REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1936-1937.

[HIGH COURT OF AUSTRALIA.]

ANDREWS . . . . . APPELLANT;
DEFENDANT,

AND

NATIONAL TRUSTEES EXECUTORS AND AGENCY COMPANY OF AUSTRALASIA LIMITED AND ANOTHER . . . } RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 22, 23.

SYDNEY, *Nov.* 26.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Will—Appointment of executor—Words purporting to devise and bequeath all real and personal estate—No beneficiary named—Executor not entitled to estate—"Intestate"—Administration and Probate Act 1928 (*Vict.*) (*No.* 3632), *secs.* 4, 8, 9, 33, 47, 48—*Statute Law Revision Act* 1933 (*Vict.*) (*No.* 4191), *sec.* 2.

A will made on a printed form was in the following terms:—"I hereby appoint" A "executor of this my will. I give devise and bequeath all my real and personal estate". A did not prove the will, but letters of administration with the will annexed were granted to a trustee company authorized by A under the *Trustee Companies Act* 1928 (Vict.) to apply for the grant.

Held by *Latham* C.J., *Starke* and *Dixon* JJ. (*Evatt* and *McTiernan* JJ. dissenting), that the will contained no sufficient indication that A was intended to take the estate as devisee and legatee; and, by *Latham* C.J.,

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Starke, Dixon and *Evatt* JJ., that A was not entitled to the beneficial interest by virtue of his appointment as executor. The estate devolved, in accordance with sec. 47 of the *Administration and Probate Act* 1928 (Vict.), as on an intestacy.

In re Skeats; *Thain* v. *Gibbs*, (1936) 52 T.L.R. 558; 155 L.T. 451, considered.

Decision of the Supreme Court of Victoria (Full Court): *In re Andrews*; *National Trustees Executors and Agency Co. of Australasia Ltd.* v. *Andrews*, (1936) V.L.R. 253, affirmed.

APPEAL from the Supreme Court of Victoria.

Richard Sherlock Andrews died on 18th December 1935 leaving a will dated 13th October 1921. The will, which was as follows, was made on a printed form, and the expressions hereunder italicized were written by the testator :—" This is the last will and testament of *Richard Sherlock Andrews* made this *thirteenth* day of *October* in the year of our Lord one thousand nine hundred and *1921* of *Carnegie* (*7 Buckley Street*) *gentleman* I hereby appoint *Ormond Andrews Hardware Manager Newcombs, Warrnambool* executor of this my will. I give devise and bequeath *all my real and personal estate*" [There was then a space, and nothing further appeared except the attestation clause and the signatures and descriptions of the testator and the attesting witnesses]. The actual position of the material words is shown in the judgment of *McTiernan* J. hereunder. The will was duly executed and attested.

On 4th February 1936 letters of administration with the will annexed of the estate of the testator were granted by the Supreme Court of Victoria to the National Trustees Executors and Agency Co. of Australasia Ltd., which was duly authorized under the *Trustee Companies Act* 1928 (Vict.) by the executor named in the will to apply for the grant. The testator left real and personal estate valued at about £3,964. At the time of his death he was a widower without children, but he left him surviving a brother and nephews and nieces. Ormond Andrews was a nephew of the testator.

The administrator company took out an originating summons, joining as defendants, Ormond Andrews and Frederick William Woolley, a nephew of the testator, who was sued as representing himself and the other next of kin of the testator, to determine

whether Ormond Andrews took under the will or whether the next of kin took as on an intestacy. *Gavan Duffy* J., who heard the summons, held that Ormond Andrews was entitled to the testator's real and personal estate : *In re Andrews* ; *National Trustees Executors and Agency Co. of Australasia Ltd.* v. *Andrews* (1). The Full Court of the Supreme Court reversed this decision and held that the real and personal estate of the testator was held in trust for the next of kin (2).

From this decision Ormond Andrews appealed to the High Court.

Sanderson, for the appellant. The case is outside sec. 48 (*b*) of the *Administration and Probate Act* 1928 (Vict.). The old law applies and Ormond Andrews takes *virtute officii*. The executor takes the legal interest, and there is nothing in the will to indicate that he is not to take the equitable interest also, and therefore sec. 33 of the *Administration and Probate Act* 1928 does not apply (*Urquhart* v. *King* (3) ; *Attorney-General* v. *Hooker* (4) ; *Southcot* v. *Watson* (5) ; *Foster* v. *Munt* (6)). *In re Skeats* ; *Thain* v. *Gibbs* (7) is wrongly decided. Extrinsic evidence is admissible in this case to show what was the intention of the testator (*Bishop of Cloyne* v. *Young* (8)). On the construction of the will the executor is entitled to the property. The words show that the testator intended to convey the beneficial interest in his real and personal property to Ormond Andrews, whom he had appointed his executor (*Fell* v. *Fell* (9)). There was no full stop after the word " estate." All the writing on the face of the instrument may be looked at for the purpose of interpreting the words of the testator (*In re Battie-Wrightson* ; *Cecil* v. *Battie-Wrightson* (10) ; *In re Bacon's Will* ; *Camp* v. *Coe* (11) ; *Abbott* v. *Middleton* (12) ; *In re Roby* ; *Howlett* v. *Newington* (13) ; *In re Harrison* ; *Turner* v. *Hellard* (14)). *In re Bacon's Will* ; *Camp* v. *Coe* (15) is distinguishable from *Bishop of Cloyne* v. *Young* (16).

(1) (1936) V.L.R. 121.
(2) (1936) V.L.R. 253
(3) (1802) 7 Ves. Jun. 224, at p. 228 ; 32 E.R. 91, at p. 92.
(4) (1725) 2 P.Wms. 338, at p. 340 ; 24 E.R. 756, at p. 757.
(5) (1745) 3 Atk. 226 ; 26 E.R. 932.
(6) (1687) 1 Vern. 473 ; 23 E.R. 598.
(7) (1936) 52 T.L.R. 558.
(8) (1750) 2 Ves. Sen. 91 ; 28 E.R. 60.
(9) (1922) 31 C.L.R. 268, at p. 284.
(10) (1920) 2 Ch. 330
(11) (1886) 31 Ch. D. 460.
(12) (1858) 7 H.L.C. 68 ; 11 E.R. 28.
(13) (1908) 1 Ch. 71.
(14) (1885) 30 Ch. D. 390.
(15) (1886) 31 Ch. D. 460.
(16) (1750) 2 Ves. Sen. 91 ; 28 E.R. 60.

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Secs. 8 and 9 of the *Administration and Probate Act* give an executor the same rights over real property as he formerly had over personal property (*In re Roby*; *Howlett* v. *Newington* (1); *Urquhart* v. *King* (2)).

Norris, for the National Trustees Executors and Agency Co. Ltd., referred to *Wentworth* on *Executors*, 14th ed. (1829), p. 10, on the question whether an executor took beneficially.

Moore, for F. W. Woolley. On the proper construction of the will there is no gift of the real or personal property to the named executor. There is no connection between the only operative sentences in the will. The testator must have known that to give something he must give to someone. There is no case in which the name of the beneficiary has been supplied (*Jarman* on *Wills*, 7th ed. (1930), vol. I., p. 490; *Williams* on *Executors*, 12th ed. (1930), vol. II., p. 743; *Murdoch* v. *Brass* (3)). Even if the testator has intended to make a gift to the executor he has not done so. The property is not conveyed by the *Administration and Probate Act* 1928. *In re Skeats*; *Thain* v. *Gibbs* (4) was correctly decided. The relevant sections of the English and the Victorian Acts are the same. The will itself does not dispose of the property (*Attorney-General* v. *Jefferys* (5)). The executor will not take under the old common law rule if it appears from the will that he was to take as executor only (*Williams* on *Executors*, 12th ed. (1930), vol. II., pp. 1009, 1014). It was only on the grant of probate that the legal title went into the executor. In this case, the executor having allowed the trustee company to take out administration *c.t.a.*, the legal estate in the land did not vest in him. As to personalty: if one assumes that Ormond Andrews did take the personalty for a time, the personalty vested in the trustee company on grant of administration *c.t.a.* The trustee company was not acting as the agent of a named executor and, therefore, cannot be holding title on behalf of such person. In this state of affairs there is no way

(1) (1908) 1 Ch. 71.
(2) (1802) 7 Ves. Jun., at p. 228; 32 E.R., at p. 92.
(3) (1904) 6 Fraser 841, at pp. 844, 845.
(4) (1936) 52 T.L.R. 558.
(5) (1908) A.C. 411, at p. 415.

of getting the legal title out of the company. The trustee company holds the property for the next of kin. The action of the named executor in allowing the company to take out probate really amounted to his renouncing probate (*Administration and Probate Act* 1928, sec. 12). As Ormond Andrews did not take out probate, realty cannot be regarded as personalty so as to give him title. " Executor " in sec. 9 means an executor to whom probate has been granted. The right given to the executor is the right that an executor had prior to 1st January 1873. This takes the position back to the *Wills Statute* 1864, sec. 32, which is taken from the *Wills Act* 1830. It then had to appear upon the face of the will that the executor was to take beneficially. " Intestate " is correctly defined by *Clauson* J. in *In re Skeats* ; *Thain* v. *Gibbs* (1) (See, *s.v.* " Intestate," *Webster's Dictionary* and the *Oxford English Dictionary*).

Sanderson, in reply. The effect of the *Administration Act* of 1872 was to take any legal estate out of the devisee and to make real property stand on the same footing as personalty. Sec. 48 of the *Administration and Probate Act* 1928 relates only to the case where there has been some disposition of the estate and an intestacy as to the rest. That section does not apply to this case. The executor has not renounced probate and he may yet claim to obtain probate.

Cur. adv. vult.

Nov. 26.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from the judgment of the Full Court of the Supreme Court of Victoria allowing an appeal from a judgment of his Honour Mr. Justice *Gavan Duffy*. The will of Richard Sherlock Andrews is a short one and is on a printed form. The will reads as follows :—

" This is the last will and testament of Richard Sherlock Andrews made this Thirteenth day of October in the year of our Lord one thousand nine hundred and twenty-one . . . I hereby appoint Ormond Andrews Hardware Manager Newcombs, Warrnambool

(1) (1936) 52 T.L.R. 558.

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executor of this my will. I give devise and bequeath all my real and personal estate "

The first question which arises upon this appeal is whether upon the proper construction of the will of the testator there is a gift of his real and personal estate to Ormond Andrews. It is contended that in the first place it is plain that the testator intended to dispose of all his real and personal estate. It is added that, as the only person mentioned in the will is the executor, a fair reading of the will leads to the conclusion that the executor is to be the person in whose favour the gift is to operate. It is easy to believe that it was the testator's intention to benefit Ormond Andrews, but the question is whether the words of the will carry out that intention. A court cannot add words to a will for the purpose of giving effect to the intention which the court supposes a testator had, but which is not disclosed by the words of the will when the will is read as a whole. The general rule is perhaps most simply stated in the words of Lord *Watson* in *Scalé* v. *Rawlins* (1): " We cannot give effect to any intention which is not expressed or plainly implied in the language." Certainly the testator has not expressly said that he gives his estate to Ormond Andrews. After careful consideration I have come to the conclusion that it cannot be said that an intention so to dispose of the estate is plainly implied in the language. It certainly cannot be said that the will shows that the testator must necessarily have intended his property to be given to the executor (See *Towns* v. *Wentworth* (2)). If to the words " I give devise and bequeath all my real and personal estate " there were added " to A.B." there would be no inconsistency with any other portion of the will. The words quoted do not in themselves show an intention to benefit Ormond Andrews. It cannot be said that the appointment of Ormond Andrews as executor indicates such an intention. Thus it is, in my opinion, impossible to say that the will as it stands contains such an indication of intention that it can properly be held that the testator intended that Ormond Andrews should be the beneficiary under the will. Thus, in my opinion, the Full Court of Victoria was right in rejecting the contention that upon the construction of the will Ormond Andrews was entitled to take.

(1) (1892) A.C. 342, at pp. 344, 345. (2) (1858) 11 Moo. P.C.C. 526; 14 E.R. 794.

The appellant then has recourse to the law which existed before the *Executors Act* 1830 was passed in Great Britain, which was the law as it existed in Victoria prior to the legislative adoption of that Act. The contention on his behalf is put in the following way :— The *Administration and Probate Act* 1928, sec. 48, provides that where any person dies leaving a will effectively disposing of part of his property Div. 6 of Part I. of the Act shall have effect as respects the part of his property not disposed of subject to the provisions contained in the will and subject to the following modifications :

" (*a*) . . . (*b*) The personal representative shall, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under this Division in respect of the part of the estate not expressly disposed of unless it appears by the will that the personal representative is intended to take such part beneficially."

This provision applies only where a person has effectively disposed of part of his property and it distinguishes between property effectively disposed of and property not so disposed of. There is no room for such a distinction in this case. The will of the testator either effectively disposes of the whole of his property or of none of it. I agree that the result is that the section does not apply.

But before holding that the law which is applicable is the law as it existed before the adoption of the *Executors Act* in relation to Victoria, it is necessary to consider sec. 47 of the *Administration and Probate Act* 1928. This section, providing for the distribution of an estate upon intestacy and setting out a table of persons often described as " next of kin," is introduced by the following words : " Where a person in respect of the whole of his or her residuary estate dies intestate then . . . the following provisions shall have effect " &c. The word " intestate " is defined by sec. 4 to include " a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate." Thus sec. 47 applies to bring about a distribution among the next of kin of any " residuary estate " which is not disposed of by his will. Sec. 33 provides that upon the death of a person intestate as to any real or personal estate the estate is to be held by his personal representatives upon trust for sale and payment of funeral, testamentary and

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administration expenses, debts and other liabilities. The residue of the money resulting from the sale, and any investments for the time being representing the same, and any part of the estate of the deceased which may be retained unsold and is not required for the administration purposes aforesaid, make up the "residuary estate" of the intestate (sec. 33, sub-sec. 4). Thus the statute provides that where there is a will and any property is not disposed of by the will and is available for beneficial distribution it is to be distributed according to sec. 47. Thus, prima facie, sec. 47 applies to this case, giving the estate to the next of kin and not to the appellant.

This proposition is disputed on the ground that the testator has not died intestate as to the beneficial interest in any part of his property because (it is said), sec. 48 not being applicable, the law as it existed before the *Executors Act* 1830 applies, so that the property has been beneficially given by the will to the executor. This contention was raised, upon the basis of corresponding statutory provisions, in the case of *In re Skeats* ; *Thain* v. *Gibbs* (1), where it was rejected by *Clauson* J. The learned judge dealt with the definition of "intestate" and held that the result of the definition was to include a person of whom it can be said that he "has not made an effective disposition of the beneficial interest in the whole of his property." He said that the appointment of an executor did not amount to an effective disposition of the beneficial interest: —"He made no disposition at all of the beneficial interest in his property by appointing an executor. The executor having been appointed he, by virtue of his office, took the property, but he took the property, not by reason of any disposition by the testator of the beneficial interest, but by reason of his appointment as executor" (2).

If this reasoning is valid it is conclusive of the present case. But, in my opinion, there is much to be said against it. It is obviously true that there is a distinction between the executor taking by reason of a direct gift, and an executor taking, not by any words of gift, but by reason of the fact that he has been appointed executor. But it cannot be said that the executor takes personalty by operation of law in the same manner as an heir at law took real

(1) (1936) 52 T.L.R. 558.

(2) (1936) 52 T.L.R., at p. 559.

estate by operation of law. The nomination of an executor in a will actually vested the personal estate in him—he thereby obtained the whole legal interest. The question whether he obtained the beneficial interest depended upon other considerations, though the presumption was " that the executors are intended to take the residue beneficially " (See authorities cited by *Isaacs* J. in *Fell* v. *Fell* (1)). It is, however, the will which (where these principles of law apply) disposes of the personal property and effectively disposes of it so as to vest it in the executor, certainly so far as the legal interest is concerned, and, subject to the dispositions of the will, presumably also so far as the beneficial interest is concerned.

If a person dies leaving a will not disposing of the beneficial interest in some part of his estate and not appointing an executor, sec. 47 of the *Administration and Probate Act* deals with the case, because the testator has died intestate in respect of his " residuary estate."

But is the testator always " intestate " within the meaning of the definition when he leaves a will appointing an executor but not expressly dealing with some of his personal property ? It appears to me that the question can be answered by considering the law which is relevant for the purpose of determining whether the appointment of an executor by a will gives him a beneficial interest. If upon the application of the proper principles of law to the will, and to the circumstances of the case, it is shown that the will is such that the executor takes a beneficial interest in " residuary estate ", then the position is that it is, in my opinion, difficult to say that the testator has died intestate in respect of any residuary estate within the meaning of sec. 47 as explained by the definition of residuary estate contained in sec. 33. It was doubtless intended to produce a different result by these provisions. But the words of the sections must be taken as they stand and I think that there is a strong argument that they fail to produce the result which may reasonably be supposed to have been in contemplation of Parliament. If this is the case, the law as it stood before the *Executors Act* 1830 would be applicable. The " fundamental presumption " that the executor

(1) (1922) 31 C.L.R., at p. 277.

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should take personalty beneficially would be applicable (*Bowker* v. *Hunter* (1)); this presumption would prima facie be rebutted by a counter-presumption based upon the unsuccessful attempt to make a gift in the words " I give devise and bequeath all my real and personal property " (*Bishop of Cloyne* v. *Young* (2)), but extrinsic evidence would be admissible to rebut this counter-presumption (see same case), and the extrinsic evidence in this case, if so admitted, would show clearly that the testator intended the executor to take the whole of his property beneficially.

But, with reluctance, I am unable to reach the point of applying these principles, apart altogether from any view that, if the matter had to be decided, I might be inclined to take of the decision in *In re Skeats* (3). Probate in this case was granted, not to the executor, Ormond Andrews, but to the respondent trustee company. This was done in pursuance of the provisions of sec. 6 of the *Trustee Companies Act* 1928. Under that section any person named as an executor in a will and entitled to obtain probate may " instead of himself applying for probate " authorize a trustee company to apply for administration with the will annexed, and such administration may be granted unless the will shows a contrary intention in the manner stated in the section. Under corresponding words in sec. 7 of the *Trustee Companies Act* it has been held that an authority given under the section is irrevocable (*In the Will of Synot* (4)), though it may be withdrawn with the consent of the trustee company (*In re Salmon* (5)). The position of an executor who has given such an authority in pursuance of which letters of administration *c.t.a.* have been granted to a trustee company " in his stead " cannot, in my opinion, be distinguished from that of an executor who has renounced probate. He has refused to accept the office of executor and the court has acted upon the basis of that refusal by granting letters of administration to another person (the trustee company) " instead of to himself." The trustee company takes his place for all purposes. Accordingly all his rights as an executor have disappeared. This fact is, I think, fatal to his claim, because he has declined to accept the office of executor and has

(1) (1783) 1 Bro. C.C. 328, at p. 329; 28 E.R. 1161, at p. 1162.
(2) (1750) 2 Ves. Sen. 91; 28 E.R. 60.
(3) (1936) 52 T.L.R. 558.
(4) (1912) V.L.R. 99; 33 A.L.T. 182.
(5) (1916) V.L.R. 288; 37 A.L.T. 184.

therefore failed to obtain the legal ownership of the personal estate of the testator which, even if the older law be still applicable, is the only possible foundation for the presumption which may give to him a right as executor to the beneficial interest.

As far as realty is concerned, the executor takes no title except by grant of probate (*Administration and Probate Act* 1928, sec. 8) and the executor in this case has not obtained such a grant. If it could be said that sec. 9 of the *Administration and Probate Act* 1928 gives rights in respect of realty to the executor independently of a grant of probate (a contention with which I do not agree) he would then only have such rights as existed before 1st January 1873 (see sec. 9). Before that date the *Wills Act* 1864, sec. 32, was in operation, reproducing the *Executors Act* 1830 of Great Britain. The terms of that Act are much clearer than those of sec. 47 of the *Administration and Probate Act* 1928 and they would prevent the executor taking a beneficial interest in this case.

The result is that the provisions of sec. 47 of the *Administration and Probate Act* 1928 are applicable and that the judgment of the Supreme Court should be affirmed.

STARKE J. Richard Sherlock Andrews made a will on a printed form, which, so far as material, was as follows :—" I hereby appoint Ormond Andrews . . . executor of this my will. I give devise and bequeath all my real and personal estate "

The words underlined were written in ink, and the remaining words were in print. Although the name of the devisee and legatee is not filled up, the executor, Ormond Andrews, claims that the context of the will indicates that he is the devisee and legatee intended by the testator. A court of construction, however, is not at liberty to conjecture, guess at, or speculate upon, what a testator may have intended to do or may have thought that he had actually done. It cannot give effect to any intention which is not expressed or plainly implied in the language of the will (*Scalé* v. *Rawlins* (1)) ; no implication is possible unless the intention is so strong and probable on its language that no contrary intention can be supposed (*Crook* v. *Hill* (2)). In the case now under consideration, the context and language of the

(1) (1892) A.C., at p. 345. (2) (1871) L.R. 6 Ch. 311.

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will do not indicate whom the testator intended to benefit. There is no connection whatever between the words which appoint the executor and those affecting to make a disposition of the testator's real and personal estate; the testator's intention to benefit the executor, if that were his intention, is not sufficiently expressed. The court ought not to make a will for the testator, and guess at or speculate upon what may have been in his mind.

It was next argued for the executor that he took the whole of the beneficial interest in the real and personal estate of the testator by virtue of his appointment as executor. I shall not go through this argument. It was based upon the law stated in *Williams* on *Executors*, 12th ed. (1930), pp. 1009 et seq., and upon the *Administration and Probate Act* 1928 of Victoria, secs. 9 and 48. It was conceded that the argument could not be supported if the decision of *Clauson* J. in *In re Skeats*; *Thain* v. *Gibbs* (1) were correct. The provisions of sec. 47 and sec. 4 (definition of " intestate ") of the *Administration and Probate Act* 1928 correspond with the sections of the English Act the subject of the decision. The reasoning of the learned judge in that case satisfies me that his construction of the English Act was right, and that the same construction should be given to the Victorian Act. In short, the testator died intestate as to the beneficial interest in his real and personal estate, and sec. 47 of the *Administration and Probate Act* 1928 governs its distribution. Further, I agree in the opinion of the learned judges of the Supreme Court of Victoria in Full Court that the uncompleted gift of the testator's real and personal estate explicitly negatives any intention on his part that the executor should take his real and personal estate by virtue of his office (*Bishop of Cloyne* v. *Young* (2)).

Other arguments were also addressed to the court, in connection with the real estate, but it is unnecessary to pursue them in the view which I have adopted. Clearly the real estate can stand in no better position than the personal estate.

The appeal should be dismissed.

DIXON J. In the Full Court of Victoria it was assumed that, unless sec. 48 of the *Administration and Probate Act* 1928 (Vict.)

(1) (1936) 52 T.L.R. 558.

(2) (1750) 2 Ves. Sen. 91; 28 E.R. 60.

applied to the testator's will, no statutory provision existed affecting the right of the executor to take beneficially property of the testator not otherwise disposed of or dealt with which devolved upon him in virtue of his office. That section could not apply to the present case, because it is confined to wills effectively disposing of part of the testator's property. It now appears from the recent decision of *Clauson* J. in *In re Skeats*; *Thain* v. *Gibbs* (1) that because of the definition of "intestate" contained in sec. 4 (1), sec. 47, as amended by Act No. 4191, applies where a testator's will appoints an executor but otherwise fails to dispose of any of his estate. *Clauson* J. said that as the law stood before the *Executors Act* 1830 such a testator made no disposition at all of the beneficial interest in his property by appointing an executor. "The executor having been appointed he, by virtue of his office, took the property, but he took the property, not by reason of any disposition by the testator of the beneficial interest, but by reason of his appointment as executor" (2). For this reason he held that the description "a person who leaves a will, but dies intestate as to some beneficial interest in his real or personal estate" was fulfilled by a testator constituting an executor who, apart from statute, would in virtue of his office take the estate as his beneficial property. The reasoning does not seem unsound and, in my opinion, we should follow the decision. The result is that, apart from any other difficulty the appellant cannot claim as the person appointed executor. His claim must rest upon the interpretation of the will.

The question is whether the testamentary paper contains sufficient to show with reasonable certainty that the testator intended the appellant to take his real and personal property as devisee and legatee.

The testator has not said in terms to whom he gives devises and bequeaths his real and personal property. His failure to do so may arise from no omission to inscribe on the paper words which he meant to write down. It may be due to his belief that what he wrote there sufficiently stated his intention. But that he failed to express his intention in actual words is none the less clear. If nevertheless what the instrument does contain implies that the

(1) (1936) 52 T.L.R. 558; and now 155 L.T. 451. (2) (1936) 52 T.L.R., at p. 559.

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appellant is the object of his disposition, the gift will be effectual. But the implication must be certain. There must be more than a probable inference as to the desires of the man. His meaning must be communicated by what is expressed in the document. The will must contain what Lord *Eldon* described as " an implication so probable, that the mind could not resist it " (*Wykham* v. *Wykham* (1)). There is, of course, a strong presumption against intestacy which will strengthen such indications of intention as may exist. But in such a case as the present, the presumption against intestacy gives little help in excluding the possibility that the testator accidentally omitted to write a name where he intended to do it, an hypothesis which would prove fatal to the implication. Indeed it has been said that the presumption may be used as suggesting an omission, an omission which may be supplied from positive indications discoverable within the will (See, per *Cussen* J., *In the Will of Barnett*; *Bradbury* v. *Barnett* (2)).

In the present case the indications of intention afforded by the will appear to me to be insufficient to raise an implication in favour of the appellant. The suggestion made during the argument by *McTiernan* J. is, no doubt, plausible. It is not unlikely that the testator mistook the directions in the side notes of the printed form and thought that he should put down in the space left for the executor the name of the person he wished to appoint to represent him and to take his property and then that the particulars of the bequests which he should insert consisted in a description of the extent of the bequest. But this is inference or conjecture, not implication.

I do not think that the contents of the will give rise to a reasonable certainty that the testator meant to designate the appellant as his devisee or legatee, either by the language he used or the language he meant to use.

I think the appeal should be dismissed.

EVATT J. The main question on this appeal is whether, upon the true construction of the will of the testator, the applicant is beneficially entitled to the whole of the estate. *Duffy* J. decided

(1) (1811) 18 Ves. Jun. 395, at p. 421; 34 E.R. 366, at p. 376.

(2) (1919) V.L.R. 524, at p. 531; 41 A.L.T. 38, at p. 40.

that he was beneficially entitled, but this decision was reversed by the Full Court of the Supreme Court. In my opinion the decision of *Duffy* J. was right.

The testator used a stationer's printed form of will. For all practical purposes, his decision to use this form determined in advance where his signature and that of the two attesting witnesses should appear. Accordingly it begs the question to assume that there was any " blank " or " gap " left in the will. It is true that, between the word " estate," which was the last word in the operative part of the will, and the testator's signature at the foot of the page, there was plenty of space for the expression of additional testamentary intentions. But, as the printed directions on the form suggested, this space was provided in order to ensure " sufficient room " for the expression of the " bequests." If a testator has expressed his intentions shortly and completely, there must still be left a certain space on the form before the appearance of his signature.

The result is that the document possesses three features, viz. :— (1) The appointment of the appellant—nephew of the testator—as executor. (2) The unambiguous assertion by the testator that, in the will, he is making a gift of all his real and personal estate, and (3) The due execution of the document as and for the last will of the testator. The last fact negatives the theory that he intended something to be added to the will at some later time. In Victoria the normal result of an appointment of a named person as executor is that in due course the entire legal interest of the testator in all his real and personal property will become vested in his executor. But the additional words " I give " make it reasonably clear that the testator's intention was that his nephew should take all his property, not as a mere administrator but beneficially. The words " all my real and personal estate " emphasize that the gift made by the will is universal in character. In short the appellant takes first legally, then beneficially. In both cases he takes all.

It is possible that the appellant has placed himself at some disadvantage by tendering the evidence (which is not contradicted or qualified) that the testator did in fact intend the appellant to take beneficially and to take everything. Although this evidence was tendered on the second branch of the case, it was likely to have

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a boomerang effect, in this way. First, it is clear, historically, that the appellant was marked out by the testator as his sole beneficiary. But this historical truth is made to appear from evidence which is legally inadmissible on the question of construction. Accordingly the rejection of the evidence tends to suggest to, or even persuade, the mind that its rejection is harmful, perhaps fatal, to the appellant's case. This in turn tends to colour the question of construction in a way which is prejudicial to the success of the appellant. Personally I had not the advantage or disadvantage of reading the affidavit before reading the will. Upon reading the will I came to a provisional but strong opinion that *Duffy* J. was right and I have heard no argument which weakened that opinion. Certainly the reading of the inadmissible evidence has not shaken my opinion and I think I can say that it has had no effect whatever.

On the other part of the case I agree with the decision of *Clauson* J. in the case of *In re Skeats* (1). That decision is also applicable to the terms of the Victorian statute. It also accords with modern notions of a just succession, a fact which is not to be ignored in the interpretation of a modern statute.

But, upon the question of the interpretation of the will, I am of opinion that the appeal should be allowed and that the judgment of *Duffy* J. should be restored.

McTIERNAN J. The testator added words in his own handwriting to the inchoate clauses in a printed form of will, which, with these additions, was duly executed by him and attested by two witnesses as his last will and testament. In the spaces provided in the form he wrote his own name, the name of the appellant and the words " all my real and personal estate." The will emerged from the act of will-making without stating after the clause " I give, devise and bequeath all my real and personal estate " who was the object of the testator's bounty. The clause immediately preceding is in this form: " I hereby appoint Ormond Andrews Hardware Manager Newcombs, Warrnambool executor of this my will." There can be no doubt that, as the testator used a printed form of will, he expected that by following the form-maker's directions he would make a will

(1) (1936) 52 T.L.R. 558.

in the form required by law and that all his real and personal estate would pass under it. There appears on the face of the will such a degree of care and attention in setting out the names and descriptions of the testator, the executor and the witnesses, and the quantum of the estate which was to pass under the will, that it seems highly improbable that after writing the word "estate" the testator simply forgot to write the name of the beneficiary and passed on to his own signature. As the form-maker fixed a place for the testator's signature irrespective of the length of the clauses above it, the reason for the blank space above the signature is not the omission of the names of the beneficiaries, but the brevity of the testator's disposition in relation to the amount of room provided on the form for that purpose.

There is, of course, a presumption against intestacy, and, moreover, in the present case it is highly improbable that this obviously punctilious testator inadvertently omitted the name of the recipient of his bounty. But if the testator has not expressly, or by reasonably plain implication, said whom he wished to take his estate, these considerations would not justify the name being supplied by any conjecture as to the testator's intentions. In this case those intentions cannot be discovered without reading the will with the marginal directions printed on the form. The body of the will presents the following appearance (The printed marginal directions and the inchoate clauses are underlined and what is not underlined was added by the testator in his own handwriting) :—

Here insert the name of person whom you wish to appoint.	I hereby appoint Ormond Andrews Hardware Manager Newcombs, Warrnambool
If a male the word "Executor," female "Executrix," Company "Executor."	executor of this my will. I give devise and bequeath
Here insert full particulars of bequests.	all my real and personal estate

It will be observed that the testator has followed the marginal directions with the utmost fidelity. He begins with his own name and address and then comes to the direction "Here insert the name

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of person whom you wish to appoint." The direction does not say " appoint as executor," and it does not tell the testator that he may if he likes appoint a company as executor. It says: " Insert the name of *person* whom you wish to appoint." The possibility of a company being executor is mentioned by the form-maker only where he instructs the testator that the word " executor " is used of a male or a company, and the word " executrix " of a female. Now the word " appoint " may refer to the appointment of a person as executor or as a beneficiary under the will. The word is commonly used of a disposition of property. The strikingly significant feature of the marginal directions is that they nowhere use the words " Here insert the names of the beneficiaries." No doubt that may be implied in the direction " Here insert full particulars of bequests." " Bequests," however, means the property bequeathed, and this direction is satisfied by a full statement of the property which the testator was giving. The testator literally complied with the direction by inserting " all my real and personal estate." The only places where a name is expressly directed to be inserted are, firstly, where a space is provided for the name of the testator, and, secondly, where a space is provided for the testator to comply with the direction " Here insert the name of person whom you wish to appoint." This fact in combination with the use of the word " appoint," which is not unequivocal, makes it sufficiently clear that the testator did not read " person whom you wish to appoint " as meaning " person whom you wish to nominate as executor " as distinct from " person whom you wish to appoint as your beneficiary." The testator inserted the name of the appellant as the person whom he wished to " appoint," and as and for the " full particulars of bequests " he wrote " all my real and personal estate." Thus, strictly according to the directions in the printed form he named the person whom he wished to " appoint," specified the property of which he was disposing and signed the will under the direction " Signature." The form and arrangement of the directions which the testator followed make it clear that the word " appoint " was understood by him to refer to a beneficial as well as a representative appointment. The clause which immediately follows " I give devise and bequeath all my real and personal estate " means in this context that the disposition

was to be absolute and that it was to be of the whole of the estate. The testator named his appointee, made the gift and specified the quantum.

In my opinion there has been no omission from the will, intentional or accidental. Nor is it necessary to supply words to give effect to the testator's intentions. Upon the true construction of the will, as I read the testator's intentions from the internal evidence of the will itself and not as a matter of conjecture there is a gift to the appellant of the whole of the testator's property.

In my opinion the appeal should be allowed.

Appeal dismissed. Appellant to pay costs of the appeal of the other parties. The respondent the National Trustees Executors and Agency Co. of Australasia Ltd. to take out of the estate the difference between party and party and solicitor and client costs and any deficiency which it fails to recover from the appellant.

Solicitor for the appellant, *A. J. Fowler.*

Solicitors for the respondents, *Bullen & Burt* and *Henderson & Ball.*

H. D. W.