[HIGH COURT OF AUSTRALIA.]

LINDERSTAM . . . . . PLAINTIFF;

AND

BARNETT AND OTHERS . . . . DEFENDANTS.

H. C. OF A. 1915.

HOBART, *Feb.* 16, 17, 18.

ISAACS J.

Deed—Revocation—Settlement by woman—Absence of independent advice—Improvident deed—Settlement for benefit of self and children.

The absence of independent advice will not vitiate a deed of settlement executed by a woman if the obtaining of independent advice would not have made any difference in the result.

By deed a widow irrevocably settled certain property upon herself for life and after her death upon her children absolutely, and she covenanted to keep the buildings, &c., upon the land in good repair.

Held, that the circumstances connected with the execution of the deed were such that she was not entitled to have it cancelled.

ACTION.

An action was brought in the High Court by Elsie Linderstam (formerly Elsie Johnston), a resident of Western Australia, against Nathaniel Benjamin Barnett and William Alfred Cane, the trustees of a certain deed of settlement made by the plaintiff, and Mary Gwendolen Johnston, Cyril Dalgleish Johnston and Bruce Carlysle Johnston, who were children of the plaintiff and beneficiaries under the deed of settlement, all of whom were residents of Tasmania, the plaintiff claiming to have the deed cancelled and the money held by the trustees under the deed paid to her.

By the deed in question, which was executed on 26th September 1907, it was declared by the trustees, to whom certain land

and premises in Hobart had been transferred by direction of the plaintiff, that they held it upon trust for the plaintiff for life and after her death upon trust to sell and divide the proceeds among her children. The trustees were given power during the life of the plaintiff at her request to sell the land and premises and to invest the proceeds in trust funds or the purchase of land approved of by the plaintiff. The plaintiff also covenanted to keep the buildings and orchard and fences on the land and premises, or upon any lands subsequently purchased, in good repair, order, cultivation and condition, to pay all rates and taxes, and to keep the buildings insured against fire.

The action was heard by *Isaacs* J.

The material facts are stated in the judgment hereunder.

P. L. Griffiths, for the plaintiff.

Lodge, for the defendant trustees.

L. L. Dobson, for the defendant M. G. Johnston.

During the argument reference was made to *Dutton* v. *Thompson* (1); *Horan* v. *MacMahon* (2); *Allcard* v. *Skinner* (3); *Kali Bakhsh Singh* v. *Ram Gopal Singh* (4).

ISAACS J. read the following judgment:—This action is brought by Mrs. Elsie Linderstam claiming the cancellation of a deed by which she settled certain property upon herself for life, and then absolutely upon her four children by a previous marriage, and claiming also the payment to her, for her own absolute disposal, of the whole of the money now held by the trustees of the settlement.

The grounds upon which this claim is made are that the settlement was (1) hasty; (2) improvident, and especially because it contains no clause of revocation, and does impose a burden for repairs, and makes no provision for emergencies; (3) that the plaintiff had no independent advice or assistance; (4) that it does

(1) 23 Ch. D., 278.
(2) 17 L.R. Ir., 641.
(3) 36 Ch. D., 145.
(4) 30 T.L.R., 138.

H. C. OF A. 1915.

LINDERSTAM v. BARNETT.

Isaacs J.

not represent her real intention at the time, she having signed it without having previously seen a draft, or had any explanation or proper understanding of its terms and purport.

Hasty, the settlement certainly was not: it was proceeded with most deliberately and cautiously. It was suggested many months before its completion, and in the meantime it was discussed and debated as to object, purport and consequences by the plaintiff and her relatives, its proposed terms reduced to writing, shown to her, criticized and amended, and re-discussed up to the very moment of execution.

Improvident, it cannot be said to be, consistently with its main object—the irrevocable protection of the children. On the contrary, it was a wise and motherly act; the only improvident and unwise step in the whole chain of circumstances being this attempt to undo it. I may quote with appositeness the words of *James* L.J. in the case of *Hall* v. *Hall* (1). The Lord Justice said:—"On the evidence it is quite clear that the lady understood what she was doing, and that it was a final, irrevocable settlement of her property. The settlement in itself is very reasonable and just. It is impossible to say that there is anything more improvident in a mother giving her children an assured provision after her death than there is in a husband making a similar provision for his wife and children, or a donee of a power making an irrevocable appointment." The clause as to repairs was knowingly and intentionally inserted and thoroughly understood, and the plaintiff was competent to undertake the obligation: *Dutton* v. *Thompson* (2). Emergencies are not left wholly unprovided for by the Court: See *In re New* (3).

As to independent advice.—No one who advised her took any benefit under the deed, nor did anyone belonging to them except the plaintiff's own children. I say nothing as to other considerations possibly affecting this objection, but I entertain no doubt that if she had had the advice and assistance of any solicitor wholly unconnected with her family or the trustees of her father's will, the result would have been the same. The settlement was so natural and provident, that not a word could

(1) L.R. 8 Ch., 430, at p. 438. (2) 23 Ch. D., 278, at p. 281.
(3) (1901) 2 Ch., 534.

have been said against it. The Privy Council, in the case of *Kali Bakhsh Singh* v. *Ram Gopal Singh* (1), stated as to independent advice that there is no rule of law absolutely requiring it. Lord *Shaw* said (2):—"The possession of independent advice, or the absence of it, is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out, the transaction. If she did, the issue is solved and the transaction upheld; but if upon a review of the facts—which include the nature of the thing done and the training and habit of mind of the grantor, as well as the proximate circumstances affecting the execution—if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand."

That brings me to the fourth ground of claim. What was her real intention at the time? Did she then intend to settle the property so as to have the productive benefit of it for her own life, and preserve it intact for her children after her death, as the deed prescribes; or did she then intend, as she now suggests, to reserve to herself the right at any time to spend the money as she pleased, in any way she pleased, and in that case leave the children entirely unprovided for? Looking at the bitter experiences through which she and her little family had passed, at the surrounding circumstances presenting both the opportunity and the advisability of making some small but certain provision for her children against the worst, and having regard to the evidence, and particularly that of Mr. Cane and Mr. Barnett, I have no hesitation in concluding that she intended to make an irrevocable provision for her children. She was to have the right to use, but not to consume, the little property she had; and, to effect that, the settlement was not to be a mere will, which she could alter or disregard. She was then thirty years of age, she already had a severe lesson, she saw her little children entirely dependent on her, she was embarking on a doubtful experiment in the way of business, she had careful, honest, prudent and disinterested friends and relatives around

(1) 30 T.L.R., 138. (2) 30 T.L.R., 138, at p. 139.

H. C. OF A. 1915.

LINDERSTAM v. BARNETT.

Isaacs J.

her, and I have no doubt whatever, notwithstanding her remarkable and repeated failure to remember circumstances that, one way or the other, one would expect to be present to her recollection, that she did see Mr. Mitchell, she did discuss the position with him, and gave to him, and received from him, ample explanation of intention and the way it was proposed to carry out the project. She was in 1907, and is still, an intelligent, clear-headed and collected woman, able, even above the average woman, to comprehend and weigh such considerations as affect this case, and she would promptly have made clear to her friends, and especially to Mitchell, so vital, I should rather say so fatal, a reservation from the gift as that which she now suggests. I use the word "suggest" because even now she does not assert that she ever told anyone that that was her intention. She said nothing of the kind even when her sister reminded her that the property was not hers, and when as she admits she realized her true position. That was in 1909. The word "use" in Mr. Barnett's account of the conversation does not convey that she could dispose of the property; but, understood as it must be, as compatible with a trust and with irrevocability, it means merely the "use" of property which continues to exist. Otherwise its use ceases. She never suggested even to her brother as late as the eve of her departure for Western Australia, in 1911, any divergence between the deed and her original intention. Her anxiety to see the deed then was to ascertain whether she could, so to speak, transfer the *locale* of the trust property to Western Australia, but not to alter the trusts themselves. The declared impossibility of doing this has led her mind to dwell upon the position until she has taken up, consciously or unconsciously, an essentially different position.

Her case entirely fails, and the deed must stand. I would only add my sincere regret that such a claim as this should have been made by the plaintiff. The trust property, small enough before, is seriously diminished by the costs the case has occasioned, and Mrs. Linderstam ought not to be allowed to throw the burden of her own fault on the children.

H. C. OF A. 1915.

LINDERSTAM v. BARNETT.

Isaacs J.

The trustees, of course, get their costs as between solicitor and client; the plaintiff must be ordered to pay all the defendants' costs, and recoup out of income any corpus necessarily applied to trustees' costs—the income payable to plaintiff to be impounded for the purpose until the liability is satisfied; if plaintiff undertakes to devote until recoupment one half the income to the benefit of the children, or some or one of them, then the other half only of the income to be impounded.

Order accordingly.

Solicitors, for plaintiff, *Eady & Bradford.*

Solicitors, for defendants, *Simmons, Wolfhagen, Simmons & Walch.*

B. L.

[HIGH COURT OF AUSTRALIA.]

IN RE ALEXANDER & COMPANY.

H. C. OF A. 1915.

SYDNEY, *Feb.* 16, 17, 19; *March* 16.

Barton, J.

Trading with the Enemy—Appointment of Controller—Motion—Evidence—Interim controller—Partnership—Trading with the Enemy Act 1914 (*No.* 9 *of* 1914), *secs.* 3, 8—*Trading with the Enemy Act* 1914 [*No.* 2] (*No.* 17 *of* 1914), *secs.* 2, 4.

The Minister for Trade and Customs having under sec. 8 (3) of the *Trading with the Enemy Acts* 1914 appointed an interim controller of the business of a firm on the ground that he believes that the firm will endeavour to transmit money from Australia to Germany for the benefit of enemy subjects,

Held, that on a motion to the High Court to appoint a controller it is sufficient that there shall be some evidence that there is a reasonable foundation for the Minister's belief.

In re Meister Lucius and Brüning (Ltd.), 31 T.L.R., 28, followed.

MOTION.

The firm of Alexander & Co. consisted of three partners—Eduard Alexander of Hamburg in Germany, a German subject