UNION TRUST COMPANY *v.* ROSSI.

Opinion delivered December 2, 1929.

1. WILLS—CONSTRUCTION.—The purpose of construction of a will is to ascertain the intention of the testator from the language used as it appears from consideration of the entire instrument, and, when ascertained, such intention must prevail if not contrary to some rule of law.
2. WILLS—EFFECT OF WIDOW RENOUNCING WILL.—Where the enjoyment of an estate by remaindermen was postponed to the widow's death solely for her benefit, and she elected to renounce the provisions of the will for her benefit, such renunciation was equivalent to termination of her life estate by death, and the remaindermen could enter into enjoyment of their interests at once.
3. PERPETUITIES—FUND FOR CARE OF GRAVE.—A provision in a will directing that $2,000 be set apart and kept as a fund to keep the graves of testator and his wife in order *held* void as against the rule forbidding perpetuities.
4. EQUITY—JURISDICTION OVER PROBATE ESTATES.—In a suit for construction of a will and to have dower set off to the widow, where debts of the estate were not found to have been paid or the administration dispenced with, the chancery court, after disposing of the special matters calling into exercise its powers, should have ordered the remainder of the proceeds of the sale of the property, after payment of the widow's dower, paid over to the executor, and left in the probate court for further proceedings.

Appeal from Pulaski Chancery Court; *Frank H. Dodge;* Chancellor; reversed.

STATEMENT BY THE COURT.

This appeal involves the construction of the will, disposing of a considerable estate of real and personal property, of Joseph Rossi, a resident of Little Rock, who died on March 11, 1927.

The will directs the payment of all his debts, and, if necessary for the purpose, the use of the insurance taken out by the testator for his wife, Emma Rossi. Item 2 reads: "I direct that $2,000 shall be set apart and kept as a fund, the principal or interest from which shall be used to keep the grave of my wife and myself in order." In item 3 the executor is directed to cause to be paid to the testator's wife "the sum of $250 per month, net," and in addition she was given the use and enjoyment of the home "for the term of her natural life," all taxes, assessments and expenses of keeping the home in repair to be paid out of the estate, and she to have the use and enjoyment thereof without any cost to her.

Item 4 is as follows: "It is my desire that, after my wife's death, my estate shall be distributed as follows: (a) $4,000 each to be paid to my sisters, Gissella Lombardi, Maria Menna, Giacinta De Palme, Caroline del Rossi; (b) each of my two nieces, children of Carmella Lombardi, shall receive the sum of $1,000, said sum to be held in trust by the executors until each of them shall become of age according to the law of Italy; the income therefrom to be paid them during their minority in such manner as the executors may see fit. After they have respectively attained full age, they shall receive the said sum and any unpaid income therefrom in full. It is also my desire that the house and lot I own in Monteroduni shall go to my said nieces, to have and to hold the same unto them and their heirs and assigns forever, and to receive all the profits therefrom. (c) The remainder of my estate, after the death of my wife and after the above bequests have been satisfied, shall go to my two brothers, or, if either of them be dead, then to their children, so that the boys shall respectively receive twice as much as

each of the girls; said division to be made so that the children of any of my brothers shall receive all that their father would have received had he been alive; and if either of my sisters or my nieces shall die without issue them surviving, the sum directed to be paid and property herein bequeathed to them shall go to my brothers or their children upon the terms above mentioned."

An emergency surplus fund of $2,000 per year arising from funds not required to be used under the first three items of the will was provided, and that the excess above that sum should be divided annually among his brothers and sisters, share and share alike, the children of any dead to take the share of their parent.

By item 6 the Union & Mercantile Trust Company of Little Rock is appointed executor, and also it provides: "but it is my desire that no part of my real estate be disposed of until after the death of my wife, Emma Rossi, and then only subject to the approval and direction of my adult male legatees or a majority of them; but no such election shall operate to delay the payment of or defeat any gift heretofore made herein."

The complaint alleges that the testator's estate consists of lot 10, block 71, in the city of Little Rock; lot 13, block 9, Chamber of Commerce Addition to the city of Little Rock; $6,297.83 in cash, $5,000 in life insurance, and certain building and loan stock maturing in the sum of $4,000 on September 28, 1928, all said property being new acquisitions; the appointment of the Union Trust Company on March 21, 1927, as executor; that the executor and all the legatees mentioned in the will were made parties and served with process, and entered their appearance. The complaint further alleged the testator left no descendants, and contained a renunciation of plaintiff's, the widow's, rights under the will, and prayed that there be set-off to her as dower one-half of the gross estate of the deceased.

Answers and cross-complaints were filed by all the parties defendant. The surviving children of Maria

Menna, a sister of the testator, who died on November 8, 1927; subsequent to the testator's death, alleged in their answer and cross-complaint that they were the sole and only heirs at law of Maria Menna. In another answer and cross-complaint filed by a sister of the testator, a devisee under his will, certain persons are alleged to be the sole and only heirs at law of Gabriel Rossi and residuary legatees to one-half of the estate; that the estate had been appraised at $103,000, the bulk of it consisting of real estate appraised at $85,000; that it is impractical to allot dower without a sale of the estate, which should be ordered made, free from dower. It further alleges that the distribution of the estate is accelerated by this action, and that the executor should be required to make final settlement of the estate when dower is allotted.

The Union Trust Company, as executor, denied the allegations of the complaint and the various cross-complaints, and prayed that the will be construed in all its phases so that it might distribute the estate in accordance with the intention of the testator, and conserve the right and property interests of all devisees and legatees.

From the decree construing the will, holding the distribution of the estate accelerated by the widow's renunciation of its terms and ordering final distribution, the appeal is prosecuted.

Clayton & Cohn, for appellant.

Lee Miles, R. P. Taylor and *S. S. Jefferies,* for appellee.

KIRBY, J., (after stating the facts). Appellant insists for reversal, first, that the court erred in holding that the election of the widow to renounce the provisions of the will and take her share of the estate as dower, etc., under the intestate laws instead, caused in legal contemplation a termination of her life estate and acceleration of the other estates dependent thereon, equivalent to its termination by the death of the life tenant.

The purpose of construction of a will is to ascertain the intention of the testator from the language used as

it appears from consideration of the entire instrument, and, when such intention is ascertained, it must prevail, if not contrary to some rule of law, the court placing itself as near as may be in the position of the testator when making the will. *Booe* v. *Vinson,* 104 Ark. 439, 149 S. W. 524; *LeFlore* v. *Hamlin,* 153 Ark. 421, 240 S. W. 712.

Our statute provides (§ 3528, C. & M. Digest) that jointures, devises and pecuniary provisions in lieu of dower may be forfeited by the woman for whose benefit they are made in such cases as would forfeit dower, and, upon such forfeiture, the estate conveyed for jointure and every pecuniary provision so made shall immediately vest in the persons or his legal representative in whom they would have vested on the determination of her interest therein by the death of such woman.

In 28 R. C. L. 333, it is said: "Ordinarily the election of the widow to take against the will has the effect of accelerating any remainder limited to take effect after a life estate given to her. The election of a widow to take against her deceased husband's will is equivalent to her death as respects the payment of legacies and the distribution of that part of the estate which is to be distributed under the will upon the happening of that event."

In the note to *Young* v. *Harris,* 5 A. L. R. 477, it is said: "The doctrine of acceleration proceeds upon the supposition that, though the remainder is, in terms, not to take effect in possession until the decease of the tenant for life, it is, in point of fact, to be read as a limitation of a remainder to take effect in every event which removes the prior estate out of the way. When, therefore, it appears that possession of the remainderman is postponed solely for the purpose of letting in the life estate, it is presumably the intention of the testator that a renunciation of the life estate shall be considered as equivalent to its termination by the death of the life tenant, and that the beneficiaries entitled in remainder

shall enter into its enjoyment at once. * * * In other words, where the purpose of the testator in postponing distribution is merely to let in the precedent estate, the premature determination of such estate will have the effect of also terminating the contingency to which the gift over is subject, which, though nominally contingent upon surviving the life tenant, is to be read as contingent upon surviving the termination of the precedent estate." See also *Sherman* v. *Flack,* and note, 5 A. L. R. 456, 283 Ill. 457, 119 N. E. 293; *American National Bank* v. *Chapin,* and note, 17 A. L. R. 305, 130 Va. 1, 107 L. E. 636.

The will devises a life estate, in clause 3, in the enjoyment of the home occupied by the wife and the testator at the time of his death, and directs that she shall have the use and enjoyment thereof, without any cost or expense to her, in addition to the $250 per month net directed to be paid her. It is true it also provides, in the last clause, that it is the testator's desire that no part of his real estate be disposed of until after the death of his wife, Emma Rossi, and then only subject to the approval and direction of his adult male legatees or a majority of them, but that no such election shall operate to delay the payment of or defeat any gift made in the will. The testator knew, however, that an election by the widow against the will and a renunciation by her of its provisions would terminate the life estate he was creating in her by the will, and upon which the enjoyment of the remainders depended, and he made no provision to meet such contingency. The provision of the life estate was necessarily for the benefit of the widow, rather than for any independent purpose of postponing the disposition of the estates dependent upon her death, and, although he expressed a desire that no part of his real estate should be disposed of until after the death of his wife, and then only subject to the approval and direction of his adult male legatees or a majority of them, he also said: "But no such election shall operate to delay the payment of or defeat any gift heretofore made herein."

It thus appears from the construction of the whole instrument that the enjoyment of the estates by the remaindermen was postponed solely for the benefit of the widow, and, she having elected against the will and renounced its provisions made for her life, it must be held presumably the intention of the testator that such renunciation of the life estate is equivalent to its termination by the death of the life tenant, and that the beneficiaries entitled in remainder should enter into its enjoyment at once. It follows that no error was committed in the holding of the court in that regard.

Neither was error committed in holding the provision of the will creating a trust fund for the perpetual maintenance of the graves of the testator and his wife void, notwithstanding the court gave as reasons for such holding that this was a provision for the benefit of the widow, who, having renounced the provisions of the will, was entitled to no benefit or enjoyment of it. Such provision was void as offending against the rule against perpetuities. Section 178, Sizer's Pritchard, Law of Wills, etc; *Read* v. *Williams,* 125 N. Y. 560, 26 N. E. 730, 21 Am. St. Reports 748; *Bates* v. *Bates,* 134 Mass. 110, 45 Am. Rep. 305; *Fite* v. *Beasley,* 12 Lea 328. It is doubtless true, however, that the testator could have provided for the burial of his own and the body of his wife in a cemetery established for taking perpetual care of the graves of those interred therein, since that would not have involved an unlawful suspension of the ownership of personal property.

No complaint is made of the decree of the chancellor ordering the disposition of the share devised to Maria Menna in the estate of the testator, which also appears to be correct.

The court, however, erred in attempting to lift the estate out of the probate court, the debts of the estate not being shown to have been paid or the administration dispensed with under the statute (sec. 1, C. & M. Digest), and proceed to the administration and disposition of it

after the special matter which called into exercise its peculiar power was disposed of, and it should have ordered the remainder of the proceeds of the land sold, after the payment of the widow's dower, paid over to the executor, and left the cause in the probate court for further necessary proceedings in the regular course of the administration, in accordance with the law and decree construing the will. *Robinson* v. *Black,* 84 Ark. 92, 104 S. W. 554; *Hawkins* v. *Lane,* 48 Ark. 544, 3 S. W. 821; *Laws* v. *Wheeler,* 171 Ark. 514, 284 S. W. 775.

For the error designated the cause will be reversed, and remanded with directions to enter a decree not inconsistent with this opinion. It is so ordered.