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Patent: and hold that there is no case for rescinding the leave so granted.

Summons dismissed.

Attorney for the plaintiff: *Mr. Hiralal Dayabhai.*

Attorneys for the defendant: *Messrs. Bhaishankar, Kanya, and Girdharlal.*

W. L. W.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1905. *February 3.*

THE ADVOCATE GENERAL OF BOMBAY (ORIGINAL PLAINTIFF), APPELLANT, *v.* HORMUSJI NOSHIRWANJI VAKIL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Indenture—Construction of indenture—"Absolutely," interpretation of—Construction of deeds—Construction of wills—Repugnancy in words.

A deed of indenture contained, among other things, a provision which ran: "upon trust and for the use of the said trustees absolutely to be expended and used by them for such charitable purposes as they might think fit." On a construction of this provision:—

Held, that having regard to the words that follow the phrase in the indenture in question, the word "absolutely" cannot be taken as conferring an unfettered and unlimited interest on the persons designed as trustees; and that the words used created a valid trust for charitable purposes in the events which had happened.

The rule that if there be a repugnancy the first in a deed and the last in a will shall prevail, has no application when the supposed inconsistencies are found in one and the same provision.

APPEAL from the decision of Russell, J.

The property in dispute belonged originally to Haji Dawood Bucker who died leaving him surviving two sons—Abdulla Haji Dawood and Haji Rahimtulla Haji Dawood—and a daughter named Khatizabai. In consequence of certain disputes between the two brothers and their sister with regard to the property, the brothers agreed to settle part of the property upon trust for the benefit of Khatizabai and her children.

* Appeal No. 1369; O. C. J. Suit No. 488 of 1904, O. S.

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The deed of indenture which embodied this agreement was dated the 15th August 1896. By this indenture a certain property in New Kaji Street, Bombay, was settled upon the following trusts:—(*a*) to collect the rents, &c., (*b*) to pay taxes and repairs, (*c*) to pay to Khatizabai for her life the balance of rents and income, (*d*) after her death to hold the premises for the use of all or one or more of her children as she should appoint, (*e*) in default of such appointment for all her children equally, (*f*) if she left no children such persons as she should appoint, (*g*) "in default of such direction or appointment upon trust and for the use of the said trustees absolutely to be expended and used by them for such charitable purposes as they may think fit."

Khatizabai died on the 31st December 1899 without issue and without having made any will. She did not exercise the power given to her by the Indenture dated the 15th August 1896 and by reason thereof the ultimate trust contained in the Indenture, *viz.* that the trustees thereof held the same premises absolutely to be expended and used by them for such charitable purposes as they might think fit, came into force. After Khatizabai's death, Abdulla Haji Dawood and Haji Rahimtulla Haji Dawood continued in possession of the property, the management being conducted by the former.

Abdulla Haji Dawood died on the 11th November 1901, having made his last will on the 15th July 1901, whereof he appointed defendants 1—4 and Haji Rahimtulla Haji Dawood executors. Abdulla left him surviving as his sole heir the 8th defendant. After Abdulla's death, his executors defendants 1, 2 and 3 continued the management of the trust premises.

Haji Rahimtulla Haji Dawood died on the 6th February 1902 intestate leaving him surviving his sons, defendants 5, 6 and 7.

The Advocate General of Bombay being of opinion that the premises described in Schedule A to the Indenture dated 15th August 1896 were validly settled upon charitable trusts although neither Abdulla Haji Dawood nor Haji Rahimtulla Haji Dawood had selected any charitable object on which to expend and use the trust property, took out an originating summons for the determination of the following questions:—

1. Whether the premises described in Schedule A to the Indenture of the 15th day of August 1896 are not, in the events which have happened, validly settled for charitable purposes?

2. Whether the said premises and the net income thereof since the 31st day of December 1899, the date of Khatizabai's death, ought not to be used and expended on some charitable object or objects?

3. Whether trustees of the said Indenture of the 15th day of August 1896 ought not to be appointed by this Honourable Court?

4. Whether in the events that have happened there is any one now having a legal right to the possession and management of the said premises?

5. Whether a scheme should not be settled to carry out the trusts of the said Indenture?

6. Whether the defendants 1—4 should not be ordered to account for the income of the said premises since the death of the said Khatizabai or from any and what date?

7. Whether the defendants 1—4 should not be ordered to hand over to the trustees to be appointed of the said Indenture the said premises described in Schedule A aforesaid and all accumulations of income, rents and profits thereof as aforesaid?

8. Whether the plaintiff is not entitled to such order as may secure the due application of the said premises and income as aforesaid to some charitable object or objects?

These questions were argued before Russell, J., who in answering them recorded the following judgment:—

RUSSELL, J.—[His Lordship after stating the facts as above set out continued.] Now in construing the above clause in this Indenture the first question is "what did the writers mean by that which they wrote?" Not what did the "writers mean to say?" See *Abbott* v. *Middleton*(1), *Grey* v. *Pearson*(2). The next principle to be borne in mind is that where there are two repugnant clauses, the first in a deed and the second in a will shall prevail: *Doe Lessee of Leicester* v. *Biggs*(3). It will, however, be found

(1) (1858) 7 H. L. C. 68 at p. 114. (2) (185) 6 H. L. C. 61 at p. 10.
(3) (1809) 2 Taunt 109 at p. 113; 11 R. R. 533 at p. 536.

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that in many of the cases in which the rule appears to have been applied, the true reason for rejecting the clause was that it was inconsistent with the rest of the instrument: see per Wilde, C. J., in *Walker* v. *Giles*(1). Upon the question of construction, then, I refer to Ashburner's Principles of Equity, pp. 176-177, where it is said:—"The question whether a trustee is under an obligation or retains a discretion, is a question of substance and not of form. It depends on the intention of the creator of the trust or the donor of the power, to be gathered from the whole instrument which creates the trust or bestows the power. The donor of a power which is in form discretionary may in substance direct that the power shall be exercised if a certain state of circumstances arises. If that state arises the trustee is under an obligation to exercise the power. His discretion is taken away and the Court can compel him to exercise the power. On the other hand, language which *primâ facie* imposes a duty upon a trustee may be coupled with words conferring upon him an absolute discretion as to its exercise." I would also refer to Lewin on Trusts, ch. XXIII, s. II, I, 4, p. 676, 9th edition, and ch. XXVIII, para. 4, pp. 949, 950.

Turning to the Indenture itself it is clear that the settlors in the first place intended to make provision for the sister Khatizabai and her children. Failing them what is the true reading of the clause I have above set out? The words are very strong "upon trust and for the use of the trustees absolutely." This clause is, it seems to be, repugnant to the following clauses "to be expended and used by them for such charitable purposes &c.," if it was intended to be merely a trust for charitable purposes and the first clause must govern. The word "absolutely," the Advocate General invites me to read as being equivalent at their absolute discretion, but taking it in conjunction with "and for the use of" I do not see my way to doing so. The cases relied on by him—*Moggridge* v. *Thackwell*(2); *Yeap Cheah Neo* v. *Ong Cheng Neo*(3); and *Lilley* v. *Attorney-General*(4)—did not contain such words. And the case seems to fall rather within the principles of *Wood* v. *Cox*(5) and *Shelley* v. *Shelley*(6), which apply,

(1) (1848) 6 C. B. 662 at p. 696.
(2) (1803) 7 Ves. (Jun.) 36.
(3) (1875) L. R. 6 P. C. 381.
(4) (1903) 1 Ch. 33.
(5) (1837) 2 My. & Cr. 684; 1 Keen 317.
(6) (1868) L. R. 6 Eq. 540 at p. 549.

though no doubt they are cases of wills. I would also refer to *In re Williams*[1], where Lindley L. J. says: "But further, I think that James V. C. was right when he said, in *Irvine* v. *Sullivan*[2] that "absolutely" may refer to extent of interest, but it may mean a great deal more, and that its natural grammatical meaning is unfettered and unlimited, *i. e.* unlimited in point of estate, and unfettered in respect of any condition or trust."

After having given the most careful consideration I can to the words in the deed and the Advocate General's argument I have come to the conclusion that a trust for charitable purposes was not created, and I accordingly answer the questions as follows:—

1. Negative.
2. Negative.
3. Negative.
4. The defendants 1—3 and 5, 6 and 7 have a legal right to the possession and management of the said premises.
5. Negative.
6. Negative in this present application.
7. Negative.
8. Negative.

I dismiss the suit and direct the cost of all parties as between attorney and client to be paid out of the accumulation of the rents in the hands of defendants 1—3.

The Advocate General appealed against this decision.

Inverarity, for appellants.

Jardine, for respondents Nos. 1, 2 and 3.

Setalvad, for respondents Nos. 6 and 7.

Lowndes, for respondents Nos. 5 and 8.

BATTY, J.—In this case the Advocate General is the plaintiff.

The first four defendants are executors of one Abdulla Dawood.

The fifth, sixth and seventh defendants are the sons of Haji Rahimtulla Dawood, brother of Abdulla Dawood, and the eighth defendant is the son of Abdulla Dawood.

The brothers Abdulla and H. Rahimtulla had a sister Khatizabai.

(1) (1897) 2 Ch. 12 at p. 21.

(2) (1869) L. R. 8 Eq. 673 at p. 680.

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Between these three persons an indenture was made in August 1896. This indenture recited that the sister Khatizabai had claimed a share in the property of the father of the parties, and that they had agreed to settle part of that property upon trust for the benefit of Khatiza and her children.

Accordingly the property specified was conveyed to her brothers, Abdulla and Haji Rahimtulla, to pay the rents to Khatiza and to her children, or to such of them as she should appoint, and in case of her dying without issue, upon trust for the use of such persons and in such manner as she should by her last will direct and appoint.

Khatiza died childless and intestate in 1899. Abdulla died in 1901. Rahimtulla died in 1902.

It is the provision as to what was to follow in these events, which has given rise to these proceedings and which has been submitted to be construed by the Court. The provision, to come into operation on Khatiza's dying without issue and without executing her power of appointment, runs: "Upon trust and for the use of the said trustees absolutely to be expended and used by them for such charitable purposes as they may think fit."

The main question raised is whether these words create a valid trust for charitable purposes in the events which have now happened or whether the defendants are absolutely entitled to the property.

The lower Court relying mainly on the decision in *In re Williams*[1] held that the word "absolutely" in the passage in question must be taken as meaning that the trustees were to take an interest unlimited in point of estate and unfettered in respect of any condition or trust and that the defendants, excepting only defendant 4, have a legal right to the possession and management of the property.

The Advocate General of Bombay has appealed against this decision on the following grounds:

1. That the said learned Judge erred in dismissing the suit.

2 That the said learned Judge should have held that the Trustees under the Indenture of the 15th of August 1896 in default of children of or appointment by Khatizabai were to take the property, the subject of the said Indenture, in

(1) (1897) 2 Ch. 12.

trust for such charitable purposes as in their absolute discretion they should think fit to devote it to.

3. That the said learned Judge erred in holding that the said trustees or their heirs took the said property in the events which had happened beneficially and not as trustees.

4. That the said learned Judge should have held that in the events which had happened the said property was validly dedicated to charitable purposes and should have directed the Commissioner to frame a scheme for the application of the said property for such purposes and should have ordered the defendants 1—4 to account for the income of the said property since the death of the said Khatizabai and to hand over to such persons as the Court might order all the said property and income in order to effectuate the scheme to be framed as aforesaid.

5. That the said learned Judge erred in answering questions 1, 2, 3, 5, 6, 7 and 8, in the Originating Summons set forth, in the negative and in answering question 4 in favour of the defendants 1—3 and 5, 6 and 7.

The first, second and third defendants, executors of Abdulla, by their counsel, state that they are inclined to support the trust.

Mr. Setalvad for the 6th and 7th defendants urges that presumably the intention of the settlors was that the property should return to the brothers of Khatiza on failure of her issue and of appointment by her; that otherwise the provisions as to charitable purposes would have been more detailed and that the word "absolutely" negatives the creation of a trust.

The case of *Doe Lessee of Leicester and others*[1] is cited by the lower Court for the general rule that "if there be a repugnancy, the first words in a deed, and the last words in a will, shall prevail." That rule Lord Mansfield stated he applied "for want of a better reason," there being apparently no other guide to the intention. The last words in the will in that case were unambiguous, giving a legal estate. The application of the rule in this case clearly depends on the answer to the main question whether the word "absolutely" is necessarily repugnant to the phrases which follow and which purport to create a trust. In the first place it is to be observed that this rule has no application when the supposed inconsistencies are found in one and the same provision. Next the intention to give a legal estate is not here so expressed as to be beyond dispute, and in accordance with the passage cited

(1) (1809) 2 Taun. 109 at p. 113.

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by the lower Court from Ashburner on Equity, the intention must be gathered from the whole instrument. *Walker* v. *Giles*[1], also cited by the lower Court, has been much questioned in later cases—*Pinhorn* v. *Souster*[2], *Brown* v. *Motropolitan Counties Life Assurance Society*[3], *Turner* v. *Barnes*[4]—and turned upon an irreconcilable inconsistency between the whole object of the deed and the construction that was rejected.

Here the case is different. There is but the one equivocal word "absolutely" pointed out as throwing any doubt upon the creation of the trust; the parties of the third part are referred to as trustees throughout save in the clause containing the release to them in their personal capacity. And special provision is made in case of the residence abroad, death, bankruptcy, discharge, refusal or incapacity to act, of all or any of them, for the continuance of the trust by the substitution or appointment of others in their stead, without any further suggestion of unlimited and unfettered beneficial interest to vest in them in any event whatsoever.

In *Wood* v. *Cox*[5], also cited by the lower Court, the words "to his or their own use and benefit for ever" were coupled with words precatory in form. (Lewin cites the case as showing that when the words are construed in equity to raise a partial trust, the devisee or legatee is treated as beneficial owner subject to the charge and the surplus will result not to the heir or next of kin but will belong to the devisee or legatee. But here there is no question of surplus. The whole interest is either beneficial or in trust.)[6] In *Shelley* v. *Shelley*[7], also cited by the lower Court, there was no doubt that the legatee was intended to take a beneficial interest, which, but for the precatory words creating an executory trust, would have been absolute. These cases, therefore, seem hardly in point.

The last case relied on by the lower Court is *In re Williams*[8]. In that case the testator gave the residue of his estate to his wife,

(1) (1848) 6 C. B. 662; 18 L. J. C. P. 323.
(2) (1853) 8 Ex 763.
(3) (1859) 28 L. J. Q. B. 236; 1 El. & El. 832.
(4) (1862) 2 B. & S. 435; 31 L. J. Q. B. 170.
(5) (1836) 1 Keen 317, reversed on appeal 2 My. & Cr. 684.
(6) Lewin on Trust, 10th Edn., p. 148.
(7) (1868) L. R. 6 Eq. 540 at p. 549.
(8) (1897) 2 Ch. 12.

her executors, administrators and assigns absolutely in the fullest confidence that she would carry out his wishes that a policy of £1,000, which was the wife's own property, and another of £300, which was the testator's, should be left by the wife on her death to their daughter, if surviving, in trust for her sole and separate use free from the debts and control of any husband she might marry. Romer, J., whose decision was confirmed by the Court of Appeal, began his judgment by observing that authorities were not of much use in considering this particular will. He further said that the words giving the whole of the estate were very important as showing that the testator intended his widow to have absolute dominion over his property, and added that the testator certainly could not have intended to create a trust as to the policy of £1,000 because the policy was not his: it was his wife's. Moreover, he noted, the testator did not say that the policy should be the daughter's after the death of the wife, but that she might by her will leave it. And this, Romer J. said, was "an additional circumstance which shows that he, the testator, was not intending to do anything more than express a hope how she would deal with the property."

In the Court of Appeal great stress was laid in argument on the incapacity of the testator to deal with the policy of £1,000. It was argued that precatory words were efficacious when the testator has power to command, and Rigby L. J. thereupon remarked: "It has never been held that a man can by any form of words create a trust of another man's property." Lindley L. J. observed that the testator had employed the same language with respect to his own policy as with respect to his wife's, and had shown no intention of imposing an obligation upon her in respect of one and not in respect of the other, and the difficulty of making any distinction between the two policies forced him to the conclusion that the widow was not put to her election as regards her own policy. But Lindley L. J. added that he might not have come to this conclusion if the testator had not dealt with both policies in the same way. This then was the *ratio decidendi* in the case, and the meaning to be attached to the word "absolutely" was only incidentally discussed.

A. L. Smith L. J., who concurred with Lindley L. J., also treated the will as one to be construed according to its language

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in view of the surrounding circumstances known to the testator when he made the will, and laying emphasis on the facts that there was an absolute gift, observed, that a trust could not have been intended as to the part which was the wife's, and that the intention as to the rest was expressed without variance of language—which amounted to an expression of confidence, "that is, a reliance or hope that the widow would carry out the testator's wishes."

In re Williams(1) has been recently followed in *Oldfield* v. *Oldfield*(2)—a case of absolute gift coupled only with an expression of desire. There passages are quoted from the judgment of Lindley and Rigby L. JJ. in *In re Williams*(1), which show that equitable obligations—whether trusts or conditions—can be imposed by any language which is clear enough to impose an obligation, provided that the whole will must be looked to, and that there is nothing in the will to prevent the words of request from being imperative. In the present case the words which, it is contended, create the trust are "to be expended and used by them for such charitable purposes as they may think fit." It is not suggested that these words are precatory in form, or that there was any such incapacity to deal with the property in the parties who used them as would negative the construction of them as imperative. The only phrase which could suggest any other construction is "upon trust and for the use of the said trustees absolutely." But the decision in *In re Williams*(1) does not rest upon the isolated phrase "absolutely," which is only referred to incidentally in that case; and which, as the remarks above quoted show, would not have prevented a contrary conclusion had there been no difficulty arising from the incapacity of the testator to create a trust in respect of part of the property as to which the same expressions of intention had been used. Moreover in *Irvine* v. *Sullivan*(3), from which Lindley L. J. quoted, it was observed that the word "absolutely" may refer to extent of interest only. Other circumstances may no doubt render another construction inevitable. But the document must be looked to as a whole and a phrase patient of two

(1) (1897) 2 Ch. 12. (2) (1904) 1 Ch. 549.
(3) (1869) L. R. 8 Eq. 673.

meanings must be governed by the general object and tenor of the document. In the present instance the document is coherent if the word is taken as referring to the extent of interest which James V. C. admits may be its meaning. The inconsistency could arise only from giving it a different meaning. And this in itself seems a sufficient reason for declining to give it such different meaning. The phrase "absolutely entitled," when it occurs in section 23 of the Trustee Act, 1850, was held in *Russell's Trust*(1) to be applicable to trustees, and the same view seems to have been taken in other cases: *Mackenzie* v. *Mackenzie*(2); *Re Baxter's will*(3); *Re Ellis' Settlement*(4).

Having regard to the words that follow the phrase in the indenture now in question, it cannot, I think, reasonably be taken as conferring an unfettered and unlimited interest as the persons designated as trustees.

For these reasons the decision of the lower Court must be reversed. On the first two issues the answer must be in the affirmative.

On the 4th, no decision is necessary.

On the 5th, in the affirmative.

On the 6th, the defendants are willing to account.

On the 7th, in the affirmative.

On the 3rd and 8th, we refer the matter to the Commissioner to prepare and submit a scheme. The defendants will continue in possession. Party and party costs as between party and party out of the estate, except the Advocate General whose costs will be as between attorney and client.

Attorneys for the appellant: *Messrs. Thakurdas & Co.*

Attorneys for the respondents: *Messrs. Thakurdas & Co., Messrs. Tayabji, Dayabhai & Co., Mr. K. B. Mehta,* and *Messrs. Pestonji, Rustim and Kolah.*

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(1) (1851) 1 Sim. N. S. 404, 408.
(2) (1851) 5 De G. & Sm. 338.
(3) (1854) 2 Sm. & G. app. V.
(4) (1857) 24 Beav. 426.