RECENT ENGLISH DECISIONS.

Vice-Chancellor Stuart's Court.

HALL *vs.* WATERHOUSE.

Where property of which a testatrix is seised in fee is devised to a married woman, her heirs and assigns (without the intervention of a trustee), with a direction that it shall not be under the control or be liable to the debts of her husband:

Held, that she has full power, during coverture, to dispose of it absolutely in fee simple by will.

This was a bill filed by devisees in trust under the will of Charlotte Roberts, praying for a declaration of the rights and interests of all parties in the real and personal estate of the said Charlotte Roberts, and that the trusts of her will and codicil might be carried into execution and administered under the direction of the court.

Charlotte Roberts (formerly Charlotte Waterhouse) was married to her husband John Roberts (who is still living) on or about the 20th July 1836. On the 26th May 1857 her only surviving brother died intestate, whereupon she and her sister Sarah Waterhouse became entitled as co-heiresses at law to an estate in fee simple in certain lands at Lindley, in the parish of Huddersfield, subject to an annuity charged on part thereof in favor of Betty Waterhouse, the widow of their father, John Waterhouse.

The bill stated that by an indenture dated the 16th May 1859, between Betty Waterhouse (since deceased) and Benjamin Hanson (trustees of the will of John Waterhouse) of the first part, John Roberts and Charlotte his wife of the second part, Sarah Waterhouse of the third part, the said John Roberts of the fourth part, George Crowther of the fifth part, the said Charlotte Roberts of the sixth part, and Sarah Waterhouse of the seventh part, the said lands at Lindley were limited (subject as to part to a mortgage, and as to the whole to the said annuity).

"To the use of such person or persons and for such estate and estates, use and uses in such parts, shares, and proportions, upon such trusts, and for such intents and purposes, and subject to such powers, charges, conditions, limitations, and agreements, and in such manner and form as Charlotte Roberts, whether covert or sole, and nothwithstanding her coverture, should from time to time when and so often as she should think proper, by deed or

deeds, writing or writings under her hand and seal duly executed and attested, or by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, to be by her duly executed and attested, direct, limit, appoint, charge, convey, demise, give, devise, or dispose of the same or any part thereof;"

And in default of such appointment to the use of the said Charlotte Roberts, her heirs and assigns for ever. The other moiety of the same hereditaments was limited to similar uses in favor of Sarah Waterhouse.

The bill also stated that by another indenture dated the 17th May 1859, and made between the said Charlotte Roberts of the one part and the said John Roberts of the other part, Charlotte Roberts, in consideration that one moiety of the before-mentioned hereditaments had been by the last-mentioned indenture limited to such uses in her favor as above mentioned, appointed to John Roberts a yearly rent-charge of 15*l.*, payable out of and chargeable upon her undivided moiety of the said hereditaments.

The answer stated that from a copy of the above settlement furnished to the defendants it appeared that the indenture of the 16th May recited that Charlotte Roberts and Sarah Waterhouse were then seised in fee simple of the entirety of the above-mentioned real estate, subject to the annuity; also that the annuity to John Roberts was for his life only, and in perpetuity, and that by the deed, after reciting that John Roberts, in consideration of the annuity, had agreed to join therein, the said Betty Waterhouse and Benjamin Hanson purported according to their estate and interest to grant, and the said John Roberts and Charlotte his wife, and also the said Sarah Waterhouse purported to grant and confirm, and in consideration of an annuity, &c., the said John Roberts purported to release and confirm to George Crowther and his heirs the said hereditaments, to hold to George Crowther, his heirs and assigns (subject to the mortgage and annuity first above mentioned) to such uses as were mentioned in the bill. It appeared that the indenture of the 16th May 1859 was duly acknowledged by Mrs. Roberts.

The answer also stated that subsequently to the date of the last-mentioned indenture Charlotte Roberts and Sarah Waterhouse purchased in their joint names certain freehold cottages at Lindley, and caused the same to be conveyed to the said George Crowther. Defendants believed no declaration of trust was made

touching these last-mentioned hereditaments, but George Crowther held the same upon trust for Charlotte Roberts and Sarah Waterhouse.

Sarah Waterhouse, by her will dated the 28th September 1860, devised and bequeathed the whole of her real and personal estate to her sister, the said Charlotte Roberts, upon trust to collect and get in all the debts and money owing to her, and, out of the moneys arising therefrom, to pay her debts and funeral expenses; and after payment and satisfaction of the same, gave, devised, and bequeathed all her before-mentioned moiety in the estate at Lindley, with all the testatrix's furniture and surplus cash that might be in her sister's possession, and which the testatrix directed she should retain for her and her heirs, executors, administrators, and assigns for her and their own benefit for ever; and she further directed that none of the above-recited real and personal estate should come under the control or intermeddling, or be liable to the debts or interferences of her sister's then present or any future husband. The will also contained the following clause:—

"I nominate, constitute, and appoint my sister Charlotte Roberts sole executrix of this my last will and testament; and I do direct that it shall and may be lawful for her to deduct and retain out of my said estate and effects all such sum and sums of money which she shall pay, bear, expend, or be put unto, for or by reason of her acting in the execution of the trusts of this my will."

Sarah Waterhouse died on the 28th September 1860.

The answer stated, that after Sarah Waterhouse's death Charlotte Roberts purchased her (*i. e.* Sarah's) several freehold cottages at Lindley, and the defendants had been informed and believed that the same had been conveyed to George Crowther and his heirs, without, as they believed, any declaration of trust; but that George Crowther stood seised of the same at Charlotte Roberts's death, in trust for her, and as part of her estate. The answer stated that the plaintiffs alleged that by an indenture dated the 23d February 1864, George Crowther had conveyed these last-mentioned hereditaments to the use of the plaintiffs, their heirs and assigns.

Charlotte Roberts, by her will, dated the 11th January 1864, by virtue and in exercise of the power of appointment given to her by the indenture of the 16th May 1859, purported to appoint as follows:—

"I hereby appoint and devise a moiety of all and every the hereditaments comprised in the said indenture (except certain portions which had been sold), and I hereby also devise the other moiety of the same hereditaments (except as aforesaid) which was devised to me by my late sister Sarah Watherhouse for my separate use, and in exercise of all other powers of disposition vested in me, I appoint, devise, and bequeath all other the real and personal estate which I am or shall at my death be able to devise and bequeath, unto Charles Hall, Henry Hall Iredale, and David Binns (the present plaintiffs), to hold the said hereditaments with the appurtenances and all other my real and personal estate whatsoever and wheresoever unto said C. Hall, H. H. Iredale, and D. Binns, their heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively (subject, as to the first moiety, to the annuity charged thereon in favor of testatrix's husband John Roberts), upon trust as soon as conveniently might be after my decease, or when and at such time or times, or in such manner as they may think proper, to sell and dispose of the same hereditaments and premises, and all other my real and personal estate and effects, either together or in parcels," &c.

Charlotte Roberts died on the 5th April 1864 without issue, leaving her husband surviving. The defendants Elizabeth Waterhouse and Ann Hirst, as surviving children of Thomas, son of Joseph, son of John Waterhouse, the father of Sarah Waterhouse and Charlotte Roberts, claimed to be the co-heiresses at law of Charlotte Roberts.

John Roberts, the testatrix's husband, was originally made a defendant, but was afterwards struck out, having disclaimed all interest in the real and personal estate of his late wife.

The plaintiffs' contention was that the devise in Sarah Waterhouse's will gave to Charlotte Roberts an absolute power of testamentary appointment over Sarah's moiety.

The defendants submitted that Sarah's will, as such, created a trust for the separate use of Charlotte Roberts, for her life only; and that Charlotte's will was inoperative, so far as it purported to be an appointment of Sarah's moiety.

Malins, Q. C. and *T. C. Wright*, for the plaintiffs.—The question as to whether a married woman can make a disposition by will of property which had previously been devised to her sepa-

rate use was decided in the case of *Rippon* vs. *Dawding*, Ambl. 565, and had recently (since the filing of the present bill) been again decided by the L. C. in the case of *Taylor* vs. *Meads*, 12 Law Times, N. S. 6. In the present instance the plaintiffs, under the will of Mrs. Roberts, were entitled to the equitable estate in fee simple of that property, devised to the testatrix by her sister Sarah Waterhouse. They therefore asked that there might be a declaration to that effect, and that the defendants, the co-heiresses at law, might be compelled to convey the legal estate to them.

Bacon, Q. C. and *Locock Webb*, for the defendants.—The will of Sarah Waterhouse only gave the testatrix a life-estate in the property, and at her death the defendants, the co-heiresses at law, according to the doctrine of the common law, became entitled. The right as to three separate properties had to be taken into consideration. First, as the moiety of the estates which was settled on the testatrix by the indenture of 1859; secondly, as to that purchased jointly by the two sisters in the lifetime of Sarah Waterhouse, and which had not been devised; and thirdly, as to the property purchased by the testatrix subsequently to the death of her sister. As to the settlement of 1859, although that deed was duly acknowledged, the property comprised under it was property to which the testatrix, previously to her marriage, had no title. The question, therefore, would arise whether it was possible for a married woman to settle property which has descended to her during coverture, so as to enable her afterwards to devise it in fee. It was only subsequently to her marriage, by the deed of 1859, that the property was settled to her separate use. By the statutes of 35 Hen. 8 and 1 Vict., a married woman is incapacitated from making a will. This court, it was contended, will not lend its assistance to the indirect performance of that which the law directly prohibits. As to the second point, the testatrix had not the power to purchase property conjointly with her sister and convey it to trustees. As to the third point, it was not permissible for a *feme covert* out of her own savings to purchase property and settle it to her own separate use: *Peacock* vs. *Monk*, 2 Ves., senior, 191; *Churchill* vs. *Dibben*, 9 Sim. 447, n. (and see cases there cited). In the case of *Taylor* vs. *Meads*, relied on by the plaintiffs, the legal estate was vested, not in the married woman herself, but in a trustee for her separate use.

The VICE-CHANCELLOR.—I have no doubt that, according to the law of this court, a married woman, entitled to freehold estate in fee simple absolutely to her sole and separate use, may dispose of it by a will made during her coverture; and that the consent of her husband is a matter of indifference. This proposition has been, I understand, established by a recent decision of the L. C., which has been referred to in the case of *Taylor* vs. *Meads*. But there are cases of much older date than that, in which difficulties have arisen upon questions relating to wills made by married women, entitled to personal estate to their separate use, without the consent of their husbands. The text-writers, justified by authority, have laid down the proposition that the only effect of the consent of the husband to the will of his wife is, the waiver of his interest in her personal estate as administrator. That is the only object which, they state, is attained. But where a freehold estate belongs to the wife absolutely in fee simple, being settled to her separate use, a will made by her will be valid either as the execution of a power, or, in case of there being no power, then as a disposition of the property belonging to her to her separate use during her coverture. The case of *Dingwell* vs. *Askew*, 1 Cox 427, is an authority on that point. It is quite plain that there is a principle which governs the question, for if the legal right of a woman to separate estate, given to her absolutely, be not accompanied with a power of alienation by all the means recognised by the law, it would be an imperfect right. Where nothing intervenes, there exists a positive and valid right in a married woman to alienate her separate estate. In the present case the right of the plaintiffs is clearly established. As to the other question, an attentive consideration of the answer will show that it is one which cannot properly be raised in this suit. The object of the suit is to acquire for the benefit of the devisees of the wife all that freehold property which belonged to the wife absolutely and in fee simple. The defendants, by their answer, endeavor to establish the proposition that the right to certain real estate purchased by the married woman and paid for out of her own moneys, accrued to the heir of the married woman, notwithstanding that it was otherwise disposed of by her will. It seems to me impossible to follow the contention thus raised. There seems to me no doubt that the property was the separate estate of the wife. I therefore consider that all the property mentioned in her will passed to the

trustees as directed. There must be a declaration to that effect and a common administration decree, and an order that the coheiresses at law must convey the legal estate. The costs of the defendants must be taxed and paid as between solicitor and client.

The following passages occur in Lord St. Leonard's book upon Powers (8th ed. 173, 174), with respect to the powers of disposition of married women over property given to them for their separate use:—"A gift simply to the separate use of a married woman is tantamount to a gift to such uses as she shall appoint by deed or will," and "where a married woman has property settled to her separate use, without any restraint upon alienation, she is deemed a *feme sole*, and may dispose of it accordingly." Doubts have been frequently expressed whether the author intended to comprise in these sweeping sentences the interests of married women in real as well as personal estate. It has been said that inasmuch as the decided cases cited in support of these propositions relate to the disposition of personal property, or, at any rate, only to the interest of married women in the income of real estate, the doctrines enunciated must be limited accordingly, and that the writer did not intend to commit himself to the position that the powers of disposition over separate property, accorded to married women by the decisions of courts of equity in regard to personal estate, are equally applicable to land.

We think it quite possible that the cautious spirit which marks the writings and speeches of the author may have induced him to leave in doubt his opinion upon a point which had been much canvassed although never expressly decided. His accustomed zeal for a moot question has certainly not been manifested in this instance. We think he would have clearly expressed his view on the subject if he had intended to do so. At the same time we do not suppose he would now find fault with those who attribute the fullest significance to the language which he has used.

By his decision in the principal case Vice-Chancellor STUART has completed judicially, so to speak, the fabric of the separate estate of married women. It is no credit to the Court of Chancery that it has taken more than a century to accomplish a result which, when stated, is so simple and logical as almost to amount to a truism, viz., that when property, real or personal, is given to a married woman for her separate use, without any express restraint upon alienation, she is to be treated, as regards such property, as a *feme sole*, and may dispose of it by any of the modes of disposition, *inter vivos* or testamentary, by which the law allows an unmarried woman to deal with her property. In Hearle *vs.* Greenbank, 1 Ves. Sen. 299 (1749), Lord HARDWICKE treated it as the settled rule of the Court, that a married woman might dispose of personal estate settled to her separate use. The property in question in that case had come to the married woman from her father, and in Fetteplace *vs.* Gorges, 1 Ves. Jun. 46 (1789), a distinction was attempted between separate personal property which came to the wife from a stranger, and from her husband, but Lord THURLOW refused to accept the distinction, and since the last mentioned case it has been firmly established that when personal property is given, or agreed to be given, to the separate use of a mar-

ried woman, whether for her life or absolutely, she may dispose of it as a *feme sole* to the full extent of her interest, although no particular power for that purpose accompanies the gift.

But although Lord HARDWICKE's rule (laid down in Peacock *vs.* Monk, 2 Ves. 190) that a *feme covert*, acting with respect to her separate property, is competent to act in all respects as if she were a *feme sole*, was expressly recognised by Lord THURLOW (Hulme *vs.* Tenant, 1 Bro. C. C. 16 (1778)) as the proper guide by which to decide cases on this subject, it has been reserved to the judges of the present day to emancipate married women in respect of their absolute interests in real estate.

It is true that in Hulme *vs.* Tenant, *ubi sup.*, the power of a *feme covert* to dispose of the rents and profits of real estate given to her for her separate use, in the same manner as she might do of personal estate similarly given, was recognised, and that this doctrine was extended in Major *vs.* Lansley, 2 R. & M. 355, to the case of an annuity issuing out of land; but till recent years text writers and judges concurred in the opinion that a limitation of real estate to a wife in fee to her separate use, without any express power of disposition, would not enable her to dispose of it during the marriage, otherwise than by fine or recovery, or at all by will, apparently upon the ground that inasmuch as no power had been given to her by the instrument to make any disposition of the property, she could only do so by the mode prescribed by the general law, and that if this were omitted her heir would take the estate.

It had long been admitted that if an express power of disposition by deed or will were added in the gift of real estate to the separate use of a married woman, she might exercise the power and appoint the fee, and that her appointment would be binding in equity on the conscience of the heir (in whom the legal estate in fee would remain), and that a court of equity would treat the heir, who at law, where the separate estate of married women was not recognised, would be considered as the legal owner, as a trustee, and compel him to make a conveyance to the person in favor of whom the wife had appointed the property (Wright *vs.* Cadogan, 1 Bro. Parl. C. 486, and Rippon *vs.* Dawding, Ambl. 565), but it was considered that if words expressly authorizing the wife to appoint the fee were omitted, a power of disposition could not be implied as incident to the estate.

The inconsistency of making an interest which owed its whole existence to the untechnical rules of a court of equity to depend upon the insertion or omission of a few words, the intention being obviously the same in both cases, found expression in the decision of Vice-Chancellor Sir JOHN LEACH in Minot *vs.* Eaton, 4 L. J. O. S. 134, that where an estate in fee was given to trustees for a married woman for her separate use, she could dispose of her equitable interest without a fine being levied; also in the decision of the Court of Appeal in Ireland (the Lord Chancellor dissenting), in Adams *vs.* Gamble, 12 Ir. Ch. Rep. 102, that a similar interest could be disposed of, since the abolition of fines and recoveries, without the formality of an acknowledged deed; and in the extra-judicial observations of Lord Justice KNIGHT BRUCE (when Vice-Chancellor) in Baggett *vs.* Meux, 1 Coll. 138, and of Lord Justice TURNER, in Atkinson *vs.* Le Mann, 23 L. T. 302. But, on the other hand, the present Master of the Rolls, in Lechmere *vs.* Brotheridge, 11 W. R. 814, determined that a married woman could not dispose, *inter vivos*, of an

equitable fee-simple settled to her separate use, without a deed acknowledged, and Vice-Chancellor KINDERSLEY, in Blackford *vs.* Wooley, 11 W. R. 478, held that real estate could not be settled upon a married woman to a greater extent than for her life. Lord Chancellor WESTBURY, however, in Taylor *vs.* Meads, 13 W. R. 394, decided that where an estate in fee-simple is given to trustees for a married woman for her separate use, she may dispose of her equitable interest by deed or will.

After the last-mentioned decision there only remained one case to be considered upon the subject, viz., where trustees are not interposed, but where the gift is directly to a married woman of an estate in fee-simple to her separate use, without more. This was the form of the gift in the principal case, and Vice-Chancellor STUART has, we think wisely, followed the Lord Chancellor's recent decision by holding that the interposition of trustees is immaterial in the eyes of a court of equity, and that a will made by a married woman was effectual to pass a fee-simple estate which had been given to her directly for her separate use. It follows that, in every case, whether the gift be directly to a married woman or to a trustee for her, whether the nature of the property be real or personal, whether the extent of the interest given be for life or absolute, whether a power of disposition be expressly given or omitted, a married woman (if she be not restrained from alienation) has the same powers of disposition *inter vivos*, or by will, over property given to her for her separate use as if she were a *feme sole*.

There only remains one point to be noticed, which arose on the principal case. It became a question whether the implied power of disposition operated so as to carry the power of conveying the legal estate in the property, or whether this was not vested in the heir of the married woman. The Vice-Chancellor held that the will only affected the property in the view of a court of equity, and that the co-heiresses of the testatrix were trustees for the persons in whose favor the will had been made. We feel that this part of the decision cannot be complained of so long as the law remains in its present state, according to which a court of law refuses to pay any regard to the equitable rights or powers of married women. It is quite clear that, even in cases where an express power of appointment over property is given to a married woman, she cannot, by her appointment, affect the legal estate in the property, but that her power is confined to pointing out the objects in whose favor she desires that a court of equity should interfere. It has accordingly been held on many occasions that, after such an appointment, the legal estate remains in the person in whom it was previously vested, who is held to be a trustee for the appointees. Some doubt is thrown upon this point by Lord ST. LEONARDS, in his comments upon Harris *vs.* Mott, 14 Beav. 169. In this case a wife to whom real estate had been bequeathed in fee to her separate use, but without an express power of disposition, joined with her husband in selling the same to a purchaser, and afterwards died, having previously made a will in favor of her husband. The husband filed a bill for specific performance, but the Master of the Rolls considered the question of the wife's power of disposition too doubtful upon the authorities to justify the specific performance of the contract. Observing upon this case, Lord ST. LEONARDS says (Powers, 8th ed. 174), "If the wife took by implication a power to dispose of the estate by deed or will, the equitable fee passed