[HIGH COURT OF AUSTRALIA.]

ALISON . . . . . APPELLANT;
DEFENDANT,

AND

ALISON AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1934.

SYDNEY, *Aug.* 14, 15, 24.

Gavan Duffy C.J., Rich, Starke, Dixon and McTiernan JJ.

Powers of Appointment—Document written by donee but not signed—Intention of donee—Non-execution or defective execution of power—Aid of Court.

Under a settlement made in respect of a previous marriage A reserved power to appoint in favour of any after-taken wife a specified interest in certain property. The power was exercisable by deed executed prior to the remarriage or by will. The first marriage was dissolved. A proposal of marriage made by A to another lady was accepted subject to her father's consent. The father required information as to A's financial position and what provision he proposed to make for his intended wife. In a document written by him, but unsigned, A gave a short account of the estate from which his property was derived, and how he had settled his interests therein, and, under the heading: "The effect of the estate on Dorothy" (the prospective wife), continued: "In the event of my death before Dorothy—Dorothy will be paid a 1/3 of the estate during her lifetime." The marriage was duly celebrated, but four months later A died intestate.

Held, that the document did not evidence an intention to execute the power; therefore, as it was a case of non-execution of a power, and not defective execution, it could not be aided by the Court.

Decision of the Supreme Court of New South Wales (*Street* J.): *Alison* v. *Strettell*, (1934) 34 S.R. (N.S.W.) 396; 51 W.N. (N.S.W.) 112, affirmed.

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APPEAL from the Supreme Court of New South Wales.

A marriage settlement, executed by James Stuart Irving Alison on the occasion of his first marriage, contained the proviso that "if and so often as the settlor shall marry again he shall have power by deed executed before any such remarriage or by will to appoint in favour of any after-taken wife a life or less interest to take effect at once or after his death in any part not exceeding one third of the trust fund." That marriage was dissolved. A proposal of marriage by Alison to another lady was accepted subject to her father's consent. Before the father would give his consent he required from Alison a statement of the latter's financial position and of the provision he intended to make for the lady whom he proposed to marry. Alison accordingly prepared a document in which he gave a short account of the estate from which his property was derived and how he had settled his interests therein. It then proceeded :— "The effect of the estate on Dorothy" (the prospective wife).—"In the event of Dorothy and I having any children they will share the estate equally with Pops and Michael" (the children of the first marriage). "In the event of my death before Dorothy—Dorothy will be paid a 1/3 of the estate during her lifetime. Rita" (his first wife) "1/3 and the remaining 1/3 held by the trustees for the benefit and education of the children. These deeds are all settled and registered in the High Court N.S.W." This document was unsigned. It was dated by the father who added some pencilled notes. The marriage subsequently took place. A few months afterwards Alison died intestate and without having formally executed his power of appointment.

An originating summons was taken out by James Alison and Florence Hay, the trustees of the indenture of settlement, for the determination of the question : Whether on the true construction of the indenture of settlement and in the events which had happened the widow was entitled (*a*) during her life to a one-third share in the income of the property subject to the trusts of the indenture, and (*b*) to any other, and if any other what, interest in that property ? The defendants to the summons were Dorothy Sparke Alison, the widow of the deceased, Marguerita Strettell, his first wife, who had remarried, and Monica Marion Esterel Alison, and Michael

James Hugh Alison, the two children of the first marriage. The summons was heard by *Street* J., who held that the document was not intended by Alison to have any dispositive effect, and therefore it did not operate to confer upon the widow an equitable right to take a one-third or any interest in the property as under an exercise of Alison's power of appointment: *Alison* v. *Strettell* (1).

From that decision the widow now appealed to the High Court, the respondents being the plaintiffs and the other defendants to the summons.

Further material facts appear in the judgments hereunder.

Flannery K.C. (with him *Williams*), for the appellant. The document prepared by Alison immediately prior to his second marriage was a defective execution of his power of appointment under the indenture of settlement made in respect of his previous marriage as to one-third of the income from the properties therein referred to. Having regard to the circumstances in which the document was prepared, the proper conclusion is that it was compiled, primarily, for the purpose of indicating what financial provision he intended to make for his then intended wife, and, secondly, as a statement of his financial position. All the elements are present necessary to invoke the aid of the Court for the purpose of perfecting the intention thus shown of exercising his power of appointment (*Halsbury's Laws of England*, 1st ed. vol. 23, p. 54, par. 104; *Farwell* on *Powers*, 3rd ed. (1916), pp. 378, 379). Those elements are: the intention to appoint; the certainty of the share appointed; and good consideration. In these circumstances any defects in the method of evidencing the intention will be remedied by the Court (*Kennard* v. *Kennard* (2)). *Pennefather* v. *Pennefather* (3) involved the non-execution of a power and is therefore distinguishable. The document should be considered as a specific exercise of a general power. It was intended to evidence a present intention of formally executing the power as soon as possible (*Garth* v. *Townsend* (4)).

[DIXON J. referred to *In re Jennings* (5).]

(1) (1934) 34 S.R. (N.S.W.) 396; 51 W.N. (N.S.W.) 112.
(2) (1872) 8 Ch. App. 227.
(3) (1873) I.R. 7 Eq. 300.
(4) (1869) L.R. 7 Eq. 220.
(5) (1854) 8 I. Ch. R. 421.

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From the document it is clear that Alison intended that the one-third share of income the subject of the power should pass to his second wife; therefore even if his intention to dispose of it under or by virtue of the power was not shown, the Court will give effect to the disposition and hold that the share referred to passed under the power (*Carver* v. *Richards* (1)).

[DIXON J. referred to *Poulson* v. *Wellington* (2) and *Wilson* v. *Piggott* (3).]

It was assumed in those cases that the power did not need execution, and they show also that a present intention to execute the formal deed is not necessary.

[STARKE J. referred to *Farwell* on *Powers*, 3rd ed. (1916), pp. 197, 201, 226.]

Abrahams K.C. (with him *Street*), for the respondents Monica Marion Esterel Alison and Michael James Hugh Alison. The true construction of the document is that it was merely a statement by Alison as to the financial provision which had already been made for a future wife. Even on the argument put forward on behalf of the appellant the matter is one of non-execution of a power because the alleged intention on the part of Alison was never carried into effect. Equity will aid the defective execution of a power of appointment if the donee's intention to execute is established, but assistance will not be given in a case of the non-execution of such a power. Unless there is an intention to enter into some legal obligation the Court will not grant its aid. *Poulson* v. *Wellington* (2) and *Wilson* v. *Piggott* (4) were decided on the ground of contract; here there was not any intention to enter into a contract.

[RICH J. referred to *Griffith-Boscawen* v. *Scott* (5).]

As to whether an intention to execute a power in the future but not immediately would amount to an execution of the power, see *Carter* v. *Carter* (6). The document does not establish an intention on the part of Alison to do something which would be operative

(1) (1859) 27 Beav. 488, at p. 495; 54 E.R. 193, at p. 196.
(2) (1729) 2 P. Wms. 533; 24 E.R. 849.
(3) (1794) 2 Ves. Jun. 351, at p. 355; 30 E.R. 668, at p. 670.
(4) (1794) 2 Ves. Jun. 351; 30 E.R. 668.
(5) (1884) 26 Ch. D. 358, at pp. 361, 362.
(6) (1730) Mos. 365, at pp. 369, 370; 25 E.R. 442, at p. 444.

under the instrument conferring the power (*Pennefather* v. *Pennefather* (1); *L'estrange* v. *L'estrange* (2)). This case differs from *Kennard* v. *Kennard* (3), as in that case there was an intention to make a present gift coupled with an intention to reduce it to a more formal instrument later. Here there was not any intention to pass any property.

David Wilson, for the respondents James Alison and Florence Hay.

Hardie, for the respondent Marguerita Strettell, submitted to any order the Court thought fit to make.

Flannery K.C., in reply. The power of appointment was executed by the donee of the power. His intention in this regard is established by the words in the document: "Dorothy will be paid a 1/3 of the estate during her lifetime."

Cur. adv. vult.

Aug. 24.

The following written judgments were delivered:—

RICH J. Under a settlement made in respect of a previous marriage, the late Mr. J. S. I. Alison reserved power that if and so often as he should marry again he should have power by deed executed before any such remarriage or by will to appoint in favour of any after-taken wife a life or less interest to take effect at once or after his death in any part not exceeding one-third of the trust fund. This marriage was subsequently dissolved. At a later date he made a proposal of marriage to the appellant, who accepted it subject to her father's consent. The father required information as to his financial position and the manner in which his wife was to be provided for. The deceased, in the presence of his intended, wrote out a long statement which, however, he did not sign. The father considered it and made pencil notes on it, which may indicate that he at any rate treated the statement as deliberative. It commenced with what may be called a history of Mr. Alison's inheritance.

(1) (1873) I.R. 7 Eq. 300.
(2) (1890) 25 L.R. Ir. 399.
(3) (1872) 8 Ch. App. 227.

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Rich J.

Then it stated that he had settled his share. Under a heading: "The effect of the estate on Dorothy" (his intended wife), it next made a short statement of what his children, his first wife and his second wife took. The material expressions occurring in this paragraph are "In the event of my death before Dorothy.—Dorothy will be paid a 1/3 of the estate during her lifetime." The statement then enumerates the virtues of the assets, the other expectancies of the writer and the benefits from life insurance he proposed to leave to Dorothy. The father assented to the marriage which took place. Shortly afterwards Mr. Alison died without having made a will. His widow now claims that the writing prepared on the occasion of her engagement amounts to a defective execution of the power. This case illustrates what *Jekyll* M.R., in *Tollet* v. *Tollet* (1), described as "the difference . . . betwixt a *non-execution* and a defective execution of a power; the latter will always be aided in equity under the circumstances mentioned, it being the duty of every man to pay his debts and a husband or father to provide for his wife or child. But this Court will not help the non-execution of a power, since it is against the nature of a power, which is left to the free will and election of the party whether to execute or not, for which reason equity will not say he shall execute it, or do that for him which he does not think fit to do himself." There is in the present case a good consideration of marriage. "If there be such a consideration, the party taking the estate is not permitted to rely upon the defect, but the Court will effectuate the intention of the settlor, and, speaking generally, this equity is enforced, not against the settlor himself, but in his favour, that is, in the execution of his intention, and at the expense of a third party" (*Sugden* on *Powers*, 8th ed. (1861), p. 533). As the author points out, in such cases there is a contract, but in other cases of defective execution everything depends upon the intention to settle, that is, to exercise the power. In the present case I can see no intention to execute the power. The language of the writer does not suggest that he had the power in mind nor independently of the power intended to pass the property. I should take him to have been setting out the arrangements which he thought

(1) (1728) 2 P. Wms. 489, at p. 490; 24 E.R. 828, at p. 829.

would ensue from his marriage. As to contract, an *animus contrahendi* seems altogether lacking. The supposed equitable doctrine of making representations good is not now considered a substitute for contract. Agreement and the other ingredients of a contract are necessary in equity as well as in law.

For these reasons I agree with the conclusion arrived at by *Street* J., and am of the opinion that the appeal should be dismissed.

STARKE J. In my opinion the decision of *Street* J. was right and ought to be affirmed.

The marriage settlement of Mr. J. S. I. Alison contained the following power: "Provided also that if and so often as the settlor shall marry again he shall have power by deed executed before any such remarriage or by will to appoint in favour of any after-taken wife a life or less interest to take effect at once or after his death in any part not exceeding one-third of the trust fund." Mr. Alison proposed to contract a second marriage. But the father of the lady whom he proposed to marry required a statement of his financial position and of the provision he intended to make for his daughter. Mr. Alison accordingly prepared a statement in his own handwriting, but unsigned, and handed it to the father. In it appeared these words—"In the event of my death before Dorothy—Dorothy will be paid 1/3 of the estate during her lifetime." The marriage subsequently took place. Mr. Alison died soon afterwards, intestate, and the question is whether, on the true construction of the marriage settlement and in the events which have happened, Dorothy Sparke Alison, the widow of Mr. J. S. I. Alison, is entitled during her life to a one-third share of the income from his estate, subject to the trusts of the marriage settlement.

The informal document prepared by Mr. Alison clearly fails to comply with the requisites of the power. It is said, however, that it sufficiently indicates the intention of the donee of the power to execute it and that this intention is effectuated in equity (*Kennard* v. *Kennard* (1)). The determination of the question depends upon the true construction of the document, taken in connection with the surrounding circumstances. Neither the purpose nor the language

(1) (1872) 8 Ch. App. 227.

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of the document, in my opinion, exhibits an intention that Dorothy shall have the property; the document does no more than set forth the financial position and prospects of Mr. Allison, and the means he has at his command as a provision for a second as well as his first wife and children. It follows that the case is not one in which equity can relieve against a defective execution of the power contained in the marriage settlement.

DIXON J. Under the trusts of a settlement made pursuant to articles, which the late J. S. I. Alison entered into upon his first marriage, property stood limited, as to one-third of the income, to the wife of that marriage for life, and, as to two-thirds of the income to him for life, and, as to the corpus, to such of his children by that or any other marriage as he should by deed or will appoint, and, in default of appointment, to such of them as should attain full age or being female should marry under it, in equal shares subject to a power of appointing a life interest, immediate or expectant upon his death, in not more than a third share in favour of any after-taken wife exercisable by deed executed before such remarriage, or by will. The first marriage was dissolved. The issue of that marriage was two children. In their interests the power of appointment to children was partially exercised and, subject thereto, released, but the modifications of the limitations effected after the dissolution of marriage are not material to this appeal.

The late J. S. I. Alison, thereupon, made a proposal of marriage to the appellant, which she accepted subject to her father's consent. Her father required a statement of Alison's financial position, and of the provisions he intended to make for the appellant. A few days later, he wrote out in her presence a paper which he read over to her. He then took it to her father, who, after considering it, gave his consent to the marriage, which was duly celebrated. Four months later Alison died intestate.

The paper, which was unsigned, began by giving a short account of the estate from which his property was derived and how he had settled his interest therein. It then proceeded:—"The effect of the estate on Dorothy.—In the event of Dorothy and I having any children they will share the estate equally with Pops & Michael. In

the event of my death before Dorothy—Dorothy will be paid a 1/3 of the estate during her lifetime Rita 1/3 and the remaining 1/3 held by the trustees for the benefit and education of the children. These deeds are all settled and registered in the High Court N.S.W." The writing then went on to state some facts relating to the nature and productivity of the property comprised in the estate and relating to the writer's prospective interest in another estate. After saying that he had a life policy, which he proposed to have paid to Dorothy when due, he ended by another reference to the reliable nature of the assets. Dorothy is the appellant; Rita is his first wife and Pops and Michael are the children of the first marriage. J. S. I. Alison executed no deed appointing any share to his second wife, and the question now is whether the writing that he drew up when he sought her father's consent to their marriage can operate to confer upon her an equitable right to take one-third as under an exercise of the power. *Street* J., from whose decision this appeal is brought, has held that it cannot so operate.

When a donee of a power exhibits an immediate intention to exercise it, but fails to take the formal steps necessary to do so, an equity arises against those who take in default of appointment, in favour of those who would have taken under the attempted exercise of the power, but for its irregularity, if they afford a good or valuable consideration, or are persons for whom the donee of the power is under a greater obligation to provide than for the persons taking in default of its exercise.

The appellant's marriage constitutes a good consideration. Moreover, as the wife of a husband whose children were provided for, she was, in the view of a Court of equity, the object of a natural obligation on the part of her husband to make some provision for her, a meritorious consideration. But, in her character as an unprovided wife, it is necessary for her to establish that her husband, as donee of the power, made an attempt to exercise it in her favour. She cannot, in that character, obtain any relief against non-execution of the power, a mere failure to attempt its exercise. The case must be one in which he sufficiently declared an intention to execute the power, but in a defective or informal manner. But, if the donee of a power agree for a good or valuable consideration that he will

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exercise it, but does not do or attempt to do so, the person to be benefited, if a party to the consideration, has an equitable title to take as if the agreement had been carried out, unless the power be limited and is of such a nature as to make a contract for its exercise improper. But the non-execution of the power in such a case will not be aided, unless there is an enforceable and binding contract (see *Morgan* v. *Milman* (1)).

In considering whether an attempt, although defective, has been made to exercise the power, the intention of the donee is material. If he has shown an intention to pursue the power and carry it into effect, the most informal act will suffice (*Kennard* v. *Kennard* (2)). It is unnecessary that he should advert to the nature or even the existence of the power. It is enough if his intention is to do that thing which the power authorizes him to do. If he attempts to dispose of the property subject to the power in a way which he is enabled to do only by the power, then, notwithstanding that the act by which he intends to do so is not a compliance with the forms necessary for the exercise of the power, the intended disposition of the property will nevertheless be carried into effect (*Carver* v. *Richards* (3)).

The document furnished by J. S. I. Alison to his prospective wife and her father does not disclose an intention on his part thereby in reliance upon the power to confer upon her a right to the life interest in one-third of the estate which it says she will have on his death. It does not advert to the existence of the power and it is expressed as if the writer considered that nothing further was required than marriage with him to entitle his second wife to a life estate. Does it show any purpose of doing the thing which the power authorizes of conferring upon his wife, after his death, an interest for life in a part of the fund not exceeding one-third ? In my opinion such an intention does not appear. The document amounts to no more than an explanation of the position in which the writer, his prospective wife, and his children will stand. It is not dispositive in character. But the statement, " in the event of my death before

(1) (1853) 3 DeG. M. & G. 24 ; 43 E.R. 10.
(2) (1872) 8 Ch. App. 227.
(3) (1859) 27 Beav. 488, at p. 495 ; 54 E.R. 193, at p. 196.

Dorothy—Dorothy will be paid a 1/3 of the estate during her lifetime," contains a definite assurance to his prospective wife and her father that she will enjoy such a right. That assurance involves the existence of an intention upon the part of the writer that the result shall ensue. In point of law, the result could only be produced by his execution before marriage of a deed of appointment exercising the power in her favour, or by some testamentary document. It would not be difficult to hold in these circumstances that an obligation to execute the power arose *ex contractu*, if the document amounts to the appropriate evidence of an enforceable agreement (see *Wilson* v. *Piggott* (1), per Lord *Alvanby* (Sir *Richard P. Arden* as he then was) and *In re Jennings* (2)). But, apart from any question of the estate including land, the *Statute of Frauds* applies because the consideration is marriage. The document is unsigned. It is not therefore possible to treat the transaction as giving rise to a binding contract to execute the power.

In my opinion the case is one of mere non-execution of a power which cannot be aided.

I think the decision of *Street* J. was right and the appeal should be dismissed.

I am authorized by the Chief Justice to state that he concurs in this judgment.

McTIERNAN J. The question to be decided is whether the appellant has become equitably entitled during her life to one-third share in the income of the property subject to the trust of the indenture of settlement dated 6th March 1922. This indenture contains the following provision: " Provided also that if and so often as the settlor shall marry again he shall have power by deed executed before any such remarriage or by will to appoint in favour of any after-taken wife a life or less interest to take effect at once or after his death in any part not exceeding one-third of the trust fund."

The settlor did not by deed or will exercise this power of appointment. But in September 1932, before his remarriage, he wrote out a document containing the following statement: " In the

(1) (1794) 2 Ves. Jun., at p. 355; 30 E.R., at p. 670.
(2) (1854) 8 I. Ch. R., at p. 427.

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event of my death before Dorothy—Dorothy will be paid 1/3 of the estate during her lifetime." Dorothy is the appellant. The form and contents of the document and the circumstances in which it was made need not be described again in detail.

The principle upon which equity supplies defects in the execution of a power is stated by Sir *Richard P. Arden* M.R. in *Chapman* v. *Gibson* (1) in these terms:—"Whenever a man, having power over an estate, whether ownership or not, in discharge of moral or natural obligations, shows an intention to exercise such power, the Court will operate upon the conscience of the heir, to make him perfect this intention." In *Carver* v. *Richards* (2), Sir *John Romilly* M.R. said:—"It is important in these cases to consider the manner in which equity gives effect to the intention of the donee of the power to pass the property, even although the power is not properly exercised. It is, as I consider, the rule of this Court that if the intention to pass the property subject to the power be clearly established, even though the intention to dispose of it under or by virtue of the power is not shown, still that equity will give effect to the disposition and hold that the property passes under the power." This decision was affirmed on appeal (3). "This branch of equity," Lord *St. Leonards* said in his treatise on *Powers*, "is not confined within very narrow bounds" (*Sugden* on *Powers*, 8th ed. (1861), p. 551), and the learned author cites *Bailey* v. *Hughes* (4), which is a striking instance of the application of this equitable principle. The appellant's relationship to the settlor and the fact that she is one of the persons to be benefited by the execution of the power would entitle her to the interposition of equity to support the document on which she relies as an exercise of the power, if such document sufficiently exhibits an intention on the part of the settlor to dispose of one-third of the income of the trust fund which he had power to appoint to her. I agree with the view at which *Street* J. arrived as to the nature of the document relied upon by the appellant. His Honor said in relation to it: "I think that James Alison did intend in one sense to explain the nature of the benefit which

(1) (1791) 3 Bro. C.C. 229, at p. 230; 29 E.R. 505, at pp. 505, 506.

(2) (1859) 27 Beav., at p. 495; 54 E.R., at p. 196.

(3) (1860) 1 DeG. F. & J. 548; 45 E.R. 474.

(4) (1854) 19 Beav. 169; 52 E.R. 313.

his wife would receive if she married him, but I am equally satisfied that he did not intend or attempt to confer that, or any benefit, by writing out in his own language these four sheets of notepaper without even putting to them his signature and the date upon which they were written out."

In my opinion the document was not intended to have any dispositive effect or " to distribute the property " subject to the power (see per *Turner* L.J. in *Carver* v. *Richards* (1).) It follows that to make a declaration that the appellant took under it the interest which the settlor had power to appoint to her would supply, not defects in the execution of the power, but a want occasioned by the non-execution of the power.

There is, in my opinion, no ground upon which equity may act to aid the document in favour of the appellant against the person entitled in default of appointment.

The appeal should be dismissed.

Appeal dismissed with costs, those of the trustees, the plaintiffs respondents, to be taxed as between solicitor and client.

Solicitors for the appellant, *Stephen, Jaques & Stephens.*

Solicitors for the plaintiffs respondents, *Norton Smith & Co.*

Solicitors for the other respondents, *Minter Simpson & Co.*

J. B.

(1) (1860) 1DeG. F. & J., at p. 566 : 45 E.R., at p. 481.