, upon the evidence as it stands, that the trustees never applied their minds collectively to all the circumstances of the case, and especially to the question of what was fair as between the persons interested in the two estates or as between the plaintiff and Vincent, or to the fact that the testator intended that Vincent should always bear one-half of the burden of Alice's maintenance. In my opinion this was not a real exercise of discretion (*In re Beloved Wilkes's Charity* (1). The discretion must, therefore, if these are the facts, be exercised by the Court.

(1) 3 Mac. & G., 440.

With regard to amendment it would be a shocking thing if a beneficiary entitled to relief against his trustees should be finally excluded from it by a slip in pleading. It is at least arguable that the judgment, if it stands, would be a bar to any further suit for the relief claimed so far as it relates to the past (see *Henderson* v. *Henderson* (1). And I am still as surprised as I was during the argument at the strenuous opposition made by the trustees to the plaintiff getting what he is entitled to, whatever that may be.

Hood J. was also of opinion that the action was wrongly constituted. For reasons already given I think that it is properly constituted so far as regards the matters of law arising upon the construction of the two wills.

With regard to the non-exercise of discretion by the trustees of J. M. Smith's will, it would be absurd to suggest that Aitken, as a trustee of Lucy's will, should sue himself and his co-trustees under J. M. Smith's will to compel a due execution of the trusts of that will by them and himself. His co-trustee, Noall, might, perhaps, have sued alone for this purpose, but he could not be expected to do so under the circumstances. And whether he could or could not sue, the plaintiff is entitled to maintain the action for relief on this head, since that relief involves a consideration of the respective rights of himself and his children. Moreover, the action being properly brought for the first branch of relief, it would be absurd to require a second suit to be brought for further administration of the trusts of the same wills, in which the parties would be identical, merely for the sake of having a different plaintiff.

The relief asked for by the plaintiff is not in form that to which I think he is entitled on either branch of the case. But that is no reason why he should not get the relief to which he is entitled.

In my judgment there should be a declaration to the effect already stated with an order for the necessary accounts and inquiries. And, having regard to the arguments which have been addressed to us in a contrary sense, and to the anomalous position of Vincent, whose interests and duty are in danger

(1) 3 Ha., 100, at p. 115.

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of conflict, I think that the plaintiff is also entitled to a declaration that the trustees of J. M. Smith's estate are respectively bound in each year to exercise an independent individual discretion, as well as their joint discretion, as to how much of the £800 should be allowed for Alice's maintenance out of that estate, and in the exercise of that discretion to have regard to the intention of the testator as to the equal division of the burden of maintenance as between Vincent and Lucy, to the respective rights of the plaintiff and his children under Lucy's will, and to the question of what is a fair division of the burden of maintenance between the two estates. With these declarations and orders the action should be remitted to the Supreme Court for further trial of the issues of fact, with liberty to all parties to amend as they may be advised.

The costs of all parties to the action, so far as it relates to the first part of the case, should be borne by the capital of Lucy's estate, but taxation should be deferred until the general taxation of costs in the action.

As to the costs of the appeal, I think that the appellants and the infant respondents should have their costs out of the capital of Lucy's estate. The other respondents should have their costs out of the capital of their respective estates.

O'CONNOR J. This case involves the consideration of some well established principles of equity in relation to a somewhat unusual combination of facts. The learned Judge of first instance at the close of the plaintiff's case held that no ground for relief had been made out, and the whole of the facts have never been fully inquired into. The appellants now come to this Court not for a determination of rights on the facts in evidence, but for further inquiry on the ground that they have established their right to the equitable relief claimed. I have had the advantage of reading the judgment of the learned Chief Justice in which he has stated very fully the relevant portion of both wills, the rights in his opinion thereby conferred and the facts in so far as they are material. In respect of these matters it is unnecessary for me to say more than that I concur in and wish to adopt the statements and conclusions contained in that judgment.

I wish, however, to express my view with as little detail as possible on the wrong which the appellant alleges he has suffered and asks to have redressed, the principles on which the remedy is to be applied, and the form in which it should be demanded at the hands of the Court. The appellant Cock, whom I shall speak of as the plaintiff, is not a beneficiary under J. M. Smith's will. But under Lucy Smith's will he is entitled for life to the residue of income left after payment of certain provisions out of income. After his death the whole residue goes to his children. Of those payments out of income only two need be referred to—that for the upkeep of Castlefield and that for the maintenance and personal support of Alice Smith at Castlefield. The sums to be applied in each case are left to the absolute and uncontrolled discretion of the trustees. The amount of the plaintiff's income in each year depends materially upon the sums applied by the trustees in respect of these two provisions. In fixing the amount for Alice's maintenance and personal support in each year the trustees are bound to consider her financial position and particularly any other means of maintenance and support which may then be coming to her. The only outside source from which income comes to her is apparently J. M. Smith's will, the trustees of which have since Lucy's death paid towards her support £100 a year instead of £400 a year which they used to pay in Lucy's lifetime. The payments to Alice out of J. M. Smith's estate are made by the trustees of that estate in the exercise of an absolute discretion, conferred on them in substantially the same terms as those used in Lucy's will. They, too, are bound to consider Alice's needs in view of other sources of income. Being aware that income must come to her from Lucy's will under the provisions to which I have referred, they have in the alleged exercise of their discretion apportioned £100 towards her maintenance, assuming that the balance necessary will be provided by Lucy's trustees out of the income of Lucy's estate.

Turning now to the provision of J. M. Smith's will, by virtue of which the amount of £400 before and £100 since Lucy's death have been paid, it must, I think, be taken from the terms of that will and the actings of the parties concerned that an annual income of £800 was required for Alice's support, and it can hardly be

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doubted that if Lucy in her lifetime had not given her a home Alice might fairly have looked to the trustees for an allotment yearly of the whole £800. It was, however, evidently contemplated by the testator that Lucy and her brother Vincent would share equally the burden of Alice's maintenance, accordingly any portion of the £800 not applied in any year for that purpose goes into residue where it is equally divided between them. In accordance with that view the brother and sister acted. Lucy gave Alice a home, £400 was applied by the trustees for her maintenance, and the remaining £400 went into residue benefitting Lucy and Vincent in equal shares. After Lucy's death Alice continued to live and be maintained at Castlefield as before, her position was in no way altered, except that Lucy's will conferred upon her the right to hold for life the accommodation at Castlefield, which Lucy in her lifetime had of her own free will allowed her. It is true that Lucy, by her will, empowered her trustees in their discretion to apply a portion of income for Alice's maintenance, but if the equal apportionment of Alice's maintenance between brother and sister were to be continued after the sister's death between the brother and her estate, the allowance of £400 a year from J. M. Smith's estate was just as necessary after Lucy's death as before. Any reduction in that amount imposed on Lucy's estate a larger share than she in her lifetime had borne of Alice's maintenance. However, J. M. Smith's trustees (I assume for the present that they all acted in the matter) determined to alter the incidence of the burden and reduced the allowance to £100. Two consequences necessarily followed. Vincent Smith, himself a trustee under his father's will, benefitted to the extent of £150 each year, the corpus of Lucy's estate gained the other £150, and an additional burden of £300 a year for Alice's maintenance was thrown on Lucy's estate; the last mentioned consequence reducing by that amount the residue of income in Lucy's estate to which the plaintiff is entitled. The trustees of Lucy's estate unfortunately took the view that J. M. Smith's trustees owed no duty to Lucy's estate, and that there was no remedy for this injury to their *cestui que trust*, and in spite of the plaintiff's strongly expressed wishes they took no action to ensure a fairer distribution of the

burden of Alice's maintenance between the estates. Indeed, the ill consequences to the plaintiff did not stop there. Half of the saving of £300 in J. M. Smith's estate coming from that estate as corpus was corpus also in Lucy's estate; but as it was in fact paid out of income in J. M. Smith's estate, the trustees of Lucy's estate treated it as income of her estate when it came to their hands, and as such paid it to the plaintiff. Then came the decision in *Cock* v. *Aitken* (1), which determined that these payments must be taken to have come out of corpus in J. M. Smith's estate and must be treated as corpus in Lucy's estate. Since then the trustees of Lucy's estate have ceased to pay these moneys to the plaintiff, have called upon him to refund the amounts previously paid, and are now systematically reducing his income by retaining portion of it each year to effect such refund. As between the plaintiff and his children, the question what is income and what is corpus in Lucy's estate is of course vitally important, and it is the clear duty of the trustees of that estate to insist upon and maintain that distinction for the benefit of the plaintiff's infant children. The greater part, if not the whole, of Lucy's estate consists of her interests in J. M. Smith's estate. The latter is as yet for the most part only notionally converted, but it is vested in the persons entitled according to their interests, the income, to adopt Mr. *Hayes*' expression, going to each person as fruit of the tree which is his. No sum has been as yet set aside to produce or ensure the production of the £800 per annum, or such portion of it as the trustees may think fit to apportion in each year towards Alice's maintenance. Whether on the true construction of the will the £800 is to come out of corpus or income, or both, it is clear that the portion of it unapplied towards Alice's maintenance in each year falls into residue and becomes corpus. But the payments from J. M. Smith's to Lucy's trustees come in fact from income, and it is impossible, therefore, for Lucy's trustees to observe the necessary distinction in these moneys as they come to hand until J. M. Smith's trustees have ascertained what is income and what is corpus in the proceeds of that estate. Until some settled plan has been adopted by which that can be ascertained, Lucy's trustees cannot put the

(1) 6 C.L.R., 290.

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income which the plaintiff is entitled to enjoy as between himself and his children on any certain or permanent basis. Such being the plaintiff's position under Lucy's will, and the relation of these estates to one another, I find it difficult to escape from the conclusion that the plaintiff has suffered substantial injury by reason of the actings of the trustees in both estates. Whether he must submit without hope of remedy, or whether equity will give him relief, and, if so, whether in the form in which he has claimed it, or in some other and what other form, are matters which this Court is now called upon to determine. There are, it is contended, two irremovable obstacles in the plaintiff's way in these proceedings. The first is that no one but Alice can complain of maladministration of the trust for her annuity. The second is that the plaintiff cannot as *cestui que trust* be allowed in this litigation to stand in the position of Lucy's trustees. The validity of the first objection depends upon whether J. M. Smith's trustees owe any duty to the other estate. I shall first, therefore, consider the mutual duties and obligations of these two sets of trustees. In this connection certain central facts must be borne in mind. Alice, even though she may be admitted to be of sound mind, appears to have been by reason of her delicate state of health an object of special solicitude to both testators. Her care was treated by J. M. Smith's will as a family obligation to be equally shared by Vincent and Lucy. That position was adopted by them and acted on in the apportionment of the special fund for her maintenance. Eight hundred pounds seems to have been fixed by J. M. Smith's will as the amount reasonably necessary to be expended by all parties in Alice's maintenance. The trustees under both wills were under precisely similar obligations. In fixing the amount of allowance they were bound to exercise their discretion after full inquiries into Alice's financial position and to consider what was fair under all the circumstances. Moreover, the *cestuis que trustent* under each will were entitled to the exercise of that discretion by their trustees, and to the concurrence of all their trustees in any course determined upon. In Lucy's lifetime three persons were interested in the proper administration of the £800—Alice, Vincent and Lucy. Any one of them might insist upon the trustees

performing their duty. It was urged that no *cestui que trust* could complain of a breach of trust who was not financially injured thereby. Neither reason nor authority, in my opinion, support that proposition. The apportionment of an unreasonably small sum to Alice, made without the concurrence of all the trustees or without consideration of the essential factors of the question to be determined, would be a breach of trust, and Lucy in her lifetime, even if Alice did not complain, could have insisted on an apportionment in accordance with the trustees' duty even though she might have benefitted by their breach of trust. After Lucy's death the trustees of her will were in the same position. Her estate in each year benefitted to the extent of one half of the unapplied portion of the £800. But if the trustees of J. M. Smith's estate fixed an amount for Alice's maintenance under circumstances which amounted to a breach of trust, it is to my mind clear that, having regard to Alice's position under J. M. Smith's will and her state of health, Lucy's trustees would be entitled to disavow any such unfair advantage to Lucy's estate, and claim that the fund should be administered in accordance with the terms of the trust. Similarly the trustees under Lucy's will were bound to keep before their minds the interests of all their *cestuis que trustent.* They were bound, in the interest of the plaintiff, to consider that an increase in the amount of their allowance for Alice's maintenance necessarily involved a substantial diminution of his income, and where that increase was rendered necessary by a reduction in the contribution for that purpose from J. M. Smith's estate, they were bound in the interests of their *cestuis que trustent* to question it if the reduced amount was fixed by J. M. Smith's trustees under circumstances amounting to a breach of trust. Such being the general principles which are in my opinion applicable to the state of facts presented by the plaintiff, his right to adequate relief in a Court of Equity depends upon his establishing a right to have the trusts of both wills in respect of Alice's maintenance administered with due regard to the interests of all parties concerned. In fixing the amount to be applied from their respective estates, each set of trustees purported to exercise the discretion conferred by the will. That will not prevent the Court from

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inquiring whether there has been any real exercise of discretion, and by all the trustees, and whether the exercise of discretion has been honest in the sense in which the Court uses that expression. In *Colton* v. *Colton* (1) *Matthews* J. concisely states the true principle. "In the case of *Constabadie* v. *Constabadie* (2) Vice-Chancellor Sir James *Wigram* said: 'If the gift be subject to the discretion of another person, so long as that person exercises a sound and honest discretion, I am not aware of any principle or any authority upon which the Court should deprive the party of that discretionary power. Where a proper and honest discretion is exercised, the legatee takes all that the testator gave or intended that he should have—that is, so much as in the honest and reasonable exercise of that discretion he is entitled to. That is the measure of the legacy.' But it is always for the Court eventually to say, when called upon, whether the discretion has been either exercised at all, or exercised honestly and in good faith: *In re Hodges*; *Davey* v. *Ward* (3). Plainly, if the trustee refuses altogether to exercise the discretion with which he is invested, the trust must not on that account be defeated, unless by its terms it is made dependent upon the will of the trustee himself." It must, I think, be conceded that the plaintiff's right to bring his claim into Court depends upon two conditions. He must, in the first place, show circumstances entitling him to proceed against his own trustees—that is the trustees under Lucy's will. Secondly, in so far as the trustees under J. M. Smith's estate are concerned, he must show a breach of trust by those trustees against the trustees of Lucy's estate. As to the first there is, I think, quite sufficient evidence. Lucy's trustees, deeming that they had no right to influence or to interfere with the exercise of discretion by the trustees of J. M. Smith's will, refused to recognize any duty to the plaintiff in that respect. Such refusal would not of itself be sufficient to entitle a *cestui que trust* to take proceedings in lieu of his trustee; but there are, it seems to me, special circumstances in the case which would justify the Court in permitting the plaintiff as *cestui que trust* to demand that the trustees shall discharge their

(1) 127 U.S., 300, at p. 321. (2) 6 Ha., 410, at p. 414.
(3) 7 Ch. D., 754.

duty, and that he should take their place in proceedings for the assertion of his rights. In *Yeatman* v. *Yeatman* (1) Vice-Chancellor *Hall*, in discussing the principles applicable in such a case, says: "Notwithstanding the view that I have taken of this case with reference to the right to sue, my impression rather is that it would be a correct holding to say that if the circumstances of any given case are such that upon an inquiry directed as to whether any and what proceedings should be taken, the Court upon the materials before it would come to the conclusion that it was a proper case for proceedings to be taken, although not necessarily and absolutely certain that they would be successful, there it would be a proper case to allow a party to sue in his own name." Besides the strong case made out for taking proceedings on behalf of Lucy's estate, one circumstance alone, apparent with respect to Aitken, is sufficient to establish the plaintiff's claim to directly invoke the aid of the Court. Aitken was an active trustee in both estates, and could hardly be expected to sue himself. This seems to me sufficient to dispose of the objection which was strongly urged against the taking action in his own right and against the trustees of J. M. Smith's will. As to the necessity of joining Noall as a party plaintiff, I agree with the observations of the learned Chief Justice that no difficulty of form in that respect should be permitted to stand in the way of doing justice between all the parties interested. As to the breaches of trust by J. M. Smith's trustees against the trustees of Lucy's estate several grounds have been relied on. Charges of being influenced in the exercise of their discretion by indirect motives are made against all three trustees. As to Emmerton and Aitken the evidence on this head is exceedingly vague and inconclusive, but as against Vincent Smith there is certainly a case for further inquiry. He stands in a delicate position, and although the testator has empowered him to exercise his discretion in respect of matters which necessarily involve his own interests, as well as the interests of others, that does not relieve him from the necessity of acting with the utmost good faith in all dealings with trust property which may result to his personal advantage. Upon the evidence before us it is difficult

(1) 7 Ch. D., 210, at p. 216.

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to discover any reason other than self-interest for the reduction of the allowance for Alice's maintenance. On full inquiry some other reason may be disclosed, but as the evidence stands at present the inference which the plaintiff asks the Court to draw against his *bona fides* is not unreasonable.

On the remaining grounds there is certainly a case for further inquiry against all three trustees. It is plain, I think, that they regarded it as their duty in fixing Alice's allowance to do the best they could for J. M. Smith's estate even to the extent of putting off substantially all the burden of her maintenance on Lucy's estate. Their counsel have endeavoured in argument to uphold the contention that in respect of Alice's maintenance the trustees of the two estates were under no obligation to arrange an allowance which should be fair to both. On the contrary, it is said it was the duty of each set of trustees in the interests of their own *cestuis que trustent* to throw as much as possible of the burden of Alice's maintenance on the other set. In the special circumstances of this case that contention cannot be supported. The intention of both testators, plainly to be gathered from their respective wills and the surrounding circumstances, was that Alice's maintenance was to be a joint burden fairly divided between her brother and her sister. That intention cannot be carried out except by co-operation and mutual consideration of interests between the two estates. The trustees of J. M. Smith's estate however took, as I have pointed out, the opposite view, and have accordingly exercised their discretion on an entirely erroneous conception of their duty. In other words, they have not exercised a sound discretion in discharging the duties of their trust. The plaintiff further alleges that in fixing the amount of Alice's allowance there was in reality no exercise of discretion by all the trustees. As to that the evidence is not by any means conclusive, but it is I think fairly clear that Aitken never exercised an individual discretion for the reason that he held the mistaken notion that trustees were not bound to be unanimous but that joint action could be taken on the opinion of the majority, and that the minority were bound to submit. In that he was apparently supported by those from whom he sought legal advice. There seems therefore to be good

ground for believing that there never was any real exercise of discretion by all the trustees. In that respect certainly a case has been made out for further inquiry.

Taking the plaintiff's case in its broad outline it rests upon breach of duty by Lucy's trustees in the fixing the amount to be applied for Alice's maintenance out of Lucy's estate without insisting on the rights of Lucy's estate being considered at the hands of J. M. Smith's trustees in determining the amount allotted annually out of the £800 towards Alice's support. Both sets of trustees are thus necessarily before the Court charged with having failed to administer their respective estates in accordance with their obligations. Under these circumstances the Court is entitled to step in and administer both estates in accordance with the trusts of each. Having both estates and all the parties before it the Court will see that the provisions in both wills for Alice's maintenance will be carried out with a reasonable regard for the interests of all parties interested in both estates. There is, I think, good ground for holding, as the learned Chief Justice has done, that the Court would if necessary apply the doctrines of contribution in allotting the proportions in which each estate should contribute to Alice's maintenance. But in the circumstances of this case it is unnecessary in my opinion to call in the aid of that doctrine. The clear intention of both testators, which it was the duty of the trustees as far as possible to give effect to, was that the charge of Alice's maintenance should be equally borne between the two estates. The trustees of both estates would have been well within their rights in agreeing to a fair basis of contribution. The Court's decree, if the plaintiff's full claim to relief is, after full inquiry, established, will amount to no more than an embodiment in judicial form of terms which any reasonably fair agreement would have contained. Having all the parties interested before it the Court ought at the same time to make such declarations and direct such inquiries as are essential to put the plaintiff's share of the income of Lucy's estate on some settled basis. This can be done only by establishing a method of accounting between the two estates which will distinguish corpus from income in the moneys that come from J. M. Smith's estate. I entirely concur in the declarations and inquiries for the

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purpose of achieving that result which the learned Chief Justice has indicated.

So far I have dealt with the substance of the plaintiff's cause of complaint without regard to the form in which it has been brought before the Court. It must I think be conceded that, on the statement of claim as it stands, the full and adequate relief, which I have in the course of this judgment pointed out he is entitled to, could not be granted. But that difficulty can be, and, in my opinion, ought to be, removed by amendment of the proceedings. All the parties interested are now before the Court, all rights and claims which can come into question on both sides have in substance been open for discussion from the beginning of the proceedings. The circumstances of the case are so unusual as to have rendered the determination of the precise nature of the plaintiff's right to relief a matter of some difficulty. This, as well as other phases of the case, have been much elucidated by the very able arguments of counsel, and the Court is now in a much better position for seeing what are the real issues in dispute than it could have been at the beginning of the hearing. Finally, no party interested can suffer from amendment any prejudice which cannot be compensated for by costs. Under these circumstances I agree that the case is one in which every amendment ought to be allowed which is necessary for doing complete justice between all parties. I therefore agree that the case should be remitted to the Court below for further trial of the issues of fact with liberty to all parties to amend as they be advised.

I agree also that the declarations should be made and the inquiries directed as mentioned in the judgment of the learned Chief Justice, and that the order as to costs generally should be as he has indicated.

ISAACS J. In the case of *Cock* v. *Aitken* (1) it was held as between the plaintiff Cock, his children, and the trustees of Lucy's will, that whatever part of the £800 annuity came into Lucy's estate as unapplied to the maintenance of Alice, came in as corpus of Lucy's estate, and not as income. It is evident, therefore, that

(1) 6 C.L.R., 290.

whatsoever judgment the plaintiff (I shall refer to the plaintiffs in the singular) may be entitled to, it must as between the parties to the former action be consistent with that decision: *Badar Bee* v. *Habib Merican Noordin* (1). But no order as to the matters raised in this action would be of the slightest benefit to him unless it did one of two things, viz.: (1) directed by some means, consistent with that judgment, if that be possible, that some part of the £700 unapplied balance of £800, at present income of J. M. Smith's estate, and falling into the hands of Lucy's trustees, should be treated as income of her estate; or else (2) enabled him to increase the amount actually applied and to be applied in J. M. Smith's estate for Alice, so as to relieve the income in Lucy's estate.

I shall deal with both these branches in order.

The learned Chief Justice has suggested an order intended to have the effect indicated in the first branch. Nothing that was said during the argument on behalf of the appellants appeared to me to suggest any such contention. The full force of the former decision was not challenged, on the contrary, it was made the starting point of the appellants' argument, and I am unable to reconcile the direction now proposed by my learned brother with the decision referred to. On the simple ground of *res judicata*, I would reject such order. But, in the circumstances, I have also to consider it apart from that objection and as if the question were *res integra*, and, so considering it, I am of opinion that it cannot be supported.

For the purpose of this branch of the case it must be assumed that there is no breach of trust on the part of the trustees of the will of J. M. Smith, that their past actions are unimpeachable, and their future action, both as to the amount and the source of the annuity to Alice, is not to be altered. The order then does not affect them or their estate, but merely allocates as between the tenant for life (the plaintiff) and the remaindermen (his children) under Lucy's will the moiety of the unapplied portion of the £800 actually received into Lucy's estate. Thus baldly stated, of course it is at once struck by the former decision, but passing that by, what equitable ground is there for a notional

(1) (1909) A.C., 615.

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change from corpus to income? Equity regards that as done which ought to have been done. But that maxim does not apply to this claim of the plaintiff as against the remaindermen in Lucy's estate. The rule and its limitations are defined by two cases of high authority. The first is *Burgess* v. *Wheate* (1), where *Sir Thomas Clarke* M.R. in delivering his judgment, with which Lord Keeper *Henley* concurred, said:—"Nothing is looked upon in equity as done, but what *ought* to have been done, not what *might* have been done. Nor will equity consider things in that light in favour of everybody; but only of those who had a right to pray it might be done. The rule is, that it shall be either between the parties who stipulate what is to be done, or those who stand in their place." And so *per Lindley* L.J. (for Lord *Esher* M.R., *Lopes* L.J. and himself) in *In re Anstis*; *Chetwynd* v. *Morgan* (2). Assuming, therefore, Lucy might have called for her share, and thus compelled the trustees to appropriate a sufficient sum to secure Alice, or, assuming both Lucy and Alice, as well as Vincent, to have assented to a part of the corpus being cut off for ever from the estate and paid away in purchase of an annuity of £800, yet it was not done, and Cock, representing for this purpose not Lucy's trustees, but his own personal interests antagonistic to the remaindermen, is not in a position to invoke the application of the maxim in respect of an estate to which he is a stranger.

But carry it even further. Assume he can claim its application, what is it the trustees ought to have done? They were primarily bound to regard the whole estate as a fund for the annuity. There is no residuary estate except subject to the annuity, and on the principles laid down by the House of Lords in *Lord Sudeley* v. *Attorney-General* (3) it was impossible to say at the testator's death, and it is equally impossible now to state definitely, the amount of the residuary estate. The judgments of Lord Chancellor *Halsbury*, Lord *Herschell*, and Lord *Davey* seem to me to strip this question of any doubt. Of course we know that there will be more than sufficient to pay the annuities, but still no one can yet say that the precise amount of the residuary

(1) 1 Eden, 177, at p. 186. (2) 31 Ch. D., 596, at p. 605.
(3) (1897) A.C., 11.

estate is ascertained. This position is fundamental. Further, one cardinal point is clear and definite. By no possible process of reasoning can any part of the £800, which is in fact paid for Alice, be part of the residuary estate. There is no residuary estate till that is provided for, and it is a contradiction in terms to assert that it comes out of corpus or income of residue. And equally the balance, which falls into residue by virtue of the special clause, is no part of the residue unless and until it so falls in, and consequently in like manner cannot be presumed to be previously part of it or of its produce.

In the circumstances however let us suppose the trustees, on the principle of *Harbin* v. *Masterman* (*No.* 2) (1), to have arranged for the distribution of the estate, first providing for the annuities. They are at least bound to set aside such a sum as invested on the best securities—that is Government securities: *Ford* v. *Batley* (2) and *Hill* v. *Rattey* (3)—will produce the annuity. That would, say at 3½%, require, considering expenses, about £23,000 for Alice; similarly over £14,000 for Mrs. Cook, or a total of £37,000, leaving a very small sum for the plaintiff's income. He would be infinitely worse off than at present.

If instead of setting apart a sum by way of security, let us suppose an annuity purchased for Alice. I put aside the difficulties as to consents; but that transaction, if imagined at all, must be imagined as it would really occur. And the capital sum required would have to be paid irrevocably to some insurer, who would promise the annuity only, on the basis of retaining the capital sum, in other words, no interest can be imagined as coming to the estate from any sum so paid away. It cannot be assumed to compensate for its smallness by absolute alienation, and yet to be retained and produce interest only on that smaller basis. That would be an impossible transaction and equity at least does not assume impossibilities. In plain words, then, unless we treat the annuity fund as alienated and so not producing interest at all—a position not to be entertained—it must necessarily be treated as identical in amount with the sum required for appropriation by way of investment, and that, as I

(1) (1896) 1 Ch., 351. (2) 17 Beav., 303.
(3) 2 John. & H., 634, at p. 646.

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have said, would comparatively impoverish the plaintiff. As already intimated, there are many legal doubts whether the scheme is permissible at all, but as a matter of business it is difficult to perceive its acceptability to the plaintiff.

I am unable to see that *In re Perkins*; *Brown* v. *Perkins* (1), and that class of cases, give any assistance to the plaintiff. A testator died leaving by his will £10,000 to his sister and her children (see report in 97 L.T., 706), and the residue as mentioned in the Law Reports, to tenants for life and remaindermen. He had made a deed two years before by which he covenanted to pay an annuity to his wife for life. That annuity was a debt in his estate, but not a debt payable at his death; and as *Romilly* M.R. said in *Yates* v. *Yates* (2), quoted by *Swinfen Eady* J. in *In re Dawson*; *Arathoon* v. *Dawson* (3), a case which explains the whole position:—"The growing payments of the annuity are nothing more than a succession of specialty debts, becoming due from year after year as long as the annuity lasts, and each of those debts must be apportioned between the tenant for life and the reversioner."

This requires some convenient working rule, and one was found and applied in various cases ending with *In re Perkins*; *Brown* v. *Perkins* (1). But that has no application to the present case where the annuitant is not a creditor of the testator's estate, where the plaintiff is not the tenant for life nor any beneficiary at all in that estate but in a secondary estate, where there is no secondary estate at all until after the amount is provided for, and where the question raised by the plaintiff is not how should the sum paid for the annuity be apportioned, but how should the sum not paid be allocated. I therefore find no analogy in *In re Perkins*; *Brown* v. *Perkins* (1).

The beneficiaries in Lucy's estate must take that estate as they find it and not as a prior testator might have made it, or even as it might be if the trustee and the beneficiaries in that prior estate had acted differently.

The matter then on this first branch comes to this—that no appropriation or capitalization was in fact effected or asked for,

(1) (1907) 2 Ch., 596.
(2) 28 Beav., 637, at p. 642.
(3) (1906) 2 Ch., 211, at p. 215.

and cannot be presumed now to have been made—more particularly as between the primary estate and a stranger to it, and in face of the former decision between that stranger and his co-beneficiaries.

The secondary estate taking what falls into it, and as it falls into it, the remaindermen have, in accordance with the former decision, the absolute and indefeasible right to the corpus as it has already been declared to be.

I now come to the second branch which seeks to affect the conduct of the primary trustees.

The plaintiff's real effort through various avenues of argument has been directed to this branch and against the trustees of J. M. Smith's will to compel them to alter their course of action with respect to Alice, so as to force them to allow her, say, £400 instead of £100 a year, and so leave the plaintiff £300 more out of the income of Lucy's estate than he at present receives. The basis of this assumption is that, as sworn by Mr. Cock himself (fol. 103), Alice is adequately maintained, and consequently a greater allowance by one set of trustees implies a corresponding reduction by the other. The plaintiff Cock, though no beneficiary of the testator's will, nevertheless asserts a right to demand from the trustees of that will the due execution of its trusts. He stands upon two contentions—one as to representing not himself individually but the trustees of Lucy's will in respect of the general claims of her estate considered as itself a beneficiary under the first will; and his second contention is a claim which, though nominally on behalf of the whole Lucy estate, is aimed at a special benefit to himself as a beneficiary under Lucy's will, and at the expense of his own children and other beneficiaries under that will, and therefore for a purpose which the trustees of Lucy's will could not be supposed to have, because trustees ought not to favour one *cestui que trust* to the detriment of the others. So far as concerns any claim which Lucy's trustees could make for the general benefit of the estate, I accept the propriety of the plaintiff's presence as plaintiff. The question to be dealt with is one of substance, and I pass by any objection as to form. What cause of action, then, would Lucy's trustees have against the testator's trustees in the present circumstances? The pivotal

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point of the plaintiff's argument, and really the only one that could in my view bring him any benefit, is this, that on the proper construction of the testator's will the £800 must come out of the corpus of his estate; and that in using income for the purpose the trustees of the first will are using Lucy's moneys instead of their own. It was urged that so it was held in *Cook* v. *Aitken* (1), and if not so held the word "proceeds" indicates it. *Cock* v. *Aitken* (1) does not so decide; the judgments were carefully worded to avoid any such misconception. That case starts with the assumption that some portion of the £800 is unapplied; and so far from holding that it has come out of corpus—in which case the question there determined could not have arisen—the Court necessarily assumed that it might have come out of income, and then, and only then, would the problem present itself whether it was to be considered income or corpus in Lucy's estate. And the Court held that in either case it was corpus so far as Lucy's estate was concerned. As to whether it could properly come out of income was not before the Court and not determined. That is raised now, and I am clearly of opinion it may come out of income as well as out of corpus. The will gives all real and personal property to the executors upon an express trust for conversion (there being an indefinite power of postponement), and for disposal of the proceeds as directed. But there is nothing in the word "proceeds" to limit the disposal to corpus. The testator's estate must for the purpose of his will be treated as converted it is true, but that is all. The very first gift out of the "proceeds" is the "net income" of a certain specific property for life. So that at the threshhold of the testator's dispositions he negatives the main argument of the appellants. The "proceeds," that is the moneys, arising from conversion simply take the place of the property left. The bequest of the annuity of £800 becomes therefore an ordinary legacy of an annuity. This brings into play the general rule of construction laid down by *Cotton* L.J. in *Gee* v. *Mahood* (2), in these words:—"If there is a direct legacy of an annuity, then *primâ facie* the annuitant is entitled to have that made good, not only out of the income, but out of the capital, unless there are words sufficient to cut down the claim of the

(1) 6 C.L.R., 290.

(2) 11 Ch. D., 891, at p. 897.

person to the income only; to which I may add that the residuary legatee, that is to say, one taking a residuary legacy, cannot take anything until all legacies have been provided for."

That case was affirmed by the House of Lords under the name of *Carmichael* v. *Gee* (1), and it was pointed out that the direction to set aside investments to produce the annuity was merely a direction for administration. That left the bequest, as here, a simple gift of an annuity unconfined by express words or necessary implication as to any specific fund. Lord *Selborne* L.C. said (2):—"In that state of things, while the property remained unconverted, I apprehend it to be clear that the annuity was an absolute charge upon the whole estate, and of course upon the whole income of that estate." Then the learned Lord Chancellor proceeds to add, that notwithstanding the trust for conversion and the doctrine that equity considers that as done which ought to be done, and the further consequence that postponement of conversion does not alter rights, which ought to accrue if conversion took place immediately, yet the general unrestricted gift of the annuity cannot be regarded as a mere life interest in the whole or part of a separated fund. This portion of his Lordship's judgment has a very important bearing on the first aspect of this case.

I therefore regard the "proceeds" of conversion as a general and indiscriminate fund formed by the moneys arising from the disposal of the real and personal property alike, out of which—accessory as well as principal—the trustees are to pay specific legacies and annuities, and subject to these prior gifts to hold the general fund in trust for the residuary legatees. So far, then, as the plaintiff relies on any duty of the testator's trustees towards Lucy or her estate as a whole to pay the annuity to Alice out of corpus, his case fails.

Then he alleges there was at least an absolute duty to exercise a discretion as to what sum, not exceeding £800, should be paid for the maintenance of Alice, and that no discretion was exercised, or if it were in fact exercised, it was fraudulently exercised, or as far as Aitken is concerned, under coercion.

I am disposed to accede to the plaintiff's argument that Lucy

(1) 5 App. Cas., 588. (2) 5 App. Cas., 588, at p. 595.

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in her lifetime could have insisted upon the exercise of the discretion, because there was a trust as to £800, either to apply it for Alice, or to pay it into residue, and as long as Alice could and would object that it was not exercised, so long would Lucy be without any rights to any of it. But it is not pretended that Alice claims, or has ever claimed, or ever will claim, any of the unapplied portion of the £800. The plaintiff in paragraph 4 admits that (of course subject to £400 paid to Alice) the whole of the testator's residuary estate was divided equally between J. M. V. Smith and Lucy Smith. No expostulation or complaint appears to have been made by Lucy—no want of notice alleged—and in the circumstances it appears to me that, so far as past payments are concerned, no case whatever can be maintained upon which to rest the technical point of Lucy's right, up to the date of her death, to claim the exercise of discretion to make her title safe. Besides, there is no proof that up to that time there was any failure to exercise discretion in fact. Then as to what has taken place since Lucy's death, the plaintiff says that to have a valid exercise of discretion with respect to the maintenance of Alice all three trustees must agree. So far I assent. Then he says that did not happen, because Aitken did not really agree that £100 was sufficient, that he merely mechanically acquiesced, since he suffered himself to be overborne because he was in the minority, still, however, retaining his belief that £100 was improper. This is a matter of fact, and the learned Judge from whom this appeal comes has dealt with it at folios 337 to 340. According to that finding Aitken was not a cipher but an active participant in the decision though giving way to a conflicting view. He may have been right or wrong in the course he took, but he listened to argument; he considered not only his own view, but also the likelihood of Emmerton's being possibly after all correct, because the unbiassed view, since it was unaffected by conflicting interests, and he ultimately adopted it, and actively assented to the sum of £100 being paid. Is the evidence open to that construction? Where the quest is the state of a man's mind, the plasticity or firmness of character of an individual, whether he effaced himself or made the best practicable working arrangement, indeed the only arrangement short of throwing the estate into

litigation, in such a case the personal manner and demeanour of the man himself in the witness box is of very high value to a Judge in interpreting the testimony. I therefore think this is an instance where I am not justified in disregarding the fact that the primary tribunal has found in favour of Mr. Aitken. A recent instance of effect being given to this consideration is the case of *N. S. Mundaliar* v. *Manika Mundaliar* reported so far in the *Times* newspaper for August 23rd 1909.

There Lord *Collins*, speaking for the Privy Council, applied that part of Lord *Lindley's* judgment in *Coghlan* v. *Cumberland* (1) relating to manner and demeanour. I do not, of course, say that that consideration is to control our judgment, because the evidence may on examination be strong enough to overcome any presumption arising from manner and demeanour, but in the present case the feature is too important to be entirely overlooked. Reading the evidence for myself I have come to the conclusion that Mr. Aitken, according to all the evidence given both by Mr. Cock and himself on behalf of the plaintiff, has shown himself to be an experienced, careful, hard-headed, straightforward and resolute trustee, and one whose conduct as a trustee has, in my opinion, been most admirable. In view of the strenuous contention of the plaintiff on the question of fact, it is necessary to point out the circumstances which have led me to my conclusion. Mr. Cock speaks first of a conversation with Mr. Aitken shortly after probate of Lucy's will, in which Aitken told him he was going to allow £700 or £750 a year for Alice out of Lucy's estate and only allow £100 out of the grandfather's estate. So far it is a statement as to what Aitken would allow out of J. M. Smith's estate, that is would concur in allowing. That is something of a definite mental resolve at any rate. The reason he gave was, though he personally thought it unfair—unfair that is to Lucy's estate—he could not do anything, because the others would not allow more.

Plainly, the effort of plaintiff was to get more consideration, not for Lucy's estate, as against the primary estate, because the more Alice received out of the primary estate, the less came into Lucy's estate, and not more consideration for Alice, but more for

(1) (1898) 1 Ch., 704.

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himself as opposed to J. V. Smith, and to Lucy's estate as a whole and to his own children.

Then Cock says he saw his solicitor, Dixon, and again saw Aitken. Cock admits he told Aitken distinctly that Dixon advised that the trustees must be unanimous, and if Aitken liked to object they could not do anything.

Now, what does that mean? Why simply this: That Cock invited Aitken, who was trustee of Lucy's will, to use his power as trustee of the first will in order to block his co-trustees, because it did not suit him as a beneficiary of Lucy's estate. In other words, though a particular discretion had to be exercised with a view to the benefit of Alice, yet its exercise was—according to Cock's request based on the advice of Dixon—to be governed by considerations not of the welfare of Alice and not even of the advantage of Lucy's estate, because it would be a detriment to that estate, but of advantage to Cock as one of the beneficiaries of Lucy's estate, and to the disadvantage of his children. Aitken said, "Get Dixon to write to Butler," who acted for Lucy's trustees.

Correspondence took place, in the course of which it was pointed out that the trustees of Lucy could not control the discretion of the other set of trustees. Then in June, Cock says, he again saw Aitken who said he could not—that is as Lucy's trustee—do anything in the matter. Cock again invited him to use his power as trustee of one estate to favour a particular beneficiary in another. To use Cock's own words—"I asked if he couldn't do anything to force their hands in the matter of Alice Smith's allowance." I said, "Mr. Dixon says you hold the key to the situation, and can force their hands." Of course he could if he allowed himself to misuse his powers in the affairs of one trust, by advancing not even the interests of another, but for the special welfare of one beneficiary of that other trust to the corresponding loss of other beneficiaries in the same trust. Aitken took the upright course of declining the invitation. No wonder he seemed worried and begged him not to press the matter.

Some time after he said to Cock, according to Cock's evidence, "Oh, its two to one and I've no say in it." That one statement

has been asked to bear most of the weight of the plaintiff's case on this point. It has been interpreted as meaning that Aitken admitted a surrender of his judgment, and to that extent an abdication of his functions. Besides being very unlikely to mean that, having regard to the general conduct of Aitken (I pass by the question whether such an admission so to speak in the street is any evidence at all against the other two trustees), I think it quite plain that Aitken's own account of what he did negatives altogether the interpretation suggested by the plaintiff. It appears that when Lucy died Aitken was executor of J. M. Smith's will, and was also in receipt of £250 a year from J. M. Smith for keeping his accounts. Feeling the pressure of personal interest on one side and duty as a trustee on the other in respect of some claims made by Vincent Smith, he gave up the £250 a year and kept his independence as a trustee. This was a signal and practical proof of strength of mind and moral firmness. Then at the beginning of 1904 he heard of the suggestion to reduce the £400 to £100. He heard of it from Vincent Smith. Aitken told him of Cock's conversation, and asked for the increase to over £400 a year. Smith said he did not think so, but would see Emmerton. Emmerton said he was not inclined to allow anything because of the ample provision for Alice in Lucy's will, but would allow £100. Aitken still desired to go so far as he honourably could, and suggested an opinion from counsel, which was obtained before he acted. Indeed nothing was done until July 1904, so that there can hardly be a fair suggestion of hurried yielding. Mr. Aitken is courageous enough to still maintain his personal opinion that £400 is a fair amount, that is as between J. M. Smith's estate and Lucy's estate, a circumstance which, as a direct motive of conduct, was properly outside the ambit of the consideration of J. M. Smith's trustees.

Then Mr. Aitken says (fols. 118 and following), that Smith told him counsel's opinion had been taken and Emmerton still thought only £100 should be allowed, and said too that he and Smith were interested, and Emmerton was neutral and therefore his opinion should be followed. Now what did Aitken do? He says: "I said I thought this was a feasible way to look at it and so I gave way." That is he concurred, or in other words decided

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that on the whole his judgment was best formed that way.—See *Messeena* v. *Carr* as reported in the *Law Journal* (1), and in the *Weekly Reporter* (2), where the facts are more fully stated than in the *Law Reports* (3).

Now let us look at his undeniable situation at that moment. He had been told by Cock himself on Dixon's authority that if he chose to obstruct the others could do nothing; that he held the key of the position; so that he was under no misapprehension as the rights of the majority. He also had Mr. Butler's statement that the trustees of Lucy's will were powerless to control the trustees of J. M. Smith's will, and that Emmerton had a perfect right to use his discretion as he had done. He had the belief that £400 would be fair all round; and he pressed his view as long and as far as he could. Where he stopped short was in not doing what Cock asked him to do, namely, to misuse his powers. He had his choice then to bring about a deadlock really in Cock's interest, or else to make the best terms for Alice he could in J. M. Smith's estate. He says (fol. 121): "After this I never tried to raise the allowance from J. M. Smith's estate as I saw it was no use, and this is the reason why no further proceedings were taken by me." This passage is the real explanation of the passage in Cock's evidence at fol. 91. He drew out the cheques for £100 after this, and the other trustees signed.

I feel no hesitation in concurring with *Hood* J. that Mr. Aitken was not overborne in the sense of surrendering his mind; but he gave way by concurring in and acting upon the resolution as to £100 because it was the best terms that could be jointly agreed to. If one of a number of trustees is always to refuse concessions of the absolute fairness of which he is not personally convinced, then most estates where there are more trustees than one must inevitably in future be administered by the Court.

I have adverted to Aitken's attitude with regard to J. V. Smith. A similar proof of his firmness with respect to Emmerton is found in Fols. 122 to 124. Then it was alleged not that either Smith or Emmerton failed to exercise their discretion in fact, but first that J. V. Smith was improperly influenced in his own favour. No evidence has been given of this except the mere

(1) 39 L.J. Ch., 216. (2) 18 W.R., 415. (3) L.R. 9 Eq., 260.

fact that he profited by the reduction. But as the testator contemplated this possibility, and indeed placed two out of his three trustees in that possible position, I do not see how a Court must regard that fact as casting any onus upon the trustees of explaining it. The explanation of that one circumstance lies on the face of the will itself; it was just what the testator said his trustees might do. So far as there is any affirmative evidence, it is opposed to the plaintiff's allegation. Smith gave way to Emmerton's opinion as an impartial one just as Aitken did, that is he did not insist on his opinion. Therefore I do not see how the principle of *Duke of Portland* v. *Topham* (1) affects the matter. Where is there any evidence of an unauthorized purpose, or bye or sinister object, so as to be a fraud on the power? It cannot be deduced from circumstances entirely consistent with propriety. There are certainly principles to be found in that case very material on another part of this case, (2): "This power must be exercised within the limits which the deed creating it prescribes" and (3): "The Court will not allow him" (that is the donee of the power) "to interpret the donor's intention in any other sense than the Court itself holds to be the true construction of the instrument creating the power"—so that, consistently with these observations of Lord *Hatherley* L.C., the trustees of the primary will could not validly look to the interests of strangers to their trust. But as impeaching the trustee's case, there are no facts here to fit the case cited. If there be, then any allowance short of £800 would be some evidence, because to the extent of half the shortage J. V. Smith might equally well be said to have had in view the motive of personal advantage, and so have acted corruptly. There are two material observations to be made before leaving the question of J. V. Smith's intentions. The first is that if for the reasons alleged the exercise of his discretion, or of Emmerton's either, was corrupt, the only person who could take the objection is Alice. No one else is injured. If she does not choose to do so, and she does not, but acquiesces—as she apparently does—no one else can impeach the transaction. Lucy was not injured, and could not

(1) L.R. 5 Ch., 40; 11 H.L.C., 32. (2) L.R. 5 Ch., 40, at p. 55.
(3) L.R. 5 Ch., 40, at p. 59.

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complain if Alice was satisfied, and no one pretends she is not. Cock swears she is adequately maintained, so that it would on his own showing be difficult to see how she could complain. Then if she acquiesces, the cases of *Skelton* v. *Flanagan* (1); and *Preston* v. *Preston* (2), quoted in *Farwell on Powers*, 2nd ed., at p. 404, are authorities to show the transaction cannot be impeached.

The second observation is that fraudulent motive is a question of fact, the matter challenged being within the scope of the trust. The Court always requires proof of the fraud. Inference from facts may suffice, and in many cases must suffice, but where the fact of personal advantage to the donee is contemplated by the donor, the proof must be clear.

In the *Case of the Queensberry Leases* (3) Lord *Eldon* L.C. said that "Judges should take care they are not misled by the idea, that because powers may be abused, there has been in the cases put abuses of the powers." In *Henty* v. *Wrey* (4), a case of alleged fraud on a power, *Jessel* M.R., presiding in the Court of Appeal, said:—"Fraud is not lightly to be presumed or inferred. In all cases in which fraud is inferred there must be such cogent facts that the Court cannot reasonably come to any other conclusion." So *per Lindley* L.J. (5).

The proper method of judicial approach to such a question is thus stated by *Kindersley* V.C. in *In re Marsden's Trust* (6): "Unless it can be shown that the trustee having the discretion exercises the trust corruptly or improperly, or in a manner which is for the purpose not of carrying into effect the trust but defeating the purpose of the trust, the Court will not control or interfere with the exercise of the discretion. There may be a suspicion that the trust has been exercised in a particular manner and from a certain motive, which, if it could be proved, would be held not to be a proper motive; but if it be mere suspicion—though suspicion is ground for jealous investigation—if it be mere suspicion, and not matter amounting to a judicial inference or conviction from the facts, the Court will not act upon it. But if on

(1) I.R. 1 Eq., 362.
(2) 21 L.T., 346.
(3) 1 Bl., 339, at p. 397.
(4) 21 Ch. D., 332, at p. 350.
(5) 21 Ch. D., 332, at p. 354.
(6) 4 Drew., 594, at p. 599.

the other hand it can be proved to the satisfaction of the judicial mind that the power has been exercised corruptly or for a purpose which defeats instead of carrying into effect the purpose of the trust, then the Court will not permit such an exercise of the power to prevail." Having regard to the terms of the trust I cannot even see grounds for suspicion.

That case also shows that, if the design of the trustees was to benefit Cock at the expense of his children, the power would be invalidly exercised. But that is just what the plaintiff asks should be done.

The suggestion that Emmerton did it to benefit his client, Vincent Smith, has been stated in the pleadings as the only wrongful motive affecting Emmerton. Another motive has been assigned in the evidence, namely, that because on 6th April 1900 Lucy Smith left Emmerton's firm, he, with a malignity that did not even stop at the grave, has wreaked vengeance on the innocent objects of Lucy's bounty, and especially the plaintiff Cock.

I can only characterise these as suggestions of despair, and they are not sustained by proof. They disregard the all important fact, which makes honesty quite consistent with the reduction of allowance to Alice, namely, the new provision for Alice by Lucy, rendering her position practically independent of any other bounty. It was, of course, quite open to the plaintiff to have interrogated all the defendants, or called them all as he did Aitken, and so have pressed his investigation to the end ; but that is entirely different from having established a *primâ facie* case against them by the evidence already given.

No other reasons were advanced for attacking the trustees of J. M. Smith's will on the ground of the want, or method, of exercise of their discretion, except one to which I now address myself.

It was urged that, not only were the trustees of J. M. Smith's will bound to look at the circumstances of Alice from time to time (*In re Roth*; *Goldberger* v. *Roth* (1)) to which I agree ; but they are bound to act, with a view to lightening the burdens or alleviating the mental difficulties of other trustees, under a totally different will, with an entirely new set of beneficiaries ; that is,

(1) 74 L.T., 50.

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they are to deflect from the line of duty to their own *cestuis que trustent* with a view to the benefit of strangers to their trust.

I am unable to assent to this contention. *Lindley* L.J. says that trusts are "equitable obligations to deal with property in a particular way," and he goes on to show what that particular way is. He says:—"A trust is really nothing except a confidence reposed by one person in another, and enforceable in a Court of Equity." (*In re Williams*; *Williams v. Williams* (1)).

We therefore have to ask what confidence was reposed by the testator in his trustees, not by any other person. The learned Lord Justice a little earlier in his judgment said that equitable obligations can be imposed by any language clear enough to show an intention to impose an obligation, and definite enough to enable the Court to ascertain *what the precise obligation is*, and *in whose favour it is to be performed*. This latter portion was quoted with approval by *Stirling* J. in *In re Oldfield*; *Oldfield* v. *Oldfield* (2).

Applying those observations to the present case the only trusts of the testator's will are the obligations which have been imposed by him (not by Lucy Smith) and by his will (not by Lucy's will), and in favour of his beneficiaries (not Lucy's beneficiaries).

So says *Story* (*Story on Contracts*, sec. 296) quoted by *Brett* L.J. in *Wilson* v. *Lord Bury* (3):—"A trustee is a person holding the legal title to property under an express or implied agreement to apply it, and the income arising from it, to the use and for the benefit of *another person, who is called the cestui que trust*."

In accord with this underlying principle is *Hardoon* v. *Belilios* (4). And it follows that no person who is not a *cestui que trust* originally or by the assignment or by devolution can claim the benefit of the obligations. This has been so clearly enunciated by the English Courts that I shall merely mention some of the authorities: *In re Empress Engineering Co.* (5) by *Jessel* M.R.; followed by *North* J. in *In re Flavell*; *Murray* v. *Flavell* (6); *Gandy* v. *Gandy* (7) by the Court of Appeal.

It is really a work of supererogation to refer to the concurring

(1) (1897) 2 Ch., 12, at pp. 18 and 19.
(2) (1904) 1 Ch., 549, at p. 555.
(3) 5 Q.B.D., 518, at p. 530.
(4) (1901) A.C., 118.
(5) 16 Ch. D., 125, at pp. 127 and 129.
(6) 25 Ch. D., 89, at p. 95.
(7) 30 Ch. D., 57.

decisions of even so high an authority as the Supreme Court of the United States, but as the point was so hotly disputed at the bar, it may be some satisfaction to know that in *Cowell* v. *Springs Co.* (1) that tribunal said of an alleged trust contained in a conveyance of land: "If any trust was in fact created, it was for the *cestui que trust*, and *no one else*, to complain of the action of the patentee" (that is the grantee) "and enforce the *trust*." On these grounds I am of opinion that, as Cock is not a *cestui que trust* of the testator's will, the trustees of that will have no obligation whatever towards him, neither directly nor indirectly, neither in his own name, nor in that of Lucy's trustees, can he call upon the testator's trustees to exert their powers with a view to his special benefit, or so as to influence or affect the action of Lucy's trustees under their own independent trust instrument. As he is not a competent plaintiff the action, so far as his individual claim is concerned, must inevitably fail: *Gandy* v. *Gandy* (2). And if my views already expressed be correct, it is unnecessary, whoever is the real plaintiff, to inquire whether the Court will control the discretion of the testator's trustees on the ground of unreasonableness, or impropriety, or want of due regard for the responsibilities of Lucy's trustees to their own *cestuis que trustent*.

But assuming those views are incorrect, I state my opinion that no circumstances are shown here which would warrant any interference by the Court. The discretion has been exercised or, if not, the trustees are not said to be unwilling to exercise it, there has been no bad faith, no object has been pursued but the fulfilment of the trust, and there has been no ruinous or mischievous course taken, tending to destroy or imperil the trust.

In *Gower* v. *Mainwaring* (3) Lord *Harwicke* L.C. says:— "Wherever there is a trust or power . . . whether arising on a legal estate, or reserved to be exercised by trustees barely according to their discretion, I do not know the Court can put themselves in place of those trustees to exercise that discretion."

Cases in accord are: *In re Beloved Wilkes's Charity* (4); *In re Brittlebank*; *Coates* v. *Brittlebank* (5); and *Re Boys* (6).

(1) 100 U.S., 55, at p. 58.
(2) 30 Ch. D., 57, at p. 68.
(3) 2 Ves. Sen., 86, at p. 87.
(4) 3 Mac. & G., 440, at p. 448.
(5) 30 W.R., 99.
(6) 41 Sol. J., 111.

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Even if the Court did interfere it would be bound to do what the trustees themselves ought to have done, that is carry out the trust as declared in the will of the testator.

There can be no clearer or more authoritative exposition of this principle than the judgments of Lord *Eldon* L.C. and Lord *Redesdale* in *Cowley* v. *Hartstonge* (1), and see *per* Lord *Cottenham*: *Cookson* v. *Cookson* (2).

As *Stirling* J. pointed out very clearly in *In re Nickels*; *Nickels* v. *Nickels* (3), whatever the Court can in such a case do the trustees can do, because the Court has no power to alter the rights of parties to property. It has simply to administer trusts, not create them. It is quite another matter where, not being bound by any private disposition, it takes, for its own action, higher ground than in the interests of quieting litigation it requires private individuals to take, as in *Ex parte Allard*; *In re Simons* (4); *In re Opera Ltd.* (5); and *In re Tyler*; *Ex parte Official Receiver* (6). To apply its own sense of what would be a fair trust to insert in a will so as to alter rights of property, or to proceed on any notion of what would be beneficial to parties in opposition to the directions of the will, would, as Lord *Langdale* observed, be the assumption of a legislative instead of a judicial power: *Johnstone* v. *Baber* (7). See also *Lewin on Trusts*, 11th ed., pp. 752, 755); *Costabadie* v. *Costabadie* (8); *Colton* v. *Colton* (9). The highest standard of a high minded man who undertakes a trust is to be faithful to the directions he has received.

But the plaintiff puts this argument:—He asks for administration of the two estates, and accounts in both, and urges that once the Court has undertaken the administration of the two estates, in the one action, it has a free hand to do what it thinks ethically fair as between the two estates; and he presses his point, that it would be ethically fair, and therefore fair within the jurisdiction of the Court of Equity, for each to pay £400 a year to Alice, and, at all events, it is in the power of the Court to take the administration out of the hands of the trustees so far at least as is

(1) 1 Dow., 361.
(2) 12 Cl. & F., 121, at p. 145.
(3) (1898) 1 Ch., 630.
(4) 16 Ch. D., 505.
(5) (1891) 2 Ch., 154.
(6) (1907) 1 K.B., 865.
(7) 8 Beav., 233, at p. 235.
(8) 6 Ha., 410, at p. 414.
(9) 127 U.S., 300, at p. 320.

necessary to adjust the ethical claims of the parties, and make some order which will secure the desired result.

In my opinion the position thus taken up is not only unsupported by any authority, but is entirely contrary to all principles of law and equity, and all the reasons upon which every relevant authority is based. As to administering two estates together, of course a Court of Equity knows no technical barriers which, under the name of multifariousness or other name, would prevent it from doing justice and complete justice in the one suit. And as to this phase of jurisdiction, the rule was stated by *Turner* V.C. in *Young* v. *Hodges* (1) in these terms:—"Where the residuary estate of one testator devolves upon another testator, the executors of the first testator may, I think, well be joined in a suit for the administration of the estate of the second testator, in all cases in which there have been such dealings between the two sets of executors as would prevent the rights of the parties suing from being fully and fairly worked out, if the suit for the administration of the estate of the first testator were brought by the executors of the second; and this case must, I think, have been held to fall within that rule. I am of opinion, therefore, that the usual accounts of the estates of both these testators must be taken in this suit."

In the case at bar there has been no intermeddling, and I am of opinion no case has been made out for administration of either estate, and still less of the two estates in conjunction. Even if there were, the Court, as I have already observed, could not invent some new trust to effect what it thought a reasonable adjustment of moral responsibilities of the respective sets of trustees.

Can this claim be rested as suggested on the doctrine of contribution? In my opinion it cannot. The basis of contribution is, as its name denotes, *a common obligation*. The liability, upon the discharge of which one person demands contribution from another, must be *the same*, not a similar, liability; and the discharge of it by the defendant must not have been voluntary, but enforced or enforceable. It is of course immaterial, so long as the obligation is the same, how many instruments there are.

(1) 10 Ha., 158, at p. 159.

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In *Dering* v. *Earl of Winchelsea* (1) *Eyre* L.C.B. says : "What difference will it make if they (the co-sureties) are severally bound, and by different instruments, but for the *same principal and the same engagement ?*"

Stirling v. *Forrester* (2), quoted by the Privy Council in *Ward* v. *National Bank of New Zealand* (3), and *Coope* v. *Twynam* (4), exemplify the principle.

The judgment of Lord Chancellor *Halsbury* in the case of *Ruabon Steamship Co. Ltd.* v. *London Assurance* (5) is decisive of the principle, and illuminative as to its non-applicability to the present case. I will quote only one passage because it is of very general importance. Lord *Halsbury* L.C. said (6): "It seems to me a very formidable proposition indeed to say that any Court has a right to enforce what may seem to them to be just, apart from common law or Statute. The Courts no doubt will enforce the common law, and will apply it to new questions of fact which arise ; but I cannot understand how it can be asserted that it is part of the common law that where one person gets some advantage from the act of another a right of contribution towards the expense from that act arises on behalf of the person who has done it. Many cases might be put where the generality of such a proposition would be plainly contrary to any received principle, and to my mind the question now in debate—admitted to be absolutely novel—would not be covered by any principle known to the law, except such a general proposition as I have indicated above."

Now, in this case, while Lucy lived, there was one obligation and one only to which the trustees of the testator's will were subject. If Lucy chose during her lifetime to voluntarily assist Alice, no contribution could be claimed by her. If, dying, she still voluntarily chose to make provision for Alice, her trustees' duty, though obligatory on them within the ambit of their trust instrument, is still voluntary so far as their testatrix and her estate are concerned in relation to others, and as Lucy could not alive, so she could not afterwards by her will, impose upon the

(1) 1 Cox. Cas. in Ch., 318, at p. 322; and 1 Wh. & T. L.C., 6th ed., 114, at p. 118.
(2) 3 Bl., 575, at p. 590.
(3) 8 App. Cas., 755, at p. 765.
(4) 1 Turn. & R., 426, at p 429.
(5) (1900) A.C., 6.
(6) (1900) A.C., 6, at pp. 9 and 10.

primary trustees any duty of contribution. The obligations of the respective trustees are not the same, they are not even similar in amount, but are distinct, separate, and independent, and quite outside the doctrine contended for.

It was suggested that *Lucas* v. *King* (1) and *In re Wells*; *Wells* v. *Wells* (2) were authorities for apportioning the allowance to Alice Smith between the two estates. But I can discern no analogy between those cases and the present. *Lucas* v. *King* (1) was a case where trustees of a will, having a discretion to apply income for an infant's maintenance, did not exercise that discretion, and so the Court exercised it for them—and in so doing did what was most beneficial for the infant. The rule of the Court, there acted on, is thus stated by *Leach* V.C., in *Foljambe* v. *Willoughby* (3): "Where there are two funds absolutely given by different persons for the maintenance of an infant, the interest of the infant must determine which of the two funds is to be applied."

In re Wells; *Wells* v. *Wells* (2) followed that, and *North* J. said if the trustees had exercised their discretion he was not satisfied that he could have interfered with what they had done. But it was clear they had not exercised their discretion, and so he applied the rule of the greatest benefit to the infant, but still recognized and declared the right of the trustees to exercise their own discretion for the future.

Now there are four reasons why, to my mind, those cases have no application here—the first is that Alice is not the applicant; the second, she is not an infant; the third, that the Court is not asked to act for her benefit, but for that of a stranger to her; and fourth, that the trustees, both sets of them, have exercised their discretion. And if they have any application, they indicate that in the future the trustees may exercise their discretion.

In my opinion, therefore, on all grounds this appeal should be dismissed with costs.

In addition to what I have already said in dissent from the final declaration of rights, as stated by the learned Chief Justice, I think the proposed order is open to this further serious objec-

(1) 8 L.T.N.S., 623; 11 W.R., 818. (2) 43 Ch. D., 281.
(3) 2 Sim. & St., 165, at 169.

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tion, that no question, so far as I have followed the case, has been raised as to any part of J. M. Smith's estate except the £800, its source and destination, nor as to any part of Lucy's estate, except as to the unapplied portion of the £800 falling into residue of the primary estate afterwards finding its way into Lucy's estate. Anything further seems to me original, not appellate jurisdiction.

HIGGINS J. In this case I have reached the same conclusion as my brother Isaacs, even though by a road somewhat different. I propose to deal first with those things which the plaintiff has asked for, and about which the parties have fought; and to deal afterwards with the order now proposed to be made, an order neither sought nor argued.

The main contest has taken place over the power of maintenance, &c., contained in the will of J. M. Smith. The plaintiff complains that the trustees of that will do not give a sufficient allowance to his aunt, Miss Alice Smith, for her maintenance, support and benefit. The lady is a party defendant, and makes no complaint of any kind; and it is admitted that she is amply supplied with funds. The question at once arises, what right has the plaintiff to bring this action? This is not a Court of Chivalry, but a Court that enforces rights at the instance of those who are directly interested.

J. M. Smith died in 1898 leaving four children, J. M. Vincent Smith, Lucy Smith, Alice Smith and Mrs. Cock—and much property. The executors and trustees of his will were Vincent Smith, Lucy Smith, H. Emmerton and W. Aitken.

The plaintiff is a son of Mrs. Cock, but he is not a beneficiary under the will of his grandfather. So that the plaintiff has not, so far, any standing under the will whatever—has not any interest entitling him to insist on the proper execution of the trusts or powers.

By the will of J. M. Smith the trustees are to take £800 per annum during the life of Alice, and apply the same or such part thereof (if any) as they think fit for the personal maintenance or support or otherwise for the personal benefit of Alice; and the balance of the £800 falls into the residue. The persons entitled to the residue are Vincent Smith and Lucy Smith.

It follows that, if the trustees do not pay into the residue the balance of the £800 after deducting the allowance for Alice, the residuary legatees, Vincent Smith and Lucy Smith (or their representatives), are the proper parties to complain; whereas if (as alleged here) they dishonestly or improperly give too little to Alice, Alice is the proper party to complain. Vincent and Lucy and Alice are not, in my opinion, beneficiaries of or "in respect of" the annual sum of £800 in any relevant sense. It is not hypercritical to challenge this statement, for I find that it lies at the root of much of the difference of opinion in this case. By beneficiary I mean beneficial owner. Alice is not beneficial owner of the £800 or of any part of it, but only of such sum (if any) as the trustees pay her out of it. Vincent and Lucy are not beneficial owners of any sum of £800, or of any part of it; they are beneficial owners of the "residue and ultimate surplus" of the estate, and of nothing else—the residue after payment periodically of any allowance to Alice. All of the £800 that the trustees do not pay to or for Alice falls as of course into the "residue and ultimate surplus." By virtue of her position as the object of the power, and not otherwise, Alice could complain if the trustees do not honestly exercise their discretion as to giving her an allowance. By virtue of their position as taking all the residue subject to any exercise of the power, Vincent and Lucy could complain if the trustees do not pay the balance not given to Alice into the residue. But the point to be remembered is that none of the three is beneficial owner, in whole or in part, of any sum of £800; and that Vincent and Lucy could not invoke the Court to compel the trustees to exercise their discretion. If, and so far as this discretion is not exercised by making payment to or for Alice, the residue is increased, and Vincent and Lucy cannot complain.

But Lucy Smith died in 1903 leaving a will. Under this will the plaintiff is entitled to the income of her residuary estate for life; but only after payment out of the income of such sums as the trustees shall from time to time in their "absolute and uncontrolled discretion think fit" to apply in or towards the upkeep of Castlefield (Lucy's house, which Alice is to enjoy for her life), and its rates and outgoings, and in or towards the maintenance

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and personal support of Alice during her life. The plaintiff's children are to take the corpus of the residue after his death.

Aitken is the executor of the will of Lucy; and he and Noall are the trustees.

Before Lucy's death the trustees of the will of J. M. Smith applied for the maintenance, &c., of Alice £400 per annum; since Lucy's death they have been applying only £100 per annum, because of the other provisions for the benefit of Alice contained in the will of Lucy. The result is that the trustees of Lucy, in the exercise of their discretion under her will, are applying more out of the income of her estate for the benefit of Alice than they would apply if the trustees of J. M. Smith kept up the £400 per annum; and the plaintiff's income is thereby diminished.

But what right has the plaintiff, a beneficiary under the will of Lucy, to bring an action to compel the trustees of the will of J. M. Smith to exercise their powers more liberally in favour of Alice? Every plaintiff must show that he has an actual direct interest in the subject matter of his action; it is not enough to show that he has an interest in the indirect or remote consequences of what is being done. A. cannot compel B. to carry out his duty to C., even though A. be indirectly injured by B.'s failure in duty. A charitable institution may compel trustees to carry out a trust made directly in its favour; but it cannot compel trustees, who hold funds for a liberal benefactor of the charity, to pay to that benefactor the funds. If the trustees of will A. and the trustees of will B. have each a discretion as to applying income to (say) a foundling hospital, and if the trustees of will A. resolve to reduce their allowance, the trustees of will B. have no right to complain. *A fortiori*, the beneficiaries under will B. have not any right to complain even if their trustees find themselves constrained (as a matter of discretion—not by any compulsion of law) to increase the allowance from will B., and thereby reduce the income of the beneficiaries.

The truth is the trustees of the will of J. M. Smith are not under any obligation, owe no duty, to the trustees of Lucy Smith, and much less to the plaintiff, so far as regards the giving of a sufficient allowance to Alice. They are under no duty to Lucy's trustees; they are under a duty to Alice to exercise their discre-

tion. On the contrary, it is the actual interest of the estate of Lucy Smith that as little as possible of the £800 should be applied for the benefit of Alice; for the balance unapplied falls into residue, and as to one half goes to the estate of Lucy Smith. The trustees of the will of Lucy have no right to complain if what is being done enures for the benefit of their estate. The course taken by the trustees of J. M. Smith increases the corpus of the estate of Lucy for the benefit of the plaintiff's children, and the plaintiff enjoys the increase of income. But the plaintiff complains of the indirect and remote consequences—consequences which are not even necessary, but rest in the discretion of Aitken and Noall—consequences which do not hurt Alice, which do not hurt Lucy's estate, but which indirectly and remotely affect himself by affecting the discretion of Lucy's trustees. The plaintiff is not fighting for his aunt, but for himself; he is fighting against his children, and he complains that the trustees do not consider his interest, although he is not an object of the power, or even a beneficiary under the will.

But it is urged (statement of claim, paragraph 9 (*d*)) that the effect of the reduction to £100 " is to throw the additional burden in providing a sufficient sum for the maintenance of the defendant, Alice Smith, upon the estate of Lucy Smith, and thereby to substantially reduce the amount of income payable " under the will of Lucy. This language is inaccurate. There is no additional burden thrown on the estate of Lucy; and the discretion of the trustees of Lucy remains " absolute and uncontrolled " as before. The allowance from Lucy's estate is not automatically increased, and it may or may not be increased at the discretion of Lucy's trustees. The true way of stating the facts is, I suppose, that the reduction of the allowance under the will of J. M. Smith since Lucy's death is a new fact which the trustees of Lucy's estate take into account when fixing their own allowance to Alice. But how can B.'s trustees, or B.'s beneficiaries, have any cause of action against trustees under will A. for acting in a way which influences or may influence the trustees of will B. in exercising their powers? There is no *nexus* of obligation between the two sets of trustees as to the allowance to Alice. Each set of trustees is accountable to its own beneficiaries and to no

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others; and as to any injury resulting from any breach of trust or misconduct the trustees are accountable to the beneficiary whom they injure, and to no others. They have to carry out the trusts of their own instrument, and have no other duties: *Cowley* v. *Hartslonge* (1). If, as is alleged, enough income is not paid to Alice under the will of J. M. Smith, no one is entitled to bring an action except Alice.

A good test of what I have stated—that Alice has the sole right to complain of the insufficiency of the allowance—occurs to me. There is no doubt that Alice could release to the trustees of J. M. Smith all her claim to the allowance out of the £800: *Quisque renuntiare potest juri pro se introducto.* A beneficiary who is sane and adult can put an end to a special trust created of property or income in his favour—can "break the trust"—and can compel the trustees to obey his own directions instead of the directions of the will: *Wharton* v. *Masterman* (2). Now, suppose that Alice released her interest—all of it, what could the trustees of Lucy say? The discretionary trust in favour of Alice contained in Lucy's will would remain, and would have to be carried out, although there would be no longer any prospect of any assistance from the estate of J. M. Smith; and the trustees or beneficiaries of Lucy's Smith's will would have no ground of complaint. Such an instance shows clearly that those claiming under Lucy Smith's will have no *locus standi* to insist on the performance of the trust for maintenance contained in the will of J. M. Smith. The whole direction for maintenance can be put an end to without asking their leave.

I am quite unable to see what the equitable doctrine of contribution has to do with this case. Where a creditor calls on surety A. to pay the debt, surety A. is entitled to call on surety B. to contribute. But here there is no debt; here there is no creditor, no surety, no obligation to pay. Simply, under two independent wills, two distinct sets of trustees have two distinct powers which even differ in their terms and scope. The trustees have not incurred any debt to Alice—much less to the plaintiff. I am quite ready to apply old principles to novel circumstances, but one must see to it that they fit. According to Lord *Redes-*

(1) 1 Dow., 361, at pp. 378-380. (2) (1895) A.C. 186, at p. 198.

dale, this right of a surety to sue his co-surety is really a kind of short cut—the result of the privity of contract between the creditor and each surety. When the surety is sued by the creditor he can say to him:—"Give me the benefit of your securities against the other securities; put me in your place." (*Stirling* v. *Forrester* (1)). But here is no debt, only a discretionary power. Alice is not suing either the plaintiff or Lucy's trustees; and if she were, there is no common obligation, or, indeed, any obligation to pay—only the obligation to exercise a discretion. Alice could not, if she wished it even, transfer the benefit of this obligation to Lucy's trustees. I do not lay stress on the point that we have here the unusual position of a beneficiary in an estate suing the trustees of another estate. Usually the executors or the trustees represent all the interest in an estate as against strangers. But in this case Aitken is the executor of Lucy, and, as he is one of the trustees of the will of J. M. Smith, he cannot sue himself. The executor, the person who has to collect the assets for Lucy's estate, is the only necessary party in an action against the executors of another estate; but here the beneficiaries must sue, or no one can sue. If, therefore, Lucy's estate has any actionable grievance against the trustees of J. M. Smith, affecting the plaintiff directly, I am of opinion that the present plaintiff could bring an action in something like the present form. But in the present case there is no actionable grievance. If the executors of Lucy were quite distinct from the executors of J. M. Smith, there is no wrong of which they could complain. Even if there is *damnum* direct or indirect, immediate or remote, to the plaintiff, there is no *injuria*. My opinion is therefore that the plaintiff has no cause of action for any insufficiency in the allowance to Alice.

But I proceed now to consider the merits of the complaint. I shall consider the merits as if the action were brought by Alice herself, relying on the "facts and instances" set out in paragraph 9 of the statement of claim.

It is alleged in paragraph 9 (*a*) that Vincent Smith is "greatly benefited" by the reduction from £400 to £100, "and that his interest and duty therefore conflict." He is benefited to the

(1) 3 Bl., 575, at p. 590.

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extent of £150 per annum in this very large estate, but Lucy Smith's estate is benefited to exactly the same extent, for he and Lucy are the residuary legatees. It is true that his interest and his duty conflict. But we are not dealing with a claim to have Vincent Smith removed from the trusteeship; and he has been placed by the testator in a position in which his duty as to the allowance must conflict with his interest as residuary legatee. The testator trusted the brother to do what is right for the sister, and the mere fact that there is a conflict of duty and interest, and that any saving in the allowance enures to his benefit as well as for the benefit of Lucy's estate, is not sufficient to establish that Vincent Smith, in consenting to the reduction, is not acting honestly within the limits of his discretion. The fact that Vincent is benefited by the exercise of discretion is, of course, evidence to be weighed; but the learned primary Judge has weighed it and found it insufficient to prove impropriety, and I agree with him. The words used in *Portland* v. *Topham* (1) are applicable to the case where a mere donee of a power indirectly departs from the objects and purposes of the power; they are not applicable to a case such as the present where the donee must necessarily be pecuniarily affected by the exercise of the power.

As for 9 (*b*), the charge against Emmerton, he is the solicitor for Vincent Smith, but there is no reasonable ground, so far as the facts appear, for accusing him of concurring in the reduction with the object of benefiting Vincent Smith as his client.

The charge against Aitken in paragraph 9 (*c*) is the charge that has been most pressed; because, as I think, of a quaint misunderstanding as to the duty of trustees. It is said that Aitken allowed himself to be "overborne" because he was in the minority; but no joint trust could be carried out unless individual trustees allowed themselves to be "overborne." It seems that Aitken wanted to allow £400; Vincent Smith £200 per annum; and Emmerton nothing; and the three agreed to put the allowance at £100. As Vincent Smith put it to Aitken, "I'm an interested party, and you are interested, and Mr. Emmerton is neutral; and therefore his opinion should be followed." Aitken

(1) 11 H.L.C., 32.

thought this was "a feasible way to look at it," and, as he says, he "gave way." The truth is that all the trustees must concur in any step taken. The position of a trustee is like that of a Cabinet Minister. He must act with his colleagues, and take the responsibility of their joint acts, even when he disapproves; but if the matter of difference is so serious that he cannot bring himself to concur, he should retire. Under the Victorian *Trusts Act* 1896, sec. 5, Aitken could have retired without even coming to the Court or appointing a new trustee. The testator is entitled to have that course followed which meets with the consent of all his trustees—their joint consent—the one resultant of individual wills. It would be absurd to expect that the resultant joint will should coincide with the direction of each of the individual wills. In this case Aitken was consulted and consented—gave a grudging assent.

I confess that for some time I was under the impression that Emmerton, whose opinion had most weight in the decision of the trustees to give Alice only £100 per annum, was inexplicably stingy. Stinginess on behalf of his trust is of course no ground for interference with his exercise of discretion; there must be some actual fraud or impropriety. It is not what the Court thinks fit, but what the trustees "think fit," that settles the amount to be paid to Alice: *Re Boys* (1). But although mere dissatisfaction on my part as to the allowance is nothing to the point, I must say, in justice to the trustees, that I have changed my impression. Mr. Aitken also thought that the allowance was insufficient; but I strongly suspect that in pressing for the £400 per annum for Alice from J. M. Smith's estate, Aitken did not fully realize the circumstances. "If Alice Smith had been without relations or friends," he says, "I would have allowed her the whole £800." That opinion was not shared by the other trustees, and is not confirmed by the facts. During the life of Lucy, Alice lived with her at Castlefield, which belonged to Lucy; but Alice had no right to be there and could legally be turned out by Lucy at any moment; and the trustees allowed Lucy £400 per annum for Alice. Treating this sum as a rough equivalent for residence and board, pocket money and conveniences at Castle-

(1) 41 Sol. J., 111.

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field, Lucy found the other £400 which, it appears, were required to keep Castlefield going. But on the death of Lucy the position was materially changed. Under Lucy's will, Alice had now a *right* to the use of Castlefield and the furniture; and, in addition, the trustees of Lucy were to apply so much as they think fit in and towards the rents, outgoings and upkeep of Castlefield, and in and towards the maintenance and personal support of Alice. It does not appear that Mr. Aitken took into account the fact that the privilege of the residence and furniture was no longer to enter into the computation of the allowance; or the fact that Lucy meant Alice to get more of her (Lucy's) property than she had been getting during Lucy's life. Emmerton's reason for reducing the allowance was, according to Aitkin, that there was an ample provision made under the will of Lucy. Under J. M. Smith's will the trustees could refuse to allow Alice anything, if they thought fit. Under Lucy's will the trustees have to allow Alice something. The learned primary Judge says that Emmerton thought that the real object of Lucy's will was to relieve her father's estate from the cost of the maintenance of Alice. This is a view which the trustees might honestly and fairly take, although Aitken never saw the matter in that light; and they were certainly not bound to take into consideration the interests of the plaintiff under an instrument with which they had nothing to do.

Pars. 9 (*d*), (*e*), (*g*) do not add anything material to the case. Par. 9 (*d*), indeed, boldly asserts that the "object" (presumably the object of the trustees of J. M. Smith), as well as the "effect" of the reduction is to throw additional burden on the estate of Lucy Smith and thereby to substantially reduce the plaintiff's income. If this means that the trustees' object is simply to injure the plaintiff by reducing his income, the suggestion is not supported by evidence, and is indeed absurd. If it means that the trustees are seeking to relieve their own estate—J. M. Smith's—at the expense of Lucy's, then there is no wrong done. For a trustee is entitled—is often in duty bound—to be selfish for his trust estate. He holds property for his beneficiaries; and the right to be selfish is of the essence of property. Trustees having power to build may put up small tenements on their

block, even though thereby they depreciate the value of adjoining land held by other persons. Trustees have often, in the interest of their trust, to put a "blackmail" price on a strip of land which an adjoining owner is compelled to buy. Trustees holding by assignment a burdensome lease must, frequently, assign it over to a man of straw, even though thereby they injure the estate of the lessor. So far as the duties of these trustees are concerned, there is not the slightest ground for the assertion, so often iterated in this case, that the trustees ought to do the "fair thing" as between the two estates. Their duty is to do what is best for their own estate. There is nothing that the law recognizes as either dishonest or unfair in trustees saving their estate from as much expenditure as they can, and paying out only what they have to pay. The case of *In re Perkins*; *Brown* v. *Perkins* (1) is no authority to the contrary. One estate—not two—was there dealt with; and the Court merely adjusted between tenant for life and remainderman the burden of a debt of the testator—the burden of a covenant for an annuity. From an ethical point of view it may be true that "property has its duties as well as its rights." But so far as the Courts are concerned, there are no such duties, unless such duties as are expressly laid down, for instance, by Acts relating to rabbits or thistles. The Court has no power to add to these duties because it thinks that it knows what would be the proper thing to do.

Par. 9 (*f*) as to the defendant Noall being broker and agent of Vincent Smith, and as to his interest and duty therefore conflicting, has been rightly scouted in the Court below.

On such materials the plaintiff asks the Court to declare that the trustees of J. M. Smith have reduced the allowance for Alice improperly. It is not alleged that the discretion was not exercised at all, but that it was exercised improperly and in the breach of their duty as trustees. An attempt was made in this case to convince us that in pars. 4 and 10 of the statement of claim the plaintiff has made the case that no discretion was exercised. These paragraphs raise the case that the payments of the allowance have been made out of income instead of corpus before Lucy's death (par. 4), and after Lucy's death (par. 10); but

(1) (1907) 2 Ch., 569.

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they raise these facts as matters of bookkeeping, and not as pointed to the exercise of discretion. The trustees would obviously have allowed the same sum for Alice whether they resorted to corpus or to income. The whole case as to the exercise of discretion is contained in par. 9. This paragraph states that since the death of Lucy the trustees have reduced this allowance to £100 a year; that the plaintiff "submits" (not "alleges") the reduction was improper and unreasonable and an unfair exercise of the discretion "by reason of the following facts and instances" (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*). I have no hesitation in treating the case as to the allowance being insufficient as confined to these seven facts and instances. It is clear that the burden of proving any corrupt or improper motive lies on the plaintiff, and that he has not discharged the burden.

It thus becomes almost immaterial to consider the precise limits of the power of the Court to interfere with trustees in the exercise of a discretionary power. But as the matter has been closely argued, I ought to say that, in my opinion, the law is substantially correct as laid down in *Simpson on Infants*, 3rd ed., p. 250; and that if the decision of *Malins* V.C. in *In re Hodges*; *Davey* v. *Ward* (1) is to be regarded as asserting a right in the Court to substitute its discretion for the discretion of the trustees, on the mere ground that the Court would itself act differently, then that decision is contrary to equitable principles. Not what the Court "thinks fit," but what the trustees "think fit" is to govern. So the will says, "such part as my trustees think fit." There might be cases so glaring that the Court could say that the trustees could not be exercising their discretion honestly for the benefit of their beneficiaries; but there is no impropriety, such as the law recognizes, when the trustees seek to relieve their own estate if possible by leaving it to another estate to bear a greater share of the burden. The case has not arisen which could justify the Court in substituting its discretion for the discretion of the trustees.

I am of opinion that the learned Judge was perfectly justified in dismissing this action, so far as regards this, the main, question.

But the plaintiff makes another complaint. He says that the

(1) 7 Ch. D., 754.

annual sum of £800 has been taken out of the income of the estate of J. M. Smith, and that it ought to have been taken out of the corpus. If (*a*) the plaintiff was entitled to the income of that estate, and if (*b*) the £800 ought to have been taken from the corpus, he might have just ground for his complaint. But, in the first place, I am strongly inclined to think the plaintiff is not entitled to this income, or to any part of it—that all that comes to the executor of Lucy from the estate of J. M. Smith, whether income or corpus of that estate, comes to Lucy's estate as corpus to be invested; and the plaintiff gets the income of such investments as are made under her will. It appears that all the estate of J. M. Smith has been distributed except three mortgages—£800, £1,800, £40,527. These are held, no doubt, to meet the annuities of £800 and £500, amounting to £1,300 per annum; and as the mortgages were properly taken, and are properly held, it is hard to see what right a tenant for life of Lucy's estate has to treat the interest on the mortgages as his income. I should not treat the interest on the mortgages as being fruit of the property of Vincent and Lucy, but as fruit of the testator's estate, which falls into the residue of that estate (subject to the payment of the annuities) by virtue of the fact that a "residue" includes all income and corpus, that is not otherwise given. But no argument has been addressed to us on this subject, and I do not like to pronounce on a subject not argued.

The question remains, has the plaintiff shown that the £800 per annum must be taken from the corpus? In my opinion he has not. The trustees of J. M. Smith are entitled to resort to the whole estate not specifically given, including the income, for this annual sum; and there is no "residue and ultimate surplus" until the annual sum has been provided. There are specific devises and annuities, and a legacy, and all the "residue and ultimate surplus," both capital and income, is given to Vincent Smith and to Lucy. The whole of the residuary gift is charged indifferently with the payment of the annuities, including the £800 per annum: *Carmichael* v. *Gee* (1). Nor can the trustees of the will of Lucy Smith compel the trustees of the will of J. M. Smith to pay the £800 out of the corpus if the will of J. M. Smith

(1) 5 App. Cas., 588.

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does not compel them to do so. The secondary will cannot add to the obligations of the trustees under the primary will. These trustees have to comply with the requirements of their own instrument, and of no other. Of course, under the primary will, it is the duty of the trustees to show their books, and to give all the information as to receipts and expenditure that they have. But they cannot be compelled to pay out of corpus and income, or compelled even to keep distinct accounts of corpus and income where their will does not make the distinction necessary.

As to the order proposed I do not think that the plaintiff was or is entitled to any account. He does not make any allegations in his claim which would justify the Court in ordering accounts. True, his prayer contains a prayer for "all necessary accounts and inquiries," but this was not pressed at the trial, and in any event it can only refer to accounts which are necessary for the objects of the action. There is no substantive relief to which the plaintiff is entitled, and for which the accounts would be necessary. I do not think that the plaintiff, or any of those claiming under the secondary will, can put the trustees of the primary will under any duties of accounting not imposed by the primary will.

Then it is proposed to ascertain the sum which would have been required at Lucy's death to purchase an annuity of £800 for the life of Alice, to calculate interest on that sum at 5 per cent., to charge half of the interest against Lucy's estate, and to pay the net balance to the plaintiff. The inquiry, as I understand it, is for the purposes of Lucy's estate only—to adjust accounts between the plaintiff and his children. But such an order is based on the assumption that it would have been the proper course for the trustees of J. M. Smith, on Lucy's death, to purchase such an annuity. In my opinion, not only was it not the proper course, but it would have been actually a breach of trust to do so, without the consent of the parties interested—Alice, Vincent, and those claiming under Lucy. Alice could not be compelled to forego her charge on the whole remaining estate of J. M. Smith, corpus or income, for the covenant of any company or person, however wealthy. Where an annuity is charged upon property the Court will leave sufficient property to meet the

annuity in all possible contingencies; but it never has distributed all the property and substituted a mere covenant. Nor can Vincent, or those claiming under Lucy, be compelled to submit to the deduction of the purchase money from the estate. They may prefer to let the will be carried out in due course, especially if the interest accruing on the mortgages in J. M. Smith's estate is above the rate to be obtained on Government securities. For these reasons, amongst others—I do not wish to over-elaborate—I am of opinion that if the plaintiff claimed such an inquiry, even in an action as to Lucy's will, he would not be entitled to get it. Indeed, it is as yet doubtful whether it will benefit him—whether it will not injure him. In my opinion the learned primary Judge was perfectly right in dismissing the action, and the appeal should be dismissed.

GRIFFITH C.J. With regard to the reference made by my brother *Higgins* to deciding points not argued I think it right to say that I listened attentively to a very careful argument by Mr. *Mitchell*, of which I made an unusually full note (for me), on the question of the construction of the will of J. M. Smith. My note (13th September) is as follows :—"Appellant is entitled to income of half the residuary estate of J. M. Smith. The income of the residuary estate ought not to be diminished by the deduction of the £800 a year. Lucy is c. q. tr. of half of J. M.'s residuary estate and (entitled) to income of it.

"The £800 is a charge on corpus and not on income. No reference to income in the will.

"A sufficient sum should be set apart from corpus to answer the £800. Half the income of the remainder should be paid to Lucy Smith's estate as income.

"*Bulwer* v. *Astley* (1); *In re Muffett*; *Jones* v. *Mason* (2).

"Appellants only liable for half the interest on such a sum."

On two subsequent occasions I invited and obtained further argument from Mr. *Mitchell* on the point, which was also discussed by Mr. *Guest* and Mr. *Woinarski* on the other side, who referred, amongst other cases, to *Allhusen* v. *Whittell* (3), and *In re Perkins*; *Brown* v. *Perkins* (4).

(1) 1 Ph., 422.
(2) 39 Ch. D., 534.
(3) L.R. 4 Eq., 295.
(4) (1907) 2 Ch., 596.

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All the points on which I have expressed an opinion were fully discussed in my hearing, and I have based my judgment entirely upon the arguments addressed to the Court.

Appeal allowed. Judgment appealed from discharged and following judgment substituted:—Declare that for the purpose of determining the income of Lucy Smith's estate as between the plaintiff Cock and his children it should be ascertained what sum would have been required at the death of Lucy Smith to purchase an annuity of £800 *during the life of Alice Smith, that one half of the interest at* 5 *per cent. per annum upon the sum so ascertained should be deducted in every year from the income of her estate, and that subject to such deduction one half of the actual net income of the unconverted or undistributed estate of J. M. Smith should be deemed to be income of the estate of Lucy Smith as if no payment in respect of such annuity had been actually made out of the income of the estate of J. M. Smith, and should be payable to the plaintiff subject to all prior charges upon it. Necessary accounts and inquiries for this purpose. Declare that the trustees of J. M. Smith's estate were and are respectively bound in every year to exercise an independent individual discretion as well as their joint discretion as to how much of the* £800 *should be allowed for the maintenance of Alice Smith out of that estate and in the exercise of that discretion to have regard to the intention of their testator that the burden of that maintenanee should fall equally upon J. M. V. Smith and Lucy Smith and to the respective rights of the plaintiff and his children under the will of Lucy Smith and to the question what is a fair division of the burden of maintenance between the two estates. Costs of all parties so far as the action relates to the first declaration and*

consequential accounts and inquiries to be paid out of the capital of Lucy Smith's estate. Infants' costs as between solicitor and client. Taxation to be deferred until general taxation of costs of the action. Cause remitted to the Supreme Court for further trial of issues of fact and decision of other questions of costs. Liberty to all parties to amend as they may be advised. Costs of appellants and infant respondents of this appeal to be paid out of the capital of Lucy Smith's estate. Other respondents to have their costs out of the capital of their respective estates. Costs of trustees' and infants' appeal to be taxed between solicitor and client.

Solicitor, for appellants, *J. W. Dixon.*

Solicitors, for the respondents, *J. M. Smith & Emmerton*; *Madden & Butler*; *J. E. Dixon.*

B. L.

END OF VOL. IX.