APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Moore.

CAMANI (PLAINTIFF), APPELLANT,

v.

BAREFOOT AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

1902. September 10.

Succession Act—X of 1865, *ss.* 90, 94—*Bequest to three children "or the survivors or survivor of them"—Incapacity of one to take by his attestation of the will—Residuary bequest to widow—Construction—Doctrine of accelaration.*

By his will, a testator, after giving a life interest in certain property to his wife, directed that after her death the property should be divided into equal shares between his "three children James, Cornelius and Florence, or the survivors or survivor of them," and the will contained a residuary bequest in favour of the wife. James (who was appointed a trustee) was an attesting witness to the will. The widow having died, Florence brought this suit, seeking to have it declared that James was incapacitated from taking under the will (by reason of his having attested it) and that she was entitled to a moiety of the property bequeathed:

Held, that the share of the legacy to James, which had lapsed, fell into the residue. The effect of the bequest to the three children "or the survivors or the survivor of them" would, in case James had predeceased the testator, have been to take the case out of the ordinary rule that a legacy lapses where the legatee dies during the lifetime of the testator. But as the two children had not survived James, the contingency on the happening of which they were to take had not happened. The testator having made a testamentary disposition which was incapable of taking effect, the share of James fell into the residue. The doctrine of acceleration could not be applied to such a case.

SUIT for the construction of a will. By his will, dated 24th September 1887, James Barefoot directed (*inter alia*) as follows:—"I will and direct that the interest only of all money or moneys that may at the time of my death be in any Bank or Banks in fixed deposits and also the interest only on all my Railway shares be enjoyed by my dear wife Matilda Barefoot absolutely for her sole use and benefit up to the time of her death and that after her death, the said fixed deposits and Railway shares be divided into equal shares between my three children, namely, James Joseph Barefoot,

* Original Side Appeal No. 5 of 1902, presented against the Decree of the Honourable Mr. Justice Boddam in the exercise of the ordinary original civil jurisdiction of the High Court in Civil Suit No. 64 of 1901.

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Cornelius Barefoot and Florence Dinah Barefoot or the survivors or survivor of them and for this purpose I direct that the said fixed deposits as aforesaid be renewed from year to year or from such times according to the Bank Rules as may be necessary: and as to the residue of all my estate personal and real I will devise and bequeath the same to my dear wife Matilda Barefoot consisting of all my household goods chattels and jewellery with the exception of the aforesaid gold watch and gold chain together with all money or moneys that may be in any current or other account except the fixed deposits and Railway shares aforesaid together with all property not hereinbefore referred to for her sole use and benefit and to be disposed of as she may think fit and proper." And he appointed his son the said James Joseph Barefoot and his wife the said Matilda Barefoot, to be executor and executrix respectively. James Joseph Barefoot was one of two attesting witnesses to the will. The testator died. Plaintiff, the said Florence Dinah (now the wife of Charles William Camani) now sued the said James Joseph, and the said Cornelius, and she subsequently impleaded the representative of the said Matilda, and prayed for a declaration that James Joseph was incapacitated from taking under the will and that plaintiff was entitled to a moiety of the property bequeathed to plaintiff, James Joseph and Cornelius (first and second defendants). Consequential relief was also sought. James Joseph (first defendant) admitted that the bequest to him was void by reason of the fact that he was an attesting witness to the will, but submitted that his lapsed legacy would not go to the plaintiff and second defendant, but that either there was an intestacy with regard to it or it fell into the residuary estate which was bequeathed to the widow. Cornelius (second defendant), left the construction of the will to the Court. The Administrator-General, as representing the widow, since deceased, pleaded that the lapsed legacy fell into the residuary estate, or that there was an intestacy in respect of it, and that the widow's estate would be entitled to one-third thereof. The first issue was: "Does the bequest to James Joseph Barefoot lapse into the residue of the testator's estate and pass under the will or is the same in the circumstances to be treated as an intestacy?" The learned Judge held that the lapsed legacy passed, under the residuary clause, to the third defendant.

Plaintiff preferred this appeal.

Mr. *Allan Daly* for appellant.

Mr. *John Adam* for first and second respondents.

Sir ARNOLD WHITE, C.J.—This case is not entirely free from difficulty, but it has been fully argued and we do not think any advantage would be gained by further considering it. The will in question provides or directs that the interest of all moneys at the time of the testator's death in any Bank in fixed deposit and also the interest on all his Railway shares be enjoyed by his wife for life and that after the death of his wife the deposits and the shares "be divided into equal shares between my three children, James Joseph Barefoot, Cornelius Barefoot and Florence Dinah Barefoot, or the survivors or survivor of them." James Joseph Barefoot is appointed a trustee under the will. Then, there is a residuary bequest in these terms: "and as to the residue of all my estate, I will and devise to my wife all my property except the fixed deposits and Railway shares aforesaid together with all property not hereinbefore referred to for her sole use and benefit and to be disposed of as she may think fit and proper." Now James Joseph Barefoot was an attesting witness to the will, and consequently under the provisions of section 54 of the Succession Act the bequest to him is void. The question is,—does James Joseph's share of the legacy bequeathed to him pass to Cornelius Barefoot and Florence Dinah Barefoot in the events which have happened, or does it fall into the residue. As it seems to me, if the will had not contained the words "or the survivors or survivor of them," it would have been a perfectly clear case. The will would have had to be construed in the same way as if James Joseph had died during the lifetime of the testator. Section 94 of the Succession Act is in these terms: "But where a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then if any legatee die before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property." The illustration to that section is "a sum of money is bequeathed to A, B and C to be equally divided among them. A dies before the testator. B and C shall take so much as they would have had if A had survived the testator." The real difficulty in the case arises in connection with the words "or the survivors or survivor of them." I think the effect of these words is this. If James Joseph Barefoot had died before the testator the effect of the words would have been to take

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the case out of the ordinary rule that a legacy lapses where the legatee dies during the lifetime of the testator. This is the proposition which was submitted by Mr. Daly and it is supported by the authority to which he has drawn our attention. So far I am with Mr. Daly. But that of course is not sufficient for his case. Then, for the purpose of establishing that Cornelius and Florence take James Joseph's share in the events which have happened—he relied on what is known as the doctrine of "acceleration." I think this doctrine has really no bearing, or at the best, only a remote bearing upon the question we have to determine. In all the cases in which this doctrine has been applied the parties ultimately benefited under the will were bound to take at some time or other, and in accordance with that doctrine the Courts of Chancery have held that where the will purports to create a life estate but the words which purport to create such estate are ineffective, those who take after the termination of the life estate are "accelerated." In the present case the effect of the will is that Cornelius and Florence or either of them only take on the happening of an express contingency, viz., that they survive James Joseph. That contingency has not happened. That being so it seems to me that the doctrine of acceleration cannot be applied. It has been argued that there is a sufficient expression of intention on the part of the testator as to what was to be done if James Joseph did not take the benefit which the testator intended, to justify us in construing the will so as, in the events which have happened, to give his share to Cornelius and Florence. The proposition comes to this. That because it is apparent that the testator intended that certain consequences should issue on the happening of a contingency which he contemplated, we are to assume he intended that the same consequences should ensue on the happening of a contingency which he did not contemplate. I do not know of any case which would warrant us in assuming in these circumstances what the intention of the testator was and in remoulding his will so as to give effect to what we assume would have been his intention if he had contemplated the contingency which actually happened. The provisions of section 90 of the Succession Act and the illustration to that section have a material bearing upon the question we have to decide. The section says "under a residuary bequest, the legatee is entitled to all property belonging to the testator at

the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect." Here the testator has made a testamentary disposition which is incapable of taking effect because the bequest is in favour of a party who is an attesting witness. It seems to me that the share of James Joseph falls into the residue and does not go to Cornelius and Florence. I think the construction adopted by the learned Judge is right and that this appeal should be dismissed. Costs of all the parties as between attorney and client (including the Administrator-General) should be paid out of the estate.

MOORE, J.—I concur.

Mr. *James Short*, Attorney, for appellant.

Mr. *A. E. Rencontre*, Attorney, for first and second respondents.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

APPASAMI PILLAI (PLAINTIFF), APPELLANT,

v.

SOMASUNDRA MUDALIAR AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

1902. September 10.

Letters Patent—Art. 15—"*Judgment*"—*Order refusing leave to appeal* in formâ pauperis—*Appeal.*

There is no appeal under article 15 of the Letters Patent, against an order, passed by a single Judge, under section 592 of the Code of Civil Procedure, refusing leave to appeal *in formâ pauperis*. By section 592 a discretion is vested in the Judge to allow or disallow the application, and an order passed in the exercise of such a discretion is not a "judgment" within the meaning of article 15 of the Letters Patent.

Sriramulu v. *Ramasam*, (I.L.R., 22 Mad., 109), *Venkatarama Ayyar* v. *Madalai Ammal*, (I.L.R., 23 Mad., 169), and *Srimantu Raja Durga Naidu* v. *Srimantu Raja Mallikarjuna Naidu*, (I.L.R., 24 Mad., 358), followed.

PETITION for leave to prefer an appeal, *in formâ pauperis* against the decree of the District Court of Tanjore in Appeal Suit No. 205

* Appeal No. 1 of 1902, under section 15 of the Letters Patent, presented against the order of the Honourable Sir Charles Arnold White, Chief Justice, dated 9th January 1902, passed on Civil Miscellaneous Petition No. 39 of 1902, presented to the High Court for leave to appeal *in formâ pauperis* against the decree in Appeal Suit No. 205 of 1901 on the file of the District Court of Tanjore (Original Suit No. 14 of 1900 on the file of the Sub-Court, Negapatam).