[HIGH COURT OF AUSTRALIA.]

GLEESON AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

FITZPATRICK AND OTHERS . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 7, 8.

Knox C.J., Isaacs and Rich JJ.

Will—Construction—Legacy—Whether payable out of particular fund—"Rest and residue."

Practice—Appeal—Costs—Construction of will—Party not directly interested in question decided—Trustees' costs.

A testator by his will gave a sum of £1,760 to certain beneficiaries in equal shares. He then gave "all the rest and residue of the money" which at his death might be in his house or to the credit of his account at his bank to A "subject only to the payment thereout" of his funeral and testamentary expenses and a certain bequest. He then devised and bequeathed all his real and personal estate which he had not otherwise disposed of by his will to trustees upon trust as to certain land for certain other beneficiaries, and as to the rest and residue of his real and personal estate for certain other beneficiaries.

Held, that the legacy of £1,760 was payable out of the money which at the testator's death might be in his house or to the credit of his account at his bank.

The Supreme Court having by a decree declared that the legacy of £1,760 was not payable out of such money, but was a general legacy payable out of the general personal estate not specifically disposed of, and that so far as such personal estate was insufficient to meet the legacy of £1,760 it was not payable out of the real estate, the beneficiaries to whom the legacy of £1,760 was given appealed to the High Court against the decree so far as it declared that the £1,760 was not payable out of such money, and by special leave also appealed

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against the decree so far as it declared that so far as the personal estate not specifically disposed of was insufficient to meet the legacy of £1,760 it was not payable out of the real estate. The appellants having succeeded in the first-mentioned appeal,

Held, by *Knox* C.J. and *Rich* J. (*Isaacs* J. dissenting), that the appellants should pay to the beneficiaries to whom the real estate was devised their costs of the appeal.

Held, also, that the trustees should have their costs as submitting respondents out of the fund from which the £1,760 was payable.

Decision of the Supreme Court of New South Wales (*Owen* A.-J. in Eq.) reversed in part.

APPEAL from the Supreme Court of New South Wales.

The will of John Clancy of Pleasant Hills in the State of New South Wales, deceased, was, so far as is material, as follows:—"I give and bequeath the sum of £1,760 to William Gleeson, Patrick Gleeson, John Gleeson, Daniel Gleeson, Joseph Gleeson, Bridget Gleeson, Margaret Gleeson, Catherine Gleeson, Nora Gleeson and Maria Gleeson all of near Pleasant Hills aforesaid in equal shares I give and bequeath all the rest and residue of the money which at my decease may be in the house or standing to the credit of my account current or on fixed deposit at my bankers to my sister Honora Maria Theresa Fitzpatrick of Wagga Wagga in the said State the wife of Michael Fitzpatrick for her own use and benefit absolutely subject only to the payment thereout of my funeral and testamentary expenses and of the bequest of £100 to the Roman Catholic priests at Henty next hereinafter referred to I direct my trustees to pay the sum of £100 to the Roman Catholic priests in charge of the Roman Catholic Church at Henty in the said State in order that I may have the benefit of their prayers and masses for the repose of my soul I give devise and bequeath all my real and personal estate whatsoever and wheresoever situate of or to which I shall at the time of my decease be seised entitled or possessed or over which I shall have any power of appointment or disposition by will except what I otherwise dispose of by this my will or any codicil thereto to William Gleeson of near Pleasant Hills aforesaid farmer and John Augustine O'Connell of Brookong in the said State farmer Upon the trusts following that is to say: As to"

certain specified land "upon trust for my nephews Joseph Peter Clancy, John Clancy, Patrick Clancy and Daniel Anthony Clancy all of Pleasant Hills aforesaid in equal shares as tenants in common And I declare that the devises to my said nephews Joseph Peter Clancy, John Clancy, Patrick Clancy and Daniel Anthony Clancy shall be subject to the payment of my niece Mary Clancy of Pleasant Hills aforesaid of the sum of £200 and to my niece Margaret Clancy of Pleasant Hills aforesaid of the sum of £200 And I direct my trustees to pay the said sums of £200 to my said nieces within twelve months from the date of my death And as to the rest and residue of my said real and personal estate upon trust for my nephews the said Patrick Clancy and Daniel Anthony Clancy as tenants in common in equal shares."

By a codicil the testator substituted his nephews Peter Clancy, John Clancy and Daniel Anthony Clancy for Patrick Clancy and Daniel Anthony Clancy in the last-mentioned gift.

An originating summons in the Supreme Court of New South Wales was taken out by William Joseph Gleeson and John Augustine O'Connell, the executors and trustees of the will, for the determination of (*inter alia*) the questions whether the legacy to the ten Gleesons of £1,760 was a specific bequest payable out of the money which at the testator's death was in his house or standing to the credit of his account current or on fixed deposit at his bankers, and whether in so far as the general personal estate of the testator was insufficient to meet the legacy of £1,760 it was payable out of the real estate of the testator. *Owen* A.-J. in Eq., who heard the summons made a decree declaring (*inter alia*) that such legacy was not a specific bequest payable out of the money which at the testator's death was in his house or standing to the credit of his current account or on fixed deposit at his bankers, but was a general legacy payable out of the general personal estate of the testator not specifically bequeathed, and that in so far as the general personal estate was insufficient to meet the legacy of £1,760 it was not payable out of the real estate of the testator but only out of the general personal estate of the testator.

From that decision the Gleesons now appealed to the High Court from so much of the decree as declared that the legacy of £1,760

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was not a specific bequest payable out of the particular money therein mentioned, and by special leave appealed from so much of the decree as declared that, so far as the general personal estate was insufficient to meet the legacy of £1,760 it was not payable out of the real estate of the testator.

Leverrier K.C. (with him *Jordan* and *G. M. Edwards*), for the appellants. The legacy of £1,760 is, on the language of the will, payable out of the moneys in the house or standing to the testator's credit at his bank. The words "the rest and residue of the money" would be meaningless unless that were so. The language of the will under consideration in *Higgins* v. *Dawson* (1) was different from that in the present case, and the decision there should not be applied. Counsel also referred to *Jarman on Wills*, 6th ed. vol. II., p. 1072; *In re Clifford*; *Mallam* v. *McFie* (2).

[KNOX C.J. referred to *Bothamley* v. *Sherson* (3); *Page* v. *Leapingwell* (4).

[ISAACS J. referred to *Giles* v. *Melson* (5).

[RICH J. referred to *Lawson* v. *Stitch* (6); *Nelson* v. *Carter* (7); *In re Mason*; *Ogden* v. *Mason* (8).]

Innes K.C. (with him *Sanders*), for the respondents Clancy to whom the specified land was devised, supported the contention that the legacy of £1,760 was payable out of the moneys in the house or standing to the testator's credit at his bank.

Maughan K.C. (with him *Davidson*), for the respondent Honora Maria Theresa Fitzpatrick. There is nothing in the gift of the legacy of £1,760 itself to indicate that it is anything else but a general legacy and so payable only out of the general personal estate not specifically bequeathed. It is the "rest and residue" of the money in the house and in the bank which is left after payment of the funeral and testamentary expenses and the gift of £100 that is given to Mrs. Fitzpatrick, and there is no reason for referring the

(1) (1902) A.C., 1.
(2) (1912) 1 Ch., 29.
(3) L.R. 20 Eq., 304.
(4) 18 Ves., 463.
(5) L.R. 6 H.L., 24.
(6) 1 Atk., 507.
(7) 5 Sim., 530.
(8) (1901) 1 Ch., 619.

words "rest and residue" to the gift of £1,760. The decision in *Higgins* v. *Dawson* (1) applies. The trustees should not have their costs of this appeal as their appearance was unnecessary (*In re Barry's Trusts*; *Barry* v. *Smart* (2)).

[KNOX C.J. In the absence of misconduct trustees are always entitled by contract to be indemnified. Whether the trustees will get their costs of appearing on this appeal is a matter for the taxing officer.

[RICH J. referred to *Carroll* v. *Graham* (3).]

If the appeal as against Mrs. Fitzpatrick is successful the respondents Clancy should not have their costs out of the estate as they have no interest in the appeal.

Street, for the respondent trustees. The trustees are entitled to their costs of this appeal.

Leverrier K.C. In order that the rights as between the appellants and Mrs. Fitzpatrick might be determined, it was proper for the appellants to bring all the parties interested under the will before this Court, as the whole will required interpretation. If the appellants succeed on that appeal they should not pay the costs of the respondents Clancy, who are thereby relieved from any possible liability to contribute to the payment of the legacy of £1,760.

KNOX C.J. So far as this matter falls to be dealt with at present, it is an appeal against so much of the order of *Owen* A. J. as holds that on the true construction of the will and codicil of John Clancy the legacy of £1,760 thereby given to the Gleesons was not a specific bequest payable out of the money which at the testator's death was in his house or standing to the credit of his account current or on fixed deposit at his bankers, but was a general legacy payable out of the general personal estate of the testator not specifically bequeathed. His Honor came to that conclusion apparently being influenced to some extent by the decision of the House of Lords in *Higgins* v. *Dawson* (1), which overruled the decision of the

(1) (1902) A.C., 1. (2) (1906) 2 Ch., 358.
(3) (1905) 1 Ch., 478.

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Knox C.J.

majority of the Court of Appeal in *In re Grainger*; *Dawson* v. *Higgins* (1). It is quite clear that the words of this will are not identical with the words of the will under consideration by the House of Lords in that case, and it seems to me that the main difference, which is that in this will the words "subject to" are used in a position corresponding to that of the word "after" in the will then under consideration, is a sufficient ground for distinguishing the decision in that case, and for applying the primary rule that every will should be construed on its own words without regard to the construction placed by other Courts on words more or less similar in other wills. Reading this will, I can feel no doubt that what the testator did and meant to do was this:—He dealt first with a certain portion of his property consisting of money in his house, money standing to his credit on account current and money on fixed deposit, and made his dispositions of that money. I have no doubt that he not only intended but expressed his intention that the £1,760 bequeathed to the Gleesons was to be paid out of the money in the house or on account current or on fixed deposit, and that the part of the will beginning "I give and bequeath the sum of £1,760" and ending "prayers and masses for the repose of my soul" was meant to deal with those sums of money to the exclusion of his other property, and that the rest of the will was meant to deal with his other property to the exclusion of the money in the house or on account current or on fixed deposit. I come to that conclusion from the words of the will, and especially from the use of the words "I give and bequeath all the *rest and residue* of the money which at my decease may be in the house" &c., which words in themselves import that the testator had already disposed of some part of the money. The words "subject to" have not the same effect as the word "after" in the case of *Higgins* v. *Dawson* (2). For these reasons I think that the appeal must succeed, and that a declaration should be made that the £1,760 bequeathed to the Gleesons is payable out of the money which at the death of the testator was in his house or standing to the credit of his account current or on fixed deposit at his bankers.

There was an appeal on another matter, namely, a question about

(1) (1900) 2 Ch., 756.

(2) (1902) A.C., 1.

the incidence of Federal estate duty under sec. 35 (*b*) of the *Estate Duty Assessment Act* 1914, but that has very properly been abandoned by Mr. *Leverrier*, the amount at stake being insignificant.

The only other question is that of costs. The testator directed that the funeral and testamentary expenses, which phrase includes the cost of an originating summons for the interpretation of the will, are to be paid out of the same fund out of which the £1,760 is to be paid. In my opinion the proper order is that the costs of all parties, excluding Mr. *Innes's* clients, be paid out of that fund, those of the trustees as submitting respondents as between solicitor and client, and that the costs of Mr. *Innes's* clients should be paid by the appellants. I say that, because Mr. *Innes's* clients were brought here as respondents to an appeal by special leave. The result of the appeal, which turns out to be for their benefit, would have been the same whether they were here or not. The expense of their coming here is caused solely by the desire of the appellants to protect themselves against a loss of about £1,200 which must inevitably have occurred in the event of Mr. *Maughan's* clients being successful. As the appellants have brought Mr. *Innes's* clients here for their own protection, I think that the appellants should pay their costs.

ISAACS J. With the exception of the last statement as to costs made by the Chief Justice, with which I shall deal afterwards, I agree in the result proposed by him. I do so on the construction of the will. There are no terms of art necessary to be considered by the light of any rules of law or canons of construction. We have simply to read the will according to its natural meaning. In *Sidle* v. *Queensland Trustees Ltd.* (1), for my brother *Powers* and myself, I said :—" Cases, as is constantly said, are of little use except for the principles they contain ; and the recorded application of those principles to a particular will can do no more than illustrate the principle, and prevent us from misunderstanding its meaning. But one universal principle is that the whole will must be read before finally arriving at an opinion as to the meaning of any controverted portion. You read the whole document through in the first place to ascertain whether it contains anything to affect the meaning of

(1) 20 C.L.R., 557, at p. 560.

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the passage in controversy. If it does not, you construe the passage by itself, having reference, of course, to the subject matter and relevant surrounding circumstances. If there is something affecting the meaning, you have to construe the controverted passage by the additional light of the other portion of the document. If authority were wanting for this, it is found in the judgment of Lord *Halsbury* L.C. in *Higgins* v. *Dawson* (1)." Adhering to the view there expressed, I have to ask myself first what is the question raised in this case? The question is whether the bounty of the testator in favour of the Gleeson family comes out of what is given to the Clancy family or out of what is property not given to the Clancy family. When I look at the will I find this very distinctly appearing on the face of it, namely, that the testator having various kinds of property made two groups of it. He had money, or contemplated having money at the time of his death, or what he called money, that is to say, that which represented money either actually in his possession or which had been in his possession and stood to his credit in his bank either on current account or on fixed deposit, and which was only referred to as money for convenience. He grouped that together, and as to the rest of his property, to which I pass at once, he dealt with it under the description of all his real and personal estate except that of which he had otherwise disposed by giving it to trustees upon trust for the Clancy family, and that trust entirely excludes any notion that the Gleeson family were to share in that property. That leaves nothing of his property but what he regarded as money, and of that he gave £1,760, which could only be payable in money, to the Gleeson family. He then went on to say: "I give and bequeath all the rest and residue of the money which at my decease may be in the house or standing to the credit of my account current or on fixed deposit at my bankers to my sister." It seems to me that it is quite unnecessary to decide the very difficult question which might otherwise have arisen, namely, whether technically the gift to the Gleeson family was what is known as a specific bequest or not. It is sufficient to say that it is an irresistible conclusion from the will that the first group of property was divided, first, £1,760 for the Gleeson family and, then, the rest and residue for Mrs. Fitzpatrick.

(1) (1902) A.C., at p. 3.

With regard to costs, the reason I find myself in disagreement with what has been said by the Chief Justice as to the costs of Mr. *Innes's* clients is that it is not simply a question of their appearance on the hearing of the appeal by special leave. The matter begins with the appeal itself, and the question is what effect has the appeal had on Mr. *Innes's* clients? It seems to me very unjust, if I may say so, that Mr. *Innes's* clients should not take the disadvantages as well as the advantages of that appeal. It is, to my mind, no reason for making the appellants pay the costs of Mr. *Innes's* clients to say that they would have obtained the advantage even if they did not appear. It is true that they need not have appeared, but what they did was that they appeared so as to gain whatever they could from the appeal and, under cover of that appeal, to ward off any disadvantages to themselves. They supported the appellants, they took the same side, and, having taken the same side and taken advantage of the appeal and the opportunity thereby given to them, they have, by the united efforts of themselves and the appellants, succeeded in the main object of the appeal, which has saved them £600. Therefore, it seems to me that they cannot justly say they have been damnified, and, in my opinion, they should bear their own costs.

RICH J. I approach the matter as one involving the construction of this particular will. I find that the testator has "separated by a barrier" or made an "artificial entirety" (to use the words of *Rigby* and *Vaughan Williams* L.JJ. in *In re Mason*; *Ogden* v. *Mason* (1)) of a mass of money defined in the will as "the money which at my decease may be in the house or standing to the credit of my account current or on fixed deposit at my bankers." Out of this segregated mass he gives to the Gleeson family the sum of £1,760, and the rest and residue—a particular residue—subject to payment of his funeral and testamentary expenses and of a certain bequest, to Mrs. Fitzpatrick. It is unnecessary to label, and I refrain from labelling, the gift under consideration either as a specific or as a demonstrative legacy. It is sufficient to say that it is payable out of the aggregation of money only. The case of *Higgins* v.

(1) (1901) 1 Ch., at pp. 625, 633.

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Rich J.

Dawson (1) is, to my mind, distinguishable. The structure and words of the clause of the will in that case are entirely different from that of the clause in this will. In that case the residue and remainder were created by the words " after " payment of the testator's debts and funeral expenses.

For these reasons I consider that the appeal should be allowed.

I agree with the order as to costs proposed by the Chief Justice. As to the costs of trustees, my experience as a primary Judge has shown me that in administration proceedings trustees should be represented by counsel in order to place the facts in their true light before the Court, to supplement the argument where necessary and to assist the Court in framing a workable order under which they can effectively administer the estate. Upon the construction of a will in a controversy between beneficiaries, the practice has been, if trustees think it necessary to appear, to allow them their costs, leaving it to the taxing master to consider their position in fixing the amount of their costs. It has been suggested that if the appellants consider that the attendance of the trustees by counsel is unnecessary they may give the trustees notice that they are not expected to attend and that if they do their costs will be objected to (*Catterson* v. *Clark* (2)). Even if this course be adopted the Court will not deprive trustees of their costs if there is a possibility that their attendance may be of service (*Re Wagstaff*; *Wagstaff* v. *Jalland* (3)).

Appeal allowed. Order appealed from varied by declaring that the sum of £1,760 *bequeathed to the Gleesons is payable out of the money in the testator's house and standing to the credit of his account current or on fixed deposit at his bankers and not out of the general personal estate not specifically bequeathed. Costs of the appellants and of the respondent Mrs. Fitzpatrick and of the trustees, those of the trustees as submitting respondents as between solicitor and client, to be paid out*

(1) (1902) A.C., 1.

(2) 95 L.T., 42.

(3) 98 L.T., 149.

of such money as aforesaid. Costs of the respondents Clancy of this appeal to be paid by the appellants.

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Solicitor for the appellants, *P. W. McCarthy*, Lockhart, by *S. L. Ridge*.

Solicitors for the respondents, *P. W. McCarthy*, Lockhart, by *S. L. Ridge*; *Walsh & Blair*, Wagga Wagga, by *McDonell & Moffitt*.

B. L.

Foll Public Prosecutions, Director of v Tzo-Martinez (1961) 119 ALR 517

Foll Thomson v Taxation, Federal Commissioner of (1923) 33 CLR 73

[HIGH COURT OF AUSTRALIA.]

CORNELL . . . . . APPELLANT;

AND

THE DEPUTY FEDERAL COMMISSIONER OF TAXATION (SOUTH AUSTRALIA) } RESPONDENT.

H. C. OF A. 1920. MELBOURNE, *Oct.* 14, 15, 18, 25. Knox C.J., Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ.

Income Tax—Assessment—Income—Shareholder in company—Undistributed income of company—Legislative power of Commonwealth Parliament—Ultra vires—Commissioner of Taxation—Judicial power—The Constitution (63 & 64 *Vict.* c. 12), *secs.* 51 (II.), 55, 71—*Income Tax Assessment Act* 1915-1918 (*No.* 34 *of* 1915—*No.* 18 *of* 1918), *sec.* 16.

Sec. 16 (2) of the *Income Tax Assessment Act* 1915-1918 provides that "Where, in the opinion of the Commissioner, a company has not in any year distributed to its members or shareholders a reasonable proportion of its taxable income, the taxable income of the company shall be deemed to have been distributed to the members or shareholders in proportion to their interests in the paid-up capital of the company, if the Commissioner is satisfied that the total tax payable on it as distributed income is greater than the tax payable on it by the company."

Held, that the provisions of the sub-section are within the powers conferred on the Parliament of the Commonwealth by sec. 51 (II.) of the Constitution.