Privy Council Appeal No. 15 of 1938

Philip Graham Greenwood - - - - - - *Appellant*

v.

Philip Graham Greenwood and others - - - *Respondents*

FROM

THE SUPREME COURT OF FIJI

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND FEBRUARY, 1939

Present at the Hearing:

LORD THANKERTON.

LORD ROMER.

LORD PORTER.

[*Delivered by* LORD THANKERTON.]

This is an appeal from an order of the Supreme Court of Fiji, dated the 27th September, 1937, on an originating summons issued by the appellant as the surviving trustee of the estate of George Freeman Martin, deceased, on the 12th August, 1937.

George Freeman Martin (hereinafter called "the testator"), died on the 28th July, 1912, leaving a will dated the 13th June, 1912; he died without issue, but survived by his wife, Catherine Helen Rose Annie Martin, and a number of brothers and sisters, including a sister, Elizabeth Martin.

Under his will the testator appointed his wife and the appellant, who was his nephew, to be his trustees and executors, and he thereby gave all his property both real and personal to his trustees upon the trusts set out therein. Under these trusts, after payment of debts, etc., and delivery of a legacy of livestock, and subject to the payment of certain annuities, the widow enjoyed the use of the testator's household furniture and effects and house and buildings, and the free income of the estate during her life. The will proceeds:—

> "and as to the whole of my property remaining at the death of my wife I hereby direct and empower my said wife to dispose of any undivided third share or interest in same by will to any person or persons and in any manner she may wish in as full and ample a manner as I myself could now dispose of such third share or interest and I direct my surviving trustee to sell and realise all of my said property remaining at the death of my wife and to apply the third of the proceeds in terms of the will of my said wife and to divide the remaining two-thirds equally amongst all my brothers and sisters now living and if any of them shall have predeceased my wife then to the child or children of such brother or sister shall be given the share such brother or sister would have received if alive."

The widow of the testator died on the 21st April, 1936, but she was predeceased by the testator's sister, Elizabeth Martin, who had survived the testator, but had died on the 15th May, 1915, unmarried and without issue. The appellant, as executor of Graham Lord Greenwood, the executor nominate of Elizabeth Martin, now represents her estate.

On the death of the widow, the period of distribution of the two-thirds of the residuary estate given to the testator's brothers and sisters arrived, and a question arose as to whether the estate of Elizabeth Martin was entitled to share in the distribution; this summons was issued for determination of that question. The respondents are the brothers and sisters of the testator or persons claiming under them, and the executor of the widow.

The summons was heard by Corrie C.J., who gave judgment on the 27th September, 1937, by which he held that the share which Elizabeth Martin would have received had she survived the testator's widow was undisposed of by the will and fell to the testator's heirs *ab intestato,* and he made an order of the same date to that effect, which is now appealed against. The respondents did not appear at the hearing before this Board, though they had entered appearance in the appeal.

The only case referred to in the judgment of the learned Chief Justice is a decision of this Board in the case of *Browne* v. *Moody,* [1936] A.C. 635. The view of the learned Judge is expressed as follows:—

> " It is argued, and all parties who have appeared before me have taken this view, that the facts in the present case are indistinguishable from those in *Browne* v. *Moody*. I am unable to accept that view.
>
> " In *Browne* v. *Moody* the interest which vested in one of the named beneficiaries upon the death of the testatrix was liable to divestiture in the event of the beneficiary predeceasing the life tenant leaving issue. In the present case the ' specified contingency ' upon the happening of which the interest which vested in a brother or sister of George Freeman Martin upon his death is subject to divestiture is expressed in the words:—' And if any of them shall have predeceased my wife.'
>
> " That is to say if a brother or sister predeceased the life tenant, divestiture occurred whether such brother or sister died leaving issue or not. Elizabeth Martin has predeceased the testator's widow; the event upon which divestiture of her interest was to take place has occurred; and her representative is not entitled to the share which she would have received if she had survived the life tenant.
>
> " There remains therefore the question in whom is such share now vested."
>
> " The answer to that question in the will is in the following terms:—
>
> " ' Then to the child or children of such brother or sister shall be given the share such brother or sister would have received if alive.' "
>
> " Upon the further question in whom is such share to vest in the event of there being no child of such brother or sister, the will is silent. That is to say, in the events which have happened,

the testator has died intestate in respect of the share of his estate which his sister Elizabeth would have received, if she had survived his wife.

" It has been argued that the testator must be taken not to have intended an intestacy and must have intended that the will should be read as though the contingency upon which divestiture of the interest of a brother or sister of the testator was to occur were ' if any of them shall have predeceased my wife leaving issue.'

" But as Lord Macmillan said, quoting with approval the observation of Rinfret J. in the case cited, ' The golden rule in interpreting wills is to give effect to the testator's intention as ascertained from the language he has used,' and I do not find manifested in the language of the testator the intention suggested."

It is to be regretted that the learned Judge did not continue the last quotation from the judgment delivered by Lord Macmillan, for it proceeds:—

" but in the present instance they do not find manifested in the language of the testatrix the intention which the Supreme Court have distilled from it. The testatrix has made her testamentary dispositions in terms of very ordinary occurrence from which the Courts in a long series of cases have drawn a contrary inference as to intention."

In the first place, their Lordships are clearly of opinion that right to the two-thirds of the residuary estate vested in the brothers and sisters of the testator upon his death. The language of the present will is even clearer than the terms of the will in *Browne* v. *Moody*, and it is unnecessary to recapitulate the authorities for this well-established rule of construction, which are fully discussed in the judgment in that case. The learned Judge appears to accept the view that vesting did so take place; but, if so, it is equally well established that such a vested interest will only be defeated by a clause of divestiture expressed in favour of someone else in a given event, or a clear and unambiguous clause of forfeiture in a given event. In the present case there is no such clause of forfeiture, and the only direction for divestiture in favour of someone else, is that expressed in favour of the issue of a legatee who has predeceased the widow. The learned Judge would appear to have treated the general mention of predecease of the widow as inferring a forfeiture of the vested interest of the legatee who predeceased the widow without issue; but it is settled that such a forfeiture must be clearly expressed as such. An illustration of such a forfeiture is to be found in *Hurst* v. *Hurst,* (1882) 21 Ch. Div. 278, in which Jessel M.R. said (p. 293):—

" This does not agree with the words of the will, which are that the bequest to the child transgressing the condition shall be ' absolutely forfeited.' The intention of these words is clear. There are cases in which it is plain that the original gift was not intended to be defeated unless there were objects to take under the gift over, as, for instance, in cases of substitutionary gifts to children; but here we have an intention separately declared that the gift is to be forfeited."

The present case cannot be distinguished from the case of *Smither* v. *Willock,* [1804] 9 Ves. Jun. 233, in which the testator left his personal estate and money to his wife for her

life and from and after her death the capital to be divided between the testator's brothers and sisters named in the will in equal shares, but in case of the death of any of them in the lifetime of the wife the shares of him or her so dying to be divided between all and every his, her or their children. One of the brothers died in the lifetime of the widow, without having ever had a child. Langdale M.R. declared the share of the deceased brother to be vested subject only in the event of his death in the life of the testator's widow leaving children, and consequently, that event not having happened, his representative was entitled. Reference may also be made to "Hawkins on Wills" (3rd edition) at page 318, where other cases are cited, and the same principle of construction appears to be implicit in what is sometimes called the rule in *Lassence* v. *Tierney,* (1 Mac. & G. 551), which is thus expressed by Lord Davey in *Hancock* v. *Watson,* [1902] A.C. 14, at p. 22:—

> "For, in my opinion, it is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be."

Their Lordships are therefore of opinion that Elizabeth Martin's share of the residue vested in her on the death of the testator, subject to divestiture only in the event of her predecease of the testator's widow leaving a child or children, and that, such event not having occurred, her representative is now entitled to her share. Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the order of the Supreme Court should be set aside and that there should be substituted therefor a declaration in the above terms. As requested by the appellant, the costs of all parties as between solicitor and client in this appeal and in the Court below will be paid out of the said share.

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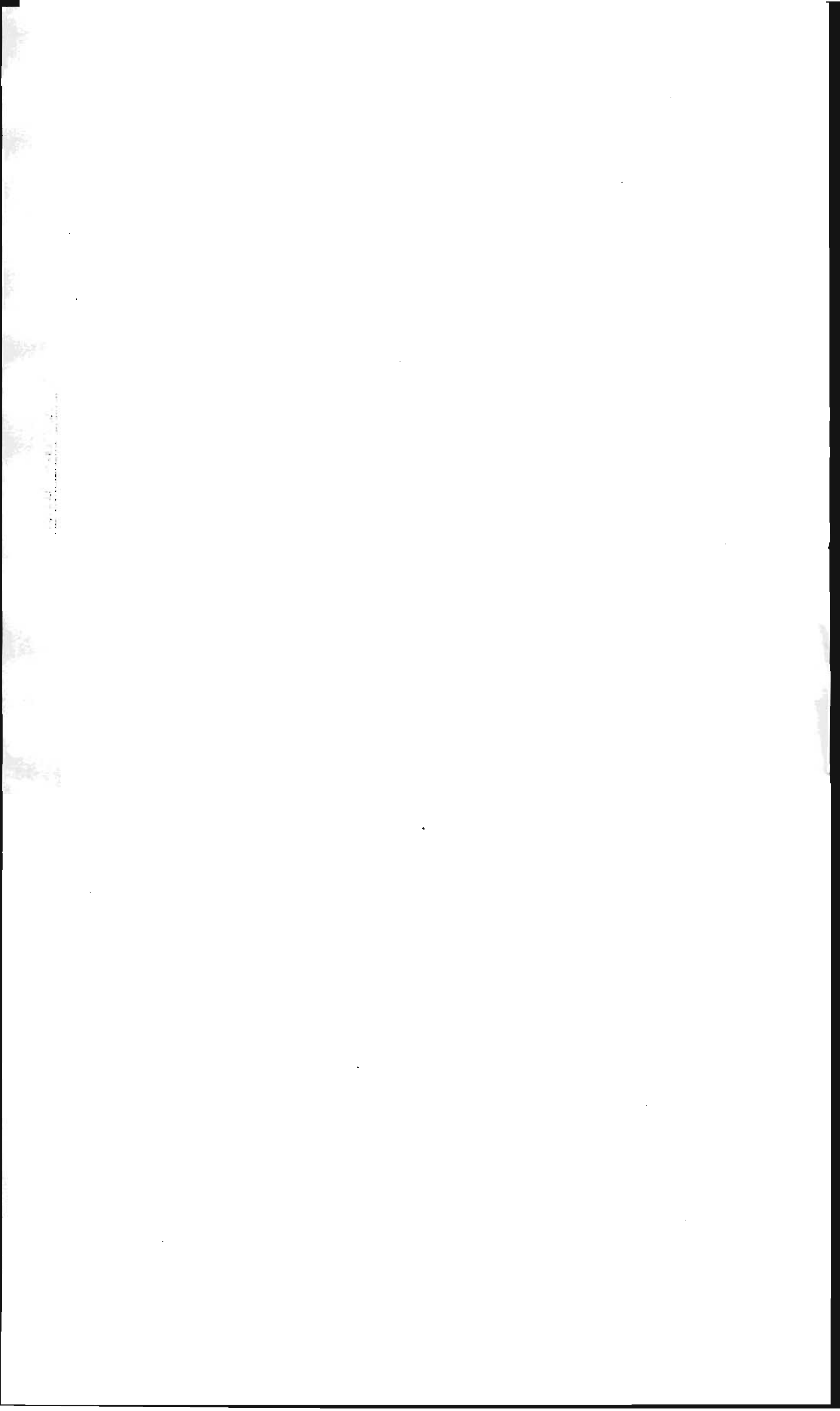

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DELIVERED BY LORD THANKERTON

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