

James Whalley Smythe Gardiner case

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*A fine levied by copyhold estates therein mentioned in trust for his eldest son, with remainder to preserve contingent remainders, with remainder to the male issue of his son in tail male, with remainder over; and afterwards made a codicil, whereby, after reciting that by the death of his brother he had become entitled for life to certain estates mentioned in the will of J. S., he revoked the limitation in his will, so far as it related to his estates in favour of his son, and declared that a proviso, contained in his will for that purpose, should be extended so as to comprehend the estates limited by the will of his brother, as well as those limited by the will of J. S., and for preventing the estates mentioned in his will from going with those limited by the will of his brother, as was provided in his will as to the estates limited by the will of J. S.: Held that such codicil did not amount to a republication of his will; neither did it amount to a devise by implication, or a confirmation of the devise of lands contained in his brother's will.—A fine levied to pass all lands in the parish of C. is sufficient to comprehend the manor of W. within that parish, although such manor was not mentioned in the line.*

Wednesday 3 February 1819

PARKER and Another, v. BISCOE.

THIS was an action of *assumpsit* brought to recover the residue of the purchase-money of certain messuages, lands, and tenements, situate in the parishes of *Tackley*, *Cuddesdon*, and *Denton*, in the county of *Oxford*, which the defendant had purchased of the plaintiffs upon a sale by public auction, and for which he paid a deposit, and undertook to pay the residue of the purchase-money on or before a given day, on having a good title to the premises. The defendant pleaded the general issue, and at the trial before Lord Chief Justice *Gibbs*, at *Westminster*, at the sittings after *Easter* term, 1817, the sufficiency of the title tendered by the plaintiffs being the only point in dispute between the parties, a verdict was taken for them, with nominal damages, subject to the opinion of the court as to the sufficiency of such title, upon a case of which the following is the substance.

Sir *John Whalley Smythe Gardiner*, bart., by indentures of lease and release, dated in July 1787, executed upon his marriage with Miss Martha Newcombe, settled certain hereditaments situate at the above parishes, to the use of himself and his heirs till marriage, then to the use of himself for life, and after his decease to the intent, that in case his intended wife should survive him, she should have for life an annuity of £800, in lieu of dower, with the usual powers of entry, distress, and perception of profits; and subject thereto, to the use of *George Gostling* and *Henry Newcome*, therein named, their executors, &c. for ninety- nine years, to commence from the decease of the said Sir *John W. S. Gardiner*, in trust for better securing the said annuity of £800, with remainder to the use of him, his heirs, and assigns. There is a hamlet in the parish of *Cuddesdon*, called *Wheatley*, and a manor by reputation called the manor of *Wheatley*, which extends over the whole hamlet; but there are no copyhold tenants within *Wheatley*, nor any freehold tenants holding of the said manor. Sir *John W. S. Gardiner*, at the time of this settlement, was seised in fee of the whole of the estates in question. By his will, dated 13 *April*, 1795, and duly executed to pass real estates, after directing his debts to be paid, and bequeathing pecuniary legacies, he devised his estate at *Tackley* to his wife for life, and also gave her an annuity of £200, in addition to the £800 to which she would be entitled by the settlement, in case she survived him, and charged the additional annuity upon all his lands within *Tackley*, *Cuddesdon*, and *Denton*; and after the death of his wife he devised all his lands in those three parishes, subject to the two several annuities of £200 and £800 to his wife; and all other his real estate whatsoever, unto the Hon. Sir *W. H. Ashurst*, knight,

his heirs and assigns for ever, to the use of the testators first and other sons successively, in tail nude, with remainder to the use of his daughters, as tenants in common in tail general; with remainder to the use of his (testator s) brother, *James Whalley*, and his assigns for life, *sans* waste; with remainder to the use of *James Whalley*, the only son of the testator's brother, the said *James Whalley*, by his late wife *Elizabeth*, deceased, and his assigns for life, *sans* waste; remainder to the first and other sons of *James Whalley*, the son, successively, in tail male, with divers remainders over.

By indenture of covenant, dated 12th May, 1796, between Sir *John W. S. Gardiner* and Lady *Gardiner* of the one part, and the said *George Gostling* and *Henry Newcome* of the other part, after reciting the settlement made upon Sir *John's* marriage, and that he and Lady *Gardiner* were desirous of exonerating the premises at *Tackley* from the payment of the rent charge of £800, secured for the jointure of Lady *Gardiner*, in case she should survive him; and that the same should from thenceforth be exclusively charged on the premises at *Cuddesdon* and *Denton*, which being free from all incumbrances, and of the annual value of £1150, would afford an ample security for payment thereof, Sir *John* and Lady *Gardiner* covenanted to levy a fine, *sur cognizance de droits comme ceo*, unto the said *George Gostling* and *Henry Newcome* of all the lands in *Tackley*, *Cuddesdon*, and *Denton*, to certain uses therein declared. The reputed manor of *Wheatley* was not named in the above indenture; a fine was duly levied, in pursuance of the above deed, as of *Easter* term, 36 Geo. 3., in which *George Gostling* and *Henry Newcome* were plaintiffs, and the said Sir *John W. S. Gardiner* and *Martha*, his wife were deforciant, of messuages and lands in the parishes of *Taddey*, *Cuddesdon*, and *Denton*.

Sir *John W. S. Gardiner* died on the 18th of November 1797, without issue, leaving *James Whalley*, his brother and heir at law, not having altered or revoked his will, otherwise than by the operation of the above fine, and seised, together with other real property, of the estates devised by his will.

The said *James Whalley*, by his will, dated the 2nd of July 1796, previous to the death of his brother, devised all his real estates, except certain copyhold estates therein mentioned, unto *Streynsham Master*, and *Adam Cottam*, their heirs and assigns, in trust for his eldest son, *James Whalley*, during the term of his life, without impeachment of waste, with remainder to *William Assheton* and *John Atherton*, and their heirs, during the life of his said son, to preserve the contingent remainders, with remainder to all and every other the son and sons of the body of his said son, successively in tail male, with remainder over. The last mentioned testator, soon after the death of his brother, Sir *John W. S. Gardiner*, made a codicil to his will, of which the following is the substance: "Whereas, by the death of my late brother, Sir *John W. S. Gardiner*, without issue, I am become entitled for life to certain estates, &c., mentioned in the will of Sir *William Gardiner*, bart. under and by virtue of the same will, with remainder to my first and other sons in tail male, &c., by which event the said estates, &c., will upon my death descend and go to. my eldest son, *James Whalley*, I do, therefore, consistently with my will, revoke and annul the limitation therein mentioned of my estates, &c. in favour of my said son, it being still my will that my said estates therein mentioned shall not be held or enjoyed by any one of my sons or daughters or their issue, together with the estates, &c. so limited by the will of my brother, as more fully expressed in the proviso in that behalf, in my will contained. And whereas the said Sir *John W. S. Gardiner* hath, by his last will, limited several lands at *Tackley*, in the county of *Oxford*, and elsewhere, in favour of me for life, with remainder to my children and their issue; and it also being my will that my said estates in my will mentioned, and which are situate in the county of *Lancaster*, shall not be held or enjoyed by any of my said sons or daughters, or their issue, together with the estates, &c. so limited by the will of the said Sir *John W. S. Gardiner*, until the ultimate remainder limited by my will shall take place or come into actual possession. I do therefore will and declare, that the proviso contained in my will shall be extended so as to comprehend the estates so limited by the will of the said Sir *John W. S. Gardiner*, as well as those limited by the will of the said Sir *William Gardiner*, and for preventing my estates in my will directed to be settled, from going with the estates so limited by the will of the said Sir *John W. S. Gardiner*, exactly in the same manner as is provided by the said proviso, with respect to the estates limited by the will of the said Sir *William*

*Gardiner*. I do also will and declare, that such of my children as may happen to be entitled, under .my will and this codicil, to my estates, in my will directed to be settled, shall be considered as an eldest child, so far as to prevent, and for the purpose of preventing such child from being entitled under my will, to any part of the money to arise from the sale of my copyhold estates therein mentioned.”

The said *James Whalley*, having taken the title of *Sir James Whalley Smythe Gardiner*, died on the 21st of August 1805, without revoking or altering his will, except by the above codicil, and leaving *James Whalley*, now *Sir James Whalley Smythe Gardiner*, his eldest son and heir at law. By indentures of lease and release, dated July, 1807, upon the marriage of the said last mentioned *Sir James W. S. Gardiner*, reciting that he was seised of an absolute estate of inheritance in fee-simple in possession, in lands situate among other places in *Tackley*, *Cuddesdon*, and *Denton*, and that a treaty of marriage had been carried on between him and *Frances Mosley*, it was witnessed, that in consideration of that intended marriage, the said *Sir James W. S. Gardiner* did grant, bargain, sell, alien, release, and confirm unto the plaintiffs, and to their heirs and assigns, all the lands comprised in the will of the said *Sir John W. S. Gardiner*, deceased, to hold the same to them, the said plaintiffs, to certain uses therein declared: and it was provided by the said indenture of release that it should be lawful for the plaintiffs and their executors, &c. at any time thereafter, at the joint request of *Sir James W. S. Gardiner*, and *Frances*, his wife, during their joint lives, and after her decease, then, at his request alone, to dispose of and convey, either by way of absolute side or exchange, all or any part or parts of the estates hereby released.—The estate in question is comprised in the settlement made by *Sir John IV. S. Gardiner*, in July, 1787, and is situate in the parishes of *Tackley*, *Cuddesdon*, and *Denton*, and a small part thereof is in the hamlet of *Wheatley*, in the parish of *Cuddesdon*, and was sold under the power reserved to the plaintiffs by the settlement made in July, 1807, and at the joint request of the said *Sir James W.S. Gardiner*, and *Frances*, his wife, according to the form prescribed by that settlement. The question for the opinion of the court was, whether, under the above circumstances, the plaintiffs were entitled to recover?

The case came on for argument this day, when Mr. Serjt. *Bosanquet* for the plaintiffs, having stated, that if there were any doubt on the construction of the instruments contained in the case, as the plaintiffs claimed as heirs at law, they must be construed beneficially for them: made five points; first, Whether the fine levied in 1796, and the deed declaring the uses of that fine, effected a revocation of the will of *Sir John Whalley Smythe Gardiner* ? And if so, then, secondly, Whether the codicil to the will of *Sir James Whalley Smythe Gardiner* amounted to, or had the effect of a republication of such will of *Sir James Whalley Smythe Gardiner* so as to subject the estates in *Tackley*, *Denton*, and *Cuddesdon* comprised in the fine of 1796, to the devises and limitations contained in such will? Or, thirdly, Whether *Sir James Whalley Smythe Gardiner's* codicil amounted to or contained a devise by implication, of the estates at *Tackley*, *Denton*, and *Cuddesdon* comprised in the fine? Or, fourthly, Whether that codicil could, in any manner, be considered as amounting to a confirmation or restoration of the devise of these estates, contained in the will of *Sir John Whalley Smythe Gardiner*? And, fifthly, Whether, as the reputed manor of *Wheatley* was not mentioned in the said fine, the lands situate in the hamlet of *Wheatley* passed by the fine?

With respect to the first, the rule has been most clearly laid down by Lord *Kenyon* in the case of *Goodtitle d. Holford v. Otway (a)* where he says, that “he takes it that the law of the land is now clearly and indisputably fixed, that where the whole estate is conveyed away to uses, though the ultimate reversion comes back again to the grantor by the same instrument, it operates as a revocation of a prior will”. This rule has been recognised in *Doe d. Dilnot v. Dilnot (a)*, where it was held, that if a testator, after having made his will, levy a fine to such uses as he shall by deed or will appoint, and die without making any new will, the will made prior to the fine is revoked thereby; it was, therefore, quite clear that the fine in this case operated as a revocation of the will of *Sir John W. S. Gardiner*. Secondly, as to whether the codicil to *Sir James Gardiner's* will operated as a republication of such will, the case of *Goodtitle d. Woodhouse v. Meredith (b)* was precisely in point, and Lord *Ellenborough* in delivering his judgment (c) in that case, as to this question, stated, that “it had been

settled in a series of cases, that the effect of a codicil is to give an operation to the codicil *per se*, and independently of any intention, so as to bring down the will to the date of the codicil;" that, therefore, may be considered as a general and established rule. This is a much stronger case than that of *Bowes v. Bowes (d)*, as there the general rule was not denied, but the codicil being restrained to the *said* lands, lands purchased after the will, were adjudged not to pass, and Lord *Eldon* there observed, "that although a republication of a will of lands certainly speaks as of the time of the republication, yet that in all cases of this kind which had come before the courts for decision, the only question had been, Whether the particular case was or was not within the general rule?" And his lordship afterwards descanted on the intention of the testator to be derived from the codicil. Here the codicil recites the will of Sir *William Gardiner*, which operated to convey lands to himself and his sons; he therefore revoked and annulled the limitation in his own will in favour of his son, *James Whalley*. His object, therefore, was, to add nothing to the former will, but merely to revoke the limitation therein mentioned. By the subsequent part of the codicil he confines the revocation of his will to those lands of his own which are situated in *Lancaster*, and thereby expressly negatives the application either of the will or codicil to the lands in question; it cannot, therefore, be contended, that because the codicil operates merely as a revocation of his will, as to certain lands of his own, that it can be carried to the extent of giving effect to a devise of lands in a distant county; the testator, therefore, in his codicil recited that the lands he had devised by his own will, should be disposed of in a different way, confining himself to three estates, and also declared his will as to the disposition of those other estates. [Mr. Justice *Richardson*. The codicil contains no general words in confirmation of the will.] It tends rather to its revocation; for it provides for the disposition of lands to which he had become entitled by two prior wills. This construction will not defeat the intention of the testator; and although the lands in question do not vest in his son by his will, as revoked by the codicil, they still descend to him as heir at law'. Thirdly, As to whether the codicil might be considered as amounting to a devise by implication. All implication is negatived; for the testator thought he had no power to devise these lands which had been previously disposed of by Sir *William Gardiner*, and his brother, Sir *John W. S. Gardiner*. Fourthly, As to whether the codicil of Sir *James Gardiner* could be considered as amounting to a confirmation of the devise of those estates contained in the will of his brother, Sir *John*: It could not so operate, unless his will were considered as new; for confirmation can only be of what already has existence (a): as, therefore, the codicil did not amount to a devise by implication, it could not be considered as containing a confirmation of the estates comprised in the will of Sir *John W. S. Gardiner*. Fifthly, As to whether the lands situate in the hamlet of *Wheatley* passed by the fine, as the manor was not mentioned therein; and the fine comprehended all the lands in *Cuddesdon*, in which the manor of *Wheatley* was situate, it was sufficiently large to embrace this manor.

Mr. Serjt. *Blouset*, for the defendant, was stopped by the Court, who were clearly of opinion, that the plaintiffs were entitled to recover upon every point which had been raised by Mr. Serjt *Bosanquet* and accordingly directed a judgement for the plaintiff.