

CASES
DETERMINED BY THE
CHANCERY DIVISION
AND IN
LUNACY
AND ON APPEAL THEREFROM IN THE
COURT OF APPEAL.

In re POOLEY.

C. A.

Will—Gift to Attesting Witness—Power to Solicitor-Trustee to make Professional Charges—Wills Act (1 Vict. c. 26), s. 15 [Revised Ed. Statutes, vol. viii., p. 33].

1888
Oct. 31.

A testatrix appointed *B.* and *P.* (a solicitor), executors and trustees of her will, and declared that any trustee of her will who should be a solicitor should be entitled to charge for all business done in relation to the estate as if he had been a solicitor employed by the trustees. *P.* was one of the attesting witnesses:—

Held (affirming the decision of *Stirling, J.*), that *P.* was not entitled to any profit costs for business done by him in relation to the estate, for that the right to make professional charges could only be claimed under the will, and was a beneficial interest under it, from claiming which he, being an attesting witness, was precluded by the *Wills Act* (1 Vict. c. 26), s. 15.

In re Barber (1) approved.

JANE JOHNSON died in July, 1887, leaving a will, by which she appointed *H. C. Brown* and *Edmund Pooley* the trustees and executors thereof. The will contained the following clause: “I declare that any trustee of this my will who may be a solicitor shall be entitled to charge my estate for all business done by him in relation to my estate in the same manner as if he had been engaged to do such business by my executors as their solicitor.”

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Pooley, who was a solicitor, was one of the attesting witnesses to the will, and proved the will on the 30th of July, 1887, power being reserved to *Brown* to come in and prove. On the 15th of February, 1888, *Pooley* delivered his bill of costs and disbursements, and on the 2nd of March, 1888, the tenant for life and *Brown*, the co-trustee, obtained the common order for its taxation.

The Taxing Master taxed the bill according to the decision of Mr. Justice *Chitty* in *In re Barber* (1), disallowing all professional costs, and so reducing the bill from £55 11s. 5d. to £2 14s. *Pooley* took out a summons to review this taxation, which was adjourned into Court and dismissed by Mr. Justice *Stirling*, who followed Mr. Justice *Chitty's* decision.

Pooley appealed.

Cozens-Hardy, Q.C., and *W. F. Hamilton*, for the Appellant:—

We contend that this disposition is not within the *Wills Act* (1 Vict. c. 26), s. 15. It is not a “beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate.” Were it not for the rule in equity that a trustee shall not make a profit out of his office, a trustee-solicitor would be able to make professional charges for business done by him for the estate, and all that this clause does is to negative the application of that rule of equity. Mr. Justice *Stirling* followed Mr. Justice *Chitty's* decision in *In re Barber*. That case may be distinguished, on the ground that the trustee there was mentioned by name; but apart from that we submit that Mr. Justice *Chitty's* view that this is a legacy affecting real or personal estate is not a just one. A legacy imports a bounty, here the trustee is only to be paid for the work he does, he gives a full consideration.

[COTTON, L.J.:—Suppose a testator said, “I give to every person who shall be a trustee of my will £10 for his trouble,” would that not be a legacy?]

No doubt it would, but that is a gift of a definite sum irrespective of the work done; here the trustee is only to be paid according to the value of his services. If a disposition of this

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kind is a legacy, then legacy duty ought to be paid on it, and it is quite a novel idea that a trustee entitled to make professional charges should pay legacy duty on them. If it is a legacy, it is primarily payable out of the personal estate. Now, suppose a will disposing of real and personal estate in different ways. If a solicitor, not a trustee, does business in respect of the real estate, his charges are paid out of the realty, but if a solicitor-trustee, who is authorized to charge, does it, then, if the right to be paid is a legacy, the payment must be primarily out of the personal estate. We have thus the anomalous result of the costs being paid out of different funds in the two cases.

[BOWEN, L.J.:—Is not a disposition of this kind within the policy of sect. 15?]

The clause must be construed according to its terms and is not to be extended by looking to its policy: *Gurney v. Gurney* (1); and we say that this case does not come within the fair interpretation of the terms. In *Gurney v. Gurney, Temple* clearly obtained an indirect benefit of considerable amount by the codicil, and the case might be said to come within the policy of the Act.

Wintle, for the Respondents, was not called upon.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Stirling*, who followed a former decision of Mr. Justice *Chitty* (2). I am of opinion that Mr. Justice *Chitty's* decision was right and that Mr. Justice *Stirling* was right in following it. The question is whether under sect. 15 of the *Wills Act* (1 Vict. c. 26), a direction in the testatrix's will that every trustee of the will who is a solicitor shall be entitled to charge for professional business done for the estate, is void as regards *Pooley*, by reason of his being an attesting witness to the will. In my opinion, it is void as regards him. *Pooley* as a trustee of the will could not, in the absence of any direction in the will, do professional work for the estate and charge profit costs. It is urged that if we hold a

(1) 3 Drew. 208.

(2) 31 Ch. D. 665.

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clause enabling a trustee to do so to have the effect of giving him a legacy, a difficulty will arise, for that in that case a solicitor-trustee will be liable to legacy duty on his profit costs. I decline to give any opinion on that point, it may hereafter come before us for decision, and I do not wish to bind myself upon it; but that consideration ought not to prevent us from giving a fair construction to the words of the enactment now before us. The section enacts: "That if any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife or husband, be utterly null and void." It is urged that if we hold this to be a legacy to Mr. *Pooley* it will be a legacy to any future trustee of the will who may be a solicitor, and that the consequences as to legacy duty will follow. That may possibly be so, but as regards the Appellant we have only to consider whether this direction is not in substance a gift to him of so much of the estate as is required to pay the profit costs, and therefore void. It is urged that it is not a gift, for that he has to work for what he receives. That is true, but the clause gives him a right which he would not otherwise have to charge for the work if he does it, and that, in my opinion, is a beneficial gift within the meaning of the section.

LINDLEY, L.J. :—

I think it is impossible to escape from the words of the section, and the case appears to me to fall within its policy. I think that under the old law Mr. *Pooley* would have taken by force of this clause such an interest as would have made him incompetent as a witness to the execution of the will. The policy of the Act was to leave the will good and to make void the gift which would have made the witness incompetent. Apart from this clause, Mr. *Pooley* could not get anything out of the estate for his services, and I cannot say that a clause which enables him

to get something out of the estate is not a gift to him within the meaning of the 15th section.

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BOWEN, L.J.:—

I am of the same opinion.

Solicitor for Appellant: *C. H. Bryson*.

Solicitors for Respondents: *Lowe & Co.*

H. C. J.

In re TURCAN.

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1888

July 5;

Nov. 1.

Settlement—Covenant to settle after-acquired Property—Property acquired by Devise, Purchase, or otherwise—Divisible Covenant—Validity—Policy of Life Insurance—Condition in Policy against Assignment—Public Policy—Settlement of whole Property—Whether enforceable at Law or in Equity.

A marriage settlement contained a covenant by the settlor to settle his estate and interest in any property or estate of or to which he should become possessed or entitled during the marriage by devise, bequest, purchase, or otherwise. He afterwards effected some policies of insurance on his life, one of which was subject to a condition that “it should not be assignable in any case whatever”:—

Held, that the policies were property to which the settlor had during the marriage become entitled by purchase within the specific words of the covenant, and that the covenant was divisible, and could be enforced as to that property by a Court of Equity.

Whether, if the policies had not come under any of the particulars specifically mentioned in the covenant, the covenant comprising the settlor’s whole future property could have been enforced by a Court of Equity, *quære*.

Held, also, that the effect of the condition against assignment was merely to make the policy non-assignable at law, as it would have been prior to the *Policies of Assurance Act*, 1867 (30 & 31 Vict. c. 144), and did not prevent the settlor from dealing with the beneficial interest in it in accordance with his covenant.

THIS was an appeal from an order of Sir *H. F. Bristowe*, Vice-Chancellor of the County Palatine of *Lancaster*.

By an indenture, dated the 13th of August, 1884, being the settlement made on the marriage of *J. G. Turcan* and *Edith A. Tonge*, a policy of insurance on *J. G. Turcan’s* life, and certain household furniture and effects, were assigned to trustees upon