Privy Council Appeal No. 76 of 1916.

George William McCaul - - - - *Appellant,*

v.

Donald Fraser - - - - - - *Respondent,*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JANUARY, 1917.

Present at the Hearing:

LORD BUCKMASTER.
LORD DUNEDIN.
LORD PARMOOR.
SIR WALTER PHILLIMORE, BART.

[*Delivered by* LORD BUCKMASTER.]

This is an appeal from a judgment of the Court of Appeal in New Zealand, which dismissed with costs an appeal from the Chief Justice sitting in the Supreme Court, in an action in which the present appellant was the plaintiff and the respondent the defendant. The object of the action was to set aside a deed executed on the 6th December, 1901, between the beneficiaries, under the will of one Duncan Fraser, and the respondent, Donald Fraser. Catherine McGregor, of whom the appellant is the special executor for the purpose of these proceedings, was one of the beneficiaries, and the respondent was both beneficiary and trustee. The deed of the 6th December, 1901, is in the form of a conveyance and release by the beneficiaries to the respondent as a trustee, and their Lordships cannot help thinking it is this circumstance that has encouraged the litigation out of which this appeal proceeds.

The facts of the case are these: Duncan Fraser, the testator, died on the 6th August, 1879, having made a will dated the 13th November, 1877, which is in rather unusual terms. By that will he gave to his son Donald Fraser, the respondent, his real and personal estate, upon certain trusts. The first trust is to permit his wife to have the use and occupation during her life of the house and furniture, and, out of the monies that come to the hands of the trustee by virtue of the trusts of the will, to pay to her a clear annual sum of one

hundred pounds a year; and then follows a provision which has given rise to much discussion, in these terms :—

"Upon trust within two years after the decease of my said wife to pay and divide all my real and personal estate and effects whatsoever and wheresoever unto and among such of my children and in such proportions and in such manner as he in his discretion shall think fit."

Now, in certain circumstances, difficult questions might have arisen as to the true construction of this clause, but in the circumstances of this case no such difficulty exists. Whatever might have been the duties of the trustee or the rights of the beneficiaries after the two years had elapsed, it is plain that the defendant, Donald Fraser, was clothed during the period of two years with the power of saying among which of the children, and in what proportions, the testator's real and personal estate should be divided; and, as he himself was one of those children, it would have enabled him, had he thought fit, to have divided the estate substantially in his own favour.

The widow died in January 1893, and the two years ran from her death. At the end of 1894 Donald Fraser appears to have spoken to some of his brothers and sisters as to how he should deal with the property, and they were unwilling that the farm and the home should be sold. That is not surprising, and it certainly is not surprising if Donald Fraser himself shared that opinion. It appears that he had lived on the spot since 1852; that it was by his labour that the land had been reclaimed from swamp; that it was he who had fenced it, had planted it, had built the fences, the houses, the yards, and the sheds, ploughed and cropped the land and brought it into good condition. The brothers and sisters, who thought that in those circumstances it would be well that the property should not be sold but retained by him, appear to have taken only a reasonable and a proper view of the true position; but in those circumstances, of course, the question would arise at once as to how best the division under the will should be effected. The whole matter appears to have been formally discussed by Donald Fraser with several of his brothers and sisters at a meeting that took place at the end of 1894, and therefore within the period of two years from the death of the mother. At that meeting it was arranged—and this statement is taken from the finding of the learned Chief Justice, from which their Lordships see no occasion whatever to differ—that Kate Fraser, the unmarried sister, was to receive an annuity of 50*l.* a year, and John Fraser, another brother, should have the same; that the farm should not be sold, and that the personal property should be given to Kate Fraser, the unmarried sister, and that the other brothers and sisters should have whatever the respondent thought fit to give them. If that be regarded as a statement agreed upon between the members of the family who were then present as to the way in which Donald Fraser should exercise the power which was

conferred upon him by the will, and he agreed that he should so exercise it, and the terms of the arrangement were communicated to Catherine McGregor and the others who were not present, and they assented, no complaint whatever could have been taken to what he did. The proposed arrangement was entirely within the scope of the trust, and the communication of the respondent's decision to the beneficiaries and their approval, if established, affords at once sufficient evidence of the exercise of the power, and also, though this was not strictly necessary, of the assent of all interested parties to the fairness of the proposed division. Now that is what the learned Judge who tried the case and saw the witnesses has found as a fact did occur.

Mrs. McGregor was duly informed. She seems to have been comfortably off. The indigent members of the family had been provided for, and she saw no reason to suggest any alteration in what her brother proposed to do. In these circumstances, if the deed which was ultimately executed in 1901 be regarded, as their Lordships think it should, as nothing but a document for giving effect to this method of dividing the estate, decided on by Donald Fraser in 1894, and approved by the others, then whatever the form of the deed may be, to its substance no objection can be made.

Their Lordships, being anxious to hear all that was to be said on behalf of the appellant, have embarked upon investigation of the evidence, but indeed there was no need for such a course, because the findings of the learned Chief Justice and of the Court of Appeal are quite clear, and are concurrent upon all the material questions of fact. They find that there was no evidence whatever of bad faith or of unfair dealing; that all the parties who were interested knew and agreed, and that Catherine McGregor, through whom the present appellant claims, never did at any time, when she was competent, dispute what had taken place. She is now dead, but at the time of the hearing she was alive, though her memory had failed her and she was no longer in possession of the faculties she had formerly enjoyed; the learned Chief Justice thought, and with him their Lordships are in entire agreement, that had she been in possession of those faculties she never would have countenanced this action or have taken proceedings on her own behalf.

For these reasons their Lordships think that this appeal must fail, and must be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

GEORGE WILLIAM McCAUL

v.

DONALD FRASER.

DELIVERED BY LORD BUCKMASTER.

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