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THE MINISTER v. NEW SOUTH WALES AERATED WATER AND CONFECTIONERY CO. LTD.

Appeal allowed. Order appealed from discharged so far as it dismissed the motion for a new trial. Verdict set aside and new trial granted with costs of motion. Costs of first trial to be costs in the cause. Respondents to pay costs of appeal.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor for the respondents, *W. H. Baker*, Newcastle.

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

[HIGH COURT OF AUSTRALIA.]

REDMAN, REPRESENTING ALSO THE ESTATE OF BERNADETTA JOHNSTONE DECEASED, Defendants, } Appellants;

AND

THE PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES LTD. AND OTHERS . . . . . Plaintiffs and Defendants, } Respondents.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 21, 22, 23, 24; *Sept.* 1.

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

Power of Appointment—Exercise of power—Fraud on power—Intention to benefit stranger—Condition—Evidence—Onus of proof—Assignment of expectant equitable interest—Absence of consideration—Admissions by assignor—Rights of assignee.

A beneficiary under a will to whom was given an equitable life interest in certain land, with a power of appointment of the land in fee to all or any one or more of a class of persons, by a codicil to her will appointed the land to A, a member of the class. Before the codicil was executed, and when the land was worth about £10,000, A by deed agreed to sell to each of B and C, neither of

whom was a member of the class, a one-third share of her expectant share under the appointment for a very small sum of money, which was in fact paid by B. There was evidence, which the Court accepted, of statements made by A on more than one occasion to the effect that the donee of the power had executed the power of appointment in her favour on condition that she would give half of her property to B, and that she had promised to do so. In an action by the trustees of the original testator for a declaration that the appointment was a fraud on the power and null and void, the defendants being (*inter alios*) A, B and the representative of C,

Held, upon this and other evidence, as against B, that the appointment was wholly void:

By *Griffith* C.J. and *Barton* J., on the ground that on the evidence the appointment was dominated by a desire and intention that a large share of the land should go to B, and that the desire to benefit an object of the power also was not sufficient to save the appointment in whole or in part;

By *Isaacs* J., on the ground that, it having been established that the appointment was upon a condition, which *primâ facie* affected the whole appointment, that A should assign one-half of the land to B, B had not discharged the onus which lay upon him of establishing a qualification of the condition which would preserve the appointment in whole or in part, assuming that the condition was capable of such a qualification;

By *Rich* J., on the ground that the appointment would not have been made but for the arrangement that A should assign a large share of the land to B, and that the purpose of the appointment was not to benefit an object of the power but a stranger.

Held, further, that the representative of C had no enforceable right under the assignment to C:

By *Griffith* C.J. and *Barton* J., on the ground that on the evidence the appointment was void as against A and therefore the title of C, which was based on the assignment of an equitable interest in A, fell with the title of A;

By *Isaacs* and *Rich* JJ., on the ground that the assignment to C, being an assignment of an expectancy and without consideration, was unenforceable.

Observations upon the position of an equitable assignee of an interest which fails on grounds personal to the assignor.

Decision of the Supreme Court of New South Wales (*Harvey* J.) affirmed.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court of New South Wales in Equity by the Permanent Trustee Co. of New South Wales, the trustees of the will of John Redman, senior, deceased, and Alice Redman against Etela Joseph Redman, Isabella Hage, Sydney Charles Fraser, John James, John Francis Wynne, Thomas Henry

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Furnival Griffin and Arthur Wigram Allen, claiming a declaration that the purported exercise by one Cecilia Adelaide Mary Falstedt of a power conferred upon her by a codicil to the will of William Redman, deceased, was a fraud upon the power and was null and void, and that the land subject to the power belonged to the persons interested in the proceeds of the sale of the residuary real estate of William Redman.

The suit was heard by *Harvey* J., who made a declaration as asked, and appointed the defendant Etela Joseph Redman to represent the estate of one Bernadetta Johnstone, who was mentioned in the statement of claim.

From that decision Etela Joseph Redman, in his own right and as representing Bernadetta Johnstone, now appealed to the High Court.

The material facts are stated in the judgments hereunder.

Flannery, for the appellants.

Knox K.C. (with him *Leverrier* K.C. and *Maughan*), for the plaintiffs respondents.

J. A. Browne (with him *John Hughes*), for the respondent Isabella Hage.

[During argument reference was made to *Redman* v. *Hage* (1); *Vatcher* v. *Paull* (2); *In re Turner's Settled Estates* (3); *In re Holland*; *Holland* v. *Clapton* (4); *Daubeny* v. *Cockburn* (5); *In re Cohen*; *Brookes* v. *Cohen* (6); *In re Marquis of Ailesbury's Settled Estates* (7); *Topham* v. *Duke of Portland* (8); *Cloutte* v. *Storey* (9); *Gilbert* v. *Stanton* (10); *Barns* v. *Queensland National Bank Ltd.* (11); *Cock* v. *Smith* (12); *Nissen* v. *Grunden* (13); *Aleyn* v. *Belchier* (14); *McDonald* v. *McDonald* (15); *Taylor on Evidence*, 10th ed., vol. I., pp. 205, 540, 603; *Farwell on Powers*, 2nd ed., p. 427.]

Cur. adv. vult.

(1) 18 C.L.R., 640.
(2) (1915) A.C., 372, at p. 378.
(3) 28 Ch. D., 205, at p. 215.
(4) (1914) 2 Ch., 595.
(5) 1 Mer., 626, at p. 643.
(6) (1911) 1 Ch., 37, at p. 40.
(7) (1892) 1 Ch., 506, at p. 526.
(8) 31 Beav., 525, at p. 538; 1 DeG. J. & S., 517, at p. 566.
(9) (1911) 1 Ch., 18, at p. 30.
(10) 2 C.L.R., 447.
(11) 3 C.L.R., 925.
(12) 9 C.L.R., 773, at p. 793.
(13) 14 C.L.R., 297, at p. 319.
(14) 1 Eden, 132, at p. 137.
(15) L.R. 2 H.L. (Sc.), 482, at pp. 488, 492.

The following judgments were read :—

GRIFFITH C.J. and BARTON J. This is a suit brought by the respondents the Permanent Trustee Co., trustees of the will of one John Redman deceased, for a declaration that an attempted exercise of a testamentary power of appointment by the late Mrs. Falstedt in favour of the respondent Mrs. Isabella Hage was invalid.

William Redman, a solicitor practising in Sydney, by a codicil made in 1862 to his will made in 1860, gave his widow a life interest in certain land followed by a testamentary power of appointment "to all or any one or more of my brothers and sisters she may think proper or on their death to any of their children." The land, which is situated in the neighbourhood of Sydney, is now of great value. William Redman, who had no children, died in September 1882, leaving a widow. In September 1883 she married a Mr. Falstedt, who died in 1900. William Redman had three brothers and two sisters, four of whom predeceased him, the only one who survived him being the plaintiffs' testator. All the interests under his will were equitable.

The appellant Etela Redman was baptized as a son of Mrs. Redman's sister, a Mrs. Dwyer, but from a very early age was taken into the home of the Redmans and called Etela Redman. He was practically adopted as their child.

After Mrs. Redman's second marriage Etela Redman ceased to live with her, and her relations with all the other members of the Redman family practically came to an end, and she frequently gave expression to a feeling of strong antipathy to them. This condition of things lasted until her death, which occurred in 1912.

In 1900, soon after Falstedt's death, Etela had come back to live with Mrs. Falstedt, and continued to do so until her death. It may be assumed that they were on very friendly terms. About the end of 1890 or January 1891, according to the story which he told in the witness-box, he and Mrs. Falstedt, who was under William Redman's will the beneficial owner of property of some value, discussed on various occasions the questions of making her own will and of the execution of the power of appointment. In these discussions the importance of keeping the disposition of the property under the power separate from that of her own property was insisted

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upon by Etela, who desired that the appointment should be made by a codicil later in date than the will, which he wished to deal exclusively with her own property.

According to Etela's story she assented to these arguments, and instructions were given to Mr. Davis, a solicitor, to prepare a will and codicil as separate documents. Such documents were prepared, but they were not executed.

The instrument by which the appointment actually in question was made bears date 12th January 1904, being a codicil to Mrs. Falstedt's will, which bears date 7th January of the same year. By it she appointed the whole of the land to the respondent Isabella Hage, who was a niece of William Redman, being a daughter of his brother Joseph. The case made by the respondents is that the appointment is invalid on the ground that it was not made solely for the purpose of benefiting Mrs. Hage, who was a permitted object of the power, but substantially, in part at least, for the purpose of benefiting Etela who was not a permitted object.

Very soon after William Redman's death and before her second marriage his widow expressed her annoyance at the terms of the power of appointment, by which she was prevented from making any disposition in favour of Etela. On one occasion she offered to execute the power of appointment in favour of Mary Redman, a niece of William Redman, if she would sign a paper promising to give half of the property to Etela. Mary Redman, however, refused this condition, saying that if she got anything she would give it to her sisters.

From the time of Mrs. Redman's marriage to Falstedt to her death in 1912 she and Mrs. Hage were not on friendly terms, and never even met, except once in a street where Mrs. Hage was walking with her child. Mrs. Falstedt gave the child 1s., and asked Mrs. Hage to bring it to see her. The invitation was not accepted. It appeared, however, that Mrs. Falstedt regarded Mrs. Hage with less dislike than the other members of the Redman family, the apparent reason (or one reason) being that on more than one occasion when Mrs. Falstedt, who was left in comparatively poor circumstances on Falstedt's death, and who derived no income from the land in question, made proposals to the members of the class

of possible appointees to enter into some arrangement by which she might obtain a present advantage from her life interest, Mrs. Hage was, with the exception of a brother since deceased, the only member of the family who did not actively oppose her wishes. One of these attempts was made in December 1890, others in 1898 and 1909.

It is not suggested that any communications ever passed in writing between Mrs. Falstedt and Mrs. Hage, and the latter denies any personal interview except the one already mentioned. The natural inference is that any communication between them must have been through the medium of Etela, who was, as already stated, living as a member of Mrs. Falstedt's family, and was on good terms with Mrs. Hage, who was in very poor circumstances.

However that may be, it was proved by evidence which the learned Judge of first instance accepted that on an occasion, which is definitely fixed as being in January 1901, Mrs. Hage told her sister, a Mrs. Yeomans, that Mrs. Falstedt had made her will in her (Mrs. Hage's) favour on condition that she would give Etela half of the property, adding that she (Mrs. Hage) would give them all a share. This statement and the conversation with Mary Redman already mentioned were relied upon by the plaintiffs as sufficient *primâ facie* evidence to establish their case as against her. In our opinion the evidence was admissible for that purpose, and was, with other evidence in the case, sufficient. The learned Judge accordingly declared the appointment invalid, and Mrs. Hage has not appealed from his judgment.

The present appellant, Etela Redman, claims as equitable assignee from Mrs. Hage by virtue of a document under seal dated 6th February 1901, which was prepared by the same Mr. Davis. By this document, which is expressed to be made by her of the one part and Etela and his sister Mrs. Bernadetta Johnstone of the other part, and recites that she had agreed with each of them to sell to each of them a one-third share of her expectant share under William Redman's will and in and under and by virtue of any will of Mrs. Falstedt for the sum of £25, she covenanted to sell to each of them the said one-third share of her expectant share in and under the will and codicil of William Redman and the will and codicil or codicils of

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Mrs. Falstedt. It may be noted that Mrs. Falstedt's will and codicil are spoken of as existing documents although no such documents are shown to have been then in existence. The land was at this time worth about £10,000. Mrs. Johnstone is now dead, and her rights are represented in this suit by the appellant Etela, who appeals on behalf of her estate as well as on his own behalf. The covenant was executed by all three parties. The only evidence we have as to the circumstances attending the execution of this document is that of Etela, who said that he was aware at the beginning of 1901, that is, before the date of the covenant, that Mrs. Falstedt was going to appoint the property to Mrs. Hage. He said also that he paid the whole of the £25, and that the document was prepared on his instructions. He further said that he did not tell Mrs. Hage before the document was executed that Mrs. Falstedt was going to appoint the property to her. Without referring in detail to the evidence, it is sufficient to say that, so far as his title is based upon the assumption that he is a purchaser *bonâ fide* and for valuable consideration it fails. Mrs. Johnstone's title fails for the same reason, and also because upon the evidence she appears to have been a mere volunteer. The interest dealt with by the document was a mere *spes successionis*, and operated, if at all, as a contract only, and did not create any present proprietary right in the land (*Meek* v. *Kettlewell* (1)).

The appellant also sets up a deed poll, called a "deed of confirmation," executed on 17th December 1907, by which Mrs. Hage, who still had only a *spes successionis*, purported to convey the same two-thirds of her expectant interest to him and Mrs. Johnstone. Mrs. Johnstone was, however, then dead, so that, *quâ* conveyance, the deed could not operate as a conveyance to her. In any view, it could only have operated in favour of Etela, and then, if at all, only as a conveyance by way of estoppel taking effect on Mrs. Falstedt's death.

It is, however, unnecessary in the present case to consider what Etela's rights would have been under this deed, since it was established by independent evidence as against him that the appointment was invalid.

(1) 1 Ph., 342.

After January 1901 the subject of the execution of a will by Mrs. Falstedt and the exercise of the power of appointment seems to have fallen into abeyance, the relations or absence of relations between her and the several members of the Redman family continuing as before. But about the end of 1903 the subject was resumed, and a will, by which Mrs. Falstedt was to dispose of her own property, and a codicil by which she was to execute the power, were separately drawn up and executed. The will, which was wholly in favour of Etela, bears date, as already stated, 7th January, the codicil 12th January, 1904.

Both before and after the actual execution of the codicil Etela frequently spoke to the members of the Redman family of the "conditions" of the codicil, which, even while non-existent, seems to have been regarded as a certainty. In particular, in 1909, in the course of one of the discussions as to a suggested arrangement by which Mrs. Falstedt might obtain a present income from the land which was still unproductive, frequent reference was made by him to the manner in which it would affect "his interests under the codicil." It seems, in fact, to have been assumed by all parties that he was to be a large beneficiary under the power. There was, therefore, ample evidence as against him that the expected execution of the power (which was taken as assured) would be, or that the actual execution had been, actuated by a desire that he should be a substantial beneficiary. This is sufficient to dispose of the case against him, for Mrs. Falstedt's intention and purpose may be presumed to have continued.

The assignee of an equitable interest, even for valuable consideration, takes subject to all the equities and infirmities of his assignor's title. It is one of the infirmities of the title of the assignor of an equitable interest that his right to it may be disputed and defeated by litigation in a competent Court between competent parties.

Even, therefore, if the document of February 1901 is treated as a contract for valuable consideration which on Mrs. Falstedt's death operated in equity as a conveyance (*In re Lind* (1))—in which view the deed poll of 1907 would not add anything to its effect—still Etela's interest could not be put higher than that of an assignee

(1) (1915) 2 Ch., 345.

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of an equitable interest. Such an assignee is a proper, and may be a necessary, party to a suit against the assignor impeaching the assignor's title. But the reason is that he is interested in resisting the plaintiff's claim to impeach that title, not that the plaintiff is called upon to maintain a separate case against him. In a suit to set aside the execution of a power the appointee is a necessary party, and the matter cannot be litigated in his absence in a Court of Equity, whose jurisdiction is personal. It has never, so far as we know, been suggested that in a suit to impeach the title of a defendant who has attempted to assign an equitable interest a plaintiff who succeeds in establishing his case as against the assignor by admissible evidence may nevertheless fail as against the assignee. If it were otherwise the assignee would be in a better position than his assignor. There is no rule of evidence with which we are acquainted that can exclude the operation of the paramount rule that the assignee takes subject to the infirmities of his assignor's title. If any ordinary rule of evidence comes into conflict with it we think it must give way. In our opinion the sole right of the equitable assignee is to support his assignor's title, on the strength or weakness of which his own depends, unless he can set up the defence that he is a *bonâ fide* purchaser for value without notice, a defence which is not available to a purchaser of an equitable interest. In the absence of that shelter the curious consequence which sometimes results in the Divorce Court of apparently contradictory judgments as to the same fact in the same suit cannot occur in a suit to declare the title to property.

These considerations are, however, not necessary for the decision of the case as against Etela, as against whom it must be taken to be established by evidence clearly admissible as against him that the execution of the power was invalid.

The result is that Etela's appeal fails.

As regards Mrs. Johnstone, she was, at best, in the position of a person who has obtained a contract to convey an interest in a property in which the contractor turns out to have had no interest. Even if such a person is a necessary party to a suit affecting the title, he must, as already said, stand or fall by the title of the person with whom he has made the bargain.

We have not thought it necessary to discuss at length the law governing the validity or invalidity of the power, which is well settled.

It is established by abundant evidence that Mrs. Falstedt was actuated by a dominant desire and intention that at least a large share of the appointed property should go to a person not an object of the power. The case of *Duke of Portland* v. *Topham* (1) is an authority which binds us to hold that the fact, if it be one, that she desired also to benefit an object of the power is not sufficient to save the appointment even in part. Nor is there any authority that suggests that in such a case the appointment is divisible.

The appeals must therefore be dismissed.

ISAACS J. The material facts are very few. In 1882 William Redman died, giving by his will and codicil power to his widow, afterwards Mrs. Falstedt, to devise his property to certain objects including Mrs. Hage. In 1901 Mrs. Hage by deed agreed to sell to Etela Redman and Bernadetta Johnstone each, *inter alia*, a one-third share of her expectant share for £25 then paid to her, and expressed in a separate acknowledgment by Mrs. Hage to have been paid by the purchasers. In 1904 Mrs. Falstedt made her will appointing the property to Mrs. Hage, and in 1912 Mrs. Falstedt died, the appointment being unrevoked.

In 1915 the Permanent Trustee Co. Ltd., as sole trustee of the will of John Redman, who of all the brothers and sisters of William Redman alone survived him, sued to obtain a declaration that the appointment was a fraud on the power and null and void, the defendants then being Etela Redman, Mrs. Hage, and certain other defendants representing interests now immaterial. After the conclusion of the case and pronouncement of decree the Court, by amendment, appointed Etela Redman, who is executor of Bernadetta Johnstone, to represent her estate for the purposes of the suit. The learned Judge, *Harvey* J., made the declaration sought, finding that an arrangement had been made by which the appointor Mrs. Falstedt should appoint the property to Mrs. Hage on a condition that she assigned at least one-half to Etela Redman, who was

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

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not an object of the power. Omitting the words "at least," there is admittedly overwhelming evidence, including admissions of Redman and Mrs. Hage themselves, that such a condition was made. Mr. *Flannery*, in the course of a most able argument on both facts and law, contended, however, that the admission that such a condition was made was consistent with a good execution of the power with a superadded condition, and at all events that it was consistent with a clear purpose to give Mrs. Hage one-half for her own sake, and as a separate manifestation of intention to give her the other half on condition of her passing it on to Redman.

Without deciding more than is necessary for this case, it appears to me the appeal so far as it relates to Etela Redman must fail for the following reasons :—The initial burden of proving the invalidity of the appointment undoubtedly lay on the plaintiff. But, as against Redman and Mrs. Hage, the admissions severally made by, and therefore admissible against, them establish that the appointment as it stands was upon a condition which, if it permeates the whole appointment, clearly invalidates it on the principles declared in *Duke of Portland* v. *Topham* (1) and *Vatcher* v. *Paull* (2). *Primâ facie* the admission in the case shows that the condition does permeate the whole. Then, assuming, without deciding, that the admitted condition is capable of qualifications which would preserve the appointment in whole or in part, the burden of proof is shifted to the defendants who are affected by the admission. This burden they have not sustained, and therefore the appeal of Redman must fail.

The case of Mrs. Johnstone's estate stands in a different position. Of course she could take no better title than Mrs. Hage had. But, as against her, it must be proved what the defect in that title was. The question here arising is one of evidence only. There is no direct evidence whatever in the case to show that the appointor had any sinister or unauthorized purpose in appointing to Mrs. Hage. There is evidence of her having expressed her preference for Mrs. Hage over the other objects of the power, by reason of Mrs. Hage, alone among those objects, not resisting Mrs. Falstedt's

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

(2) (1915) A.C., 372, at p. 378.

desire to have the property sold. That tells in favour of the appointment so far as it goes. But the invalidating evidence consists purely in admissions by Redman and Mrs. Hage, which, however cogent against them personally were not in any way admissible against another person unless brought within some recognized exception from the general rule that all evidence must be direct and on oath (*Spargo* v. *Brown* (1), *per Bayley* J.). One exception, and the only one that could have relevance to this case, is that admissions made against interest by a predecessor in title are admitted against a defendant on the ground of privity of estate (*Woolway* v. *Rowe* (2); and see also *Llanover* v. *Homfray* (3)). But Mrs. Hage is not proved to have made the admissions when she had any interest in the property. The only date of her admission fixed with anything approaching definiteness is 1901, that is three years before Mrs. Falstedt's will was made and eleven years before it took effect. When the admission was made, and, indeed, when the so-called assignment to Bernadetta Johnstone was executed, Mrs. Hage had only an expectancy. That expectancy constituted no interest whatever in the property (*In re Parsons* (4)). Consequently the case does not fall within the exception of privity. Further, it is established beyond question that where there is an assignment in equity of a purely equitable interest, the assignee, and the assignee alone, is regarded in the eye of a Court of Equity as having any interest whatever in the property assigned. So clear is this that the assignor in such circumstances is not only not a necessary, but not even a proper, plaintiff and his joinder as such was at one time, and before the later procedure provisions as to misjoinder, fatal to the suit (*Fulham* v. *McCarthy* (5), *per Cottenham* L.C.).

If, then, Mrs. Johnstone is to be regarded as an assignee in equity of after-acquired property, which on the principle of *Tailby* v. *Official Receiver* (6) and *Lind's Case* (7) passes in equity directly it comes into existence and answers the description, I should be of opinion that the appeal of her representative should succeed because there was no evidence against her estate.

(1) 9 B. & C., 935, at p. 938.
(2) 1 A. & E., 114, at p. 115.
(3) 19 Ch. D., 224.
(4) 45 Ch. D., 51.
(5) 1 H.L.C., 702, at pp. 717, 718.
(6) 13 App. Cas., 523, at p. 543.
(7) (1915) 2 Ch., 345.

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The answer to her claim, however, appears to me to rest upon a different principle. The contract in 1901 to sell her a third share of the expectancy was a contract only, for, as Lord *Lyndhurst* held in *Meek* v. *Kettlewell* (1), "the assignment of an expectancy . . . cannot be supported unless made for a valuable consideration." A late case dealing with that subject is *In re Ellenborough* (2), where the doctrine was affirmed by *Buckley* J.

The whole doctrine of equity that a party to a contract is the owner of the property he has bought rests on the principle that equity will enforce the contract, not necessarily by specific performance, but either in that way or in some such way as Lord *Macnaghten* indicates in *Tailby's Case* (3). (See also *per* Lord *Parker* in *Central Trust and Safe Deposit Co.* v. *Snider* (4).) If equity would not specifically perform or otherwise enforce Mrs. Hage's contract to assign a one-third share to Mrs. Johnstone, the whole matter is at an end, and it is at an end if voluntary. It rests then in contract only. Being under seal, it is a contract at law; and there equity leaves it. Equity, paying no attention to the mere presence of a seal, does not regard a voluntary promise as binding on the conscience of the promisor, and therefore withholds its assistance from a volunteer (*Jefferys* v. *Jefferys* (5); *In re Earl of Lucan* (6)). And as it remains a mere contract depending for its enforcement on whatever remedies law as distinguishable from equity will afford, equity does not regard the property itself as passing.

No doubt Mrs. Hage received £25 consideration. But is that conclusive? The assignment, so called, of 1901 is precise that the sale is distributive. It is a sale of a one-third to Etela Redman, and a sale of a one-third to Mrs. Johnstone. On the face of the instrument the consideration was from both, and, if that remained so, I should hold in favour of the Johnstone estate. But as to this matter, there is direct sworn testimony of Redman that he paid the £25 out of his own money, and of his own volition, and in circumstances which lead irresistibly to the conclusion that the payment was independent of any request of Mrs. Johnstone.

(1) 1 Ph., 342, at p. 347.
(2) (1903) 1 Ch., 697.
(3) 13 App. Cas., at p. 547.
(4) (1916) A.C., 266, at p. 272.
(5) Cr. & Ph., 38.
(6) 45 Ch. D., 470, at p. 475.

In that state of facts, could Mrs. Johnstone or her representative enforce the contract in equity? In my opinion the answer is no, and for a clear reason. There was absolutely no consideration moving directly or indirectly from Mrs. Johnstone, and that is fatal to any attempted enforcement by her representative. The principle is deeply embedded in our law (see *Price* v. *Easton* (1)), and was enforced by the House of Lords as lately as the case of *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (2). That is as effective in equity as at law. The so-called deed of confirmation stands in the same position as the original deed.

I agree, therefore, that the appeals must be dismissed.

RICH J. I agree that the appeals must be dismissed.

The admissions made by Mrs. Hage and Etela Redman and the inference from the circumstances lead me to the conclusion that the appointment would not have been made but for the arrangement between the donee of the power and the appointee, and that the purpose of the appointment was not to benefit an object of the power but strangers to it. It follows that the power has been exercised in a manner which defeats the purpose for which the trust was created.

So far as Mrs. Johnstone's estate is concerned, I rest my judgment on the ground that the purported assignment to her is without consideration and therefore unenforceable: *In re Ellenborough* (3).

Appeals dismissed with costs.

Solicitors for the appellants, *Murphy & Moloney.*

Solicitors for the respondents, *S. M. Stephens*; *Hughes & Hughes.*

B. L.

(1) 4 B. & Ad., 433.

(2) (1915) A.C., 847.

(3) (1903) 1 Ch., 697.