[HIGH COURT OF AUSTRALIA.]

WIGLEY AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

CROZIER . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Sept.* 21, 22, 23, 24.

MELBOURNE, *Oct.* 1.

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

Will—Trust for conversion—Power to suspend conversion—Appropriation towards annuity—Proper time for conversion—Interest on arrears of annuity—Amendment as to parties—Representative character.

A testator by his will and codicil devised and bequeathed all his real and personal estate to trustees upon trust for conversion, with power to postpone conversion as they should judge expedient and with full power of management pending conversion. He directed his trustees until "final conversion" of his estate to pay to his daughter R. an annuity of £300, which was to be a first charge on his estate, and, if his estate would allow and produce the same, to his daughter-in-law C. an annuity of £200. He then directed that as to the proceeds of conversion the trustees should set aside such a sum as his trustees should deem sufficient for providing by investment in such manner as his trustees should think fit an annuity of £300 for R. and, if his estate would extend thereto, such a sum as would produce an annuity not to exceed £200 for C. Subsequently, at a time when there had been no conversion and when there were large arrears owing on both annuities, an indenture was executed between the trustees and R. and her two daughters by which, after reciting that all the parties thereto believed that it would be more beneficial for the estate and for the interests of all persons interested therein that the conversion should be further postponed, the trustees purported to appropriate the whole of the estate of the testator, subject to the payment of arrears of R.'s annuity, for the purpose of providing for the

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annuity to R., and to settle the property so appropriated for the benefit of R. and her daughters, and to settle the amount of the arrears, which R. purported to assign to the trustees, for the benefit of such daughters.

Held, that the trustees must be taken to have believed, as recited in the indenture, that it was more beneficial for those interested in the estate that conversion should be further postponed; that neither R. nor her daughters nor all of them was or were then entitled to demand immediate payment or appropriation of any sum of money; that, therefore, the trustees were not then entitled to convert the estate; and, therefore, that the indenture was void and inoperative as against C.

In re Lepine; Dowsett v. *Culver*, (1892) 1 Ch. 210, distinguished.

Held, also, that R. was not entitled to receive interest on the arrears of her annuity from the time of the execution of the indenture.

To the originating summons by which this matter was brought before the Supreme Court, the surviving trustee of the will and codicil, who was also the surviving trustee of the indenture, was a defendant, but he was described therein only as trustee of the will and codicil. R. was also a defendant but not her two daughters, W. and F. Application was made to the High Court immediately prior to their judgment that the originating summons might be amended by adding W. as a defendant and by describing the trustee as the surviving trustee of the indenture, but no application was made to add F. as a party.

Held, that the amendments should be made (*Isaacs* J. dissenting with regard to the trustee).

Decision of the Supreme Court of South Australia (*Gordon* J.) varied and affirmed as varied.

APPEAL from the Supreme Court of South Australia.

An originating summons was heard by *Gordon* J., in which Elizabeth Ann Crozier was the plaintiff, and Thomas Francis Wigley, described as the then trustee of the will and codicil of John Crozier deceased, and Elizabeth Richardson were the defendants. The questions and matters in respect of which a determination was sought by the summons were (so far as material) as follows:—

"1. Whether on the true construction of the will of the said testator, and in the events which have happened, and notwithstanding the execution of a certain indenture dated 23rd November 1903 made between Edwin Crozier of Bimbowrie in the said State sheep farmer (since deceased) and the said Thomas Francis

Wigley the then trustees of the will and codicil of the said testator of the first part the said Elizabeth Richardson of the second part and Lilian Sturt Wigley the wife of the said Thomas Francis Wigley and Violet Frost the wife of Percy Frost of Melbourne in the State of Victoria gentleman of the third part (which indenture purports *inter alia* to set aside appropriate and retain the whole of the estate of the said testator subject to the payment of certain moneys therein stated to be due to the said Elizabeth Richardson for arrears of annuity for the purpose of securing an annuity of £300 bequeathed to the said Elizabeth Richardson by the said will) the said Elizabeth Ann Crozier is entitled:—

"(*a*) To be paid any and what portion of the arrears of the annuity of £200 until the final conversion and getting in of the estate of the said testator bequeathed to her by the said will;

"(*b*) To have any and what portion of the estate of the said testator set aside and retained for the purpose of providing for the annuity of £200 from and after the final conversion and getting in of the said estate bequeathed to her by the said will?"

The material portions of the will of the testator, and of the indenture of 23rd November 1903, as well as the material facts, are set out in the judgment of *Griffith* C.J. hereunder.

The following declarations and orders were made by the judgment of *Gordon* J.:—

"1. I declare that on the true construction of the will and codicil of the said testator the annuity not exceeding £200 per annum bequeathed to the plaintiff until the conversion and getting in of the estate of the said testator is not as against the defendant Elizabeth Richardson upon the corpus of the said testator's estate but only upon so much of the income thereof as may remain after payment thereout after the annuity of £300 per annum bequeathed to the defendant Elizabeth Richardson until the final conversion and getting in of the estate of the said testator and that such last-mentioned annuity is charged as well upon the corpus as upon the income of the said estate.

"2. It appearing that the whole estate of the said testator does not at present exceed in value the sum of £13,200 or thereabouts and that the whole of the said estate (with the exception of

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certain allotments of land at Wentworth New South Wales) has been converted and got in and that the income of the said estate has not been sufficient to fully pay and satisfy the said annuity of £300 bequeathed to the said Elizabeth Richardson and that the sum of £2,450 is due to her in respect of such arrears I do order that the proceeds of the sale conversion and getting in of the said estate be applied by the trustee or trustees of the said will in the first place in the payment to the said Elizabeth Richardson of such arrears as aforesaid without any allowance for interest on such arrears and in the second place in setting aside and retaining out of such the sum of £8,000 to provide the annuity of £300 per annum bequeathed to the said Elizabeth Richardson during her life. And I do also order that a further sum of £425 be set apart out of the said proceeds and invested in the name of the said trustee or trustees in South Australian Government 3¾ per cent. inscribed stock having a currency of thirty years for the purpose of providing out of the income of such investment the reasonable and proper remuneration costs charges and expenses of such trustee or trustees not exceeding in the whole £15 18s. 9d. in relation to the management and administration of the trusts relating to the said sum of £8,000 to be set aside as aforesaid to provide the annuity of £300 per annum bequeathed to the said Elizabeth Richardson during her life. And that subject to the payment of such reasonable and proper remuneration costs charges and expenses as aforesaid out of the income of the investment as aforesaid of the said sum of £425 the said sum of £425 or the investments for the time being representing the same to be held upon the trusts hereinafter declared with respect to the residue of the said estate.

"3. I do further declare that notwithstanding the execution of the indenture dated 23rd November 1903 referred to in the originating summons herein the residue of the said estate after payment of the aforesaid £2,450 to the said Elizabeth Richardson and after setting aside retaining and investing the sums of £8,000 and £425 as aforesaid ought to be set aside retained and invested by the trustee or trustees of the said will and codicil for the purpose of providing out of the income of such investments first the reasonable and proper expenses of such trustee or trustees

incurred or to be incurred in and about the execution of the trusts of the said will and codicil relating to such residue and secondly so far as such income will extend in providing for the payment to the plaintiff during her life of the annuity not exceeding £200 per annum bequeathed to her by the said will. And I do order that the said residue of the said estate be so set aside retained and invested by the said trustee or trustees accordingly."

From this judgment T. F. Wigley and Mrs. Richardson now appealed to the High Court.

Nesbit K.C. and *Cleland*, for the appellants. At the time the indenture was made Mrs. Richardson was entitled to demand from the trustees of the will the arrears of her annuity, and that they should set aside and appropriate sufficient of the property to provide for her annuity in the future. The trustees were not bound to convert the estate before so setting aside and appropriating: *In re Lepine*; *Dowsett* v. *Culver* (1); *In re Richardson*; *Morgan* v. *Richardson* (2). The setting aside which was effected by the deed must be taken to have been at the full amount of the then values of the securities, and it must be presumed that Mrs. Richardson and her daughters took it in full satisfaction of their claims against the estate.

[GRIFFITH C.J. referred to *In re Beverly*; *Watson* v. *Watson* (3).]

Although the trustees might have thought it would be for the benefit of the beneficiaries to hold the securities, they were not bound to do so, especially where those securities were shares in respect of which they had a heavy personal liability, and that belief would not have made a sale of the securities a breach of trust on their part. The statement in the indenture that it was for the benefit of those interested in the estate to postpone conversion only refers to Mrs. Richardson and her daughters who were then the only persons really interested. If Mrs. Richardson had died before conversion and appropriation, her children would have been entitled to have such a sum set aside as should have been set aside to provide for her annuity, and they would get

(1) (1892) 1 Ch., 210. (2) (1896) 1 Ch., 512. (3) (1901) 1 Ch., 681.

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that sum: *Hayes and Jarman on Wills*, 12th ed., p. 165. The effect of Mrs. Richardson's annuity being made by the will a first charge on the estate is that the trustees must see that the whole of the annuity is amply provided for before they pay anything to Mrs. Crozier.

[ISAACS J. referred to *Harbin* v. *Masterman (No. 2)* (1); *In re Parry*; *Scott* v. *Leak* (2); *In re Nickels*; *Nickels* v. *Nickels* (3); *Carmichael* v. *Gee* (4).

GRIFFITH C.J. referred to *Wright* v. *Callender* (5).]

[They referred to *In re Brooks*; *Coles* v. *Davis* (6); *In re Waters*; *Preston* v. *Waters* (7); *In re Gilbert*; *Ex parte Gilbert* (8).]

A valid appropriation does not depend on any consent of parties, and neither an agreed price nor an arrangement equivalent to a sale is necessary, nor is it necessary that the legatee should be consulted. There must be an identification of the subject matter of what is appropriated, a definite act which is equivalent to a payment or a setting aside or an appropriation, and that appropriation must be fair and just to all interested in the estate.

Even if the indenture is bad so far as an appropriation of the estate is concerned, it is good so far as it relates to the £2,450 the arrears of Mrs. Richardson's annuity is concerned, and that sum together with a proportionate part of the increase of the value of the securities are now subject to that indenture: *Torre* v. *Browne* (9). An agreement by the trustees to pay interest on the amount of the arrears should be implied from the indenture.

Isbister and *Poole*, for the respondent. If Mrs. Richardson had died before conversion, there would simply have been an extinguishment of life interest and the daughters' rights would still have existed. The statement in the indenture that it was for the benefit of those interested in the estate to postpone conversion is in accordance with the facts and probabilities, because the

(1) (1896) 1 Ch., 351, at p. 355.
(2) 42 Ch. D., 570.
(3) (1898) 1 Ch., 630, at p. 634.
(4) 5 App. Cas., 588.
(5) 2 D.M. & G., 652, at p. 655.
(6) 76 L.T., 771.
(7) (1889) W.N., 39.
(8) (1898) 1 Q.B., 282.
(9) 5 H.L.C., 555, at p. 577.

ncome was increasing every year. There is no power of sale given expressly by the indenture but only a power of postponing sale. That is consistent with keeping on foot the power of sale given by the will and negatives the idea of a conversion by appropriation under the will. The indenture is invalid as an appropriation because under the circumstances stated in the indenture any appropriation of the unconverted estate was improper. A valid appropriation is a substitute for a valid sale. The first requisite, therefore, was that the trustees should be in a position to sell consistently with a due execution of their trusts, and they were not in that position in November 1903. Even if a sale, and consequently an appropriation, had been proper at that time, the attempted appropriation was invalid because there was no fixed price, and because it was not fair. In order to support an appropriation there must either be an immediate right to demand a conversion, as in *In re Lepine* (1) and *In re Richardson* (2), or the proper time for conversion must have arrived as in *In re Beverly*; *Watson* v. *Watson* (3). There is no distinction between this case and *Johnstone* v. *Baber* (4). Mrs. Richardson had no right in 1903 to get a security for her annuity, but only to insist on the trustees keeping sufficient to pay her annuity: *In re Hall*; *Foster* v. *Metcalfe* (5).

[ISAACS J. referred to *Bent* v. *Cullen* (6).]

Mrs. Richardson's daughters had no right to appropriation before conversion. Until conversion the measure or extent of their right was contingent. Under the will there was a duty to set aside after conversion, and a power to settle. Neither could be anticipated: *Lewin on Trusts*, 11th ed., p. 752; *Weller* v. *Ker* (7); *Moore* v. *Clench* (8). Mrs. Richardson's right to the arrears of annuity was not absolute. The trustees had to pay at some time, but the time was within their proper discretion: *Chambers* v. *Smith* (9). Mrs. Richardson is not entitled to interest on the arrears of her annuity. Any contract to pay interest must be found in the will, and the only contract, if any, that can be made

(1) (1892) 1 Ch., 210.
(2) (1896) 1 Ch., 512.
(3) (1901) 1 Ch. 681; 49 W.R., 343.
(4) 22 Beav., 562.
(5) (1903) 2 Ch., 226.
(6) L.R. 6 Ch., 235.
(7) L.R. 1 H.L., Sc., 11.
(8) 1 Ch. D., 447, at p. 452.
(9) 3 App. Cas., 795, at p. 804.

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out here, is a contract arising out of the deed. The trustees could not enlarge the rights of the beneficiaries. There is no contract in the deed to pay interest, but only a contract to pay the income arising from the investment of the arrears. The claim to a proportionate part of the increase in the value of the securities attributable to the investment of the arrears is in the nature of a claim by a creditor to a partnership with his debtor and is bad: *Taylor* v. *Taylor* (1). [They also referred to *Bethell* v. *Abraham* (2); *Lewin on Trusts*, 11th ed., p. 494; *Ord* v. *Noel* (3); *Anon.* (4); *Prideaux Precedents*, 10th ed., pp. 607, 609; *Turner* v. *Turner* (5).]

Nesbit K.C., in reply.

Cur. adv. vult.

Melbourne, October 1.

On the appeal coming on for judgment, *Isbister* applied for an order amending the summons by describing the appellant Wigley as also claiming to be trustee of the indenture of 23rd November 1903, and adding Lilian Sturt Wigley as a party. He referred to the Rules of the Supreme Court of South Australia 1893, Order LXXIII., rr. 3, 4, 7, 8; Order LV., rr. 9, 35 (*a*); *In re Medland*; *Eland* v. *Medland* (6).

Nesbitt K.C. consented to Lilian Sturt Wigley being added as a party, and announced that he appeared for her. He opposed the other application.

GRIFFITH C.J.—The amendment will be allowed.

The following judgments were then read:—

GRIFFITH C.J. The testator, who died in 1887, by his will, made a few days before his death, devised and bequeathed all his real and personal estate to trustees upon trusts for conversion, with full power to suspend the conversion "for such period as my said trustees shall judge expedient," and during the suspense of conversion "to manage and order all the affairs" of the estate

(1) 8 Hare, 120.
(2) L.R. 17 Eq., 24.
(3) 5 Madd., 438, at p. 440.
(4) 6 Madd., 10.
(5) 14 Ch. D., 829.
(6) 41 Ch. D., 476.

"as regards letting occupation cultivations repairs insurance receipts of rents and investment" as the trustees might think expedient. The power could hardly have been conferred in wider terms. He then directed that his trustees "until the final conversion and getting in of my estate" should pay to his daughter Elizabeth (the appellant, Mrs. Richardson) an annuity of £300, and also directed that "if my estate will allow and produce the same" his trustees should "until the conversion and getting in thereof" pay to the plaintiff, who was the wife of his son Walter, an annuity not exceeding £200. He further directed that the annuity to Mrs. Richardson should be the first charge on his estate after payment of debts and outgoings. Here the trusts of the will ended so far as regards dealing with the estate before conversion.

The testator then went on to declare his wishes as to dealing with the estate after conversion as follows: "And as to the money to arise from the sale conversion and getting in of my estate upon trust" after payment of debts "in the first place to set aside and retain such a sum of money as my said trustees shall deem sufficient for providing by investments in such manner as my said trustees shall think fit an annuity of £300 per annum to my said daughter Elizabeth Richardson during her life and in the next place (if my estate will extend thereto) such a sum of money as will produce an annuity for the said Elizabeth Crozier such annuity not to exceed £200 per annum." After the deaths of the respective annuitants the principal sums so set aside and the investments representing them were to be held upon trust for their respective children in such shares as the trustees might deem expedient, with power to settle the funds for the benefit of the annuitants and their children. The testator gave the residue of his estate to his five sons in equal shares. By a codicil he gave some specific legacies.

The first point to be observed upon this will is that there is a sharp division between the trusts before conversion and the trusts after conversion. The testator's estate at the time of his death, as then known, was valued at £13,471, of which a sum of £5,750 was represented by shares in joint stock companies, the greater part of the remainder being in money or property readily con-

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vertible into money. It is plain, therefore, that the chance of Mrs. Crozier being able to derive any benefit from the will depended to a great extent upon the time and manner in which the trustees might exercise the trust for conversion. If they exercised it at such a time that the total proceeds of conversion would not be more than the fund required to provide the annuity of £300 a year for Mrs. Richardson, Mrs. Crozier would get nothing. They were, therefore, especially bound to have regard to her interests in the exercise of their discretion, for she was, although postponed to Mrs. Richardson, equally an object of the testator's bounty.

For three years after the testator's death both annuities were paid in full. In 1891 nothing was paid. In 1892 Mrs. Richardson received £125 and Mrs. Crozier £83 6s. 8d. Then nothing was paid to either for five years. In 1897 the appellant Wigley, who is a son-in-law of Mrs. Richardson, became a trustee of the will with Edwin Crozier, and in and from that year £200 a year was paid to Mrs. Richardson on account of her annuity until June 1903, when full payments to her were resumed. Mrs. Crozier has received nothing since 1892.

These fluctuations are accounted for by the well known disastrous disturbance which occurred in the commercial affairs of Australia during the last decade of the nineteenth century. But the dividends upon the shares held by the trustees steadily increased from 1898, in which year they amounted to £279 18s. In 1899 they were £342 15s. 7d.; in 1900, £396 3s. 7d.; in 1901, 1902 and 1903, £389 12s. 8d., more than sufficient to pay Mrs. Richardson's annuity of £300 a year. In 1903 the unpaid arrears of her annuity amounted to £2,450, but the trustees had in hand in cash and liquid securities enough to pay that sum if it had been demanded and to leave a surplus of £1,400. The assets other than shares were bringing in interest which amounted in 1900 to £90 11s., in 1901 to £104 6s. 3d., in 1902 to £74 1s. 6d., and in 1903 to £114 2s. As things then stood, therefore, Mrs. Crozier was *primâ facie* entitled to receive something on account of her annuity, subject to a right on the part of Mrs. Richardson to which I will directly refer.

Under these circumstances what were Mrs. Richardson's rights?

She was probably entitled to demand immediate payment of the arrears of her annuity, £2,450. She was also entitled to insist that before the estate should be diminished by payments to other beneficiaries a sufficient part should be kept intact to assure her annuity: *Harbin* v. *Masterman* (*No.* 2) (1). But this retention would have been by way of security only, and would have enured not only for her benefit, but also, after she was satisfied, for the benefit of any other persons interested in the estate The position was analogous to a mortgage with an equity of redemption. Possibly Mrs. Richardson was also entitled to object to any payment being made to the respondent if such payment would endanger her future safety. But this was all. She was not entitled to insist upon an immediate conversion of the unconverted estate, or to have the estate from which her annuity was derived handed over to her. Even if the income of the estate had been insufficient for payment of her annuity in full she would not have had any such right. In *Wright* v. *Callender* (2), the rights of an annuitant under such circumstances were stated by Lord *Cranworth* L.J. Referring to the case of *May* v. *Bennett* (3) he said (4):—"What Lord *Gifford* said was this: 'If there is any difficulty in making good the difference out of the general estate of the testator, she must have the deficiency raised from time to time by the sale of parts of the appropriated stock." Now, that is, in my opinion, the equity and the only equity which the annuitant has."

If Mrs. Richardson had asked the trustees to convert the unconverted part of the estate, they would have been bound to consider the interest of the respondent and the residuary legatees before exercising their discretion.

This being the condition of the estate in 1903, and these being Mrs. Richardson's rights, an arrangement was entered into between the then trustees, Edwin Crozier and the appellant Wigley of the one part, and Mrs. Richardson (who was born in 1845) and her two daughters, Mrs. Wigley and Mrs. Frost, who were her only children and were then of full age, of the other part, which was attempted to be carried out by an inden-

(1) (1896) 1 Ch., 351.
(2) 2 D.M. & G., 652.
(3) 1 Russ., 370.
(4) 2 D.M. & G., 652, at p. 656.

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ture of 23rd November 1903. That indenture, after reciting the trusts of the will, and that the trustees had under the power in the will suspended the conversion of a considerable portion of the estate, and that the whole of the trust estate consisted of and comprised the real and personal property specified in a schedule to the indenture, and that the sum of £3,098 was due to Mrs. Richardson for arrears of annuity (an amount arrived at by allowing interest, which it is now admitted could not be allowed), and that if the whole of the unconverted trust estate were sold and converted into money the proceeds arising therefrom added to the converted portion would not, in the opinion and judgment of the trustees, after payment of the arrears be sufficient to provide and yield by proper investment the annuity of £300, proceeded as follows :—

"And whereas all the parties hereto believe that it would be more beneficial for the estate and for the interests of the persons interested therein or entitled thereto that the conversion of the unconverted estate should be further postponed and such estate continued in its present condition for such time as the said trustees may think fit: And whereas the said Elizabeth Richardson, Lilian Sturt Wigley, and Violet Frost have requested the said Edwin Crozier and Thomas Francis Wigley as such trustees to postpone such conversion as aforesaid, and also to set aside so much of the estate including that unconverted as may (after payment of the said arrears of annuity to the said Elizabeth Richardson) be sufficient for providing and yielding by its income the said annuity of £300 to the said Elizabeth Richardson, and also to declare determine and fix the shares and proportions of the children of the said Elizabeth Richardson in the estate so set aside and the time or times and manner of the payment thereof and to settle such estate for the benefit of the said Elizabeth Richardson and her children, which they the said Edwin Crozier and Thomas Francis Wigley have consented and agreed to do upon having the release and indemnity hereinafter contained."

The indenture then witnessed that in consideration of the premises Crozier and Wigley, "as such trustees of the said will and under or by virtue of the powers and directions thereby

given to or conferred upon them and of every other power and authority enabling them in this behalf," did set aside, appropriate and retain all the estate specified in the schedule, "being the whole of the estate of the said testator (subject to the payment thereout of the said sum of £3,098 so due to the said Elizabeth Richardson for arrears of annuity) for the purpose of providing and yielding hereafter by its increase rents and profits in its present or future state of investment the said annuity of £300 to the said Elizabeth Richardson during her life." The trustees then declared that they stood possessed of the estate so set aside, appropriated and retained by them (subject to the payment of the said arrears and to the payment of the annuity) and all the investments and securities representing the same upon trust for the children of Mrs. Richardson in equal shares, payable on her death. The trustees next, in attempted execution of the power in the will for that purpose, proceeded to "settle the said real and personal estate of the said testator so set apart appropriated and retained by them as aforesaid" for the benefit of Mrs. Richardson and her daughters, and it was declared that they might postpone the sale or conversion of any part of the unconverted trust estate in their absolute discretion. The indenture finally contained an assignment of the £3,098 by Mrs. Richardson to the same trustees for the benefit of her daughters, and a release of the trustees from all liability as trustees of the will, and a covenant for indemnity.

Mrs. Crozier was not informed of the execution of this indenture, and did not become aware of its existence until February 1908. At that time the whole of the testator's estate had been converted, and was represented by a sum of money large enough to pay the arrears of Mrs. Richardson's annuity in full, to purchase Government securities of sufficient amount to provide the annuity of £300, and to leave a large surplus for the other beneficiaries.

Shortly afterwards Mrs. Crozier took out an originating summons, to which the trustees, Wigley and Mrs. Richardson, were made defendants, asking for the decision of two questions—whether notwithstanding the indenture she was entitled to be paid any and what portion of the arrears of her annuity, and

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whether she was entitled to have any portion of the estate set aside and retained for the purpose of providing for her annuity. Mrs. Wigley has now been added as a defendant.

The question debated on the hearing of the summons and before us was whether the indenture was valid or invalid. It may be doubtful whether such a point could properly be raised on an originating summons, but no objection has been taken to the form of procedure, and any such objection, if it could be taken, must be deemed to have been waived.

Gordon J. held that the indenture was invalid, and made a decree for administration of the estate on that footing.

The appellants endeavoured to support the indenture on the authority of the case of *In re Lepine*; *Dowsett* v. *Culver* (1), and other cases to the same effect. The principle on which an appropriation of specific assets may be made in satisfaction of a legacy (whether specific or of residue) is stated by *Buckley* J. in *In re Beverly*; *Watson* v. *Watson* (2). It is correctly stated in the head-note as follows:—"The principle upon which executors and trustees under a will which contains a trust for sale and conversion have power to appropriate any specific part of the residuary estate towards satisfaction of a legacy or share of residue, is that they have power to sell the particular asset to the legatee, and to set off the purchase money against the legacy."

Gordon J. held that the actual transaction evidenced by the indenture was not in substance a sale, principally on the ground that the several assets were not valued and assessed at a specific price but were handed over *in globo*. The appellants contend that this is not material if the assets were admittedly of less value than the amount of the debt or obligation in satisfaction of which they were assigned, and relied on the case of *In re Gilbert*; *Ex parte Gilbert* (3), which undoubtedly supports that view. And they say that they had a rough valuation made of the assets at the then current market prices, and that the result was such as to justify the recital of their insufficiency contained in the indenture. The total value so ascertained was, they say, about £9,500 or £9,750, which would not have been sufficient, if in-

(1) (1892) 1 Ch., 210.
(2) (1901) 1 Ch., 681.
(3) (1898) 1 Q.B., 282.

vested in trustee investment at that time, to have brought in £300 a year.

But for the purpose of the rule just stated the notion of a sale connotes (1) that the state of facts is such that the trustees can sell without breach of trust, and (2) that the purchaser is a person entitled to demand immediate payment or appropriation of a sum equal to the purchase money. In my opinion neither of these conditions existed in November 1903. The recital in the indenture that "all the parties hereto believe that it would be more beneficial for the estate and for the interests of the persons interested therein or entitled thereto that the conversion of the unconverted estate should be further postponed and such estate continued in its present condition for such time as the said trustees may think fit," is in my judgment conclusive to show that to the knowledge of all parties to the deed the first condition was not fulfilled. Mr. *Nesbit* suggested that by "the persons interested" in the estate Mrs. Richardson and her children only are meant. If so, so much the worse for his clients, for the trustees were bound to consider the interests of all the persons interested. But I cannot so construe the words. An attempt was made to get over the effect of this recital by a statement made by the appellant Wigley in his affidavit as follows:—"In 1903 the said Elizabeth Richardson applied to the said then trustees for payment of the arrears of her annuity and interest thereon at 4 per cent. amounting to the said sum of £3,098 and the said trustees made inquiries as to the value of the shares and ascertained that if the said shares were then sold and the proceeds thereof added to the converted portion of the said estate the said estate would not amount in the whole to more than the sum of £9,500. The said trustees at the same time considered what amount would in their opinion be sufficient to set aside to provide by investments authorized for trust moneys an annuity of £300 per annum for the said Elizabeth Richardson and they considered it would be unsafe to set aside a less sum than £10,000 for that purpose. The said trustees decided that they would realize the said shares unless the said Elizabeth Richardson would agree to the trustees setting aside the estate as it then stood for the purpose of providing as far as possible for the future payments of her annuity

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and for the said arrears and interest. There was a personal liability on the said trustees to the extent of £7 10s. per share on the said shares in Elder, Smith & Co. Limited, of £1 per share on the said shares in the Bank of Adelaide and £1 per share on the said shares in the Port Adelaide Dock Company Limited."

If this means that the trustees thought it their duty to sell, I cannot, in the face of the recital in the indenture, accept it as a true statement of their opinion at that time. Moreover, if the words:—"The said trustees decided that they would realize the said shares unless the said Elizabeth Richardson would agree to the trustees setting aside the estate as it then stood for the purpose of providing as far as possible for the future payments of her annuity and for the said arrears and interest" are taken literally, they only mean that the trustees would sell unless Mrs. Richardson agreed to their retention of the estate as it then stood for the purpose of providing for her annuity, which they were already bound to do until a proper time for sale should arrive. If they mean that they would sell to her detriment unless she would agree to their setting aside the whole of the estate for her exclusive benefit, *i.e.*, agree to the extinguishment of the *quasi* equity of redemption of the other beneficiaries, the trustees were contemplating a gross breach of trust.

It was further suggested that the trustees were unwilling to continue under personal liability in respect of certain shares in the Bank of Adelaide, which formed part of the trust estate, for the benefit of Mrs. Crozier, but were willing to do so for the benefit of the other beneficiaries, one of whom was a sister of one of the trustees and another the wife of the second trustee. There is nothing in the evidence to support the suggestion that they were under any such apprehension, and it is in my opinion negatived by the fact that since the testator's death the trustees had increased their holding in the bank, and that they still further increased it after the indenture of November 1903.

In my opinion a sale under the circumstances affirmed by the recital already quoted would have been a breach of trust.

As to the second condition it is clear that neither Mrs. Richardson nor her daughters, nor both together, were entitled to demand immediate payment or appropriation of any sum of money.

Under the express trusts of the will that right could not arise until after the final conversion of the estate, which had not happened. And, even if there had been no such express trust, they would not, for reasons already given, have had any such right.

In my judgment therefore the indenture was a breach of trust and invalid. I should add that I agree with *Gordon* J. in the conclusion that apart from these considerations the transaction was not in substance a sale. It was rather an attempt to extinguish the equity of redemption of the other beneficiaries for the benefit of Mrs. Richardson and her children, whose only right to the estate at that time was in the nature of a charge by way of security. The reasons which forbid a mortgagee to sell to himself are in my opinion entirely applicable to such a case.

It was further contended by Mr. *Nesbit* that even if the indenture is invalid the effect of it was to make the arrears of £2,450 an interest-bearing debt from its date. I cannot find any foundation for that contention. Possibly so much of the indenture as purports to be an assignment of the arrears may be valid as between the parties to the deed. But it only amounts to an assignment of a debt which as between debtor and creditor was not interest-bearing: *Torre* v. *Browne* (1). I fail to see how an assignment of it by the creditor can impose any fresh liability upon the debtor. There is not a word in the indenture about interest.

In my opinion to imply an agreement by the trustees, *quâ* trustees of the will, to pay interest on that sum would be to make a new agreement for the parties, which they never thought of. And I am disposed to think that, the transaction itself being a breach of trust, no implied right can be based upon it as against the beneficiaries. *Ex turpi causâ non oritur actio.*

I think that the third paragraph of the judgment should be varied by prefixing a declaration that the indenture is void and inoperative as against the plaintiff, and that with that variation the judgment of *Gordon* J. should be affirmed with costs.

BARTON J. I have read the judgment of the Chief Justice, and it seems to me that it covers the whole ground and that the

(1) 5 H.L.C., 555.

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reasoning is conclusive. I have, therefore, nothing to add except that I concur in the conclusion.

O'CONNOR J. The rights claimed by the appellants in this litigation depend upon whether the appropriation of assets which the indenture of November 1903 purported to effect was under the circumstances of the case a valid exercise of the powers which John Crozier by his will conferred on his trustees. Concurring as I do in the judgment of the learned Chief Justice, which I have had the advantage of reading, I do not propose to deal with any of the questions raised, except the question of the validity of the indenture as an appropriation, the determination of which necessarily involves some important principles. John Crozier made his will in the year in which he died. His estate was then worth £13,471. Of that, £5,750 was represented by shares in the Bank of Adelaide, in the Port Dock Co., in Elder, Smith & Co. Ltd., and in the Portland Co., assets likely to be of fluctuating value and which would need to be handled with watchful care in time of commercial depression. Under these circumstances it was natural that he should confer on the trustees, as he did in express terms, the power generally to effect the sale and conversion of his estate in such terms and in such manner as they should deem most advantageous, and with full power to suspend for such period as they should judge expedient the conversion and sale of his estate or any part of it with full powers of management in the meantime. Of the beneficiaries who are subjects of the testator's bounty, Mrs. Richardson and her children stand under the will in the most advantageous position, then come Mrs. Crozier and her children, and then his sons who took the residue. Having regard to the nature of the estate and its value at the time of the testator's death, it is obvious that the likelihood of pecuniary advantage from the estate to any beneficiary other than Mrs. Richardson and her children depended upon the careful exercise by the trustees of their discretion to convert or suspend conversion in accordance with the interests of all concerned. It is unnecessary for me to follow the history of the estate and its yearly fluctuating value from the testator's death until the date

of the indenture in 1903. But taking that date as a starting point it appears that there was then owing to Mrs. Richardson £2,450 arrears of annuity. She claims to be entitled to interest on that sum. I entirely concur in Mr. Justice *Gordon's* view that the arrears of annuity do not carry interest. Taking the amount of arrears payable as at that figure, there was then in the estate sufficient to pay the amount out of liquid assets and yet leave £1,400 worth of that class of assets to the good. The share investments were then producing an income of £363 10s. 6d. free of charges, thus leaving £300 for Mrs. Richardson's annuity and £63 odd towards Mrs. Crozier's annuity. In other words, the estate was in a position while it remained thus invested to pay Mrs. Richardson all she could at that time claim and to give Mrs. Crozier a portion of her rights. It was in that condition of affairs that the trustees determined to make the appropriation which is now challenged. I need not discuss in detail the reasons put forward in support of this course. But they may be summed up in a few words. Mrs. Richardson's valid claims under the will amounted to more than the value of the whole estate. If the estate were converted by sale in the ordinary way they would be bound to hand over to her the whole of the proceeds. They were therefore entitled by the process adopted in the indenture to appropriate the whole estate for her benefit. In taking this view the trustees were in error in assuming that Mrs. Richardson was entitled under the terms of the will to have the proceeds of conversion by sale of the whole estate in the ordinary way handed over to her for the benefit of herself and children, though it may be conceded that, assuming a valid sale, she could have demanded that the proceeds be set apart and held by the trustees for the benefit of herself and her children. But between such a conversion and the transaction which actually took place there is a vast difference. Conversion cannot take place until the conditions which authorize the trustees to convert have arisen. Appropriation can only be supported as a substitute for conversion. To adopt the phrase used by Mr. *Isbister* in his very able argument, "a valid appropriation is the substitute for a valid sale." In all the cases cited the conditions which justified a sale existed at the time of appro-

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priation, and the appropriation was merely a method of effecting the same purpose without circuity. The principle upon which alone appropriation can be justified, so clearly stated by Mr. Justice *Buckley* in *Beverly's Case* (1), cannot be applied to render an appropriation lawful under conditions in which a sale would amount to a breach of trust. It is clear by the express terms of the will that the trustees could not convert the estate by sale at a time when they thought it "more beneficial for the estate and for the interests of the persons interested therein"—to quote the words of a recital in the deed—that the conversion of the unconverted estate should be postponed and the estate continued in its then condition. That recital in my opinion demonstrates under the trustees' own hands that at the time when the indenture was made they deemed it expedient in the interest of the estate to hold rather than to sell. Attempts were made to explain the recital away. It was said to be an error in form, that it did not mean what it said. But, in my opinion, not only must the recital be taken to be true as against the trustees, but its truth in fact is strongly corroborated by every circumstance in the case. Any prudent business man at the time managing the estate to the best advantage would have come to the conclusion which the recital expresses. A stronger corroboration still is to be found in the action of the trustees themselves. They *did* continue the estate in its then condition and they did so because they deemed it to the advantage of Mrs. Richardson and her children to hold rather than to sell. It is obvious that if it was for the advantage of those beneficiaries that the estate should be so held, it was equally in the interest of the other beneficiaries to keep it unconverted. As a sale by the trustees at a time when they believed it was against the interest of the estate to sell would have been a breach of trust, an appropriation in substitution for the sale must be so likewise. Another consequence equally fatal to the appellants' contention follows from the principle that an appropriation must be a substitute for a sale. That also has been fully dealt with by the learned Chief Justice. Mrs. Richardson was not at the time of the alleged appropriation in a position to demand that the proceeds of a sale should be

(1) (1901) 1 Ch., 681, at p. 686.

handed over to her. *Wright* v. *Callender* (1) is a clear authority that Mrs. Richardsen could not under the terms of the will demand that the fund set aside out of the proceeds for the production of her annuity should be paid to her. Her utmost right even after conversion was that it should be held by the trustees separate and intact for the purposes of her annuity and for the benefit of her children after her death. As she could not in the event of a sale be entitled to have the proceeds paid over to her, the very foundation for appropriation fails, and the indenture relied on by the appellants cannot be otherwise than a breach of trust.

I agree that the decision of Mr. Justice *Gordon* must be upheld with the variation suggested by the learned Chief Justice, and that this appeal must be dismissed.

ISAACS J. This proceeding up to a few minutes ago was a proceeding to which the trustee of the indenture was not a party, nor was Mrs. Wigley or Mrs. Frost a party or represented in any way whatever. Mr. Wigley was present as trustee of the will and codicil, under which his duty as trustee of the will was by no means necessarily in the same direction as under the indenture. As trustee of the indenture, it was his duty to maintain it as against Mrs. Crozier; as trustee for Mrs. Crozier, the trustee of the will might be called upon to defend her rights as against Mrs. Wigley and Mrs. Frost. It cannot be said, therefore, that the trust estate consisting of the property settled by the indenture was represented any more than if Mr. Wigley were trustee in some bankruptcy estate not otherwise represented. This is a favourable matter of substance, and not capable of being cured now by a formal amendment still in the absence of Mrs. Frost. As to Mrs. Wigley, as she has consented to be joined, she will be bound. The principles are stated in *Daniell's Chancery Practice*, 7th ed., at pp. 200, 206 and 207. See particularly the case of *Read* v. *Prest* (2). I am of opinion that the rules cited by Mr. *Isbister* do not affect this. Mrs. Frost is not bound by these proceedings, and all I have to say on the case is subject to that observation.

The question argued was whether the children of Mrs. Richard-

(1) 2 D.M. & G., 652. (2) 1 Kay & J., 183.

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son are solely entitled to the moneys now in the hands of the trustee and representing the assets in the estate of the testator, or whether Mrs. Crozier, subject to a proper provision for Mrs. Richardson's annuity, is also entitled to look to those moneys for her annuity.

The contention on the part of the appellant is, in effect, that the arrangement effected by the deed of November 1903 was equivalent to a conversion, and therefore answers the requirement of the special trust for conversion and appropriation contained in the will; and that the will having made Mrs. Richardson's annuity a first charge on the whole estate, subject to payment of debts and other outgoings, it was open to the trustee to appropriate when he did, although actual conversion in the ordinary sense had not taken place.

On the other hand, the view presented for the respondent was that, pending actual conversion, the trustee was not entitled to set apart any of the estate, either finally or by way of security.

The will gives all the testator's property, real and personal, to trustees upon trust to sell and convert into money such part as did not consist of money and to get in and collect the rest. He gave full power to suspend the sale, conversion, and getting in of the estate or any part thereof, and gave the trustees during the suspense certain powers of management.

For the moment I pass by certain provisions, and for convenience of construction come to the dispositions of the money the proceeds of conversion and collection.

There is a trust in the first place to set aside and retain a sum of money to provide an annuity of £300 for Mrs. Richardson during her life. The terms in which this trust is framed have greatly determined my opinion on the case. The sum to be set aside is not a sum which as invested at the time of the testator's death produces, or which invested in the most remunerative securities will produce the annuity. It is such a sum as in the opinion of the trustees will be sufficient to provide the annuity by investments in such manner as the trustees think fit. The amount to be set aside is therefore to be regulated by the exercise of discretion as to the investments in which the money is to be placed. That includes a discretion as to the nature of the

securities which are to constitute the investments, and the rate of income they will produce. Such a discretion can obviously only be exercised at the time when the trustees are ready with the money for investment in securities then desirable, which may not have existed before. That connotes conversion before setting aside. The shares in which the money stood in November 1903 were not authorized investments, and consequently it was not open to the trustees to consider these as investments within the meaning of the trust; and it follows further that the amount to be set aside could not be regulated with reference to them, but conversion by some means was necessary. And, if so, it is a necessary result that unless the transaction amounted to, and was intended to amount to, conversion, there could have been no setting aside within the terms of the trust.

I turn now to the indenture to ascertain whether there was a conversion, or its equivalent.

Before analyzing this document, I should refer to the fact that the will provides that the sum to be set aside for Mrs. Richardson's annuity is to be held after her death upon trust for her children. Her two children, who are both of age, are parties to the indenture, she herself is found to be past childbearing, and so far therefore as concerns the concurrence of all possible and competent *cestuis que trustent* there has been enough to enable them to end the trust as to that fund and, if so desired, to have it paid over to the two children. Looking to the deed to see whether there has been in effect a conversion, I find two things plainly stated—(1) that the trustees under the powers of the will have so far *suspended* the sale and conversion of portions of the estate, and (2) that, believing it to be more beneficial for the estate and those interested in it that the conversion of the unconverted part should be *further postponed and the estate continued* in its then present conditions, all parties have agreed to this for such time as the trustees might think fit.

Now, although the parties proceed to deal with the property and settle it, yet I do not pursue their method of settling it because, whatever is done, is done upon the avowed basis that there has not been and still is not any actual conversion of the then unconverted property. It is retained and to be retained by the

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trustees as still under the will—and I agree with Mr. *Isbister's* view that the powers of postponement of sale and conversion contained in the deed referred to the sale and conversion as authorized by the will. That Mr. Wigley so understood the deed is evident from his affidavit of 14th October 1908.

What the parties intended to do, and what they did, are two very different things. The trust had lasted 16 years, and at the date of the deed the value of the assets were less than, if invested on authorized securities, would have given Mrs. Richardson her annuity. Had the trustees gone through the form of realization they could have set aside the whole of the proceeds, and the Richardsons (mother and daughters) could have unitedly claimed the whole fund; they could have immediately re-invested the money in the same securities, and would now retain them or their proceeds.

Or, possibly, without going through the form of sale, if the trustees had given their opinion that the assets should be sold, and so declared, they could have transferred them by way of satisfaction complete, or *pro tanto* on the principle of cases cited.

But honest as the parties were, and as I think without any intention to overreach Mrs. Crozier, that is not what they did. Their intention is determined by their acts, and the deed is in substance nothing but a declaration of trust, by which the trustees continue to hold unconverted, and still under the provisions of the will, but henceforth in favour only of Mrs. Richardson and her daughters, the assets with certain superadded trusts as between mother and daughters. It is not a sale or anything in the nature of a sale.

The cases such as *In re Lepine*; *Dowsett* v. *Culver* (1), are thus inapplicable, because here there was neither intention to convert directly or indirectly, nor an opinion of the trustees that conversion would be proper. To say that the arrangement actually arrived at and recorded by the deed was equivalent to a conversion would be to flatly contradict its express declarations.

Can then any arrangement be supported otherwise than by reference to the special trust?

(1) (1892) 1 Ch., 210.

Let it be assumed, without in any way so deciding, that except for some prohibition found in the will, either in express terms or by necessary implication, the trustees, independently of the special trust arising after conversion, would be at liberty to set aside a sum to secure the annuity during Mrs. Richardson's life. Still I am forced to the conclusion that on a proper construction of the will itself this was not the intention of the testator. The golden rule for the interpretation of wills is that the intention of the testator is to prevail, that is, his intention ascertained from the language of the will itself by the aid of the provisions of the law and the acknowledged canons of construction.

I passed over some intermediate provisions for the purpose of alluding to them at this point, where their real efficacy may be better appreciated. The general scheme of the will being conversion, and then appropriation, but with a discretionary power of postponement, it was of course present to the testator's mind that in the meantime his daughter and his daughter-in-law should be provided for. And he proceeded to make a specific *ad interim* provision.

This provision is special and independent of the main bequest of annuities. It was to last, not until every possible penny had come in, but until enough money had come in to enable the trustees to make the permanent appropriation directed by the will, based on their formed judgment as to then existing opportunities for investment. That *ad interim* provision is of great importance. Upon its character and duration must depend the extent and duration of any possible security which Mrs. Richardson could in any circumstances ask, and the trustees could grant.

Even if the principle of *Harbin* v. *Masterman* (*No.* 2) (1) would in ordinary circumstances apply at that stage of administration, yet no provision could extend beyond the right it was intended to secure, or be more than commensurate therewith, and consequently, as it is plain to me, this preliminary provision was *ad interim* only, no appropriation, however well founded in 1903, for purposes then existing, can be held as validly subsisting after actual conversion. The separate and self contained provision as to the intermediate annuity, the expressed limit of its duration, namely,

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

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until the final conversion of the estate, the direction that the annuity shall be a first charge on the whole estate, after debts and outgoings, and the absence of any direction to appropriate during that period, and consequently of any gift to the grandchildren of any specific fund producing the annuity, lead me to conclude that it was not the intention of the testator to have any appropriation of a fund, which should thenceforth form the permanent provision for Mrs. Richardson and her children, until the time arrived when the trustees determined to convert, and either converted in the ordinary way or did what the law regards as equivalent to such conversion.

The power to appropriate being strictly regulated by the will itself, it is unnecessary, as I conceive, to determine the effect and application of the numerous cases cited. I ought to say, however, assuming the power to permanently appropriate to have existed on 23rd November 1903, and to have been then exercised, I do not consider its exercise unfair. The mere fact that the investments then existing produced more than £300 does not establish unfairness because the trustees, charged with the duty of considering what safe and secure investments would produce, were bound to have regard to the reduced income those would produce.

I am therefore of opinion that, subject to the payments in the first instance to Mrs. Richardson of all arrears of her annuity and to the setting aside and retention of such a sum of money as the trustees shall deem sufficient for providing by investments in such manner as he shall think fit an annuity of £300 per annum for Mrs. Richardson, Mrs. Crozier is entitled to have a sum set aside to provide for her annuity not to exceed £200.

This leaves only one question to be considered, viz., whether interest should be allowed to Mrs. Richardson on £2,450, the amount due to her for arrears on 23rd November 1903.

Now my personal inclination runs very strongly in favour of allowing interest since the date of the deed, because all the parties to the deed looked upon the arrears as paid, and as henceforth as not recoverable by action. There seems to be a strong element of unfairness in allowing the income from her arrears to fall to the benefit of the residue.

But I am reluctantly forced to deny her right to interest by

such cases as *Taylor* v. *Taylor* (1), and *Martyn* v. *Blake* (2). Lord Chancellor *Sugden* cites a case which in principle and in result covers the present.

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Judgment appealed from affirmed with variations. Respondent to pay costs of the appeal.

Solicitors, for the appellants, *Gall & Isbister.*
Solicitors, for the respondent, *Nesbit, Webb & Nesbit.*

B. L.

[HIGH COURT OF AUSTRALIA.]

DASHWOOD . . . . . APPELLANT.

AND

MASLIN AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Husband and wife—Divorce—Intervention—Appointment of Crown Proctor —Matrimonial Causes Act 1867 (*S.A.*) (31 *Vict. No.* 3), *secs.* 28, 36, 37.*

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ADELAIDE, *September* 24.

MELBOURNE, *October* 1.

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

*Secs. 28, 36, and 37 of the *Matrimonial Causes Act* 1867 (S.A.) are as follow :—

"28. In every suit instituted for dissolution of marriage the Court, at the time when application is made to it to direct the mode in which the questions of fact raised and the pleadings shall be tried, or any other period of the suit, may, if it think fit, appoint some practitioner of the said Court to act as Crown Proctor in such suit ; and the Court may, if it shall think fit, from time to time remove any practitioner appointed to be Crown Proctor for any suit, and appoint some other practitioner in his stead ; and the practitioner so appointed to be Crown Proctor in any suit as aforesaid shall, until removed by the Court, perform the duties, and have and exercise the powers and authorities, in respect to the suit for which he has been appointed, which by this Act, or by the said Rules and Regulations, are or may be imposed or conferred upon the

(1) 8 Hare, 120, at pp. 126, 127.

(2) 3 Dr. & War., 125.