[PRIVY COUNCIL.]

GRAY AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

THE PERPETUAL TRUSTEE COMPANY LIMITED AND ANOTHER . . . RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE HIGH COURT.

PRIVY COUNCIL. 1928.* June 12.

*Will—Husband and wife—Simultaneous wills—Mutual wills—Agreement to make wills in favour of each other—Prior deed of settlement by husband—Exercise of power of appointment over settled property—Benefit of husband's will taken by wife—Subsequent will made by wife—Equitable interests—Trust of settled property for beneficiaries under wife's first will—Costs of appeal—Unsuccessful appellants—Wills, Probate and Administration Act* 1898 (*N.S.W.*) (*No.* 13 *of* 1898), *sec.* 23—*Wills Act* 1837 (1 *Vict. c.* 26), *sec.* 27.

In 1879 a husband settled certain real and personal property on such trusts as his wife, with his consent during his life and at her uncontrolled discretion after his death, might by deed or will appoint. In 1914, pursuant to an arrangement made between them, the husband and the wife on the same day made wills identical in terms to the extent that each left his or her property to the other for life with remainder to the children and grandchildren of the marriage. The will of the husband contained a statement that the property of which he was disposing included the property over which he had a power of appointment under the settlement of 1879. The will of the wife contained a statement that she expressly refrained from exercising her power of appointment under the settlement of 1879. The husband died in 1915 without having revoked his will, and he left property valued at over £9,000 apart from any interest under the settlement. The wife died in 1923, having shortly before

* Present—The Lord Chancellor, Viscount Haldane, Lord Buckmaster, Lord Wrenbury and Lord Warrington of Clyffe.

her death made another will by which she left all her property to one of her daughters. Up to the time of her death the wife received the income of the settled property and also of the other property left by the husband.

*Held*, (1) that the simultaneous wills of the husband and wife were not mutual wills made under such circumstances that neither of them could revoke or modify them without the assent of the other; and (2) that the wife was not put to her election either to take under her husband's will or to reject it if she desired to retain the general power of appointment under the settlement.

*Dufour* v. *Pereira*, (1769) 1 Dick. 419; 21 E.R. 332, explained.

*Lord Walpole* v. *Lord Orford*, (1797) 3 Ves. 402, and *In re Oldham*: *Hadwen* v. *Myles*, (1925) Ch. 75, approved.

*Held*, also, that in the circumstances the costs of all parties as between solicitor and client should be paid out of the settled funds.

Decision of the High Court: *Hudson* v. *Gray*, (1927) 39 C.L.R. 473, affirmed.

APPEAL from the High Court to the Privy Council.

This was an appeal against the decision of the High Court: *Hudson* v. *Gray* (1).

VISCOUNT HALDANE delivered the judgment of their Lordships, which was as follows:—

In this case the question is whether the appellants are entitled to the reversal of a judgment of the High Court of Australia, delivered by a majority on appeal from a decision of the Supreme Court of New South Wales (*Harvey* C.J. in Eq.) (2), which was reversed by the High Court (1). What was held by the High Court was that Mrs. Hargrave, the testatrix in this case, was entitled to revoke her will of 29th October 1914 and to make a different will of 18th July 1923. It was further held that the latter will was a good execution of a general power of appointment contained in a settlement dated 25th January 1879 and made between her and her husband, Lawrence Hargrave, who predeceased her. This settlement was a postnuptial one, consisting entirely of the husband's property. That was vested in a trustee (1) upon trust for such persons and purposes as the wife should, with the consent of her husband during his life and afterwards at her own discretion, by deed or will appoint (the wife had thus in case of her surviving her husband, an unrestricted general power of appointment); (2)

(1) (1927) 39 C.L.R. 473. (2) (1926) 26 S.R. (N.S.W.) 615.

PRIVY COUNCIL. 1928. GRAY v. PERPETUAL TRUSTEE CO. LTD.

upon trust for the wife for life; and after her death and in default of appointment by her (3) upon trust for such persons and purposes as her husband should by deed or will appoint; and in default and subject thereto (4) on trust for the husband for life; and after his death (5) on trust for the child or children of the marriage of Mr. and Mrs. Hargrave absolutely, with an ultimate trust in default of children for her husband in fee.

The trusts of this settlement are stated above in outline. The wording is quite clear. The main trust, stated more precisely, was for such ends, intents and purposes as Mrs. Hargrave should at any time or from time to time, with the consent of her husband during his life, and after his decease at or in her uncontrolled discretion, notwithstanding any future coverture, by deed or deeds or by will appoint, and in default of and until and subject to any and every such appointment, upon trust during her life for her separate use, and after her decease and in default of and subject to any and every such appointment by her as aforesaid, upon such trusts as the husband should by deed or will appoint, and subject to such appointment by him as aforesaid for him during his life and after his death for the children of the marriage absolutely, and in default of such children for the husband absolutely.

No appointment by deed was made; but on 29th October 1914 the husband and wife both made wills, and these were contemporaneous. By the husband's will he left all his property, including all his "estates real and personal" over which he had a power of appointment by virtue of the settlement of 25th January 1879, to trustees for sale, conversion and investment, and to pay the income to his wife, Margaret Hargrave, for her life, and after her death to pay such income until the death of the last of his children equally between his surviving children and the issue surviving them of those that were dead, and after the death of the last of his children the trustees were to distribute the trust funds among all the grandchildren then living *per capita* and not *per stirpes*. It must be borne in mind that the husband's power under the settlement was subordinate to that of the wife, which had been made paramount.

The will of the wife, made on the same date, was in some points different. She appointed the respondent Company to be her trustee

and executor. She expressly refrained from exercising the power of appointment vested in her by the settlement of 1879. She left all her real and personal estate (excluding what she could appoint under the general power just referred to, which she had declared her intention not to exercise) to her trustee upon trust for conversion and investment, and to pay the income to her husband for his life, and then to her children surviving her (with representation), and after the death of the last of her children to distribute the corpus among her grandchildren then living *per capita*, with substitution of the issue of any of them who had died before the period of distribution leaving issue.

It is clear that the general power remained intact in her, although she had not exercised it, subject, of course, to any questions to which its subsequent exercise by her might give rise. So far there was no complication. In 1915 she made a codicil leaving two annuities to be paid by her trustee out of what she had vested in the trustee by her will. In July 1915 her husband died, and thenceforward Mrs. Hargrave took the benefits conferred on her by his will. On 15th September 1919 Mrs. Hargrave made another will, in which she again expressed an intention not to exercise the general power given to her by the settlement of 1879, but gave out of her own estate annuities, including one of £250 a year, to her daughter Margaret, the present respondent. For the rest this new will did not interfere materially with the provisions of the will of 1914.

But on 18th July 1923 Mrs. Hargrave made a further will, which did interfere with these provisions completely. She had moved to London, and when there by this new will she "devised and bequeathed all her real and personal estate" to her daughter the respondent, Margaret Hudson, absolutely, and appointed her the sole executrix.

Mrs. Hargrave died in October 1923, and letters of administration with the will annexed were granted at Sydney to the respondent Company.

There is no doubt that the terms of this final will were such as to amount to an exercise of the general power conferred on Mrs. Hargrave by the settlement of 1879. It is not in controversy that, although no intention to include the exercise of the power

PRIVY COUNCIL. 1928. GRAY v. PERPETUAL TRUSTEE CO. LTD.

was expressed in this will, it must be taken to have been exercised under the general words of disposition, by virtue of either sec. 23 of the *Wills, Probate and Administration Act* of New South Wales, or by virtue of sec. 27 of the English *Wills Act*, if she was domiciled at her death in England. On this assumption the will disposes of property comprised in the settlement, amounting to over £12,000.

Their Lordships have to decide two questions which have been brought before them. The first is whether the simultaneous wills of Mr. and Mrs. Hargrave were mutual wills made under such circumstances that neither the husband nor the wife could revoke or modify them without the assent of the other. The second question is whether a case of election has arisen.

As to the first question, it is necessary to turn to the evidence of the circumstances under which the wills of 1914 were made. The evidence is somewhat meagre. But it appears that by September 1914 the respondent Company had been appointed sole trustee of the settlement of 1879, and that Mr. and Mrs. Hargrave went to the office of the Company to express their desire that their disposable property should go in the same way among their children and grandchildren. They had then four children and two grandchildren. Mr. Bennett, an official of the respondent Company, gave evidence that on 22nd September 1914 Mr. and Mrs. Hargrave came to the office of the respondent Company and discussed how they should make their wills so that the property disposed of should go among their children after their deaths. Mr. Bennett had no exact recollection of what passed, but he thought that something was said by Mr. Hargrave to the effect that if he made a will leaving everything to her for life, with remainder to the children for life and then to their children, would she not do the same; and that she said she would. Mr. Douglas, another official of the Company, gave evidence to much the same effect, adding that it was arranged that the husband should make an appointment of the funds in the settlement, and that his wife should by her will negative any intention on her part to exercise her power.

This last provision appears to be the result of a belief in the minds of the parties that the non-exercise by the wife of her power might effect a saving of death duty.

The Chief Judge in Equity (*Harvey* J.), who tried the case, was of opinion that it could not be said that the evidence established that there was an actual bargain between the husband and the wife that they should make wills in identical terms, in the sense that each refused to make a will unless the other agreed to do so. On this point of fact *Knox* C.J., on the appeal to the High Court, agreed with him, although he felt constrained by the authorities to dismiss the appeal. *Isaacs* J., however, took a different view and held that the arrangement made amounted to an actual agreement. He was in favour of allowing the appeal, but on different grounds. *Higgins* J. held that there was no agreement to make the wills irrevocable, and was for allowing the appeal. *Rich* J. held that, as the wife when she succeeded had bound herself in equity to give effect to her husband's appointment and not to exercise her own power, a ground which did not depend on the mere effect at law of the establishment of a contract such as *Harvey* J. had discussed, but on equitable interests which he thought had arisen, the appeal should be dismissed. *Starke* J. thought that the husband and wife were not making stipulations binding either in law or in equity, but were only settling the division of their property in the measure which seemed fair to them at the moment. He was therefore in favour of allowing the appeal.

*Harvey* J. had decided for the appellants on the ground that although no binding contract was proved, still it was established by authority that where mutual wills are made by two persons as the result of some understanding or arrangement between them, this was enough, although it might not amount to a binding contract in law, to give rise to equities.

Their Lordships are in agreement with *Harvey* J. and the other learned Judges in Australia who have held that no binding contract was established by the evidence. What they have to consider is the proposition as to the effect in equity laid down by *Harvey* J., as stated.

There was a particular authority which was relied on by the appellants for the proposition that if two persons simultaneously make wills to the same effect, and in that sense mutually, a second

PRIVY COUNCIL. 1928. GRAY v. PERPETUAL TRUSTEE CO. LTD.

will made by one of them after succeeding to the other's estate under the originally made will, is precluded from being treated as effective to interfere in equity with the existing disposition. This authority was the well-known case of *Dufour* v. *Pereira*, decided by Lord *Camden* in 1769 (1). The decision has been fully discussed in a book of authority, *Hargrave's Juridical Arguments*, vol. II., at p. 272. The volume last named contains a very full account by the learned editor of a discussion of the case in its early stages by Lord *Loughborough*, who in 1797 finally decided the very question in *Lord Walpole* v. *Lord Orford* (2). In *Dufour* v. *Pereira* the conclusion reached was that if there was in point of fact an agreement come to that the wills should not be revoked after the death of one of the parties without mutual consent, they were binding. That they were mutual wills to the same effect was at least treated as a relevant circumstance, to be taken into account in determining whether there was such an agreement. But the mere simultaneity of the wills and the similarity of their terms do not appear, taken by themselves, to have been looked on as more than some evidence of an agreement not to revoke. The agreement, which does not restrain the legal right to revoke, was the foundation of the right in equity which might emerge, although it was a fact which had in itself to be established by evidence, and in such cases the whole of the evidence must be looked at. It was upon this ground that Lord *Loughborough*, in the later case of *Lord Walpole* v. *Lord Orford* dismissed the claim founded on the principle of Lord *Camden's* judgment, holding that no sufficiently definite agreement had been proved.

The most recent judgment on the effect of mutual wills made by husband and wife, without independent evidence of any contract, is that of *Astbury* J. in *In re Oldham*; *Hadwen* v. *Myles* (3). That learned Judge subjected the authorities to a careful examination, and came to the conclusion that the mere fact that two wills were made in identical terms does not of necessity imply any agreement beyond that of so to make them. In the case before him he found

(1) (1769) Dick. 419; 21 E.R. 332. (2) (1797) 3 Ves. 402.
(3) (1925) Ch. 75.

that there was not sufficient evidence of any further agreement, and that there was nothing in the authorities referred to in the argument that constrained him to decide otherwise.

Their Lordships agree with the view taken by *Astbury* J. The case before them is one in which the evidence of an agreement, apart from that of making the wills in question, is so lacking that they are unable to come to the conclusion that an agreement to constitute equitable interests has been shown to have been made. As they have already said, the mere fact of making wills mutually is not, at least by the law of England, evidence of such an agreement having been come to. And without such a definite agreement there can no more be a trust in equity than a right to damages at law.

This disposes of the first of the contentions which were put forward at the Bar for the appellants.

The second contention was that Mrs. Hargrave was put to her election either to take under her husband's will, or to reject it if she desired to retain the general power of appointment, and that, having elected to take under his will, she could not afterwards create new interests under the power which could prevail in equity. This contention is, in the opinion of their Lordships, untenable. They are unable to find language in the husband's will which either puts the wife to her election, or puts her in the position of seeking at the same time to approbate and to reprobate its provisions. The husband's will disposed of his own property and also purported to exercise his own power of appointment under the settlement. But under the settlement his power was subordinate to the paramount power of the wife, who was enabled to override everything. This paramount power the wife expressly refrains from exercising in her will of 1914. But not the less she abstained from extinguishing it, and confines the operation of her will to her own property. Their Lordships therefore find no reason for holding that she was in any way precluded from exercising her general power subsequently, or for doubting that in law she must be taken to have done so by her final will of 1923. This being so, there is no inconsistency, and there is no room for any question of election arising.

PRIVY COUNCIL. 1928. GRAY v. PERPETUAL TRUSTEE CO. LTD.

For these reasons they will humbly advise His Majesty that the appeal should be dismissed. They are always reluctant to give unsuccessful appellants their costs. But in this case the questions which have arisen are so obviously the result of the obscure and unusual procedure of the husband and wife in relation to the settlement of 1879 that they think that the costs of all parties as between solicitor and client should be paid out of the settled funds.

Refd to *Burwood Council of the Municipality of v Harvey* (1995) 86 LGERA 389

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[HIGH COURT OF AUSTRALIA.]

HOYT'S PROPRIETARY LIMITED . . . APPELLANT; DEFENDANT,

AND

O'CONNOR . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1928. MELBOURNE, *Feb.* 22, 23. SYDNEY, *April* 17. KNOX C.J., Isaacs, Powers and Starke JJ.

*Negligence—Occupier of building—Suspended verandah projecting over street—Collapse of verandah—Injury to pedestrian—Negligence in construction—Negligence in user—Nuisance—Use of verandah for sightseeing—Occupier permitting use—Dangerous weight—Inroad of trespassers from adjoining premises—Anticipated danger of—Precautions against—Duty of occupier—New trial—Substantial wrong or miscarriage—Supreme Court Rules* 1916 (*Vict.*), *Order XXXIX., r.* 6.

The appellant was occupier of a building attached to which was a verandah projecting over the footpath of a public street. On the occasion of a street procession a number of persons were permitted to stand upon the verandah to view the scene. As the procession came near, other persons, without permission, stepped from an adjoining building on to the appellant's verandah; and immediately afterwards the verandah sank to the ground and injured the respondent, who was upon the footpath below. The respondent brought