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the third word had been "beerhouse," there again would have been a word which has acquired a technical meaning. But the word "beershop" has not acquired any such technical meaning, and I have no doubt that it means a shop where beer is sold. It includes a beerhouse, but it also includes a place where beer is sold, but which is not a beerhouse. As to the passage in *Burn's Justice*, people who draw these agreements rarely go to *Burn's Justice*, and we cannot presume that this covenant was framed with a view to what is there said as to the meaning of "beershop."

COTTON, L.J. :—

I am of the same opinion. It has not been established that the word "beershop" has acquired any technical meaning, and we must construe it according to its natural meaning. A shop means a place where goods are sold by retail, a beershop, therefore, means a place where beer is sold by retail, and it does not matter whether the beer is consumed on the premises or not. The word includes a beerhouse, but it also includes a shop where beer is sold to be consumed off the premises.

Solicitor for Plaintiffs: *T. W. Rogers.*

Solicitors for Defendants: *Shum, Crossman, Crossman, & Prichard.*

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Feb. 15.

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 of 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, and in default of appointment to the use of the person under whom the Plaintiff claimed. The settlement contained a power for the trustee 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 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 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. 0d. consols, which they transferred to her.

A. died a widow in 1879, having by her will, made 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 consols, did not amount to more than £6000:—

Held (affirming the decision of *Jessel, M.R.*), that the general devise of personal estate contained in *A.*'s will operated as an execution of the powers of appointment over the real estate given to her by her marriage settlement and by her father's will, and passed the consols.

THIS was an appeal from the decision of the Master of the Rolls (1). The facts, which are fully stated in the previous report, were shortly as follows:—

By the marriage settlement of *John* and *Ann Brown* certain real estate was settled after their deaths in the events which happened to such uses as *Ann Brown* should by will appoint, and in default of appointment to *Edward Lee*, the father of *Ann Brown*, in fee. The settlement contained a power to the trustees to sell the estate and reinvest the proceeds in land. *Edward Lee* died in 1843, having devised his real estate to *E. L. Baldwin*, under whom the Plaintiff claimed.

In 1855 the trustees sold the estate and invested the proceeds in consols.

In 1879 *Ann Brown* died, having by her will appointed the Defendants her executors, and bequeathed all her residuary personal estate to two legatees.

The Plaintiff claimed the consols as real estate unappointed by the will, but the Master of the Rolls held that the bequest in

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C. A. *Ann Brown's* will operated as a valid appointment of the consols ;
 1881 and the Plaintiff appealed from this decision.

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Chitty, Q.C., and *J. G. Wood*, for the Appellant :—

The power given to *Ann Brown* was not to appoint personal estate, but to appoint land, and that could only be effectually exercised by a general devise of land. Up to the *Wills Act*, a general devise of land carried moneys directed to be laid out in land : *Lingen v. Sowray* (1) ; *Guidot v. Guidot* (2) ; *Leechmere v. Earl of Carlisle* (3). Sect. 27 does not alter that rule, and only goes to this—that a general devise of real estate shall operate as an exercise of a general power to appoint real estate, and a general bequest of personal estate shall operate as an exercise of a general power to appoint personal estate. The words “my personal estate” are not a sufficient reference to the power, or to the proceeds of the real estate, and the Court must not assume an intention to execute the power, but must look to the circumstances at the time the devise takes effect : *Gillies v. Longlands* (4). The fund was not then at home, and the testatrix had no absolute power of disposal over it so as to make it her own, but only a power to appoint real estate by will. She could never have made it her personal estate, and therefore the fact that it had been transferred into her name may be disregarded. It was a wrongful possession by her. She was, in fact, a trustee of it for those entitled under the settlement, unless she effectually disposed of it by her will.

[They also referred to *Adams v. Austen* (5) and *Blake v. Blake* (6).]

Rigby (*Davey*, Q.C., with him), for the Defendants, the executors of *Ann Brown* :—

The testatrix, by obtaining a transfer, rightly or wrongly, of the fund into her name, shewed an intention to make it part of her personal estate. But, independently of that, I submit that under the *Wills Act*, more than pure personal estate is intended to pass under a general bequest of personalty. The first section of the

(1) 1 P. Wms. 172.

(2) 3 Atk. 254.

(3) 3 P. Wms. 211, 215.

(4) 4 De G. & Sm. 372.

(5) 3 Russ. 461.

(6) 15 Ch. D. 481.

Act defines personal estate to mean “leasehold estates and other chattels real, and also . . . all other property whatsoever which by law devolves upon the executor or administrator.” Those words are wide enough to cover these consols.

[He was stopped.]

J. G. Wood, in reply.

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JAMES, L.J.:—

In this case I am of opinion that the decision of the Master of the Rolls ought to be affirmed. Under the father's will and the settlement this fund was liable to be reinvested in land, and the testatrix had a power to appoint it by her will. Now what she did was this: almost immediately before the execution of her will, there being this fund outstanding in the hands of the trustees, and being liable to be reinvested in land, she applied to have the fund transferred into her own name. I cannot attribute any object to her in asking for that transfer, or any object to the trustees in making the transfer to her, but an intention to reduce it into possession—to make it her own personal estate, which it would be, subject to any equity which might be afterwards enforced against her executor, in case she died intestate. She intended to make it her personal estate so far as she could. Then, by her will, she gives the whole of her personal estate to certain persons, subject to certain legacies and other purposes mentioned in her will.

The question then is, was that gift by her liable to be defeated by a person who says “you have not exercised the power of appointment over it, because it was real estate”? It was real estate in the hands of the trustees, and was liable to be recalled and made real estate by any person who had an equity paramount to the equity of those who claimed under her will. But you must see whether what she has done was sufficient to destroy that equity, that is, the equity which could be enforced against her as a wrong-doer—treating her as having acted tortiously, whether she was a wrong-doer or not—and what she did was this. She gave all her personal estate, and she did it under a power in the *Wills Act* which says that a bequest of personal estate of a testa-

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trix shall be deemed to include any personal estate which she had power to appoint in any manner she pleased. Now, beyond all question or doubt, this was personal estate. It was existing as personal estate *de facto*. Whether you treat it as personal estate liable to be invested in land or not, the testatrix in this case had power to appoint it generally in any manner she thought fit. She does give it. It seems to me to be impossible to cut down the words of the will so as to prevent the will having any operation over that which she made her personal estate so far as she could. She intended to give it, and did give it, as part of her personal estate, so far as she had power to do so, whether it was real or personal estate. That being so, it seems to me that the decision of the Master of the Rolls is right.

COTTON, L.J. :—

First, I think it better to dispose of an argument which was pressed upon us by Mr. *Chitty* to some extent—that the testatrix was a trustee of this fund. I often object to a word being used inappropriately, and an argument being founded upon the inappropriate and improper use of that word. She was not a trustee. She took the money out of the name of the trustee and had it transferred into her own name, and thereby expressed an intention, as far as she could, to make it her own, and not to hold it as a trustee. It is true that there was a trust attaching to this money, and she was liable to be called upon to re-transfer to the trustee; and even if that was not done, unless she disposed of the property, those entitled under the settlement might claim against her estate for the amount of it. She was not trustee of it, and was not holding it as trustee, but she held it, as far as she could, as her own, subject to the rights in Equity which those interested under the settlement might have. Therefore it is impossible to say that this can pass under the words in her will which devise her trust estate. It simply is a question, therefore, whether it passes under the previous part of her will.

This, then, is not a question between two persons taking under her will, as to which devise or bequest most aptly describes the matter in contest, but whether there has or has not, having regard to the statute, been an exercise of the power under the one

and the only one clause of the will which can have that operation. When I look at the words of the Act of Parliament alone, I find it impossible to say that there has not been an exercise of the power as regards this fund, for it is personal estate, that is to say, it is property which, but for the will, would pass by law to and devolve upon executors and administrators. That being so, we have this, that although there was a trust which renders the fund liable to be laid out again in land, and it would therefore to some extent, in Equity, be impressed with the character of land, it is personal estate within the words of the 27th section, and the construction put upon it by the 1st section of the Act of Parliament.

When one comes to treat it as a question of construction and intention on the testatrix's part, we find she had done all that she could to make this fund her personal estate and to take it out of the settlement; and, having regard to the facts of the case and to the expression of intention on her part independently of what there is in the will, I agree with the Master of the Rolls that we can see sufficient here to justify us, if it is a question of construction, in construing the words of her will as applying to the fund which she had dealt with in the manner she did. It is not necessary to go through the cases which have been cited. Two of them were cases where there was a contest between different appointees; but the case before Vice-Chancellor *Knight Bruce of Gillies v. Longlands* I must just refer to, because he, in my opinion, expressly decided that case on the ground that there had been nothing done by the lady to shew her wish or desire that there should not be a reinvestment in land. First, he says (1): "There is no doubt but that at the death of the husband the fund was impressed with the character of real estate. After the husband's death, the wife had no power of herself to change the character of the property, because her children had a right to a voice in the matter in respect of their interests in remainder." And then he goes on: "But independently of this consideration, I can find no such act of the widow as shews that she intended to change the character of the fund; and we know that it is not the actual state of the fund, but the state in which it ought to be, that governs the case. Therefore, this fund

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(1) 4 De G. & Sm. 379.

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remained as it was immediately after the purchase of 1789, unless there has been an act indicating an intention that the state should be changed." He assumes there that she had no power effectually to put an end to the trust for investment in land, but he still considers whether there was anything on her part to shew an intention to treat it not as realty but as personalty. In this case, in my opinion, we have what shews her intention, although, I agree, it was not in her power absolutely to do it. Therefore that decision of Vice-Chancellor *Knight Bruce* cannot, in my opinion, having regard to what he says, be considered as in any way being an expression of opinion opposed to our judgment in this case, the facts and the circumstances here being different on a very material point.

LUSH, L.J.:—

I am of the same opinion.

JAMES, L.J.:—

Lord Justice *Cotton* has drawn attention to the fallacy of using the word "trustee." There is another fallacy. The fund has been spoken of as if it were real estate. But it is only treated as real estate because the heir-at-law, if the testatrix had died intestate, would be entitled to it as if it were real estate. It is quite a fallacy to say that it is real estate. It is not real estate, it is only *quasi* real estate. If the heir-at-law had taken it, it would be in his hands personal estate.

J. G. Wood:—I understand your Lordships to hold that the equity to have the fund reinvested is entirely displaced by the appointment, which operates so as to carry all the beneficial as well as the legal interest.

COTTON, L.J.:—Exactly so.

Solicitors: *Rogerson & Ford*, agents for *J. Ricketts, Bath*; *J. Crowdy & Son*.