

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Farrelly and another v. Corrigan, from the Supreme Court of Queensland ; delivered 17th June 1899.*

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Present at the hearing :

LORD WATSON.

LORD MACNAGHTEN.

LORD MORRIS.

LORD DAVEY.

[*Delivered by Lord Macnaghten.*]

This is an appeal from an order of the Supreme Court of Queensland refusing an application for a new trial of a probate action.

The action was tried before Real J. and a special jury of four. At the conclusion of the trial the Court granted probate in solemn form of a document dated the 26th of June 1890 propounded as the will of James Corrigan excluding however from probate a bequest of 4,000*l.* to one William Farrelly which was directed to be paid to him within one month after the testator's death.

The persons who propounded the document in question were the Appellants John Farrelly the father of William Farrelly and a Mr. Woolgar who were named as executors.

Besides the legacy of 4,000*l.* the will gave 50*l.* to each of the executors and 10*l.* to be spent in masses for the repose of the testator's soul. The residue of the estate after payment of debts and legacies was to be divided in equal shares

between a sister and four brothers of the testator or their representatives.

James Corrigan died on the 7th of March 1894. On the 4th of May following the executors obtained probate of the will in common form. Shortly afterwards they paid the 4,000*l.* to William Farrelly. The residue of the estate divisible between the testator's sister and his four brothers was just under 600*l.* In December 1895 the Respondent Thomas Corrigan who was one of the four brothers was paid 119*l.* as his share of the estate. In February 1896 he brought the action to have the probate revoked. The executors counterclaimed asking for probate in solemn form.

James Corrigan the testator was a person of little or no education. During the greater part of his life he worked as a common labourer. In 1880 on the death of a brother who had kept a hotel at Gympie he was sent for to help the widow in carrying on her late husband's business. John Farrelly who had been an intimate friend of the hotel-keeper and was then Clerk of the Petty Sessions at Gympie assisted him with money and advice. After a time he became owner of the hotel. John Farrelly managed his business affairs for him and laid out his money in speculations in which he was interested himself to such good purpose that Corrigan in a short time became comparatively a rich man. Before the date of his will and down to the time of his death he seems to have considered himself worth not less than 8,000*l.*, and undoubtedly he looked upon John Farrelly as the man who had made him.

William Farrelly was articled with Messrs. Tozer and Conwell a firm of solicitors at Gympie. In 1888 when he was about 20 years of age he was entrusted with the management of the testator's affairs under his father's super-

vision. From that time down to the testator's death he acted as the testator's confidential agent. He had, he says, full control of all the testator's property including his banking account.

The document propounded as James Corrigan's will was in William Farrelly's handwriting. It was prepared by him without any written instructions, and without the intervention of any other adviser, and he maintained it appears so much secrecy about its preparation that his own father with whom he was living at Gympie did not know till after the testator's death who received the instructions for the will or who prepared it.

When the will was challenged it was obvious that there was a grave case to be tried. It could not be disputed that it was incumbent on those who sought to uphold the gift to William Farrelly to prove the truth and honesty of the transaction and to remove the suspicions which the comparative magnitude of the gift and the circumstances under which the will was prepared were calculated to excite.

The trial lasted five days. With the summing up of the learned Judge no fault can be found. He explained the law with perfect accuracy in terms which have been approved by this Board in *Barry v. Butlin* and by the House of Lords in *Fulton v. Andrews*. In the course of the trial and before Counsel for the executors addressed the jury in reply he read out the questions which he proposed to leave to the jury. No objection was taken to any of them. The jury found that the will was signed by the testator and duly executed in the presence of the attesting witnesses and that the testator was of sound mind and understanding. So far there was no difficulty. The points really in dispute were covered by Questions 3 and 4. Those questions were as follows:—3. "Was the said

2 Moo. P.C. 480.

7 E. & I. Ap. 448.

“ document read over to the said James Corrigan before he signed the same ? ” 4. “ Did he the said James Corrigan before and at the time he so signed his name know and approve of the contents of the said document ? ” Before the verdict was finally settled the jury came back into Court three times. First they asked the Judge whether they might answer Question 4 by saying “ Yes with the exception of 4,000*l*.” They were told they might if they came to the conclusion that the testator knew and approved of the contents of the document except as to these words and did not know and approve of it so far as these words formed part of the document. Then they came back again with the questions answered. But the proposed answer to Question 3 was “ No proof.” The learned Judge then directed the jury that there was evidence if they believed it—the evidence of William Farrelly—but they were not bound to believe him if under the circumstances of the case they were not satisfied of the fact upon the evidence. They had better retire he said and consider Question 3 and answer it clearly. The learned Judge was certainly not wrong in telling the jury that there was evidence on the point if they believed William Farrelly. For William Farrelly stated positively that he read over the will of the 26th of June 1890 to the testator “ slowly and carefully ” and that he read over to him every word of it just as it was written. Before the jury retired the second time one of the jurymen asked the learned Judge if they might say what they thought the testator’s intention was. The learned Judge told the jury that it could make no difference and that unless both parties wished it they had better not. Then the jury retired and it seems that in their absence the Counsel for Mr. Farrelly the executor pressed the learned Judge to allow the

jury to say what they proposed to add stating that his client particularly desired it. Counsel for the Plaintiff consented. So when the jury came back with the questions answered they were told that they might make the addition which they proposed to their answer to Question 4. They went out of Court and added a rider. The final answer to Question 3 was simply "No." The final answer to Question 4 was "Yes, with "the exception of the words four thousand "pounds (4,000L.) which words he did not know "and approve of." The rider added to this finding was—"The jury believe the testator's "intention was to leave half his property to "William Farrelly."

The verdict of the jury was accepted by both parties at the time without question or comment. The learned Judge was not asked to give any further direction or to submit any other question to the jury.

The executors then applied to the Supreme Court for a new trial. The grounds of the application were stated to be (1) That there was no evidence to support the findings in answer to Questions Nos. 3 and 4 or either of them and (2) That the said findings were and each of them was contrary to the evidence. The rider which the jury added to their answer to Question 4 was not made a ground of appeal or even mentioned in the notice of appeal. All the Judges were of opinion that the grounds of appeal as alleged could not be supported. And it appeared that the Trial Judge was not dissatisfied with the verdict. But it was argued that the rider neutralised the effect of the verdict and that it removed or might be treated as removing the suspicion which otherwise would have attached to the transaction. This view commended itself to the learned Chief Justice. He admitted that no exception could be taken "to the direction of the learned Judge

“given under the circumstances of the trial and “as applied to the contest as then existing “between the parties.” But as applied to what his Honour termed “the actual state of the case “as shown by the finding of the jury” he thought the direction was “incomplete and possibly “misleading.” He formulated an addition to the rule laid down in *Barry v. Butlin* which he considered would remedy the defect. His opinion was that owing to the “unexpected course which “the case took at its conclusion the verdict was “so unsatisfactory that it ought not to be allowed “to stand.” The majority of the Court however thought that the rider in question was irrelevant and immaterial and that if it was to be treated as involving a finding of fact it rather increased than diminished the suspicion attaching to the transaction.

Their Lordships concur with the majority of the Full Court. They have some difficulty in following the reasoning of the learned Chief Justice. They think that the propositions of law laid down by Parke B. and approved by Lord Cairns are sufficient for all cases in which a person who has prepared a will is found to take a substantial benefit under it and they do not think that the additional rule proposed by his Honour would be a judicious amendment or an improvement in any case.

It would be superfluous to comment on the suspicious circumstances which occur in this case. It will be sufficient to observe that there are two points of grave importance on which the jury rejected the evidence tendered on behalf of the Appellants. William Farrelly declared that he read the will over to the testator. The jury were asked whether the will was read over to James Corrigan before he signed it. They answered flatly “No.” Then there was another matter in contest between the parties. William Farrelly said that the testator was not an

illiterate man and asserted that he could "read well." No one could have been in a better position to judge of James Corrigan's attainments than William Farrelly. But on the other hand there was cogent evidence to show that although the testator had learnt to sign his name he could neither read nor write. The point was important because the will was in the testator's possession for a considerable time and if the Jury had been satisfied that the testator could read they might fairly have presumed that he must have made himself acquainted with its contents, and they would hardly have found that he was ignorant of the most important provision it contained. It was important too in another point of view. It was admitted by William Farrelly that it was the practice of the office in the case of an illiterate testator to read the will to him in the presence of witnesses. No witness was present to hear Corrigan's will read. If Corrigan was illiterate William Farrelly neglected his duty in departing from the established practice of the office and it would not be easy to suggest any honest reason for the departure. It is obvious that the jury must have come to the conclusion that James Corrigan was illiterate and indeed upon the evidence presented to them it appears to their Lordships that it would have been difficult for them to have come to any other conclusion. Now if the jury were not satisfied that the will was read over to the testator and if they were satisfied that the testator though able to sign his name was wholly illiterate it would seem to be scarcely reasonable to suggest that findings of fact based on these conclusions and arrived at after much deliberation and with evident reluctance by a jury acting in the discharge of their solemn duty ought to be set aside because the jurors chose to hazard a conjecture on a matter with which they had nothing to do and in regard

to which they were under no sense of responsibility. For they had been told that they had better say nothing about the testator's intentions and they were warned that anything they might say on that subject could have no effect. Their Lordships think that the majority of the Full Court were probably right in supposing that the rider was added without serious thought out of regard to the character of the persons concerned. The learned Chief Justice observes that the course which the trial took at its conclusion was "unexpected"—unexpected it must have been, for there is not to be found in the Judge's notes any scrap of evidence upon which the opinion expressed in the rider could have been founded. It was a mere guess and it would not have been relevant or material if it had been based on satisfactory evidence.

If however it is to be taken as a fact that the testator's intention was that half his property should go to William Farrelly and half to his own relations and that instructions were given to William Farrelly to that effect but that he departed from these instructions and gave himself 4,000*l.* as being substantially equivalent to one half of the testator's property at the time the case would seem to assume a more serious aspect. It would have been a grave dereliction of duty on the part of William Farrelly to have dealt with the testator's property in that way without even attempting to bring home to his mind the effect of the provision which the writer of the will was making in his own favour in substitution for that which according to the hypothesis the testator intended to give him. In such a case how could there be what the law requires "clear and satisfactory evidence that the will contained the real intention of the testator"? With all deference to the opinion of the Chief Justice there would be clear and satisfactory evidence to the contrary.

*Baker v. Butt* 2 Moo. P.C. 321.



Their Lordships think that the application for a new trial was properly refused by the Full Court and that this Appeal ought to be dismissed and they will humbly advise Her Majesty accordingly.

As the Respondent has not appeared it will not be necessary for their Lordships to make any order as to costs.

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