[HIGH COURT OF AUSTRALIA.]

MORAN . . . . . APPELLANT;
DEFENDANT,

AND

HOUSE AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 17, 20; *Nov.* 6.

Isaacs A.C.J., Gavan Duffy and Starke JJ.

Will—Construction—Gift on condition of grant of a Home Rule Government to Ireland—Validity—Government of Ireland Act 1920 (10 & 11 *Geo. V. c.* 67), *secs.* 2, 3, 9, 10, 37, 56, 72.

Practice—Costs—Originating summons—Difficulty occasioned by disposition of real estate—Costs out of real estate.

A testator, who died in 1922, by his will made a gift to a charitable institution of certain real estate "one year after a Home Rule Government is granted to Ireland."

Held, that by the *Government of Ireland Act* 1920 (10 & 11 Geo. V. c. 67) a Home Rule Government was granted to Ireland within the meaning of the will, and therefore that, as that Act was passed before the death of the testator, the gift was a valid charitable gift.

By an originating summons the determination (without an administration by the Court) of certain questions arising out of the will of the testator, in respect of whose personal estate there was admittedly an intestacy, was sought. The main question was as to the validity of the above-mentioned gift.

Held, by *Isaacs* A.C.J. and *Gavan Duffy* J. (*Starke* J. dissenting), that the costs having been occasioned wholly by the testator's disposition of the real estate should be paid out of that real estate.

Decision of the Supreme Court of Victoria (*Weigall* A.J.) in part affirmed and in part varied.

APPEAL from the Supreme Court of Victoria.

Edward Dillon died on 25th February 1922 having made a will dated 31st March 1908. Administration with the will annexed was granted to Walter Bryant House, the Curator of Estates of Deceased Persons. The material provisions of the will as annexed to the rule to administer were as follows:—The testator gave all his personal estate to his brother William Dillon and his sister Sarah Dillon in equal shares. He directed that the rents of certain specified cottages on his land in Adderley Street, West Melbourne, should be paid to such brother and sister or to the survivor of them until both of them should have died. The will then continued: "and after the death of both of them the Parliament in the British House of Commons to be used for the purpose of forwarding a Home Rule Government for Ireland and to be termed Edward Dillon's annual subscription and one year after a Home Rule Government is granted to Ireland I direct that the above-mentioned cottages and the land upon which they are erected are sold to the highest bidder by public auction and the money realized by their sale is I direct to be devoted for the maintenance of a bed or beds for poor persons in the Infirmary in the town of Roscommon County Roscommon Ireland and to be called the Edward Dillon bequest." The testator's brother and sister above named predeceased him, and his sister Jane Moran survived him.

An originating summons was taken out by the administrator for the determination (without an administration by the Court) of the following questions (*inter alia*):—(3) In the events which have happened is the gift for the maintenance of a bed or beds for poor persons in the Infirmary in the town of Roscommon, County Roscommon, Ireland, a good charitable gift; or is the same void for remoteness or any other reason? (6) In the events which have happened is there an intestacy as to any and what portions of the estate of the testator? (7) How should the costs of and incidental to this application be provided for?

The defendants to the summons were Jane Moran, as representing the next-of-kin of the testator, and Frank J. Kelly, who was sued on behalf of the Roscommon Infirmary as the secretary thereof.

The summons was heard by *Weigall* A.J., who made an order

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declaring (*inter alia*) as to question 3 that the gift for the maintenance of a bed or beds in the Roscommon Infirmary was a good charitable gift, and as to question 6 that in the events which had happened there was an intestacy as to the whole of the personal estate but not as to any other portion of the estate. It was then ordered "that the costs of all parties of and incidental to this application be taxed as between solicitor and client and be paid or retained out of the personal estate of the testator and if the said personal estate be insufficient then to the extent of the deficiency out of the real estate."

From so much of the order (so far as is material) as related to the answers to questions 3 and 6 and to the costs, Jane Moran now appealed to the High Court.

Keating, for the appellant. The gift to the Roscommon Infirmary, which comprised the whole of testator's realty, was void for remoteness. It would not be valid unless "a Home Rule Government" had been "granted to Ireland" at the date of testator's death, 25th February 1922. "Home Rule" in relation to Ireland, had a special or specific meaning. The term "Home Rule" originated in Ireland in 1870, in relation to a movement with a formulated objective that contemplated Ireland as one undivided whole. And until the close of that movement in 1918, the term "Home Rule," when used in relation to Ireland, retained its original meaning and its strict application to Ireland contemplated as one undivided whole in federal union with Great Britain (see *Oxford English Dictionary*, *sub* "Home Rule"; *Redlich's Procedure in the British House of Commons* (1908), vol. I., pp. 135-136, and notes and references therein; *Barry O'Brien's Life of Parnell*, vol. I., pp. 66-67; *Davitt's Fall of Feudalism in Ireland*, p. 87; *Macdonough's Home Rule Movement* (1920), preface and pp. 12, 287, 290). The *Government of Ireland Act* 1920 (10 & 11 Geo. V. c. 67) did not, in the testator's meaning, grant "a Home Rule Government" to "Ireland." If a grant at all, it was not of "a" Government, but of two Governments, and not to "Ireland," but to Southern Ireland and to Northern Ireland respectively. Further it was not a "grant" within the testator's meaning of "granted." Sec. 72 provided that

in case in either Southern Ireland or Northern Ireland members of the proposed new Parliament did not in sufficient numbers within a certain time take their seats, Crown colony government might be applied to that part of Ireland, Southern or Northern, as the case might be. The Act, if a grant, was as much a grant, therefore, of Crown colony government as it was of responsible government. But substantially the Act was not a grant in the testator's meaning. It was a legislative offer, and was unaccepted by Southern Ireland, as the events contemplated in sec. 72 actually occurred there. The Act was not in relation to Ireland a Home Rule granting Act, but, at most, a Home Rule enabling or furthering Act. It provided for a Council for Ireland as a stepping-stone to Home Rule for Ireland, but it fell short of granting a Home Rule Government to Ireland in the testator's meaning of 1908; just as the later *Irish Free State Constitution Act* 1922 (*Session* 2) went beyond that meaning in abolishing Irish memberships in the British House of Commons. As to costs, the order below was wrong. The costs should be borne by the real estate. Costs in an originating summons for the construction of a will are subject to all the rules relating to administration actions (*Halsbury's Laws of England*, vol. XXVIII., p. 632, par. 1233, note (*t*) and cases thereunder; *Patching* v. *Barnett* (1); *In re Middleton*; *Thompson* v. *Harris* (2); *Barnwell* v. *Iremonger* (3); *In re Betts*; *Doughty* v. *Walker* (4)). All the questions submitted in the present case (excepting question 7 as to costs) concerned the realty, which was wholly comprised in the gifts in question. As to the whole personalty there was never at any time anything but an admitted intestacy.

[ISAACS A.C.J. referred to *In re Jones*; *Elgood* v. *Kinderley* (5); *Re Copland*; *Mitchell* v. *Bain* (6).]

Kelly, for the Curator of Intestate Estates.

Llewellyn Jones, for the respondent Kelly. The gift to the Roscommon Infirmary is good. The *Government of Ireland Act*

(1) (1881) 51 L.J. Ch. 74, at pp. 79-80; (1907) 2 Ch. 154 n.
(2) (1882) 19 Ch. D. 552.
(3) (1860) 1 Drew. & Sm. 242.
(4) (1907) 2 Ch. 149.
(5) (1902) 1 Ch. 92.
(6) (1895) 44 W.R. 94.

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1920 satisfied the requirement that a Home Rule Government should be granted to Ireland. There was granted by that Act a form of Home Rule Government, and the fact that Ireland is for some purposes of the Act divided into two portions does not matter. Certain powers were given in respect of the whole of Ireland (see secs. 2, 3, 10 (2), 37, 56). Where each of the two parts has self-government, the whole has it. As to costs, this case does not fall within *Patching* v. *Barnett* (1). The costs cannot be said to have been increased by the administration of the real estate (*Williams on Executors*, 11th ed., vol. II., p. 1661). The difficulty is caused by the ambiguous language of the testator, and therefore the costs should be paid out of the residue (*In re Hall-Dare*; *Le Marchant* v. *Lee Warner* (2)).

Keating, in reply. "Granted," as used by testator, is not to be construed in a technical sense, as if applied to a real property transaction, but in the substantial sense of "established" or "constituted." Sec. 72 of the Act of 1920 was not put into force, because before the date of the intended assembling of the Parliament of Southern Ireland the British Prime Minister publicly invited the leaders in Southern Ireland and Northern Ireland to confer with him in London (*Stephen Gwynne's History of Ireland* (1920), p. 531). Negotiations then commenced which resulted in the treaty of December 1921 and the *Irish Free State Constitution Act* 1922 (13 Geo. V., sess. 2, c. 1). This last-named Act differed radically from the Act of 1920 in that it contemplated Ireland only as one and integral. It constituted the whole of Ireland into the Irish Free State, reserving to the Parliament of Northern Ireland the right within a certain time to declare that area outside the Irish Free State jurisdiction and the further right to come in later. As to the significance of treating Ireland as one whole, see *Journal of Comparative Legislation*, 3rd series, vol. v., part I., p. 52, article by Professor Swift McNeil, pars. 1 and 2. The Council of Ireland provided for in the Act of 1920 was, at most, a nucleus of possible future union—a stepping-stone to Home Rule Government for Ireland. Sec. 9 reserved to Great Britain, until then, the larger self-governing powers, such as police, post office, stamps, public

(1) (1881) 51 L.J. Ch. 74.

(2) (1916) 1 Ch. 272.

records. Those were all to be included in the endowment when Home Rule would in the future be given to Ireland. As to costs, *In re Hall-Dare* (1) is distinguishable. It also approved the general principle that, where part of an estate is separated and set apart and all acts of administration in relation to it have been completed before any question with regard to another part of the estate is raised in an administrative action, the latter part should bear the costs.

Cur. adv. vult.

The following written judgments were delivered :— Nov. 6.

ISAACS A.C.J. AND GAVAN DUFFY J. This is an appeal from an order of the Supreme Court of Victoria upon an originating summons which the respondent House, who is the Curator of Estates of Deceased Persons, took out as administrator with the will annexed of the estate of Edward Dillon. The summons made two persons defendants, namely, the appellant Moran, as one of and as representing all the other next-of-kin, and the respondent Kelly, on behalf of the Roscommon Infirmary as secretary thereof. The summons asked for the determination (without an administration by the Court) of seven questions, the last being as to the incidence of costs. Five questions related exclusively to the real estate, which by the will was, in certain events, devoted to the purposes of the Infirmary. The sixth question, though extending to all the property in the estate, was virtually consequential on the first five, namely, as to intestacy. No controversial question arose as to personalty, with respect to which the deceased was admittedly intestate and to which the next-of-kin were entitled outside any controversial question raised by the summons. *Weigall* A.J., who heard the summons, determined (1) that the gift to the Infirmary should take effect, (2) that the costs of all parties of and incidental to the application should be taxed as between solicitor and client and be paid out of the personal estate and, if that were insufficient, then to the extent of the deficiency out of the real estate. The appellant Moran appeals against both branches of the decision. These require separate consideration.

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The first arises in this way:—The deceased, Edward Dillon, a resident of Melbourne, there made his will on 31st March 1908, leaving his personal property to his brother and sister equally. No question now arises as to the personalty. As to the rents of two cottages in West Melbourne he left "the rents" to be paid to his brother and sister, shortly, for life and, after their death, then in a certain event he directed the premises to be sold and the proceeds devoted for the Infirmary at Roscommon. The event is "one year after a Home Rule Government is granted to Ireland." The testator died on 25th February 1922. The question is whether by the Imperial Act passed on 23rd December 1920 (10 & 11 Geo. V. c. 67) "a Home Rule Government" was "granted to Ireland," within the meaning of the words used by the testator. *Weigall* A.J. decided in the affirmative, and that therefore, as the event had happened during the testator's lifetime, the gift to the Infirmary was valid, and consequently the next-of-kin were not entitled to the proceeds of the cottages.

Mr. *Keating* on behalf of the next-of-kin certainly said all that could be said in support of their case. He contended that the decision was wrong because (1) the Act did not "grant" any government to Ireland, since it merely offered a form of government, leaving it for acceptance; (2) if any government was "granted," it was not to "Ireland," but that a government was granted to "Southern Ireland," and a government to "Northern Ireland"; (3) the provision in the event of the Council of Ireland being established for fuller powers of government indicated that, the smaller powers did not amount to "Home Rule for Ireland." It must be clearly understood that it is no part of the province of this Court to discuss anything but the meaning of the testator's words as they appear in his will, and whether the Act of 1920 falls within that meaning. That it is a "grant" of government appears on its face. It is a definite enactment that a certain form of government shall be established in Southern Ireland and a certain form of government in Northern Ireland. True, it also provides that, if that form of government so established shall not be availed of, another may be substituted, but that does not affect the fact that primarily a named form of government was enacted. The first objection therefore cannot be sustained.

The second and the third may be taken together. The Act calls itself "An Act . . . for the Government of Ireland." The testator's words do not describe any specific form of "Home Rule Government for Ireland." His words are altogether general. He says simply "*a* Home Rule Government for Ireland," and, therefore, the scope is wide enough to embrace any form of government for Ireland which may fairly be called "Home Rule." Whatever may be the limits of a definition properly indicating "Home Rule," the Act in question falls within it, and the decision of *Weigall* A.J. on this point is affirmed.

The second question relates to the direction as to costs. These were dealt with, not as a matter of discretion, but as a matter of rule. This is not a general administration, and the litigation was and is really confined to the real estate. Even in general administration the costs so far as increased by the administration of the real estate must be borne by that real estate (see cases cited in *Annual Practice* 1924, p. 1247). The costs here were occasioned wholly by the testator's disposition of the real estate. That is the sole disposition that has caused the difficulty, and, in our opinion, it is just that the real estate should bear the cost of clearing itself. The order as to costs should be varied so as to read as follows: "That the costs of the parties other than the administrator of and incidental to this application be paid out of the real estate of the testator."

The litigant parties having each been only partially successful, no costs as to them of this appeal. The costs of the administrator in the Supreme Court and this Court as between solicitor and client to be retained out of the assets of the estate; the real estate, if necessary, to recoup the personal estate in respect thereof.

STARKE J. I agree with the opinion of my brethren upon the substantial question, but I am unable to assent to their view as to the costs of the proceedings.

The administrator of Dillon deceased issued an originating summons for the determination (without an administration by the Court) of certain questions involving the true interpretation of the will of the deceased in the events which have happened. The costs

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so incurred were expenses incident to the proper performance of the duty of the administrator, and fall within the term "testamentary expenses." Primarily, such expenses are payable out of the general personal estate of the deceased. But the practice is that the costs of an administration action, so far as they have been increased by the administration of the real estate, are borne by the real estate. In this case, however, there was no administration order, and in particular there was no inquiry as to the real estates of which the deceased was seised, or to which he was entitled, at the time of his death, or as to the incumbrances affecting the same, or any direction for sale or any account of rents and profits.

Weigall A.J., who has great experience in these matters, did not regard the interpretation of the will of the deceased, so far as it affected his real estate, as an administration of the real estate within the rule of practice, and, in my opinion, he was quite right in this view. The contrary view is opposed, I believe, to the long standing practice of the Supreme Court of Victoria, and is based, I fear, upon a misunderstanding of the cases of *Patching* v. *Barnett* (1) and *In re Middleton*; *Thompson* v. *Harris* (2).

The appeal ought, in my opinion, to be dismissed, and with costs.

Appeal, so far as it relates to the gift of the real estate, dismissed. Order as to costs varied so as to direct that the costs of the parties other than the administrator of and incidental to the application be paid out of the real estate of the testator. Administrator's costs in the the Supreme Court and in the High Court as between solicitor and client to be retained out of the assets of the estate; the real estate, if necessary, to recoup the personal estate in respect thereof.

Solicitor for the appellant, *T. A. Kennedy.*

Solicitors for the respondents, *Henderson & Ball*; *Phillips, Fox & Masel.*

B. L.

(1) (1881) 51 L.J. Ch. 74; 45 L.T. 292. (2) (1882) 19 Ch. D. 552.