Present: De Sampayo and Schneider JJ.

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JOSEPH *et al.* *v.* MARIA WENDT *et al.*

64—D. C. Colombo, 688.

Jus accrescendi—*Joint legacy—Defined share—Death of life-renter—Accrual of interest—Lapse into residue.*

Where a last will contained a direction to the trustees to apply the rents of a certain property as follows—" One-half of such rents to M. W. during her life for her maintenance, and the other half towards the maintenance, education, advancement in life of L. M.; " and where by a codicil the said benefit was extended to another person in the following terms:—" Whereas I am desirous that J. J. should participate and have an equal one-third share in the said provision, I do therefore give and devise to J. J. an equal share and interest in the aforesaid house and rent thereof, and desire that the bequest should be subject to the same condition and provision as are made applicable to the other two devisees."

Held, that the bequest was of a defined share of the rents to each of the three devisees, and that, on the death of J. J., her interest did not accrue to the other two.

Held, further, that on the death of J. J. her share of the rents fell into the residue as indicated in clause 8 of the will.

APPLICATION by the trustees of the last will and testament of the late Mr. C. L. Ferdinands for a direction from the Court as to the distribution of one-third share of the rents of the property known as " Villa St. Leonards. " The answer to the question depended on the construction of the fifth and eighth clauses of the will, taking them in connection with the codicil to the will. The fifth clause was as follows so far as it relates to the matter in issue:—" To pay and apply the rents of ' Villa St. Leonards ' after the deductions for taxes and repairs as follows: One-half of such rent to my sister-in-law during the life for her maintenance, and to apply the other half of such rent towards the maintenance, education, advancement in life of my nephew, L. M., who has been under my care and protection. " The codicil provided as follows:—" Whereas I am desirous that my niece, J. J., should participate and have an equal one-third share in the said provision, I do therefore give and devise to my said niece, J. J., an equal share and interest in the aforesaid house and rent thereof, and desire that the bequest should be subject to the same condition and provision as are made applicable to the other two devisees. "

The eighth clause of the will contained the following direction:—I desire that my debts be paid by the sale of the real and personal property not herein specially bequeathed, and the balance proceeds

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be divided equally among my brothers and sisters . . . . . and among M. W., L. M., and . . . . , all of whom I appoint residuary legatees of this will.

Two questions arose for consideration: First, whether, on the death of J. J., the two surviving beneficiaries became entitled to her share of the rents; secondly, if they did not, did such share pass to the residuary legatees mentioned in clause 8, or to the intestate heirs of the testator?

The learned District Judge held that, on the death of J. J., her interests accrued to the other two devisees on the principle of *jus accrescendi.*

Samarawickreme (with him *H. V. Perera* and *F. C. Loos*), for appellants.—There is no room for the application of the rule of *jus accrescendi,* as a defined share is given to each devisee. The rule applies to the case of a legacy to a class, and then only where a lapse occurs. Here all the legatees survived the testator. Even if J. J. predeceased the testator, the rule would not apply, as this is a bequest of one-third share to each.

Under the English law accrual among co-legatees occurs when a legatee dies during the lifetime of the testator, unless the benefit of survivorship is specially added (*Jarman on Wills, p. 430*).

A class gift is a general one, and the class bears a certain relation to the testator.

It is submitted that there being no accrual, the testator died intestate with regard to the disposition of the rents of the share of J. J. after her death.

Hayley (with him *Choksy*), for respondents.—The clear intention of the testator was to benefit the three devisees out of the rents of the house. It is only after the death of all the life-renters that the property is directed to be sold. His intention was that, until all the life-renters' interests are exhausted, they should not fall into the residue. The result would be that the residuary legatees would not be entitled to claim the rents of the property until all the life-renters of the property had died.

William on Executors, vol. 2, p. 1208, states the law as follows:—" Where, however, words, which according to the common rule constitute a tenancy in common, are combined with, or followed by others, which would make a tenancy in common inconsistent with the manifest design or the subsequent bequest of the testator, they may be taken to indicate, not the nature, but the proportion of the interest each party is to take. "

June 9, 1925. DE SAMPAYO J.—

Both these appeals raise the same question, and the respondents are the same, though the appellants are two separate sets of petitioners. Both the appeals will, therefore, be considered together.

The question relates to the construction of the will of the late C. L. Ferdinands, whose estate is being presently administered by certain trustees. At the time of his death, the testator left the three children of his deceased sister, Jane Joseph, namely: (1) Jennie Joseph, (2) William Arnold Joseph, and (3) John Ferdinands Joseph, of whom the last two are the appellants in appeal No. 64. He also left several sisters, who are the appellants in appeal No. 64A. The respondents to both appeals are Maria Wendt and L. M. Maartensz who are beneficiaries under the will. The proceedings out of which the appeals arise may be regarded as an application by the trustees for directions of the Court as to whether the rent of the house "Villa St. Leonards" (property of the estate) is distributable among the appellants and respondents, or is payable entirely to the respondents alone.

The answer to this question depends on the construction of the fifth and eighth clauses of the will, taking them in connection with the codicil of the will. The fifth clause of the will is as follows:—

"I desire that my executor should apply the proceeds of the two policies of assurance of my life in the Royal Insurance Company to free from mortgage my houses in Flower road called 'St. Leonards' and 'Villa St. Leonards,' and I give and devise both properties to my said executors in trust to rent the same, and, after deducting from such rent a percentage to pay taxes and repairs, to pay the balance rent of 'St. Leonards' to my sisters, or the survivors or survivor of them for their maintenance during their lives free from the debts and control of the husbands of any of them, their own receipts being accepted in full discharge, and such rents shall not be paid to them in anticipation, my intention being that the rents should be applied for their own maintenance. And to pay and apply the rents of 'Villa St. Leonards' after the same deductions for taxes and repairs, as follows:—One-half of such rent to my sister-in-law, Maria Wendt, during her life for her maintenance, and to apply the other half of such rent towards the maintenance, education, and advancement in life of my nephew, Lewis Mathew Maartensz, who has been under my care and protection for the last seven years. I empower my executor, if need be, to apply half the value of 'Villa St. Leonards' towards the education and advancement in life of the said Lewis Mathew Maartensz. And in further trust after the death of the said life-renters to sell the said two properties and distribute the proceeds among those I have hereinafter appointed the residuary legatees of this will."

It should be here stated that by the codicil, the testator, after referring to the provisions of clause 5 of the will in favour of Maria Wendt and L. M. Maartensz with regard to the rent of ".Villa St. Leonards," declared: " Whereas I am desirous that my niece, Jennie Joseph, should participate and have an equal one-third share in the said provision, I do therefore give and devise to my said niece, Jennie Joseph, an equal share and interest in the aforesaid house and rent thereof, and desire that the bequest should be subject to the same condition and provision as are made applicable to the other two devisees."

This puts Jennie Joseph in the same position as Maria Wendt and L. M. Maartensz, and gives her a one-third share of the rent of " Villa St. Leonards." Now Jennie Joseph died childless on September 6, 1919. It will be noticed that under clause 5 of the will the trust is to last till the death of the three beneficiaries, there called the " life-renters," and the property is then to be sold and the proceeds distributed among the " residuary legatees." The present difficulty arises from the fact that the will does not contain any special provision applicable to the distribution of the rent from the date of death of Jennie Joseph till the termination of the trust.

It would appear that the trustees, on the assumption that the two surviving beneficiaries—Maria Wendt and L. M. Maartensz—are entitled to the entire rent, have hitherto paid it to them, while the appellants contend that they are entitled to one-third share of the rent among them. The whole controversy turns on the question whether the bequest is a joint bequest to all, or a separate bequest of one-third share to each? The principal of *jus aaccrescendi*, which the District Judge in the order under appeal relies on, can only apply in the former case, but not in the latter. The provision in the will is not, for instance, to pay the rent to Maria Wendt and L. M. Maartensz in equal shares. It is on the contrary to pay one-half to Maria Wendt " during her lifetime for her maintenance," and to apply the other half " towards the maintenance, education, and advancement in life " of L. M. Maartensz. The purposes are different in each case, and in the latter case the rent is not even to be paid to the legatee, but to be applied by the trustees themselves for the object specified. It is clear to my mind that this is not a joint bequest; there is nothing to qualify it by reference to survivorship, and there is therefore no room for the operation of *jus accrescendi*. There is no alteration in the nature of the bequest when Jennie Joseph was by the codicil added as a legatee. The codicil had only the effect of making the rent divisible into three parts instead of two parts. It is hardly necessary to discuss the authorities cited on behalf of the respondents because they refer to cases in which the bequest is joint and

not separate. Mr. Hayley pressed upon our attention the following passage in *Williams on Executors (10th ed.), vol. 2, p. 1208*:—

> "Where, however, words, which according to the ordinary rule, constitute a tenancy in common are combined with, or followed by, others which would make a tenancy in common inconsistent with the manifest design or the subsequent bequest of the testator, they may be taken to indicate, not the nature, but the proportion of the interest each party is to take."

He referred to the concluding words in clause 5: "Among those I have hereinafter appointed the residuary legatees of this will," as indicative of such a manifest design or subsequent bequest. But this is quite insufficient. The residuary legatees, as will be seen, are a large class, and not merely Maria Wendt and L. M. Maartensz, and include the petitioners, appellants, themselves. I therefore think the share of Jennie Joseph did not accrue to the other two legatees, but that its destination must be determined by other considerations. This brings us to clause 8 of the will which the testator himself intended as a residuary clause, and which in fact amounts to such. It is as follows:—

> "I desire that my debts be paid by sale of the real and personal property not herein specially bequeathed, and the balance proceeds be equally divided among my brothers and sisters free from the control of the husbands of any of them (the children of a deceased brother or sister taking amongst them the share of their deceased parent), and among Maria Wendt, Isabel Louise Maartensz, and Lewis Mathew Maartensz, all of whom I appoint residuary legatees of this will."

In my opinion one-third of the rent which would have been payable to Jennie Joseph, if living, fell into the residue upon her death and became divisible among the residuary legatees mentioned in this clause. The appellants in appeal No. 64 are the children of a sister, and are within the circle of the residuary legatees, and both sets of appellants are entitled to shares in the rent in question. There is one curious feature in the case which need not, however, trouble us at the present moment. In the conclusion of clause 5 of the will the trustees are directed to sell the trust property after the death of Maria Wendt and L. M. Maartensz, and to distribute the proceeds "among those I have hereinafter appointed the residuary legatees of this will," and yet under clause 8 Maria Wendt and L. M. Maartensz are themselves nominated among the residuary legatees.

This is illustrative of the want of care with which the will has been drafted, but the intention of the testator is quite clear in regard to the point we are considering.

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We are not in a position to allot to the various appellants the precise shares to which they are respectively entitled. For this purpose the case should go back to the District Court. I would allow the appeals and send the case back for further proceedings. Each party should bear its own costs in the District Court and in this Court.

SCHNEIDER J.—

By the fifth clause of his will the testator devised two houses " in trust " to the executor and trustee of his will. As regards one of these houses, called " Villa St. Leonards," he directed as follows:—" To pay and apply the rents, after deduction for taxes and repairs, as follows: One-half of such rent to my sister-in-law, Maria Wendt, during her life for her maintenance, and to apply the other half of such rent towards the maintenance, education, and advancement in life of my nephew, Lewis Mathew Maartensz, who has been under my care and protection for the last seven years. I empower my executor, if need be, to apply half the value of ' Villa St. Leonards' towards the education and advancement in life of the said Lewis Mathew Maartensz." Four years after the execution of his will, he made a codicil in which he said:

> " Whereas by the aforesaid will I made provision that the rent of my house ' Villa St. Leonards ' should be apportioned by the executor and paid to and for the benefit of Maria Wendt and Lewis Mathew Maartensz, and whereas I am desirous that my niece, Jennie Joseph, should participate and have an equal one-third share in the said provision, I do therefore give and devise to my said niece, Jennie Joseph, an equal share, right, and interest in the aforesaid house and rent thereof, and desire that the bequest should be subject to the same condition and provision as are made applicable to the other two devisees."

The undoubted effect of the will and codicil was to give the three beneficiaries an equal one-third share of the rents. Since the death of the testator and up to the death of Jennie Joseph in September, 1919, the rents were divided equally between the three beneficiaries, but, after the death of Jennie Joseph, the then functioning trustees divided the rents equally between the two surviving beneficiaries. But recently certain persons claimed to be entitled to the one-third share of the rents which had been bequeathed to Jennie Joseph. On appeal we were invited to regard these proceedings as an application by the trustees for direction from the Court as to the administration of this one-third share of the rents. Two questions arise for consideration: First,

whether the two surviving beneficiaries became entitled to this share of the rents upon the death of Jennie Joseph; secondly, if they did not, whether the persons who take under the eighth clause of the will as residuary legatees, or the intestate heirs of the deceased testator, became entitled to this share. Parts of the will are very obscurely worded, but I have no hesitation whatever in coming to the conclusion that the two surviving beneficiaries as such are not entitled to the share in question. They can only claim it on the ground that the legacy is a joint legacy, and not a legacy of a specific share to each one of them. The language of the clause makes it abundantly clear that the bequest is not of the whole to the three beneficiaries, but of a defined share to each of them. As regards the one-third share of the rents given to Maria Wendt and to Jennie Joseph, the testator directed the payment of that share to each of them during her lifetime, but as regards the share given to Lewis Mathew Maartensz, the executor was directed not to pay, but to apply it towards his maintenance, education, and advancement in life. While, therefore, the share of the rents payable to Maria Wendt and Jennie Joseph is described as for their maintenance and for the term of their life, the share given to Lewis Mathew Maartensz was not only for his maintenance, but education and advancement in life, and it is to be noticed that there are no express words showing that this was to continue during the whole of the lifetime of this beneficiary. I am inclined to take the view that the testator did not include Lewis Mathew Maartensz within the term " life-renters " at the end of this clause where he provides for the termination of the trust and the distribution of the proceeds. There is another reason which leads me to the conclusion that it was not a joint legacy to the three beneficiaries. In the same clause of the will and immediately preceding this bequest, he made provision for the payment of the rents arising from the house " St. Leonards " He directed as follows:— " In trust to rent the same, and, after deducting from such rent a percentage to pay taxes and repairs, to pay the balance rent to my sisters or the survivors or survivor of them for their maintenance during their lives." The language of this clause is in strong contrast to the language of the bequest under consideration. The bequest to the sisters was to them as a class, and the language is clear that upon the death of one or more of them the survivors or survivor were to succeed to the share of the deceasing sister or sisters. I would accordingly hold that upon the death of Jennie Joseph the surviving beneficiaries did not become entitled to her share of the rents.

There remains to be considered the question whether the share of rents in dispute falls within the provisions of the eighth clause of the will, or is payable to the heirs of the intestate estate. I was

at first inclined to take the view that it should go to the intestate heirs. The eighth clause of the will is as follows:—

> "I desire that my debts be paid by sale of the real and personal property not herein specially bequeathed, and the balance proceeds be equally divided among my brothers and sisters free from the control of the husbands of any of them (the children of a deceased brother or sister taking amongst them the share of their deceased parent), and among Maria Wendt, Isabel Louise Maartensz, and Lewis Mathew Maartensz, all of whom I appoint residuary legatees of this will."

It seems to me that this clause is confined to the balance sale proceeds of the "personal and real property," referred to in that clause, and that it is not a residuary clause applicable generally to all the residuary property of the testator. But my brother De Sampayo is in favour of the view that this share of the rents in question comes within the clause, and that the words "all of whom I appoint residuary legatees of this will" at the close of that clause are sufficient to include the rents in question. I would accept his construction of clause 8, and agree in holding with him that the share of the rents in question are payable to the persons named in that clause. The trustees should, therefore, pay this share of the rents to those persons. For the purpose of ascertaining who those persons are, the record will be remitted to the lower Court.

In the circumstances I think the order should be that each party should bear its own costs in both Courts.

Set aside and sent back.