

1908 in this particular contract. I think it is perfectly plain that there  
 THE FORFAR- was on each side an undertaking—the defendants undertaking  
 SHIRE. to do certain things, and the plaintiffs undertaking to bear the  
 Bargrave Deane risk if those things were done. The defendants have failed to  
 J. do that which they undertook to do; therefore they cannot look  
 to the plaintiffs in their part of the contract to carry out the  
 contract on their part. I find, therefore, in this case that the  
 plaintiffs have succeeded in establishing their claim against the  
 defendants for the damage sustained by reason of this breach of  
 contract, the measure of the damage being the expense to which  
 they were put in having the damage repaired, occasioned by the  
 neglect on the part of the defendants.

There will be judgment for the plaintiffs with costs, and a  
 reference to the registrar to assess the amount of the damage.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *E. F. Turner & Sons.*

T. L. M.

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# WRIGLEY v. LOWNDES AND OTHERS.

July 23, 24.

*Special Power of Appointment—Will—Exercise by earlier Will—No express Clause of Revocation—Complete Exercise of Power—Later Will alone admitted to Probate.*

Whether a special power of appointment has been exercised or not by will must depend, in the absence of any specific reference to the power, or the property subject to the power, upon whether it can be gathered from the terms of the will that the donee of the power had the power in mind and meant to exercise it.

The testatrix (donee of a special power of appointment) made a will by which she duly and in terms exercised such special power of appointment. In a later and holograph will executed by her were these words, “I wish to leave at my death everything I have power to will to my husband”:—

*Held*, that the testatrix meant to exercise and did exercise the special power by the later will, and that that will revoked the earlier will.

*In re Weston's Settlement, Neeves v. Weston*, [1906] 2 Ch. 620, referred to.

THE question here raised on the construction of a will was as to whether the testatrix, the donee of a special power of appointment, had effectually exercised that power.

The material facts are set forth in the head-note and judgment.

*Micklem, K.C.*, and *Bayford*, for the plaintiff. There remains only the question whether the testatrix had in her mind the existence of the power and its exercise. The words used in the second will are ample to shew that she had: *In re Teape's Trusts*(1); *Thornton v. Thornton*(2); *Kent v. Kent and Others* (3); *In re Waterhouse, Waterhouse v. Ryley*. (4)

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*Atkin, K.C.*, and *R. H. Pritchard*, for some of the defendants. Assuming that the second will revokes the first and is alone to be admitted to probate, the question is whether the second will contains such a reference to the power as to shew an intention to execute it: *In re Esther Williams, Foulkes v. Williams*. (5)

The only possible construction of the second will, which disposes of property apart from the power, is that it gives an absolute estate to the husband, but the only power the testatrix had was to appoint a life interest.

The Wills Act (1 Vict. c. 26), s. 27, does not help this case, because it only applies to a general power of appointment, and this is a special one. [They also referred to *Sykes v. Carroll* (6) ; *Brodrick v. Brown*. (7)]

*Barnard, K.C.*, and *Willock*, for the first two defendants on the record, did not argue.

*Micklem, K.C.*, in reply. An express reference to the power is not necessary. There are alternatives, e.g., a reference to the property subject to the power or an intention, otherwise expressed in the will, to exercise the power: *In re Weston's Settlement, Neeves v. Weston*. (8)

July 24. SIR GORELL BARNES, PRESIDENT. The facts of the case are that on March 25, 1904, the deceased Katherine Wrigley, late of The Priory, Hoylake, in the county of Chester, executed a will which contained a clause as follows: "In exercise of the power in this behalf me hereunto enabling under and by virtue of the will with the codicil thereto of my father, Walter Barton Wignall,

(1) (1873) L. R. 16 Eq. 442.	(5) (1889) 42 Ch. D. 93.
(2) (1875) L. R. 20 Eq. 599.	(6) [1903] 1 I. R. 17.
(3) [1902] P. 108.	(7) (1855) 1 K. & J. 328.
(4) (1907) 77 L. J. (Ch.) 30, C. A., affirming 96 L. T. 688.	(8) [1906] 2 Ch. 620.

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deceased, which will bears date the 6th day of March, 1894, and which codicil bears date the 20th day of September, 1895, and of which will and codicil my brother Frederick William Wignall, . . . Ernest Campbell Lowndes, and my father's cousin Edward Wignall are the trustees and executors, and of every other power me hereunto enabling, I appoint to or in favour of my husband, the said Arthur Harold Wrigley, the sum of 400*l.* a year, payable out of the yearly income of my share of the trust fund passing under the said will calculated from the date of my death or of the death of my mother, whichever shall last happen, during such portion of his life as he shall remain my widower and not be married again."

That clause in her will is the result of a power which was contained in the will referred to in the said clause. The power conferred by Mr. Walter Barton Wignall's will is in these terms: "I empower my daughter by her will to appoint to or in favour of her husband the whole or any part of the yearly income of the share of the said trust fund for any period determinable on or before the death of such husband, but so that on his marriage again the benefit to be derived by him under or by virtue of such appointment shall during the existence of any issue of his marriage with my said daughter be limited and extend to the annual income of one-third only of her same share. . . ."

One other document has been referred to, and, although I do not think it has a strict bearing on the question before the Court, I understand that it may have a bearing if the will executes the power. A settlement, which was, I think, post-nuptial and supplemental to his second marriage, was made by Walter Barton Wignall on April 14, 1886, and it contains a clause as follows: "Provided always that each daughter of the said Walter Barton Wignall may (notwithstanding the antecedent trusts) by her will appoint that in the event of her dying without leaving issue her surviving or such issue so surviving her shall not afterwards under the trusts aforesaid obtain a vested interest in her share of the said trust fund, the income of her share of the trust fund shall, from and after the failure of such issue, be paid to her husband (if any) during such portion of his life as he shall remain her widower and not married again or for any shorter period."

These two powers were possessed by the deceased at the time of her death ; one of them is referred to and noticed by her will of March 25, 1904.

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But before her death, which occurred on May 2, 1907, she made a new and very short will, which is in these terms :—

“I wish to leave at my death everything I have power to will to my husband Arthur Harold Wrigley.

“March 28th, 1907.

“Katherine Wrigley.

“Witnessed by M. Sudden.

“Witnessed by B. Banks.”

I am satisfied that this document was duly and properly executed and attested.

The husband, who is the plaintiff in this case, says that this is the only document which should be admitted to probate, on the ground that it not only disposed of such small amount of property as the deceased herself possessed, but was a will which, by the light of facts which she must have known, exercised the power of appointment which she possessed. The allegation in the statement of claim is, “that the deceased by her said will dated the 28th day of March, 1907, duly exercised the power of appointment and revoked the said will dated the 25th day of March, 1904.”

The defendants Ernest Campbell Lowndes and Charles Mylne Barker, as executors of the will of March 25, 1904, in substance say “that the power of appointment conferred upon the deceased by the will and codicil of her father, Walter Barton Wignall, deceased, was a special power of appointment, and that by the terms of the will dated the 28th day of March, 1907, the deceased did not duly exercise the same nor did she revoke the will dated the 25th day of March, 1904.”

The other four defendants plead that “neither of the said wills exercised the power of appointment given to the deceased by the will and codicil of her father,” and they ask the Court to pronounce against both the said wills.

That leaves a very short question for decision. I do not say that the question of execution of powers is a very simple matter. But when one comes to examine the most important of the cases

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on the subject, they all turn on the application of general principles—principles which are laid down and applied with more elasticity at the present day than formerly—to the particular words and facts of the particular case before the Court.

The only use of the case is to establish and emphasize a general principle.

I take, for my statement of the principles, the words of Buckley L.J. in *In re Weston's Settlement, Neeves v. Weston* (1), where he says: "For the exercise of a special power there must be either (1.) a reference to the power, or (2.) a reference to the property subject to the power, or (3.) an intention otherwise expressed in the will to exercise the power." All that that really means is whether one can gather, from the terms of the will itself, that the testatrix had in mind that she had a power and meant to exercise it.

Turning, then, from the principle, let us look at the form of this last will.

It is not in the ordinary general terms we have so often met with in the case of holograph wills, saying that the testator or testatrix leaves everything to the wife or husband, as the case may be. But this will shews that the testatrix knew she had the power and meant to exercise it. It is capable, no doubt, of disposing of the property which she herself possessed; but it is hard to say that she did not intend to dispose of the property under the power. "I wish to leave at my death everything I have power to will to my husband"—very short and very emphatic. Bearing in mind the facts which she must have known at the time, I hold that she meant to exercise, and did exercise, the power which she undoubtedly possessed.

This document, therefore, is alone admissible to probate, as it revokes any will that went before it. I pronounce for the last will, and for that alone.

The declaration I make, at the request of counsel, is that the deceased by this will executed the special powers conferred upon her by the will and by the settlement; and the pleadings may be amended so as to cover that declaration about the settlement.

(1) [1906] 2 Ch. 620, at p. 624.

The costs of all parties, as between solicitor and client, may be paid out of the estate.

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Solicitors for plaintiff: *Sharpe, Parker, Pritchards, Barham & Lawford, for Grierson & Martin, Liverpool.*

Solicitors for first two defendants: *Charles Mylne Barker & Co.*

Solicitors for other four defendants: *Chester, Broome & Griffithes, for W. F. Morecroft, Sproat & Killey, Liverpool.*

H. D. G.

# IN THE ESTATE OF FANNY DEBORAH MEYER.

1908

July 27.

*Testamentary Papers—Execution by one Person of Codicil of the other Person—  
—Mistake—Intention—Effect—Refusal of Probate.*

Two sisters executed codicils similar in terms. By mistake each sister executed the codicil intended for, and purporting to be, that of the other.

Upon application after the death of one of the sisters for probate of the codicil executed by her:—

*Held* that, the intention to execute the document propounded being wholly absent, probate must be refused in respect of the whole document, notwithstanding that it contained some testamentary dispositions which were intended by the testatrix, being, in fact, common to the two documents executed.

FANNY DEBORAH MEYER and her sister Emilie Meyer for many years resided together, keeping a joint establishment.

Some time before March, 1907, they, not for the first time, executed mutual wills.

On March 4, 1907, their solicitor went to their house by request and took instructions from both of them to make codicils to their respective wills in similar terms, and he made a note of these instructions on the original paper whereon he had taken instructions for their wills.

After the death of one of the sisters it was discovered, on opening the envelope containing the will of the deceased, that she had executed the codicil intended for her sister, and the sister had executed the codicil intended for the deceased.