INGRAHAM v. MEADE.

Case No. 7,045.

{3 Wall. Jr. 32;[1] 13 Leg. Int 372.}

Circuit Court, E. D. Pennsylvania. April Term, 1855.

REFORM OF DEEDS—ILLUSORY APPOINTMENT—GRANDCHILDREN TREATED AS CHILDREN—FRAUD ON POWER OF APPOINTMENT.

1. Where stocks had been loosely settled or transferred by a father to trustees, in trust for his wife and children, the certificate declaring only in general terms on its face that it was for the lady and "her children;" the nature and extent of the lady's interest or control not being, on the certificate or otherwise, in any way specified; the court did not regard such a settlement in favor of children generally as sufficient to control a solemn deed made sometime afterwards by the trustees, the lady and the father, the original founder of the trust, reciting the former loose settlement—reciting further that it was expedient now to declare the said trust and now declaring the trust to be (among other things) that the lady on her death might dispose of the stocks among such of her children and in such proportions as she by her will might appoint.
2. A power to appoint "among such of the children of R. & M. and in such proportions as M. may appoint" is an exclusive power; that is to say M. may entirely exclude certain children if she pleases.
3. The English equitable practice of setting aside certain appointments as illusory, it seems is not known as part of the Pennsylvania jurisprudence.
4. A power of appointment among "children" in terms, may include grandchildren, if in a general way grandchildren are manifest objects

of the trust. And in the case before the court, though children alone were mentioned as entitled to receive under appointment, yet as the issue of children were, by the same clause, provided for in defect of appointment, it was *held* that the latter provision transfused its virtue in a manner to the former one; and that such issue was meant to be included within the power of appointment also.

5. Although the donee of a power may not do indirectly that which it is unlawful for him to do directly, yet where the donee has exercised the power, without any agreement with the party in whose favor it in terms beneficially operates, that such party shall apply its benefits in the manner unlawful for the donee to direct, the simple fact that such party has voluntarily, and without any knowledge of what the donee intended to do, applied or agreed with a third party so to apply them, is not enough to make the appointment a fraud and void.

Mr. Richard Meade had, in the year 1812, in a somewhat loose way, transferred certain stocks, about $50,000, to the late Edward Tilghman, Esquire, and others, in trust; with an intent apparently to provide a fund for his wife's separate use, and one with which she might maintain and educate their children, then all minors. No regular declaration of trust was made by anybody, nor was the stock described in the investments thereof, otherwise than as for Mrs. Margaret Meade and her children; the nature and extent of Mrs. Meade's interest, or her control or authority in regard to the trust property, not being, in any way, particularly declared. Mr. Meade having been a consul of the United States in Spain, was, for some years after, much away from the country, and the trust, though kept sufficiently alive at all times, appears to have been treated at none with much formality. However, in 1821, being then at home again, Mr. and Mrs. Meade with the trustees made a formal deed, in which, reciting the looseness of the trust and some other facts of the case, in order that the disposition of neither principal nor interest might be subjected to difficulty, did "mutually agree and declare" that one of the trusts upon which the property should be held was that the trustees should pay and distribute the principal among "such of" Mrs. Margaret Meade's "children" as the said Mrs. Meade, by her last will should appoint; and "for want of such appointment, then in trust for the use of such of the said children as shall be living at the death of the said Margaret, and the issue of such of the said children as may then be dead, share and share alike; the said issue if more than one to take only the share which their parent would have taken if living." Mrs. Meade died leaving seven children and certain grandchildren, the issue of two deceased children, and leaving also a daughter-in-law, Elizabeth, the widow of a deceased son, Robert, spoken of hereafter as Mrs. Robert Meade; and having by her will appointed to one child $500; to three others $4,000; to three others (including one named Salvadora) $9,500; and as regards her grandchildren, $3,000 to one, the issue of one child deceased, and $5,000 to others, the issue of another child deceased. But in regard to these last appointments, st. those among grandchildren, reciting "lest I may not have the power to make the foregoing appointments and direction," she says, "in case it should be determined that the said appointment and direction should be invalid," "then I appoint the last mentioned sums" to A, B, &c, nam-

ing certain of her children, "their heirs, executors, administrators and assigns;" no trust or purpose being named by Mrs. Meade in regard to it. A bill in equity was now filed by the daughter to whom but $500 was appointed, against the other appointees and the trustees and executors, to set aside all these appointments as illusory or fraudulent and void.

It is necessary to mention that during Mrs. Meade's lifetime she had, under a particular exigency of her daughter Salvadora, and with a view of securing to the daughter a house which this daughter had herself built but not fully paid for, advanced to her about $3,500 in a purchase of that house. This sum, this daughter, by an agreement or bond subsequently made, bound herself to repay after her mother's death to Elizabeth, already mentioned as the widow of one of Mrs. Meade's sons, Robert, who, as above stated, had died in his mother's lifetime, leaving this widow, but leaving no children. The history of this transaction was thus given by the daughter, one of the defendants, in response to the bill, her account being corroborated generally by testimony from Mr. Gerhard, whom she mentions in it. "In about a year after her mother's purchase of the house (st. about June, 1849) the defendant ascertained in conversation with her, that this matter had prevented her from carrying into effect an object which she had much at heart, st. the raising of a fund to be left as a testimonial of her affection for the widow of her son Robert, who had been a devoted daughter to her, but for whom she had not the legal power to provide out of her trust estate by testamentary appointment. The defendant immediately, of her own voluntary motion and without any prompting or suggestion from her mother, declared that she would pay to Mrs. Robert Meade, the sum which had been advanced in the purchase of her house; and she afterwards wrote to her mother to the same effect, that she would pay to Mrs. Robert Meade out of whatever money might be coming to her at her mother's death. Nothing was said in this conversation about any sum which her mother was to leave her, nor was there then, or at any other time, any understanding or agreement whatsoever, that the voluntary promise of the defendant to pay Mrs. Robert Meade what her mother had advanced out of her income, should form any consideration or condition for her mother's bequest, or testamentary

appointment in her favor. The defendant heard nothing more on the subject until she was summoned to see her mother during her last illness, about the 27th December, 1851. She has been informed, and believes, that some months before her last illness, her mother had expressed to her counsel, Mr. Gerhard, her intention to bequeath the amount, which she had as above mentioned advanced out of her income for the purchase of the defendant's house, to Mrs. Robert Meade, so that the same would be payable to her immediately on the testatrix's death, and that she was led to change this intended disposition by the suggestion of Mr. Gerhard, that it might prove highly oppressive to the defendant, if she were laid under an obligation to pay the money immediately on her mother's death. On or about the 28th of December, 1851, the defendant and Mr. Gerhard met at her mother's residence; her mother briefly said to her that Mr. Gerhard had something for her to do, and that she wished her to do it. Mr. Gerhard showed her a paper, which had been prepared by him, in which she agreed to pay to Mrs. Robert Meade, out of the first money she should receive after the death of her mother, out of the trust estate, a sum which was left in blank. The defendant sat down and made a calculation of what her mother had advanced for her. The amount thus ascertained, $3,500, was inserted in the blank, and the paper was signed by her. She had no further conversation with her mother on the subject, except in regard to the person with whom the paper should be deposited, which, upon Mr. Gerhard's suggestion, and with her mother's assent, was deposited with a common friend, Mr. Stewardson." In regard to the appointment over to the children of the sums originally left to grandchildren, the bill charged that they were made under an express or implied agreement that the legatees should apply them to the purpose of the original appointment, and that the legatees were bound in conscience if they received them so to apply them: and it interrogated the legatees, who were defendants in the bill, whether any and what conversations, and what agreement or understanding, expressed or tacit, they had had with Mrs. Meade; and whether they themselves "do intend now or hereafter to hold or apply the said sums which may be received by them under the said alternate appointments for the use of either of the parties to whom by the said will the appointments were originally made;" and whether such holding or application is in pursuance of any verbal or written, tacit or expressed contract, agreement or understanding between them and Mrs. Meade, or because of any request of hers, or intimation from her. The answer denied very fully any such agreement or understanding, conversation, request and intimation; but declined to answer (as not bound to do so) whether since Mrs. Meade's death the legatees ever had made any agreement respecting the application of any sums which may be received by them under the alternative appointments; or to state what their intentions were on that subject; alleging that whatever disposition they might make of the same would not be in pursuance of any verbal or written, expressed or tacit

understanding with Mrs. Meade, or because of any request of hers, or intimation from her to them.

Mr. Meredith and Mr. McMurtrie, for complainant, contended that here was a clear trust created in 1812 for the children of Mrs. Meade, generally, i. e., for all the children, and for all alike. Its want of formality was wholly unimportant. A trust "for the children of Mrs. Meade" being a clear expression, and there being no other expression, it is a controlling one also. When the trust was created, in 1812, no reason existed for a distinction between the children, none was meant to be made, and none was made. The trust being for all the children alike, the wife, husband and trustees had no right, without the children's assent, to change it. If the deed of 1821 meant to change it, the terms "such of" and "in such proportions" must be treated as illegally put in, and the deed of 1821 must be read by the light of the settlement of 1812.

II. The head of illusory appointments was a well known one in England at the time of our Revolution. It has never been since repudiated here. It may be often difficult in application; but so are many heads of the law—salvage, commissions and others. But there are certain principles to be inferred from cases; and these will show that such an appointment as this is illusory—$500 to one child, and $10,000 nearly, to another.

III. A power to appoint to children excludes a power to appoint to grandchildren. The power of appointment in this case does not arise on a loose or informal instrument. On the contrary, it arises on an instrument of special form and solemnity; one which was made to originate, give and perpetuate form. Its words therefore are to control; and those words are clear. If the appointment is made by will, the right to appoint is among children alone. If the disposition is effected by intestacy, it is to children and grandchildren. But to take the provisions made in case of intestacy, and apply them to a wholly different, distinguished and preceding case—the case of appointment by will—is to confound a testament and intestacy, and to destroy the whole meaning of legal provisions. At any rate, carry the mode of interpretation through, and if the term "grandchildren" in the last clause—the clause of intestacy—is to control the word "children" in the former one—the clause providing for appointment by will—

prelimhen let the last clause control the former altogether; and make an equal division among all parties. To that the complainant will accede. Then with regard to the alternative appointment. Here, in the first place, is a litigious clause. If it "shall be determined that the said appointment and direction is invalid." It can never he "determined" without a suit. The clause invites directly to litigation. But the plan is a contrivance, a fraud on the power. Who doubts that the grandchildren will receive the amount if the legatees receive it? Indeed, the defendants decline, in terms, to give any account of present agreements or intentions. Of course, among persons of intelligence, having as they deserve to have, confidence in each other, there were no contracts or conversations where contracts or conversations would be fatal. But that there is an intention; in fact, an obligation in conscience, to carry it out, and that the alternative bequest was made with the expectation and purpose that it should be carried out fully, faithfully, exactly, who denies or doubts? And this is the very sort of thing from which equity took its rise—which it particularly lays its hands on as contemptuous and offensive, in this instance to herself.

P. M. McCall, contra.

GRIER, Circuit Justice. I. Is this appointment of $500 illusory and therefore void? The theory on which the English chancellors have acted in setting aside certain appointments as "illusory," is apparently founded in equity and justice. But like many other theories which are very plausible in the abstract, experience has shown this one to be difficult in application. The term "illusory" is vague and indefinite, depending on uncertain discretion or opinion of the person using it. Where a power is given by the donor to another to distribute, it is for the purpose of inequality, which future and unknown events may make just and judicious. The donor might do with his own as he pleased—give a penny to one, and ten thousand pounds to another. He has a right to intrust this power to another by substitution. The objects of his bounty are now all equally worthy (infants perhaps); if the division were made now, there is no reason for inequality. But before the time arrives for distribution, there may be a thousand reasons why the distribution should be unequal. When a chancellor undertakes to decide that any degree of inequality is a fraudulent exercise of the power, he is assuming to himself a knowledge of the secret wish and intention of the donor not expressed in the deed, and undertaking to exercise a discretionary power not intrusted to him, but to another. It would perhaps have been better originally to have adopted the adage "stet pro ratione voluntas" in such cases, than to have assumed this indefinite, discretionary and therefore dangerous power over men's property. However much the chancellor may laud his great principle, that equality is equity, how does he know that even extreme inequality was not the very purpose and object of the power? I certainly concur with the scruples expressed on this subject in the English chancery cases of Kemp v. Kemp, 5 Ves. 849; Butcher v. Butcher, 9 Ves. 393; and Bax v. Whitebread, 16 Ves. 15.

We know of no cases showing whether this doctrine, so much disliked by later authorities and finally abolished by act of parliament in England, has ever been adopted by the courts of Pennsylvania. We are, therefore, pleased to be relieved from the responsibility of deciding the question whether the appointment of $500 to one of a class of nine or ten in the distribution of $50,000 be illusory or not.

The power in this case is not only to distribute among, but to select from, the class of persons pointed out. It is what is called an exclusive power. The right to select necessarily implies the power to exclude. No distributee can say his share is illusory, when the distributor was not bound to give him anything. We cannot strike out the words "such of," out of this deed; and unless we do so, the rules of grammar and all legal precedent must be disregarded, before we pronounce this not to be an exclusive power. The cases on the subject are too numerous to be specially noticed, but may be found collected in Mr. Sugden's work on Powers (chapter 7, $5).

II. Are the appointments to the grandchildren void for defect of power? As the alternative appointments are made to "children" in case those to the grandchildren should fail for want of power, there can be no failure for defect of power or want of appointment. Whether the appointment to the grandchildren be good is, therefore, a question in which the complainants in this bill have no concern. It is a point, nevertheless, on which the court are compelled to give an opinion, and the only one in which we have found any difficulty in arriving at a satisfactory conclusion.

It is undoubtedly a general rule in the construction both of wills and deeds of settlement that while the word "issue" will be construed to include grandchildren, the word "child" or "children" will not receive such construction. Hence it has been laid down as an established rule, that a power of appointment to children, will not authorize an appointment to grandchildren. Neither will a legacy or devise to "children," be construed to include grandchildren. And when there is nothing else in the deed or will to show that the testator or donor did not use these words in a different sense, this rule of construction should not be departed from. But every instrument must be construed from its whole

contents taken together, in order to ascertain the true meaning and intention of the party or parties to it. No one isolated word or term can he seized upon and made to absolutely control the rest of the instrument. The testator or donor may have used particular words either in a wider or narrower sense than that given by philologists or judges. The word "issue" may be found from other clauses to have been used to designate a child or children only, and not to include grandchildren. Lord Alvanley has said (Reeves v. Brymer, 4 Ves. 698) that "children" may mean "grandchildren" where there can be no other construction, "but not otherwise." This dictum, like many other acute dicta, must itself be construed with some latitude, as if taken literally it would deny the right of the court under any circumstances to give such construction. But I presume that Lord Alvanley meant no more than that this term could receive no other construction, unless from the external circumstances of the testator the devise, gift or power would fail altogether, as in Gale v. Bennett, Amb. 681, where it was decreed that grandchildren might claim a devise "to children" where there were no children. Or where a more comprehensive meaning must necessarily be given to the word to render it consistent with other clauses of the instrument clearly expressed. Thus in Deveaux v. Barnwell, 1 Desaus. Eq. 499, grandchildren were decreed to take under the words "my surviving children," under the pressure of circumstances which showed that such must have been the intention of the testator; the court saying with Lord Macclesfield, "if there is no precedent it is time to make one." But such a construction should not be made unless a strong case of intention, or necessary implication requires it.

The deed before us shows a clear and indisputable intention to include grandchildren among the beneficiaries of the trust: it makes the issue of a deceased child the representative of its parent, and as much the object of the bounty of the donor as any living child. The clause giving the mother the power to select and distribute unequally among the beneficiaries, and which uses the word "children" only, is immediately followed by that defining the class of beneficiaries as "such of the said children as shall be living at the death of said Margaret" and "the issue of such children as may be dead share and share alike which their parent would have taken if living." Here the donor himself describes the persons meant in the first clause, giving a power of selection and distribution. They are described as the "children," but not as the children surviving at the death of the mother; but all the children of the donor and his wife, the dead to be represented by their issue or offspring if they left any. To construe this power so as to restrict the objects of it to a part of the beneficiaries, would be inconsistent with the clear intention that the issue of deceased children should stand in "loco parentis." When the deed of settlement was executed, no reason was known why any should be excluded; the grandchildren were equally the objects of the donor's bounty as their parents would have been if alive. If so, the power to select or distribute according to future changes among the objects of their

affection in order to its just execution, must be construed to include all the recipients of their bounty. Suppose all the children except one or two died before the mother, leaving issue; the exercise of the right either to distribute or select must be at the expense of nine-tenths of the beneficiaries who would be incapable of receiving anything by appointment. The power to select or distribute cannot be exercised at all, or only injuriously, unless it be as wide as the bounty.

We do not think it would be carrying out the intention of the donor as clearly expressed in this deed, to construe the word "children" so as not to include those deceased before their mother as represented by their issue. Any other construction which would make the exercise of the power of selection or distribution be a necessary exclusion of part of the beneficiaries contrary to the desire of either father or mother, the donor or the donee of the power, would in our opinion be a declaration that the deed is inconsistent with itself, and grossly absurd. We are of opinion, therefore, that the appointments to the grandchildren are valid.

III. Is the appointment to Salvadora a fraud and violation of the trust? It must be admitted that if the bond given by Salvadora to Mrs. Robert Meade stood alone, and without explanation, there would be some plausible grounds for this charge.

It is unnecessary to examine the numerous cases on the subject of fraudulent execution of powers, as we do not consider the facts of this case to bring it within the category. The answer in this case is responsive to the bill and instead of being impeached is fully supported by the testimony of Mr. Gerhard. They amply explain the whole transaction, and show there was no act tending, nor intention on the part of the testatrix to commit a fraud on the power entrusted to her, by improperly diverting the trust fund to herself or others for whom it was not intended. The debt due from Salvadora to her mother was transferred to Mrs. Robert Meade, while the time of payment was extended, till Salvadora should be in funds from the receipt of her share or portion of her expectancy in the trust. The whole transaction was just and honorable, and wronged no one.

Decree: That by the deed, &c, Mrs. Meade had an exclusive power of appointment, &c, which gave her a right to select among the objects of the power; that the appointment of $9,500 to Salvadora was not made in fraud of the power; that the grandchildren were proper objects of the power; and that the

several appointments, including the one of $500 to the complainant, were and are valid appointments under the power.

[1] {Reported, by John William Wallace, Esq., and here reprinted by permission.}