H. C. OF A. 1910.

WINGADEE SHIRE COUNCIL v. WILLIS.

Higgins J.

and the statement as to the 28th October was a mere *videlicet*; and even if the *videlicet* is wrong, the statement is right. The prescribed notice has been duly given to pay—the notice in the form and with the particulars prescribed (see sec. 146 (1)). Errors such as this are not fatal to the rights of the Council. The maxims *utile per inutile non vitiatur, falsa demonstratio non nocet, quicquid demonstratae rei additur satis demonstratae frustra est* (see *Broom's Legal Maxims*, 7th ed., pp. 468, 470, 471), all seem to apply. The error is such as the ratepayer could detect by an examination of the Act, or of the notice itself. Probably, if an action had been brought on 28th October, the plaintiff could not have shown that any rate was due on that date; but in this case the writ was issued on 30th July 1908.

Appeal allowed.

Solicitor, for appellants, *J. D. Y. Button*, Coonamble; by *Ellis & Button.*

Solicitors, for respondent, *Wilson & Harriott.*

[HIGH COURT OF AUSTRALIA.]

HENRY CHARLES SMITH . . . . APPELLANT;
DEFENDANT,

AND

THE PERPETUAL TRUSTEE CO. LTD. AND ALFRED HENRY DELOHERY . . } RESPONDENTS.
PLAINTIFFS,

H. C. OF A. 1910.

SYDNEY, *August* 22, 23, 25.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Will—Forfeiture clause—Equitable assignment—Direction to trustees to pay future income to creditor—Power of attorney given to creditor—Assignment for benefit

of creditors—Intention to assign—Consideration—Revocable mandate to agent—Issue of writ of foreign attachment—Garnishee order.

The appellant was entitled to an interest under the will of his grandfather. The will provided that if the appellant should assign or charge his benefit under the will, the benefit should lapse. The appellant was indebted amongst others to the defendant D., who was his solicitor. While so indebted the appellant, who was about to leave the State, executed a power of attorney in favour of D., empowering him to demand, sue for, and recover all moneys payable or hereafter to become payable to the appellant by the trustees of the will, for the purpose of liquidating and paying all his debts. The power of attorney contained the usual clause that it should continue in force until notice of death or revocation. The appellant also gave D. a letter addressed to the trustees of the will (to whom it was subsequently delivered), informing them that he had instructed D. to pay his creditors out of his income as it fell due, and requesting them to pay to D. all future income or corpus in the estate to which the appellant might be entitled. The intention of the appellant and D. was that the relationship between them should be that of principal and agent.

Held, that the documents did not in form constitute an assignment, and that the evidence did not show that the appellant intended to make over his interest under the will to D., or that he had given to any of his creditors a right of payment out of or security over the fund, and that the appellant had not forfeited his interest under the will.

Oldham v. *Oldham*, L.R. 3 Eq., 404, distinguished.

Held, also, that the service upon the trustees of a writ of foreign attachment by a creditor, in an action brought by him against the appellant, did not create a forfeiture.

Decision of *A. H. Simpson* Ch. J. in Eq.: *Perpetual Trustee Co.* v. *Smith*, 10 S.R. (N.S.W.), 429, reversed, on the first point.

APPEAL from the decision of *A. H. Simpson*, Ch. J. in Eq.

The late Charles Smith by his will, dated 24th December 1896, appointed the respondent company his executors and trustees, and after certain specific devises and legacies gave the residue of his estate to his trustees upon trust to sell and convert, and after payment of debts and funeral and testamentary expenses to divide the proceeds of sale into four unequal parts, which he defined, and then directed his trustees to hold the first part on trust, "First to pay out of the income to my son John Robert Smith and his present wife the sum of £200 per annum each, and subject to the payment of such annuity or annuities I direct my

H. C. OF A. 1910.

SMITH v. PERPETUAL TRUSTTE CO. LTD.

trustees to apply during the life of the said John Robert Smith such portion or portions of the income to be derived from such first share as they may think fit for the maintenance and education, or for the preferment or advancement, or otherwise for the benefit of all or any of the child or children or remoter issue of the said John Robert Smith, and shall accumulate the surplus of such income at compound interest by investing the same and the resulting income thereof in one or more of the investments hereby authorized, and shall subject as aforesaid stand possessed as well of the capital as the income and accumulations of income of such first share upon trust to pay the same to all the children of the said John Robert Smith, who being males shall attain the age of twenty-one years, or being females shall attain that age or marry under that age and if more than one in equal shares." Then followed a proviso: "That if any child of the said John Robert Smith shall die leaving children or other issue then such child or children or other issue of such deceased child of the said John Robert Smith shall take the share to which his, her or their parent would if living have been entitled and if more than one in equal shares as tenants in common *per stirpes* and not *per capita*."

He then directed the trustees to hold the second share upon trust "for my son Henry William Smith and his present wife and for their children and remoter issue upon the same trusts and in the same manner in all respects as my trustees are directed to hold the first of such shares in trust for my son John Robert Smith, his wife, children and issue."

The will contained a forfeiture clause, which provided that, "If any person entitled to any legacy or annuity under this my will, or to any share in any income or in the corpus, or to any other benefit thereunder, shall at the time of my death be or afterwards prior to the absolute vesting of such corpus become or be adjudged bankrupt, or shall assign or charge his or her respective benefits under this my will or any part thereof, or if any other event shall happen in my lifetime or after my death whereby although the same were payable to him or her such benefits would be by his or her act or default or by operation of law so disposed of as to prevent his or her personal enjoyment thereof, then and in any

such cases such legacy, annuity, share or benefit shall lapse or cease as the case may be as if he or she were dead."

Henry William Smith is still living, but his wife died on 5th December 1905, leaving five children, of whom the appellant H. C. Smith is the eldest.

The appellant was a man of extravagant habits, and though his debts had been paid more than once, in September 1907 he owed to various creditors a sum of £6,000 or thereabouts. Among his creditors was the defendant Delohery, who was acting as his solicitor, to whom he owed £530—£280 to the defendant himself, and £250 to him on behalf of his brother.

In September 1907 the appellant had arranged to go to New Zealand, and on 25th September he executed a power of attorney in favour of the defendant Delohery empowering him "to demand sue for and recover all money payable or hereafter to become payable to me by the trustees of the estate of the late Charles Smith for the purpose of liquidating and paying all my just debts." The power of attorney contained the usual clause that it should continue in force until notice of death or revocation. On the same day he signed a letter addressed to the respondent company, in the following terms:—

"Sydney, 25th September 1907.

"The Manager,

"Perpetual Trustee Company Limited,

"Trustees in the estate of the late Capt. Charles Smith.

"Dear Sir,—As I have arranged with and instructed Mr. A. H. Delohery, solicitor, Sydney, to pay my creditors out of my income as it falls due and have given him a power of attorney to act on my behalf, will you please pay all future income as it falls due to me in my grandfather's estate to Mr. A. H. Delohery personally or to his credit in his special account at the Commercial Banking Co., King Street branch, and his receipt will be a sufficient discharge for such payments. In case I am also entitled to portion of the corpus in such estate, you will please also pay the same to Mr. A. H. Delohery in like manner, and he is authorized by me to give you a receipt for the same.

"Yours truly,

"(Signed) Charles H. Smith.

H. C. OF A. 1910.

SMITH v. PERPETUAL TRUSTEE CO. LTD.

"P.S.—Note my address is—

"C/o A. H. Delohery, Solicitor, 53 Elizabeth Street, City."

This letter was in the defendant Delohery's handwriting. It was delivered to the respondent company on 30th September, and a few days afterwards the power of attorney was handed to them.

In June 1908 one Byrne brought an action against the appellant, and on 25th June a writ of foreign attachment was issued in the action and served upon the respondents, attaching the appellant's property in the hands of the respondents.

This suit was brought by the respondents, as trustees of the will, asking for a declaration that (1) the execution of the power of attorney, and (2) the issue of the writ of foreign attachment, operated as a forfeiture of the appellant's interest under the will. *A. H. Simpson* C.J. in Equity, made a declaration that a forfeiture had taken place by the execution by the appellant of the power of attorney and the letter addressed to the respondents: *Perpetual Trustee Co.* v. *Smith* (1)

The appellant appealed on the ground that the execution of these documents did not constitute an assignment of the appellant's interest under the will, or operate as a forfeiture.

Langer Owen K.C. and *Maughan*, for the appellant. The question is whether the power of attorney and the letter addressed to the Perpetual Trustee Co. operated as an equitable assignment of the appellant's interest under his grandfather's will. If they did that interest is forfeited under the forfeiture clause in the will. It is submitted they did not, and also that the writ of foreign attachment, even if validly issued, did not create a forfeiture. The appellant had been warned by Delohery and the manager of the trustee company that an assignment would create a forfeiture. At the time of the execution of the power of attorney the appellant was about to go to New Zealand. Delohery had been told by the manager of the company that they would pay future income to Delohery upon the appellant's order. It was arranged that £100 a year was to be paid to the appellant, and that the balance should be paid into an account

(1) 10 S.R. (N.S.W.), 429.

in the appellant's name upon which Delohery could operate for the purpose of paying creditors. These documents were given to Delohery as the appellant's agent, and there was no intention to vest the property in him. It was obviously not intended by either the appellant or Delohery that there should be an assignment, as they both knew this would create a forfeiture. The letter was a mere mandate to an agent which could be revoked at any time. It would have been a fraud upon the bargain for Delohery to treat the document as an assignment: *In re Sheward*; *Sheward* v. *Brown* (1).

The documents as a matter of form do not amount to an assignment. They purport to be an authority to collect moneys and pay creditors. If there is an ambiguity, the surrounding circumstances may be looked at, and the intention to create an assignment is negatived by the evidence. There cannot be a charge in equity without an intent to charge: *Hopkinson* v. *Forster* (2). It must be shown on the part of those who assert an equitable charge that they have obtained it by agreement: *Brown, Shipley & Co.* v. *Kough* (3). What the appellant did in this case was to appoint an agent to receive his income, and when received to pay it to his creditors: *Re Swannell*; *Morice* v. *Swannell* (4). If the appellant had informed his creditors that such an assignment had been made, this would not give the creditors a lien on his property: *Malcolm* v. *Scott* (5).

[ISAACS J. referred to *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (6).]

There was no consideration for the power of attorney. If there was not in form an assignment, and the evidence shows that the intention was to create a revocable agency, the fact that Delohery was a creditor would not necessarily make the mandate irrevocable, or constitute Delohery a trustee of the property for the benefit of the creditors: *Wood* v. *Cox* (7); *Lepard* v. *Vernon* (8); *Wilkinson* v. *Wilkinson* (9); *Oldham* v. *Oldham* (10); *Burn* v. *Carvalho* (11).

(1) (1893) 3 Ch., 502.
(2) L.R. 19 Eq., 74.
(3) 29 Ch. D., 848, at p. 854.
(4) 101 L.T., 76.
(5) 3 Ha., 39, at p. 46.
(6) (1905) A.C., 454.
(7) 2 My. & C., 684.
(8) 2 V. & B., 51.
(9) 3 Swans., 515.
(10) L.R. 3 Eq., 404.
(11) 4 My. & C., 690, at p. 702.

H. C. OF A. 1910.

SMITH v. PERPETUAL TRUSTEE CO. LTD.

[HIGGINS J. referred to *Field* v. *Megaw* (1).

ISAACS J. referred to *Riccard* v. *Prichard* (2).]

The writ of foreign attachment is merely an interlocutory order and cannot create a forfeiture: *Common Law Procedure Act* 1899 (No. 21), secs. 188, 202. It may turn out that there is no cause of action, or the creditor may not proceed with the action. The object is merely to prevent the debtor from anticipating his property. A garnishee order does not operate as a forfeiture: *In re Greenwood*; *Sutcliffe* v. *Gledhill* (3); *Durran* v. *Durran* (4); *Levy* v. *Lovell* (5); *Ex parte Sear*; *In re Price* (6).

Knox K.C. and *Harvey*, for the Perpetual Trustee Co. The appellant's letter to Delohery is an absolute unqualified direction to pay all the moneys to which the appellant was or might be entitled in his grandfather's estate to a person who at the time of the presentation of the letter to the trustee company was, to the knowledge of the company, a creditor of the appellant. The letter on the face of it contains nothing, and nothing is deposed to, as to any intended revocation of that authority. There is no case which decides that such a transaction does not amount to an equitable assignment. The mandate given by the letter was not revocable, and while anything remained owing to Delohery the appellant could not insist on the company paying any money to him instead of to Delohery. The direction in the letter is quite independent of the power of attorney. The direction in the letter is to pay to Delohery, not to the appellant's attorney; so if the appellant had informed the company that he had revoked the power of attorney, that would not cancel the direction in the letter to pay to Delohery. The power of attorney was prepared as a security for the money advanced by Delohery on behalf of his brother. It was arranged that £250 should be raised to pay off the most pressing of the creditors, and Delohery, on his brother's behalf, agreed to lend this sum. There must at least have been a moral understanding that the authority would not be revoked. Otherwise there would be no security for the loan.

(1) L.R. 4 C.P., 660.
(2) 1 Kay. & J., 277.
(3) (1901) 1 Ch., 887.
(4) 91 L.T., 187.
(5) 14 Ch. D., 234.
(6) 17 Ch. D., 74.

A power of attorney given to a creditor to enable him to discharge his debt is irrevocable until the debt is discharged: *Wilkinson* v. *Wilkinson* (1); *Oldham* v. *Oldham* (2). The provision that the power of attorney should remain in force until notice of death or revocation is consistent with its being irrevocable until Delohery's debt was paid, and is inserted to comply with sec. 14 of the *Conveyancing Act* 1901, by which acts done after death or revocation, but before notice, are valid.

[ISAACS J., as to whether the existence of a debt is sufficient consideration for the giving of a security to secure the debt, referred to *Wigan* v. *English and Scottish Law Life Assurance Corporation* (3).]

Primâ facie the authority was given to Delohery *quâ* creditor. The onus is on the appellant to show that it was given to him in some other capacity.

[GRIFFITH C.J.—There is nothing to show that the power of attorney was drawn up in consideration of a promise to the creditors.

ISAACS J.—This may be done without creating a charge. The question is, was it?]

In *Oldham* v. *Oldham* (2) there was a past debt, and the mandate on the face of it was revocable. There was no enforceable agreement in that case that the creditor would not withdraw the authority.

[ISAACS J.—The circumstances may show that a request for forbearance is to be implied: *Fullerton* v. *Provincial Bank of Ireland* (4).]

If the effect of the transaction is that the trustees may refuse to pay the appellant any money accruing due to him, the provision in the will as to forfeiture applies. The appellant is not allowed to place any of the money out of his dominion. But for this provision the presumption would be very strong that there was an intention to assign. The creditors were in a position to enforce their claim against the appellant. There was clearly evidence of an agreement to forbear. If this was an authority given to an agent or solicitor, then as soon as it was communi-

(1) 3 Swans., 515.
(2) L.R. 3 Eq., 404.
(3) (1909) 1 Ch., 291, at p. 297.
(4) (1903) A.C., 309.

H. C. OF A. 1910.

SMITH v. PERPETUAL TRUSTEE CO. LTD.

cated to any creditor, including Delohery, it became irrevocable: *Hurst* v. *Hurst* (1); *Montefiore* v. *Browne* (2); *Johns* v. *James* (3); *Wilding* v. *Richards* (4).

Owen K.C., in reply. If the documents are ambiguous the Court will lean against forfeiture: *Durran* v. *Durran* (5). In *Oldham* v. *Oldham* (6) the intention was to create an assignment, and there was then present consideration given.

Cur. adv. vult.

August 25.

GRIFFITH C.J. The appellant is entitled to an interest under the will of his grandfather, the late Charles Smith, as to which it is sufficient to say that it is not a present vested interest under which he can claim any immediate payments of either capital or income. The will contained a provision that if any person entitled to "any legacy or annuity under this my will, or to any share in any income or in the corpus, or to any other benefit thereunder, shall at the time of my death be or afterwards prior to the absolute vesting of such corpus become or be adjudged bankrupt, or shall assign or charge his or her respective benefits under this my will or any part thereof, or if any other event shall happen in my lifetime or after my death whereby although the same were payable to him or her such benefits would be by his or her act or default, or by operation of law so disposed of as to prevent his or her personal enjoyment thereof," then the benefit should lapse and go over and be disposed of as directed in the will. This suit was brought by the respondent company, who are trustees of the will, asking *inter alia* for a declaration, which has been made by the learned Chief Judge in Equity, that the execution by the appellant of two documents, one a power of attorney, and the other a letter addressed to the company and dated 25th September 1907, constituted an assignment of his interest under the will and operated to divest it from him. The power of attorney is also dated 25th September, and so far as it is material is as follows :—" Know all men that I, Henry Charles

(1) 21 Ch. D., 278.
(2) 7 H.L.C., 241.
(3) 8 Ch. D., 744.
(4) 1 Coll., 655.
(5) 91 L.T., 187, 819.
(6) L.R. 3 Eq., 404.

Smith, of Sydney, in the State of New South Wales, being about to leave the said State and reside in New Zealand, do hereby constitute and appoint Alfred Henry Delohery, of Sydney aforesaid, solicitor, my true and lawful attorney for me and in my name to ask, demand, receive, sue for, and recover all money payable, or hereafter to become payable to me by the trustees of the estate of the late Captain Charles Smith, and on receipt of the payment thereof for me and in my name to offer receipts and discharges for the same to sign and deliver . . . and to operate on an account opened in my name in the King Street branch of the Commercial Banking Company at Sydney for the purpose of liquidating and paying all my just debts, and to sign all cheques to be drawn on such account." The power of attorney concludes with the usual declaration that "it shall continue in force until notice of my death, or of the revocation hereof shall have been received by the said A. H. Delohery." The account mentioned in the power of attorney had in fact been opened on 2nd September in the name of the appellant, who gave his own signature to the bank and also an authority to Delohery to operate upon it. Delohery was at that time a creditor of Smith. By a letter of the same date addressed to the respondent company, the trustees under the will, the appellant informed them that he had instructed Delohery to pay his creditors out of his income as it fell due, and proceeded, "Will you please pay all future income as it falls due to me in my grandfather's estate to Mr. A. H. Delohery personally or to his credit in his special account at the Commercial Banking Co., King Street branch, and his receipt will be a sufficient discharge for such payment. In case I am also entitled to a portion of the corpus in such estate, you will please also pay the same to Mr. A. H. Delohery in like manner, and he is authorized by me to give you a receipt for the same." The reference in the letter to the account in the Commercial Banking Co. was not quite accurate. In one sense it was Delohery's special account, but it was in fact, as described in the power of attorney, an account opened in the name of Smith himself. The contention of the respondent company is that a power of attorney given by a debtor to his creditor to receive money due to him is irrevocable, and operates as an assignment of all moneys to be dealt with under it, and the case of *Wilkin-*

H. C. OF A. 1910.

SMITH v. PERPETUAL TRUSTEE CO. LTD.

Griffith C.J.

son v. *Wilkinson* (1) was relied upon to support that contention. In that case a power of attorney, which was given to a creditor, empowered him to receive certain rents, and out of them to reimburse himself all sums advanced by him to the maker of the power of attorney, and in the next place to pay them to another creditor until his advances were repaid. *Sir T. Plumer* M.R. was of opinion that that power of attorney operated as an equitable assignment. He said :—"A power of attorney given to a creditor is not revocable. It (*i.e.*, the power of attorney in question) is an equitable security, conferring a right to receive and withhold the rents until the debts are paid; and the bankrupt had no longer dominion over the property." The last words indicate the governing element in the matter, namely, that the maker intended to part with dominion over the property. Reference was also made to the case of *Burn* v. *Carvalho* (2). In every case regard must be had to the whole of the circumstances. If a mere request to a debtor to pay the debt to a creditor of the person making the request were necessarily an equitable assignment, extraordinary consequences would follow. A cheque given by a debtor to his creditor might be an equitable assignment. No doubt a power of attorney given as part of a transaction which amounts to an equitable assignment is irrevocable, but you must first ascertain the nature of the transaction. No particular form of words is necessary to constitute an equitable assignment. As Lord *Macnaghten* points out in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (3), an equitable assignment does not always on the face of it purport to be an assignment, or use the language of an assignment. "It may be addressed to the debtor. It may be couched in the language of a command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely

(1) 3 Swans., 515, at p. 527.
(2) 4 My. & C., 690.
(3) (1905) A.C., 454, at p. 462.

disregarded by the debtor." But in every case there must be an intention to assign. That may conclusively appear on the face of the document, or it may be proved by extrinsic circumstances. In my opinion the test in each case is whether the debtor intends to part with his dominion over the property. That is the test suggested by *Sir T. Plumer*, and it is clearly stated by *Knight Bruce* V.C. in *Wilding* v. *Richards* (1). In that case several documents were in question, and the observations of the learned Vice-Chancellor were made with regard to the last of them :— "An instrument in favour of creditors, though in form a deed of trust, may have been intended to be an instrument, in effect, of agency—a mere direction to a person in the situation of steward or agent, or in an analogous position, as to the mode of distributing or applying the property of the person executing the deed; without any intention on his part of creating in any other person a right against it. It is established that in such cases, if the Court, having the deed before it, is satisfied that the intention was so, the intention is to have effect given to it, though, in form, the deed be a deed of trust." *A fortiori* where there is no document purporting to be a deed of trust. In the present case the power of attorney and the letter to the Perpetual Trustee Co. are both ambiguous, in the sense that they are certainly open to the construction that Smith was merely appointing an agent to collect money for him and pay his debts out of it. Taken by themselves, apart from the fact that Delohery himself was a creditor of the appellant, they *primâ facie* show a mere authority creating the relation of principal and agent. It was contended, however, that the fact that Delohery was a creditor is conclusive. The fact that there is in existence a debt which would be a good consideration for a promise by the debtor is one question; whether a promise was made in consideration of that debt is quite another. To constitute an agreement the debt and the promise must be connected together, either expressly or by circumstances showing intention to connect them in such a way that the debt is treated as consideration for the promise.

Assuming that the debt to Delohery could be so connected with the giving of the power of attorney as to show that it was given

(1) 1 Coll., 655, at p. 663.

H. C. OF A. 1910.

SMITH v. PERPETUAL TRUSTEE CO. LTD.

Griffith C.J.

in pursuance of a promise to give it by way of assignment of Smith's interest under the will, and that if so given it would operate as an equitable assignment and would be irrevocable, as to which I express no opinion, the question still remains: Does the evidence establish any such connection? In other words: Was the real relation that of assignor and assignee, or of principal and agent?—would the money received by Delohery be his money subject of course to the trust, or would it still be appellant's money, to be dealt with according to his instructions?

To answer this question it is necessary to examine the facts. The appellant was indebted to a very large extent. He had asked Delohery to help him in making arrangements with his creditors, and on 2nd September he had arranged to borrow £250 from Delohery's brother on the security, as I understand from the evidence, of a covenant to pay, and an assignment of a life policy. On the same day the account was opened at the Commercial Bank and the power of attorney was prepared. Smith was very careful throughout the transaction, and had been careful in previous transactions, to inquire whether any documents that he signed would affect his interest under his grandfather's will. It is therefore clear that he did not intend to do anything which would operate as an assignment under the will. I agree that parties cannot effectually agree that that which is in law an assignment shall not be an assigment. That was the decision in *Oldham* v. *Oldham* (1), where the written documents showed on their face a complete agreement to assign. But when the question whether a transaction which is not in form an assignment nevertheless operates in law as an assignment or not depends upon the intention of the parties, an agreement that it shall not so operate is, in my opinion, decisive. I have shown that this may be so even in the case of a deed which is open to two constructions: *Wilding* v. *Richards* (2). Upon the evidence in this case it is clearly established that the intention of the parties was that the relation between Smith and Delohery should be that of principal and agent, and not that of assignor and assignee.

Another point raised in the pleadings was as to the effect of a writ of foreign attachment taken out by a creditor in an action

(1) L.R. 3 Eq., 404. (2) 1 Coll., 655.

brought by him against the appellant, and served on the company. It is not necessary to refer in detail on this point to the Statute under which the writ was taken out, or to the particular circumstances of the proceeding, for the case on that point is concluded in the appellant's favour by the case of *Levy* v. *Lovell* (1). I think, therefore, that the appeal must be allowed, and the decree varied by declaring that these instruments do not separately or together, nor does this writ of foreign attachment, operate as an assignment or so as to divest the appellant's interest under the will.

BARTON J. read the following judgment:—The remarks of *Knight Bruce* V.C. in *Wilding* v. *Richards* (2) pointedly apply to this case.

In form, the documents are not by any means a deed of trust, as was the fact in that case, or a declaration of trust. But in their form they amount to no more than "an instrument, in effect, of agency—a mere direction to a person in the situation of . . . agent . . . as to the mode of distributing or applying the property of the person executing" the documents. A person about to leave the State, as the appellant was, and desiring to distribute his income monthly among creditors, reserving a proportion for his own needs, might well resort to two such instruments for the purpose of effecting his object *per aluim*, avoiding the inconvenience and expense of having his income remitted to him every month and thereout remitting again to the place he had left the numerous sums included in the periodical distribution. The appellant, desiring some person to make such a distribution, chose his own solicitor to perform this office for him. The mere fact that the solicitor was also a creditor does not of itself alter the character of the transaction. The solicitor was given no preferent right, and his authority might have been recalled next day.

It was for the respondent company to show that the surrounding circumstances divested the transaction of the character which it bore on the face of the documents and gave it the effect of an assignment or a charge upon the appellant's income under his

(1) 14 Ch. D., 234.

(2) 1 Coll., 655, at p. 664.

H. C. OF A. 1910.

SMITH v. PERPETUAL TRUSTEE CO. LTD.

Barton J.

grandfather's will. I cannot see that there is sufficient evidence to establish such a change. The money I think remained Smith's. The power of attorney did not authorize Delohery to place the money to any bank account except that of the appellant, and it was placed to his credit, with an authority to Delohery to operate on it. The appellant's own right to operate on it remained. The power of attorney was revocable, and if it were revoked, as it might be next day, the letter would cease to operate with it. It cannot be said that the case comes within those in which a transaction has been held to be an assignment because of the giving of a power of attorney to a creditor, which is irrevocable, it is true, where not expressly made revocable. But where the document is on its face revocable the creditor who takes it does so with that incident, and Mr. Smith had it in his power to revoke at any moment. No doubt the parties intended to make the transaction as near an approach to a security as they could without making an assignment or a charge. But I am clearly of opinion that the dominant intention was to avoid any such alienation, an intention as strong on the part of Delohery as on that of the appellant. The documents are entirely in conformity with that intention, and the evidence rather confirms than negatives it.

On the question of the writ of foreign attachment I need not add anything.

I agree that the appeal must succeed.

ISAACS J. read the following judgment:—I am also of opinion this appeal should succeed. The onus of establishing either that the documents relied on—the letter of 25th September or the power of attorney or both of them together—constitute or were intended to operate as an assignment or a charge is upon the party who affirms it, the respondents. And they have failed.

In the first place, there is nothing in the actual form of words employed which expressly or by necessary implication assigns or charges the income or corpus. The *primâ facie* import of the instruments is that Delohery was to act as Smith's agent, and not a word can be found in the documents themselves which regards him in any other character.

Further, there is nothing in the mere language of the instru-

ments which amounts to a transfer or a trust for creditors. The respondents then are forced to supplement the documents themselves with evidence of extrinsic circumstances, and it therefore lies upon the respondents to show that, taking all things into consideration, the intention of the appellant was to assign his interest or charge it in favour of one or more of his creditors. The evidence relied on is that of Delohery and his diary. The appellant was not called, and gave no evidence even on commission. If the onus lay upon him by reason of the apparent effect of the documents I should find it very difficult to say that the oral testimony was sufficient to break down a case otherwise established. But the appellant's absence cannot supply the lack of necessary evidentiary material of a positive nature to alter the apparent character of the instruments themselves, and while Delohery's sworn evidence is opposed to an assignment or charge, and indicative of agency only, his diary, though affording considerable ground for speculation, is not sufficient to outweigh the rest of the case. Consequently with regard to assignment the condition stated by Lord *Macnaghten* in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (1) is not satisfied. The respondents have not shown that they were given to understand that the appellant's interest was made over by him to Delohery. And with regard to the charge the respondents have equally failed to show that the appellant gave to his creditors or any of them a right to payment out of or security over the fund. An equitable assignment (*per* Lord *Hardwicke* in *Wright* v. *Wright*) (2) and an equitable charge (*per Chitty* J. in *Brown, Shipley & Co.* v. *Kough*) (3) both depend upon contract, and require valuable consideration to support them : *Fullerton* v. *Provincial Bank of Ireland* (4). In my opinion it cannot be maintained here that such an agreement is satisfactorily shown. Conjecture or suspicion is of course not sufficient—but the respondents' case cannot well be pressed further. And it is an important circumstance in considering the probabilities that Delohery not only was alive to the necessity of guarding Smith against any assignment or charge which he knew would create a forfeiture, but for his own

(1) (1905) A.C., 454, at p. 462.
(2) 1 Ves., 408, at p. 412.
(3) 29 Ch. D., 848, at p. 854.
(4) (1903) A.C., 309.

H. C. OF A. 1910.

SMITH v. PERPETUAL TRUSTEE CO. LTD.

Isaacs J.

sake, if for no other reason, he would avoid that disaster. The scheme of agency, though revocable, was of some probable practical value, and would work no loss to any person.

It was strenuously contended by Mr. *Knox* that an agency of this kind irrevocable in its nature was tantamount to an assignment or charge. But in this case irrevocability cannot be the test. If the respondents' main contention be correct irrevocability would be the result.

"Where an agreement is entered into for sufficient consideration, and either forms part of a security, or is given for the purpose of securing some benefit to the donee of the authority, such authority is irrevocable: *Story on Agency*, sec. 476," adopted by the Privy Council in *Frith* v. *Frith* (1). The cases there instanced by Lord *Atkinson* illustrate the point that irrevocability follows, but does not create the obligation. The learned Chief Judge in Equity quotes a passage from *Wilkinson* v. *Wilkinson* (2) that a power of attorney given to a creditor is not revocable. Of course, that is true if understood in connection with all it connotes. Delohery was a creditor, and he was also a solicitor and agent of the appellant. Those two positions were to some extent conflicting, and on the surface the documents show he acted merely in the latter capacity. He could in his relations with his client ignore his own status as creditor, and accept the simple fiduciary position of agent. He swears he did, and there is no law of which I am aware to force upon him a position and rights which he disclaims. As to revocability, therefore, it comes to this: the express language of the power admits it; there is no evidence to the contrary; and so, unless it is first proved that the transaction was in truth one of assignment or charge, there is nothing to make the mandate irrevocable, unless the further contention of Mr. *Knox*, namely, that communication has that necessary effect. It was urged that Mr. Delohery was at all events a creditor in fact, and assuming that so far as agreement was concerned he merely fulfilled the character of agent of Smith, with authority to collect and distribute the income in satisfaction of debts, yet he being a creditor necessarily had notice of this, and that made him a *cestui que trust*, even though the agency could

(1) (1906) A.C., 254, at pp. 259, 260. (2) 3 Swans., 515.

be recalled as to all other creditors. That contention, however, is not tenable. I agree that a trust deed for the benefit of creditors generally communicated to one creditor who assents, or forbears in consequence, makes the trust irrevocable as to him, though the settlor is still at liberty to revoke as to the other creditors. For this the observations of *James* L.J. in *Johns* v. *James* (1), of *Wigram* V.C. in *Griffith* v. *Ricketts* (2), and the judgment of *Malins* V.C. in *Re Sanders' Trusts* (3) are authorities. But when the reason of attaching any importance to communication is once apprehended the whole matter becomes plain, and it is then apparent why that fact has no relevance to such a case as the present.

An ordinary trust, when constituted, at once creates rights in the beneficiaries, independently of any communication to them: see *per Page Wood* V.C. in *Paterson* v. *Murphy* (4). But that is not so where a trust is created for the benefit of creditors generally. In *Smith* v. *Hurst* (5) *Turner* V.C. states the distinction between the two kinds of trusts, and incidentally his observations are generally useful in the elucidation of this case. He said:—"Many of the cases upon voluntary deeds were cited and commented upon in the argument of this case, and I have thought it right, therefore, to examine the authorities upon the subject. . . . . Each case of the latter description being thus governed by circumstances, any further examination of the authorities would, I think, be useless. It would lead to the ascertainment of no principle, and would only involve the question whether the principle has been rightly applied." When the subsequent circumstances are looked at in any case it may be found that there was communication to a creditor, who, as in *Harland* v. *Binks* (6), said he was satisfied, that is, as Lord *Campbell* said, was satisfied to come in under the deed and take the benefit of the trust, and who either altered or might have altered his position in consequence. As to such a creditor accepting the position of *cestui que trust*, the trustee cannot retire nor can the settlor undo the trust. *Johns* v. *James* (1) gives to these con-

(1) 8 Ch. D., 744, at p. 750.
(2) 7 Ha., 299.
(3) 47 L.J. Ch., 667.
(4) 11 Ha., 88, at p. 91.
(5) 10 Ha., 30, at pp. 47 and 48.
(6) 15 Q.B., 713, at p. 719.

H. C. OF A. 1910.

SMITH v. PERPETUAL TRUSTEE CO. LTD.

Isaacs J.

siderations the sanction of the Court of Appeal. But that all presupposes a transaction which is in form a trust for creditors, a species of trust which from its special inherent character differs so far from ordinary trusts as to need communication and adoption by the creditors before the trust becomes complete. It is plain, therefore, that principle is foreign to a case of mere agency. And this was practically so decided by Vice-Chancellor *Knight Bruce* in the creditor's suit of *Cornthwaite* v. *Frith* (1). There the debtor by deed assigned his property to the defendant to sell and convert into money, with an agreement *inter alia* to pay creditors. Then the debtor left England. The plaintiffs claimed to be creditors. In the voluminous correspondence that ensued Frith promised the plaintiffs to carry out what he termed the trusts reposed in him. It was argued that, as the deed was communicated to the creditors and assented to by them, that was sufficient to create a binding trust.

But the Vice-Chancellor *in arguendo* answered this by saying "A man places money in the hands of his steward to pay his creditors. The steward may pay a creditor, but can he give the creditor any new right?" And in his judgment he said it was impossible to doubt that at the moment the deed was executed it was only the creation of an agency or power for the purpose mentioned in the document, giving no right to institute a suit to any person except the actual parties to the instrument. He also held that Frith, the trustee, had no power to bind the settlor by any communication to the creditors. No act of the settlor himself was proved so that the effect of communication by him was formally left open. But the case established that mere communication even by the agent himself is not sufficient to convert the transaction from one of mere agency to one of equitable obligation to third persons. And the principle appears to me obviously to extend the whole distance.

As to the second branch of the case, namely, the effect of the foreign attachment case, I agree with what has fallen from the learned Chief Justice.

HIGGINS J. read the following judgment:—The question is,

(1) 4 DeG. & S., 552, at p. 560.

has the appellant lost all his interest under the will? He has lost it if he has assigned or charged all or any of his benefits under the will to or in favour of Delohery, or if he has done anything to prevent his personal enjoyment thereof. The Chief Judge in Equity has declared that a certain power of attorney in favour of Delohery, and a letter of the same date—25th September 1907—constitute an assignment of the appellant's interest and have operated to divest it from him.

Unless there was an assignment, there has been no forfeiture. Under "assignment" I include any act whereby the benefits under the will are so disposed of as to prevent the appellant's personal enjoyment thereof—anything which would divest him of effective control of, or dominion over, the moneys, enforceable in the Courts. Now, I do not know how there can be any assignment of property—putting aside an assignment by operation of law, as on bankruptcy, sale on execution, &c.—without the intention of the assignor to assign—to pass the property out of himself into some one else. This is the final question in all such cases—what was the intention of the alleged assignor; and this is mainly a question of fact, to be determined by a review of all the circumstances. No particular form of words is necessary for an assignment; but there must be some distinct indication of intention to make over, to part with control over, the thing alleged to be assigned: *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (1). I quite concur with the learned Judge that the fact that neither Smith nor Delohery intended to do anything that would work a forfeiture does not conclude the matter, if there was in substance an assignment. I quite agree that if the transaction was, in truth and in substance, an assignment, the Courts will treat it as such, will "brush aside the cobweb varnish" (to use an expression of Lord *Kenyon*), and declare a forfeiture. But the question remains: did Smith assign or agree to assign—did he transfer, or agree to transfer—his interest to Delohery? The cases on this subject of equitable assignment and consequent forfeiture are very numerous; but they can only be treated as illustrations of the application of a principle, not as authorities showing that in any new case arising certain facts are to be taken as decisive of the fact of assignment.

(1) (1905) A.C., 454, at p, 462.

H. C. OF A. 1910.

SMITH v. PERPETUAL TRUSTEE CO. LTD.

Higgins J.

The power of attorney and the letter on which the plaintiffs relied in this case have already been described; and the circumstances under which they were signed. On its face, the power of attorney is merely a power given by Smith, when leaving for New Zealand, to his solicitor to receive moneys payable to him by the trustees of his grandfather's estate, and to operate on his bank account. There is nothing to indicate that the power is to be irrevocable—nothing to indicate that the authority of Delohery may not be terminated at any moment. Indeed, the final clause of the power assumes that it is revocable, for it provides that the power shall continue in force until notice of Smith's death or of revocation shall be received by Delohery. As for the letter, it requests the Trustee Co., as Smith has instructed Delohery to pay his creditors out of his income as it falls due, and has given him the power of attorney, to pay all future income to Delohery or to the credit of his special account, and there is a similar request as to any portion of the corpus to which Smith might be entitled. So far as the letter also is concerned, there was nothing on its face to prevent Smith from revoking its directions immediately, or at any time since its date. Nor is there any tittle of evidence, verbal or written, that such control, such dominion, over his interest as Smith had up to 25th September was in any way to be abandoned. Where, then, is the assignment? Where is there any intention to transfer or part with the property?

The nature of the benefits to which Smith was entitled under the will has also to be taken into consideration. He was not entitled to any income as of right. The trustees had merely a power to apply, during his father's life, so much of the income of the father's share (subject to his father's annuity) as they should think fit for his (H. C. Smith's) benefit; and if the trustees should find that the income was merely to go to Smith's creditors, they could refuse to make any payment on his account. Smith had, in truth, nothing to assign, so far as regards income—I mean nothing that Delohery or the creditors could insist on receiving, as against the trustees; and as regards the corpus with accumulations, Smith would take nothing if he died leaving issue. Delohery as a solicitor knew all this. He could not have compelled payment of any income, and the prospect of corpus was

remote and contingent. In such a position, an assignment—a transfer of the right to receive money payable by the trustees—would be of very little (if any) more value to the creditors than the prospect of Smith allowing his agent to make payments from time to time as he received money from the trustees.

But it is urged that this was a power of attorney to be used for the benefit of Smith's creditors; and that, at the very least, Delohery, being one of Smith's creditors, the power of attorney (and letter) constituted an equitable assignment to him. There are, it must be admitted, numerous expressions in reported cases which seem, until the facts are examined, to favour the view that a power of attorney given to a creditor is not revocable, and is a binding equitable assignment. Generally speaking, these are cases in which the power is given to the creditor in his capacity as creditor; and the receipt of the money by him is *pro tanto* a satisfaction of his debt. The transaction is virtually a making over to the creditor of some specific asset of the debtor towards payment of that creditor's debt. Indeed, I cannot recall any such case—except perhaps, the peculiar case of *Oldham* v. *Oldham* (1), in which money to be received by the creditor was not to be kept by the creditor. The recipient of the power is always, or nearly always, the ultimate payee. But in the present case nothing was further from the minds of the parties to the transaction than that Delohery was to keep the money received. He would receive as agent for Smith; and it was incumbent on him to distribute the net proceeds (deducting his own charges: see his diary) as dividends among all the creditors *pro ratâ*. He certainly was not to keep out of the receipts the amount owing to himself (I include his brother) in priority to the other creditors. We have again to refer to first principles: did Smith appropriate—make over—put out of his control—this money coming to him under the will, in whole or in part? and I cannot find any evidence that he did. The learned Judge does not find that there was any sham or unreality in the documents or in the actions of the parties, but seems to base his judgment on the reported cases, as if they bound him to find an equitable assignment as a matter of pure law, instead of basing his judgment on all the facts and

(1) L.R. 3 Eq., 404.

H. C. OF A. 1910.

SMITH v. PERPETUAL TRUSTEE CO. LTD.

Higgins J.

circumstances of the case. I concur with the view put by Mr. *Owen* that the communication to the creditors of the facts with regard to the power of attorney would be very relevant, very important, if we once found that there was an assignment in trust for creditors. The Courts have held—and the doctrine has been too long established to be gainsaid—that even a person who executes an actual deed of trust for creditors may revoke it before it has been acted on or communicated to the creditors: *Johns* v. *James* (1). But the cases on this subject are cases where there have been express words of assignment; they do not establish that communication to creditors turns an instrument of agency into an assignment.

To my mind, the whole matter is summed up tersely in the words of the late Master of the Rolls, *Sir George Jessel*, in *Hopkinson* v. *Forster* (2):—"You can have no charge in equity without an intent to charge." In that case, Forster had borrowed £50 from C., giving his own cheque to C. in exchange; and he wrote to his bankers (who were agents for his regiment):—"I also wish you to place . . . . £50 to Dr. Cullen's (credit), as soon as possible." The facts are very different, no doubt; but the principle stated is the principle on which we have to act. I concur in the judgment of the Court.

Appeal allowed.

Solicitors, for appellant, *Ash & Maclean.*

Solicitors, for respondents, *Macnamara & Smith*; *A. H. Delohery.*

C. E. W.

(1) 8 Ch. D., 744.

(2) L.R. 19 Eq., 74, at p. 75.