WARRINGTON J.
1915
March 5.

In re RAVEN.

SPENCER *v.* THE NATIONAL ASSOCIATION FOR THE PREVENTION OF CONSUMPTION AND OTHER FORMS OF TUBERCULOSIS AND REGINALD PRATT.

[1914 R. 1024.]

Will — Construction — Charitable Legacies — Declaration that Trustee shall decide any Question of Disputed Identity—Jurisdiction of Court—Latent Ambiguity—Evidence of Intention.

Testator gave certain charitable legacies—including a legacy of 1000*l.* to The National Association for the Prevention of Consumption"—and the testator directed that "if any doubt shall arise in any case to the identity of the institution intended to benefit the question shall be decided by my trustees whose decision shall be final and binding on all parties." There was no society of that name merely, but there was a society whose full name was "The National Association for the Prevention of Consumption and other Forms of Tuberculosis." There was also an independent branch of this association whose full name was "The Leicester and Leicestershire Branch of the National Association for the Prevention of Consumption and other Forms of Tuberculosis" to which the testator had been a subscriber and in whose favour extrinsic evidence of intention was sought to be given. Both the trustees and the Leicester and Leicestershire Branch were desirous that the question of identity should be finally decided by the trustees. The National Association insisted on having the decision of the Court:—

Held, that the direction in the will so far as it purported to oust the jurisdiction of the Court was void and inoperative (1.) on the ground of repugnancy and (2.) as being contrary to public policy.

Massy v. *Rogers* (1883) 11 L. R. Ir. 409 approved and followed.

Held, also, that extrinsic evidence of intention was inadmissible and that the National Association was entitled to the legacy.

ADJOURNED SUMMONS.

William Raven, of Leicester, hosiery manufacturer, who died on January 9, 1914, by his will dated September 29, 1911, appointed Charles Henry Spencer, of Leicester, chartered accountant, and his sons, William John Raven and Horace George Raven, his executors and trustees. Clause 13 of the will was as follows: "I bequeath the following charitable legacies free of all duties, that is to say,

"(1.) To the Leicester Infirmary 1000*l.*;

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"(2.) To the National Association for the Prevention of Consumption 1000*l.*;

"(3.) To the Leicester and Leicestershire Maternity Hospital now or formerly connected with the Leicester and Leicestershire Provident Dispensary 500*l.*;

"(4.) To the Unitarian Church meeting for worship at the chapel known as the Great Meeting situate in Bond Street Leicester 500*l.* to be applied for such purposes as the vestry connected with the said chapel direct;

"(5.) To the Leicester Association for Promoting the General Welfare of the Blind 250*l.*;

"(6.) To the Leicester Guild of the Crippled 250*l.*;

"I direct that the receipts of the respective treasurers for the time being of the before mentioned charitable institutions and Great Meeting (or such other officer or officers thereof as my trustees shall think fit to pay the money to) shall be good discharges for the said legacies, and if any doubt shall arise in any case to [*sic*] the identity of the institution intended to benefit the question shall be decided by my trustees whose decision shall be final and binding on all parties."

The question arose on the second of these legacies. There was no society whose name was merely "The National Association for the Prevention of Consumption," but there was a society incorporated in 1899 whose full name was "The National Association for the Prevention of Consumption and other Forms of Tuberculosis," whose office was at 20, Hanover Square, London. This association had power to constitute branches, and amongst other branches there was an unincorporated branch whose full name was "The Leicester and Leicestershire Branch of the National Association for the Prevention of Consumption and other Forms of Tuberculosis."

The legacy of 1000*l.* was claimed on behalf of each of these charities, which for this purpose were completely independent institutions.

It appeared that the testator had been a subscriber to the Leicester and Leicestershire branch for some years prior to his death, and had not subscribed to the National Association itself. Extrinsic evidence of intention was also offered for the purpose

of showing that the Leicester and Leicestershire branch was the charity intended to be benefited by the testator.

The trustees of the will were desirous of deciding the question if they had power so to do, in which they were supported by the treasurer of the Leicester and Leicestershire branch. The National Association on the other hand insisted that the question should be decided by the Court.

Under these circumstances the trustees took out this originating summons against the National Association and the treasurer of the Leicester and Leicestershire branch as defendants for the determination (1.) of the question whether they had power to decide whether the legacy in question was intended for the benefit of the National Association or for the benefit of the Leicester and Leicestershire branch, and whether their determination of the question would be final and binding both on the National Association and on the Leicester and Leicestershire branch; and (2.) if it should be determined that the trustees had no such power, then that the question might be determined by the Court. On the first point,

Hughes, K.C., and *A. Adams*, for the trustees. The legatees take subject to the terms of the will and cannot object to the determination of the question by the trustees, a doubt having clearly arisen as to the identity of the legatee and the trustees being willing and desirous to exercise their power. The precedent books contain common forms conferring similar or analogous powers upon executors or trustees relating to specific bequests and the like, all of which involve taking property from one person and giving it to another: Davidson's Precedents, 2nd ed. vol. iv. pp. 46, 203; Key and Elphinstone's Precedents, 10th ed. vol. ii. pp. 930, 950, n. Powers of maintenance and discretionary trusts to apply income in favour of such one or more of a class as trustees think fit are examples of the same character. *Massy* v. *Rogers* (1) may be cited against us, but the first proposition stated in the head-note to the report of that case was not necessary for the decision and goes too far. The subject was also discussed in *In re Thompson*. (2) The gift in the present case is

(1) 11 L. R. Ir. 409. (2) (1910) Victorian Law Rep. 251.

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a gift sub modo. The direction is not repugnant to but a qualification of the original gift. Assuming that the trustees have the power, it is immaterial that in exercising it they may take into consideration circumstances which would not perhaps be taken into consideration by the Court itself. The real effect of the gift may be to give a power of selection to the trustees, but there is no objection to that. [They also cited *Steff* v. *Andrews*. (1)]

Coldridge, K.C., and *MacSwinney*, for the treasurer of the Leicester and Leicestershire branch, supported the same argument. There must be a reasonable doubt about identity so as to give rise to the power conferred upon the trustees, but subject to the existence of that doubt—which is not disputed to exist in the present case—all analogy is in favour of supporting the right of the trustees to determine the question. For instance, the power in the present case involves no greater interference with the legatee's rights than the common instance of a discretionary power given to trustees to settle a daughter's share. The testator in *Charter* v. *Charter* (2) named a private individual to be the arbiter of proper allowances to be made to his widow, and Lord Cairns L.C. quotes that passage of the will in his speech without expressing any doubt as to its validity.

Tomlin, K.C., and *J. W. Manning*, for the National Association, were not called on.

WARRINGTON J. The testator bequeathed certain charitable legacies and amongst them a legacy of 1000*l.* to the "National Association for the Prevention of Consumption." He then inserts this direction: "If any doubt shall arise in any case to" —meaning of course "as to"—"the identity of the institution intended to benefit the question shall be decided by my trustees whose decision shall be final and binding on all parties." It is said that in this case a doubt has arisen whether the legacy in question ought to be given to one institution or another. The trustees desire to decide the question finally if they have power so to do. Of the two institutions between whom it is said that a doubt exists, one desires that the trustees should decide

(1) (1816) 2 Madd. 6. (2) (1874) L. R. 7 H. L. 364, 379.

and the other desires—and this is the important point—to have the question determined by the law of the land, that is to say, by the King's Courts administering the law. The question is whether the alleged legatee,—I try to use some expression that shall be entirely without prejudice—or the institution which claims to be the legatee, is debarred from having the decision of the Court on the question because the testator has inserted this direction in his will. In my opinion it is not competent for a testator to confer certain legal rights by giving legacies and at the same time to say that the question whether that legal right is or is not to be enjoyed is not to be determined by the ordinary tribunal—in other words, it is not competent for him to deprive the person to whom that legal right is given of one of the incidents of that legal right; and if necessary I should be prepared to rest my decision upon the ground that the attempt to do so is an attempt to do two inconsistent things. In my opinion the gift of a legacy to a legatee, even if it be of doubtful construction, is in fact a gift to the person who shall be determined to be the legatee according to legal principles, and to give effect to a provision such as the provision which the testator has inserted in his will in the present case is in fact to assert the direct contrary and to say that the gift is not to the person who shall be determined to be the legatee by the Courts which administer the legal principles to which I have referred, but to the person who shall be decided to be the legatee by the trustees, who by the will are unfettered and may make their decision upon such grounds as they think fit. I think therefore that I can safely decide the point on that ground alone; but I also think that I may and ought to decide it on wider grounds, namely, that it is contrary to public policy to attempt to deprive persons of their right of resorting to the ordinary tribunals for the purpose of establishing their legal rights. That particular point has been decided in Ireland in a case the judgment in which though not binding on me is certainly in accordance with my own opinion, and, even if it were not, is still one to which I should pay the greatest respect. I refer to the decision of Chatterton V.-C. in *Massy* v. *Rogers* (1), which seems to me

(1) 11 L. R. Ir. 409, 416, 417.

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to be exactly in point in the present case. The head-note to the report on this particular matter is, "A testator cannot, by constituting private individuals a forum domesticum to decide whatever questions may arise upon the construction of his will, oust the jurisdiction of the Court to determine such questions." The power conferred on the trustees by the testator in that case was in these terms: "I have now stated my will, to the best of my ability, clearly as to the disposal of my different properties; yet, in order to prevent disputes, I shall add this clause: And it is my will that all differences of opinion as to my intentions"—that means as to the proper construction to be attached to his will—"shall be left to the decision of the executors, whose decision shall be final if they agree; and if they do not, they shall appoint an umpire, from whose judgment there shall be no appeal." The Vice-Chancellor said this: "The testator has attempted to reserve for the decision of his executors as a forum domesticum all questions upon the construction of his will, and to oust the jurisdiction of the ordinary tribunals to deal with them. His power to do so is contested as being against the policy of the law. This is not the case of a discretion being vested in the executors, as in *Gisborne* v. *Gisborne* (1), *Tabor* v. *Brooks* (2), and other similar cases, to apply the personal estate without control to particular purposes with which, in the absence of fraud, this Court cannot interfere. In such cases no question of public policy exists. Here the authority which the testator desires to vest in his executors is one which the law entrusts to Her Majesty's Courts, which must be freely open to all her subjects. The testator appears to have considered, whether rightly or wrongly, that it would be for the advantage of his legatees that their mutual rights under his will should be necessarily submitted to a private tribunal constituted by himself. No case has been cited where such a condition was given effect to, even as to real estate, or as to personal estate with a gift over on breach of the condition." Then he refers to the rules applicable to cases of contract, that is to say, that according to common law, independent of the statutes such as the Common Law Procedure Act and the Arbitration Acts, the

(1) (1877) 2 App. Cas. 300. (2) (1878) 10 Ch. D. 273.

parties to a contract cannot oust the jurisdiction of the ordinary Courts. They may, of course, make the decision of some tribunal, some individual, not being one of His Majesty's Courts, a condition precedent to the commencement of an action for recovery of money; that is another thing altogether; but if once the contract gives a legal right it is not competent at common law for the parties to the contract to oust the jurisdiction of the Courts. Having dealt with that part of the case, the Vice-Chancellor goes on: "What the parties to a contract cannot be permitted to effect by stipulation cannot, in my opinion, be effected by a testator in his will. The only mode in which conditions or provisoes in a will can be made effectual is by election. A legatee or devisee cannot take under a will and against it; if he takes under it, he must conform to its conditions and submit to its provisoes. But I cannot hold that by this method any proviso or restriction contrary to the policy of the law can be enforced, any more than it could be by express stipulation in a contract. Certain rights are claimed under a will, the existence of which do not depend on the fulfilment of any condition precedent, or upon any ascertainment by a prescribed method. The nature and extent of these rights is the subject of controversy, but the rights are there, and the policy of the law is that they shall be ascertained by the constituted tribunal. Every subject of the realm is entitled to free access to those tribunals, to ascertain, establish and enforce the rights which the law gives him, whether arising upon contract, or upon testamentary disposition. In my opinion, any attempt to exclude this right is unlawful and inoperative." It seems to me that that statement of the law exactly applies to the present case. In the present case, as in the case before the Vice-Chancellor, certain rights are claimed, namely, the right to be treated as the legatee, the existence of which does not depend upon the fulfilment of any condition precedent or upon any thing to be ascertained by a prescribed method. It has been attempted to say that the gift is equivalent to a gift to such institution as the trustees shall select. In my opinion that is not the effect of this gift. The gift of this legacy is to a particular institution, and that institution, if it proves its right, is entitled to the legacy and is not in the position of

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having to fulfil any condition precedent; nor does the right depend on ascertainment by any prescribed method; the right is ascertained by the gift itself. That being so, it seems to me impossible for the testator to qualify that gift by providing that the right to the legacy, the subject of the gift, shall be determined by some tribunal other than that of the country. In my opinion, as Chatterton V.-C. held in *Massy* v. *Rogers* (1), the provision in this case is unlawful and inoperative, and therefore the question so far as there is a question between the two claimants must be decided in the ordinary way.

The second question raised by the summons was then argued.

Tomlin, K.C., and *J. W. Manning*, for the National Association. The legacy is in terms given to the National Association and not to the Leicester and Leicestershire branch. The National Association was known to the testator.

[They were stopped.]

Coldridge, K.C., and *MacSwinney*, for the treasurer of the Leicester and Leicestershire branch. The surrounding circumstances are sufficient to show that the testator intended the branch and not the National Association itself. The testator was a Leicester man of business and had subscribed to the branch; and the other five charities mentioned in clause 13 of the will are all connected with Leicester. [They cited *National Society for the Prevention of Cruelty to Children* v. *Scottish National Society for the Prevention of Cruelty to Children* (2).] Moreover, there is in the present case a latent ambiguity or equivocation in the description which renders parol evidence of intention admissible: Wigram on Extrinsic Evidence, 5th ed. pp. 110, 143, proposition 7; *In re Wolverton's Mortgaged Estates* (3); and the parol evidence in the present case if admissible is decisive.

WARRINGTON J. I feel no doubt at all how this question should be determined. The testator has given a legacy of 1000*l.* to the National Association for the Prevention of Consumption. There

(1) 11 L. R. Ir. 409. (2) [1915] A. C. 207, 211, per Earl Loreburn.
(3) (1877) 7 Ch. D. 197.

is a corporate society called the National Association for the Prevention of Consumption and other Forms of Tuberculosis. If there were no more in the case than that, there could be no possible doubt that the testator meant to give the legacy to that society, in other words the testator has used a description which indicates without doubt his intention to give the legacy to the National Association for the Prevention of Consumption and other Forms of Tuberculosis. It is said, however, that the legacy is not given to the National Association for the Prevention of Consumption and other Forms of Tuberculosis because that society has a number of branches and one of the branches is established in Leicester and Leicestershire, where the testator lived, and is known as the Leicester and Leicestershire Branch of the National Association for the Prevention of Consumption and other Forms of Tuberculosis. It is plain, however, that the testator has in terms given the legacy to the National Association itself and not to a branch of the association. Then it is urged that there is such a latent ambiguity in the testator's language that I ought to admit evidence of actual intention outside the will altogether, and that, if that evidence is admitted, it is quite clear that the testator meant to give the legacy to the branch and not to the association. In my opinion extrinsic evidence of intention according to the rule stated in Wigram on Extrinsic Evidence can only be admitted where there is a description applying indifferently to more than one person or society, while in the present case the description does not in my opinion apply indifferently to more than one society, but applies only to the National Association; and, if I were to admit such evidence of intention as is suggested, I should in fact be allowing the testator to make a will by word of mouth. There is in my opinion no doubt about the legal rule which excludes this evidence, and I must hold that the legacy in question is given to the National Association.

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A. C.