

SAXTON v. SAXTON.

[1879 S. 174.]

V.-C. M.

1879

Dec. 15.

Wills Act, ss. 23, 24—Bequest of Leasehold—Subsequent Purchase of the Fee.

A testator gave to his wife all his term and interest in the leasehold house at *B.*, in which he then resided, for her absolute use and benefit, subject to the payment of the ground rent and performance of the covenants affecting the same. After the date of his will the testator purchased the freehold of the house at *B.*, which was conveyed to him in fee simple:—

Held, that the house passed to the testator's widow, under the specific devise contained in the will, for an estate in fee simple.

SPECIAL CASE.

The will of *William Waring Saxton*, dated the 28th of April, 1876, commenced with the following clause:—

“I give, devise, and bequeath unto my dear wife *Emily* all my term and interest in the leasehold dwelling-house and premises known as No. 1, *Berkeley Gardens, Kensington*, in which I now reside, for her own absolute use and benefit, subject to the payment of the ground rent and performance of the covenants affecting the same, but free from any claim or incumbrance (if any) created by me.”

The testator, at the date of his will, was in possession and occupation of the messuage and premises mentioned in his will, and known as No. 1, *Berkeley Gardens*, under a lease for the residue of a term of ninety-four years from the 24th of June, 1859, at a yearly ground rent of £10, and subject to the performance of the usual covenants.

Subsequently to the date of his will the testator contracted for the purchase of the freehold of inheritance of and in the said messuage and premises, and by an indenture dated the 11th of July, 1877, the same messuage and premises were, in consideration of £280, conveyed unto and to the use of the testator, his heirs and assigns, for ever, and the testator was therefore at the time of his decease entitled to the said messuage and premises for an estate of inheritance in fee simple. The said conveyance contained no words whereby the lease was expressly merged in the

V.-C. M.

1879

SAXTON

v.

SAXTON.

—

freehold of inheritance of the messuage and premises. The annual value of the property was about £100.

The questions submitted for the opinion of the Court were,

1. Whether the messuage and premises, No. 1, *Berkeley Gardens*, passed to the Plaintiff (the widow of the testator) under the specific devise contained in the will, and if so, for what estate or interest?

2. Whether the costs of and incidental to this special case ought to be borne by the testator's general personal estate, or how otherwise?

Glasse, Q.C., and *Terrell*, for the Plaintiff, the widow of the testator :—

The question raised by this special case is, whether the legacy given by the testator to his wife, which consisted of his leasehold interest in the house where he then resided was adeemed by his subsequent purchase of the freehold. The only authority which can be cited in favour of the Defendant's contention is the case of *Emuss v. Smith* (1), but that decision was questioned by Lord *St. Leonards* (2), and was not followed in several other cases : *Struthers v. Struthers* (3), *Cox v. Bennett* (4), *Miles v. Miles* (5), and *Wedgwood v. Denton* (6). The 24th section of the *Wills Act* says that the will shall speak from the death of the testator, unless a contrary intention shall be expressed. In this case there is no suggestion of a contrary intention, since it is manifest that the testator intended his wife to have the house for whatever interest he had in it.

Higgins, Q.C., and *Levitt*, for the Defendants, the children of the testator :—

The case of *Emuss v. Smith* is entitled to considerable weight, since it appears that the parties were represented by very eminent counsel, who would not have allowed the case to pass without substantial argument; and that case is a distinct authority in our favour. We say that a contrary intention is expressed in this will sufficient to take it out of the 24th section of the *Wills Act*, for the

(1) 2 De G. & Sm. 722.

(2) Real Property Statutes, p. 365.

(3) 5 W. R. 809.

(4) Law Rep. 6 Eq. 422.

(5) Ibid. 1 Eq. 462.

(6) Ibid. 12 Eq. 290.

testator has said, I give all my term and interest in the leasehold, which means all "the term and interest I now have," and that brings the case within *Cole v. Scott* (1), where it was decided that the word "now" clearly alluded to the period at which the testator was making his will, and that he had thereby indicated a contrary intention.

[MALINS, V.C.:—I never could follow the case of *Cole v. Scott*. It is opposed to *Doe v. Walker* (2).]

No doubt at first sight the cases of *Struthers v. Struthers* (3) and *Coæ v. Bennett* (4) are opposed to *Emuss v. Smith* (5), but it is remarkable that the latter decision was never referred to in either of those cases by the learned Judges who decided them. It was cited in *Coæ v. Bennett*, but not in *Struthers v. Struthers*. Those cases rested entirely upon the construction of the particular words used in the wills.

[They also cited *Moor v. Raisbeck* (6), *Goodlad v. Burnett* (7), and *Hawkins on Wills* (8), citing *Hutchinson v. Barron* (9).]

MALINS, V.C.:—

It is clear to my mind that the object of the testator was to give to his wife all the interest he had in the house in *Berkeley Gardens*, which was in fact a lease for the residue of a term of ninety-four years, subject to a ground rent of £10 a year. After the execution of his will he purchased the freehold interest, or, in other words, he bought up the ground rent, so that at the time of his death, the leasehold being merged in the freehold, his interest was a freehold interest. The question then is, whether the interest which the testator gave to his wife was adeemed, or whether, under the 23rd section of the *Wills Act*, the widow was entitled to the whole interest. The words of the 23rd section of the Act are clear and free from doubt. "And be it enacted that no conveyance or other act made or done subsequently to the

V.-C. M.

1879

SAXTON

v.

SAXTON.

(1) 1 Mac. & G. 518.

(2) 12 M. & W. 591.

(3) 5 W. R. 809.

(4) Law Rep. 6 Eq. 422.

(5) 2 De G. & Sm. 722.

(6) 12 Sim. 123.

(7) 1 K. & J. 341.

(8) Pages 20, 21.

(9) 9 W. R. 538.

V.-C. M.

1879

SAXTON

v.
SAXTON.

execution of a will of or relating to any real or personal estate therein comprised . . . shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death." The question now raised has been before the Court on previous occasions. The first decision is in *Emuss v. Smith* (1), where a testator, by a will dated before, and republished by a codicil after, the *Wills Act*, devised all his freehold estate at B., which he purchased of C. It appeared that there was a small piece of land purchased with the estate from C., and always held with and annexed to it, which was leasehold; and after executing the codicil the testator purchased the fee of that small piece of land, whereby the leasehold was merged, and it was held that the after-acquired fee did not pass by the codicil. I do not think that that case could have been fully argued, and there certainly are other authorities opposed to that decision. In the case now before me, the subject-matter of the devise is the house—the place in which he resided, and where he was desirous that his wife should continue to reside. It seems to be admitted that if he had given the house in *Berkeley Gardens* for all the interest he had in it, then the freehold would have passed; but he gave all the interest he had in the house, which it is said was a gift of the leasehold. I cannot but think that in using the expression he has used, it is precisely the same as saying, my house for all the interest I have in it. To my mind it is simply a different collocation of the words, but meaning the same thing. At the time of making his will he had a leasehold interest in the house, and afterwards he purchased the freehold; and it is argued that as he had no leasehold interest in the house, which was the interest he possessed at the time of making his will, the legacy was adeemed. Now, there are authorities which warrant me in coming to a decision contrary to that of *Emuss v. Smith*. There is the case of *Struthers v. Struthers* (2), where the testator gave certain leaseholds for all the residue of the term for which the same should be held by him at his death, and after making his will he acquired the fee, and it was held that such fee passed under the 24th section of the *Wills Act*. There Vice-Chancellor *Kindersley*, who

(1) 2 De G. & Sm. 722.

(2) 5 W. R. 809.

fully considered the question, was of opinion that the words were used to express the whole extent of the property he might leave at his death, not anticipating that he should then be entitled to any greater interest. The will therefore operated on the fee simple subsequently acquired.

The question came before the Court again in the case of *Cox v. Bennett* (1). There the point arose in this way: the testatrix bequeathed to trustees certain house property, which he described as leasehold, upon trust for the benefit of his wife for life, and after her death as she should appoint generally, and he also made a residuary devise and bequest of realty and personalty. After the date of his will the testator purchased the reversion of the leaseholds, which he had given for the benefit of his wife, and took a conveyance to himself in fee. The question was, whether the freehold interest passed to the trustees in trust for his wife, and Vice-Chancellor *Giffard* said, "I think this is one of those cases which it was intended that the *Wills Act* should operate upon. The clause in the statute says that the will is to pass such estate or interest in such real or personal estate as the testator shall have power to dispose of at his death; and there is nothing in the will to confine its operation to the interest which the testator had at the date of the will. The mere method which the testator adopts of describing his property is not equivalent to saying, 'I give the leasehold interest' and nothing else. There is, I think, in this description abundant to carry the freehold interest in the property."

Then the same thing was in effect decided in *Miles v. Miles* (2). The words of the specific devise were, "my messuage, partly freehold and partly leasehold, No. 3, *Cannon Street*," and there was a residuary devise upon trust for sale. The testator, subsequently to his will, purchased the reversion of the leasehold part of the messuage, and it was held that the whole of his interest in the messuage passed by the specific devise.

And there is another case of *Wedgwood v. Denton* (3). There a testatrix gave her house in *Liverpool*, held under the corporation, for the life of *T. Kay* and twenty-one years after his death," and

V.-C. M.

1879

SAXTON

v.

SAXTON.

(1) Law Rep. 6 Eq. 422.

(2) Law Rep. 1 Eq. 462.

(3) Law Rep. 12 Eq. 290.

V.-C. M.

1879

SAXTON

v.

SAXTON.

upon *T. Kay* dying in her lifetime, and after the execution of the will, she surrendered the twenty-one years' lease to the corporation and took a new lease for seventy-five years. It was there held that, notwithstanding the surrender of the original lease, the gift was valid for at least the period of twenty-one years from the death of *T. Kay*. Beyond that period it was not necessary to decide upon the construction of the trusts of the will.

There is nothing more clear than that this testator intended to give the house as a provision for his wife, and he intended by the words he used to give any interest he might have in that house. Very likely he thought it would be inconvenient for her to have this ground rent to pay, and so he purchased it to save her trouble. There can be no doubt about the intention, nor have I any doubt about the meaning of the *Wills Act*. The 24th section made the will to speak from the death, and the effect was to pass the house for whatever interest he had in it. Therefore, I answer the first question in the affirmative, that the house passed to the Plaintiff under the specific devise contained in the will of the testator for an estate in fee simple; and the costs will be borne by the general personal estate.

Solicitors for all parties : *Saxton & Son*.