

Privy Council Appeal No. 114 of 1914.

Charles Holwell Ward and others - - *Appellants,*

v.

Henry Isaac Close Brown and others - - *Respondents.*

FROM

THE SUPREME COURT OF JUDICATURE OF JAMAICA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 8TH JULY 1915.

Present at the Hearing.

LORD DUNEDIN.

LORD SUMNER.

LORD SHAW.

SIR EDMUND BARTON.

[*Delivered by* LORD SHAW.]

This is an appeal from an Order of the Supreme Court of Jamaica dated the 14th of July 1914, which affirmed a decision of the Chief Justice of Jamaica dated the 28th of April 1914.

The question raised is as to the construction of certain portions of the will of Lieut.-Col. the Hon. Charles James Ward. The will is dated the 24th September 1913. Mr. Ward died on the 7th December 1913.

The clauses raising the point of construction are these :—

“7. I devise and bequeath all my Real and Personal
“ Estate not hereby otherwise disposed of unto my Trustees
“ upon trust that my Trustees shall sell call in and convert

" into money the same or such part thereof as shall not
 " consist of money and shall with and out of the moneys
 " produced by such sale calling in and conversion and with
 " and out of any ready money pay my funeral and testa-
 " mentary expenses and the legacies and bequests be-
 " queathed by this my Will or any Codicil hereto and shall
 " invest the residue of the said moneys by placing same
 " on deposit in the Colonial Bank and the Bank of Nova
 " Scotia or either of the said banks at their discretion
 " and shall stand possessed of the said residuary trust
 " moneys and investments for the time being representing
 " the same and the income arising therefrom (hereinafter
 " called the Residuary Trust Funds) in trust to pay out of
 " the said income thereof during the life of my said wife
 " the following annual payments (payable in equal monthly
 " instalments) :—

" To my said wife—Six hundred pounds ;

" To my son Charles Ward—Four hundred pounds ;

" To my son Arthur Claud Ward—Six hundred
 " pounds ;

" To my son Harry Ward—Five hundred pounds ;

" To my son Frank Ward—Five hundred pounds ;

" To my daughter Mrs. McGrath—Four hundred
 " pounds ;

" To my daughter Mrs. Haggart—Four hundred
 " pounds ;

" And to my daughter Sybil Ward—Three hundred
 " pounds.

" And from and immediately after the decease of my said
 " wife my Trustees shall stand possessed of the Residuary
 " Trust Funds in trust for all my said children in the
 " following proportions and shares—To each of my said
 " sons a sum equivalent to four twenty-fifths of the said
 " Residuary Trust Funds and to each of my said daughters
 " a sum equivalent to three twenty-fifths of my said
 " Residuary Trust Funds.

" 8. If any child shall die in my lifetime or after my
 " decease leaving a child or children who shall survive me
 " then and in every such case such last-mentioned child or
 " children shall take and if more than one equally between
 " them the share which his or her or their parent would
 " have taken of and in the Residuary Trust Funds if
 " such parent had survived me."

On the 22nd December 1913, the will was
 duly proved by the executors named therein.

The testator was survived by his widow and by all of the seven children above named. They are all still alive with the exception of Captain Arthur Claud Ward, who died in action in France since the suit was instituted, viz., on the 26th August 1914. His widow and two infant children have been made parties to this appeal. Some of the other six children of the testator have children; some have not. The details are unnecessary. The true contest in the case has reference to the vesting of the shares of estate dealt with in the clauses above quoted.

By the Originating Summons, a question—the only one brought before the Board—was put to the Court as follows:—“Whether each of the “plaintiffs (the testator’s children) take a vested “interest in respect of his or her proportion and “share in the residuary trust funds bequeathed “to him or her under the will of the said “testator.” It is somewhat unfortunate in the opinion of their Lordships that the answer, as worded by the Courts below, is indirect and negative in form. But the Board does not differ in substance and result from the judgment as that is explained by the learned judges of the Supreme Court.

Both parties admitted in debate that under the clauses quoted there was vesting *à morte testatoris* in the testator’s children, they having survived him. The appellants maintained that this vesting was absolute; the infant respondents, on the other hand, maintained that in the case of the death of any child before the period of distribution, viz., the death of the testator’s widow and of such child leaving children, the vesting of the particular share was subject to defeasance in favour of such grandchildren.

Clause 8 of the will does undoubtedly raise difficulty. The appellants’ contention was that

grandchildren could not take unless their parent had died in the testator's lifetime. The will says, however, "if any child shall die in my life—*time or after my decease*"; and so the appellants boldly contend that the words "or after my decease" should be struck out. The respondents on the other hand are met by the fact that vesting *à morte*, and no later, is indicated by two expressions in the same clause referring both to children and grandchildren as surviving "me"; and they boldly contend that the word "me" should be struck out.

Fortunately clause 7 does not a little to help towards a solution. That clause makes clear what was the mind of the testator on the important subject of the realisation and distribution of his estate. These were to take place at the death of his widow. She and each of his seven children were provided with fixed annuities to be paid during the period of his widow's survivance. All were provided with a minimum income until the widow's death, and thereupon and once for all the estate was to be divided.

Their Lordships think this consideration is paramount, and that language used by the testator bearing on the death of any of his children leaving children is *primâ facie* referable to a child's death occurring prior to the distribution of the estate. To select for preference grandchildren born of a child who had predeceased himself, and to exclude from the succession grandchildren born of a child who had survived him but predeceased his wife—this preference and exclusion to take place in regard to grandchildren all of whom had been born and all of whose parents had died prior to the appointed distribution of the estate—this does not appear to accord with the intention of the testator.

While it would not be sound to hold that any defeasance could take place subsequent to the prescribed period of distribution, their Lordships are of opinion that at and up to that period defeasance in favour of grandchildren can and was intended to occur. The language of Lord Hatherley in *O'Mahoney v. Burdett*, 7 E. & L. Ap. p. 403, shows the importance of the consideration as to the date of division and its bearing on the question of defeasance:—

“ In those cases where the Court has found upon the face
 “ of the will a positive direction to pay over the personalty to
 “ the legatee, or to make a distribution among several
 “ legatees at a given time, the period of distribution being
 “ fixed at which, as it appears from the face of the will,
 “ the whole estate was intended to be entirely disposed of
 “ and divided, and to pass from the hands of the executors,
 “ the Courts have laid hold of that circumstance to say, ‘ We
 “ ‘ hold this defeasance to be before that period of distribu-
 “ ‘ tion arrives,’ holding it to be an unreasonable construction
 “ of the testator’s will to say that he directed on the one
 “ hand that the money shall be absolutely paid and divided
 “ and distributed, and put into the hands of those who,
 “ having it in their hands, will of course spend it without
 “ any further trust, and on the other hand that a subsequent
 “ event, namely, a certain person’s dying childless after that
 “ distribution has taken place should divest the property,
 “ that is to say, make it necessary for the executor to take
 “ steps to get back again, and recall that money which he
 “ has paid in order to hand it over to those who would take
 “ under the executory devise.”

The assistance derived from clause 7 thus enables the ambiguity caused by clause 8 to be cleared up. The whole will must of course be read together, according to the ordinary principle set forth in many authorities and recently by this Board in *Chunilal Parvatishankur v. Bai Samrath*, 38 Indian L.R., Bombay Series 399.

Their Lordships will humbly advise His Majesty that the appeal be dismissed, but that the judgment of the Supreme Court be varied

in its declaration, and that it be declared that the plaintiffs under the provisions of the will acquired on the death of the testator a vested interest liable to defeasance in the event of any of them dying in the lifetime of the testator's widow leaving a child or children.

The costs of all the parties, taxed as between solicitor and client, will come out of the estate.



In the Privy Council.

CHARLES HOLWELL WARD AND
OTHERS

v.

HENRY ISAAC CLOSE BROWN AND
OTHERS.

DELIVERED BY LORD SHAW.

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