

order might be made against the tenant for life and residuary legatees, notwithstanding the facts above stated. They referred to *Whitney v. Smith* (1); *Doody v. Higgins* (2).

Ince, Q.C., *Romer*, and *Decimus Sturges*, for other parties.

JESSEL, M.R.:—

I do not think that an order of this kind—an order against people personally—ought to be made without previous notice to them. But at any rate I have a discretion, under Rules of Court, 1875, Order xvi., rule 7, to order notice to be given to these persons. Let notice be given to them, and let the action stand over for a fortnight for that purpose.

Solicitors: *E. Warriner*, agent for *Gibbs & Llewellyn*, *Newport, Mon.*; *Clarke, Woodcock, & Ryland*, agents for *Farr & Wade*, *Newport, Mon.*; *Hunt & Son*, agents for *C. R. Lyne*, *Newport, Mon.*

CHANDLER v. POCOCK.

[1879 C. 346.]

Settlement—Real Estate—General Power of Appointment—Power of Sale—Direction to lay out Money in Purchase of Land—Conversion—Reinvestment in Government Funds—Will—General Bequest—“My personal Estate”—Exercise of Power of Appointment—Wills Act, 1837 (1 Vict. c. 26, ss. 1, 27).

By *A.*'s marriage settlement, dated in 1832, her father settled certain real estate to the use of *A.* for life, and after her death, and, in default of issue of the marriage, to the use of such persons as she should by will appoint. The settlement contained a power for the trustees to sell the real estate with a direction to lay out the proceeds, with *A.*'s consent, in the purchase of other hereditaments to be settled to the like uses, with a power of interim investment, with the like consent, in Government securities.

By his will, dated in 1831 and confirmed, subject to the settlement, by a codicil executed in 1832, shortly after the settlement, *A.*'s father devised the property, subject to the settlement, and all other his real estate, to the use of *A.* for life, and, in default of her having any issue, to such uses as she should by will appoint.

Some years afterwards, *A.*'s father and husband both having died and there

(1) Law Rep. 4 Ch. 513.

(2) 9 Hare, App. xxxii.

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In re

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having been no issue of the marriage, the trustees of the settlement, at *A.*'s request, sold all the settled real estate for a sum of £24,226 2s. Consols, which they transferred to her.

A. died a widow in 1879, having by her will, dated in 1875, shortly after the transfer to her of the consols, after appointing executors and bequeathing pecuniary legacies amounting to upwards of £30,000, bequeathed "all the residue of my personal estate and effects whatsoever" to two persons absolutely. The personal estate to which *A.* was entitled at the date of her will and of her death, independently of the £24,226 2s. Consols, did not amount to more than £6000 :—

Held, that, having regard to sect. 27 of the *Wills Act*, 1837 (1 Vict. c. 26), and the interpretation clause, sect. 1 ("personal estate"), *A.*'s will should be read as an appointment of "all the Government and other funds and all personal property over which I shall, at the time of my death, have a general power of appointment by will"; and that the will operated as an execution of the powers of appointment over the real estate given to her by her marriage settlement and her father's will, and passed the consols.

DEMURRER to statement of defence.

The statement of claim alleged to the following effect :—

Edward Lee, by his will, dated the 30th of August, 1831, devised his freehold hereditaments at *Compton*, in the county of *Berks*, and at *Box*, in the county of *Wilts*, and all other his real estate, to the use of his daughter, *Ann Lee*, for her life, with remainder to the use of trustees for a term of 500 years to raise portions for her younger children, with remainder to divers uses in favour of her issue; and, in default of such issue, to such uses as the said *Ann Lee* should by will, notwithstanding her coverture, appoint; and in default of such appointment, to the use of the testator's nephew, *Edward Lee Baldwin*, in fee.

In 1832 *Ann Lee* married *John Brown*, and a settlement was executed prior to such marriage. By this settlement, which was dated the 14th of July, 1832, and made between the said *Edward Lee* of the first part, the said *Ann Brown* of the second part, the said *John Brown* of the third part, and the trustees of the fourth part, the said *Edward Lee* limited the *Compton* estate, after the solemnization of the marriage, to certain uses for the benefit of the said *Edward Lee*, *John Brown*, and *Ann Brown* respectively during their respective lives, and after their several deceases to divers uses in favour of the issue of the marriage; and, in default of such issue, to the use of such person or persons and in such manner as the said *Ann Brown*, whether covert or sole, should by

will appoint; and, in default of such appointment, to the use of the said *Edward Lee* in fee. And the settlement contained a power for the trustees, during the lives of the said *Edward Lee*, *John Brown*, and *Ann Brown*, and the lives and life of the survivors and survivor of them, by their, his, or her direction to sell all or any part of the hereditaments thereby settled, and for that purpose to revoke the uses thereinbefore limited: and it was provided that the trustees should lay out the money arising from such sales in the purchase of other freehold hereditaments in *England*, or of copyhold or leasehold hereditaments convenient to be held with the freehold hereditaments so purchased; yet so that during the lives of the said *Edward Lee*, *John Brown*, and *Ann Brown*, or the lives or life of the survivors and survivor of them, such purchases should be made with their, his, or her consent in writing: and also that the trustees should settle the hereditaments so to be purchased to the same uses as were thereinbefore declared concerning the hereditaments sold, or as near thereto as circumstances would admit: and that, until the money should be so laid out, it should be lawful for the trustees, with such consent as aforesaid, to invest it upon the stocks, public funds, or other Government securities in the *United Kingdom*, and that the dividends arising from such investments should be paid to the person or persons to whom the rents and profits of the hereditaments purchased would be payable.

By a codicil dated three days after the settlement, *Edward Lee* redevise the hereditaments comprised in the settlement to the uses of his will, subject to the limitations of the settlement; and in other respects confirmed his said will.

Edward Lee died in 1843.

John Brown died in 1853.

In the year 1855 the trustees of the settlement sold all the hereditaments therein comprised for the sum of £24,226 2s. Consols, which was thereupon transferred into their names by the purchaser.

In 1875 the then trustee of the settlement transferred the Consols to the said *Ann Brown*.

The statement of claim then went on to allege that the said *Ann Brown* died on the 18th of July, 1879, without ever having

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had any issue, “and without having in anywise exercised the powers of appointment given to her by the said settlement, and the said will of the said *Edward Lee*, as confirmed by his said codicil thereto, respectively, or either of such powers,” but having by her will, dated the 24th of July, 1875, appointed the Defendants, *Thomas Canning* and *Thomas Chandler*, her executors.

The said *Edward Lee Baldwin* died in 1857, having by his will devised and bequeathed all his real and personal estate to his wife *Elizabeth Baldwin* absolutely. She died in January, 1879, having by her will devised and bequeathed all her real and personal estate to her son, the Plaintiff, *William Chandler*, whom she appointed her sole executor.

The Consols were now in Court under an order made in the action.

The Plaintiff claimed a declaration that he was entitled to the Consols.

The Defendants, the executors of *Ann Brown's* will, delivered a statement of defence in which they alleged as follows:—The transfer of the Consols to *Ann Brown* was made at her request in the belief that she was absolutely entitled to dispose thereof as she thought fit. By her will—which was said to have been executed shortly after the transfer to her of the consols—after appointing the Defendants *T. Canning* and *T. Chandler* her executors, and after bequests of specific legacies, and of pecuniary legacies to the amount of £30,500, to be paid free of legacy duty, she proceeded as follows:—“I give and bequeath all the residue of my personal estate and effects whatsoever unto and equally between *William E. N. Browne* and *Mary C. Browne* for their own absolute use and benefit. And I direct that interest at the rate of £4 per cent. per annum on the several legacies or sums of money hereby bequeathed from the day of my decease until the same are respectively paid or invested upon the trusts of this my will, shall be paid to the respective legatees. And I give and devise to the said *T. Canning* and *T. Chandler* all such real estates as are vested in me as trustee or mortgagee, subject to the equities affecting the same respectively.”

By a codicil dated in 1879 the testatrix gave additional pecuniary legacies to the amount of £850, free of legacy duty, but in other respects confirmed her said will.

The personal estate to which *Ann Brown* was entitled at the dates of her said will and codicil respectively, and at the time of her death, independently of the said sum of £24,226 2s. Consols, and of a sum of £3163 10s. 9d. Consols produced by the sale of the freehold property at *Box* mentioned in her father's will, did not amount to more than £6000, and her debts, and funeral and testamentary expenses, amounted to at least £200.

Under these circumstances the Defendants submitted that the will of *Ann Brown* operated as a valid execution of the powers of appointment given to her by the settlement, and by her father's will and codicil, and accordingly that the fund in Court passed to them as her executors.

The Plaintiff demurred to the statement of defence on the ground that the will of *Ann Brown* disposed only of personal estate and of real estate vested in her as a trustee or mortgagee, and did not dispose of, or operate as an appointment of, any other real estate; and did not operate as an execution of the aforesaid powers of appointment; and that the fund in Court was, by virtue of the settlement, of the nature of real estate.

Chitty, Q.C., and *J. G. Wood*, for the Plaintiff, in support of the demurrer :—

Had this been a power to appoint personal estate, no doubt the case would have been covered by sect. 27 of the *Wills Act*, 1837 (1 Vict. c. 26); but this is not a power to appoint personal estate, but to appoint land, which could only have been effectually exercised by a general devise of real estate. The converse point was decided in *Adams v. Austen* (1), where it was held that a general devise of lands was not a good execution of a power to appoint moneys to arise from the sale of land. Here the power of appointment is not over the proceeds of sale of the land settled—in which case a general bequest of personal estate might have been a sufficient exercise of the power: *Standen v. Standen* (2)—but only over the land settled and the land which might be substituted for it. *Lingen v. Sowray* (3) and *Guidot v. Guidot* (4) are authorities that money directed to be laid out in land will only pass under a general devise of lands.

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(1) 3 Russ. 461.

(2) 2 Ves. 589; 6 Bro. P. C. 193.

(3) 1 P. Wms. 172.

(4) 3 Atk. 254.

M. R. The rule applicable to this case is thus stated by Sir *J. Jekyll* in *Lechmere v. Earl of Carlisle* (1): "The rule in all such cases is, that 'What ought to have been done shall be taken as done,' and a rule so powerful it is as to alter the very nature of things, to make money land, and, on the contrary, to turn land into money."

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[JESSEL, M.R.:—He does not mean to say that the rule turns sovereigns into acres, or *vice versâ*. What he means is that it works a conversion for the purpose of devolution.]

We submit that the question in this case is one of devolution. The rule is one of universal application. "It is in equity a universal rule, that money directed to be laid out in the purchase of land, or land directed to be sold and turned into money, shall be considered as that species of property into which it is directed to be converted; and this, in whatever manner the direction is given, whether by will, by way of contract, by marriage articles, by settlement, or otherwise, and whether the money has been actually deposited in the hands of trustees for the purpose, or is only covenanted to be paid, and whether the land has been actually conveyed, or is only agreed to be conveyed": *Lewin on Trusts* (2); *Fletcher v. Ashburner* (3).

Davey, Q.C., and *Rigby*, for the Defendants, were not called upon.

JESSEL, M.R.:—

I must say, it appears to me that upon a fair construction of the Act this sum of Consols passed under the will in question. I say "it appears to me," because I do not mean or pretend to say that another person or another Judge may not honestly entertain a different opinion. It depends entirely upon the mode in which you read the Act of Parliament. My mind is so constituted that I always prefer the literal reading, unless there is something in the context which prevents me from adopting the literal reading: and I am going to do that here.

Of course, I can well understand it may be said that the literal

(1) 3 P. Wms. 215.

(2) 6th Ed. p. 768.

(3) 1 Bro. C. C. 497, 499; 1 W. & T. L. C. 5th Ed. pp. 896, 903-905.

reading is not the right one, and that the Act ought to be read as if it had been framed thus: "For the purpose of this Act, all property subject to a general testamentary power shall devolve or pass under the will exactly in the same way as if it were the testator's own property." If the Act had said that, I think it would have produced a different result as regards the will I have before me: but has the Act said that? Let us see what it has said. The 27th section has said—I pass over the first part of it relating to real estate, as we are dealing now with a disposition of personal estate—"A bequest of the personal estate of the testator, or any bequest of personal estate described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

Now, the first question to be considered is—what is the meaning of the words, "a bequest of the personal estate of the testator"? I have no doubt that a bequest of "my personal estate" is not only the natural way, but almost the only way, in which you can describe in a will a bequest of personal estate of a testator. He naturally would use the personal pronoun—"I bequeath my personal estate." That is a bequest of personal property and of personal estate—"a bequest of the personal estate of the testator"; a "bequest of personal property described in a general manner." It is not the less general because the testator uses the word "my." I consider that either branch of the clause would have carried anything subject to a general power by way of appointment under the bequest of "my personal estate."

I now come to the next question, which is more difficult—What is the meaning of the words "personal estate" in this section, when there is personal estate liable to be laid out in real estate, and, according to the doctrine of Equity, to be treated for the purpose of devolution, as real estate; that is, personal estate "constructively converted," as it has been called? Now, first of all, you must consider from what time the will speaks. In our days a will, as regards property, speaks from the time of the death; and, therefore, cases which decided that a will made under

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the old law did not include after-acquired land of the testator, have no application to a will under the present law.

Consequently, a bequest of "my personal estate" is, in my opinion, not only a bequest of the actual personal estate of the testator, but also a bequest of all the personal estate over which at the time of his death he shall have a general power of appointment by will. Accordingly such a bequest should be read as if it included these words, "I appoint all the personal estate over which I shall have at my decease a general power of appointment by will."

What is the "personal estate" to which the Act refers? Not the personal estate of anybody in particular, for it says "personal estate," generally. What is personal estate or what is real estate you must find out from the nature of the property itself: it may be real estate as to devolution as regards the remainderman who takes in default of the exercise of the power, or even as regards the testatrix herself, while she is alive: but the question is—Is it actually real estate, or is it actually personal estate?

Reading, then, the will as containing the words "Any personal estate which I have power to appoint," what does it include? For an answer to that question I turn to the interpretation clause of the Act (sect. 1), and I find that the words "'personal estate' shall extend to leasehold estates and other chattels real,"—those are the things themselves, evidently: the clause refers, not to the interest of anybody in them, but to the nature of the things,—and also to moneys, shares of Government and other funds,"—recollect, these are the words: I shall see presently whether we are dealing with "shares of Government funds,"—"securities for money (not being real estates), debts, *choses in action*, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator." Those last words refer to an interest; the former words do not: and, therefore, we have got this, that "personal estate" includes Government funds.

Now, let us look at the will as if it stood thus: "I appoint all the Government and other funds and all personal property which at the time of my death I shall have power to appoint" to *A. B.* That is literally the meaning of the Act. What does it cover? Does it not cover bank annuities, which are Government funds,

and which in the present case were, at the moment of death, liable under the trusts of the settlement, to be laid out in the purchase of land over which the lady had a general power of appointment only? Why should I say there is a "contrary intention," when I cannot assume anything of the kind? But it may be said, according to the authorities, if she had given "my personal estate" to A. B., and, instead of having a power of appointment, she had been absolutely entitled to the reversion in remainder with an intermediate interest—for that is all the authorities go to—the reversion would not have passed. There is no authority that I know of which goes to this, that if she had a life interest only—as she in fact had—and, subject to that life interest, she was absolute owner, the annuities would not have passed under the gift. In fact, it is clear that a gift of the bank annuities over which she had a power of appointment would have passed them: but the question is whether the gift of "my personal estate" would have passed them when there is no interest in anybody else who at the moment of her death would be entitled to call for conversion.

What the authorities do decide is this, that where there are persons entitled to an intermediate interest who, after the death of the testator, have still a right to call for the investment of money in land, there it is real estate of the testator, and a gift of "my real estate" would pass it, but a gift of "my personal estate" would not. I agree, not only is that covered by authority, but I should think that the question was not arguable at the present day, as the authorities are so old.

Then it is said that, because the gift of "my personal estate," *per se*, would not have passed the absolute reversion in the property, had there been persons entitled to an intermediate interest, it is very remarkable that the same gift in the same words should be sufficient to pass the property when she had only a power of appointment over it, not an absolute interest. But what seems to be most remarkable merely is that the statute makes "my personal estate" mean something else which is not "my personal estate"—that is all. What that "something else" is must depend upon the words of the statute.

Now, as regards the question of intention. When a testator has given "my personal estate" to A., and "my real estate" to B.,

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he means, under the present law, that that which shall be personal estate at the time of his death is to go to *A.*, and that that which shall be real estate at the time of his death is to go to *B.* There may be constant fluctuations in the nature of the testator's property: there may be many cases in which the real estate is converted into personal estate, and *vice versâ*, without the testator knowing anything about it; and therefore there may be an element of uncertainty as to the nature of the property. There are cases of wills which naturally and of themselves involve some amount of uncertainty; but the moment we get the property fixed—"my estate at the time of my death"—there is an end of the uncertainty.

In this particular instance one can see perfectly well that there could have been no uncertainty. Consols had been transferred to the testatrix. She knew that they could not have been laid out in land without her consent: I am not speaking of her technical consent under the settlement, but of her real and actual consent by reason of the way in which the property had been dealt with. I do not, I hope, as a general rule, allow myself to be influenced by surrounding circumstances; but, if I ought to be so influenced, I never saw a clearer case than the case before me.

I therefore overrule the demurrer.

Solicitors for Plaintiff: *Rogerson & Ford*, agents for *J. Ricketts, Bath.*

Solicitors for Defendants: *J. Crowdy & Son.*