[HIGH COURT OF AUSTRALIA.]

BIRD . . . . . APPELLANT;
PLAINTIFF,

AND

PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1946.

MELBOURNE, *Oct.* 17; *Dec.* 20.

Latham C.J. Starke, Dixon, McTiernan and Williams JJ.

Deed—Covenant—Acknowledgment of indebtedness—No pre-existing debt—Direction to executor to pay on death a sum to be calculated from an antecedent date to date of death—Testamentary document.

P. and his wife had lived for some years without charge with the wife's sister, Mrs. B. As the result of a conversation with another relative, G., in which P. expressed a desire to recompense Mrs. B., G. mentioned the matter to his solicitor, who drew up a document in the following terms:—"I . . . hereby acknowledge that I am indebted to" Mrs. B. "for the board and residence of myself and my wife at the rate of four pounds per week from" 12th March 1929 "and I direct my trustees and executors or administrators on my death to pay to" Mrs. B. "a sum calculated at the said rate of four pounds . . . per week from" 12th March 1929 "to the date of my death with interest added at the rate of five per centum per annum calculated yearly on the amount owing each successive year from March" 1929. P. executed the document under seal in December 1938, and it was then taken by G. to his solicitor, who put it with Mrs. B.'s papers. On P.'s death Mrs. B. brought an action against his administrator on the basis that the document contained a covenant by P. to pay the sums stipulated in it.

Held, by *Starke*, *Dixon* and *McTiernan* JJ. (*Latham* C.J. and *Williams* J. dissenting), that the deed contained no express covenant by P. to pay the acknowledged debt nor should any such covenant be implied, and that being consequently a mere testamentary direction not executed in the manner provided by the *Wills Act* 1928 (Vict.) the deed was inoperative.

Decision of the Supreme Court of Victoria (*Martin* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

Mary Ann Bird brought an action in the Supreme Court of Victoria against the Perpetual Executors and Trustees Association of Australia Ltd. (as trustee and administrator of the estate of J. A. Parker, deceased) for moneys which it was alleged that Parker had covenanted or impliedly covenanted to pay by a document, executed by him under seal on 27th December 1938, which was in the following terms :—" I, James Allen Parker . . . hereby acknowledge that I am indebted to Mary Ann Bird . . . for the board and residence of myself and my wife at the rate of four pounds per week from the twelfth day of March one thousand nine hundred and twenty-nine and I direct my trustees and executors or administrators on my death to pay to the said Mary Ann Bird a sum calculated at the said rate of four pounds . . . per week from the twelfth day of March one thousand nine hundred and twenty-nine to the date of my death with interest added at the rate of five per centum per annum calculated yearly on the amount owing each successive year from March one thousand nine hundred and twenty-nine."

Parker and his wife had lived without charge for some years with the plaintiff, who was his wife's sister. In December 1938, as was found by the trial judge (*Martin* J.), Parker told the plaintiff's brother-in-law, George Bird, that " he had never paid the plaintiff anything whilst he had been living at her place and wished to make some provision for her, that he desired to pay her £4 weekly with interest from the time he began to live there until his death. Bird replied that he had arranged to see his own solicitor (Mr. Atkyns) that day and asked would he mention the matter to him. Parker told him to do so and Bird thereafter saw Atkyns who drafted the document " in question. " This document was taken to Parker who signed it, placed his finger on the seal, and asked Bird to give it to Atkyns . . . and put it with Mrs. Bird's papers. Bird did this and saw Atkyns place it with papers belonging to the plaintiff."

Martin J. found that there was no contract, express or implied, between the plaintiff and Parker as to board and lodging ; he held that the document was duly sealed and delivered, but that it was testamentary in character and, as it was not executed in accordance with the *Wills Act* 1928 (Vict.), it was inoperative. He accordingly gave judgment for the defendant.

From this decision the plaintiff appealed to the High Court.

Dean K.C. (with him *Gunson*), for the appellant. The intention behind the document was that Parker would enter into a binding obligation. The form of words used, " I direct my trustees " &c.

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means no more than "I covenant that my trustees will pay"; if so, the document is not testamentary. No particular form of words is necessary to constitute a covenant; it need only be clear that the words used amount to a promise (*Norton* on *Deeds*, 2nd ed. (1928), pp. 532, 533). [He also referred to *Halsbury's Laws of England*, 2nd ed., vol. 10, pp. 303, 304; *Isaacson* v. *Harwood* (1); *Courtney* v. *Taylor* (2).] The document here took effect before Parker's death. It had a legal result immediately on its execution, as containing an immediate acknowledgment of a debt and a promise that the trustees would pay at the death. The covenant to be implied is that on Parker's death his trustees will pay. In *Fletcher* v. *Fletcher* (3), distinction is made between an instrument which is itself not consummated and one which is presently binding though it is not to be performed till later; *Jeffries* v. *Alexander* (4) is to the same effect, and the same distinction is found in *In re Carile*; *Dakin* v. *Trustees Executors and Agency Co. Ltd.* (5). The document here is in the latter class. In *Foundling Hospital* (*Governors and Guardians*) v. *Crane* (6) the whole question was whether the document had any legal effect before death. There is no authority holding a deed to be testamentary where no power of revocation is reserved, expressly or impliedly. If a document lacks a power of revocation, is sealed and delivered and is capable of being treated as a covenant, it is not testamentary.

Hudson K.C. (with him *Nelson*), for the respondent. The document does not contain an express covenant to pay the appellant any sum. There is no ground on which any such covenant can be implied. It is conceded that, if there is a deed containing a simple acknowledgment of a debt and nothing more, then usually there will be implied a covenant to pay, but that is not this case. Where there is simply an acknowledgment, there is no point in it unless it is to operate as a covenant; but, where some other purpose for the acknowledgment appears, the acknowledgment then becomes a narrative and a historical statement. The implication is only made where it is necessary to carry out the intention of the party. In the present case the implication suggested is inconsistent with the words of the document. There must be a binding agreement that a thing shall be done; the parties must intend to affect their legal rights and

(1) (1868) 3 Ch. App. 225.
(2) (1843) 6 Man. & G. 851, at p. 870 [134 E.R. 1135, at p. 1144].
(3) (1844) 4 Hare 67: See pp. 77-79 [67 E.R. 564, at pp. 568-569].
(4) (1860) 8 H.L.C. 594: See pp. 644, 649 [11 E.R. 562, at pp. 581, 583].
(5) (1920) V.L.R. 427: See pp. 428, 432, 434.
(6) (1911) 2 K.B. 367: See pp. 379, 381, 382.

obligations (*James* v. *Cochrane* (1)) : See also *Habergham* v. *Vincent* (2) ; *Marjoribanks* v. *Hovenden* (3) ; *In re Fenton* ; *National Trustees Executors and Agency Co. of Australasia Ltd.* v. *Fenton* (4) ; *In re Carile* ; *Dakin* v. *Trustees Executors and Agency Co. Ltd.* (5).

Dean K.C., in reply, referred to *Boughton* v. *Boughton* (6).

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. In my opinion this appeal should be allowed. I agree with the reasons for judgment of my brother *Williams*. I limit my separate observations to a summary of my reasons for regarding the deed executed by Parker as more than a direction to his personal representatives, and as implying a covenant that they will pay the moneys referred to in the deed.

If the deed had been merely a direction to Parker's personal representatives to pay money to Mrs. Bird, it would not be possible to regard it as implying a covenant by Parker. But there are features of the transaction which show that the deed, though containing such a direction, was intended to do more than record the direction. In the first place, the deed contains, in addition to the direction, an express acknowledgment of indebtedness. Such an acknowledgment would be unnecessary and out of place if the document were intended merely to direct the personal representatives to make a benefaction. In the second place, the direction to the personal representatives is not merely a direction to pay a sum of money ; it is a direction to pay an " amount owing." The direction is not a direction to give effect to a gift, but to pay a debt which has been created by the deed. These two features show an intention to bring into existence an obligation as distinct from an intention to make a gift. Thirdly, the document was given to Mrs. Bird's solicitor for her, and was not held by Parker himself or under his control. This fact is more consistent with the view that Parker intended to bind himself by an obligation to Mrs. Bird than with the other view that he intended only to tell his personal representatives to act in a particular manner. The document was intended to bring about a relation between Mrs. Bird and himself : it was more than a revocable expression of intention for the guidance of his personal

(1) (1852) 7 Ex. 170, at p. 177 [155 E.R. 903, at p. 906].
(2) (1793) 2 Ves. Jun. 204, at pp. 204*a*, 230 [30 E.R. 595, at pp. 596, 608].
(3) (1843) Dru. 11, at pp. 27, 28.
(4) (1919) V.L.R. 740.
(5) (1920) V.L.R. 427 : See particularly p. 431.
(6) (1739) 1 Atk. 625 [26 E.R. 393].

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representatives. These features of the transaction, in my opinion, justify the conclusion that the deed imports a covenant by Parker that his personal representatives will pay the moneys acknowledged and declared by the deed to be owing.

STARKE J. Appeal from a judgment of the Supreme Court of Victoria.

The appellant sued the respondent as trustee and administrator of the estate of James Allen Parker deceased for moneys covenanted to be paid pursuant to a document under seal executed by Parker in December 1938 or in the alternative for moneys payable to the appellant for board and lodging provided by the appellant for Parker deceased and his wife.

It appears from the evidence that Parker and his wife had resided with the appellant for several years but, as the trial judge found, there was no agreement between them express or implied to pay for their board and lodging. And this finding has not been challenged.

But Parker wanted to provide for Mrs. Bird (the appellant) and in December 1938 executed the document under seal. It is in these terms :—" I, James Allen Parker of Manningtree Road Hawthorn hereby acknowledge that I am indebted to Mary Ann Bird of the same place for the board and residence of myself and my wife at the rate of Four Pounds per week from the Twelfth day of March One thousand nine hundred and twenty-nine and I Direct my trustees and executors or administrators on my death to pay to the said Mary Ann Bird a sum calculated at the said rate of Four Pounds (£4) per week from the Twelfth day of March One thousand nine hundred and twenty-nine to the date of my death with interest added at the rate of five per centum per annum calculated yearly on the amount owing each successive year from March One thousand nine hundred and twenty-nine.

As Witness my hand and seal the seventh day of December One thousand nine hundred and thirty-eight."

The trial judge held that the document was duly sealed and delivered (See *Xenos* v. *Wickham* (1)), and this finding has not been challenged. But he also held that the document could not operate as a deed or a will because it was testamentary in character and was not executed in accordance with the provisions of the *Wills Act* 1928 (Vict.).

A document made to depend upon the event of death for its vigour and effect and as necessary to consummate it is a testamentary

(1) (1867) L.R. 2 H.L. 296.

document (*Glynn* v. *Oglander* (1); *The King's Proctor* v. *Daines* (2); *In the Goods of Morgan* (3); *Williams* on *Executors*, 11th ed. (1921), p. 81).

But a document is not testamentary if it takes effect immediately upon its execution though the enjoyment of the benefits conferred thereby be postponed until after the donor's death (*In the Goods of Robinson* (4)). The document here under consideration is not testamentary in form but it is the substance and effect of the document that is important and not its form (See *Thorold* v. *Thorold* (5); *Bartholomew* v. *Henley* (6)). Parker acknowledges that he is indebted to the appellant. That acknowledgment standing alone would import an immediate covenant to pay, but the acknowledgment does not stand alone for it is accompanied by a direction to his personal representative to pay the same on his death which is inconsistent with any immediate covenant on his part to pay the debt. Parker has guarded his acknowledgment and accompanied it with an express declaration that the sum shall be paid only upon his death: See *Tanner* v. *Smart* (7)). No obligation was created upon the execution of the document; its operation and effect depends upon the death of Parker. Such a document however is testamentary in character and to be effective must be executed in accordance with the *Wills Act*.

The appeal should therefore be dismissed.

DIXON J. The intestate, though his years were advanced and his means considerable, was unwilling to make a will. He and his wife, however, had lived without charge for a long period with his wife's sister, who is the plaintiff appellant, and he accepted the view that he should recompense her. He informed another relative that he wanted to provide for his sister-in-law and in the manner he proceeded to state and sought his help. The latter arranged to go to his own solicitor and obtain whatever was necessary. The result was the document sued on, which is treated as corresponding with the intestate's desires. The intestate executed it in a formal manner and gave it to his relative requesting him to hand it back to the latter's solicitor to be placed by him with the plaintiff's papers. Upon this state of facts I regard it as clear that the instrument was delivered as a deed and not as an escrow, so that, in the phrase of *Buller* J., it

(1) (1829) 2 Hagg. Ecc. 428 [162 E.R. 912].
(2) (1830) 3 Hagg. Ecc. 218 [162 E.R. 1136].
(3) (1866) L.R. 1 P. & D. 214.
(4) (1867) L.R. 1 P. & D. 384.
(5) (1809) 1 Phill. Ecc. 1 [161 E.R. 894].
(6) (1820) 3 Phill. Ecc. 317.
(7) (1827) 6 B. & C. 603 [108 E.R. 573].

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would " take place upon its execution " (*Habergham* v. *Vincent* (1)). That is to say it went into effect immediately according to its tenor and produced such effect as the law would ascribe to its terms. The plaintiff's case, to my mind, depends entirely upon the contents of the deed interpreted in the light of the circumstances. It depends upon the question whether the instrument contains an agreement, that is a covenant, on the part of the intestate with the plaintiff to pay her the amounts calculated in the manner it states for the whole or some part of the period covered by the document. There are no express words of agreement or covenant and the question depends upon what is to be implied. But it is no objection that the payments are not to be made until the intestate's death. A covenant for payments to be made by the covenantor's executors or administrators is perfectly good. If the instrument containing such a covenant is executed so as to take effect as his deed during the covenantor's lifetime, it is no objection that his death is the event upon which the obligation is to be fulfilled. That does not make it a testamentary instrument. The only point at which in the present case the fact becomes material that the document has not been executed in accordance with the *Wills Act* 1928 (Vict.) is with reference to the direction to " my trustees executors or administrators." If that be considered as amounting to no more than a direction to personal representatives, then it cannot be carried into effect by the administrator as a direction he is bound or entitled to obey. In that aspect it would be but a testamentary direction. It must be remembered that no trustee, as distinguished from an administrator, was ever appointed and no trust was ever constituted.

If, however, from the direction and from the rest of the document an implied covenant with the plaintiff can be spelt out, that is an intention on the part of the intestate immediately to bind himself and his estate towards her, then the liability affects the administrator as such, notwithstanding that considered as a bare direction to him that part of the instrument could not have been efficacious.

But, unfortunately, I think that no such covenant or agreement can be implied. The strongest passage in the document in favour of an implied covenant is the express acknowledgment with which it opens. We know that the acknowledgment is of a debt never incurred, but that does not lessen its effect. What matters more is that it relates only to a period ending with the date the document bears. It is an ancient principle that an absolute acknowledgment of a debt contained in a deed may be treated as importing a covenant to pay it. But the true rule was stated by Lord *Romilly* in *Marryat*

(1) (1793) 2 Ves. Jun. 204, at p. 230 [30 E.R. 595, at p. 608].

v. *Marryat* (1), when he said " if the sole object of the deed be to create an acknowledgment of the debt, then it does not matter in what terms that is expressed, and a covenant will be implied; but if the deed has another object, then a covenant will not be implied from that acknowledgment." In *Isaacson* v. *Harwood* (2) Lord *Cairns* carefully qualified the rule. " In the simple case," he said, " of a debtor acknowledging a debt by a deed under seal, without any other object declared by the deed, no doubt it must be assumed that, although no words of covenant are used, the debtor meant to be bound, or else why should he go through the form of executing a deed ? " And in *Ivens* v. *Elwes* (3) *Kindersley* V.C. said: " When you find, besides the recital, more in the deed relating to the same matter in order to imply a covenant, you must see an intention from the other parts that the recital of the debt is so to operate."

In the present instrument it seems to be fairly evident that the acknowledgment is intended to be but introductory to and explanatory of the direction which follows. " The deed has another object." There is " more in the deed relating to the same matter." It would be difficult to suppose that the intestate meant to undertake an obligation to pay his sister-in-law immediately the amounts in which he said he was indebted to her. Plainly he intended payment to be *post mortem*. Further, what was meant as the operative part of the instrument is the direction and that covers the past and the future up to the intestate's death. The more the document is considered, the plainer it becomes that its intended purpose was to direct the trustees, executors and administrators to make the payments as in respect of a debt of the intestate. It was upon them it was to operate. It appears to me to be confined to this purpose and to disclose no purpose of imposing upon the intestate himself an obligation, debt or liability *de praesenti solvendum in futuro*. It must be borne in mind that the supposed consideration for the amounts accruing after the date of the document had still to be enjoyed and I think that to distinguish between what was to be payable for the past and what was to be payable for the future would be unreal.

The essence of the document is the direction and it was expressed and designed to impose an executorial duty. A covenant cannot be implied unless it was so intended and on examination the document does not seem to me to disclose any evidence of the requisite intention.

For these reasons I think that the appeal fails. It is, however, a case in which the appellant ought not to be required to pay the respondent's costs. I would simply dismiss the appeal.

(1) (1860) 28 Beav. 224, at p. 226 [54 E.R. 352].
(2) (1868) L.R. 3 Ch. App. 225, at p. 228.
(3) (1854) 3 Drewry 25, at p. 36 [61 E.R. 810, at p. 814].

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McTIERNAN J. In my opinion this appeal should be dismissed.

The plaintiff's claim in this action was that Parker covenanted or impliedly covenanted to pay the plaintiff the money sued for. The action was against the administrators of Parker's estate. The plaintiff alleges that the covenant is contained in a document which was signed and sealed by Parker on 7th December 1938. There is a finding by the learned trial judge, and it is amply supported by the evidence, that the technicalities necessary to make the document a deed were fulfilled; and it was delivered and took effect in Parker's lifetime as a deed.

The money claimed includes interest; the total sum is claimed in respect of the period from 12th March 1929, the date from which Parker admitted in the deed that his liability to the plaintiff ran, down to Parker's death. The amount sued for is computed in accordance with the terms of the deed. There is no express acknowledgment by Parker that he was indebted to the plaintiff in respect of the period from the date of the deed down to his death or that he was liable for any interest. But Parker's direction in the deed to his trustees and executors or administrators covers the period down to his death and extends to interest on the moneys owing from 12th March 1929. The direction to Parker's personal representative was clearly not intended to have any operation or effect until his death. The direction is in substance a testamentary gift. The formalities required by the *Wills Act* 1928 (Vict.) were not observed in making this document and the plaintiff is therefore not entitled under the direction to receive any payment from the administrator out of the estate.

The direction is not a covenant. There is no express covenant in the deed. An implied covenant would support the action. *Tindal* C.J. said in *Courtney* v. *Taylor* (1) :—" To charge a party with a covenant, it is not necessary that there should be express words of covenant or agreement. It is enough if the intention of the parties to create a covenant be apparent." An implied covenant by Parker that he himself would pay or an implied covenant by him that his personal representatives would pay would support this action which, as already stated, is brought against the administrators of Parker's estate.

In regard to the latter covenant, if the deed implied it, that would not be a ground for saying that the deed was testamentary, for the deed is not revocable and any covenant implied would have come into operation, as the deed did, during Parker's lifetime. The question therefore is whether the deed implies a covenant from Parker to

(1) (1843) 6 Man. & G., at p. 867 [134 E.R., at p. 1143].

pay the plaintiff the whole or part of the money claimed in the action.

The admission of a debt in a document under seal implies a covenant to pay the debt. In *Courtney* v. *Taylor* (1) *Maule* J. said that the admission should be unequivocal; and in *Jackson* v. *North Eastern Railway Co.* (2) *Malins* V.C. said that the admission should be general and unqualified.

It is necessary in each case to determine what was the object of the document. If its sole object is to create the acknowledgment, a covenant to pay would be readily inferred from the document (*Marryat* v. *Marryat* (3)). If there is nothing in the document except the acknowledgment the document would generally amount to a covenant to pay. In the present case the deed contains the acknowledgment and the mandate to Parker's personal representatives. The presence of other provisions in a deed besides an acknowledgment may show that the sole object of the deed is not to create the acknowledgment, but that the deed has another object. Then the admission may be only collateral to the object of the deed. In *Courtney* v. *Taylor* (4) there was a deed containing an admission of the debt claimed but the Court inferred from other provisions of the deed that it was not intended to create a fresh covenant to pay; and that "the acknowledgment may very well have been made *diverso intuitu*." In *Marryat* v. *Marryat* (5) the Master of the Rolls (Sir *John Romilly*) explained the principle in this way: "In *Courtney* v. *Taylor* (6) there was an acknowledgment of the debt, exactly in the words here used, not merely a statement of the amount of the debt which 'was still due' and owing, but as Robert Taylor 'doth hereby acknowledge,' the same recital as here. The question is, what is the effect of that? It is admitted that if the sole object of the deed be to create an acknowledgment of the debt, then it does not matter in what terms that is expressed, and a covenant will be implied; but if the deed has another object, then a covenant will not be implied from that acknowledgment. If, therefore, this deed had simply gone on to say, 'that it is hereby witnessed that the said sum of £4,441 is due from Marryat to Hallett which he Marryat doth hereby acknowledge and admit,' and had ended there, the Court would have implied a covenant to pay, and the deed would have created a specialty debt. But this deed does not end there; on the contrary, it previously recites Marryat's interest under the will, and then it proceeds to recite the amount of the debt due, and to assign over to

(1) (1843) 6 Man. & G., at p. 870 [134 E.R., at p. 1144].
(2) (1877) 7 Ch. D. 573, at p. 583.
(3) (1860) 28 Beav. 224 [54 E.R. 352].
(4) (1843) 6 Man. & G. 851 [134 E.R. 1135].
(5) (1860) 28 Beav. 224, at pp. 226, 227 [54 E.R. 352, at p. 353].
(6) (1843) 7 Scott (N.S.) 749.

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Hallett the interest under the wills as a security for the debt. Then what is the object of the recital ? It is nothing more than this :—to ascertain, free from any dispute, the amount which is to be secured upon the share of Marryat in those two estates. That is the intention and object for which the deed is made, and accordingly this recital is merely collateral to the intention and object for which the deed is executed. The deed was executed not for the purpose of creating any covenant from Marryat, but for the purpose of giving a security for the simple contract debt, which he admits to be due." The principle was applied by *Malins* V.C. in *Jackson* v. *North Eastern Railway Co.* (1).

An observation by *Tindal* C.J. in *Courtney* v. *Taylor* (2) is authority against the argument that the present deed implies a covenant to pay : " Had it been the intention of the parties that the defendant should be liable to pay the £577 10s. (the amount admitted to be due), nothing could have been more easy than to insert an express covenant for the payment of the money. In the absence of such a covenant this acknowledgment may be supposed to have been inserted for some other purpose." An observation to the like effect was made by *Malins* V.C. in *Jackson* v. *North Eastern Railway Co.* (3). The observation is this : " And if it was the intention to create an absolute liability in the company to pay, why was there not a covenant to do so inserted in the deed ? " *Malins* V.C. took into consideration that the deed was prepared by a lawyer and added " and if it had been intended to bind the company to pay at all events I am satisfied he would have inserted the usual covenant to do so."

If the acknowledgment of Parker's debt to the plaintiff stood alone, it would be clear that the sole object of the deed was to create the acknowledgment and the deed would imply a covenant by Parker to pay the plaintiff for the board and lodging of his wife and himself at the rate of £4 per week. But the direction to the personal representative shows that it was not intended to create an obligation to pay the plaintiff anything in Parker's lifetime. The direction does not create an obligation to pay anything after his death. The language of the deed shows that its sole object was not to create an acknowledgment of the debt sued for. Therefore the condition upon which Sir *John Romilly* said that the Court would imply a covenant from an admission of a debt in a deed is not present (see *Marryat* v. *Marryat* (4)). I think that the object of the acknowledgment is

(1) (1877) 7 Ch. D. 573.
(2) (1843) 6 Man. & G., at p. 868 [134 E.R., at p. 1143].
(3) (1877) 7 Ch. D., at p. 586.
(4) (1860) 28 Beav. 224 [54 E.R. 352].

merely to state the ground for the direction to the personal representatives. The acknowledgment is collateral to the object of the deed which is, I think, to give the direction, which it contains, to Parker's personal representative. The deed does not in my opinion imply a covenant by Parker to pay the money claimed or any part of it.

If Parker intended to enter into a covenant to pay the plaintiff it is difficult to understand why the covenant was omitted. Nothing could have been more easy than to insert an express covenant for payment. In the absence of such a covenant the acknowledgment may be supposed, as *Tindal* C.J. said of the acknowledgment in *Courtney* v. *Taylor* (1), to have been inserted for some other purpose than creating a covenant from Parker.

I think that in the circumstances the appeal should be dismissed without any order as to costs.

WILLIAMS J. This is an appeal from a judgment of the Supreme Court of Victoria dismissing an action brought by the appellant as plaintiff against the respondent company (which is the personal representative of J. A. Parker, who died on 20th March 1945) as defendant. The plaintiff sued the defendant on two counts, but accepts the decision of the court below on the second count so that the appeal relates only to the first count. On this count the plaintiff claims to recover the sum of £4,580, comprising £4 per week as from 12th March 1929 to 20th March 1945 (£3,332) and interest (£1,248) alleged to be due upon an express or implied covenant to pay this sum contained in a document under seal dated 27th December 1938. This document is in the following terms :—

" I, James Allen Parker of Manningtree Road Hawthorn hereby acknowledge that I am indebted to Mary Ann Bird of the same place for the board and residence of myself and my wife at the rate of Four Pounds per week from the Twelfth day of March One thousand nine hundred and twenty-nine and I Direct my trustees and executors or administrators on my death to pay to the said Mary Ann Bird a sum calculated at the said rate of Four Pounds (£4) per week from the Twelfth day of March One thousand nine hundred and twenty-nine to the date of my death with interest added at the rate of five per centum per annum calculated yearly on the amount owing each successive year from March One thousand nine hundred and twenty-nine.

As Witness my hand and seal the seventh day of December One thousand nine hundred and thirty-eight.

James Allen Parker (Seal)
G. Bird."

(1) (1843) 6 Man. & G. 851 [134 E.R. 1135].

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The circumstances surrounding the execution of this document are briefly as follows. The plaintiff, who is the sister of the second wife of J. A. Parker, owns a cottage in Hawthorn where she and her sister and another sister were living at the time of Parker's second marriage. Parker commenced to reside in this cottage shortly before the marriage, which appears to have taken place in 1929, and after the honeymoon he and his wife returned to the cottage and continued to reside there until the date of his death. Although he was a man of considerable means he did not contribute to the maintenance of the common home, the whole of these expenses being borne by the plaintiff. Parker was in poor health at the date of the marriage and became a semi-invalid thereafter. At the date of the marriage he was 68 and his wife 54 years of age. The plaintiff was quite willing to bear the whole of the expenses of the upkeep of the common home, but Parker evidently thought that she ought to be reimbursed for the board and residence of himself and his wife after his death and asked her brother to instruct the latter's solicitor, who was also the plaintiff's solicitor, to have a document prepared to give effect to his intention. The solicitor prepared the document of 7th December 1938, which was taken by the brother to Parker, read over to him by the brother and read by him in the presence of his wife. He told the brother that he was quite satisfied with the contents and the document was then signed and executed by him as a deed and his signature witnessed by the brother. He then asked the brother to take the document to the solicitor and tell him to put it with the plaintiff's papers, which the brother did.

It is clear from the evidence and it is not disputed that, as the learned trial judge found, the document was duly executed by Parker. His Honour also found that it was duly delivered as a deed. In *Lady Naas* v. *Westminster Bank Ltd.* (1) Lord *Wright* said : " The character of the act of delivery depends on intention, which must be ascertained by considering the nature and all the circumstances of the case. This is the effect of *Bowker* v. *Burdekin* (2) and *Xenos* v. *Wickham* (3) ". In *Macedo* v. *Stroud* (4) Lord *Haldane*, delivering the judgment of the Privy Council, said : " No particular technical form of words or acts is necessary to render an instrument the deed of the party who has executed it. For as soon as there are acts or words showing that it is intended to be executed as his deed that is sufficient." This finding was faintly challenged on the appeal, but it is clear that it was right. If Parker had retained the deed in his

(1) (1940) A.C. 366, at p. 399.
(2) (1843) 11 M. & W. 128 [152 E.R. 744].
(3) (1867) L.R. 2 H.L. 296.
(4) (1922) 2 A.C. 330, at p. 337.

possession it could still have been delivered as his deed, but it was in fact handed to his brother-in-law to be placed in the possession of the plaintiff's own solicitor and, in these circumstances, there can be no question that Parker intended the document to be delivered as a finally executed deed.

The crucial question is whether the document was only intended to have a future operation after Parker's death, and therefore to be testamentary in character and inoperative unless duly executed and proved as a will. A covenant by a person that his personal representatives will pay a sum of money to another person upon or at some time after his death is a valid covenant (*Boughton* v. *Boughton* (1); *Fletcher* v. *Fletcher* (2); *Jeffries* v. *Alexander* (3); *In re Maryon-Wilson*; *Wilson* v. *Maryon-Wilson* (4); *Hay* v. *Commissioner of Stamps* (5)). The present document does not contain the word "covenant"; it directs the personal representatives of Parker to calculate and pay a sum of money to the plaintiff on Parker's death; but any words in a deed which show an agreement to do a thing make a covenant (*Norton* on *Deeds*, 2nd ed., p. 532.) It was submitted for the appellant that a covenant that the personal representatives would pay this sum must be implied from the language of the document as a whole. On the other hand, it was submitted for the respondent that the document must be read literally, that the direction to pay was not intended to be a covenant but a revocable mandate, that the document had an ambulatory operation and was intended to confer a bounty on the plaintiff in the nature of a legacy, and could not be valid as a deed because it was not intended to be consummated until Parker's death in the sense that until then no conclusive and irrevocable effect could be given to it (*Fletcher* v. *Fletcher* (6); *In re Carile*; *Dakin* v. *Trustees Executors and Agency Co. Ltd.* (7); cf. *In re Williams*; *Williams* v. *Ball* (8).) In *Isaacson* v. *Harwood* (9), Lord *Cairns* said:—"Now it is well settled that there is no magic in the words of a covenant. Whatever words are used by a party to a deed, if he intends that they shall operate as a covenant, he will be held liable. In the simple case of a debtor acknowledging a debt by a deed under seal, without any other object declared by the deed, no doubt it must be assumed that, although no words of covenant are used, the debtor meant to be

(1) (1739) 1 Atk. 625 [26 E.R. 393].
(2) (1844) 4 Hare 67 [67 E.R. 564].
(3) (1860) 8 H.L.C. 594, at pp. 644, 649, 667 [11 E.R. 562, at pp. 581, 583, 590].
(4) (1900) 1 Ch. 565.
(5) (1911) 11 S.R. (N.S.W.) 304.
(6) (1844) 4 Hare, at p. 79 [67 E.R., at p. 569].
(7) (1920) V.L.R. 427, at p. 435.
(8) (1917) 1 Ch. 1.
(9) (1868) L.R. 3 Ch. App. 225, at p. 228.

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bound, or else why should he go through the form of executing a deed ? "

The document of 7th December 1938 contains an acknowledgment that Parker was indebted for the board and residence of himself and his wife at the rate mentioned from 12th March 1929 to the date of the document, and the learned trial judge thought that if the document was intended to have an immediate operation as a deed the plaintiff could have sued immediately on the acknowledgment of debt up to the date of the document if she had known of its existence. I agree that this would have been contrary to Parker's intention, but I do not see how the plaintiff could have sued upon the acknowledgment as an implied covenant to pay the debt except in the manner prescribed by the document, that is to say, as an admission of a debt *debitum in praesenti solvendum in futuro*. There was no contract between Parker and the plaintiff to pay her for the board and residence of himself and his wife, so that the elevation of what would otherwise have been a mere moral obligation into an acknowledged debt throws considerable light upon the legal effect intended to be given to the direction for payment. This is a direction to pay, not the amount of the existing indebtedness, but this amount plus a further amount calculated at the same rate to accrue due for the future board and residence of Parker and his wife. The document also directs that interest be paid " on the amount owing each successive year from March 1929," so that payments in respect of the period after the date of execution of the document are to be treated as included within an " amount owing." Thus the direction to pay was plainly intended to create an obligation having the same legal effect with respect to the sums to accrue due as with respect to the sums which had already accrued due in the past. As the amount accrued due for services rendered to 7th December 1938 was acknowledged to be a debt, it necessarily follows that Parker must have intended that the sums to accrue due from week to week for the same services to be rendered from week to week in the future should also create an indebtedness. The acknowledgment of the amount accrued due to the date of the document is in express terms an admission of a present indebtedness which could only be effective if the document was intended to have an immediate operation. A deed cannot be delivered in escrow upon the condition or contingency that it is only to become effective upon the death of the grantor (*Foundling Hospital* (*Governors and Guardians*) v. *Crane* (1) ; *Carile's Case* (2).) But there are no circumstances which could justify a finding of fact that the present document was delivered as an escrow.

(1) (1911) 2 K.B. 367.

(2) (1920) V.L.R. 427.

It was not even retained in Parker's possession, although this would not have been fatal to complete delivery, but was delivered to the plaintiff's solicitor to hold on her behalf. The document falls entirely within the statement of Lord *Cranworth* in *Jeffries* v. *Alexander* (1) :—" The instrument in question is certainly a deed, and not a will. It was duly executed as a deed, and was evidently intended to be irrevocable." The direction to the personal representatives to pay the finally ascertained indebtedness was therefore immediate and irrevocable and implies a covenant or agreement by the maker that they will pay it. It was a voluntary covenant, but there is no distinction in legal operation between a complete, bona-fide, and valid voluntary deed and one executed for valuable consideration (*Dickinson* v. *Burrell* (2)).

It was pointed out that the document does not provide for the eventualities of the plaintiff refusing to supply board and residence in the future or of her being prevented from doing so by predeceasing Parker, or of Mr. and Mrs. Parker leaving the common home or of Parker surviving Mrs. Parker so that joint board and residence would no longer be required, and that the direction to pay does not in express terms make the continued accrual of the debt contingent on joint board and lodging being supplied in the future. It was submitted that these omissions from the document indicated that it was not intended to be irrevocable or to become effective except in the event of death. Having regard to the period for which the plaintiff and the Parkers had shared a common home and to his age and health, it was improbable that any of these events would have happened, and it is perhaps permissible, as Mr. *Dean* contended, to apply *mutatis mutandis* the words of the Privy Council in *Thomson* v. *Commissioner of Stamp Duties* (3) :—" No pronouncement is made on that in the present case which is decided, as the Act was meant to be applied—namely, not on facts reversed but on facts as they stand. Here, as is seen, Act fits fact like hand and glove." It is true that the direction to pay does not expressly state that the future payments are conditional upon future board and residence being supplied to Parker and his wife jointly, but the acknowledgment clearly indicates that this was intended, and an implication to this effect necessarily arises in the light of the document as a whole. As *Tindal* C.J. said in *Williams* v. *Burrell* (4) :—" In every case, it is always matter of construction to discover what is the sense and meaning of the words employed by the parties in the deed. In some cases, that meaning is

(1) (1860) 8 H.L.C., at p. 649 [11 E.R., at p. 583].
(2) (1866) L.R. 1 Eq. 337, at p. 343.
(3) (1929) A.C. 450, at pp. 454, 455.
(4) (1845) 1 C.B. 402, at pp. 430, 431 [135 E.R. 596, at p. 607].

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more clearly expressed, and therefore more easily discovered; in others, it is expressed with more obscurity, and discovered with greater difficulty. In some cases it is discovered from one single clause; in others, it is only to be made out by the comparison of different and perhaps distant parts of the same instrument. But, after the intention and meaning of the parties is once ascertained, after the agreement is once inferred from the words employed in the instrument, all difficulty which has been encountered in arriving at such meaning, is to be entirely disregarded; the legal effect and operation of the covenant, whether framed in express terms, that is, whether it be an express covenant, or whether the covenant be matter of inference and argument, is precisely the same; and an implied covenant, in this sense of the term, differs nothing in its operation or legal consequences from an express covenant."

The implied promise was therefore only to pay for joint board and residence actually supplied in the future. Accordingly the further accumulation of the debt would have ceased if such board and lodging could no longer have been supplied because of the occurrence of some supervening event. For these reasons I am of opinion that the plaintiff is entitled to succeed on the first count, and I would therefore allow the appeal, set aside the judgment of the Supreme Court and enter judgment for the plaintiff for the sum of £4,580.

Appeal dismissed.

Solicitor for the appellant, *Wilson Heriot.*

Solicitors for the respondent, *Malleson, Stewart, Stawell and Nankivell.*

E. F. H.