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on the subject save us from the duty of deciding the case now before us on what we may consider a correct principle. The present will is, in my opinion, so worded 'that future illegitimate children are undoubtedly included in it, and are sufficiently described without making it necessary to prove that they were begotten by any particular man; and as the only children who can take are children who must have been born, or at any rate begotten, during the lifetime of the testator, I am of opinion that it does not violate any rule of public policy. I am of opinion, therefore, that the Appellant is entitled to succeed.

Solicitor for the Appellant: Mr. *J. Warburton*, agent for Messrs. *Jellicorse & Bates, Manchester*.

Solicitors for the Respondents: Mr. *G. Brown*; Messrs. *Chester, Urquhart, & Co.*

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Feb. 19.

## PRESCOTT v. BARKER.

[1872 P. 100.]

*Wills Act* (1 Vict. c. 26), s. 26—Devise of "*Lands*"—*Leaseholds for Years—Contrary Intention.*

The 26th section of the *Wills Act*, which provides that a general devise of the testator's lands shall include leaseholds, unless a contrary intention appear by the will, was intended to abolish a technical rule which generally defeated the intention, and not to substitute another technical rule in its place. If, therefore, on the fair construction of the will, there are indications of an intention that leaseholds should not pass by the devise of lands, they will be excluded.

A testator, after devising his mansion-house to his wife for life, devised his mansion-house and "lands" in strict settlement. There was a direction to trustees to receive and accumulate the rents during the minority of any tenant for life or tenant in tail by purchase, and to stand possessed of the accumulations upon trust, if such tenant for life or in tail attained twenty-one, or died under that age leaving issue entitled or inheritable under the will, to pay or transfer the funds to such tenant for life or in tail, his executors or administrators, as personal estate, but if such tenant for life or in tail died under twenty-one without leaving such issue, then to lay out the fund in the purchase of freeholds in fee simple to be settled to the same uses as the devised estates. There was a power of sale, and a direction to invest the moneys arising from sales in the purchase of freehold lands to be settled to the same uses, or leaseholds convenient to be held therewith, with a direc-

tion to settle the purchased leaseholds on like trusts, but so that they should not vest absolutely in any tenant in tail by purchase who did not attain twenty-one; but on his death under that age should devolve as if they had been freeholds of inheritance, and been settled accordingly. There was also a bequest of heir-looms to be held on trusts corresponding with the uses of the mansion-house, with a similar proviso against their vesting absolutely in any tenant in tail by purchase who did not attain twenty-one. The testator bequeathed his residuary personal estate to trustees upon trusts corresponding with the uses of the devised estates, with a proviso that it should not vest absolutely in any tenant in tail by purchase dying under twenty-one, but on his death under that age should devolve as if it had been freehold of inheritance included in the devise:—

*Held* (affirming the decision of *Malins*, V.C.), that there was sufficient indication of an intention not to include leaseholds for years in the devise of lands, and that they passed under the residuary bequest.

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THIS was an appeal from a decision of Vice-Chancellor *Malins* on a Special Case on which His Honour decided that leaseholds passed under a residuary bequest of personal estate, and not under a general devise of the testator's lands.

*George Barker*, by will dated the 21st of January, 1861, gave and devised his mansion-house at *Stanlake*, in *Berkshire*, with the appurtenances, to the use of his wife and her assigns during her life, and subject as aforesaid, he gave and devised the same mansion-house, hereditaments, and premises, and he also gave and devised "all other my messuages, lands, and hereditaments in the county of *Berks*, and also all my lands and hereditaments in the parish of *Padbury* or elsewhere in the county of *Bucks*, and all my messuages, lands, and hereditaments in the county of *Middlesex*, and all other lands and hereditaments (if any), wheresoever situated and being in *England*, belonging to me at my death," to the use of his eldest son *George W. Barker* and his assigns during his life, with remainders to *George W. Barker's* sons and daughters and their children, similar to the limitations afterwards stated with respect to his second son *Alfred G. Barker's* children, with remainder to the Defendant, *Alfred G. Barker*, for life, with remainder to the use of each of the sons of the said *Alfred G. Barker* who should be born during the testator's life, for the life of such son, and after his decease to the use of his first and other sons successively in tail male, so that the elder of the sons of *Alfred G. Barker* to be born during the testator's lifetime, and his

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first and other sons successively and the heirs male of their respective bodies, might take before the younger of such sons and the heirs male of their respective bodies, with remainder to the sons of *Alfred G. Barker* who should be born after the testator's decease successively in tail male, with remainder to the use of the first and other sons of each son of *Alfred G. Barker* born in the testator's lifetime, according to their respective seniorities in tail general, with remainder to *Alfred G. Barker's* sons born after the testator's decease successively in tail general, with remainder to each of the daughters of *Alfred G. Barker* who should be born during the testator's lifetime for the life of such daughter, with remainder to her first and other sons successively in tail, with remainder to her first and other daughters successively in tail, with remainder to the daughters of *Alfred G. Barker* to be born after the testator's decease successively in tail. There followed a set of limitations in strict settlement on the testator's daughter *Emma Blanche Barker* and her descendants, similar to those in favour of *Alfred G. Barker* and his descendants, and after them a set of similar limitations in favour of the testator's son *Charles Henry Barker* and his descendants, with an ultimate remainder to the use of the testator's "own right heirs for ever."

The will contained a power in the usual form for tenants for life to limit jointure rent-charges to their respective wives, and a power to limit the property charged therewith for any terms of years for securing such jointures.

The will then contained a clause empowering the trustees, during the minority of any tenant for life, or tenant in tail male by purchase, or in tail by purchase, to enter into possession or receipt of the rents, and after applying a sufficient sum for maintenance, to invest the surplus of such rents in their names in any of the Parliamentary stocks or funds of *Great Britain*, or at interest upon Government or real securities in *England* or *Wales* (but not in *Ireland*), or on security of leasehold hereditaments in *London* or in the county of *Middlesex* not having less than sixty years to run, and directed them to accumulate the income of such investments at compound interest, and stand possessed of the accumulated fund upon trust, if the tenant for life, or tenant in tail male by purchase, or in tail by purchase, during whose minority the said rents, issues,

and profits should have accumulated, should attain the age of twenty-one years, or die under that age leaving issue entitled or inheritable under the will, to pay or transfer the same to such tenant for life or tenant in tail male, or in tail, his or her executors or administrators, as personal estate of such person, but if the tenant for life or tenant in tail male by purchase, or in tail by purchase, during whose minority such rents, issues, and profits should have accumulated, should die under the age of twenty-one years without leaving issue entitled or inheritable under the will, then upon trust to convert the fund into money and lay out the proceeds in the purchase of lands, tenements, and hereditaments of freehold tenure for an estate in fee simple in *England* (the county of *Berks* to be preferred), and that the hereditaments so purchased should be settled and assured to the like uses as were by the will declared concerning the said hereditaments thereinbefore devised in strict settlement, except the house at *Stanlake*.

The will also contained a power of sale and exchange empowering the trustees during the life of any tenant for life entitled in possession, with the consent of such tenant for life, and also during the minority of any person thereby made tenant for life, or in tail male by purchase, or in tail by purchase, who, if of full age, would for the time being be entitled to the possession or the receipt of the rents and profits, at their discretion, to sell or exchange for other manors, lands, and hereditaments in *England* or *Wales*, all or any of the premises thereinbefore devised in strict settlement, and to invest all moneys which might become payable on any such sale or exchange, "in the purchase of other manors, lands, or hereditaments in *England* or *Wales*, for an estate of inheritance in fee simple, or of lands of a leasehold, or copyhold, or customary tenure, convenient to be held therewith, or with any hereditaments for the time being subject to the existing uses or trusts of this my will." And the testator declared that the trustees should settle and assure all such of the manors, lands, or hereditaments so to be purchased or taken in exchange as should be freeholds of inheritance to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisions, and directions to, upon, for, with, under and subject to which the hereditaments, by the sale or exchange of which the purchase-money

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of the hereditaments so as aforesaid directed to be settled should have arisen, or in exchange for which the hereditaments so as aforesaid directed to be settled should have been received, would, in case the same had not been sold or given in exchange, have stood settled; and should settle and assure all such of the said manors, lands, or hereditaments so to be purchased or taken in exchange as should be of leasehold, copyhold, or customary tenure, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisions, and declarations as should or might correspond with and be similar to the uses, trusts, intents, purposes, powers, provisions, and declarations to, upon, for, under, and subject to which the hereditaments, by the sale or exchange of which the purchase-money of the hereditaments so as last aforesaid directed to be settled should have arisen, or in exchange for which the hereditaments so as last aforesaid directed to be settled should have been received, would under the will, if not so sold or given in exchange, have stood settled and assured, or as near thereto as the different tenure and quality of the premises, and the rules of law and equity would admit of. "And so that if any of the lands purchased or taken in exchange shall be held by a lease for years, the same shall not vest absolutely in any person hereby made tenant in tail male by purchase, or in tail by purchase, who shall not attain the age of twenty-one years; but on his or her death under that age, shall go, devolve, and remain in the same manner as if they had been freeholds of inheritance, and had been settled accordingly."

The will also contained the following bequest:—"I bequeath all my pictures, prints, books, plate, glass, china, ornamental and other clocks, articles of linen, household goods, furniture and effects whatsoever, which at my decease shall be in or about my said mansion-house at *Stanlake*, unto the said" [trustees], "in trust to permit the same to go along with and be used and enjoyed, so far as the rules of law and equity will permit, by the person or persons who, under or by virtue of this my will, shall for the time be in the possession of, or entitled to the receipt of, the rents, issues, and profits of the said mansion-house hereby devised in strict settlement; yet so that the same shall not vest absolutely in any person hereby made tenant in tail male by purchase, or in

tail by purchase of the said mansion-house, unless such person shall attain the age of twenty-one years; but on the decease of any such person, being tenant in tail male by purchase, or in tail by purchase, under this my will, shall go, devolve, and remain in the same manner as if they had been freeholds of inheritance, and had been included in the devise in strict settlement herein contained of the said mansion-house."

The will then contained the following residuary bequest:—"I give and bequeath all the money, securities for money, goods, chattels, and personal estate of or to which I am or at my death shall be possessed of or entitled, either at law or in equity, or of which I have, or at my death shall have, power to dispose by will" to his trustees, "upon trust, at their discretion, either to permit the same or any part thereof to remain in its actual state of investment so long as they should think fit, or to convert the same into money and invest such money in their names upon Government or real securities in *England or Wales*" (but not in *Ireland*) "or on the security of leasehold houses or hereditaments in *London* or the county of *Middlesex*, held for terms of years, not having less than sixty years to run at low ground rents," or in certain stocks or shares therein mentioned. And the testator declared that his trustees should stand possessed of his said residue, stocks, funds, and securities, and the income thereof (subject to the payment of a certain annuity, and to a trust for accumulating £1500 a year for twenty years from his decease), and of the funds to arise from such accumulation, upon such trusts as should correspond with and be similar to the uses, trusts, &c., thereinbefore declared concerning the hereditaments thereinbefore devised in strict settlement; "so nevertheless that the said residuary estate, accumulations, and premises shall not vest absolutely in any person hereby made tenant in tail male by purchase, or in tail by purchase, of the same hereditaments and premises, unless such person or persons shall attain the age of twenty-one years; but on the decease of any such person, being tenant in tail male by purchase, or in tail by purchase, under or by virtue of this my will, shall go, devolve, and remain in the same manner as if they had been freeholds of inheritance, and had been included in the devise in strict

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settlement hereinbefore contained of the same hereditaments and premises."

The testator made a codicil, dated the 18th of July, 1865, by which he revoked the limitations in favour of *C. H. Barker* and his descendants, he having died without issue, and in default of issue of his said sons *G. W. Barker* and *Alfred G. Barker*, and of his daughter *Emma B. Barker*, under the limitations contained in his will, who should attain twenty-one or marry, devised his said estate, real and personal (subject to the powers therein contained), instead of the devise for the use and benefit of his own right heirs as named in his will, to the use and for the benefit of his said sons, *George W. Barker* and *Alfred G. Barker*, equally to be divided between them, and their respective heirs, executors, and administrators, absolutely and for ever.

The testator died in November, 1868, and his will and codicil were proved in January, 1869.

The testator's eldest son, *George W. Barker*, died in September, 1869, without having been married.

The testator's second son, *Alfred Gresley Barker*, had three children, all of whom were infants. Two of them were born in the lifetime of the testator, and one after his death.

The testator was at the date of his will and of his death possessed of large real estates, and also of certain leasehold hereditaments, producing a gross rental of about £760 per annum, situate in *Paddington*. These leaseholds were held for terms of years, of which about seventy were then unexpired.

The question was whether these leaseholds passed under the residuary bequest or under the devise of the testator's messuages, lands, and hereditaments, in which latter case the interest of a tenant in tail in them would not be defeated by his dying under twenty-one, and they would not be subject to a trust for conversion. Vice-Chancellor *Malins* having decided that they passed under the residuary bequest, *Alfred Gresley Barker* and his children, who were born in the testator's lifetime, appealed (1).

(1) 1873. Dec. 17.

SIR R. MALINS, V.C. :—

This is a special case stated for the

opinion of the Court upon the question whether, by a particular clause in the will of Mr. *George Barker*, who was a solicitor of this Court, of great emi-

Mr. *Bristowe*, Q.C., and Mr. *Cust*, for the Appellants:—

By 1 Vict. c. 26, s. 26, these leaseholds must pass by the general devise unless a contrary intention appears by the will. We submit

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nence and long-standing, his leasehold estates have passed.

The will is dated in 1861. It is a will, therefore, to which the provisions of the *Wills Act* of the 1st Vict. c. 26, apply. The testator had considerable freehold estates, and also leasehold estates, as I understand, in the parish of *Paddington*, and by his will he says, "I give and devise the mansion-house, hereditaments, and premises, and I also give and devise all other my messuages, lands, and hereditaments in the county of *Berks*, and also all my lands and hereditaments in the parish of *Padbury* and elsewhere in the county of *Bucks*, and all my messuages, lands, and hereditaments in the county of *Middlesex*, and all other lands and hereditaments (if any) wheresoever situated and being in *England*, belonging to me at my death, to the use of my eldest son, *George William Barker*." He gives it to his eldest son for life, then to his issue in tail male and tail general, with remainder to his second son and to his issue for life in tail male, and then to his daughter in the same manner, and he winds up by making a devise to his own right heirs. He also provides that in the case of any person being made tenant in tail born in his lifetime, he shall not be tenant in tail, but tenant for life, with remainder to his or her issue. That, therefore, is a will which shews an intention on the part of the testator to tie up his property as long as the rules of law and equity will permit.

Having made this devise, which may be considered as a devise of all his lands and hereditaments in the county of *Middlesex* and elsewhere, and having

given these lands in this very strict manner, the question is, whether that passes the leasehold property which he had for seventy years unexpired. Now the *Wills Act* is very express in its provisions. The 26th section says, "Be it enacted that a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary copyhold or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary copyhold and leasehold estates of the testator, or his customary copyhold and leasehold estates, or any of them to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will."

This, therefore, devises the lands and hereditaments in every part of *England*, and will certainly pass the leasehold estates in question, unless by the will some contrary intention shall appear.

Now if the testator had ended his will with the ultimate remainder to his own right heirs, I am perfectly clear that there is nothing in the will up to that point to shew a contrary intention; and then, not only by the express words of the section which I have just read, but by the interpretation which has been put upon that section in the celebrated case of *Wilson v. Eden* (11 Beav. 237; 5 Ex. 752; 14 Beav. 317; 12 Q. B. 474; 16 Beav. 153), first by the Court of Exchequer on the special case sent by the Master



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that there is here no such proof of contrary intention as will take the case out of the statutory rule. The case is governed by *Wilson v. Eden* (1). For the Court to give effect to the trifling circum-

of the Rolls; secondly, by the Court of Queen's Bench, and finally confirmed by Lord *Romilly* when Master of the Rolls, it is settled that although there is a general devise or bequest of the lands of the testator to one for life, with remainder to his issue in tail, with remainder over, the inconvenience which would arise from holding that the leasehold property would vest in the first tenant in tail from the moment of his birth will not operate against the general devise; if, therefore, there had been nothing more in this will than the devise of these lands to his sons and to their family in succession, and then to his daughter in the manner I have mentioned, I am clearly of opinion, not only by the words of the will, but by *Wilson v. Eden*, followed as it has been by other cases, that I should be bound to hold that these leasehold estates would pass, though the consequences would be to vest them in the first tenant in tail who was born, absolutely, and would render all the subsequent limitations inoperative. But the statute says "that they are to pass unless a contrary intention shall appear by the will." Now how is that to be shewn? Mr. *Bristowe* has argued that a testator must say so; but if that had been the intention of the Legislature the language would have been different. It would then have been, "unless the testator shall express a contrary intention." Here it is, "unless a contrary intention shall appear by the will." What is the meaning of that? It must be that the Court, having the construction of the will to determine, must be

satisfied by regarding every part of it, either from one part or from all the parts taken together, and be able to draw the conclusion that the testator did not intend, under a general devise of lands and hereditaments, to pass the leasehold property. Accordingly, in this case, Mr. *Cotton* very properly conceded that if the will had been as I have mentioned, and if it had stopped after the limitation to the right heirs, that would not be sufficient to shew the contrary intention, because the same limitations occur in *Wilson v. Eden*, so that the property would vest in the first child that was born, absolutely in tail. In that case the ultimate limitation was to Sir "*William Eden* and his heirs and assigns." The same argument was raised in that case as has been raised here. It was said there was a clear intention that only the real estate should pass. The argument was rejected, and I should have been bound to reject the argument in this case were it not for the fact that by other parts of this will my opinion is that the testator has shewn a sufficient indication of intention that this property should not pass by the general devise. Now whatever he did intend to pass by the general devise, over that property he has given powers of sale and exchange, and he has provided that the moneys arising from the sale may be invested in the purchase of other lands of a freehold nature, or leasehold estates conveniently situated to be held therewith. If it had stopped there it would have been "the proceeds of freeholds or leaseholds convenient to be

(1) 11 Beav. 237; 5 Ex. 752; 14 Beav. 317; 18 Q. B. 474; 16 Beav. 153.

stances in favour of the Respondents in this will, after getting over the great difficulty arising from the inapplicability of limitations in strict settlement to leasehold estates, would be straining at

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held therewith to be invested on the same trusts." That would not have altered the effect of it.

But then it goes on to provide that if leasehold estates are bought—that is, bought under the general devise in strict settlement—then they are to be settled in such a manner as that they are to go exactly as the estates sold would have gone, and he has then expressly provided that they shall not vest in any person made tenant in tail who shall die under the age of twenty-one years; therefore distinctly shewing that he did not intend that the leaseholds should pass, because if they had passed by this devise they would have vested in the first tenant in tail; and the consequence is that the property which is sold is not to go to the first tenant in tail, but is by this expressly directed to be tied up in such a manner as that it is not to vest in any tenant in tail by purchase who does not attain the age of twenty-one years. Now, therefore, if I had thought that he had passed his leasehold estates before, that shews to my mind that he would have inserted a similar clause, that the leasehold estates comprised in the proviso should not vest in any person made tenant in tail who should not attain the age of twenty-one years. That is one circumstance from which, I think, it may fairly be concluded what his impression was (and his impression was no doubt his intention) as to the leasehold estates passing by that devise.

Another circumstance, which Mr. Cotton very strongly adverted to, was, that when he comes to an accumulation clause he says that during the minority of any person made tenant in tail the

rents are to be accumulated, and by using that expression, "the minority of the person made tenant in tail," I think he shews that he knew perfectly well that a tenant in tail dying under age could not dispose of an estate tail, but that it would go over, under the limitations contained in his will, to the issue of that tenant in tail if he died leaving issue, if not it would go over to the next one in the line of limitations; but he provides that the rents and profits during the minority of the tenant in tail are to be accumulated, and the accumulations are again to be laid out in land; but they again are so to be settled that the produce of these accumulations are not to vest in any tenant in tail by purchase who has not attained the age of twenty-one years.

Then another circumstance is this: He gives his chattels in strict settlement. He bequeaths his pictures, prints, books, plate, glass, china, ornamental and other clocks, articles of linen, household goods, furniture, and effects whatsoever, which at his decease shall be in or about his mansion-house of *Stanlake*, to trustees on trust to go with the real estate. They are all to go together, but that again provides, "so that the same shall not vest absolutely in any person hereby made tenant in tail male by purchase or in tail by purchase of the mansion-house, unless such person shall attain the age of twenty-one years, but, on the decease of any such person being tenant in tail male by purchase, or in tail by purchase, under or by virtue of this my will, shall go, devolve, and remain in the same manner as if they had been freehold of inheritance, and had been

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a gnat after swallowing a camel. *Reeves v. Baker* (1) is in favour of giving a wide effect to a general devise. The alteration of the

included in the devise in strict settlement."

Then we come to that clause which is very material, if I am right in considering that these leaseholds did not pass by the special devise which I have referred to of the general estate. He now gives his general residuary personal estate in these terms: "I give and bequeath all the money, securities for money, goods, chattels and personal estate of or to which I am or at my death shall be possessed of or entitled to either at law or in equity, or of which I have or at my death shall have power to dispose of by will, unto the trustees on trust either to permit and suffer the same or any part thereof to remain in its actual state of investment." Of course Mr. *Bristowe* has very properly conceded that if the leaseholds do not pass under the first clause they will pass by this, under the description of personal estate. But an observation was made that it could not apply to the leasehold estates because he speaks of the present investment, and a man would hardly speak of leaseholds in this sense—to remain in their present state of investment: but *reddendo singula singulis*, I am of opinion that those words apply to the part of the property which is, strictly speaking, so invested, and that it would pass that part of his property which is otherwise not disposed of.

Now what are they to do with his personal estate? They are to collect it, and it is to remain in the same state of investment, or it is to be put into other investments. Then what is to be done? It is to be held by the trustees

in such a manner as that it is to go in strict settlement. They may also lend the money on leaseholds not having less than sixty years to run, and then they are to hold it in strict accordance with the limitations contained therein, of his real estate, so that whoever is entitled to the real estate is also to be entitled to the personal estate. But then, again, comes this provision: "shall not vest absolutely in any person hereby made tenant in tail male by purchase, or in tail by purchase, of the same hereditaments and premises, unless such person or persons shall attain the age of twenty-one years; but on the decease of any such person being tenant in tail male by purchase, or in tail by purchase, under or by virtue of this my will, shall go, devolve, or remain in the same manner as if they had been freeholds of inheritance and had been included in the devise in strict settlement hereinbefore contained." Now if the testator was so anxious, first, that the accumulations of his real estate should not vest, then that his heir-looms should not vest in any person made tenant in tail, and, thirdly, that his general personal estate should not vest, what an absurdity it would be to suppose that he intended his large leasehold estates should vest, and that he should make no such provision as to them as he had done with regard to the others.

Therefore I look at every part of the will, and I see that he could not have intended the leaseholds to pass by the first gift, but that he intended them to pass by the second gift, and that they were to be held on the same trusts as his general real estate, so that they

ultimate limitation by the codicil is a strong argument for including leaseholds.

should not vest in any person made tenant in tail who should not attain the age of twenty-one years.

Then Mr. *Bristowe* says there is a codicil, and that the codicil makes a difference, because by his will he had wound up by a limitation to his own right heirs, and now, by the codicil executed in 1865, and reciting the limitations contained in his will with regard to his real estate, he says, instead of the devise "for the use and benefit of my own right heirs, they are to go to the benefit of my sons"—that is, everything he had given before; the words are: "To the use and for the benefit of my said sons *George William Barker* and *Alfred Gresley Barker*, equally to be divided between them and their respective heirs, executors, and administrators, absolutely and for ever." Mr. *Bristowe* argued that that shews that he knew very well that in the original devise there was real and personal property, because he gives it to his heirs, executors, and administrators; but that argument, I think, entirely falls to the ground when it is considered that he had given his personal property to be held in the same manner as his real estate. The ultimate limitation with regard to that will be to his right heirs, which will mean next of kin or legal personal representatives, but now he substitutes his two sons. By the first part of the will he had given the real estate, by the second part he had given the personal estate, and as to both he now says, "I give it to them and their heirs"—that is, the real estate; "and their executors"—that is, the personal estate. Therefore that fully explains it.

Now, therefore, upon these clauses, being, as I am, bound in all cases of

construction of written instruments, to look at the instrument in every part of it to ascertain what the intention of the parties is—looking at every part of this will, and seeing the inconvenience that would arise from allowing the property to vest absolutely in the first tenant in tail who came into *esse*, so that the consequence would be that if *George William*, the first son, had had a child who died an hour after its birth, the property would have vested in him—although I agree with Mr. *Bristowe* that that would not have been sufficient, yet that is an objection which was overruled in *Wilson v. Eden*, and that alone would not have done; but when I find such anxious provisions to prevent that consequence happening, I come to the conclusion that it was not inserted with regard to the property comprised in the first devise because he considered that he had only passed the real estate, and that with regard to such real estate no such provision was necessary, as it would not vest in any tenant in tail who did not attain the age of twenty-one years and had not executed a disentailing deed. That knowledge I must attribute to the testator, and therefore, the statute not requiring that there should be any express intention, but it being only a "contrary intention" to be collected from the whole will, I come to the conclusion that there is a contrary intention shewn by this will.

The first question, therefore, will be answered in the affirmative, and the second in the negative. And with regard to the third question, I am of opinion that the trustees may postpone the sale and conversion of the leasehold estate for the present. It appears that the leasehold estates produce a gross

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Mr. *Cotton*, Q.C., and Mr. *C. Comyns Tucker*, for the child of *Alfred Gresley Barker* born after the testator's death, were not called upon.

LORD SELBORNE, L.C. :—

We are of opinion that the Vice-Chancellor's judgment and decision in this case are clearly right.

The argument of the Appellants is founded on the 26th section of the *Wills Act* ; but as we understand it, the object of that section was to abrogate a merely technical rule tending, in many cases, to defeat the intention of testators using language in its natural sense, and not to establish another technical rule which, in particular cases, might have a like effect in the contrary direction. The intention is to be regarded, and the only effect of that section is, in conformity with what was considered by the Legislature to be the natural *primâ facie* use of language, to shift the *onus probandi*, and to throw it on those persons who deny that in a will "lands" are meant to include leasehold estates in land. To that extent, of course, the statute operates in the Appellants' favour, because the word "lands" being found in the part of the will under which the Appellants claim, the effect of the statute is to throw on the other side the *onus probandi*, that the word "lands" does not include the leaseholds in question. But when that *onus probandi* is thrown on the other side, all that they have to do is to shew to the Court from the whole will sufficient grounds to satisfy a reasonable man that the intention of the testator was not by the word "lands" to pass the leasehold estates. In *Wilson v. Eden* (1), it is laid down by the Court of Queen's Bench that, in acting under that section, the Court is not to look to any

rental of about £762 per annum, and that they are held for long terms of years, of which about seventy years are now unexpired, and that they have increased in value since the death of the testator. Upon that statement I am of

opinion that they are at perfect liberty to retain them for at least twenty years if they think that the property is still likely to increase in value. The third question will, therefore, be answered in the affirmative.

(1) 18 Q. B. 474.

technicalities, but to collect the intention from the whole will—a sound maxim in all cases. I was reminded, by the nature of the argument on the other side, of a somewhat parallel, although converse case, not depending on the statute—*Coard v. Holderness* (1)—where a testator gave all his estate, effects, and property, whatsoever and wheresoever, which he was or might be possessed of or entitled to, upon trust for his children, plainly throwing on the heir-at-law the *onus probandi* to shew that the real estate did not pass. That *onus probandi*, in the case of *Coard v. Holderness*, was held to be satisfied by a process similar in principle to that which the Vice-Chancellor has applied, and which we apply to the present will; that is, by looking at all the subsequent parts of the disposition, and seeing whether you would or would not, by holding the gift, (as *primâ facie* it ought to be held,) to include real estate, produce inconsistency, and be defeating and departing from the intention indicated by expressions occurring from time to time in subsequent places. The Master of the Rolls in that case stated thus the principle on which he proceeded, which I think is equally applicable here (2):—“I am of opinion that the burthen of proof is thrown upon the heir-at-law to shew that these words are, according to the settled rules of construction, to be cut down so as to include personal estate only. I think that the rest of the will does justify the Court in coming to the conclusion that these words were intended to be confined to personal estate. The view I take of this case is this: that these words are to be construed with due regard to the general scope and object of the testator, and that for this purpose the whole will must be looked at together.”

Looking at the present will, the first thing to be considered is the fact, which, and which alone, is common to the present case and *Wilson v. Eden*, that the gift, in which the Appellants contend that the leasehold estates are included, is a gift to uses in strict settlement, which, in their entirety and integrity, cannot be applied to leasehold estates, but must, more or less, fail—that is, fail from the time at which the first tenant in tail is reached; there they must stop by the irresistible operation of law as to the leasehold estates, while they would go on as to the freeholds. The whole intention, therefore, apparently indicated by such a settle-

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(1) 20 Beav. 147.

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ment, is capable of taking effect as to the freehold estates, but is not capable of taking effect as to the leasehold estates. Lord *Langdale* appears to have thought, in *Wilson v. Eden* (1), that this alone was a sufficient ground for holding that the intention could not be to include leasehold estates, and Mr. *Cust* urged that overcoming that difficulty was like swallowing a camel, and that all the other difficulties in this will are, in comparison to it, but as gnats. I think that Lord *Langdale*, who was an eminent Judge, had at least this reason for his opinion—that a construction which cannot take effect equally as to all the subjects of the gift when they are blended together is probably and *primâ facie* one which had not presented itself to the mind of the testator as involving that result. The Courts of Law, however, and eventually this Court, came to the conclusion, that the fact of the devise being to limitations in strict settlement was not by itself sufficient to exclude leaseholds; and the argument now seems to be that, because it is not sufficient when standing alone, it is to have no weight at all when accompanied by various other indications in the context of the will. I am not surprised that the Courts of Law should have come to the conclusion arrived at in *Wilson v. Eden*. It is not at all necessary for me to express any opinion as to that authority, by which undoubtedly we are bound; but I am not surprised at it, because we know that in other cases not depending upon statute—such as *Forth v. Chapman* (2)—the Courts of Law had become accustomed to very violent divorces of different kinds of property, which the testator had dealt with by a single disposition, and which he apparently had intended to go together. But, admitting that limitations in strict settlement would not by themselves sufficiently discharge the burden of proof here lying upon the Respondents, what is the present will?

The first thing that strikes us in this will, and which is entirely different from anything in *Wilson v. Eden*, is this—that whereas in *Wilson v. Eden* there was a gift of land in strict settlement to one set of persons, and a gift of the testator's residuary personal estate absolutely to another person, here we have on the whole will the most perfect evidence of intention on the part of the testator to keep his whole estate, personal as well as real, together,

(1) 11 Beav. 237.

(2) 1 P. Wms. 663.

and make the whole, by the most effectual legal means which he could employ, the subject of one strict settlement in favour of one designated succession of persons, whom he intended to take beneficially one part as well as the rest, as far as possibly could be done consistently with the rules of law and equity. When we follow that scheme in detail, we find, as it appears to me, almost at every step where we could possibly look for special indications of purpose, indications of a purpose inconsistent with that separation and divorce of the leaseholds from the freeholds which would be the practical result of the success of the Appellants' argument. There is a clause, the force and effect of which I had not distinctly perceived until it was drawn to our attention in reading the judgment of the Vice-Chancellor, which furnishes a strong argument as to the testator's intention. It is this—that as often as any person, who under the previous words was designated as tenant for life or tenant in tail by purchase, should be under the age of twenty-one, the testator's trustees should enter into the possession or the receipt of the rents, issues, and profits of the same premises—evidently all and every part of them—and receive and invest and accumulate, subject to maintenance and proper charges, the whole of those rents during the minority of the tenant for life or tenant in tail by purchase, and if that person attained twenty-one, then pay over to him the accumulated rents, and if he died under twenty-one, then invest those accumulated rents in the purchase of freehold land to be settled to the same uses. It seems difficult, if not impossible, to reconcile the operation of that clause with the argument, which, as soon as ever a tenant in tail comes into *esse*, vests in him absolutely the whole of the leaseholds, there being in this part of the will no provision whatever to prevent leaseholds, if they pass by the words, from vesting absolutely in the first tenant in tail at the moment of his birth, or at the moment of the testator's death, as the case might be. That is the first indication, and I think it a very strong one. The second is furnished by the power of sale, which applies to the whole property; and so, if leaseholds pass, to leaseholds as much as to freeholds:—the proceeds of sales under that power of sale are to be invested “in the purchase of other lands or hereditaments in *England* or *Wales* for an estate or estates of inheritance in fee simple, or of lands of a leasehold

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or copyhold or customary tenure, convenient to be held therewith " —the first place in which leaseholds are expressly mentioned in the will, except in a clause referring to them as a security on which money might be lent, which is not material. The testator, therefore, authorizes an investment, not in any leaseholds, but in leaseholds convenient to be held with the settled estates, of money that might have arisen from a sale of part of the settled estates; and he goes on to distinguish what is to be done in the case in which freeholds are purchased, and in the case in which leaseholds, copyholds, or customary estates are purchased. If freeholds of inheritance are bought, they are to be settled to the same uses to which the hereditaments, by the sale or exchange of which the purchase-money should have arisen, previously stood settled; the word "hereditaments" alone being used as signifying the subject-matter of the sale, but which might be anything that was part of the settled estates, and "hereditaments" being a word which, after the statute, as I conceive, as well as before, means heritable property. If the property purchased is freehold of inheritance, it is to be settled to the same uses; but if it is of leasehold, copyhold, or customary tenure, then it is to be settled in a different way. [His Lordship here read the trust for settlement of the customary copyhold and leasehold estates, with the clause preventing leaseholds for years from vesting absolutely in a tenant in tail dying under twenty-one.] Now let us consider the effect of that. If leaseholds for years were included in the settlement, and were sold under the power of sale, the proceeds of that sale could not be invested in other leaseholds to be settled on the same trusts as the leaseholds which had been sold, but upon different trusts, which would prevent a tenant in tail by purchase from taking absolutely if he died under twenty-one. There is an equally careful provision to prevent the heir-looms in the mansion-house from vesting absolutely in a tenant in tail dying under twenty-one; but I agree that, as the reference there is to the limitations of the mansion-house, and not of the other property, that argument has not in all points the same cogency.

Lastly, we come to the gift of all the testator's personal estate, which most clearly includes the leaseholds if they do not pass under the previous gift. Directions are given for allowing it to

remain in its actual state, or to convert it and invest the proceeds on such stocks, funds, or securities as therein mentioned; directions are given for payment of an annuity, and for the accumulation of £1500 a year to form an accumulated fund; and, subject to these directions, the whole residuary personalty, including the accumulated fund, is to be held upon trusts corresponding with the uses of the estates devised in strict settlement, with a proviso preventing its vesting absolutely in any tenant in tail by purchase who does not attain twenty-one. To my mind, there is in every one of those clauses a distinct, and in the whole of them a cumulative, indication of intention that leaseholds should not pass by the specific devise in the settlement, but should pass by the ultimate gift of the personal estate; and therefore I am of opinion that the Vice-Chancellor's decree must be affirmed with costs.

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SIR W. M. JAMES, L.J.:—

I am of the same opinion. I cannot say that I do not to some extent agree with Mr. *Cust* when he says that a camel was swallowed in the case of *Wilson v. Eden*.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I do not know that I quite agree with that last observation, because I think that if the testator in *Wilson v. Eden* had been asked whether he intended the leaseholds to go with the freeholds, he would have said, "Yes," and that if the present testator had been asked the same question, he would have said, "No."

The LORD JUSTICE JAMES:—I agree in that remark.

Solicitors: Messrs. *Bowker, Peake, & Bird*.