The Duke of PORTLAND and Others - Appellants.

Lady MARY E. TOPHAM and Others - Respondent

A power to be validly executed must be executed without any indirect object. The donee of the power must give the property, which is the subject of it, as property, to the person to whom affects to give it.

A. created a power to appoint a fund between two of his daughters, *H*. and *M*., or to appoint it to one, in exclusion of the other, and subject to such restrictions, &c., as the donee of the power (*A*.=s son) might think fit. The donee of the power executed a deed of appointment, which in form gave the whole of the fund to one of the sisters, *H*., but it was understood between the parties that *H*. was only to receive one moiety of the fund for her own use, and that she was to allow the other to accumulate, subject to some future arrangement, and in pursuance of this understanding *H*. gave her brokers directions to invest, in the name of the donee of the power, of another brother, and of herself, one-half of the fund, and the interest thereon, to accumulate:

HELD, that this was, in equity, a fraudulent execution of the power, and that the deed of appointment was wholly void.

The power authorised the donee to execute an appointment with or without a power of revocation and new appointment. The deed of appointment did not reserve the right of revocation. The Lords while affirming the decree of the Court below, which declared the deed of appointment void, introduced into the Order the words "without prejudice to any question as to any future exercise of the power of appointment," but refused to express any opinion whether any such future exercise of the power could be permitted.

THIS was an appeal against certain Orders of the Lord Justices.

The late Duke of *Portland* married, on 4th *August* 1795, a daughter of Major-General *Scott*, and on that marriage a settlement was executed by which, among other things, certain *English* estates of the Duke were charmed with a sum of 40,000*l*. for the younger children of the marriage, in such shares and proportions as the Duke and Duchess or the survivor should appoint, and in default of appointment, among the younger children equally. A similar charge, with nearly similar powers of appointment, was created on the *Scotch* estates of the Duchess. On the 8th *June* 1814, a deed, with similar provisions, was executed, and was confirmed by a private Act of Parliament. There were nine children of the marriage. The eldest son died in 1824 unmarried, and the present Appellant, now Duke of *Portland*, became then., as eldest surviving son, Marquis of *Tichfield*. Lady *Caroline Bentinck*, one of the daughters, died in 1827. There were

then seven children living, and on the marriage in that year of Lady *Charlotte* with Mr. *Denison*, one-seventh of the 40,000*l*. charged on the *English* estates as appointed to be raised for her use, and was, in fact, paid in cash by the Duke, he taking an assignment of the seventh to himself as part of his personal estate. The same course was followed with respect to Lady *Charlotte*'s seventh share of the 40,000*l*. charged on the *Scotch* estates. On the marriage of Lady *Lucy*, in 1828, to Lord *Howard de Walden*, the same course was pursued, as to the charges on both the estates, in her favour.

Early in the year 1843, it came to the knowledge of the Duke that his youngest daughter Lady *Mary Bentinck*, had entertained proposals of marriage from Colonel (now Sir *William*) *Topham*. His Grace did not think fit to approve of the match, and strongly expressed his opinion, threatening that he would, so far as he had the power, leave away everything from Lady *Mary*. Her Ladyship promised not to marry in the Duke's lifetime.

On the 24th *June* 1843, an indenture was executed between the Duke of *Portland* of the first part, the then Marquis of *Tichfield* (now Duke of *Portland*, and Appellant), Lord *George Bentinck* and Lord *Henry Bentinck*, of the other part, by which the Duke covenanted with the Marquis, Lord *George*, and Lord *Henry*, to transfer a sum of 52,000*l*. Three per Cent. Consols, into their names; and it was declared that the Marquis, Lord *George*, and Lord *Henry*, should stand possessed of the said sum of 52,000*l*. upon trust, to invest the dividends during the life of the Duke, and

after his decease the said trust fund and all accumulations should be held by them on trust for Lady *Harriet Bentinck* and Lady *Mary Bentinck* (the two surviving unmarried daughters), or for one of them exclusively, if the other should be living at the time of the appointment thereinafter mentioned (or the issue, &c.), in such parts, shares, and proportions, and for and with such limitations in favour of one or more of them, and either by way of legacy, portion, present or remote interest, or otherwise, and to vest and be payable, &c. at such time or times, age or ages., and upon such contingencies, and under and subject to such directions and regulations for maintenance, education and advancement, and such conditions and restrictions as the Duke during his life, or, after his decease, the person who during the lives of the said Lady *Harriet* and Lady *Mary*, or the survivor of them, should be Duke of *Portland*, from time to time, by any deed, &c., should appoint. And in default of and until such appointment upon trust, during the joint lives of Lady *Harriet* and Lady *Mary* to pay the dividends to them as tenants in common for their respective absolute use and benefit; and after the decease of either, to pay the whole of the dividends to the survivor for life ; and after the decease of the survivor, the trust fund and dividends were to go to such person as should then be Duke of *Portland*. In fact, 50,000*l*. of this sum had been invested on mortgage ; the rest was invested in the Three and a-quarter per Cent. Consols.

By an indenture of 29th *June* 1843, between the Duchess of the first part, the late Duke of the second part, the then Marquis of *Tichfield* (the now Duke and Appellant) and Lord *George Bentinck* of the third part, three sums of stock, amounting to 23,343*l*., Three and a-half per Cent. Consols, and a sum of 9,000*l*., due on a

bond of the Duke, all of which were stated to be subject to the disposition of the Duchess, were assigned to the then Marquis of *Tichfield* and Lord *George* as trustees, in trust to pay the dividends and interest to the Duchess for her life, and after her death to set apart so much of the trust fund as, at 3*l*. per cent., would realise 800*l*. per annum on the trusts thereinafter declared, and subject thereto absolutely to Lord *Henry*, or if he should die in the lifetime of the Duchess, to Lord *George Bentinck* absolutely; and as to the fund so set apart to produce the 800*l*. per annum, to be held upon trust during the life of Lady *Mary Bentinck*, and provided the Duke during his life, or, after his decease, the person who should for the time being, during the life of Lady *Mary*, be Duke of *Portland*, by any deed, &c., either with or without power of revocation and new appointment, &c., should so direct or appoint, but not otherwise, to pay any annual sum not exceeding 800*l*. out of the dividends for the benefit of Lady *Mary* for life, in such manner, &c., as should be expressed in such appointment, and subject to such trust and power to stand possessed of the same for Lord *Henry*, and in case he should die during the life of the Duchess, for Lord *George*.

The Duchess of *Portland* died in 1844, on which event a part of the principal sum was paid to Lord *Henry* absolutely, and the rest, producing 800*l*. a year, continued invested as a trust fund. The sum of 800*l*. arising from this trust fund had been regularly received by Lord *Henry*, but not for his own use, nor had he paid it over to Lady *Mary*, but his bankers, under his order, dated *September* 1844, had regularly invested it in the purchase of consols. By a memorandum of that date, he acknowledged that he was possessed of the fund Aduring the life of my sister, Lady

Mary, in trust for her, as my father, or the Duke of *Portland* for the time being, may direct. In case of no such direction, the investments are to belong to me absolutely.@

Lord *George Bentinck* died early in the autumn of 1848. His death reduced the number of younger children of the Duke then living to five. Of these Lady *Harriet* and Lady *Mary* were unmarried. The Duke then desired to divide the two sums of 40,000*l*. equally among them. He proposed to give a sum of 2,666*l*. 13*s*. 4*d*. between his two married daughters, which would bring their respective shares, charged on the two estates, to 16,000*l*. each, and then to divide the remaining 24,000*l*. into three parts, one to be given to Lady *Harriet*, one to Lord *Henry* for himself, and one to him in trust, subject to any appointment of the Duke of *Portland* for the time being, as expressed in the deed of 29th *June* 1843.

Two deeds poll, of the 13th and 28th *October* 1848 (the latter relating to the Scotch estates) were, in pursuance of this intention, executed by the Duke, reciting the facts already stated, and appointing 8,000*l*. to be raised immediately after his death to be paid to Lady *Harriet* as her fifth share of the sum of 40,000*l*., and appointing to Lord *Henry* the sum of 16,000*l*., being two other fifth parts of the said sum.

Only one moiety of the sum appointed to Lord *Henry* was in fact paid to him absolutely, the other was paid to him on trust, and Lord *Henry* signed an order directing Messrs. *Drummonds*, his

bankers, to invest this moiety in the names of the Marquis of *Tichfield* and of Mr. *Ellis*, and to place the dividends in their joint names to an account AM.,@ which it was by the bill alleged meant the initial letter of Lady *Mary*'s name. Messrs. *Drummonds* executed this order, and invested the 16,000*l*. (formed of the two sums of 8,000*l*. charged severally on the *English* and *Scotch* estates) in the purchase of 18,686*l*. Three and a quarter per Cents., in the names of the Marquis and Mr. *Ellis*.

By an indenture of the 24th *November* 1848, between Lord *Henry Bentinck* of the one part, and the Marquis of *Tichfield* and Mr. *Ellis* of the other part, after reciting that Lord *Henry* had invested the sum of 16,000*l*. in the purchase of 18,686*l*. Three per Cents, in the names of the Marquis and Mr. *Ellis*, with the intent (from the natural love and affection which Lord *Henry* had for his sister, Lady *Mary*) that a provision should be made for her upon such contingency as was thereinafter expressed, he directed the Marquis and Mr. *Ellis* to stand possessed of the same (which they agreed to), upon the following trusts:- From the expiration of 21 years from the day of the decease of Lord *Henry*, or till (previously thereto) such appointment should be made as would entitle Lady *Mary* to the transfer of the whole of the stocks &c., or until she should die previously to the appointment of the whole to her, that the Marquis and Mr. *Ellis* should receive the dividends on the 18,686*l*., and the dividends on the investments thereof to form an accumulating fund; and upon farther trust at the expiration of the accumulation, or at an time previously, on the direction of the Duke of *Portland* for the time being, to pay all or any part, &c., for the benefit of Lady *Mary*, in such manner as the Duke of

Portland for the time being should direct, and if no direction, for the benefit of Lord *Henry* absolutely.

By another indenture of the 24th *November* 1848, between the Duke of the first part, the then Marquis *Tichfield* and Lord *Henry Bentinck* of the second part, and *Charles Heaton Ellis* of the third part, the Duke limited all his *Marylebone* estates to Mr. *Ellis* upon trust (among other things), to raise certain annuities of 1,250*l*. for different members of the family, and after the death of the Duke to raise a clear annuity of 2,720*l*. during the joint lives of Lady *Harriet* and Lady *Mary*, and pay the same unto the Marquis of *Tichfield* and Lord *Henry* and the survivor by quarterly payments, and to the intent that the said Marquis and Lord *Henry* should pay the said annuity of 2,720*l*. unto Lady *Harriet* and Lady *Mary*, or unto either of them in exclusion of the other, in such parts and subject to such conditions or restrictions as the said Marquis during his life, or, after his decease, Lord *Henry*, or, after his decease, the personal representative of the survivor of them, should from time to time, by deed, direct or appoint, and in default of such appointment, to pay the annuity between Lady *Harriet* and Lady *Mary* in equal proportions.

The Duke of *Portland* died 27th *March* 1854, and the Marquis of *Tichfield* thereon succeeded to the dukedom and afterwards gave up any claim he might have had, originally, as a younger child, to a share in the charges in favour of the younger children. He determined to carry into effect the wishes of his father as to Lady *Mary*. For this purpose he consulted Mr. *C. Heaton Ellis*, who, in a

letter dated 22d *June* 1854, noticing difficulties raised by the legal advisers of the Duke, suggested the appointment of all the dividends and interest of the 52,000*l*. to Lady *Harriet*, remarking that Ano bargain or arrangement should be made with her beforehand, lest the appointment be vitiated. I dare say it will occur to her ladyship afterwards, or it can prudently be suggested to her, that one-half of the interest and dividends, and one-half of the annuity, as it is paid, should be laid out to accumulate, as she would not like in the present state of things, to benefit personally beyond her own moiety." There was a great deal of correspondence to the same effect. At that time the fund consisted of 50,000*l*. on mortgage, and 21,844*l*. Three and a-Half per Cents. A direct and absolute appointment to Lady *Harriet* was not, however, then adopted, and it was proposed to make from time to time provisional appointments of the dividends of these sums. These were made in two particular instances by deeds dated on the 21st *September* 1854.

After the appointments of 21st *September* 1854, the annuity and the income of the fund, subject to the trusts in the deed of 24th *June* 1843, were paid to Messrs. *Drummond* to the account of the Duke and Lord *Henry* as trustees, and then carried over in pursuance of their order to an account in their names marked "Account *S*," (Sister's account). They were then transferred from that account to the account of Lady *Harriet*, and one moiety was under her order invested, the other moiety was applied to her own use. Mr. *Ellis* had prepared this order by direction of the Duke, and Lady *Harriet* signed it at Mr. *Ellis*=s request. The order was in the following terms:-

A18th October 1864.

AMessrs. *Drummond*,-Please to invest one-half the payments in future to be made to my credit from the joint account of the Duke of *Portland* and Lord *Henry Bentinck* (marked >*S*,=) in the purchase of Three per Cent. Consols, in the names of the Duke of *Portland*, Lord *Henry Bentinck*, and myself.

AHarriet M. Bentinck.@

On the 5th *October* 1854, Lady *Mary Elizabeth Bentinck* married Colonel *Topham*. On the marriage a settlement was executed securing to her during life and to her appointees afterwards, the exclusive benefit of the property to which she was or might be entitled.

On the 19th *December* 1854 the Duke of *Portland* (the Appellant) executed a deed poll reciting the marriage of his sister, and declaring that in pursuance of the power in that behalf contained in the deed of the 24th *June* 1843, he appointed that, until farther or other appointment, &c., and subject thereto, all the dividends to accrue during the life of Lady *Harriet* on the said sum of 52,000*l*. and the accumulations, should be paid and belong to Lady *Harriet*. And power was reserved to the Duke of *Portland* for the time being to revoke the appointment thereinbefore contained, and to declare such other trusts of the dividends, &c., during the lives

of Lady *Harriet* and of Lady *Mary*, or of the survivor of them, as he should from time to time think fit.

By another deed poll of the same date, with the same recitals, the Duke appointed the whole of the annuity of 2,720*l*., during the joint lives of Lady *Harriet* and Lady *Mary*, to be paid to Lady *Harriet* exclusively until farther appointment, and subject thereto, and power was reserved to the Duke, or after his death to Lord *Henry*, and after the death of the survivor to his personal representative, wholly or partially to revoke this appointment, and to make such other as he should think fit.

On the 13th *July* 1860, Lady *Mary E. Topham* filed her bill (afterwards amended and re-amended) against the Duke of *Portland*, *C. Heaton Ellis*, Lord *Henry C. Bentinck*, Lady *Harriet Bentinck*, and others, which, after setting forth the above facts, prayed, first, that the Plaintiff might be declared entitled to the sums of 18,686*l*. Consols, purchased with the said sums of 8,000*l*. and 8,000*l*., appointed to Lord *Henry Bentinck* by the deeds poll of the 13th and 28th *October* 1848, and the accumulations thereon, or that the appointments made by the said deeds might be declared void as against the Plaintiff, so far as the same related to those two sums, and that the settlement thereof might be declared void as against her, and that the same might be set aside, and that suitable directions might be given. And secondly, that so much of the fund standing in the names of the Duke of *Portland* and Mr. *Ellis*, as trustees of the settlement of the 24th *November* 1848, as had arisen from the income of the two

sums of 8,000*l*., might be paid to the Plaintiff, and the residue transferred to her trustees under her settlement. Thirdly, that she might be declared entitled to one moiety of the income of the fund, subject to the trusts of the indenture of the 24th *June* 1843, and moiety of the annuity of 2,720*l*., appointed by the deeds poll of *September* and *December* 1854, to Lady *Harriet*, and the accumulations thereon; and that it might be declared that the appointments made by the said deeds poll were void as against the Plaintiff, and that she was entitled to one moiety of the income accrued due on the fund since the death of the late Duke of *Portland*, subject to the trusts of the indenture of *June* 1843, and to one moiety of the annuity of 2,720*l*. (after deducting certain necessary credits) comprised in the indenture of *November* 1848; and that a receiver might be appointed, and accounts directed.

Answers were put in and evidence taken, and a great many letters passing to and from the late and the prese Duke, and Mr. *C. H. Ellis*, and other documents of a like kind were read. These letters were relied on as showing the intentions of the parties in executing the deeds of 1843, 1848, and 1854, the difficulties that had been found in the way of carrying these intentions into effect by legal forms, the scheme (without formal communication of the purpose) to put Lady *Mary*‘s share under the control of Lord *Henry*, or of Lady *Harriet*, by giving either or both an apparent absolute interest in the fund, on a private understanding that Lady *Mary*‘s share of the funds that should be accumulated during the life of Lady *Mary*‘s husband, to be then disposed of as it was known that the late Duke had desired.

In her answer to the Plaintiff's bill, Lady *Harriet* declared that it was not till she saw the bill that she was informed of the legal effect of the deeds of *December* 1854; she believed that under the deeds of 1843 she had become absolutely entitled for life, for her own use, to a moiety of the dividends of the 52,000*l*., and of the annuity of 2,720*l*.; she did not know that she had any beneficial right in respect of the other moiety. She knew that her father desired that, in the event of Lady *Mary* marrying Sir *W. Topham*, she should not derive any benefit from any settlement made by the Duke, but this was better known to the present Duke and Lord *Henry* than to herself. Since the date of the deeds of 1854, the whole of the dividends of the 52,000*l*. and the accumulations, and the whole of the annuity of 2,720*l*., bad been paid to the two Defendants, the Duke and Lord *Henry*, and by them passed to her account with Messrs. *Drummond*. One moiety thereof had been applied by her to her own use, the other moiety had been invested under her order, in the joint names of the Duke, Lord *Henry*, and herself. This order had been given by her, on the suggestion of *C. H. Ellis*, who, she believed, made the suggestion with the privity or sanction of the Duke. She never before claimed this other moiety, but she now submitted that the whole had been validly appointed to herself.

The cause was heard before the *Master of the Rolls* on the 23rd *April* 1862, and on the 22nd *July* he pronounced an Order declaring that the appointments made by the deeds poll of the 13th and 28th *October* 1848 were void, so far as the same related to the two sums of 16,000*l*. respectively appointed to Lord *Henry*, and that the indentures of the 24th *November* 1848 were void, and that according to the true construction of the settlement of 1795, such

younger children of the late Duke and Duchess only as survived their parents became entitled to such part of the 40,000*l*. as was unappointed, and that the Plaintiff became entitled, on the 27th *March* 1854, the day of the death of the Duke of *Portland*, to the sum of 8,000*l*., part of the sum of 16,000*l*. expressed to be appointed by the deed poll of the 13th *October* 1848, and to 8,000*l*., part of the sum of 16,000*l*. appointed by the deed poll of the 28th *October* 1848; and it appearing that one moiety of those two sums was invested on the 31st *October* 1848, in the purchase of 18,626*l*. stock, in the names of the Duke of *Portland* and *C. H. Ellis*, and that the dividends thereon had been accumulated up to the time of this decree, it was declared that the legal personal representative of the late Duke, was entitled to the dividends which accrued on that stock, from the 31st *October* 1848 to the 27th *March* 1854, and the accumulations thereof. And it was ordered that the now Duke and *C. H. Ellis* should within six weeks, pay or transfer such legal representative such dividends; and that the Duke and *C. H. Ellis* should transfer to Lady *Mary*'s trustee, under her settlement, such a portion of the 18,686*l*. as on the 27th *March* 1854 was of the value of 12,000*l*., and pay to her, on her separate receipt, the dividends due on the same, from 27th *March* 1854, and the accumulations thereof. And costs were given, and the trustee of Lady *Mary* was to hold the rest for the purposes of her settlement; and as to the other matters, the Plaintiff's bill was dismissed [31 Beav. 525].

On the 7th *November* 1862, Lady *Mary* presented petition of appeal against this partial dismissal of her bill. The Duke of *Portland*, Lord *Henry* and Lady *Harriet Bentinck*, appealed against the other parts of the decree.

The petitions of appeal came on before the *Lords Justices*, who made an Order dated 2d *May* 1863, directing that the decree made by the *Master of the Rolls* should be discharged; and it was by the said Order declared that the deed poll of the 13th *October* 1848 was void, so far as related to the sum of 8,000*l*. part of the sum of 16,000*l*. thereby appointed to Lord *Henry Bentinck*, and that the sum of 8,000*l*. was distributable under the trusts of the indenture of the 4th *August* 1795 and the 8th *June* 1814, as in default of appointment, and that Lady *Mary* was entitled, on the 27th *March* 1854, to the sum of 2,661*l*. 13*s*. 4*d*., being one-third part of the sum of 8,000*l*.; and that the deed of the 24th *November* 1848 was void, so far as related to one moiety of the 18,686*l*., and the accumulations thereon. And it was ordered that the Duke of *Portland* and *C. H. Ellis* should raise, by a sale, &c., a sum of 2,666*l*. 13*s*. 4*d*., and another sum of 942*l*. 14*s*. 1*d*., and before the 1st *June* 1863 should pay over the former to the trustee under Lady *Mary*'s settlement, and pay to Lady *Mary*, on her separate receipt, the 942*l*. 14*s*. 1*d*. And their Lordships farther declared that the two appointments dated 21st *September* 1854, the one being of the annuity of 2,720*l*., and the other being of the dividends of the annuity of 52,000*l*. and accumulations during the life of the late Duke of *Portland*, and also the two appointments dated 19th *December* 1854, the one being of the annuity, and the other of the dividends, were void, and that Lady *Harriet* and Lady *Mary* were entitled, in equal shares, to the said amounts of 2,720*l*. and the dividends, &c., from the 27th *May* 1854. And a case was ordered to be prepared for the Court of Session, as to the law of *Scotland* with reference to the validity of the appointment of the

28th *October* 1848 as to the *Scotch* estates. And costs were reserved.

On the 20th *June* 1863, the *Lords Justices* made another Order, directing that notwithstanding the Order of the 2d *May* preceding, the Duke of *Portland*, Lord *Henry*, and Lady *Harriet*, should before 20th *July* 1863, or within seven days after service of this Order, transfer to the Accountant General in trust in the cause the 22,710*l*. 18*s*. 8*d*. Consols in the Order mentioned. And that Lady *Harriet* should, with the privity of the Accountant General, pay into the Bank, to the credit of the cause, the 3,311*l*. cash therein mentioned, which sums were to be invested, and the interest on the said sums to be paid to Lady *Mary* on her separate receipt; and Lady *Harriet* was ordered to pay the costs of that application.

The case for the *Scotch* Court was prepared, but by arrangement was not proceeded with, and, by consent, the cause was directed to stand for hearing with regard to costs. On the 5th *December* it was heard, and the *Lords Justices* made an Order that the costs of Lady *Mary*, so far as to the deeds of the 21st *September* and 19th *December* 1854, should be paid to her [1 De G. Jo. & Sm. 517].

The Duke of *Portland* appealed against the Order of 2d *May* 1863, so far as it discharged the Orders of the *Master of the Rolls*, and declared the two appointments of the 21st *September* and 19th *December* 1854 void, and declared Lady *Harriet* and Lady *Mary*

entitled, in equal shares, to the annuity of 2,720*l*.; and ordered the Duke, Lord *Henry*, and Lady *Harriet*, to sell the 22,710*l*., Three per Cents., and pay the produce thereof to Lady *Mary* on her separate receipt; and ordered Lady *Harriet* to pay Lady *Mary* the sum of 3,311*l*., and so far as their Order directed the Duke to pay costs. Lord *Henry* and Lady *Harriet* also appealed.

Sir *H. Cairns* (with whom were Mr. *B. Hardy* and Mr. *Alfred Bailey*) for the Appellant, the Duke of Portland:

Looking at the deeds which create the power, it is clear that the power has been properly exercised. Their object was to grant the donee of the power a control over the property that would otherwise have passed without control to Lady *Mary*. The Appellant had endeavoured to conform himself to the wishes of his father, the donor of the power, by effectuating that object. Had there been no appointment, the fund would have gone to Lady *Mary*; it was therefore appointed to Lady *Harriet*. No doubt that lady would thus, in form, be made the mistress of the whole fund; but she knew what were the wishes of her father, and there was therefore good reason to expect that she would consider for herself whether at any future time a part of the fund might not be given to her sister. This expectation could have no effect on the validity of the appointment. [Lord *St. Leonards*: There was to be a Aprudent suggestion@ to her of what as to be done.] Prudent for a person possessing the power to act as she pleased. [Lord *St. Leonards*: If the object was wrong, it could make no difference that it was to be effected by a person who had a power given her the very purpose

of effecting it.] But the object was not wrong. Every parent has a right to interpose checks against a marriage of his child of which he disapproves. Lady *Harriet* was not called on positively to do anything. Nothing of that sort is to be found in the deeds. She knew the wishes of her father, and a hope was entertained that she would act on them. She, herself, now claims the whole of the fund, as absolutely given to her by the deeds, and declaring that she never was asked to do any thing that would qualify her absolute right to it. She claims it free from all obligations. This shows that no equitable fraud can be alleged against the deeds. The Appellant, the Duke of *Portland*, is compelled to come here. He is told by the Court below that what he has done is wrong, and he cannot do anything till by judgment of this House he may find whether he can execute a new appointment. [Lord *St. Leonards*; You list not assume that he has a power to do so; or, if he has, there is no necessity for his coming here.] Any

donor of a power has a right to come here to be assured whether his exercise of it has been invalid. He made no contract with the appointee; if he had done so, it would have been bad. He was advised that he could not make a conditional appointment; he made an appointment, absolute in form, in the hope that Lady *Harriet*, knowing the wishes of her father, would exercise her absolute control over the fund in accordance with those wishes. [The *Lord Chancellor*: If the Duke made that representation to Lady *Harriet*, and she said, AI accept the obligation,@ would that make the appointment good?] But no such representation was made to her, and she never signified such an acceptance. The appointment in terms leaves her perfectly free. [The *Lord Chancellor*: But the understanding existed. Would not every conscientious person say, that no more sacred obligation could be

created than a trust thus made dependent on honour and filial feeling?] Courts cannot deal with appointments on principles of that kind. [Lord *St. Leonards*: Lady *Harriet* never had absolute control over the whole fund - it was placed in the hands of two other persons - nor was the money even in the hands of the bankers placed to her particular account. It was placed to the AS.@ account, which the evidence shows meant ASister's@ account.] The fund stood in Lady *Harriet*=s name; it was therefore hers. If she did not choose to execute any trust of it, there was no power to compel her to do so. [Lord *Chelmsford*: The Order is not to invest the money, but to invest half of the payments made from the amount, in the joint names of Duke, Lord *Henry*, and herself.] The effect of which is, that she would remain mistress of the fund, the other two being merely trustees under her directions. [The *Lord Chancellor*: The temporary appointments related to temporary payments; but the Order of the 18th *October* 1854, related to payments for all future time. She joined in a direction to the bankers as if she was the appointee of the whole fund; so that, since then, the income has been accumulated under an order made anterior to the permanent appointments.] That is so, but there having been a power of appointment under the indentures of *June* 1843 and *November* 1848, and that appointment being constituted without any bargain, direct or indirect, between the appointor and the appointee, it is valid, notwithstanding any manner of dealing with the fund which the appointee has thought fit to adopt.

Mr. *G. M. Giffard* (Mr. *T. Stevens* and Mr. *C. E. Freeling* were with him), for Lady *Harriet Bentinck*:

Her Ladyship had not entered into any arrangement with any one as to the mode in which she should deal with the fund of which she was appointee; she believed herself to be absolutely entitled to the fund. The deeds were only subject to the power of revocation, but that power had not been exercised. The Duke had merely a hope and expectation that Lady *Harriet* would act as he wished. That cannot affect the validity of the deeds. A Court of Equity will not act on mere suspicion where the execution of an instrument under a power of appointment appears fair, *McQueen v. Farquhar* [11 Ves. 467]. And where there has been a power of appointment to a child, and the appointment has been to the husband and the child, the Court has declined to interfere. That seemed to support the legality of a stipulation between the donee of the power and its creator. But it was not necessary to put the argument so high, for there was no stipulation here; there was nothing which bound Lady *Harriet* to any partition of the property. [Lord *St. Leonards*:

Lady *Harriet* says she was entitled to one-half of the fund, and that what she did was to carry the intention of the Duke into effect. Then she signed an order, and by that order the accumulation of half the income from the fund has taken place, and that half she has never pretended to deal with as her own. Put these facts together, and show the House how they prove that she considered herself entitled to the whole fund.] The Duke's intention was to make an absolute appointment to Lady *Harriet*, and in form he executed that intention, and the appointment is absolute. If she did not know of the expectation and agree to it, the fund was her property; if she did know of it, even then., there being no act of her own to divest herself of the property, it was still hers.

The *Attorney General* (Sir *R. Palmer*) and Mr. *Rolt* (Mr. *C. Hall* and Mr. *Rowcliffe* were with them), appeared for Lady *Mary Topham*, but were not heard.

The *Lord Chancellor* (Lord *Westbury*), addressing the *Attorney General*, said: On the two appeals we have heard, which are entirely distinct from Lord *Henry*‘s appeal, the House does not think it necessary to trouble you, save as to this one point. The *Lords Justices* have set aside the appointments; but you observe, instead of the decree stopping there, they go on to declare that the two sisters are entitled in equal shares. Now the Duke, the donee of the power, being a party to that decree, it might possibly hereafter be considered that the possibility of any future exercise of his power of appointment might be precluded by that decree. The House, therefore, is disposed to affirm the decree, but introducing into it these words, AAnd that without prejudice to any question as to any future exercise of the power of appointment.”

The *Attorney General*: Of course, my Lord, we cannot possibly object to that. It will be for your Lordships to consider whether the precise words might not be amended, so as to show that your Lordships do not hold out the notion that any future exercise could affect past accrued dividends.

Lord *St Leonards*: There is a power of revocation in the appointment, distinctly. There are two questions. Supposing there

was no power of revocation in the appointments then one question would arise, whether an appointment being set aside on the ground of an evasion of the real words of the power, the donee of that power could execute a new appointment. That I am not looking at. But there is an absolute power of revocation in the appointment in question, and that power of revocation may possibly exist, independent of the decision on the validity of the appointment which has been made. Suppose, for instance, the Duke were, to-morrow, to revoke the appointment and make a new appointment, could he be estopped by anything we now do, from trying that point?

The *Attorney General*: Your Lordships will recollect that the form of the bill is such as to enable the Court to determine as to the present right to the funds which have accrued down to the present time.

The *Lord Chancellor*: I thought I had put it in the most favourable form for you, because the words suggested by me were, Without prejudice to any future exercise of the power of appointment. You take the past dividends under the existing Order.

The *Attorney General*: It appeared to me that those words would be quite sufficient; but I thought it my duty to mention what was passing in my own mind. That is the construction I should put on those words; they do not, as we conceive, and no appointment would, affect our right to anything that has become payable and due previously to the time of the revocation.

Lord *St Leonards*: Understand distinctly that the House pronounces no opinion on the continuance of the power of revocation, on the possibility of its being exercised. This House, in merely affirming the decree with an exception which will not prevent the exercise of the power of revocation, if it can be legally exercised, gives no opinion whatever upon that point.

The *Attorney General*: I did not think it could affect our right to anything that has become payable.

Lord *Cranworth*: I think you cannot be damnified, because dividends that have already accrued due necessarily belong to the parties under the appointment.

The *Attorney General*: And the decree goes on to direct the payment of them to us.

The *Lord Chancellor*:

My Lords, the case which is presented to your Lordships on behalf of the noble Appellant, his Grace the Duke of *Portland*, in effect may be represented thus that his Grace, feeling it incumbent on

him to carry into effect what he received as the solemn wish and desire of his father, did therefore execute the two, or rather substantially the four, deeds which have been the subject of the present discussion.

It is unnecessary to dwell upon the different views of the case presented at the Bar by the counsel for the Duke, and presented by his sister, Lady *Harriet Bentinck*, in her answer. I can myself have no possibility of doubt that the Duke desired that Lady *Harriet* should know everything that was passing in his own mind. But in reality that was not done, and these deeds were executed, no doubt retained by the solicitor of the Duke, and neither communicated nor their effect explained or stated to Lady *Harriet*, antecedently to the institution of this suit. The truth, therefore, was, that Lady *Harriet* was never placed in the position in which it is clear that the Duke desired that she should be placed, and considered her to be placed, namely, in the position of a person having the absolute ownership of the fund, and left at liberty to deal with the whole, or any part of the fund,

in such manner as she should think right. The Duke, by his agents, controlled the whole of the disposition of the fund. Lady *Harriet* states (of which there can be no possibility of doubt) that she herself was entirely ignorant of the fact that she had, or was intended to have, any absolute interest or control in or over these funds; and that in what she did for the purpose of giving effect to what the Duke originally desired should be done, but which he had been told could not be legally done, she acted merely instrumentally - merely for the purpose of giving effect to what she was told to do; and that she did not in that respect exercise any

control, any will, or any right of disposition. The whole thing, therefore, was, in truth, an arrangement proceeding and emanating wholly from the donee or owner of the power; and it assumed that shape in which it is quite clear, from the very case of the owner of the power, that he was advised that the matter could not be supported.

Without farther dwelling on' the matter, inasmuch as your Lordships concur in opinion, I think we must all feel that the settled principles of the law upon this subject must be upheld, namely, that the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power. I think it would be endangering the whole of the established principles of our law upon this subject if we were to permit a transaction of this kind to stand, or to hold that it is a transaction which can be reconciled with the faithful, sincere, just, and honest exercise of the power committed to the appointor, and which he is to exercise as a trustee. I will abstain from going farther into the case. I think your Lordships will concur entirely in the conclusion which has been arrived at in the Court below.

But there is that point to which reference has been already made. The Court below has rightly set aside the deed of appointment. It is wholly unnecessary, therefore, to refer to the power of revocation contained that deed. But that deed of appointment having been set aside as null and void, it is possible (on which no opinion is given or implied by the House) that the donee of the power may still exercise his original power. And therefore, my Lords, in confirming the decree which sets aside the deed of appointment, it may be desirable to include the words which have been already suggested, in order to prevent the decree being used hereafter as an argument that will bar any attempt to exercise the power by the Duke. With that alteration, I should move your Lordships to confirm the decree, and to dismiss the appeal, which must be dismissed, I think, in the usual manner, namely, with costs.

Lord *Cranworth*:

My Lords, upon the facts as they have transpired now, from the answer from Lady *Harriet*, I confess, in concurrence with what has fallen from my noble and learned friend on the Woolsack, that I do not entertain a particle of doubt. The only reason why I rise to say a single word is this, that if the facts had been, as I had supposed them to be from the opening of Sir *Hugh Cairns*, namely, that the Duke had said to Lady *Harriet*, “I wish, in order to carry into effect that which I suppose to have been our father’s intention, to accumulate one moiety of this fund, the accumulation to continue during the married life of my sister *Mary*; but I find

that this is impossible. I shall give you the whole. Make it entirely, your own; you may spend it all yourself, or you may accumulate one half if you think fit;" if that had been what had passed, I confess (not wishing to commit myself to any point that does not arise here), as at present advised, I should have thought that was a perfectly legitimate mode of dealing with the fund.

Lord *St. Leonards*:

My Lords, the rules on this subject are so well settled that it is quite unnecessary to go through any authorities on the subject. A party having a power like this must fairly and honestly execute it without having any ulterior object to be accomplished. He cannot carry into execution any indirect object, or acquire any benefit for himself, directly or indirectly. It may be subject to limitations and directions, but it must be a pure, straightforward, honest dedication of the property, as property, to the person to whom he affects, or attempts, to give it in that character.

Now here it is impossible not to see that Lady *Harriet* was made use of, not only as an intended donee, but also as an instrument, an agent, wholly unconscious of the real character of the donation, to carry into execution the intentions of the Duke. If you look at the dates, you cannot help being struck with them. Temporary appointments were made for the mere purpose of keeping the thing alive, so as to prevent the property resting in Lady *Mary*, if

she did marry contrary to the wish of the late Duke. Those temporary appointments were dated in *September* 1854.

Then comes an extraordinary letter from Mr. *Ellis* to Lady *Harriet*, who was then entitled under the temporary appointments. And he says, that he does not believe that he had before seen her, or had any conversation with her on the subject, and that his only communication was this letter of the 4th *October* 1854, "Dear Madam, I have the honour to enclose an order for your Ladyship's signature; and in doing so, I should explain that the Duke lately executed deeds revocable at any time, but under which no payments beyond 600*l*. a year can for the present be made to Lady *Mary*. The half-year's dividend on 21,400*l*., Three and a quarter per Cents, will this month be paid to your credit by the trustees, as well as 680*l*., less property tax, for the quarter's double annuity. The arrangement made, which will be completed by the enclosed order (setting aside and making a fund for future disposal) has appeared to be the best, if not the only mode of faithfully carrying into effect the late Duke's views and intentions." Then there is an order enclosed, which she signs, being, as she tells you in her answer, wholly without knowledge that she had the slightest beneficial interest in that half of the fund over which the order operates. Then that order, the fund having been invested in the names of the three, is carried farther, on the 28th *October* 1854, by an arrangement which is to bind, in all future time, that moiety.

Then what comes afterwards? Why the absolute appointment. But the Duke, by his agents, had already fixed this sum as an appropriated fund, not for Lady *Harriet*, but for Lady *Mary*, to be tied up for Lady *Mary*, so as to prevent her from marrying, before the actual appointment was executed. The temporary appointments were set aside after this order for the investment and appropriation of the money, and then the absolute appointments were executed which gave the property in form absolutely to Lady *Harriet* - but, mind, not in form even, until she had executed that order which gave the warrant to the bankers to continue to keep that money at all times in the way which was understood between the parties. She was no more an appointee of the funded property than I am. She was an agent, or a hand, made use of for the purpose of carrying into effect what might be a very proper thing, for anything I know, on the part of the Duke, but which he was not justified in doing under the form of an execution of the power.

My Lords, I confess I never saw a more naked case. There is really nothing to decide. The parties have shown that it was not a real transaction, as such appointments must be in order to be valid, but that it was a transaction founded upon an intention to give one-half absolutely, and no more, to Lady *Harriet*, and to make her the instrument of tying up the other half for Lady *Mary*, so that they might give it to her or not, just as they thought proper, afterwards. There is that account with the bankers marked AS,@ which is admitted to mean “Sister=s,” and which we know means Lady *Mary*, and it was partially carried to that account.

Upon the whole, therefore, this is a case which it cannot for a moment be contended that the appointment is good. If not good for the moiety, which it is not, then it cannot be good for the other part; for the other part is given to the appointee who is to execute that purpose, which, of itself, destroys the whole appointment. I think, therefore, the case is perfectly clear; and that the moment you understand the facts, you cannot have the least doubt about it.

The difficulty which I confess I felt at first, was on the power of new appointment, as to whether that power continues or not, on which I decline to give any opinion. I think it is quite enough for this House to declare that it is a void appointment, and to set aside the appointment, but unless the whole case can be raised in argument, so as to put an end to the question as to the power of new appointment, I think, with my noble and learned friend on the Woolsack, that we are not at all called upon to pre judge that question. And I wish it to be distinctly understood that this House gives no opinion whatever on the power of the Duke to execute anew the power of appointment, now that it has declared that this appointment itself is void.

Lord *Chelmsford*:

My Lords, my noble and learned friends have so entirely expressed my views of the case, that it is not necessary for me to add anything to what they have said, and in which I entirely agree.

Mr. *Osborne* (Mr. *Morris* was with him) for Lord *Henry Bentinck*:

On the question of the appointment to him of the two sums of 8,000*l*. each, the appointment to him of both these sums is valid. The Duke and Duchess had, under the settlement of 1795, the power to appoint the two sums of 40,000*l*. each among the younger children in any way they thought fit. Lady *Mary* was aware that if her marriage took place, the late Duke would leave away from her everything in his power. Under these circumstances, Lord *George* and Lord *Henry* were made appointees, and Lord *George* being dead, Lord *Henry* became the sole appointee of the fund, and there is nothing to prevent him from receiving it to his own use. The fund is so entirely his own, that had Lord *Henry*, after the appointment, become bankrupt, his assignees could have claimed it. That is a test of the effect of the appointment. [Lord *St. Leonards* read a part of Lord *Henry*'s answer, in which he said that in all the matters relating to these appointments he was Aa complete dummy" in the hands of the late Duke. - Lord *Chelmsford* read, as exactly expressing the point of the case, a part of the judgment of the *Master of the Rolls* [AIf the appointee refuses to give effect to the wishes of the appointor, he gets what it was never intended he should have, and enjoys property which, if his conduct could have been foreseen, might, and probably would, have been given to another. The case is exactly the same, whether the consent or the agreement to act as desired be given or entered into before or after the appointment. The Court also would be placed in this dilemma: if it did not enforce compliance with the wishes of the appointor, it would be

sanctioning the appointee in taking property never intended for him; and if the Court were to enforce it as binding in conscience on the appointee, the Court would enforce the execution of a power in favour of persons who were not the objects of it."-31 Beav.541] in this case.]

The *Lord Chancellor*:

My Lords, this case, which is now presented to your Lordships, it is impossible to distinguish in principle from the one which we leave already disposed of. Indeed, even if it were possible to make a distinction, we have facts in this case which negative all possibility of upholding this appointment of the Duke. The facts are plainly and distinctly admitted by the Appellant; and it is no more than we should all have expected from distinguished persons occupying the high position which the parties to this cause do, that they should come before a court of justice with a clear and explicit statement of the real facts of the case. They have done so, and there is no controversy about those facts; but principles of law, established for a long period of time, compelled the Court to take a different view of the legal effect of those facts from the view which was entertained by the parties themselves. They have been mistaken in their view of the law; they believe that they had a right to do that which they have done, and therefore they honestly did it; but they had no right to do that which they have done; and your Lordships would throw the whole subject of the law of appointments into the greatest confusion if any doubt were permitted to remain for a moment with respect to the principles

which are applicable to this case. It was from this conviction that your Lordships have felt yourselves bound to interfere, and to put it to the learned counsel for the Appellant, whether they will argue against those established rules. I must, therefore, my Lords, move that this appeal also be dismissed, and be dismissed with costs.

Lord *Cranworth*:

My Lords, I have nothing to add to what has been said by my noble and learned friend. I come to the conclusion here, as a matter of fact that all the parties knew perfectly well from the beginning for what purpose this sum of 8,000*l*. was appointed.

Lord *St. Leonards*:

My Lords, I think the case a great deal too clear to require any farther observations.

The following Order was afterwards entered on the Journals:-

Ordered, That the Order of the *Lords Justices* of the 2d of *May* 1863, be affirmed, with the following variation, viz.: after the

words Aand their Lordships do declare,@ and before the words Athat the two appointments in the pleadings mentioned,@ insert "without prejudice to any question as to any future exercise of the powers of appointment;@ and that the Order of the *Lords Justices* of the 5th of *December* 1863, be affirmed; and that the three Petitions and Appeals be dismissed; and that the Appellants in the said Appeals respectively do pay to the said Respondents respectively, who have answered the said respective Appeals, the costs incurred by them in respect of the said Appeals.

Lords' Journals, 7 *April* 1864.

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