ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

EDWARDS

V.

BOYD

ORIGINAL

REASONS FOR JUDGMENT

Oral *Judgment delivered at* Sydney

on Wednesday, 18th March 1959

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

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JUDGMENT McTIERNAN J.

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The facts and the history of this case have been gone into very fully in the course of the argument and it does not seem necessary again to traverse that field.

I come at once to the suit which was heard by Mr Justice Roper. In that suit the wills of the 2nd and the 5th April 1951 were known to the Court, besides the will of the 29th September 1950, of which the Court granted probate.

The appellant was, during the pendency of those proceedings, cited to prove the will of the 2nd April, but he did not do so. He undertook to prove only the third will. I agree with the view taken by Mr Justice Myers that the appellant did, at that stage, in fact abandon the will of the 2nd April. It is a very reasonable conclusion, having regard to all that was brought out in evidence before Mr Justice Roper, that the appellant could have had very little faith in the genuineness of that will, or, at any rate, in his prospects of being able to establish that it was the will of which the Court would grant probate.

I think that the decision of Mr Justice Roper must be taken to have necessarily involved that the will of the 29th September 1950 was the last will, or the last valid and effective will, of this testatrix.

It seems to me to follow inevitably, from the views which I have expressed, that the present suit of the appellant, the one which we are now considering, is a completely hopeless one, that it is one in which he could not possibly succeed if it were allowed to go on.

It is therefore true to say that the suit is

vexatious and frivolous in the proper sense of those words. In my opinion, the order of Mr Justice Myers was right, and the Full Court, which unanimously affirmed it, was also right. It has been pointed out by Mr Clyne that Mr Justice Dixon said this, in the case of Cox v. Journeaux and Others (52 C.L.R. 713): "The inherent jurisdiction of the High Court to stay an action as vexatious is to be exercised only when the action is clearly without foundation". In our opinion, it can be very justly said of this action that it is without substantial foundation. His Honour proceeded: "....and when to allow it to proceed would impose a hardship upon the defendants which may be avoided without risk of injustice to the plaintiff".

We are also of opinion that it is quite consistent with those principles, to hold here that the order of the learned primary Judge was right, and the Full Court of the Supreme Court was right in affirming it.

In these circumstances I am of opinion that their Honours in the Full Court dealt very satisfactorily and correctly with the appeal to them, and this appeal from their order should be dismissed. I would uphold not only that part of the order of Mr Justice Myers which strikes out the action, with which this appeal is concerned, but also that part of his Honour's order which operates as an injunction restraining the present appellant from instituting any other proceedings of the kind therein described, without leave of the Court.

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FULLAGAR J.

I agree. There are only two or three words which I wish to add.

I think Mr Clyne has said everything that it is possible to say for the appellant in this case, and I was impressed by a good deal of what he said yesterday afternoon, particularly when he asserted that his client ought not to be precluded from proceeding with his suit merely on the ground that his claim is dubious or subject to grave suspicion in many respects. But I have come to the conclusion that it is, as my brother McTiernan has said, clearly a hopeless case.

I agree with the judgments of the Supreme Court and I agree particularly with one passage, at p. 29 of the appeal book, in the judgment of the learned Chief Justice. His Honour says: "The present suit only makes the same attack, but on another ground, and I think that this is a case in which this issue has been decided, and decided finally, between the parties". In other words, I am of opinion that the validity of this will of September 1950 has been already conclusively determined so far as any attacks on the ground of want of due execution, etc., are concerned, and so far as any alleged subsequent wills are concerned.

It is to be remembered that the appellant had been cited to prove the document of 2nd April, on which he now relies. He must be taken, as Mr Justice Myers said, I think, clearly to have abandoned that will. That will is referred to in the course of the reasons for judgment of Mr Justice Roper (I refer particularly to pp. 117 and 118 of the appeal book in that case).

I am of opinion that this suit has no prospect

whatever of success and, if the Court allowed it to proceed, it is my opinion that it would be allowing its process to be abused.

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KITTO J.

I agree. I, too, feel indebted to Mr Clyne for his forceful and clear statement of his client's case. I should not, perhaps, feel as happy in the result had I not had the benefit of such a clear and such an exhaustive examination of the relevant facts.

I have had the opportunity of looking, not only through the papers in this case, but through the transcript so far as it related to the will of 2nd April and the transcript of the proceedings before Mr Justice Roper, and the clear impression on my mind is that this is not a case in which the appellant may fail if it proceeds; it is not a case in which he is likely to fail; but a case in which it is quite inconceivable that he should succeed.

I am not conscious of departing, and I certainly would not wish to depart, in the least respect from the principles laid down by Mr Justice Dixon in Cox v. Journeaux and Others in 52 C.L.R. at p. 720.

I accept to the full the proposition that the jurisdiction which is now appealed to is to be exercised only when the action is clearly without foundation and when to allow it to proceed would impose a hardship on the defendant, which may be avoided without risk of injustice to the plaintiff.

I can see no foundation whatever for the action. To allow it to proceed would impose a clear hardship on the present respondent. To prevent it from proceeding would not have the slightest chance of imposing an injustice on the plaintiff. On the contrary, it will put a stop to his proceeding further with a claim which, though it might not

involve him ultimately in paying more costs, at least must inevitably involve him in an order to pay more costs.

In my opinion we cannot possibly take any other view than that the Supreme Court was completely right, and I therefore agree that the appeal should be dismissed.