1-8-70 21/70

G.P.-S.33967—1968-69—1,000. J. 219.

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(APPELLATE ~~Provincial~~ Division.)
(Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

HORACE LESLIE LELLO and OTHERS *Appellant,*

versus

MARY DORIS HARDWICKE DALES N.O. *Respondent*

Appellant's Attorney Hill, McHardy & De Bruyn *Respondent's Attorney*
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate D J Shaw S C *Respondent's Advocate*
Advokaat vir Appellant A M Mazza *Advokaat vir Respondent* J L Hamman

Set down for hearing on
Op die rol geplaas vir verhoor op ~~1-3-71~~ 1-3-1971

~~3.6.70~~ 3.4.69

CORAM: HOLMAN, JANSEN J.J.A., DIAMOND, MILLER et KOTZE A.J.A.

APPELLANT: 9.42 AM - 10.47 AM

RESPONDENT 10.47 AM - 11.00 AM
11.00 AM - 11.35 AM

DCLD

APPELLANT 11.35 AM - 12.47 PM : 1½ hrs

Miller H JA — Appeal allowed. Paragraphs 1 & 2 of the order made by the Court below, dated 1st May, 1970, are set aside but paragraphs 3 & 4 (which relate to costs) stand. The follwoing order is substituted for paragraphs 1 & 2:-

The whole of the residue of the Estate of the late Annie Elizabeth Dales devolves in equal shares on her nieces & nephews alive at the time of death of Harry Foster Dales.

The appellants' costs of appeal, including costs consequent upon the employment of two counsel, are to be paid out of the estate of the late Annie Elizabeth Dales. The respondent's costs of appeal are to be paid out of that estate as between attorney and client.

REGISTRAR.
12.3.1971

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills Taxed.—Kosterekenings Getakseer.

Date. Datum.	Amount. Bedrag.	Initials. Paraaf.

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between:

HORACE LESLIE LELLO AND OTHERS ..... APPELLANTS

AND

MARY DORIS HARDWICKE DALES N.O. ..... RESPONDENT

Coram: Holmes, Jansen, JJ.A., Diemont, Miller et Kotzé A.JJ.A.

Heard: 1 March 1971 Delivered: 12 March 1971

J U D G M E N T .

Miller, A.J.A. :

This appeal raises the question whether half of the residue of the estate of the late Annie Elizabeth Dales accrues to her nieces and nephews to whom she bequeathed "the other half" or whether, because of the events and circumstances about to be described, a partial intestacy has resulted. If it is found that accrual does not take place, a further question concerning the date upon which the ab intestato heirs are to be determined will arise.

Annie Elizabeth Dales (to whom I shall refer as the "testatrix") died in 1927. She was survived by

(i) her only child, Harry Foster Dales (to whom I shall

refer as "Harry") (ii) four brothers, (Edward, Horace, Samuel and Albert) and (iii) thirteen nieces and nephews, the children of the three last-named brothers. Her will was executed on 20th February, 1923 and it appears that at that time her brothers, with the exception of Edward, were married and had children and that her son, Harry, had no children. Her will is in these terms:

"I GIVE devise and bequeath the whole of my Estate and Effects, movable and immovable, real and personal, wheresoever situate, and whether in possession, reversion, remainder or expectancy, unto my Executors and Trustees hereinafter mentioned, to be held and applied by them to the ends, uses intents and purposes following, that is to say,

UPON TRUST:

To pay to my son, HARRY FOSTER DALES during his lifetime, and for his own absolute use and benefit, the whole of the income, life-rent, interest and usufruct received from ~~my Estate and Effects.~~

The whole residue of my Estate and Effects shall,

on ..... /3

on the death of my said son, devolve to and upon the lawful issue of my said son HARRY FOSTER DALES. Should he, however, die without leaving lawful issue him surviving then I direct that the residue of my Estate and Effects shall devolve as follows:- half to my brother EDWARD WILLIAM ALFRED LELLO or his lawful issue if any, and the other half in equal shares, share and share alike to my nephews and nieces, the children of my brothers."

(I have omitted from the will only the formal opening sentences thereof and a paragraph devoted to the appointment of Executors, Administrators and Trustees).

Edward, who never married, died intestate in 1936. His three brothers all predeceased Harry, who died, childless, on 17th March, 1969. In those circumstances, uncertainty prevailed concerning the destination of that half of the residue of the estate which, had Harry had children, would have passed to them on his death and which, Harry having died without children, would have

passed ..... /4

passed to Edward, had he survived or, failing him, to his children, if he had left any. Harry's widow, in her capacity as Executrix of his estate, accordingly applied in the Durban and Coast Local Division for an order declaring that upon a proper interpretation of the will

> "(a) half the residue of the Estate of the late ANNIE ELIZABETH DALES devolves, as on intestacy, upon the Estate of her son, the late HARRY FOSTER DALES; and
>
> (b) the other half of the residue of the Estate of the late ANNIE ELIZABETH DALES devolves upon her nephews and nieces alive at the date of the death of the said HARRY FOSTER DALES (namely the First to Eleventh Respondents inclusive herein) equally."

The application was opposed by Horace Leslie Lello, (~~the~~ appellant) ~~one of the nephews of the testatrix,~~ who was supported by the remaining nieces and nephews to whom "the other half" was bequeathed. Their contention, as presented

on ..... /5

on their behalf in the Court a quo, was that they were entitled by operation of the jus accrescendi to the half in respect of which the testamentary heirs failed. In the alternative, it was contended that if there was no accrual, with resultant partial intestacy, that half should be awarded to those of the testatrix's ab intestato heirs who were alive at the time of Harry's death and not to the estate of Harry, who was the ab intestato heir of the testatrix at the time of her death. The Court (Friedman, J.) held that the joinder in the will being verbis tantum and there being no indications in the will to show that the testatrix intended that accrual should take place, the jus accrescendi was not applicable. Pursuant to that conclusion, the learned Judge held that the controversial half was to be awarded to Harry's estate, on the authority of the decision of the Full Bench of the Natal Provincial Division in Estate Anderson v. Anderson, 1946 N.P.D. 568, by which he was bound. The costs of both parties were ordered to be paid out of the estate of the testatrix but whereas the applicant's costs were to be paid as between attorney and client, the then respondents' costs were to be paid as between party and

party. The matter now comes on appeal directly to this Court by the written agreement of the parties.

It was not contended on appeal, nor could it be reasonably argued, that the form of joinder of heirs in the will was other than verbis tantum. That being so,

> " .... all the authorities agree that when the co-heirs are joined verbis tantum, accrual does not take place, unless it appears from the will and the surrounding circumstances that it was the Testator's intention that accrual should take place. This is common ground on which all the authorities meet."

(per De Villiers, J.A. in Winstanley and Others v. Barrow and Others, 1937 A.D. 75 at p.91). The importance, in Roman-Dutch Law, of the form of a conjunction verbis tantum in the consideration of the question whether or not accrual takes place, has been recognized over and over again in decisions of our Courts. In Estate Cato v. Estate Cato and Others, 1915 A.D. 290 at p. 304, Innes, C.J., said, without qualification,

> "The jus accrescendi has no application here, because the surviving children were appointed heirs to equal shares". And in the same case, (at p. 312)

Juta, A.J.A., said

> "As the children were instituted heirs no question of the jus accrescendi arises, but even if it could arise, then inasmuch as the children received equal shares the joinder in the will is verbis tantum, and there is no right of accrual. (Voet, 30,1,61)".

In Estate Smuts v. Commissioner of Inland Revenue, 1929 T.P.D. 953, at p. 964, Feetham, J., (as he then was) said

> ".... we are faced with the difficulty that the rule as to the effect of a conjunction verbis tantum, though obviously a somewhat artificial rule of interpretation, the validity of which has been vehemently disputed by Decker and other commentators, has on the authority of Voet long been followed in our Courts -"

The learned Judge no doubt had in mind Decker's note to Van Leeuwen's Roman-Dutch Law (3.4.8). (See Kotze's translation of Van Leeuwen's Roman-Dutch Law, Vol 1, at pp 365-368). More recently, too, the artificial nature of the rule or presumption which flows from a joinder verbis tantum has been

suggested ..... /8

suggested. (See Administrator Estate O'Meara v. O'Meara and Others, 1943 N.P.D. 144 at pp 148,151; Ex parte Knight: In re Estate Gardner, 1955(3) S.A. 577 at p 587.) The belief that the rule or presumption does not necessarily reflect a logical deduction or inference from the form of the joinder does not alter the fact that it is part of the Roman-Dutch Law which has been accepted and applied for very many years in our Courts, but it serves to emphasize the importance of the qualification relating to the probable intention of the testator as gleaned from the will as a whole and the surrounding circumstances.

In using the words "probable intention of the testator", I have not overlooked that in Winstanley's case, at p. 91, De Villiers, J.A., observed that in order to put the jus accrescendi into operation where there had been a joinder verbis tantum, it was necessary to show that the testator

> "positively contemplated the predeceased of one of his heirs and intended that the specific share of that heir should in that event accrue to his co-heirs".

It appears to me that the word "positively" was used by the ..... /9

the learned Judge to connote that what was required was actual contemplation as opposed to a mere awareness of the possibility of predecease of one of the heirs. Such contemplation might be inferred as a matter of probability. And if it were to be inferred, the next step would be to determine whether such contemplation, considered together with the other relevant facts and circumstances, showed that it was more probable than not that the testator intended that accrual should take place. This view of what would be sufficient to justify a refusal to draw the inference which the law otherwise enjoins the Court to draw from the form of the joinder, appears to be not inconsistent with what was said in Winstanley's case, at p. 90. De Villiers, J.A., there concluded that "the sum and substance" of the authorities was that ".... by Roman-Dutch Law the jus accrescendi does not operate between co-heirs unless there are indications (conjecturae) that the Testator intended it to operate. The word conjectura (used by Van der Keessel in this context) is said in Freund's Latin Dictionary, to mean, inter alia, "a putting

together .... /10

together of facts or indications; hence an opinion founded on a comparison of facts". And this appears to be the sense in which the word was used by Van der Keessel and interpreted by De Villiers, J.A.. I might add that Schorer, in his notes on Grotius's Introduction, appears also to have regarded "the probable intention of the testator" as a sufficient criterion. (Note 182; Maasdorp's translation of Grotius's Introduction to Dutch Jurisprudence, at p. 487). All this, however, does not mean that the intention of the testator may be sought by reasoning or conjecture not founded upon the scheme and terms of the will. (Cuming v. Cuming and Others, 1945 A.D. 201 at p. 206). It is in the will that the indications and pointers must be sought, but it is permissible and sometimes essential to read and interpret the will in the light of the relevant circumstances existing at the time of its making. (See Ex parte Sadie, 1940 A.D. 26 at p. 31.)

The will gives a clear view of the general purpose of the testatrix. She was a widow and had only one child, to whom, for reasons which are not known, she chose to

give ..... /11

give not the corpus of her estate but the use thereof for his life-time. She accordingly devised the whole of her estate to Trustees, who were to pay to her son, Harry, the whole of the income therefrom. She contemplated and made provision for the event that Harry would leave issue him surviving and the event that he would not. If he left children, they were to inherit the whole of the residue of her estate; if he died childless, she made provision (i) for her brother, Edward, who alone of her four brothers was then unmarried and childless and (ii) for the children of her married brothers. It is also very clear that in regard to Edward, she contemplated both that he might predecease Harry and that he might die without issue. The first contemplation is manifested by her appointment of Edward "or his lawful issue" to succeed if Harry died childless; the second, by the words "if any" with reference to Edward's issue. Looking at the will as a whole, therefore, and bearing in mind the composition of the family which her will was designed to benefit, it is clear that the testatrix intended Harry to have no more than a life-interest in the whole of her estate and that upon his death without issue, she intended

that ..... /I2

that the whole of the residue of her estate should pass directly to the family. It was contended by Mr. Hewat, for the respondent, that the circumstance that the testatrix clearly manifested an intention to dispose of the whole of the residue by will and therefore did not intend that any part thereof should devolve ab intestato, was not a sufficient ground for finding that she intended that accrual should take place. This is undoubtedly so, for, as De Villiers, J.A., pointed out in Winstanley's case, the consequence would otherwise be that in all such cases in which the will disposed of the whole estate, accrual would follow. (See also Ex parte Knight: In re Estate Gardner, supra, at p.589). But this is not to say that the fact that the testatrix manifested a clear intention to dispose of the whole of her estate in a particular way is irrelevant to the question of her probable intention in regard to accrual. It is one of the factors which must necessarily be taken into consideration, forming as it does the very essence of the will from which the testator's intention concerning accrual is to be gleaned, provided that it is not allowed "by itself" (See Ex parte Knight, supra, at p.587)

to ..... /13

be unrealistic to conclude otherwise than that the testatrix was alive to the strong probability that Edward would predecease Harry. Viewed in this light, the reservation of a part of her estate for Edward in the unlikely event of his surviving his nephew, Harry, renders less crisp and decisive than it might otherwise have been, the division of the estate into two parts and the form of the joinder of heirs thereto. This case appears to me to be stronger in favour of accrual than the case referred to by Van der Kessel, (Praelectiones, 2.24.19; ed. Van Warmelo et al. Vol 2, p. 458) which was referred to in the judgment of the Court a quo and upon which the appellant relied. A more complete report of that case, decided in 1751, (Hooge Raad) is to be found in Lybrecht, Notaris Ampt., 1.20.12. (at pp 304-305). It appears that the testator in that case, after providing for legacies and prelegacies, appointed "tot zyne eenige en universele Erfgenamen" of the rest of his estate, Pieter and Susanna to the first one-fourth part, Maria to the second one-fourth part, Pieter Katersveld to the third one-fourth part and Hendrik to "het resterende een vierde part." Maria predeceased the testator. The question posed

for ..... /15

for the Court's decision was whether her one-quarter share should devolve ab intestato or whether " 't zelve moet komen ten voordelen van de drie owerige geinstitueerde Erfgenamen?" The decision was in favour of accrual. Mr. Hewat said that that case was distinguishable on the ground that the beneficiaries were expressly appointed "sole and universal heirs". (See also Van Reenen and Others v. Estate Kelsey, 1913 C.P.D. 92, where, too, the beneficiaries were appointed, in equal shares, as "sole and universal heirs" and the decision was that one of the heirs having predeceased the testators, accrual took place in favour of the remaining heirs.) The reasoning in Van Reenen's case has been described by the present Chief Justice as "unconvincing save in so far as they found upon a disinclination to hold a partial intestacy". (Ex parte Knight, supra, at 588) I respectfully agree that the appointment of beneficiaries as "sole and universal heirs" is not in itself a cogent reason for holding that accrual takes place in the face of a joinder verbis tantum; nor is it safe to rely on the case described by Lybrecht and Van der Keessel, supra, for the reasons

for ..... /16

for its decision are not known. A clue to the possible reasons may be found in Van der Keessel's comments . (Praelectiones, 2.23.5.) He said:

> "Ek sou eerder toegee dat in 'n kwessie oor persone wat deur die woorde (van die beskikking) gesamentlik ingestel is hierdie vermoedens te pas kan kom, t.w. of die erflater die dele daarby geskryf het met die bedoeling om hulle te skei dan wel met die plan dat dit verstaanbaar kan wees watter deel hulle elkeen sal hê." (Gonin's and Pont's translation, ed. Van Warmelo, ibid, at p 445.)

But however that may be, it is clear that the probable purpose of the testatrix in effecting what on the face of it may appear to be a division of the estate into distinct parts, is a relevant consideration when a decision has to be made whether, having actually contemplated that one of the heirs may fail, she also intended that accrual should in that event take place. In all the circumstances of this case, and bearing particularly

in ..... /17

in mind the dominant purpose of the testatrix, revealed by the will, to benefit her brothers' children if Harry died without issue but to reserve, in the unlikely event of Edward outliving Harry, a part of the estate for Edward, I am of the opinion that there are sufficient conjecturae to show, and, indeed, with a reasonably high degree of probability, that she intended that if the reservation made in the interests of Edward should prove to have been unnecessarily made, because of his predecease without issue, the children of her brothers would benefit to the full extent of her estate. To put it in another way, the conjunction, although verbis tantum in form, was not intended to achieve a division which would persist after the need for such division had ceased to exist, i.e. after Edward died without issue, during the lifetime of Harry.

In my judgment, therefore, what was bequeathed to Edward, accrues to the nieces and nephews alive at the time of Harry's death.

This ..... /18

This conclusion renders it unnecessary to decide the question, referred to earlier herein, concerning the date upon which the ab intestato heirs of the testatrix would have to be determined if it were found that partial intestacy resulted and in respect of which it was contended that Anderson's case (1946 N.P.D. 568) was wrongly decided. In appropriate circumstances, however, the correctness of the decision in Anderson's case on this point (see at pp 577-9) might merit consideration, as also the question whether the dictum in Union Government v. Olivier (1916 A.D. 74 at p. 90) was intended to be of general application, (as appears to have been accepted in the cases referred to in Anderson's case at p.578) or was merely attuned to the particular circumstances of that case.

The question of costs remains. Mr. Hewat asked that the respondent's costs as between attorney and client be ordered to be paid out of the estate, regardless of the result of the appeal. Where an executor or trustee acts in that capacity in order to obtain a ruling on doubtful

provisions ..... /19

provisions in the will, and it is proper that his costs be paid out of the estate, it is normally unnecessary to add that such costs be paid as between attorney and client. (See Jewish Colonial Trust Ltd. v. Estate Nathan, 1940 A.D. 163 at pp 184, 185). But in this case, the respondent is not the executrix in the estate of the late Annie Elizabeth Dales, but in the estate of her late husband, Harry. It was for that reason that the Court a quo pointedly ordered that her costs be paid, as between attorney and client, out of the estate of the testatrix. There does not appear to be any reason why, despite the success of the appeal, that order should be altered, nor is there any reason why, in the circumstances of this case, her costs of appeal should not be paid out of the estate on the same basis. It would be unjust to require her personally to pay any portion of the costs only because her contention as to the devolution of one-half of the residue of the estate was not upheld on appeal, more particularly in that she was fully justified in approaching the Court in the first instance. It might be mentioned that in her application to the Court a quo she sought

not ..... /20

not only the order which is in issue in this appeal but also other relief (which was granted by the Court a quo) affecting the administration of the estate.

So far as the appellants' costs are concerned, because the whole of the residue of the estate will now pass to the nieces and nephews it does not much matter, as Mr. Shaw conceded, whether attorney and client costs or only party and party costs are awarded. In either event, the costs will, in effect, be paid by the nieces and nephews concerned. It will be sufficient, then, merely to order that the costs of the appellants be paid out of the estate.

The appeal succeeds. Paragraphs 1 and 2 of the order made by the Court below, dated 1st May, 1970, are set aside but paragraphs 3 and 4 (which relate to costs) stand. The following order is substituted for paragraphs 1 and 2:

> The whole of the residue of the estate of the late Annie Elizabeth Dales devolves in equal shares on her nieces and nephews alive at the time of death of Harry Foster Dales.

The ..... /21

The appellant's costs of appeal, including costs consequent upon the employment of two counsel, are to be paid out of the estate of the late Annie Elizabeth Dales. The respondent's costs of appeal are to be paid out of that estate as between attorney and client.

S. Miller, A.J.A.

Holmes, J.A.)
Jansen, J.A.) concur.
Diemont, A.J.A.)
Kotzé, A.J.A.)