Prerogative — No 133. — Bargrave — Gilbert v Garland & others — Major.

Dr Collyer, Wynne — Dr Harris & Calvert.

Q. can the Bond be construed to be Testamentary?

Dr Collyer... Thos: Gilbert Esq died 30 Novr last. On Decr 31. his Will dated 20. Jany 1760 (wch shd be 1761) & a Codicil dated 12 May 1766, both of his own hand writing, were proved by Jas Garland & Stracey Fill Esqrs the Exors therein named; Jas Garland was indebted to the Deceased 1000 £ by Bond, dated 8 Novr 1750, which Bond the Deed gave Anne Gilbert his Wife, without assigning it to any Person in trust for her use, but from the time he gave it to her, constantly considered it, as her sole property, & accounted with her, not only for the Interest, but for such part of the Principal, as was paid him from time to time by Garland. In one of Gilberts Pocket Books is an Entry, wch was originally a draft of a Will wch he executed 29 July 1754. in presence of 3 Ws & by a Memm in his own hand writing, on the opposite leaf to that, whereon the Draft is wrote, it appears that on Decr 8. he made many Obliterations & Alterations in this Draft, & 20 Jany 1760 fairly transcribed the said Draft agreable to the several Obliterations & Alterations, he had made therein, & executed the same in presence of 3 Ws. the Authenticity of these Entries appear, by comparing them with the Will proved by Garland & Fill, with which they agree in every respect, as to Date & Circumstances. Garlands Bond is not specially mentioned, in this Draft, in the Pocket Book, or in the original Will itself, but immediately under the draft of this Will, is a Memm dated 22 Jan: 1761. as follows,

" P.S. The Bond for my Lady. I never knew a more disinterested Wo-
" :man in my Life; she never gave any hint to desire me to pro-
" :vide for her, in any shape, & had more valuable Qualities than
" most men, I ever conversed with; This is real Truth.....
" NB Let it be remembered, that the Landed Estate is improved
" a hundred a year, since it came into my Hands, & the Colliery.
" Founded, which may be reckoned one hundred & fifty a year
" clear, in general, & likely to be improved; therefore if any Re-
" =lations murmur, they are undeserving of what is left to...
" their Children. Jan: 22. 1761. St James's Square.....

It appears by several Indorsements, on the Back of this Bond that Garland constantly paid the Interest, & from time to time, several Sums in part of the Principal; particularly 19 Novr 1763 40 £ Interest & 100 £ Principal on said Bond: & 19 Nov: 1765. he paid £ 16. 5. 0. Interest, & £ 50 Principal; & then had reduced the Principal money due on the said Bond to £ 600 – These are 2 other Memm in two other Pocket Books of the Deceased, exactly tallying, with the afd Indorsements. the First is, as follows

" Novr 19. of Garland, Interest 40. Ditto Principal 100."
" on my Lady's Bond."

The Second is thus

" Novr 19. of Garland 50. 0. 0. Principal."
" 16. 5. 0. Interest half a year; due Novr 19. 600 £."
" remain for my Lady."....

The Deceased constantly mentioned Mrs Gilbert, by the Appellation of my Lady – The Residuary Legatees contend, that the Devise not being regularly made, in a Will, or Codicil, the Bond must sink into the Residuum, & cannot be conveyed, by either of the afd Memm to Mrs Gilbert, neither of which, they say, by Law, can be considered of a Codicillary, or a Testamentary nature.

Mrs Gilbert apprehends the Intention of the Testator (tho, not expressed agreable to the precise modes of Law,) is the point to be considered, & these Memm: being confessedly of Mr Gilberts hand writing, & strongly declarative of his Intentions, has propounded these Memm: as a

Codicil to the last Will & Testament of the Deceased, & amongst other things, pleaded that Mr Gilbert considered said Bond, as the absolute property of his said Wife, & intended the same for her at his death; that Deed by Will gave his Wife an Annuity of 200 £ pr Annum & 500 £ in money; that the Deed, a short time before his death, told one of his intimate Friends, that he had given his Wife 200 pr An. & better than 1000 £ in money; meaning the 500 £ given her, in his Will, & the 600 £ due on Garlands Bond.

Dr Harris.... Thos: Gilbert died 30 Novr last; he left a Will & the Will is dated in 1760 but executed in 1761. & the Codicil 12 May 1766. The Exors took Probate: By the Will the Testator says, "I leave my Anne Gilbert "
" who has lived with me many years, & behaved alway like a Wife "
" 200 £ pr An. & 500 £ in money." he leaves 1000 £ to his Sister, & the Residue to his Exors, for the use of his Sister during life (except Jewels &c wch he bequeaths to his Wife) & 100 £ to each of his Exors – In the Codicil he says, "In case of any Accident before an Alteration of my Will, I ad "
" have this Paper looked on, & executed, as my Codicil by my Exors. "
At the End of the Codicil, is this Memorandum, "My Will in Mr
" Garlands hands, & a Copy of it in my Bureau." (The Exors have been cited to prove a 2d Codicil marked No A) The Bond for my Lady Septr "
6. 1754." Neither of the Exors believe the said Exhibit to be intended by the Deed, as a Codicil to his Will.

Dr Collyer..... I am Council for the Widow, who has an Annuity of 200 £ pr An. & 500 £ the Will & Codicil leaves the Residue to Dr Reeves, who married the Deceds Sister: the Will is made from a Draft, in a Pocket Book with Obliterations &c and corresponds with it: I mention this to shew, that he wrote in a Book, wch he considered, as containing serious matters. It bears date 2 days after the date of his real Will. The date of the Will is wrong: then the following Memm will appear to be entered in consequence of the Execution of the Will; as soon as he had done it; he makes it by way of Postscript: it looks as if it was connected with the Will, be it wrote when it will, & when he had made the Obliterations in the Will he intended should stand he left this Postscript standing: Is it possible a man could have a 1000 £ Bond & be makeing his Will, yet take no notice of it? he considered the Bond as disposed of to his Wife, & chose this manner of confirming the Gift; he had deposited his Will with a Friend, he keeps this Memm secret: he conceals this from Dr Reeves & his Wife, to whom he possibly thought it might give Umbrage; he had not given it in Trust, so it was no gift to his Wife, he might take it back at any Time; but he does all he can to convince the World he intended it her: he calls it my Lady's Bond; he knew this was insufficient to secure it to her, unless, he gave it by some Testamentary Disposition: Nothing can arise from the Confession of these Gentlemen; as not believing it to be a Codicil, if they had, they ws have taken Probate of it, but being doubtfull of the Point, they take the Opinion of the Ct: they Ct never confess it in their Answers: the Exors say, they believe he had no other Bond: the only Question, is Can this be pronounced for as Testamentary? By Law there is a difference between a Testament & a Codicil; one Testament will destroy another: with respect to personal Estate, it is immaterial wh it is a Will or Codicil; if it is the Intention of the Deed, it is a Testamentary disposition; it is sufficient if the Intention can be proved: if Codicils are ever so numerous, the Exor must take Probate of them; where they contradict each other, the Parties interested share: this Codicil contradicts nothing, it is Substantive, therefore may easily stand, with the Will & the other Codicil.....

Dr Wynne..... I am also Council for Mrs Gilbert: the Deed in 1754 gives his Wife £ 150 Annuity, & 1755 had in Contemplation, an addition of 50 £ to her Annuity.