

BUCKLEY
J.

1905

March 16.

In re GRASSI.
STUBBERFIELD v. GRASSI.

[1903 G. 839.]

Will—British Subject's Holograph Will in accordance with Law of Foreign Country in which made—Effect on English Leaseholds—Lord Kingsdown's Act (Wills Act, 1861) (24 & 25 Vict. c. 114), ss. 1, 4.

Sect. 1 of Lord Kingsdown's Act provides that every will made out of the United Kingdom by a British subject (whatever may be his domicile) "shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate" if made according to the forms required by the law of the place where the same was made:—

Held, that "personal estate" includes leaseholds, and that when the will of a British subject made abroad in the form required by the law of the place has been proved in England, the beneficial interest in the leaseholds passes to the person pointed out in the will as the donee of that interest, provided the bequest does not infringe the law of England, e.g., that relating to accumulations or perpetuity.

CARLO GRASSI was domiciled in England and was a naturalized British subject. He owned leasehold property in Gerrard Street, Soho, and Little Pulteney Street, London. On December 22, 1901, while on a visit to Italy, he died at Viadana, in that country, having while in Italy made a holograph will which was not attested by any witnesses. The will was in the Italian language and, as translated into English, was as follows:—

"Parma, the first of November, 1901. By means of this my holograph will, I dispose of my property for the time when I shall have ceased to live in the following manner: I bequeath the usufruct for life of all my property to my dearest wife Louisa Frances Cook [*sic*] wherever the said property may be situate and existing. [Here followed some pecuniary legacies.] I grant in favour of my sister Luigia Grassi, widow of Tizzi, a life annuity of 400 Italian lire, to be paid quarterly in advance from the day of my death and by the care and at the charge of my wife, the usufructuary, and in the event of the predecease of the latter I charge the heirs, whom I am about to appoint,

therewith. The legacies to my nephew and niece . . . and to the sister Maria Grassi shall be paid within two years from my death, without opposition from my wife, who must renounce the usufruct of the corresponding capital. I exempt my said wife from the obligation of making an inventory and of giving security. I nominate and appoint as my universal heirs to the bare ownership of my property the Congregation of Charity of Viadana, in order that, upon the death of my wife, the usufructuary, an institution may be founded as an asylum for poor abandoned old people of both sexes, to be called by my name and that of my wife, that is to say, 'The Carlo and Louisa Grassi Institution.' I appoint as testamentary executor Socrate Zangelini . . . Francesco Grassi . . . and J. W. Stubberfield . . . (Signed) Carlo Omobono Grassi, son of the late Domenico."

BUCKLEY
J.
1905
GRASSI,
In re.
STUBBERFIELD
v.
GRASSI.
—

This will was valid according to Italian law, and in February, 1902, it was proved in England by Stubberfield, power being reserved to make a like grant of probate to the other executors.

Double probate of the will was afterwards granted to Zangelini.

An action was commenced in the Chancery Division by Stubberfield against Louisa Frances Grassi (the widow of the testator), Socrate Zangelini, the Congregation of Charity of Viadana, and Luigia Grassi (representing the testator's next of kin) for administration of the real and personal estate of the testator. And in this action an order was made directing certain inquiries, including an inquiry as to the technical meaning of "usufruct" in Italian law.

In answer to this inquiry the master certified as follows:—

"The word 'usufruct' has a technical meaning according to the Italian law, and as appears by the . . . affidavit of . . . Carlo Fadda (a member of the Italian Bar) the following definition is given of the term by art. 477 of the Italian Civil Code: 'Usufruct is the right to enjoy things the ownership (proprietà) of which belongs to another in the manner in which the owner (proprietario) would enjoy the same, but with the obligation to preserve the substance of them as regards both the matter and the form thereof.' Every species of property

BUCKLEY J. 1905
 GRASSI, *In re.*
 STUBBERFIELD v. GRASSI.
 —

movable and immovable may be the subject of a 'usufruct.' The legal effect according to the Italian law of the gift in the testator's will contained, 'I bequeath the usufruct for life of all my property to my dearest wife Louisa Frances Cook, wherever the said property may be situate and existing,' is to give a specific legacy to the said defendant Louisa Frances Grassi of the usufruct for her life of all the property the testator was possessed of or entitled to at the time of his death, and it entitles her, according to such Italian law, to the possession and enjoyment of the same from the day of the testator's death, subject to the duties and liabilities imposed on usufructuaries by the provisions of arts. 477 and 496 to 514 of the Italian Civil Code . . . (save in so far as the said duties or liabilities are modified or excluded by the following clause contained in the said will: 'I exonerate my said wife from the obligation to make an inventory and to give security'), and subject to payment of his debts and to the legacies and to the annuity given by his will. The above-mentioned gift according to Italian law included the usufruct of the testator's business of a wine and provision merchant carried on by him at 26, Gerrard Street, Soho, and the enjoyment and right to receive the profits thereof having regard to the exemption of his said wife from the obligation of making an inventory and of giving security, and the nomination and appointment of the defendants, the Congregation of Charity of Viadana, as his universal heirs, and the other provisions in his said will declared."

A summons was taken out in the action by the plaintiff asking that directions might be given with reference to the leaseholds forming part of the testator's estate, and in particular whether, having regard to the provisions of Lord Kingsdown's Act (1), the beneficial interest therein was dis-

(1) 24 & 25 Vict. c. 114, s. 1: "Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled

posed of by the will, and, if so, whether Louisa Frances Grassi was entitled to the specific enjoyment thereof during her life or for any other and what period during the continuance of the lease under which the testator held the premises.

This summons was adjourned into Court.

H. B. Cohen (*T. Boston Bruce* with him), for the plaintiff, stated the facts and submitted the question for the decision of the Court.

Birrell, K.C., and *A. J. Chitty*, for the testator's widow. By s. 1 of Lord Kingsdown's Act the will is good, as regards the personal estate, for the purpose of being admitted to probate. "Personal estate" must include leaseholds, and the beneficial interest in the leaseholds should be held to pass in the manner in which the testator has shewn by his will that he meant it to pass.

It is true that if the will had contained some provision in accordance with Italian law, but infringing some provision of English law, the statute would not have validated the illegal provision: *Freke v. Lord Carbery*. (1) But the difficulty in such a case arises from the conflict of laws with regard to immovable property. But the division into immovables and movables "does not square with the distinction known to English lawyers between things real, or real property, and things personal, or personal property": Dicey's Conflict of

BUCKLEY
J.

1905

GRASSI,
In re.

STUBBERFIELD

v.
GRASSI.

when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin."

Sect. 2: "Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed

according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made."

Sect. 4: "Nothing in this Act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act."

(1) (1873) L. R. 16 Eq. 461.

BUCKLEY J. Laws, p. 72. The statute is referring to personal estate, not to movables.

1905
 GRASSI, *In re.*
 STUBBERFIELD v. GRASSI.

In Foote's Private International Jurisprudence, 3rd ed. p. 268, note (b), the opinion is expressed that in cases within Lord Kingsdown's Act the *lex situs* with respect to leaseholds may be satisfied without the formalities required for the devise of English land by the Wills Act.

To hold that those formalities were requisite in the case of leaseholds would be to put a forced construction on the Act, for prior to the Wills Act those formalities were not required in the case of leaseholds.

Technical persons will no doubt say that the Act was only intended to enable wills to be admitted to probate, and that, although the legal title in the leasehold vests in the executor, the beneficial interest does not go to the intended donee pointed out in the will; but that is not the effect of the Act.

The Act is intituled "An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects." That law, so far as regards the formalities of execution, is contained in the Wills Act, 1837, s. 1 of which says that "'personal estate' shall extend to leasehold estates and other chattels real." Sect. 9 of that Act prescribes the formalities required for the due execution of wills, whether of realty or personalty. Sect. 11 excepts the cases of testators who are soldiers in actual military service or mariners at sea. The object of s. 1 of Lord Kingsdown's Act in saying that the will is to be "well executed for the purpose of being admitted to probate" is only to place such a restriction or limitation on the enabling words as are necessary to prevent its being said that the will is to be valid for all purposes—e.g., to render valid things which in other wills would contravene Thellusson's Act or the law against perpetuities.

If a will under circumstances like these is not good as to the beneficial interest in leaseholds, it is not good as to a similar interest in any personal estate in England. As regards the old law, the case of *Stanley v. Bernes* (1) may be referred to. There a natural-born British subject, resident and naturalized

(1) (1830) 3 Hagg. Ecc. 373.

in Portuguese dominions, made a will and two codicils disposing of effects partly in Portugal and partly in England, executed according to Portuguese law, but inferring that he considered himself an Englishman. These instruments were admitted to probate in England by the High Court of Delegates, but two further codicils disposing solely of money in the British funds, attested by three witnesses, but not executed according to the law of Portugal, were refused probate.

BUCKLEY
J.

1905

GRASSI,
In re.

STUBBERFIELD
v.
GRASSI.
—

Under s. 2 of the Act it has been held that, where an Englishman resident in Scotland bequeathed his whole means and effects by a will executed according to the law of Scotland, but not to that of England, leasehold estates in England passed: *In re Watson*. (1)

[They also referred to s. 26 of the Wills Act, 1837, and to *Davis v. Gibbs*. (2)]

F. Whinney, for the Congregation of Charity of Viadana. The Act of 1861 uses the term "personal estate" as a technical term, which is defined in the Wills Act, 1837. The words of restriction in s. 1 of the Act of 1861 may have been inserted to prevent a conflict with the probate laws of some other country: see *Hood v. Lord Barrington*. (3) Notwithstanding s. 26 of the Wills Act, 1837, it has been said that a gift of real estate does not pass leaseholds: *Butler v. Butler*. (4)

The term "personal estate" cannot have different meanings in ss. 1 and 2 of the Act of 1861.

Buckmaster, K.C., and *Sheldon*, for Luigia Grassi. The beneficial interest in the leaseholds did not pass to the widow, but belongs to the next of kin. Some effect must be given to the words "for the purpose of being admitted to probate." They are satisfied by holding that on probate being obtained here the executor obtains the legal title in all the personal estate; and that no beneficial interest in any personalty passes to the persons named as beneficial legatees in the will. There is nothing absurd in such a construction, having regard to *Pepin v. Bruyère*. (5)

(1) [1887] W. N. 142; 35 W. R. 711.

(2) (1729) 3 P. Wms. 26.

(3) (1868) L. R. 6 Eq. 218.

(4) (1884) 28 Ch. D. 66.

(5) [1902] 1 Ch. 24.

BUCKLEY J. Assuming that the beneficial interest in personal estate other than leaseholds passes, it is contended that the beneficial interest in leaseholds does not pass to the legatee.

1905
 GRASSI,
In re.
 STUBBERFIELD v.
 GRASSI.

The Act does not profess to amend the Wills Act. The fact that a disposition is admitted to probate here does not render it valid as an exercise of a power of appointment by will if it is not executed in accordance with s. 9 of the Wills Act, 1837.

[They also referred to *In re Kirwan's Trusts* (1); *Pechell v. Hilderley* (2); Jarman on Wills, 4th ed. vol i. p. 8.]

No reply was called for.

BUCKLEY J. The question to be decided is whether the words "personal estate" in s. 1 of Lord Kingsdown's Act include leaseholds. The division of subjects of property into movables and immovables and into real estate and personal estate are familiar to all of us. They are not coterminous. Leaseholds are immovables, but are nevertheless personal estate although they savour of the realty. A door is thus opened to controversy whether the words "personal estate" in Lord Kingsdown's Act are confined to movables. When the Wills Act was passed in 1837, care was taken to define personal estate, and in s. 1 it was provided that the words "personal estate" should extend to leasehold estates and other chattels real. Sect. 11 of the same Act provides that "any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act." It cannot be disputed that the words "personal estate," as there used, include any leasehold property which the soldier or mariner may possess. Sect. 26 of the Wills Act provides that a general devise of a testator's lands shall include leasehold estates. The Act throughout proceeds on the footing that leasehold property is not real estate but personal estate, so that s. 26 was wanted to include leaseholds under "lands." All the sections tend to shew that the Wills Act proceeds, not on the division between mobilia and immobilia, but on that

(1) (1883) 25 Ch. D. 373.

(2) (1869) L. R. 1 P. & M. 673.

between real and personal estate; and that was the distinction recognised when Lord Kingsdown's Act was passed. BUCKLEY J.

Lord Kingsdown's Act was passed in 1861 and is intituled, "An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects." That title does not, it is true, refer to the Wills Act; but the law which Lord Kingsdown's Act was going to amend was, in fact, contained in the Wills Act, 1837. The Wills Act required wills to be executed and attested, in the manner there pointed out. Lord Kingsdown's Act was going to affect that law and to say that in certain cases wills should be admitted to probate although that Act had not been complied with. 1905 GRASSI, *In re.* STUBBERFIELD v. GRASSI.

The 1st section of Lord Kingsdown's Act relates to wills made out of the United Kingdom by British subjects. The 2nd section relates to wills made in the United Kingdom by British subjects. The framework of the two sections is substantially the same, but there are certain verbal differences between the two sections, which may, and I think must, have arisen from a want of scanning the language, and not from the existence of any purpose of producing different results. For instance, s. 1 refers to "a British subject," whereas s. 2 speaks of "any British subject." Sect. 1 refers to "the law of the place"; s. 2 refers to "the laws for the time being in force in that part of the United Kingdom where the same is made." Again, there is a difference of language in the words pertinent to the matter which I have to decide, inasmuch as s. 1 says that the will shall, as regards personal estate, "be held to be well executed for the purpose of being admitted . . . to probate," whereas s. 2 says that the will "shall, as regards personal estate, be held to be well executed and shall be admitted . . . to probate." Does s. 1 mean that the will is to be well executed for the purpose only of being admitted to probate, and not for any other purpose? I cannot understand how that can possibly be held to be the meaning. The variance between the two sections is, in my judgment, one of words only, and not of meaning. What is the effect of being "well executed for the purpose of being admitted to probate"? Does that extend to make a gift of leasehold property to a certain person

BUCKLEY J. effectual? I cannot see why it should not. In the Act which is amended personal estate is defined as including leaseholds. Again, s. 4 of Lord Kingsdown's Act says that nothing in that Act contained shall invalidate any will, "as regards personal estate," which would have been valid if that Act had not been passed, except as such will may be revoked or altered by any subsequent will made valid by the Act. The personal estate there referred to must be the same thing as that referred to in s. 1 and that referred to in s. 11 of the Wills Act. I see no reason whatever why the expression "personal estate" as used in Lord Kingsdown's Act should not be held to include leasehold property.

1905
GRASSI,
In re.
STUBBERFIELD
v.
GRASSI.
—

There is another reason which appears to me to support the conclusion at which I arrive. Before Lord Kingsdown's Act, where a British subject domiciled abroad made a will according to the law of his domicile and that will was admitted to probate here, although the legal title in any leaseholds given by the will passed, the will would not pass the beneficial interest in the leaseholds. Mr. Buckmaster argued that nothing was done by Lord Kingsdown's Act to help such a person wishing to dispose of his beneficial interest. But it seems to me that the Act has done something for the testator in such a case by giving him the means of disposing of the beneficial interest in the lease. I need not refer to the cases cited, which are only authorities for familiar propositions. A disposition by will to which Lord Kingsdown's Act applies is no doubt not effectual in any way other than that which results from its being admitted to probate; for example, although it might be admitted to probate it is clear, on the authority of *Freke v. Lord Carbery* (1), that provisions in a will infringing Thellusson's Act or the English law against perpetuities would not be validated by Lord Kingsdown's Act. Therefore s. 1 of that Act does not say that the will shall be valid for all purposes. The section says, in effect, that the will shall be valid for the purposes of being admitted to probate, and will then take its place and be effectual for such purposes following on probate as the law of England allows.

(1) L. R. 16 Eq. 461.

This testator was an Italian by origin, but at the time of his death he was naturalized and domiciled in this country, and for all purposes material to this case was an Englishman. He went on a visit to Italy and died there, and his case clearly falls within s. 1 of the Act of 1861. The will was made out of the United Kingdom by a British subject and was valid according to the law of Italy, and has been admitted to probate in England. By his will he left the usufruct in his property in the manner indicated therein. The effect is that his widow is entitled to a life interest in his leaseholds, and it is not disputed that she has the right to enjoy them in specie.

BUCKLEY
J.
1905
GRASSI,
In re.
STUBBERFIELD
v.
GRASSI.
—

Solicitor for plaintiff and the widow: *Herbert F. Oddy.*

Solicitors for the Congregation of Charity: *Markby, Stewart & Co.*

Solicitor for Luigia Grassi: *T. Richards.*

F. E.

PAWLEY v. PAWLEY.

[1903 P. 2622.]

Husband and Wife—Married Woman Plaintiff—Dismissal of Action with Costs—Order for Payment out of separate Property notwithstanding Restraint on Anticipation—Receiver—Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 2.

BUCKLEY
J.
1905
March 17.
—

In an action by a married woman, on an application for an order, under s. 2 of the Married Women's Property Act, 1893, for payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, the onus is on the married woman to shew why the order should not be made.

IN November, 1903, this action was commenced in the King's Bench Division by or in the names of C. J. C. Pawley, Hamilton E. Pawley, Emily De Hoog (a married woman), and Lucy Dresel (a married woman) against Ernest Frederick Pawley, the claim being for damages for an alleged breach of an agreement. The name of Emily De Hoog was struck out by an order dated April 21, 1904.

On June 1, 1904, the action was transferred to the Chancery