

BOYES v. COOK.

[1876 B. 37.]

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1880

March 12.

Will—Appointment by general Bequest—Power created subsequently to the Will
—Contrary Intention—1 Vict. c. 26, ss. 24, 27.

By a separation deed *A.* settled his property, reserving to himself a general power of appointment by will over one-third of it, and declaring the trusts of the remaining two-thirds for his wife and children. By his will, executed several months previously to the separation deed, *A.* devised and bequeathed all his property to trustees upon trusts for his wife and children:—

Held (reversing the decision of *Malins*, V.C.), that the will was a good execution of the power: and that the settlement and the circumstances under which it was executed could not be looked at to shew a contrary intention.

In re Ruding's Settlement (1) questioned.

THIS was an appeal from a decision of Vice-Chancellor *Malins*.

The suit was instituted for the administration of the trusts of a separation deed executed by *T. B. Boyes* and his wife.

On the 24th of October, 1860, *T. B. Boyes* made his will, whereby he devised and bequeathed all his real estate and the residue of his personal estate to his wife *Elizabeth Boyes*, *H. Cook*, and *A. Pickering*, upon trust to sell and convert the same into money, and to stand possessed of the proceeds upon trust to invest the same and to pay the annual income to his wife during her life or widowhood, and after her decease or second marriage, in trust for his children in manner therein mentioned.

After the date of his will differences arose between the testator and his wife and they agreed to live separate, the wife taking the care and maintenance of the children.

A separation deed was executed on the 10th of April, 1861, whereby the testator conveyed all his real and personal property to trustees upon trust to sell and convert the same into money, and to hold the proceeds upon trust to pay one-third of the income to the testator during his life, and after his death to stand possessed of one-third of the capital in trust for such per-

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sons and for such intents and purposes as he should by his last will or any codicil thereto direct or appoint, and in default of such direction or appointment, upon the same trusts as were thereafter directed respecting the other two-thirds of the trust funds, which were for the benefit of the children.

The testator died in 1875, without having revoked or altered his will, and the question arose in the suit on further consideration whether the residuary gift in the will operated as an execution of the general appointment reserved in the subsequent separation deed.

The case came on for further consideration before Vice-Chancellor *Malins* on the 23rd of July, 1878, when his Lordship, following his own decision in *In re Ruding's Settlement* (1), held that there was sufficient in the surrounding circumstances to shew a contrary intention on the part of the testator within the meaning of the 27th section of the *Wills Act* (1 Vict. c. 26), and that the will did not operate as an execution of the power in the deed.

From this decision the trustees of the separation deed appealed.

*J. Pearson*, Q.C., and *Cozens-Hardy*, for the Appellants:—

A will containing a general gift of property is a good execution of a general power of appointment under the 1 Vict. c. 26, ss. 24, 27, although the power was created after the date of the will: *Stillman v. Weedon* (2); *Thomas v. Jones* (3); *Hodsdon v. Dancer* (4). In order to prevent the bequest from operating as an execution of the power, a contrary intention must appear in the will; the surrounding circumstances cannot be taken into account. *In re Ruding's Settlement* was not rightly decided, for in that case the Vice-Chancellor presumed a contrary intention from the surrounding circumstances. In *Moss v. Harter* (5) a contrary intention appeared on the will itself. In the present case there is nothing in the will to shew a contrary intention, and there is no other property which the testamentary gift can affect, so that unless it operates as an execution of the power there will be an intestacy as to one third of the estate.

(1) Law Rep. 14 Eq. 266.

(3) 2 J. & H. 475.

(2) 16 Sim. 26.

(4) 16 W. R. 1101.

(5) 2 Sm. & Giff. 458.

*Simmonds*, for the testator's widow, supported the appeal. He referred to *Scriven v. Sandom* (1).

*C. H. Turner*, for the Plaintiff, who was one of the testator's children:—

It is impossible to construe the will without looking at the settlement to see if the power is properly executed: and when you look at the settlement it is clear that the testator did not intend the will to be an execution of the power. If any part of the settlement is looked at the whole must be considered. The two instruments must be read together; and if this is done it is clear that the object of the settlement will be frustrated if the will should operate as an execution of the power. This is sufficient to shew that the testator had no intention that his will should have any such effect. The will was in effect partially revoked by the deed.

*S. Hallett*, and *Marcy*, for the other children.

JAMES, L.J.:—

Notwithstanding the decision of the Vice-Chancellor in *In re Ruding's Settlement* (2)—which case, as at present advised, I find it very difficult to distinguish from the present, and if it be necessary to overrule that decision it must be overruled on the principle I am about to enunciate—I am of opinion that the decision appealed from cannot be sustained. The 24th section of the *Wills Act* enacts that every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will; and then the 27th section says, that a general devise or bequest of real or personal estate shall be construed to include any real or personal estate which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will. Taking these two sections together, it is clear that a will containing a general devise or bequest, and made before the

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(1) 2 J. & H. 743.

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creation of a general power to appoint by will, and remaining unrevoked until the testator's death, is a good execution of the power. In fact a general power of appointment really confers on the donee of the power the entire beneficial interest in the property subject to the power, and enables him to dispose of it as he pleases. In *In re Ruding's Settlement* (1) the Vice-Chancellor held that the surrounding circumstances could be looked at in construing the will. But when it is said that surrounding circumstances may be looked at, that only means that the circumstances existing at the time when the testator made his will may be looked at. You may place yourself, so to speak, in his arm-chair, and consider the circumstances by which he was surrounded when he made his will to assist you in arriving at his intention. But to look at a settlement subsequently executed is not to look at the surrounding circumstances which existed when the will was made. In my opinion we cannot look at the differences which arose subsequently between the testator and his wife, for the purpose of saying that the deed of separation operated as a partial revocation of the benefit conferred on the wife by the will. We cannot look at the separation deed for the purpose of construing the will. I think, therefore, that the decision of the Vice-Chancellor must be reversed.

BRETT, L.J. :—

It appears to me that *Thomas v. Jones* (2) rightly decided the meaning of the Act of Parliament, and laid down a general rule which should be followed in all cases. I confess I cannot follow the reasoning of the Vice-Chancellor in *In re Ruding's Settlement*. But assuming that there are special circumstances in that case which may support that decision, there appear to me to be no such special circumstances in the present. Therefore, even supposing *In re Ruding's Settlement* was rightly decided, I think it is no authority in favour of the decision in the present case.

COTTON, L.J. :—

I also agree that the decision of the Vice-Chancellor in this case cannot be supported. The 24th and 27th sections of the *Wills*

(1) Law Rep. 14 Eq. 266.

(2) 2 J. & H. 475.

Act lay down a general rule for these cases ; and the Vice-Chancellor, in *In re Ruding's Settlement*, did not dispute that general rule. He says there (1): " Upon the general question I intend to raise no doubt that a will containing a general bequest of property under the 27th section of the *Wills Act* passes all property which the testator had at the time of his death, including all the property over which he has a general power of appointment, whether the general power was created before or after the date of the will. Upon that subject I must be understood as not raising the slightest doubt." And then he goes on to deal with what he considered the special circumstances of that case. Now the 27th section of the Act says that a general bequest shall operate as an execution of a general power of appointment unless a contrary intention shall appear by the will. In my opinion that section applies, unless a contrary intention appears by the will, whether the will is made before or after the creation of the power. We have to look only at the will for a contrary intention, and the distinctions made by the settlement cannot be said to be a contrary intention appearing by the will. I think it is settled that where a general power to appoint by will is created after the execution of a will containing a general bequest, the testator must be taken to have known that his will would operate as an execution of that power unless he altered his will. That being so, there is nothing on the face of this will to shew that it should not operate as an execution of the power given by the settlement. I am, therefore, of opinion that this appeal must be allowed.

Solicitors for Appellants: *Munton & Morris*.

Solicitors for Respondents: *R. Hewlett ; Lewis & Indermaur ; Saunders & Baker*.

(1) Law Rep. 14 Eq. 272.

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