

Err. & App.]

IN RE GOODHUE, ETC.—GARDINER V. GRAHAM.

[C. L. Cham.]

devised to them, and which may in terms of the will devolve upon and become the property of others, some of whom may not yet be in being. The court is left in the unfettered exercise of its sound discretion as to what, according to the particular circumstances arising, it shall order, and as to how it shall proceed.

It is worthy of notice that the petition which invokes the interference of the court proceeds upon the same assertion that the Act of the Legislature proceeded, namely, that the estates devised to testator's children by the will are vested in interest, with the period of enjoyment only postponed. If that be clearly so, then no evil could ensue from the court proceeding upon a summary petition, on notice to the other parties to the deed; but if strangers to that deed contend that no estate, vested in interest, is at all devised to testator's children, and that to deal with the estate upon the basis claimed by the children may work a manifest fraud to the testator's infant grandchildren, then, as it seems to me, the proper course for the court to adopt is to decline to lend its aid to anything prejudicial to such infants in their absence, or otherwise than upon a bill and by a decree of the court, finally determining and adjudicating, according to its ordinary course and proceeding, upon the rights of all parties interested under the will, and by putting a decretal construction upon the deed and the act of the Legislature, which are claimed to have an effect so subversive of all the most acknowledged principles of justice.

It was argued upon the authority of *In re Freeman*, 2 Er. & Ap., 109, that no appeal lies from an order made upon a petition, as the order appealed from here was; but that decision does not, in my judgment, govern this case. There the proper proceeding to lead to the order was a petition, and the subject-matter of the petition was not appealable matter. Here what is complained of is, that the taking any proceeding upon the petition without notice to all parties interested, and affecting to bind the interests of absent parties, and to deprive them of their estates, was, as far as these parties are concerned, contrary to natural justice, and that an order made upon such a petition, which is prejudicial to the testator's grandchildren, was an improper proceeding, and under the circumstances not warranted. *In re Freeman* is, in my judgment, no authority for contending that an appeal does not lie in such a case. I entertain no doubt that it does, and think it was the duty of the trustee to appeal, and that his appeal should be allowed.

WILSON, J.—at present concurred in the judgment of Mr. Justice Gwynne.

MOWAT, V. C.—I have read the judgment which the Chief Justice had prepared, and, as I concur in it in the main, I have not thought it necessary to write a separate judgment. I may observe, however, that we all agree that, so far as affects property, real and personal, which was actually in the Province at the time of passing the Act, the Legislature had power to pass the Act, even assuming the construction heretofore put upon the Act to be the correct one; and that

in holding that the Act was inoperative, so far as relates to property which was out of the Province at that time, I acted on a correct view as to the limits of the power of the Legislature. That restriction receives further support from the late case of *Lynch v. the Provisional Government of Paraguay*, L. R. 2 Prob. and Div., 268, to which we are referred this morning. As to the direction in the order that the trustees should convey, I do not agree with my learned brother Galt, that the Court had no power so to order. I think that the Court had that power. I think, however, that conveyances by the referee would have been effectual, and that it was matter for the discretion of the Court, whether to order the conveyances to be executed by the one or by the other; and I do not dissent from the suggestion that that part of the order should be varied. As to the point raised by my brother Gwynne, that the Act does not sufficiently show that the Legislature intended to affect the interests of the grand-children, I have read his judgment very carefully, but I am unable to say that it has created in my mind any doubt as to the intention of the Act. The object of the Act was plainly to give at once to each of the testator's six children one-sixth of the testator's residuary estate; and that is what my order on the petition provided that they should have. That may not have been a right thing to do; it may have been a thing entirely unprecedented in British legislation; but the Legislature, as we all think, had power to do it; and I cannot say that, in view of the whole Act, its enactments, its preamble, and the schedule to it, I have the shadow of a doubt but that the Legislature had the intention to do what the orders *In re Goodhue* assumed as their intention.

BARKER, for the plaintiff, asked the Court if the proceeds of some £10,000, Consols brought to this country after Mr. Goodhue's death, were to be included in the division.

DRAPER, C. J., and MOWAT, V. C.—Yes, if the money was in Ontario at the time of the passing the Act.

BECHER, Q. C., prayed, that as there was in effect no judgment of the Court of Appeal, the Court being equally divided, and as it was most desirable that a judgment should be obtained, which either party could appeal from to the Privy Council, the case might be re-argued at an early day. There might be then a fuller Bench.

The Court granted the application; and intimated that it would sit for the purpose of hearing the cases re-argued, on Monday, the 11th March, at 10 a.m.

COMMON LAW CHAMBERS.

GARDINER V. GRAHAM.

Security for costs—Next friend.

Where a plaintiff sues by her brother-in-law, as next friend, with whom she lives, he will not be ordered to give security for costs, even though there is a doubt as to his solvency.

[Chambers, Oct. 4, 1871.—Mr. Dalton.]

Rachel Gardiner, the plaintiff, an infant, by Alonzo Richardson, her next friend, who was