

WARRINGTON J. 1907
 ATTORNEY-GENERAL

Attorney-General is only to be entitled to such relief as he could have claimed if the action had been commenced on November 9, 1907, the date upon which he was added as a co-plaintiff by amendment.

PONTYPRIDD
 WATER-
 WORKS
 COMPANY.

The hearing was then proceeded with, and ultimately the action was compromised.

Solicitors: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd; Wrentmore & Son, for Frank James & Sons, Cardiff.*

W. I. C.

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 Jan. 14.

In re BARNETT.

DAWES *v.* IXER.

[1900 B. 2420.]

Power—Execution—“Writing or Writings”—“Appointment made by Will”—Testamentary Document not provable as Will—Validity—Wills Act, 1837 (1 Vict. c. 26), ss. 1, 9, 10.

Mrs. Barnett assigned a policy of assurance on her own life to trustees by a settlement which contained a proviso that it should be lawful for her at any time during her life “by any deed or deeds writing or writings with or without power of revocation to be by her duly executed in the presence of two or more credible witnesses to revoke all any or either of the” provisions of the settlement, and to appoint other trusts in their place. She subsequently signed a document by which she did not in terms revoke any of the provisions of the settlement, but purported to make certain dispositions of (*inter alia*) the property the subject of the settlement in testamentary form. This document was signed by her in the presence of two credible witnesses, but, inasmuch as her signature was not placed at the foot or end thereof, it could not be admitted to probate as a will. The question now raised was whether the document operated as an exercise of the power of appointment:—

Held, that the document was a “writing in the nature of a will in exercise of a power,” and therefore by s. 1 of the Wills Act, 1837, a “will” within the meaning of that statute; it was therefore an “appointment made by will” within the first sentence of s. 10, and, inasmuch as it was not executed as a will in accordance with s. 9, it was invalid as an execution of the power.

In re Broad, [1901] 2 Ch. 86, not followed.

By a settlement of September 20, 1888, Mrs. Barnett, a widow, assigned a policy of assurance on her own life for 3000*l.*, and all

sums which might be received by way of bonus or addition to the sums thereby assured, to trustees upon certain trusts which are immaterial for the purposes of this report; and the settlement contained the following proviso: "Provided always nevertheless and it is hereby declared and agreed that it shall and may be lawful for the said Ann Barnett at any time or times during her life by any deed or deeds writing or writings with or without power of revocation to be by her duly executed in the presence of two or more credible witnesses to revoke all any or either of the gifts directions limitations and appointments hereinbefore contained of or relating to the moneys and premises by these presents expressed or intended to be assigned and to give direct limit and appoint such other disposition use or uses trust or trusts concerning the same moneys and premises or any part thereof as she the said Ann Barnett shall think proper hereafter to express by such deed or deeds writing or writings these presents or anything herein contained to the contrary notwithstanding."

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On August 26, 1846, Mrs. Barnett signed a document by which, without in terms revoking the provisions of the settlement, she purported to make certain dispositions of the property thereby settled. The document commenced with the following words: "The life assurance for three thousand pounds at my death I wish my two sons C. J. and H. G. Barnett to receive the money," and then she gave directions as to what they were to do with it. She proceeded to deal with other property not subject to the settlement as follows: "The chains glass watch seals gold rings and gold buckle I generally wear I leave Miss Dekin and all my clothes. I leave out of my money in the English funds one thousand pounds to my son Edward and one thousand pounds to my son William, the principal not to be touched without my son Henry's consent the remainder in the English funds to my son H. G. Barnett let it be what it may. My funeral expenses and all my debts to be paid out of the money at my bankers. I wish ten pounds to be given to my own maid and five pounds to each of my servants for mourning—after paying the above the remainder at my bankers to be equally divided between my sons C. J. and H. G. Barnett." She made similar dispositions of other properties,

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and concluded thus : “ Whatever bonus or sum of money may be added to the policy of assurance my wish is should be given as follows ”; and she named the persons amongst whom it should be divided.

This document was signed by her in the presence of two credible witnesses, but, inasmuch as her signature was placed considerably below the end of the writing, the document could not be admitted to probate as a will.

The question in dispute was whether this document was a valid exercise of the power of revocation and fresh appointment contained in the settlement. Mrs. Barnett died in March, 1849, without having exercised the power in any other way.

In July, 1849, a new trustee of the settlement was appointed by a deed which recited the document of August 26, 1846.

The tenant for life under the settlement as modified by the document died in 1897.

This summons was taken out by the last surviving trustee of the settlement of 1838 to determine (inter alia) whether the document of August 26, 1846, operated as an appointment under the power contained in the settlement, and, if not, who was entitled to the trust funds.

John Henderson, for the trustee.

J. F. W. Galbraith, for a party who claimed to be entitled under the document of 1846 to a share of the settled funds. The document of 1846 was intended to operate, and did operate, as a valid appointment, and it has always been acted on as such. If the document had been actually a will there is authority for saying that it would have operated as an execution of a power to appoint by “ writing or writings ”: *Collard v. Sampson*. (1) It was not the less a writing because it could not be proved as a will.

[He was stopped by the Court.]

Coles, for a party who took under the settlement in default of revocation and reappointment. The document is void under the first words of s. 10 of the Wills Act. It was testamentary in character, and revocable until the death of Mrs. Barnett; therefore it was

(1) (1853) 4 D. M. & G. 224, 227

void unless it was executed as a will in accordance with the terms of the Wills Act. It was an ambulatory disposition of property not to take effect till her death, and was the very kind of document struck at by the Wills Act. The Legislature intended that every document intended to take effect on death should be executed as a will. By s. 1 of the Wills Act the word "will" extends to an appointment "by writing in the nature of a will in exercise of a power," which is an accurate description of the document of 1846. It is therefore clear that it is an "appointment made by will" within the first sentence of s. 10, and is invalid because it is not properly executed. Mrs. Barnett need not have made the appointment in a testamentary form; but she chose to do so, and ought to have complied with the statutory formalities. As it is, the document has no effect at all: *In re Daly's Settlement*. (1) On the other hand, the decision in *In re Broad* (2) is inconsistent with the total avoidance of the document. In that case, however, the first part of s. 10 was not referred to, and the question was treated purely as one of construction.

J. F. W. Galbraith, in reply. This is a question of the construction of the words of the settlement. Mrs. Barnett had power to appoint by any writing or writings duly executed in the presence of two credible witnesses, and the document of 1846 answers that description. The property did not fall in till her death, so the appointment was necessarily ambulatory in form. The document is not a "writing in the nature of a will" within s. 1. It is severable; it refers partly to the policy and partly to her own property, and the part which purports to be an appointment of the settled funds was not revocable. It was not made void by the first part of s. 10, for the whole of that section must be read together, and, as is shewn by the marginal note, it refers to appointments by will only; whereas this is an appointment by writing. The object of the section was to provide that in cases where additional formalities were prescribed by the settlement the appointment should be good provided the statutory formalities only were complied with: *Collard v. Sampson*. (3) The section

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(1) (1858) 25 Beav. 456, 460.

(2) [1901] 2 Ch. 86.

(3) 4 D. M. & G. 224, 227.

WARRINGTON J. applies only to powers requiring specifically a will, and does not affect powers requiring an instrument in writing: Farwell on Powers, 2nd ed. pp. 173, 174; *West v. Ray* (1); 1908
BARNETT, *In re*. *Taylor v. Meads*. (2) A decision to this effect is implied in DAWES *In re*. *In re Broad* (3), though the section was not referred to. All the formalities required by the settlement have been fulfilled, and the appointment is therefore valid.

Ward Coldridge and *H. W. Wickham*, for other parties, supported the same contention.

WARRINGTON J. There are two questions in this case. The first question is whether the document of August 26, 1846, is an "appointment made by will" within the meaning of s. 10 of the Wills Act; and the second question is whether, if that document is an "appointment made by will" within the meaning of that section, it is a valid execution of a power to appoint by "writing or writings"; the document in question not being executed in accordance with the formalities required by the Act. [His Lordship stated the facts, and continued:—] If it were not for the provisions of the Wills Act, it could hardly be contended that the document of 1846 was not a valid exercise of the power. The power is to appoint "by any deed or deeds writing or writings with or without power of revocation to be by her duly executed in the presence of two or more credible witnesses." This document was a writing duly executed in the presence of two credible witnesses, and would therefore fall within the terms of the power. The whole question turns on the provisions of s. 10 of the Wills Act; and the construction of the first part of that section has never, as far as I can see, come before the Court directly for judicial determination, although there have been plenty of cases which turned on the second part. The section is as follows: "No appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will,

(1) (1854) *Kay*, 385, 393.

(2) (1866) 4 D. J. & S. 597, 602.

(3) [1901] 2 Ch. 86.

notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity." The word "will" is defined in s. 1 of the Act to "extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power. . . ." In the first place, is this document of 1846 an appointment made by a "writing in the nature of a will"? I will not read it again; it must be patent to everybody who heard it read that this was a document intended to take effect at Mrs. Barnett's death, and not before. That is to say, that it was to have the characteristics of a will, and was intended to express the desires of the person who signed it as to what should be done with the property of which she was capable of disposing, after her death, and not before. It is sufficient to refer to the terms of the directions to pay her funeral expenses and debts out of the money at her bankers, which must mean the amount of money in her bank at the date of her death, to make it clear that the document, taken as a whole, was intended to operate as part of her testamentary dispositions, and was not intended to be an immediate disposition of the property. But it is said that, although that may be true with reference to that part of it in which she was dealing with property other than that comprised in the settlement, it does not apply to what she was dealing with under the power of appointment. But I cannot separate the document like that; I must deal with it as a whole; and in my opinion it is a will within the definition of a will in the Wills Act, and therefore ought to have been executed with the formalities required by that Act.

If I am right in saying that this was an appointment made by will, the question is whether it is invalid by reason of the provisions of s. 10. The provision of that section applicable to this case is the first sentence of the section, "No appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required." This is an appointment made by will, and is an exercise of a power; the express words of the section, therefore, would make it invalid. It is said that I must read into the section after the words "of any power" the words "to appoint by will," and read it as if it

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had said "no appointment made by will, in exercise of any power to appoint by will, shall be valid"; so that, as this is only incidentally a power of appointment by will, because by the literal words of the settlement it has to be by "writing," the first part of this section does not apply, because it is an appointment made in exercise of a power to appoint by writing, and not in exercise of a power to appoint by will. The only argument that can be adduced in support of that contention is derived from the words used in the second part of the section, and the way in which they have been treated in *Taylor v. Meads* (1) and *West v. Ray*. (2) The point in both those cases was this. There was a power to appoint by writing signed, sealed and delivered in the presence of and attested by two or more credible witnesses—that is a formality larger than that required by the Wills Act—and reliance was placed on the second part of the 10th section in support of the contention that the document was valid as an appointment, although not executed with the extra formalities required by the document creating the power, which were necessary to make it a valid execution of the power. It was pointed out in those cases that the part of the section which the Court was dealing with, namely, the second part of the section, only applied to appointments which were required to be made by will, and that they were not dealing with appointments to be made by will, but with appointments to be made by writings executed in a particular way. The powers could be exercised by will, but they were not necessarily appointments by will, and therefore that part of the section did not apply. These cases are not authorities in the present case. It is true that the learned judges in those cases spoke of the 10th section as that with which they had to deal, and they gave their views of the meaning of that which they so described; but it is obvious when the section is read that they were referring to the part of the section which was material to the cases with which they were dealing, and not the part I am dealing with. It is impossible for me to construe that section otherwise than in accordance with its plain meaning; and if I find a document which purports to be an appointment by will, it is clear that that cannot be valid unless it is executed in

(1) 4 D. J. & S. 597.

(2) *Kay*, 385.

accordance with the formalities required by the Act. And there is a very good reason for this provision. If a person having a power of appointment by writing exercises it by an ambulatory document which is not to operate till after his death, and is therefore revocable although no express power to revoke is reserved, it is a will, and ought to be executed as a will in accordance with the Act if it is to be valid. That is the plain meaning of the section, and in the absence of authority to the contrary I must hold that this is not a valid exercise of the power.

But I cannot part with the case without referring to an authority which is to some extent adverse to this decision—*In re Broad*. (1) The facts there were that under the instrument creating the power the appointment might be made by writing or writings sealed and delivered in the presence of two or more credible witnesses, or by will or by any writing in the nature of or purporting to be a will. The donee of the power in that case had signed a document purporting to be a will, but had not executed it in accordance with the Wills Act; and Kekewich J. held that, as it clearly purported to be a will, although it might not be in the nature of a will, it was a valid exercise of the power. The result of that case is adverse to the decision I am about to pronounce, but I do not consider that it is an authority against it, for this reason. The 10th section, which is the determining factor in my decision, was not referred to at all in that case. Whether the learned judge and the counsel on both sides forgot the first part of s. 10, which is not often referred to—whether we (2) all forgot it or not, I do not know; but the learned judge dealt with the question as if the first part of the section did not exist. He dealt with it purely as a question of construction; and said: “Here I have a power which can be exercised by a document purporting to be a will, and I have a document which is not a will but purports to be a will, and therefore I hold that that document is a proper exercise of the power.” I do not say anything about the correctness or incorrectness of that decision. If I said anything about it at all, I should say that it seemed to me to be perfectly obvious, in the way I have stated it, that the

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(1) [1901] 2 Ch. 86.

(2) Mr. Justice Warrington, then K.C., was of counsel for the plaintiff.

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decision must have been as the learned judge decided. But the particular point with which I have to deal was not before him, so it is not an authority on which I can place any reliance. I only have to construe a few words of the statute. On the true construction of the document this is an "appointment by will in exercise of a power," and is invalid as an exercise of the power inasmuch as it was not executed in accordance with the Act.

Solicitors: *Dawes & Sons; Griffith & Gardiner; Campbell Wade, for Nockolds & Wade, Bishop's Stortford.*

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In re WILLIAM FALCONER'S TRUSTS.

In re ANN FALCONER'S TRUSTS.

PROPERTY AND ESTATES COMPANY, LIMITED *v.* FROST.

[1907 F. 224.]

Power of Appointment—Partial exercise of, by Donee—Range of Investments authorized by Instrument creating Power — Extension of, by Donee—Validity.

Where the donee of a power of appointment does not appoint to objects of the power he cannot alter the range of investments authorized by the instrument creating the power.

A testator by his will gave all his real and personal estate to trustees upon trust to sell and convert and to invest the proceeds in certain investments which did not include mortgages of leaseholds, and he directed them to pay the income of the trust estate to his wife for life, and after her death to hold the trust estate upon trust for such of his nine children as his wife should by will or codicil appoint, and in default of appointment upon trust to divide the same among his nine children in equal shares. The testator's widow by her will, in exercise of the power given her by the testator's will, appointed certain sums to her daughters in respect of their one-ninth shares, and declared that the trustees of the testator's will might invest the moneys subject to the trusts of that will in certain securities which were not within the range of investments thereby authorized, including mortgages of leaseholds. By a codicil to her will the widow, in further exercise of the power, declared that the trustees of the testator's will should hold two of the one-ninth shares of the trust estate upon trusts in favour of certain objects of the power, and, subject to a slight modification in the amounts of the sums appointed by her will, made by a second codicil, she allowed the bulk of the trust estate to pass under the testator's will in default of appointment. After her death the trustees of the testator's will