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Miller, Re
[1991] 1 QdR
359

[HIGH COURT OF AUSTRALIA.]

NICOL . . . . APPELLANT;
DEFENDANT,

AND

CHANT AND OTHERS . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A.
1909.

HOBART,
Feb. 17, 18.
MELBOURNE,
March 5.

Griffith C.J.
Barton and
Isaacs JJ.

Will—Interpretation—Devise of real estate—Land subject to option of purchase—Exercise of option after death of testator—Conversion into personalty—Contrary intention expressed in will.

The rule laid down in *Lawes* v. *Bennett*, 1 Cox Cas. in Ch., 167, that, where a testator by his will gives his real estate to A. and his personal estate to B., and his land is at his death subject to a lease with an option of purchase, upon the exercise of the option the land is converted into personalty, and that the conversion operates retroactively so as to entitle B. to the purchase money, only applies where the testator gives his real estate to one and his personal estate to another *simpliciter*, and there is no context from which a contrary intention may be gathered.

A testator when he made his will was possessed of a hotel property subject to a lease for a term of seven years with an option in the lessor to purchase during the term for a certain sum, and the hotel property was then subject to a mortgage. By his will he devised all his "real estate" to his trustee upon trust to pay the rent and income thereof to his wife for life, and after her death he directed his trustee to stand possessed of his "said real estate" upon trust to sell and convert, and to divide the net proceeds and the rent and income thereof until sale among four named persons. He then bequeathed to his wife a number of named classes of personal chattels and also "all other my personal property absolutely," and he then empowered his trustee to raise any money on his "real estate" or any portion thereof for the purpose of paying off any mortgage on his "real estate." At the death of the testator the hotel

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property was the only real estate he had, and it was still subject to the mortgage, to the lease, and to the option of purchase, and that option was exercised four years afterwards.

Held by *Griffith* C.J. and *Barton* J. (*Isaacs* J. dissenting) that the intention of the testator as expressed by the will was that the hotel property should not be included in the words "all other my personal property," but that in any event his wife should have a life interest only in the hotel property, and, therefore, that the rule in *Lawes* v. *Bennett*, 1 Cox Cas. in Ch., 167, did not apply.

Lawes v. *Bennett*, 1 Cox Cas. in Ch., 167, distinguished.

Decision of the Supreme Court of Tasmania (*Nicholls* J.) affirmed.

APPEAL from the Supreme Court of Tasmania.

In 1901 one Mary Ann Lawton owned certain land and premises in Hobart, known as the Empire Hotel.

On 14th March 1902 she made her will, by which she devised all her real and personal property to Frederick Henry Lawton, and appointed him sole executor.

On 22nd March 1902 she granted a lease of the hotel for a term of 7 years to one Parer, with an option of purchase by him during the term for £6,000.

On 20th August 1902 Mrs. Lawton died, and her will was not proved, but was registered. Thenceforward F. H. Lawton took the rents and profits of the hotel until his death.

On 28th April 1904 F. H. Lawton made his will which was as follows :—

"This is the last will and testament of me Frederick Henry Lawton of Hobart in Tasmania gentleman whereof I appoint Charles Chant of Hobart in Tasmania solicitor to be trustee and executor of this my will hereinafter called my said trustee I devise all my real estate unto my said trustee his heirs executors administrators and assigns upon trust to pay the rents and income thereof to my wife Ellen Lawton for and during her life for her own use and benefit And from and after the decease of my said wife I direct that my said trustee shall stand possessed of my said real estate upon trust to sell and convert the same into money at such time and in such manner as he shall judge most advantageous and to divide the net moneys arising from such sale and the rents and income of my said estate until sold between the three children of my late brother Charles Lawton

namely Flora Lawton Elsie Lawton and Brenda Lawton all of whom are hereinafter referred to as my said nieces and the child I have adopted Frederick Goldrick in four equal shares vesting at the age of twenty-one years and in the case of my said nieces vesting at that age or marriage Provided always that in case any one or more of my said nieces or the said Frederick Goldrick shall die in the lifetime of my said wife leaving lawful issue then such issue shall take the share in the proceeds of my estate which their parent if living would have taken but in the case of the death of any one or more of my said nieces or of the said Frederick Goldrick who shall not leave lawful issue then her or his share shall go and belong to the survivors or survivor in equal shares I direct that my just debts and testamentary expenses be paid out of my personal estate I bequeath to my wife Ellen Lawton all my jewels trinkets personal ornaments and wearing apparel and all my furniture plate plated goods linen glass china books pictures script statuary musical instruments and all other articles of personal domestic or household use or ornament wines liquors and consumable stores and also all other my personal property absolutely I bequeath to my friend Arthur Wilson my gold chronograph watch curb chain gold sovereign case and pendant and sapphire gold ring I declare that my said trustee Charles Chant shall be entitled to charge my estate for professional business done by him in relation thereto in the same manner as if he had not been nominated as my said trustee And I hereby revoke all other wills heretofore executed by me I empower my said trustee from time to time to raise any money on my real estate or any portion thereof as he may deem best for the purpose of paying off any encumbrance charge or mortgage on my real estate and for that purpose to enter into and give the mortgagee or lender all necessary powers of sale and all other clauses declarations and covenants as usually found in mortgage deeds or as he may think fit to give."

On 5th May 1904 F. H. Lawton died. When he made his will and when he died his only real estate was the hotel, and at his death he also had personal property.

On 17th July 1908 the assignee of Parer exercised the option

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of purchase contained in the lease, and the hotel was conveyed to him by the trustee.

An originating summons was taken out by the trustee of the estate of F. H. Lawton for the determination of the following question:—

Whether the proceeds of the sale of the Empire Hotel, Elizabeth Street, Hobart, ought to be paid to Charles Chant as trustee of the real estate devised by F. H. Lawton upon the trusts mentioned in the will, or whether the same ought to be paid to Helen Nicol, the widow of F. H. Lawton (and who had since re-married), under and by virtue of the bequest to her by F. H. Lawton of his residuary personal estate.

The summons was heard by *Nicholls* J., who made a declaration that the net proceeds of sale of the hotel property should be held by the trustee of the will of F. H. Lawton on the trusts declared by the testator as to his real estate.

From this decision Helen Nicol now appealed to the High Court.

Crisp and *Raymond Smith*, for the appellant. The rule in *Lawes* v. *Bennett* (1), applies, viz., that where land included in a general devise of real property is subject to a lease with an option of purchase in the lessee, and the option is exercised after the testator's death, the land is converted into personalty as from the time when the option is exercised, and the proceeds of sale fall into the personal residue. That case has been followed in many cases from *Townley* v. *Bedwell* (2), to *In re Isaacs, Isaacs* v. *Reginall* (3), and, although the decision has been spoken of as unsatisfactory, it has never been dissented from or overruled. See also *Collingwood* v. *Row* (4); *Goold* v. *Teague* (5).

The rule will apply in all cases unless there is a specific devise of the property after the option is given: *In re Pyle*; *Pyle* v. *Pyle* (6); *Drant* v. *Vause* (7).

[ISAACS J. referred to *Weeding* v. *Weeding* (8); *Duffield* v. *M'Master* (9)].

(1) 1 Cox Cas. in Ch., 167.
(2) 14 Ves., 591.
(3) (1894) 3 Ch., 506.
(4) 26 L.J. Ch., 649.
(5) 7 W.R., 84.
(6) (1895) 1 Ch., 724.
(7) 1 Y. & C.C.C., 580.
(8) 1 John. & H., 424.
(9) (1896) 1 I.R., 370, at p. 379.

At any rate the rule will not be excluded unless there is an intention expressed on the face of the will that the rule is not to apply: *Theobald on Wills*, 7th ed., p. 130; *In re Isaacs*; *Isaacs* v. *Reginall* (1); *In re Glassington*; *Glassington* v. *Follett* (2). As that intention must appear on the face of the will, extrinsic evidence is not admissible to help that intention. *Charter* v. *Charter* (3); *Grey* v. *Pearson* (4); *Higgins* v. *Dawson* (5); *Roddy* v. *Fitzgerald* (6). Therefore evidence is not admissible to show that the Empire Hotel was the only real estate the testator had when he made his will, and unless that is done no doubt arises as to whether the rule is applicable. In order to say that in this case the rule does not apply, the general devise of real estate must be read as a specific devise of the Empire Hotel, and although where it appears from a will that the testator in using general words was referring to a specific property, evidence may be given to show what that property is, in this case there is no ground for such a proceeding. The evidence as to the Empire Hotel is also inadmissible, and, even if it was admissible, the fact that power is given to the trustee to mortgage the real estate cannot throw any light on the testator's intention.

Chant, trustee, in person, respondent.

Ewing and *Hodgman*, for three of the beneficiaries, respondents. If the principle of *Lawes* v. *Bennett* (7), assuming it goes as far as is contended, operates as an injustice, this Court should now depart from it.

All the Courts in England which have dealt with *Lawes* v. *Bennett* (7) have been bound by it, and it has never come before a Court which could overrule it.

The rule can be avoided not only by a specific devise of the property, but by an intention shown by the will that the rule should not apply. Here it is manifest on the face of the will that the testator intended that the donees of the real estate

(1) (1894) 3 Ch., 506.
(2) (1906) 2 Ch., 305, at p. 311.
(3) L.R. 7 H.L., 364.
(4) 6 H.L.C., 61.
(5) (1902) A.C., 1.
(6) 6 H.L.C., 823, at p. 876.
(7) 1 Cox Cas. in Ch., 167.

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should take the Empire Hotel whether it was in the shape of realty or of the proceeds of realty.

The gift of the property in successive estates negatives the intention to deprive the beneficiaries of their interests upon the option being exercised. The testator mentions the classes of things which he intends to be personal estate: *Hotham* v. *Sutton* (1). The power to raise and pay off mortgages evidently has relation to specific property. In every case evidence is admissible to find out what the testator meant when he used particular terms in his will, and for that purpose evidence is admissible as to the state of his property when he made his will: *In re Rowe*; *Pike* v. *Hamlyn* (2).

Lodge, for an infant beneficiary, respondent. In construing a will evidence is admissible to define the subject matter with which the testator was dealing when he made his will: *In re Lowman*; *Devenish* v. *Pester* (3), where it was held that a share in the proceeds of real estate passed under a devise of land. See also *Moase* v. *White* (4); *In re Davison*; *Greenwell* v. *Davison* (5); *Doe* v. *Hiscocks* (6); *Morrice* v. *Aylmer* (7). The trust for the reversioners was intended to have operation in any event. Words which indicate that the whole interest in the land is to pass will be sufficient to take the case out of the rule in *Lawes* v. *Bennett* (8). The express mention of the various chattels which the testator gave his wife, followed by the words "and all other my personal property," show that the testator did not intend to include in his personal property any interest in this land: *In re Tillar*; *Tillar* v. *Paull* (9).

Crisp in reply. *Lawes* v. *Bennett* (8) did not lay down any new principle. It has stood the test of time and should be followed. There is nothing in the will itself to indicate that in any event the devisees of the real estate are to get that real estate or its proceeds. In *Collingwood* v. *Row* (10) where the rule was applied

(1) 15 Ves., 319.
(2) (1898) 1 Ch., 153.
(3) (1895) 2 Ch., 348.
(4) 3 Ch. D., 763.
(5) 58 L.T., 304.
(6) 5 M. & W., 363.
(7) L.R. 7 H.L., 717.
(8) 1 Cox Cas. in Ch., 167.
(9) 50 Sol. J., 464.
(10) 26 L.J. Ch., 649.

there would appear to have been successive trusts. The words "all other my personal property" should not be interpreted *ejusdem generis* with the preceding chattels: *In the Goods of Jupp* (1). In *In re Lowman; Devenish* v. *Pester* (2) extrinsic evidence was only admitted to indicate the particular property dealt with and not to construe the will.

[The following authorities also were referred to during argument:—*Edwards* v. *West* (3); *In re Sherlock's Estate* (4); *Lord* v. *Colvin* (5); *Lysaght* v. *Edwards* (6); *Wright* v. *Rose* (7); *Polley* v. *Seymour* (8); *Anderson* v. *Anderson* (9); *In re Morgan; Morgan* v. *Morgan* (10); *Giles* v. *Melsom* (11); *In re Walker's Estate* (12); *Lord Ranelagh* v. *Melton* (13); *In re Adams and the Kensington Vestry* (14); *Butler* v. *Butler* (15); *Wigram on Wills*, p. 72; *Theobald on Wills*, 7th ed., pp. 125, 209.]

Cur. adv. vult.

The following judgments were read:—

Melbourne, March 5.

GRIFFITH C.J. The testator in this case was the owner of an hotel property in Tasmania called the Empire Hotel, which had come to him by devise from his mother who died in August 1902. He was also possessed of personal property. The hotel was subject to a lease for a term of seven years from 23rd December 1901, under which the lessee had an option of purchase for £6,000 to be exercised during the term. In May 1903 the testator mortgaged the hotel property for £3,300, repayable on 15th October 1906. By his will, dated 28th April 1904, he devised all his "real estate" to the respondent Chant as trustee, upon trust to pay the rent and income thereof to his wife the appellant (now Helen Nicol) for her life, and after her death he directed that his trustee should stand possessed of his "said real estate" upon trust to sell and convert, and to divide the net proceeds, and the rent and income until sale, amongst the four respondents other than the trustee, or their issue. He directed

(1) (1891) P., 300.
(2) (1895) 2 Ch., 348.
(3) 7 Ch. D., 858.
(4) (1899) 2 I.R., 561.
(5) L.R. 3 Eq., 737.
(6) 2 Ch. D., 499, at p. 521.
(7) 2 Sim. & St., 323.
(8) 2 Y. & C., 708.
(9) (1895) 1 Q.B., 749.
(10) (1893) 3 Ch., 222.
(11) L.R. 6 H.L., 24, at p. 29.
(12) 17 Jur., 706.
(13) 2 Drew. & Sm., 278.
(14) 27 Ch. D., 395.
(15) 28 Ch. D., 66.

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his debts and testamentary expenses to be paid out of his personal estate. Then followed a bequest to his wife of "all my jewels trinkets personal ornaments and wearing apparel and all my furniture plate plated goods linen glass china books pictures script statuary musical instruments and all other articles of personal domestic or household use or ornament wines liquors and consumable stores and also all other my personal property absolutely." After another bequest of a watch and chain, sovereign case and gold ring, to a personal friend, and a direction that his trustee should be entitled to make professional charges for work done as a solicitor in connection with the estate, and a clause revoking previous wills, the will concluded with a clause empowering the trustee to raise any money on his "real estate" or any portion thereof for the purpose of paying off any mortgage on his "real estate."

The testator died on 5th May 1904. In July 1908 the lessee of the hotel elected to exercise his option to purchase.

The appellant claims that under these circumstances the purchase money (after discharge of the mortgage debt) is personalty, and passes to her absolutely under the gift of "all other my personal property." The respondents (other than Chant) claim that the testator's whole interest in the Empire Hotel was disposed of by the will as real estate, and that its subsequent conversion by the exercise of the lessee's option does not deprive them of the benefit of the original devise. The learned Judge from whom this appeal is brought thought that the case would be governed by the rule laid down by *Kenyon* M.R. in *Lawes* v. *Bennett* (1), and followed by Lord *Eldon* L.C. in *Townley* v. *Bedwell* (2), had it not been for the fact established in evidence (which he held to be admissible) that the Empire Hotel was the only real estate of which the testator was owner when he made his will. But he thought that, as the gift of real estate would have been entirely inoperative unless it meant the Empire Hotel, the testator must be taken to have meant to describe it specifically by the term "real estate," and that the operation of the rule in *Lawes* v. *Bennett* (1) was therefore excluded.

(1) 1 Cox Cas. in Ch., 167. (2) 14 Ves., 591.

The question to be determined is purely one of construction. In construing a will the first duty of the Court is to examine it, and to discover the meaning of the language of the testator as applied to the circumstances existing at the date of the will, and to give effect to the intention so discovered unless some authoritative rule of law or construction requires a different conclusion. The inverse process, of first taking up a supposed rule assumed to be *primâ facie* applicable, and then inquiring whether the words of the will exclude the operation of the rule, is, as has often been said, likely to lead to erroneous conclusions. I need not cite authorities (which are numerous) for this position.

Applying this principle without the aid of any artificial rule of construction, I find no difficulty in ascertaining the testator's intention. He knew that he was the owner of the Empire Hotel, that it was subject to a mortgage which fell due in 1906, and, presumably, that the lessee had an option of purchase. With this knowledge he set himself to dispose of his property. I leave out of consideration the fact that he had no other real estate. The first thing which strikes one is that he makes a sharp distinction between the disposition of what he calls his "real estate" and that of what he calls his personal property. He gives the latter to his wife absolutely, and gives her a life interest only in the former, with remainder to the respondents represented by Mr. *Ewing.* He further directs that after his wife's death the real estate shall be sold and the proceeds divided among them. At his death the lease had nearly five years to run. If it had been twenty years the principle would be the same. His widow might die during the term and before the option was exercised, in which event it would have been the trustee's duty to sell the reversion (subject of course to the option), and to divide the proceeds amongst the named beneficiaries. To my mind it is absolutely inconsistent with this direction that he should have intended that in that event the proceeds should not be distributed until the time for the exercise of the option had expired, and that the question whether her representatives or the other objects of his bounty should take the proceeds should depend upon the manner in which the option should be afterwards exercised.

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Again, it is not in question that the Empire Hotel was real estate at the time of the testator's death, and passed under the devise of his real estate. It must therefore be taken that he intended to deal with it by that disposition. Moreover, he applied his mind to the fact that some of his real estate was mortgaged and might be still encumbered at his death, and made a special provision to enable the mortgaged property to be preserved in specie to answer the successive trusts which he desired to have executed. I think that under these circumstances he must be taken to have had the Empire Hotel in mind when he gave this direction. The words which he used are general, "my real estate"; but if he had the Empire Hotel specially in mind while using these words in this part of his will I cannot escape from the conclusion that he had it also in mind when he used the same words in the gift of his real estate upon successive trusts. I am therefore of opinion that, if the will is construed according to the plain meaning of the words without the aid of any artificial rule, the intention that the hotel property should not be included in the words "all other my personal property," but that in any event his wife should have a life interest only in that property is apparent. If the fact that that property was his only real estate may be considered, the conclusion is overwhelming, but I do not rest my judgment on that fact, although the inclination of my opinion is that evidence of it was admissible. (See *In re Lowman; Devenish* v. *Pester* (1)).

Is there, then, any rule of law or rule of construction binding upon this Court which compels them to construe the will so as to defeat the testator's intention? The case relied upon is *Lawes* v. *Bennett* (2), which has been several times followed in England, but always with more or less veiled expressions of disapproval. In that case, which was decided in 1785, a testator possessed of both real and personal property gave his real estate to A. and his personal estate to B. There was no context. Part of his land was subject to a lease with an option of purchase, which was exercised after his death. *Kenyon* M.R. held that upon the exercise of the option the land was converted into personalty, and that this conversion operated retroactively so as to entitle B. to

(1) (1895) 2 Ch., 348, at pp. 352, 359. (2) 1 Cox Cas. in Ch., 167.

the purchase money. This decision is not consistent with the general rule that the question whether property which may be converted from realty to personalty by the exercise of a power vested in another person passes as real or personal estate must be determined by its condition at the time of transmission, as, for instance, in the case of mortgaged property (*Wright* v. *Rose* (1)). In my opinion the case can only be regarded as a decision that, when a testator gives his real estate to one and his personal estate to another *simpliciter*, and there is no context, it must be taken that he means to give as personal estate whatever may in the event turn out to be personal estate, so that in such a case if land of his is liable to be converted under an option of purchase which may be exercised after his death, he must be taken to mean that the land is to retain its quality of real estate until the option is exercised, or the time for exercising it has passed, and thereafter is to be real or personal property according to the event. The case was followed (but not approved) by Lord *Eldon* L.C. in 1808 in the case of *Townley* v. *Bedwell* (2) which was really a case of intestacy, the devise of the land in question having been held void(3). Here, again, the question was between real and personal estate *simpliciter*, with no context of a will to show the intention of the ancestor. But the rule cannot, of course, be extended to cases in which to give effect to it would be to frustrate the declared intention of the testator. Thus in *Drant* v. *Vause* (4) *Knight-Bruce* V.C. held that the decision in *Lawes* v. *Bennett* (5) was not applicable to a will by which the testator specifically devised land which was subject to an option to purchase, together with other real estate, to trustees for successive beneficiaries. The learned Vice-Chancellor did not advert to the successive limitations, but said that, as the testator had made specific mention in his will of the estate which was the subject of the option, the general rule did not apply. In the later case, *Emuss* v. *Smith* (6), the same learned Judge applied the same test, but under somewhat different circumstances. The testator had by a will made in 1830 specifically devised land called Nash's Own Farm, and

(1) 2 Sim. & St., 323.
(2) 14 Ves., 591.
(3) 6 Ves., 194.
(4) 1 Y. & C.C.C., 580.
(5) 1 Cox Cas. in Ch., 167.
(6) 2 De G. & S., 722.

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given his residuary real and personal property on certain trusts. In 1838 he entered into a contract by which he gave an option to purchase Nash's Own Farm, and another farm called Williams' Farm. In 1839 he made a codicil which dealt specifically with Williams' Farm, but did not mention Nash's Own Farm. The learned Vice-Chancellor held the codicil to amount to a republication of the will. On the point now in question he said (1):—"As the case stands, taking together the peculiar language of the will, and the particular language and the nature of the contract, upon which no option was expressed during the life of the testator, coupled with the fact of the republication by the codicil, I am of opinion, that it is consistent with the true construction of the testator's testamentary instruments, and the effect that ought to be given to republication,—that it is consistent with law, and justice, and reason, and consistent also with the cases of *Lawes* v. *Bennett* (2), and *Knollys* v. *Shepherd* (3), to say, that the purchase moneys of Williams' Farm and Nash's Own Farm belong to those who would have enjoyed them if Mr. Galton had not exercised the option of buying."

It is manifest that the learned Vice-Chancellor regarded the question as one of interpretation of the whole of the testamentary instruments, and did not think that the supposed rule could control a contrary intention sufficiently expressed. The case of *In re Pyle*; *Pyle* v. *Pyle* (4), before *Stirling* J., is on all fours with *Emuss* v. *Smith* (5). It is also an authority for the principle (which I have applied) that in construing a will regard should be had to the circumstances present to the mind of the testator at the time of execution. In the case of *In re Isaacs*; *Isaacs* v. *Reginall* (6), *Chitty* J. applied the rule in *Lawes* v. *Bennett* (2), to the case of an intestacy. It does not appear to have been pointed out to him that *Townley* v. *Bedwell* (7), was such a case.

It is clear that the *ratio decidendi* of the cases before *Knight-Bruce* V.C., and *Stirling* J., was that the testator had shown by his will an intention inconsistent with the rule in *Lawes* v.

(1) 2 De G. & S., 722, at p. 735.
(2) 1 Cox Cas. in Ch., 167.
(3) 1 Jac. & W., 499.
(4) (1895) 1 Ch., 724.
(5) 2 De G. & S., 722.
(6) (1894) 3 Ch., 506.
(7) 14 Ves., 591.

Bennett (1). The fact of the estate being specifically mentioned was thought sufficient to prove that intention, but any other manifestation of intention is equally efficacious.

For the reasons already given I am of opinion that the application of that rule to the present case would result in defeating the manifest intention of the testator as appearing on the face of his will. I think, therefore, that the rule does not apply, and that the decision appealed from was right.

We were invited to say that we would not follow *Lawes* v. *Bennett* (1), which has never, except in *Townley* v. *Bedwell* (2), been considered by a Court of Appeal. But for the reasons which I have already given it is not necessary to express any opinion on the question whether that case should be regarded as binding upon the Courts of Australia.

Some argument was addressed to us to establish that the term "real estate" and "personal property" are words of art and must have effect given to them accordingly. But it is clear that this doctrine cannot prevail against the canon which requires the Court to ascertain the meaning of the testator from the whole will. There is no word the primary meaning of which may not be modified by the context.

Barton J. The late *Sir George Jessel* M.R. once used some words which I think we may well lay to heart in this case. "I think it is the duty of a Judge," he said, "to ascertain the construction of the instrument before him, and not to refer to the construction put by another Judge upon an instrument, perhaps similar, but not the same. The only result of referring to authorities for that purpose is confusion and error, in this way, that if you look at a similar instrument, and say that a certain construction was put upon it, and that it differs only to such a slight degree from the document before you, that you do not think the difference sufficient to alter the construction, you miss the real point of the case, which is to ascertain the meaning of the instrument before you. It may be quite true that in your opinion the difference between the two instruments is not sufficient to alter the construction, but at the same time the Judge

(1) 1 Cox Cas. in Ch., 167. (2) 14 Ves., 591.

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who decided on that other instrument may have thought that that very difference would be sufficient to alter the interpretation of that instrument. You have, in fact, no guide whatever; and the result, especially in some cases of wills, has been remarkable. There is, first, document A., and a Judge formed an opinion as to its construction. Then came document B., and some other Judge has said that it differs very little from document A.—not sufficiently to alter the construction—therefore he construes it in the same way. Then comes document C., and the Judge then compares it with document B., and says it differs very little, and therefore he shall construe it in the same way. And so the construction has gone on until we find a document which is in totally different terms from the first, and which no human being would think of construing in the same manner, but which has, by this process, come to be construed in the same manner:" *Aspden* v. *Seddon* (1). Firmly convinced of the truth of these words and of their value as a guide, I shall first try to ascertain the testator's meaning without reference to other people's wills. What he meant can only appear from what he has said. It is true that the Court is entitled to know what subject matter it is that he was dealing with. A will cannot be put in operation without reference to that, as Lord *Blackburn* made very clear in the case of *The River Wear Commissioners* v. *Adamson* (2) when he said:—" In the cases of wills the testator is speaking of and concerning all his affairs; and therefore evidence is admissible to show all that he knew, and then the Court has to say what is the intention indicated by the words when used with reference to these extrinsic facts, for the same words used in two wills may express one intention when used with reference to the state of one testator's affairs and family, and quite a different one when used with reference to the state of the other testator's affairs and family. In the case of a contract, the two parties are speaking of certain things only, and therefore the admissible evidence is limited to those circumstances of and concerning which they used those words: see *Graves* v. *Legg* (3). In neither case does the Court make a will or a contract such as

(1) L.R. 10 Ch., 394, at p. 397, note 1. (2) 2 App. Cas., 743, at p. 764.
(3) 9 Ex., 709.

it thinks the testator or the parties wished to make, but declares what the intention, indicated by the words used under such circumstances, really is." It is the words of this will, then, that we have to interpret, in view of the subject matter of which those words dispose.

The testator had, under the will of his mother as sole devisee and legatee, a property called the Empire Hotel and certain furniture and effects. He made his will on 28th April 1904, and died a week afterwards. We know that at that time he owned the Empire Hotel; that it was under lease for seven years from December 1901 with an option of purchase during the term; that it was under mortgage; that the mortgage debt was to fall due in October 1906; and that the leaseholder exercised his option to purchase by notice in July 1908, and has obtained his conveyance.

Further, *Nicholls* J. admitted evidence that the Empire Hotel was the only real estate of the testator at the dates of his will and of his death. The Chief Justice is inclined to think this evidence admissible, I understand that my learned brother *Isaacs* holds a strong opinion to the contrary. If necessary I should be prepared to hold that the fact that the testator's real estate consisted of the Hotel property alone was part of the "extrinsic circumstances" which made up (to repeat the words of Lord *Cairns* L.C. in *Charter* v. *Charter* (1), "all the facts which were known to the testator at the time he made his will," and which the Court has a right to know so as to "place itself in the testator's position, in order to ascertain the bearing and application of the language which he uses." If this piece of evidence is admissible, and I find it difficult to distinguish it in that regard from the other facts, there can be little doubt that the testator, in making the devise under discussion, was speaking as clearly and as separately of the Empire Hotel as if he had devised it specifically by that name. In that case there would have been no difficulty in dismissing this appeal. But under the circumstances it is desirable that we should decide the case without regard to the fact to the admission of which the appellant objects. Excluding it then we find the testator disposing of his property with reference to the other facts I have related. It is unnecessary to

(1) L.R. 7 H.L., 364, at p. 377.

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repeat his words at length. His wife, the "Ellen Lawton" named in the will, is the appellant, now Helen Nicol. The three nieces and the adopted son are made respondents, together with the devisee in trust, Mr. Chant. Upon the will as already sufficiently set out by the Chief Justice, *Nicholls* J. decided that the net proceeds of the sale of the hotel, upon the exercise of the option to purchase, passed under the devise of the real estate and are to be held by the trustee upon the trusts of the will as to real estate. That is the question under appeal. The appellant contends that the exercise of the option converted the land into personalty, and that the conversion related back to the time of the option being exercised, making the property in effect personalty before and at the date of the will: *Lawes* v. *Bennett* (1).

It is our duty to read the whole document together before declaring what we consider the testator to have meant by it or by any part of it, and to see in what way and to what degree the sense of expressions used is affected by the relations *inter se* of its parts. No doubt effect must be given to technical words as being used in their primary sense in documents of which the general tenour is technical. But the overmastering rule is that the intention of the testator must be gathered from an examination of the entire document as applied to the subject matter to which it refers, and to the intention so gathered, to the context so applied, if it be distinctly ascertained, all else must be subordinated. "We have now reached the sound rule, that for the purpose of collecting the intention, every part of the will must be considered."—Lord *Eldon* L.C., in *Gittens* v. *Steele* (2).

The first question then is not, what rule of law or construction can I drag into this matter, but what does this testator mean *by his words* with reference to this property that we know he had to dispose of? If *primâ facie* the meaning of the words, so applied, is distinct, the question arises whether some established rule of law or construction, if adduced, modifies that meaning, and it is not to do so unless it manifestly governs the case. What then is the meaning to be given to the devise of "real estate"? The term is apt to include the Empire Hotel. The option to purchase had not been exercised. It was real estate, and the testator

(1) 1 Cox Cas. in Ch., 167.
(2) 1 Swans., 24, at p. 28.

certainly knew that it was his, whether he had other freehold land or not. He apparently knows the difference between realty and personalty. And I consider it important that the disposition which includes the Empire Hotel gives the widow no more than a life interest, while that disposition which in terms refers to personalty, and so excludes what was realty at the date of the will—and therefore excludes the hotel—is made to the wife absolutely and not merely for life. He is to be taken to know of the existence of the option, as indeed the appellant insists. Recollecting that, did he mean the devise on the one hand and the bequest on the other to be so construed as to take away from his nieces and his adopted son the interest in remainder which his words, if words mean anything, were meant to secure to them, such a proposition would contradict itself. His wife, *e concessis*, was to have all that was then personalty, and a life estate in the hotel. Did he then intend to leave to a mere tenant, a stranger, beyond any control, the power to give her an absolute and not merely a life estate in that property, and so to destroy outright his careful plan of disposition as to the others whom he wished to benefit? That, again, would be entirely opposed to his apparent intention, for he provides that after his widow's death the "real estate," which be it remembered included the hotel, shall be sold by the trustee, and the proceeds, as well as the net income until sale, divided between the nieces and the adopted child. What was Mr. Chant's duty if it happened that the widow died, the option remaining unexercised? The will directed him in that case to sell the property, at the time he should judge advantageous, and to divide the proceeds among the young beneficiaries; and subject to the option, he would have to do so. And these dispositions may well stand without in any way impeding the exercise of the option. Then would the trustee have been doing his duty if he retained those proceeds until the lease expired without an exercise of the option? The dispositions of the will raise many questions of this sort as indications that it was not intended that the rule relied on should obtain to alter the testator's scheme. The hotel was under mortgage, and he must be taken to have borne in mind that his death might precede discharge and reconveyance.

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It is for this reason, or partly for this reason, even if he had other real estate encumbered, that he gives his trustee power "to raise any money on *my real estate*, or any portion thereof as he may deem best for the purpose of paying off any encumbrance, charge, or mortgage on my real estate, and for that purpose to enter into and give the mortgagee or lender all necessary powers of sale," &c. By this provision he could get the encumbered land freed of its burden. For what purpose, except that it might be applicable to the limitations he had expressed with regard to it? And as there is no reason to think that he used the term "real estate" in different senses in two parts of his will, then he must have been referring to the Empire Hotel in the provisions as to raising money to pay off encumbrances (at the end of the will) as well as in the earlier part where he makes the limitations for life, and in remainder in respect of his "real estate." If this is so, and I cannot come to any other conclusion, then did he intend the widow to have in any event a greater interest in the hotel than he expressly gave her? That was a life interest and no more: and I think the whole will shows she was not to have more.

I am of opinion then that the meaning of the will as applied to the testator's possessions is distinct. But then there is adduced the rule of construction in *Lawes* v. *Bennett* (1), or as it is called an established rule of law, by which, say the respondents, *nous avons changé tout cela.* In that case the testator left all his real estate to Bennett and all his personal estate to Bennett and his sister equally as tenants in common. He had demised part of the realty to Douglas, with an option of purchase, and this option was not exercised till after his death, when a conveyance was called for and given. The husband of Bennett's sister then demanded a moiety of the purchase money as hers under the bequest of personalty, and Lord *Kenyon* declared accordingly, on the ground that on the exercise of the option the conversion operated, so as to turn the testator's interest into personalty, back to a period anterior to the will. Lord *Eldon*, who had argued against this decree at the bar, followed the decision 23 years later in *Townley* v. *Bedwell* (2), but apparently did not look with favour on this decision; "I do not mean to say," he re-

(1) 1 Cox Cas. in Ch., 167. (2) 14 Ves., 591, at p. 596.

marked, "that a great deal may not be urged against it." Succeeding Judges have followed it where they have seen no way of escape; but it has always been regarded as somewhat anomalous. Neither in *Lawes* v. *Bennett* (1), nor in *Townley* v. *Bedwell* (2), so far as I can discover, was there any indication of intention in the will to prevent the rule, if I am to call it so, from applying. There were no limitations or provisions, such as I think there are in the present will, to show on the testator's part a dealing with the real property demised evincing his intention that on its subsequent conversion the beneficiaries should take the same interest in the proceeds as they did or would failing conversion, that is the same interest as was conferred on the face of the will. That is the intention which in some of the subsequent cases has been held to be shown, to the exclusion of the contention founded on *Lawes* v. *Bennett* (1). There are examples both ways, and it is argued that the criterion is whether the real estate has been so specifically devised before conversion (and as it is sometimes added, only where the giving of the option precedes the testamentary expression of intention) that no doubt can be entertained that that specific property was intended to pass and remain as if unconverted—that is, so far as the donees and their respective interests have been concerned. I do not intend to analyse the mass of cases. In this instance it is a profitless quest, for reasons which I quoted early in this opinion. But having examined them with care I am prepared to repudiate the argument that *Lawes* v. *Bennett* (1) must be applied in all cases except those of specific devise. Those who so assert mistake instance for principle. I do not think there is a case which says a word to narrow down the dominant rule of testamentary construction in this fashion. The whole principle is that the distinct intention of the testator must prevail. That the cases cited are with few exceptions, if any, instances of intention evinced in one particular way does not confine the operation of the principle to such instances, and I am of opinion that if such an intention is clearly evinced in the will, then, however it be evinced, it can operate to exclude the rule in *Lawes* v. *Bennett* (1). In the present case it seems to me that the attempt is even

(1) 1 Cox Cas. in Ch., 167. (2) 14 Ves., 591.

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to extend its operation, and I will conclude by quoting an opinion of *Lord Halsbury's* which with even more than usual force lays down what I conceive to be the proper course to follow when such an attempt is made. The case was that of *Attorney-General* v. *Jefferys* (1) decided by the House of Lords in July of last year: "My Lords, whether this critical construction of a man's will and the establishment of certain canons of construction whereby whenever similar cases occur you are bound to adopt the view which has presented itself to the mind of learned Judges in early times be wise or not, I think this principle is right—that after a system of construction has existed for a couple of centuries it would be very rash indeed to interfere with that system of construction, when it has been so laid down as a principle to guide people whose duty it is to construe wills. But when the question comes before us of extending that supposed rule or line of authority to a case which certainly is not literally included in that principle, I think I am at liberty to say that, whatever may be my view of the original rule, I for myself will decline to apply that principle to any new case so as to extend the rule."

Allowing then the authority of *Lawes* v. *Bennett* (2) to the extent of the ground it seems to me to cover, and declining to give its principle extension beyond that limit, I am of opinion that the testator has in this will expressed an intention to which I ought to give effect if I can, and that the proper effect to give it is to hold with *Nicholls* J. that the words "my real estate" in the will include the testator's interest in the Empire Hotel property itself, and that the proceeds of the sale pass according to the devise of real estate. I therefore think that this appeal must be dismissed.

ISAACS J. I regret my inability to take the same view. The one question in this case is to discover the testator's intention as to the purchase money of the Empire Hotel derived under the option given by his mother, Mary Ann Lawton.

The first principle in ascertaining the intention of a testator is that, inasmuch as by law his will must be in writing, the intention must be found in that writing. None other can be imputed to

(1) (1908) A.C., 411, at p. 413. (2) 1 Cox Cas. in Ch., 167.

him. It is not what was in his mind—the law knows nothing of a mental testament—but it is what is in the formal writing he has left, interpreted according to recognized rules. I need not quote for this principle the authority of any judicial utterance but that of Lord *Watson* in *Scalé* v. *Rawlins* (1), where that learned Lord said :—" We are not at liberty to speculate upon what the testator may have intended to do, or may have thought that he had actually done. We cannot give effect to any intention which is not expressed or plainly implied in the language of his will." Lord *Halsbury's* language is to the same effect. " In the language of his will " is the all important phrase. The Court must construe that language, and not make or alter a will. There is always a natural and strong temptation to effectuate what, in the opinion of the Judge who reads a will and learns the surrounding circumstances, was apparently or conjecturally in the testator's mind, though omitted from the terms of the will, but it is a judicial duty to resist that temptation. Private opinion and judicial declaration in such a case must be carefully kept apart, as by *Sir William Grant* in *Jones* v. *Tucker* (2), and *Cholmondeley* v. *Clinton* (3).

Among the numerous weighty and authoritative reminders of this doctrine are the cases of *Page* v. *Leapingwell* (4); *In re Ovey*; *Robertson* v. *Broadbent* (5); *Higgins* v. *Dawson* (6); *In re Moses*; *Beddington* v. *Baumann* (7). I do not mean to say that there must be actual words to fit with technical accuracy the interest claimed; but if not, the testator's expressions, taken as a whole and construed with due regard to the rules of law, and also to established canons of construction unless these last are clearly negatived, must comprehend it. Form is not material if the substance is present, but substance lacking cannot be supplied even where the mind is privately convinced it was the testator's desire to have introduced it in order to perfect his bounty. The distinction so often emphasized is between " What did the testator mean to say ? " and " What is the meaning of that which he has said ? "

(1) (1892) A.C., 342, at p. 344.
(2) 2 Mer., 533.
(3) 2 Mer., 171, at p. 343.
(4) 18 Ves., 463, at p. 466.
(5) 8 App. Cas., 812, at p. 820.
(6) (1902) A.C., 1, at p. 11.
(7) (1903) A.C., 13, at p. 17.

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Now on reading the will, the most prominent feature observable is that the testator has deliberately separated his property into two grand divisions, namely, his "real estate" and his "personal estate" or "personal property," using terms of art well defined by law, and thus, *primâ facie* at all events, dividing it into the "two species of property" referred to by Lord *Kenyon* in one of the cases.

He uses no words whatever which expressly qualify the expression "real estate." He makes first a general devise of all his "real estate"—not a specific devise of the Empire Hotel—to his trustee, &c., upon trust first to pay the rents and profits to his wife for life, and after her death to stand possessed of "my said real estate" upon trust to sell and convert "the same" into money, and divide the net moneys arising from such sale and the rents and income till sold among three nieces and one adopted child. So far he is dealing with nothing but "real estate," whatever that means.

It is essential to a right determination of this case to remember that the devise is not specific but general. The failure to observe this, in my opinion, is the radical flaw in the respondents' position, and disposes of all their contentions. "A specific devise," says Lord *Selborne* L.C. in *Giles* v. *Melsom* (1), "or a specific bequest . . . is a devise or bequest by a description which identifies a particular subject then existing as intended to pass to the donee in specie." Applying that definition, it is incontestable that the words "all my real estate" and "my said real estate" and "the same" do not amount to a specific devise. They apply generally to whatever real estate the testator may happen to have at his death. *Jessel* M.R. in *Lysaght* v. *Edwards* (2) observed that under the *Wills Act* a general gift of real estate is, in the absence of contrary intention—which must, of course, be contained in the will—to be read as equivalent to "all the real estate which I shall be entitled to at the time of my death." Whether the testator lived for twenty years after the date of his will, or died the next day, whether he purchased other land or not, or sold all he possessed, the expressions "real estate" and "personal estate" or "personal property" in this will would have

(1) L.R. 6 H.L., 24, at p. 29. (2) 2 Ch. D., 499, at p. 505.

the same signification. The only differences would arise in applying its provisions to the actual property left.

What then is the signification of the term "real estate?" In construing a will a Court is not left entirely at large as if it were a jury engaged in finding the intention of the testator as a matter of fact from all the circumstances by which he was surrounded. If there is a canon of construction applicable to an expression found in the will, that is *primâ facie* to be applied. As *Fry* L.J. said in *In re Coward; Coward* v. *Larkman* (1), a canon of construction "is a rule which points out what a Court shall do in the absence of express or implied intention to the contrary." *Bowen* L.J. said it was a "*primâ facie* rule" which you may be called on to abandon by the pressure you may find in the document, from the words displacing it. *Romer* L.J. in *In re Gorringe; Gorringe* v. *Gorringe* (2), said:—"In construing a will what I like to do is, before going to the authorities, to read the will itself carefully, and to see whether, apart from authorities, I cannot gather what the meaning of the testator was." The learned Lord Justice did not mean that a Judge is to read the document as if there were no rules whatever to guide him in its interpretation, because he immediately adds:—"Of course, in construing the will I must bring in aid all those rules of law and construction which the authorities have laid down." In the case of technical terms it is as if an Interpretation Act provided that they should have a certain signification, unless a contrary intention appears from the will.

As to the meaning of "real estate," the first judicial consideration is that it is a technical term. In *Butler* v. *Butler* (3), *Chitty* J., in speaking of a trust of "real estates wheresoever situate"—an expression somewhat stronger than the present—said:—"That is a general gift describing them as the testator's real estates. Now real estate is a term of art, a technical term well understood; and the general principle applied to construe wills is, that if a testator uses a technical term he must be deemed to use the technical term in its technical sense." Of course that is subject to an intention so clearly and unmistak-

(1) 57 L.T., 285, at p. 291.
(2) (1906) 2 Ch., 34, at p. 347.
(3) 28 Ch. D., 66, at p. 71.

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ably expressed in the will as to overcome the presumption. But the countervailing words must be extremely plain. So the Privy Council held in 1897 in the case of *Lalit Motum Singh Roy* v. *Chukkum Lal Roy* (1), where Lord *Davey* said that one of the cardinal principles in the construction of wills was "to use Lord *Denman's* language, that technical words or words of known legal import must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it *perfectly clear* that the testator did not mean to use the technical terms in their proper sense." The principle adverted to by Lord *Davey* is one of the most deeply rooted in our law, as may be seen from *Jesson* v. *Wright* (2), and the stream of cases of the highest authority supporting it.

This leads to the examination of the other words: what is there to satisfy the condition of the cardinal principle enunciated by the Privy Council? In other words, what is there in those words sufficient to convert the expression "real estate" from a general devise to a specific devise, or what is the same thing for this purpose, to give the purchase money arising under the option specifically to the nieces and adopted son, so as to except that money from his general dispositive provision as to personalty, into which it would *primâ facie* fall if *Lawes* v. *Bennett* (3), is sound law?

The fact that the Empire Hotel was his only real estate at the date of his will is quite immaterial, and cannot affect the meaning of the general words "real estate." They are plain words of well recognized signification used without ambiguity or equivocation, and amounting to a general devise; and that cannot be qualified by a history of the testator's actual property at the moment of making his will. They are perfectly sensible with reference to the extrinsic circumstances; a phrase which means, not that the extrinsic circumstances make it more or less reasonable or probable that the primary meaning of the words is what the writer should have intended, it is enough if those circumstances do not exclude it, that is, deprive the words of all reason-

(1) I.L.R. 24 Calc., at p. 846; L.R. 24 Ind. App., 76.

(2) 2 Bligh, 1.

(3) 1 Cox Cas. in Ch., 167.

able application according to such primary meaning (see *per Coleridge* J. in *Shore* v. *Wilson* (1)). If "real estate" means what *Jessel* M.R. said it does; if the Empire Hotel was real estate, although subject to be converted retrospectively, it is impossible to say the words "real estate" are not sensible with reference to surrounding circumstances. And I am distinctly of opinion that extrinsic evidence of the state of the testator's property at the date his will was made is not admissible to qualify the meaning of his general devise of all his real estate.

In *Beddington* v. *Baumann* (2) Lord *Halsbury* L.C. refers to the general principle "that, where you are dealing with a will which is an ambulatory document, you have no right to refer to the circumstances under which it was made, or the date in respect of which it was made, *or the property that existed at the time when it was made*; you are remitted by virtue of the 24th section of the *Wills Act* to the moment of death to show what it is that is being disposed of."

The testator may or may not have mentally intended to denote the Empire Hotel by the words "real estate"; but as the Privy Council said in *Roy's Case* (3): "It is possible that a testator may have imperfectly understood the words he has used; or may have misconceived the effect of conferring a heritable estate, but this would not justify the Court in giving an interpretation to the language other than the ordinary legal meaning."

Some observations by *Lindley* L.J. in *In re Lowman*; *Devenish* v. *Pester* (4) were relied on for the respondents as assisting their case.

The words of the learned Lord Justice appear to me to tell the other way, because he was referring to a specific devise.

That brings me to the last suggested circumstance relied on to enlarge the proper meaning of "real estate" so as to include the option purchase money—I refer to the disposition of the proceeds under the trust for sale created by the testator and to be exercised after the death of his widow. Now there is in the words "personal estate" or "personal property" as much force and efficacy as in "real estate," and in enlarging the one, there must

(1) 9 Cl. & F., 355, at p. 535.
(2) (1903) A.C., 13, at p. 15.
(3) L.R. 24 Ind. App., 76.
(4) (1895) 2 Ch., 348, at p. 354.

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be a corresponding diminution of the other. Lord *Davey* in *Roy's Case* (1) stated as another cardinal doctrine that "clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention." That was only following Lord *Redesdale's* opinion in *Jesson* v. *Wright* (2). We must consequently look for some definite, clear, and specific expression of intention, not merely that the future proceeds of "real estate" are to be divided, but that the particular proceeds under the option are indicated as included. Where does that appear ?

The moneys directed to be divided as the proceeds of the real estate are moneys which the trustee is to receive in respect of a sale and conversion arising under the voluntary direction of the testator which he can control and regulate as to the date and conditions. The date of the conversion is to be that which he directs. He has directed his trustee to sell and convert after the widow's death at such time and in such manner as he shall judge most advantageous. In all probability the trustee would wait till the option period had passed without being exercised. But if the moneys now in controversy are deemed to have arisen under a conversion which took place in legal contemplation in 1901, and under a contract made by the testator's mother over which he had not at any time control, a conversion under an option which came into existence and was exercised independently of, adversely to, and under a title superior to his, then it is plain the moneys of which he directs the distribution cannot be the moneys now in dispute. In that case there would not be the clear particular intention which, according to the Privy Council ruling, is necessary to except the option purchase money from the general gift of personal property, by giving to the term real estate a meaning more extended than that which the law habitually and primarily attaches to it.

The power to raise money to pay off mortgages I pass by as immaterial, because for its operation it necessarily excludes the idea of the exercise of the option, as it cannot operate after the option is exercised, and therefore cannot relate to the proceeds derivable thereunder. The result is that the words "real estate,"

(1) L.R. 24 Ind. App., 76. (2) 2 Bligh, 1.

construed as rules of law and canons of constuction require, have their natural and primary meaning, and all that remains is to ascertain whether the law regards these purchase moneys as "real estate" or "personal property."

Lawes v. *Bennett* (1) decides that where an option to purchase land is given by contract with the owner, the exercise of the option finally and absolutely converts the land into personalty, and as between real and personal representatives, converts it retrospectively as from the date of the contract. It is a rule of law (see *per Page Wood* V.C. in *Weeding* v. *Weeding* (2)). It must be so, because it applies to cases of intestacy, *In re Isaacs*; *Isaacs* v. *Reginall* (3); and as the learned Chief Justice has pointed out in *Townley* v. *Bedwell* (4).

If *Lawes* v. *Bennett* (1) be held to apply, it is evident the appeal must succeed. The respondents deny the application of the rule, first, because the case should be held to be wrongly decided, which would end the matter: and next, because it is excluded by the words of the will. The last point is in my opinion untenable for the reasons I have given.

As to its soundness. The decision was pronounced in 1785, and though sometimes referred to as unsatisfactory, still stands untouched by adverse authority. It was the judgment of Lord *Kenyon*, and was followed by Lord *Eldon* in *Townley* v. *Bedwell* (4), in 1808; recognized by *Knight-Bruce* V.C. in *Drant* v. *Vause* (5), in 1842; and in *Emuss* v. *Smith* (6), in 1848; followed by *Kindersley* V.C. in *Collingwood* v. *Row* (7), in 1856; recognized by Lord *St. Leonards* in his *Vendors and Purchasers*, 14th ed., p. 157, in 1857; followed by *Wood* V.C. in *Weeding* v. *Weeding* (8), in 1861; recognized by *Jessel* M.R. in *Lysaght* v. *Edwards* (9), in 1876; and by *Baggallay* L.J. in *In re Adams and the Kensington Vestry* (10), in 1884; followed by *Chitty* J. in *In re Isaacs*; *Isaacs* v. *Reginall* (3); recognized by *Stirling* J. in *In re Pyle*; *Pyle* v. *Pyle* (11); by *Meredith* J. and *Holmes* L.J. in *In re Sherlock's Estate* (12).

(1) 1 Cox Cas. in Ch., 167.
(2) 1 John. & H., 424, at p. 430.
(3) (1894) 3 Ch., 506.
(4) 14 Ves., 591.
(5) 1 Y. & C.C.C., 580.
(6) 2 De G. & S., 722.
(7) 26 L.J. Ch., 649; 5 W.R., 484.
(8) 1 John. & H., 424.
(9) 2 Ch. D., 499, at p. 521.
(10) 27 Ch. D., 395, at p. 399.
(11) (1895) 1 Ch., 725.
(12) (1899) 2 I.R., 561, at pp. 584, 607.

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NICOL v. CHANT.

Isaacs J.

So far as the Australian Colonies are concerned, I have not been able to trace any judicial references, except a distinct recognition of the case in 1871 by the New Zealand Court of Appeal, as law established by the preponderence of authority; *Minifie* v. *Hall* (1). If good law, it requires no extension of its application to make it govern this class of case. It is the very class of case it was decided to meet.

I do not feel at liberty therefore to treat as *res integra* a question which has been regarded as settled for so long a period and by Judges of such eminence and authority. The leading decision, as *Chitty* J. observed in *In re Isaacs*; *Isaacs* v. *Reginall* (2) "has stood the test of time, and stands as a land mark on the subject."

I accept the rule as part of the law to be administered by the Court, and subject to any contrary intention expressed by the will, as impressing on the £6,000 purchase money of the Empire Hotel the character of personalty, as from 1901.

The test of contrary intention, as put by *Chitty* J. in *In re Isaacs*; *Isaacs* v. *Reginall* (3) and *Stirling* J. in *In re Pyle*; *Pyle* v. *Pyle* (4), is whether on the *face of the will* the testator gives the *purchase money payable under the option*. This might, as *Stirling* J. points out, be done by saying that the property whether remaining specie or *converted under the option* should go in the same way. *Weeding* v. *Weeding* (5); *Drant* v. *Vause* (6); *Emuss* v. *Smith* (7); *Wall* v. *Bright* (8); and in *In re Pyle*; *Pyle* v. *Pyle* (9), all show that a specific devise of the land after option given is equivalent to a gift of convertible land as such and therefore in whatever form it may be, including sale under the option.

On the other hand, where there is no specific devise of the land, no specific reference to the option purchase moneys, and no words which in their plain meaning embrace those moneys, it is not, for the purpose of avoiding the rule of *Lawes* v. *Bennett* (10), sufficient to give successive estates or power of appointment or directions to distribute the real estate devised generally or its proceeds:

(1) 1 N.Z. C.A.R., 421, at p. 425.
(2) (1894) 3 Ch., 506, at p. 508.
(3) (1894) 3 Ch., 506.
(4) (1895) 1 Ch., 724, at p. 727.
(5) 1 John. & H., 424.
(6) 1 Y. & C.C.C., 580.
(7) 2 DeG. & S., 722
(8) 1 J. & W., 494, at p. 497.
(9) (1895) 1 Ch., 724.
(10) 1 Cox Cas. in Ch., 167.

Collingwood v. *Row* (1), and see the trusts more fully stated in 5 W.R., 485; *Goold* v. *Teague* (2), the latter report setting out the trusts which were even stronger than in the present case. The last mentioned case has been disapproved as to another point of the judgment, but the decision so far as relevant stands unimpeached. It was on demurrer, which also proves the doctrine of *Lawes* v. *Bennett* (3) to be a rule of law.

For these reasons I am of opinion the appeal is well founded and should be allowed.

Appeal dismissed with costs. Costs of trustee as between solicitor and client. Trustee to be at liberty to take his costs out of the estate so far as he cannot recover them from the appellant. The other respondents to have only one set of costs.

Solicitors, for the appellant, *Stephens & Stephens.*

Solicitors, for the respondents, *C. Chant*; *Elliston & Hodgman*; *C. Ball.*

B. L.

(1) 26 L.J. Ch., 649. (2) 7 W.R., 84; 5 Jur. N.S., 116.
(3) 1 Cox Cas. in Ch., 167.