REPORTS OF CASES

IN THE LAW OF

REAL PROPERTY & CONVEYANCING

ARGUED AND DETERMINED

IN ALL THE COURTS OF LAW AND EQUITY.

Reporters.

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ROLLS COURT.—J. Macaulay, Esq.
VICE-CHANCELLOR KNIGHT BRUCE'S COURT.—G. S. Allnutt, Esq.
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Barristers at Law.

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1846.

ROLLS COURT.

July 18, 1844.

HAWKINS v. WOODGATE and OTHERS. (*a*)

Covenant for repurchase of an annuity, construction of—Election, in pursuance of covenant, to take policy of assurance on life of grantor of annuity—Notice of election—Time.

An annuity-deed contained a stipulation for the repurchase of the annuity by the grantor at a certain price, upon his giving one calendar month's notice of his intention so to do; and that, if the annuitant should effect any policies of assurance on the life of the grantor (which he was to be at liberty to do), he would, upon notice given by the grantor, "at the time of such repurchase," of his election to take the policies so effected, assign to him "any policy or policies which might be then vested in" the annuitant. Policies were accordingly effected, and the grantor of the annuity having given the month's notice of his intention to repurchase at the expiration thereof, and having also at the same time given notice of his election to take the policies: Held, that the grantor had a prospective interest in the policies under the deed; and that the annuitant could not, after the notice and before the day for completing the repurchase, surrender the policies at the assurance office for his own benefit; but that he was under no obligation to keep them on foot by paying the premiums.

THIS was a suit instituted by the grantor of an annuity to obtain an assignment to him of two policies of assurance effected on his life by the annuitant, to which the grantor claimed to be entitled, under and by virtue of a clause in the deed of annuity, providing for the repurchase thereof on certain terms.

George Hawkins, the plaintiff, by indenture bearing date the 2nd of December, 1825, in consideration of 2,500*l.*, sold to Richard Drew an annuity of 365*l.* 19s. 2d., for the term of ninety-nine years, if plaintiff should so long live; and for securing payment thereof, assigned to trustees certain hereditaments, stocks, funds, &c. in the said indenture mentioned. This deed contained a covenant by the plaintiff for facilitating the effecting assurances upon his life by and at the expense of Drew, to the extent of 2,500*l.*, and for payment of such additional premiums as might be advanced; and contained also a proviso for enabling the plaintiff, at any time after the expiration of five years from the date thereof, to repurchase the annuity, upon giving three months' notice in writing to Drew, and upon paying to him the sum of 2,500*l.* and all arrears. Drew then effected an assurance on the life of the plaintiff with the Sun Life Assurance Society for the sum of 1,000*l.*, and another with the Crown Life Assurance Society for 1,500*l.* By an indenture bearing date the 17th October, 1827, the annuity was assigned, and by another indenture of even date the policies were transferred, to Edward Chapman Bradford.

The annuity having fallen into arrear, and the funds upon which it was charged proving insufficient for the payment of this and of a second annuity, and other incumbrances thereon, and disputes having in consequence arisen between the incumbrancers, the plaintiff, and the trustees of his marriage settlement, respecting the priority of the several incumbrances, the party then entitled to the second annuity instituted a suit against E. C. Bradford, the plaintiff, and the other parties interested, pending which a sum of 4,945*l.* 14s. 7d., dividends on the trust fund applicable to the payment of the annuity, was received and retained by the trustees of the settlement. To put an end to all differences, it was agreed that this sum, though less than the arrears due, should be divided between the two annuitants in the proportions of 1,500*l.* and 3,445*l.* 14s. 7d., and that they should thereupon assign their respective annuities, and all arrears thereof, and all benefit and advantage of the securities for the same, to trustees upon trusts, of which one was to pay to E. C. Bradford an annuity of 215*l.* 19s. 2d. Accordingly, by an indenture bearing date the 23rd of August, 1839, the annuities and securities were assigned to James Weston, E. H. Richards, and W. S. Cookson; and by another indenture of even date it was declared that the said J. Weston, E. H. Richards, and W. S. Cookson should stand possessed thereof, upon trust, amongst other things, to pay to E. C. Bradford an annuity, during the life of the plaintiff, of 215*l.* 19s. 2d. as and from the 5th day of July then last. And it was thereby provided that the proviso for enabling the plaintiff to repurchase the annuity granted by the deed of the 2nd

(*a*) Reported by J. MACAULAY, Esq., Barrister-at-law.

December, 1825, should cease and determine; and that "in case the said George Hawkins, at any time hereafter during the continuance of the said annuity of 215*l.* 19s. 2d., shall be minded and desirous to repurchase the same annuity, and of such his mind and intention shall give one calendar month's notice, in writing, to the said E. C. Bradford, his executors, administrators, or assigns, and shall, at the expiration of such notice, pay, or cause to be paid, unto the said E. C. Bradford, his executors, administrators, or assigns, the sum of 2,500*l.*, together with all arrears of the said annuity of 215*l.* 19s. 2d. then due, and the proportionable part of the growing payment thereof, computed to the time of such repurchase," together with costs, &c., then E. C. Bradford would accept the sum of 2,500*l.* in full, for the price or consideration of the repurchase of the annuity of 215*l.* 19s. 2d., and it should thereupon cease and determine. "And in case the said G. Hawkins shall at any time repurchase the said annuity of 215*l.* 19s. 2d. under the proviso hereinbefore contained, and shall, *at the time of making such repurchase*, by notice in writing to the said E. C. Bradford, his executors, administrators, and assigns, elect to take the policy or policies hereinafter mentioned, but not otherwise, he, the said E. C. Bradford, will assign and make over unto the said G. Hawkins any policy or policies of assurance upon the life of the said G. Hawkins, *which may then be vested* in the said E. C. Bradford," that might have been effected in respect of the annuity of 365*l.* 19s. 2d., or of 215*l.* 19s. 2d.; provided, nevertheless, that "it shall not be in anywise incumbent on the said E. C. Bradford to effect or renew or keep on foot any such policy or policies as aforesaid, or at any time after the completion of such repurchase as aforesaid, without such election being made by the said G. Hawkins as aforesaid, to assign or make over the same to the said G. Hawkins."

E. C. Bradford died on the 12th November, 1843, having appointed by his will the defendants, Henry Arthur Woodgate, Richard Hardinge, and William Woodgate, his executors, who proved his will and are now his legal personal representatives.

The plaintiff being desirous of repurchasing the annuity of 215*l.* 19s. 2d., and of taking an assignment of the two policies, on the 18th of May last served a notice on the defendants to the effect that he was minded to repurchase the annuity, and that he thereby elected "to take the policies of assurance now vested in you, as the executors of the said E. C. Bradford." For that purpose, he deposited in the hands of Messrs. Clayton and Cookson, his solicitors, the sums of 2,500*l.* and 79*l.* 15s. 7d., the proportionable part of the growing payment of the annuity up to the 18th May last. The defendants then conceiving they had a right, any time previous to the actual completion of the purchase, to surrender the policies, and being fortified in that opinion by the opinion of counsel, proposed to the assurance offices respectively to take the two policies at the respective sums of 355*l.* and 389*l.* 7s. 11d., their estimated value, which they agreed to do. Upon this coming to the knowledge of the plaintiff, he filed his bill on the 13th May, to restrain them, and to oblige them to assign the policies to him on payment of the sum of 2,579*l.* 5s. 7d. for the repurchase of the annuity and the proportionable part of the growing payment thereof. An injunction having accordingly been obtained, the defendants applied for its discharge, on the ground that its continuance (unless on terms) would prevent them from raising the question, whether they were not at liberty, at any time before the repurchase should have been actually made, to surrender the policies or dispose of them in any other manner for the benefit of their testator's estate, inasmuch as the day for repurchasing would arrive before the cause could be heard; and the Court thereupon made an order, in accordance with an agreement entered into between the parties, without prejudice to any question in the cause, directing the plaintiff to pay 800*l.* into court, to cover the estimated value of the policies (744*l.* 7s. 11d.) and the costs of the suit, and directing the defendants thereupon to assign the policies to the plaintiff. The cause now came on for argument on bill and answer.

Kindersley and *Bates*, for the plaintiff.—The whole question in the cause comes to this, whether, after notice and before the day on which the repurchase was to be completed, the defendants were at liberty, on the fair construction of the terms of the deed of the 23rd of August, 1839, to surrender the policies of assurance for the

benefit of their testator's estate. The language of the proviso is,—if the plaintiff "shall, at the time of making such repurchase, elect to take," &c., "the said E. C. Bradford, &c. will assign any policy, &c. which may be then vested," &c. This stipulation, it is contended, requires the notice of election to take the policies to be given at the *time* of the repurchase of the annuity, and provides for the assignment of those policies only which may be *then* vested in Mr. Bradford or his executors. The defendants, therefore, think that, had they surrendered the policies before the 18th of May, as they had agreed to do, they would have committed no violation of the provisions of the deed. If this view of the subject were correct, the clause in question would be entirely neutralized, and the effect would be to make the instrument absolute nonsense. In every case in which it would be beneficial to himself, the annuitant would, of course, surrender the policies, and the stipulation to assign them to the plaintiff would be virtually inoperative. But this could not have been the intention of the parties; for the very introduction of the clause is a proof that they intended it to have some operation, and in the view of the case taken by the other side it can have none. The construction contended for would be a monstrous violation of the rule of this court, that the intention of the parties to an instrument is to govern in carrying out its provisions, and it cannot, therefore, be supported. The plaintiff, by the stipulation, has acquired an interest in the policies, of which he cannot be deprived; and, upon the payment of the 2,579*l.* 5s. 7d. was entitled not merely to the repurchase of the annuity, but to the assignment of the policies.

Turner and *Bacon*, for the defendants.—By the indenture of the 2nd of December, 1825, the annuity in question was granted to Richard Drew, and the repurchase thereof by the plaintiff, the grantor, was provided for in the same deed. Soon after, the annuity was assigned by Drew to Bradford for valuable consideration, as were also the policies effected on the plaintiff's life by Drew, to the amount of 2,500*l.* Now, had the transactions ended there, the policies were and would still have remained in Bradford's possession, for his own absolute use and benefit. That being the situation of the parties on the 23rd of August, 1839, when the deed of arrangement was executed, the question we have to consider is, whether the absolute title of Bradford is or is not displaced by the contract contained in that deed. Now, the deed in question is one of arrangement, one by which the plaintiff is permitted to escape from his former liabilities in respect of arrears, and by which the original annuity itself is given up by Bradford for another of considerably less amount; the benefit is, therefore, all on the plaintiff's side, and Bradford derived no advantage from the contract, but the contrary. No benefit, therefore, ought to be given to the plaintiff, but such as appears on the face of the deed; and it being a mere dry contract, and the question being what is its effect, the construction should, if possible, be in favour of Bradford rather than the plaintiff, who is the gainer. If it had been intended by the parties to the deed that the plaintiff should become entitled to the policies, why was not the clause respecting them inserted in the proviso for repurchase? This has not been done, and from the severance of them, therefore, the inference is, that it was not the intention of the parties that there should exist any such right as that contended for on the part of the grantor. But it is said that, having by his notice declared his election to take the policies, the plaintiff is thereupon entitled to demand them. Where do you find any thing to that effect in the deed? The right of the plaintiff, according to the express terms of the deed, was to accrue at a fixed period, which has not yet arrived, and upon the performance of an act which has not yet been performed; for it was only at the time of the repurchase, that is, at the time of the payment of his purchase-money, that he was to be entitled to such policies as *then* existed, and he was not to be entitled even then unless at that very time he made his election. And this view of the case is confirmed by the proviso that follows, viz. "It shall not be incumbent on E. C. Bradford to keep on foot any such policy, nor, after the repurchase without such election being made, to assign the same to the plaintiff." But it is said the effect of the notice was to entitle the plaintiff to the policies, though it was given previously to the day on which the repurchase was to be completed. If this were the case, then it would follow that, immediately upon notice being given, an obligation would be imposed on Bradford to keep up the

policies for the plaintiff's benefit, and he would be a trustee of them for him. If then the notice should be given a few days before the premiums on the policies became due, Bradford would be under an obligation to pay the assurance out of his own moneys for the benefit of the plaintiff, and if the plaintiff should afterwards abandon his notice, still Bradford would have thereby been prevented from dropping the policies, if so inclined. So that the effect would be to give the plaintiff the benefit of Bradford's payments *de anno in annum*, and deprive the latter of his right to drop the policies, contrary to the express terms of the proviso, which says it shall not be incumbent on him to keep them on foot. Suppose the plaintiff had died in the meantime between the service of the notice and the day of completing the repurchase, would his representatives have been entitled to the policies? There is no such contract. Again, it is said that, according to our view of the case, the provisions of the deed would be inoperative. But they may have been intended to apply to a case where the policies, at the period of the repurchase, being of no value to Bradford, the plaintiff might be desirous of keeping them on foot for his own benefit, in order to prevent the necessity of taking out fresh policies at a later period of life, and of course at an advanced premium. In no case, however, is it intended by the deed that he was to derive a profit from what Bradford might turn to his own advantage. Suppose the policies had been taken out with the Equitable Insurance Society, and had risen in value, as they well might do, to an amount sufficient to pay the price of the repurchase, can it be contended that it was the intention of the parties to the deed that the plaintiff might serve notice in such a case to repurchase, and then demand an assignment of the policies so increased in value by the payments of Bradford, and with the proceeds thereof pay his purchase-money and get rid of the annuity? Surely not. The true construction is, that if notice should be given, on the day of the completion of the repurchase, of the plaintiff's election to take any policies which should be then existing, then that he should be entitled to an assignment of them; and, as none were (or would have been) so existing, none can of course be assigned.

Kindersley, in reply, was not heard.

The MASTER OF THE ROLLS.—By the deed of August, 1839, provision was made, amongst other things, for payment of a portion of the arrears of an annuity granted by the plaintiff, to which Bradford was then entitled; and also for the payment thereafter, by the plaintiff, of an annuity of less amount than the former, in lieu thereof. It was also thereby stipulated that the premiums on the policies of assurance then existing, or thereafter to be effected on the life of the plaintiff, and all increase of such premiums, should be paid by Bradford out of his own moneys. Then comes the proviso on which the question arises. [His Lordship read it.] First, it must be admitted, Bradford was under no obligation to make payments on the policies in question, nor to keep them on foot at all; and secondly, the plaintiff had a prospective interest in the policies, which, though liable to be defeated by their being dropped, might afterwards gain him a right to their possession. The plaintiff being desirous of repurchasing the annuity, apprizes the defendants that he intended to do so, and at the same time gives them notice that he elected to take the policies. That notice did not alter the contract between the parties; it did not impose any obligation not before existing; but it did apprize the defendants that the plaintiff intended to claim the prospective interest to which he was entitled by the terms of the contract. But the defendants say, notwithstanding this prospective interest of the plaintiff in the policies, "we have a right to surrender them for the benefit of our testator's estate." I am at a loss to know on what reasonable construction this was to be done. They had not at any time a right to surrender for valuable consideration; they had only a right to say they would not keep up the policies any longer, and so to let them drop; but that is a very different thing from denying to the plaintiff the prospective interest for which he contracted, and thereby deriving profit to their testator's estate. It was said that the right to elect related to the time of completing the repurchase; but if that were so, the day for completing might have arrived, the conveyance been prepared, and the parties just ready to sign it, and the defendants

might then have surrendered, and so defeated the plaintiff's rights under the contract. The plaintiff could not repurchase the annuity without giving notice, and immediately thereupon the transactions respecting the repurchase of which were to issue in the conveyance, commenced, and the right to take the policies was thereby determined, and after that the defendants had no right to surrender. It is to be remembered also that Bradford had stipulated to receive the original purchase-money in full, for the annuity. It is clear the plaintiff has a right to have the policies assigned to him. The defendants having acted under advice, I have some doubt as to the costs. Declare the plaintiff entitled to the policies, and to have them assigned.

The assignment to be settled by the Master if the parties differ. The monies paid into Court to be paid to the plaintiff. The defendants to pay the costs of the suit out of their testator's estate.

THE VICE-CHANCELLOR OF ENGLAND.

July 6, 1844.

WILLIAM JAMES, WILLIAM JENNISON, and CATHARINE, his Wife, and HUNTER TODD (all since deceased), in behalf of themselves and all others the Nephews and Nieces of the first degree to MARY KRANEN, Widow, deceased, Plaintiffs, *v.* ROBERT SMITH, CHARLES WHITE, EMMA WHITE, and JULIANA WHITE, infants, by the said CHARLES WHITE, their Father and Guardian; WILLIAM EVANS, JAMES RICHARD WALKER, and ALITHEA, his Wife, JOHN JAMES, ELIZABETH JAMES (all since deceased), WILLIAM JAMES, JOHN MITFORD, and ROBERT MITFORD (the latter since deceased), late infants, by JOHN MITFORD, their Guardian, Defendants.—By Original Bill.

AND

WILLIAM JAMES, Plaintiff, *v.* THOMAS PRICE, DAVID LANGTON, HUGH LEWIS (since deceased), RICHARD WATT WALKER, MARGARET JAMES, HENRY R. REYNOLDS, the younger, JOS. WILLIAM THRUPP, JOHN MITFORD, WILLIAM JENNISON, the younger, and JAMES TODD, Defendants.

AND

The said WILLIAM JAMES, Plaintiff, *v.* ROBERT WHEATLEY LUMLEY, Defendant. —By Bills of Revivor. (*a*)

Will, construction of—Whether "nephews and nieces" included grand-nephews and grand-nieces; also, great grand-nephews and great grand-nieces.

The testatrix by her will gave 30l. to her niece M. M. daughter of her nephew T. M. Then, in a subsequent part of the will, she gave to A. L. and M. L., the son and daughter of her late niece M. L., deceased, 30l. each. Then, in a subsequent part of the will, she gave to her said niece M. M. a pair of silver salt-cellars and two silver table-spoons, and to her said niece, M. L., one pair of silver salt-cellars and two silver table-spoons. Held, that under the term "nephew and niece" were intended by the testatrix to comprehend both grand-nephew and grand-niece.

MARY KRANEN, having by her last will and testament, bearing date the 22nd day of March, 1788, directed that all the interest which she might have at the time of her decease in the Three per Cent. Reduced Bank Annuities, or other public stocks, funds, government or other securities, might be converted into money, and be disposed of as afterwards in her will declared, bequeathed as follows:—"I give and bequeath 30*l.* to my *niece*, Mary Malltus, spinster (daughter of my *nephew* Thomas Malltus); 30*l.* to Anthony Lock and Mary Lock (son and daughter of my late niece Mary Lock, deceased)." In another part of the will the testatrix gave the residue in the following words:—"unto and to be equally divided between and amongst all and every my *nephew* and *nieces* respectively, their respective executors and administrators; I give to my god-daughter, Mary James, the youngest daughter

(*a*) Reported by GEO. GOLDSMITH, Esq. Barrister-at-law.