[HIGH COURT OF AUSTRALIA.]

GILBERT AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

FITZPATRICK . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1927.

HOBART, *Feb.* 14, 16.

KNOX C.J., HIGGINS AND RICH JJ.

Will—Construction—Legacy or debt—Direction to pay executor-trustee debt amount of which he will disclose to other trustees—Proof of debt.

A testator by his will, after directing payment of his debts, declared that F. whom he appointed one of his executors and trustees, should be paid "the debt or sum of money owing by me to him the amount of which" F. "will disclose to my other trustees."

Held, by *Knox* C.J., *Higgins* and *Rich* JJ., that the words of the will were not sufficient to constitute a legacy, but that the testator intended to acknowledge that he was indebted to F., and (*Higgins* J. dissenting) that F. was entitled to payment of the sum stated by him to be owing.

Decision of the Supreme Court of Tasmania (*Ewing* J.) varied.

APPEAL from the Supreme Court of Tasmania.

By his will William Francis Gilbert deceased appointed Ann Mary Gilbert, Philip Henry Gilbert and William George Fitzpatrick his executors and trustees. After a direction to his trustees to pay his just debts and funeral and testamentary expenses, the will contained the following provision: "I declare that the said William George Fitzpatrick is to be paid out of my estate the debt or sum of money owing by me to him the amount of which the said William George Fitzpatrick will disclose to my other trustees."

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After the testator's death probate of the will was granted to Ann Mary Gilbert and Philip Henry Gilbert. William George Fitzpatrick, who had renounced probate, gave notice to the executrix and executor that the debt or sum of money owing by the testator to him at the time of his death was £410 10s. 4d., and requested them to pay that sum to him forthwith. The executrix and executor having refused to do so, Fitzpatrick issued an originating summons in the Supreme Court of Tasmania asking for the determination of the question (as amended at the hearing) whether upon the true construction of the will the declaration above set out constituted a legacy of a sum of such amount as Fitzpatrick should so disclose. An order was also asked directing the executrix and executor to pay to Fitzpatrick the sum of £410 10s. 4d.

The summons came on for hearing before *Ewing* J., who made an order declaring and ordering (1) that upon the true construction of the will the declaration above quoted " constitutes a legacy to the said William George Fitzpatrick of a sum of such amount as the said William George Fitzpatrick should disclose to " the executrix and executor, and (2) that the executrix and executor should in due course of administration pay to William George Fitzpatrick the sum of £410 10s. 4d., being the amount disclosed by him to the executrix and executor " pursuant to the declaration aforesaid."

From that decision Ann Mary Gilbert and Philip Henry Gilbert now appealed to the High Court.

Griffiths, for the appellants. By the testamentary direction the creditor is not given the privilege of exclusively determining his own debt. On the true construction of the words themselves, the amount which is to be paid is " the debt or sum of money owing." The qualifying clause has two meanings. Either the previous direction to pay the debts includes this or it does not. If it does, then the words are idle ; if it does not, the words are substantively dispositive on the face of them. This is not a legacy: it is not in conformity with the *Wills Act*, requiring a will to be in writing and to be attested properly. There being a direction in the will to pay debts, the only way of reconciling the two provisions is to require

the payment of the debt as a debt. [Counsel referred to *Trustee Act* 1898 (Tas.), sec. 38; *Jarman on Wills*, 6th ed., pp. 469-479; *In re Conn*; *Conn v. Burns* (1).

Shields (with him *A. I. Clarke*), for the respondent. If the clause means anything, it means that Gilbert realized that there was a debt due to Fitzpatrick, that it might damage Fitzpatrick's claim if he had to collect it in the ordinary way and therefore that his statement of the amount was to be sufficient proof of the debt. Whether the declaration constituted a legacy or not does not much concern the respondent. If that is the meaning of the clause, when Fitzpatrick made his disclosure of the amount that amount ought to be paid unless the executors can establish fraud.

Griffiths, in reply.

Cur. adv. vult.

Feb. 16.

The following written judgments were delivered:—

KNOX C.J. AND RICH J. This is an appeal from an order of *Ewing* J. declaring that the respondent is entitled under the will of William Francis Gilbert deceased to a legacy of a sum of such amount as the said respondent should disclose as the debt or sum of money owing by the testator to him.

The appellants are the executors and trustees of the will of William Francis Gilbert. The respondent was appointed by the will an executor and trustee, but renounced probate. It appears from the uncontradicted evidence that the testator and the respondent had been, for many years prior to the testator's death, close personal friends and that during a period of some twenty-five years there had been financial transactions between them. By his will the testator directed his trustees to pay his just debts and funeral and testamentary expenses and certain specific and pecuniary bequests. The will proceeded as follows: "I declare that the said William George Fitzpatrick is to be paid out of my estate the debt or sum of money owing by me to him the amount of which the said William George Fitzpatrick will disclose to my other trustees."

(1) (1898) 1 I.R. 337.

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On 14th July 1926 the respondent gave notice to the appellants that the debt or sum of money owing by the testator to him at the time of his death was the sum of £410 10s. 4d., and requested them to pay that sum to him forthwith. The appellants thereupon refused to admit liability for that amount and asked for an account showing whence the liability arose and how the amount was made up. In reply to that letter the respondent, without admitting that he was bound to do so, furnished particulars of the amount disclosed by him, and subsequently demanded payment of £410 10s. 4d. as the debt due to him. The appellants having refused to pay the amount, the respondent issued an originating summons asking for the determination of the following question: "Whether upon the true construction of the said will of the said William Francis Gilbert (otherwise Francis William Gilbert) deceased the declaration in the said will in the words following that is to say 'I declare that the said William George Fitzpatrick is to be paid out of my estate the debt or sum of money owing by me to him the amount of which the said William George Fitzpatrick will disclose to my other trustees' constitutes a legacy"; and asking for an order "directing payment to be made to him the said William George Fitzpatrick by Ann Mary Gilbert and Philip Henry Gilbert the executrix and executor respectively of the will of the said William Francis Gilbert (otherwise Francis William Gilbert) deceased of the sum of four hundred pounds ten shillings and four pence being the debt or sum of money owing to him the said William George Fitzpatrick by the said William Francis Gilbert (otherwise Francis William Gilbert) at the time of his death and which he the said William George Fitzpatrick has in accordance with the terms of the said will disclosed to the said Ann Mary Gilbert and Philip Henry Gilbert."

On the hearing of the summons the question was amended by the insertion at the end thereof of the following words, namely, "of a sum of such amount as the said William George Fitzpatrick should so disclose."

As before stated, *Ewing* J. held that the direction in the will which has been set out constituted a legacy to the respondent of the amount disclosed by him; but the real contention between the parties is whether the respondent is entitled to payment of this amount out

of the estate without establishing his claim to the satisfaction of the executors or in legal proceedings. For the respondent it is said that the direction in the will to which we have referred means that the amount of the debt as disclosed by the respondent shall be paid out of the estate. For the appellants it is said that that direction amounts to no more than that the respondent shall be paid out of the estate such an amount as is legally due to him.

In our opinion the respondent's contention is correct. It is clear by the terms of the will that the testator intended to acknowledge that he was indebted to the respondent, and the question is whether the words, "the amount of which the said William George Fitzpatrick will disclose to my other trustees," operated to make the amount so disclosed conclusive proof of the amount of that debt.

We have pointed out that the will contains a general direction for payment of debts, and it follows that, if the contention of the appellants be correct and the respondent is entitled to recover no more than he can prove to be legally owing to him, the clause dealing specially with the debt of the testator to the respondent has no effect whatever and might well not have been included in the will. It is the first duty of the Court in construing a will to give effect, if possible, to every provision contained in it and, having regard to the facts already detailed, we find it impossible to hold that the declaration inserted by the testator with specific reference to the debt owing by him to the respondent should be treated as mere surplusage. No other alternative has been presented to us, for counsel for the appellants was unable to suggest that the clause in question would have any effective operation unless it were construed as meaning that the disclosure of the amount by the respondent was to be conclusive as to the amount of the testator's debt to him. The words of the direction in question, while not as clear as they might have been, appear to us to be capable of the meaning which the respondent seeks to put upon them, and, in the circumstances, we think that the respondent is entitled to payment out of the estate of the sum of £410 10s. 4d., though we are unable to agree with the learned Judge in thinking that the words of the will are sufficient to constitute a legacy.

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Substantially the appeal fails, but, as the matter seems to have been contested in the Supreme Court on the question of legacy or no legacy, we think the costs of both parties of this appeal should be paid out of the estate of the testator.

HIGGINS J. This case was treated before the learned primary Judge on the basis of a legacy instead of a debt, inasmuch as the summons stated that Mr. Fitzpatrick claimed to be interested in the relief sought "as a legatee" under the will of Gilbert. But the only question that remains ultimately for decision is as to the effect of the declaration in the will with regard to the debt due to Fitzpatrick—is the amount of this debt, as disclosed by him to the two "other trustees," to be accepted by them conclusively, without any question? The will begins by directing the trustees to pay "my *just debts* and funeral and testamentary expenses"; then follow some legacies; and then it says "I declare that the said William Gilbert Fitzpatrick is to be paid out of my estate *the debt or sum of money owing by me to him* the amount of which the said William Gilbert Fitzpatrick will disclose to my other trustees." What is to be paid by the other two trustees to this trustee is, therefore, the debt that is owing—actually owing—to him. The solicitor who drew the will probably referred specially to payment of this debt because of the unusual double relation of creditor and executor (as intended), and because of the doctrine that the appointment of a creditor as an executor often extinguishes the debt in case the creditor take probate (see *Williams on Executors*, 11th ed., pp. 1058-1059). The clause operates also as a clear admission that there was *some* debt—an admission which simplified the duty of the co-executors; and it informs them that Fitzpatrick will "disclose" the amount. This also simplifies their duty. But that is all. The words used are not that Fitzpatrick is to be paid the amount of the debt *as disclosed* by him, or that the disclosure of an amount by him is to be treated as conclusive. The word "conclusive" is not used, or any equivalent words.

I should have thought it obvious that there is nothing in the words used to relieve the co-executors of their duty to pay only the debt that was actually owing. No one denies that a testator can make

his creditor's statement of the amount owing conclusive; but the burden lies on the plaintiff to show that such an unusual provision has been made; and that burden has not been satisfied. There are no express words to such an effect; and there is no necessary intendment.

According to the argument for the plaintiff, if a testator keep a current account with his grocer, and the testator cannot foresee how the account will stand at his death; then, if words are used such as in this will, and the grocer "discloses" a debt of £10,050 because of a land transaction as well as because of the groceries, the executors must pay the whole without investigation. I assume honesty of opinion on the part of the grocer. There are differing opinions as to what constitutes a debt.

It has been urged for the plaintiff that unless the testator's words make the plaintiff's statement conclusive as to the amount they are "meaningless." I suppose what is meant is that the words add nothing further to the duties of the co-executors under the will. But even if a clause merely state what the law would imply—e.g., the clause directing the payment of "my just debts" before the legacies—that does not justify the Court in inserting by conjecture a direction which is not to be found in the will either in express words or by *necessary* intendment. I have stated the object with which the words were probably inserted.

In my opinion, the order is wrong in directing payment of the amount disclosed by the plaintiff merely because it has been so disclosed by him.

Order appealed from varied by striking out the first declaration, and the words "pursuant to such declaration aforesaid" in the second declaration. Costs of this application of both parties—those of appellants as between solicitor and client—to be paid out of the estate of testator.

Solicitors for the appellants, *Griffiths, Crisp & Baker.*

Solicitor for the respondent, *Tasman Shields.*