MAASDORP, C.J., and WARD, J. Mar. 4th, 1912. | STOKES' EXECUTOR *vs.* ROBERTS' EXECUTORS.

Will.—Vesting.—Bequest of Income to Arise.—Death of Legatee before accrual of Income.—Plene Administravit.—Costs.

Where R had in his will left his estate to certain heirs with a direction that certain property should not be alienated but used to produce revenue, and with a proviso that if the income should ever exceed a certain sum the surplus income should be paid to certain persons, among whom was S., and S. had died before the income had exceeded the said sum :—Held, that. *on a surplus accruing, S.'s estate had no right to any share in such surplus income.*

A plea of plene administravit *is not available against heirs or legatees where claims have been overlooked by executors.*

Costs of proceedings for interpreting will be ordered to be paid out of estate.

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Action for declaration of rights under a will.

The plaintiff was the executor dative in the estate of the late Theresa Maria Stokes (born Roberts), who died in 1903. The defendants were the executors in the estate of the late James Roberts, who died in 1900, leaving a will dated the 20th May, 1893. The will, so far as it is material, reads as follows:—

"I direct and request that my farm Damplaats, situated in the district of Boshof, Orange Free State (which I have for many years believed to be diamondiferous), shall be retained and shall not be sold, and that search shall be made by my heirs until a mine is found therein. That during the said search they have the usufruct of my estate to continue the search. I also direct that the farm Leeuwkuil, in the district of Bethlehem, Orange Free State, shall be retained and not sold (except its sale is rendered necessary by the pressure of judgment debts

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upon my estate). The said farm Leeuwkuil shall not be sold except as above until trials and borings have been made in various parts, and until my heirs are satisfied that there does not exist any coal or minerals. Should a mine be discovered on Damplaats, claims in it must not be sold nor the ownership of the land parted with in any way, but said claims may be leased for short periods or the claim may be given out to work on shares for short periods. My executors may invest any funds derived from my estate in securities of the Orange Free State Government.

"I hereby institute and declare my adopted daughter Charlotte Roberts, of Port Elizabeth, and her mother, to be heirs of one-half of my estate, subject to the following conditions thereabout.

"And Florence Sophia Bradley, commonly called Florence Sophia Webb, and her daughter Henrietta Maria to be the heirs of the other half subject to the following conditions thereabout, viz.:—

"That until the income of my estate exceeds £240 per annum net the income shall be divided into two equal parts, and one such half part shall be paid to each couple as above stated, but when the revenue of my estate yields and is more than £240 per annum then the surplus above £240 per annum shall be divided into three equal parts, and one of these third parts shall be equally divided into six parts and paid to the said Charlotte Roberts, to her mother, to Harold Dhodad Roberts, to Maria Roberts, Harold's daughter, to Reuben Roberts, and to Sarah Humphreys (born Foulds).

"The second third part shall be equally divided and paid to Florence Sophia Bradley (often called Webb) and to her six children, the said Henrietta Maria, Charles Henry, Alfred James, Ivy Hay, Jessie Irene, and Myra, and the last third part of the surplus above £240 shall be paid to the children now living of my deceased brothers John, William, Henry and Benjamin Roberts."

It was alleged by plaintiff that the revenue of the testator's estate had exceeded £240 per annum. Mrs. Stokes was one of the children of Benjamin Roberts, one of the testator's deceased brothers, and as such plaintiff

claimed that her estate was entitled to a share in one-third of the annual revenue from the testator's estate in so far as it exceeded £240. The defendants denied the right to this share, pleading that Mrs. Stokes was only a legatee of the share in the surplus income from the testator's estate and was only entitled to a life interest in the surplus. It was further alleged that the annual income from the testator's estate had not exceeded £240 during Mrs. Stokes' lifetime.

The defendant pleaded *plene administravit* and also that W. V. Stokes, Mrs. Stokes' husband, acting as his wife's executor testamentary, had signed the liquidation account in the estate of the testator, and was precluded from objecting to the administration and distribution of the testator's estate in terms of the liquidation account. In the replication the plaintiff denied that Mrs. Stokes had died testate, and denied that W. V. Stokes was legally entitled to administer her estate and to bind the heirs by any act done by him as executor. It was further alleged that at the time Stokes purported to act as executor one of Mrs. Stokes' children, who was still living at the date of the action, was a minor.

A consent paper was put in, by which plaintiff admitted that W. V. Stokes had acted as executor of his wife's estate, but said that the letters of administration had been cancelled. The defendant admitted that the will under which Stokes had been appointed executor had been declared invalid.

H. F. Blaine, K.C. (with him *P. U. Fischer*), for the plaintiff: Mrs. Stokes was an heir under the will and not a legatee. When the testator made his will he had two conditions in view, namely (1) the position of his estate at the time he made the will, and (2) the position of the estate, if the prospective property consisting of minerals should materialise. Under the first condition, which had not changed at the date of the testator's death, the estate which was inconsiderable was left to Charlotte Roberts and her mother and Florence Sophia Bradley and her daughter. The testator intended that all those persons who were to share the income of the estate, in so

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far as it exceeded £240 per annum, should become joint heirs on the fulfilment of the second condition. If the testator had intended that the latter group should be legatees, he would have expressed his intention in the will. The second group includes the members of the first group. By including the heirs under the first part of the will in the second he showed that he did not intend the former to be heirs of the whole estate and the other parties to be merely legatees or life usufructuaries. The word "heir" in the first part of the will only refers to the first condition, namely, in the event of the income not exceeding £240 per annnum. See *Maasdorp's Institutes of Cape Law* (2nd Ed.) Vol. I., p. 142. The heirs under the first part were entitled to the *corpus* from which the £240 was to be derived until it produced that sum or more. As soon as the income exceeded £240 per annum all the parties were to become co-heirs of the *corpus* producing the excess. See *Kerr* vs. *Middlesex Hospital* (95 Revised Reports, p. 231).

M. Nathan (with him *J. G. Dickson*), for the defendant: It is a well-established principle of law that the testator's intention must be ascertained from the words of the will. The will absolutely disposes of the *corpus* for the benefit of the persons expressly stated by the testator to be his heirs. The persons mentioned in the latter part of the will are legatees under a conditional legacy. The contingency did not arise in the lifetime of Mrs. Stokes, and consequently the legacy did not vest in her. See *Maasdorp's Institutes of Cape Law* (1st Ed.), Vol. I., p. 173. The same principle would apply in the case of a conditional heir. The bequest would fail on the failure of the condition. The first and second groups of legatees are joined *verbis tantum* and consequently the *jus accrescendi* is not applicable. The third group are joined *re et verbis* and the *jus accrescendi* applies. Mrs. Stokes' share must, therefore, be divided among the surviving co-legatees in that group. See *Black and others* vs. *Executors of Black and Black* (21 S.C. 555); *Steenkamp* vs. *de Villiers* (10 S.C. 56); *Engelbrecht and others* vs. *Botha and others* (24 S.C. 726): *In re Estate Ralani or*

Galant (23 S.C. 370). The contingency was uncertain; it was the legacy of a *spes*. See *Pothier* on *Legacies* (*van der Linden's Trans.*) chap. II. sec. 1, p. 42; *Voet* 36 (*McGregor's Trans.*, p. 157); *Voet* 36, 2, 2; *Digest* 36, 2, 5, 2, and 35, 1, 41; *van Leeuwen's Censura Forensis*, 3, 8, 29, 30 and 31; *van Breda* vs. *The Master of the Supreme Court* (7 S.C. 360); *Jones* vs. *Matthews* (14 S.C. 68); *Spengler* vs. *Higgs' Executor* (1 R. 221); *de Wet* vs. *Hurter's Executors* (5 S. 356); *Marais* vs. *Leibrandt and others* (1 R. 231). If the Court holds that this is the case of the legacy of an annuity the same conditions are applicable. The law recognises the succession of executors in office, and consequently the plaintiff has been estopped by Stokes' consent to the liquidation account filed in the defendant estate.

[MAASDORP, C.J.: But Stokes had no *locus standi*.]

If he had compromised the claim of a creditor or paid a debtor his successor would have been bound. See *Brink* vs. *Esterhuyzen* (1 M. 473) as to *plene administravit*.

[MAASDORP, C.J.: The estate had not been distributed in the present case.]

The executor would not be liable unless negligence could be proved.

H. F. Blaine, K.C., in reply: On the question of *plene administravit* see *Union Bank (in liquidation)* vs. *Watson's Executors* (8 S.C. 300). A minor is interested, and she cannot be prejudiced by Stokes' action. The maxim that no one may be enriched at the expense of another is applicable. As to conditional heirs see *Maasdorp's Institutes of Cape Law*, Vol. I., p. 143.

Cur. adv. vult.

Postea (April 15th).

MAASDORP, C.J.: The plaintiff, who is the executor dative in the estate of the late Theresa Maria Stokes, sues the defendants, who are executors of the estate of the late James Roberts, in an action for a declaration that the estate of the said Theresa Stokes is entitled under the

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will of the said James Roberts to a share of one-third of the revenue (in so far as it exceeds £240 per annum) of the estate of the said James Roberts.

From the pleadings and certain admissions made by the parties in a consent paper put in and verbally in Court it appears that the will of the said James Roberts was executed on the 20th May, 1893, and that he died on the 17th February, 1900, that Theresa Stokes was a daughter of Benjamin Roberts, one of the brothers of James Roberts, and that she was alive at the date of the execution of the will and died on the 22nd February, 1902.

The husband of Theresa Stokes was appointed executor testamentary to her estate under a will which was proved, but which was subsequently declared invalid by the Cape Provincial Division of the Supreme Court which set aside the appointment of the husband as executor.

Whilst the husband was such executor he filed an objection to the liquidation and distribution account lodged by the defendants with the Master, based upon the same grounds upon which this present action is based, but subsequently withdrew his objection and approved of and signed the said account.

The present claim is based upon clause 5 of the said will, which provides: "but when the revenue of my estate yields and is more than £240 per annum then the surplus above £240 per annum shall be divided into three equal parts . . . and the last third part of the surplus above £240 shall be paid to the children now living of my deceased brothers, John, William, Henry and Benjamin Roberts." As a matter of fact the revenue of James Roberts' estate never exceeded £240 per annum between the date of his death and that of Theresa Stokes, daughter of his brother Benjamin (though it has exceeded that sum since that latter date), but notwithstanding this fact it is contended that the estate of the deceased Theresa Stokes is entitled to the share in the one-third of the excess of the revenue over £240, to which she would herself have undoubtedly been entitled, if she were still alive.

The defendants' main defence to the action is that the rights of the late Theresa Stokes under the will ceased with her death, and that her estate has no claim to those rights, but they set up in addition the plea of *plene administravit*, and say that her husband, as executor, consented to and signed the defendants' accounts which have been duly confirmed, and that the plaintiff is now debarred from raising his present claim.

It will be as well to dispose of this second plea first, and to point out that though the plea of *plene administravit* may be applicable as against creditors who have failed to put in their claims in due time according to law, it cannot hold as against heirs or legatees whose claims have been overlooked by executors. In addition to this the husband, as executor of Mrs. Stokes, had no right or title to dispose of the rights, if any, of his children under this will of James Roberts without the sanction of the Court, especially as one of those children was still a minor.

Coming, however, to the main defence of the defendants, we have to determine the interpretation to be put upon the will of James Roberts, and especially upon the clause on which the plaintiff bases his claim. Now it has been laid down in a number of cases decided by the Courts of South Africa, that in interpreting or construing a will the object to be aimed at should always be to give effect to the intention of the testator, in so far as this can be done consistently with the rules of law, not conjecturing but expounding the testator's will in so far as it can be ascertained from the words used by him. If the testator's intention be clear, and the words used by him be sufficient to give effect to it, the words should be construed so as to give effect to that intention. The testator's language should be taken in its ordinary grammatical sense, unless it is clear from the context that he intended to use it in a different sense. The will will also have to be looked at as a whole, and the entire scope of it, as it affects each provision of it, will have to be considered.

Applying these rules to the present case it would appear that the testator in drafting his will was regarding his estate from two alternative points of view, namely:

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(1) As an ordinary estate, consisting mainly of two farms, Damplaats and Leeuwkuil, which as mere farming propositions were of no great value and could not be expected to produce as much as £240 per annum; and (2) as a potential revenue producing fund, consisting of the two farms, considered as mining propositions.

Considered from the first point of view the testator elected to institute Charlotte Roberts and her mother as heirs to one half of his estate, and Florence Sophia Bradley and her daughter, Henrietta Maria, heirs to the other half of the same.

Further, even considering the estate from the point of view of its turning out to be a mining proposition, and therefore a possible revenue-producing fund, he declared his wish to be that as long as the income of the estate did not exceed £240, such income should be divided equally between the two above-mentioned couples of heirs in two equal shares. As soon, however, as the revenue exceeded the the sum of £240 per annum, the testator seems to have regarded the preferent claim, which, in his opinion, those heirs had upon his estate, as being exhausted, and he thereupon looked round to see what other persons might have claims upon him, and he accordingly divided the surplus revenue of his estate, when it yielded more than £240 per annum, into three equal parts, of which the first part was to go to the said Charlotte Roberts and her mother and certain other individuals mentioned by name, the second to the said Florence Bradley and her daughter and certain other individuals mentioned by name, and the third to the *children then living* of his four deceased brothers, who are not mentioned by name, but whose identity is sufficiently established by the phrase "the children now living of my deceased brothers, John, William, Henry, and Benjamin Roberts," and of whom Theresa Stokes was one.

Now it is clear that if the property of the estate turned out to be valuable from a revenue-producing point of view, the testator intended that it should not be alienated but should be kept for the purposes of such revenue. This is shown more particularly by the clause having reference to Damplaats, to wit:—"Should a mine be discovered

on Damplaats, claims on it must not be sold nor the ownership of the land parted with in any way," and by the clause having reference to the investment of any "funds derived from my estate."

It follows that under the will no one had any claim to the capital or revenue producing fund of the estate (unless it be the two groups of heirs first referred to), and that the other persons mentioned in the will had merely a share in the revenue of the funds, and that only when it exceeded £240 per annum. Now the revenue never exceeded that amount during the lifetime of Mrs. Stokes, and there is no indication in the will to show that the preference shown to her by the testator was intended to be extended to her children also. We are therefore bound to come to the conclusion that the estate of Mrs. Stokes has no right to any share in the surplus revenue of the estate of James Roberts.

This being our view of the case, the authorities quoted by counsel on either side cannot be of much assistance to the Court. Mr. *Blaine* attempted to introduce the principle of the law with respect to annuities, but there is no question of any annuity. Mr. *Nathan* again quoted a number of authorities on the subject of the lapsing of legacies owing to the failure of a condition attaching to the same and on the vesting of legacies, which may be and generally speaking are very good law, but can be of no assistance to the Court in interpreting this particular will, which owing to the peculiar circumstances of this case is itself of a very exceptional character.

The judgment of the Court must be for the defendants.

The question of costs to be argued in Chambers at a later date.

WARD, J.: The will of James Roberts from which the present claim takes its rise provides as follows:—"I hereby institute and declare my adopted daughter, Charlotte Roberts, . . and her mother, to be heirs of one-half of my estate, subject to the following conditions thereabout, and Florence Sophia Bradley commonly called Florence Sophia Webb and her daughter to be heirs of the other half, subject to the following conditions

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thereabout, viz:—That until the income of my estate exceeds £240 per annum net the income shall be divided into two equal parts, and one such half part shall be paid to each couple as above stated, but when the revenue of my estate yields and is more than £240 per annum then the surplus above £240 per annum shall be divided into three equal parts, and one of these third parts shall be equally divided into six parts and paid to the said Charlotte Roberts, her mother, to Harold Dhodad Roberts, to Maria Roberts, Harold's daughter, to Reuben Roberts, and to Sarah Humphreys (born Foulds). The second third part shall be equally divided and paid to Florence Sophia Bradley (often called Webb) and to her six children. The last third part of the surplus above £240 shall be paid to the children now living of my deceased brothers, John William, Henry, and Benjamin Roberts."

The plaintiff claims a share of the income of the estate of James Roberts, in so far as it exceeds £240 per annum, as the representative of the estate of Maria Theresa Stokes, a daughter of Benjamin Roberts above referred to.

In my opinion the whole inheritance of James Roberts was disposed of, the one half to Charlotte Roberts and her mother, the other half to Florence Sophia Bradley and her daughter. The other three groups named in the will can therefore only come in as legatees of certain surplus profits of the estate should such come into existence in the future. The legacies take the form of a direction to pay profits which it is quite uncertain may ever be earned. The date of payment is not merely postponed, but is entirely uncertain, and when the time of payment is uncertain that amounts to a condition. In this case the condition was not fulfilled in the life-time of Maria Theresa Stokes. Whether the event on which the legacies were to become payable would ever take place or not she had no vested interest in them, and there was consequently nothing which she could transmit to her representatives. I agree that there should be judgment for the defendants

Postea, 25th April.

P. U. Fischer, for the plaintiff: The dispute arose out of an ambiguity in the will. The executor should have had the point settled before administering the estate.

J. G. Dickson, for the defendant: When there is any ambiguity in a will and litigation is necessitated no doubt the ordinary rule is that costs should come out of the estate. But it must be proved that there was some show of reason for the proceedings, and that they were likely to conduce to, or had in their result conduced to, the benefit of the estate. See *Bartlett* vs. *Wood* (30 L.J. Ch., at p. 616). The action was not necessary for the administration of the estate: see *Le Sueur* vs. *Le Sueur* (1876, Buch., p. 153).

[MAASDORP, C.J.: It was through your action that a dividend-producing asset had been distributed among the legatees.]

But the Court has declared that Mrs. Stokes was not a legatee. The whole estate has been distributed in accordance with an agreement arrived at, at a meeting of all the heirs and legatees. See *De Jager* vs. *Scheepers* (1875, Buch., p. 86).

The Court ordered the costs of both parties to be paid out of the estate Roberts with leave to the plaintiff to apply again if so advised.

[Plaintiff's Attorneys, MCINTYRE & WATKEYS.
Defendants' Attorneys, FRASER & SCOTT.]

[Reported by R. C. STREETEN, Esq., Advocate.]