1879
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CHARLES H. B. FISHER.....APPELLANT;

AND

GEORGE R. ANDERSON, *et al*.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will, construction of—Tenants in common or joint tenants.—Costs.

By will *J. H. A.* directed:—"Until the expiration of four years from the time of my decease, and until the division of my estate as hereinafter directed, my executors shall every year place to the credit of each of my children the sum of sixteen hundred dollars, and if any of my children shall have died, leaving issue, then a like sum to and among the issue of the child so dying, such sum of sixteen hundred dollars to be

*PRESENT:—Ritchie, C. J., and Strong, Fournier, Henry and Gwynne, J. J.

paid by half yearly instalments to such of my children as shall be of age or be married; but if any advances shall have been made to any of them, and interest shall be due thereon, such interest to be deducted from the said sum of sixteen hundred dollars.

"As regards the division, appropriation, and ultimate disposition of my estate, it is my will that, subject to the payments of my just debts and legacies, bequests and annuities, I have heretofore given or may hereafter give, and to the expenses of the management of my estate, all the rest, residue and remainder of my estate, and the interest, increase and accumulation thereof, be distributed, settled, paid and disposed of, to and among my children who may be alive at the time of the division and appropriation into shares of my estate hereinafter directed, and the issue then living of such of my children as may be then dead, at the time and in the manner following, that is to say:

"That immediately, on the expiration of four years from my death, my executors, after making such provision as may be necessary for the payment of any debts and legacies that may be outstanding and unpaid, and of outstanding annuities, and of the expense of the management of my estate, shall divide all my remaining estate into as many just and equal shares as the number of my then surviving children and of my children who shall before them have died, having lawful issue then surviving, shall amount unto, and shall apportion and set off one such share to each of my said then surviving children, and one such share to the lawful issue of each of my then deceased children, whose lawful issue shall be then surviving, all the issue of each deceased child standing in the place of such deceased child.

"And it is my will, and I direct, that from henceforth a separate account shall be kept by my trustees of each share, and of the interest and profit thereof, and the payments made to or on account of or for the maintenance and education of each of my said children or issue, shall be charged against the share apportioned to such child or children, or wherein such issue shall be interested, so that all accumulations and profits that may arise shall enure to the increase of each several share on which such accumulation or profit shall accrue—it being my intention that after such division shall take place, the maintenance, education and support of each of my children while under the age of twenty-one years shall be drawn from the separate income of such child, and the maintenance and education of the children of any of my children who may have before them died, leaving issue, shall be drawn from

1880

FISHER v. ANDERSON.

the share or shares set apart for the issue of such deceased child or children.

"And that my children, and such issue of deceased children being of age, that is to say, of the age of twenty-one years, or when respectively they shall attain the age of twenty-one years, shall be severally entitled to receive for their own use the whole of the interests and profits of the share and proportion of my estate to which they may be respectively entitled."

On 26th May, 1864, *M. L. A.*, testator's daughter, married *C. H. F.*, appellant. Testator died 24th Dec., 1870. On 25th Aug., 1872, testator's daughter died, leaving three children: *H. A. F.*, *E. B. F.*, and *W. S. F.* On the 14th Sept., 1877, *H. A. F.*, the eldest son of appellant and *M. L. A.* died. Thereupon the appellant claimed that the three brothers took their mother's share under the will as tenants in common and, the property being personal property, *H. A. F.'s* share vested in the appellant, his father.

Held,—That the intention of the testator was that his estate should be divided, and that the children of testator's daughter took as tenants in common, and consequently on the death of the eldest son the whole right, title and interest in his share, vested in the appellant.

APPEAL from a judgment of the Supreme Court of *Nova Scotia* (sitting in Appeal in Equity), pronounced on the 22nd of April, 1879, dismissing an appeal of the present appellant against the decree or judgment of the Judge in Equity made therein.

The following case was entered into between the parties, and filed on the Equity side of the Supreme Court, under the practice in *Nova Scotia*, viz.:

"On or about the 24th day of December, A.D., 1870, the Honorable *John H. Anderson* departed this life, having first made his last will and testament, a true extract whereof is hereto annexed marked 'A.' At the time of his death he left several children him surviving, and amongst others *Mary Louisa*, then the wife of *Charles H. B. Fisher*, one of the parties hereto. The said *Charles H. B. Fisher* was married to the said *Mary Louisa Anderson* on the 26th day of May, A.D., 1864, and at the time of the death of the said *John H.*

1880

FISHER v. ANDERSON.

Anderson, there were living of the issue of the said marriage the following persons, namely: *Henry Anderson*, born on the 31st day of August, A.D. 1866, *Edwin Bayard*, born on the 7th day of December, A.D. 1867, *Walter Stanley*, born on the 11th of September, A.D. 1869. The said *Mary Louisa* departed this life on the 25th day of August, A.D. 1872, leaving the said children her surviving. The said *Mary Louisa* died without having made a will, and without having exercised any right or power of appointment conferred upon her by the said will.

"On the 14th day of September, A.D., 1877, the said *Henry Anderson Fisher* departed this life, leaving his two brothers him surviving and who are still living.

"The said extract hereto annexed marked 'A' is the only portion of the will of the said *John H. Anderson* which in any way bears upon the question intended to be raised by this case, but either party shall be at liberty to produce and use at the argument hereof a copy of the entire will of the said *John H. Anderson*, providing the same is certified under the hand of the Registrar of the Court of Probate for the county of *Halifax*, and sealed with the seal of the said Probate Court.

"*George R. Anderson, John Starr* and *Andrew K. Mackinlay* are now the executors and trustees of said will.

"The said *Charles H. B. Fisher*, as the father of the said *Henry Anderson Fisher*, claims that upon the death of the said *Henry Anderson Fisher* his share in the estate of the said *John H. Anderson* became the property of him the said *Charles H. B. Fisher*, and did not go to the surviving brothers of said deceased child.

"The foregoing statement of facts has been agreed upon by the said *Charles H. B. Fisher* on his own behalf, and by the said *George R. Anderson, John Starr*

1880

FISHER v. ANDERSON.

and *Andrew K. Mackinlay*, as such executors and trustees as aforesaid, on behalf of their *cestui que trust* who are interested in said fund, and the opinion of this court is sought as to whether or not the share of said *Henry Anderson Fisher* upon his death vested in his father, the said *Charles H. B. Fisher*, as his heir or legal representative.

"Nothing herein contained shall be construed to deprive the party against whom the judgment of this court shall be given of the right of appeal from such decision."

The clauses of the will of the said *J. H. Anderson*, upon which the determination of this appeal depended, are set out in the head note.

The case was argued before Mr. Justice *J. W. Ritchie*, Judge in Equity for the Province of *Nova Scotia*, who gave judgment in favor of the defendants. The plaintiff appealed to the Supreme Court of *Nova Scotia* from that decision, and that Court dismissed the appeal with costs.

The question which arose on this appeal was whether, under the will of *John Anderson*, the children of the appellant by *Mary Louisa Anderson*, a daughter of the testator, took as joint tenants or tenants in common, the benefit which they derive?

Mr *Gormully* for appellant:—

On the construction of the will, the children of Mrs. *Fisher* took as tenants in common.

There is very little dispute as to the law, the point is, does the will, as a fact, create a severance?

Now, where in a will property, whether real or personal, is given to two or more persons, any expression, which in the slightest degree imports a division among the objects of the gift, creates a tenancy in common. It has been held, for example, that a tenancy in common is created by the use of the words "to and

among," "respectively," "between or amongst," and "between them," and also by the use of the word "participate."

A court of equity leans in favor of a tenancy in common rather than a joint tenancy.

The Judge in Equity has founded his decision chiefly on the following clause of the will:

"That.....my executors..... shall divide all my remaining estate into as many just and equal shares as the number of my then surviving children and of my children who shall before then have died, having lawful issue then surviving, shall amount unto, and shall apportion and set off one such share to each of my said surviving children, and one such share to the lawful issue of each of my then deceased children whose lawful issue shall be then surviving, all the issue of each deceased child standing in the place of such deceased child."

Perhaps if that clause stood alone the decision would be correct, but it is submitted that the learned Judge has not given sufficient weight to the other parts of the will.

The appellant relies on that portion of the will in which the grandchildren as well as the children of the testator are given several interests in the income thereby bequeathed to them, the words "to and among" being sufficient to create a tenancy in common. See *Richardson* v. *Richardson* (1), *Stilworthy* v. *Sancroft* (2).

The case of *Crooks* v. *De Vandes* (3), is relied upon by the respondents, but there the only words were "what remains to go to my grandsons," and Lord *Eldon* did not think there was anything in the context to control the natural meaning of these words.

This was a gift to a class, and those who take are

(1) 14 Sim. 526.
(2) 33 L. J. Ch. 708.
(3) 9 Ves. 200.

1880

FISHER v. ANDERSON.

those who are alive at the time of the distribution, and the moment they took, they took absolutely. The time for division had passed before the child died, and if the executors had followed the directions in the will the division would have taken place. The Court below did not discuss the period of division.

Mr. *Cockburn*, Q.C., for respondents:

In one of the cases referred to by the learned Judge in Equity, *Bridge* v. *Yates* (1), precisely the same words were used, and there it was held that two grandchildren, the issue of a deceased child of testator, took as between themselves as joint tenants, and not as tenants in common, the testator not having spoken of any division amongst them. The only division contemplated in this case is that of the grand division of the children when they attain the age of 21 years. There never was a subdivision of one share left to the issue of the children dead contemplated. It is altogether a question of construction, and I contend it was not the intention of the testator that the husband of his child should take anything under this will.

The learned counsel relied on the reasons given in the three concurring judgments appealed from and the following cases therein cited, viz.:

In *re Hodgson* (2), *McGregor* v. *McGregor* (3), *Leak* v. *McDowall* (4), *Crooke* v. *DeVandes* (5).

Mr. *Gormully* in reply.

RITCHIE, C. J.:—

This was an appeal from a judgment of the Supreme Court of *Nova Scotia*. The question raised is as to the construction of the will of *John Anderson*, viz: Whether the children of the appellant by *Mary Louisa Anderson*,

(1) 12 Sim. 645.
(2) 1 K. & J. 181.
(3) 1 DeG. F. & J. 63.
(4) 32 Beav. 28.
(5) 9 Ves. 206.

a daughter of testator, took under his will as joint tenants or tenants in common.

On 26th May, 1864, *Mary Louisa Anderson* married the appellant. The testator died on 24th December 1870. On the 25th August, 1872, *Mary Louisa Fisher née Anderson* died, leaving three children, *Henry Anderson Fisher, Edwin Bayard Fisher, and Walter Stanley Fisher.*

On the 14th Sept., 1877, *Henry Anderson Fisher*, the eldest son of the appellant, and *Mary Louisa Anderson* died, and the appellant now claims that the three brothers took their mother's share under the said will as tenants in common and not as joint tenants, and the property being personal property vested in the appellant, his father. On the other side it is contended the brothers took as joint tenants, and that consequently the interest of *Henry Anderson Fisher* survived to his brothers.

Though unquestionably at the present day tenancies in common are favored rather than joint tenancies, it cannot be doubted, that where the words used create a joint tenancy and there is nothing to indicate a contrary intention, no words or circumstances which, either expressly or by implication, create a severance, that must be taken to be the real intent of the testator, but wherever slight words of severance are found, the court acts upon them, and this the more readily in cases where provision is being made for families, for courts of equity have always inclined to tenancies in common when a question arises upon a provision for children.

Cruise thus states Lord *Hardwicke's* views, as taken from *Stones* v. *Heurtly*, MSS. R. (1):

> Courts of law were anciently very favorable to joint tenancies to prevent the splitting of tenures and services, but since the abolition of tenures, even courts of law have been less favorable to them, but courts of equity always espouse tenancies in common as being a more suitable provision and prevents the descent of and right to the

(1) Greenleaf's Cruise's Dig. vol. 3, p. 415.

1880

FISHER v. ANDERSON.

Ritchie, C.J.

estate depending on an accident, that of survivorship, and are still more inclined to them when the question arises upon provisions for children, whereby an equality is established among them. It was said on the one hand that the word "survivor" makes a joint tenancy, and on the other hand that the words "*equally to be divided*" should sever it and make a tenancy in common, and I am of opinion in this case these last words must prevail, for it could never be the testator's intent that, if any one of his younger children should die leaving children, such children should have nothing at all, but their mother's share should go to the surviving sisters. It was said the daughters might have severed the joint tenancy, but here they were under age, any one of them might have married and had children and died under age before any severance of the joint tenancy could be.

An observation peculiarly applicable to the present case, and Mr. *Jarman*, after citing a great number of cases, showing what expressions have been held to create a tenancy in common, says:

The preceding cases evince the anxiety of later judges to give effect to the slightest expressions affording an argument in favor of a tenancy in common, an anxiety which has been dictated by the conviction that this species of interest is better adapted to answer the exigencies of families than a joint tenancy, of which the best quality is that the right of survivorship may, at the pleasure of either of the co-owners, (if personally competent), be defeated by a severance of the tenancy (1).

In *Haws* v. *Haws* (2), Lord *Hardwicke* says:—

The general rules insisted on are true, for certainly joint tenants are not favored here, because they introduce inconvenient estates and do not so well provide for families, therefore this court leans against them, and so, I believe, do the courts of law now, though they favored them formerly, and the ground upon which they went was the multiplication of services under the old tenures, but the statute of 12 Car., 2 ch. 24, s. 1, has reduced the several sorts to socage tenure only.

Again, in *Rigden* v. *Vallier* (3), Lord *Hardwicke* says:

Here is a father making provision for all his children: suppose one of them had died and left children, if a joint tenancy, it must have gone from them and survived to the other sons and daughters of the grantor, which could never be his intention.

In *Taggart* v. *Taggart* (4), Lord *Redesdale* says:

(1) 2 Jarman, 3rd ed. 239.
(2) 3 Atkyns 524.
(3) 3 Atkyns 730.
(4) 1 Sch. & Lef. 88.

Joint tenancy as a provision for the children of a marriage is an inconvenient mode of settlement, because during their minorities no use can be made of the portions for their advancement, as the joint tenancy cannot be severed.

And Lord *Hatherley*, in *Robertson* v. *Fraser* (1), says: Ritchie, C.J.

I cannot doubt, having regard to the authorities respecting the effect of such words as "amongst" and "respectively," that anything which in the slighest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy and to create a tenancy in common.

From all which it may safely be affirmed that where words of joint tenancy are coupled with words amounting to a division, there will be a tenancy in common.

I think enough can be found in this will to indicate an intention of severance sufficient to justify the conclusion that a tenancy in common was created, that the share of the child of the testator *Mary Louisa* was on her death to be shared equally by her issue, that is by her children; for by the term "issue" as used in connection with that of "parent," and to take the share primarily intended for the parent, I think the testator clearly meant children, and the word must be so construed.

A critical examination of the terms of the will makes the intention of severance, I think, apparent. After vesting his property in trustees, giving directions as to the managing, selling and investing the estate, and after certain specific bequests, and after making provision for his wife, and also for the bringing up, maintenance and education of his children while under the age of 21 and unmarried, the testator provides for a division of his estate, on the expiration of four years from his death, but until the expiration of the four years, and until the division takes place, the executors are required, in these words, "every year to place to the credit of each of my children the sum of $1,600, and if any of my children shall have died, leaving issue, then

(1) L. R. 6 Ch. App. 699.

1880

FISHER v. ANDERSON.

Ritchie, C.J.

the like sum *to and among the issue* of the child so dying."

This sum of $1,600 a year was unquestionably to the issue as tenants in common, because it is abundantly clear from numerous authorities that the terms "to and among" create a tenancy in common. Then provision is made as regards the "*division, appropriation* and *ultimate disposition* of my estate." These words indicate that the testator intended himself to *divide, appropriate* and *ultimately dispose* of the estate, and he proceeds to do so, subject to payment of debts, legacies, and expenses of management, in these words:

All the rest, residue and remainder of my estate, and the interest, increase and accumulation thereof, be distributed, settled, paid and disposed of *to and among* my children (who may be alive at the time of the division and appropriation into shares of my estate, hereinafter directed), and the issue then living of such of my children as may be then dead.

The words "to and among," I think, apply quite as much to the "issue" as to the "children," and quite as much as the words *share and share alike* were held to apply in *Hodges* v. *Grant* (1). In that case, the language as to the residue was:

Unto and among all the children of *James Grant* who shall be then living, and the issue of such of the children of the said *James Grant* as shall be then dead, having left issue living at the time of their respective deaths, equally to be divided between such children and issue share and share alike, but so that the issne of such children respectively, shall take only such share as their respective parents would, if living, have been entitled to.

It was contended that the children only took as tenants in common and the issue of deceased children as joint tenants. The Master of the Rolls says:

You cannot get over the words "equally to be divided between such children and issue share and share alike," for the words apply to the *issue* as much as to the *children*.

In delivering judgment he also said:

With regard to the residuary gift, I am of opinion that the issue of deceased children of *James Grant* are entitled to take as *tenants in common*.

(1) L. R. 4 Eq. 140.

That is to say, I think, this clause should be read the words "who may be alive, &c." as matter of description, and as in a parenthesis "to and among my children and the issue then living of such of my children as may be then dead."

Then, as to the time and manner of this division, the testator provides that immediately on the expiration of four years from his death, his executors, after making provision for debts and legacies, and annuities outstanding, and the expense of the management of his estate, "shall divide all my remaining estate into as many *just and equal shares* as the number of my then surviving children, and of my children who shall before then have died leaving lawful issue then surviving, shall amount unto, and shall apportion and set off one such share to each of my said then surviving children, and one such share *to the lawful issue* of each of my then deceased children, whose lawful issue shall be then surviving, all the issue of each deceased child standing in the place of such deceased child." This, I take it, was to indicate that though the estate was to be divided, as previously provided, *to and among* his children and the issue then living of such of his children as might then be dead, such issue should only have divided among them what the parent would have had had she been living at the time of the division and appropriation, and was not intended to interfere with an equal division of such share among her issue, and this, I think, is indicated by the next section which provides for the keeping of a separate account by the trustees of each share, thus:

And it is my will, and I direct, that from henceforth a separate account shall be kept by my trustees of each share, and of the interest and profit thereof, and the payments made to or on account or for the maintenance and education of each of my said children or *issue*, shall be charged against the share apportioned to such child or *children*, or *wherein such issue shall be interested*, so that all accumulations and profits that may arise shall enure to the increase of each

1880

FISHER v. ANDERSON.

Ritchie, C.J.

several share on which such accumulation or profit shall accrue, it being my intention that after such division shall take place, the maintenance, education and support of each of my children, while under the age of twenty-one years, shall be drawn from the separate income of such child, and the maintenance and education of the children of any of my children who may have before them died, leaving issue, shall be drawn from the share or shares set apart for the issue of such deceased child or children.

This separate account must have been intended to be kept, not only of each share apportioned to each child, but also of the share of each of the children of a deceased child, and this, I think, the following, as it were explanatory clause, makes very clear :—

And that my children, *and such issue of deceased children being of age*, that is to say, of the age of twenty-one years, or when respectively they shall attain the age of twenty-one years, *shall be severally* entitled to receive for their own use the whole of the interests and profits of the share and proportion of my estate to which they may be respectively entitled.

What would be the share and proportion of his estate to which they would be respectively entitled, if the testator did not contemplate an equal division of the mother's share *to and among* the issue or children of a deceased child? What can this mean but that the children of the testator were to have equal shares of the estate, and the children of a deceased child to have equal shares of the deceased parent's share, and that an account was to be kept against each child and against each of the issue or children of a deceased child, so that each should be maintained and educated out of his or her share, and not that the whole or an unequal portion should be expended on one to the detriment of the other or others; and unless such an account was kept, as well against the children severally of the deceased child as against the children living of the testator, how could the testator's clearly expressed intention be carried out, viz: that his children and such issue of

deceased children *being of age*, or when respectively they shall attain the age of twenty-one years, should be severally entitled to receive for their own use the whole of the interest and profits of the *share* and proportion of the estate to which they may be respectively entitled?

Unless shares were set apart and these separate accounts kept with each and all, both children and issue, what would they respectively be entitled to? No distinction whatever is made between the children and their issue, but, as in the case of the children so in the case of the issue, each of the children and each of the issue is to receive on coming of age the whole of the interests and profits of *the share* or proportion of his estate to which they may be respectively entitled. All this, I think, indicates that the testator intended that his children should enjoy his estate share and share alike, and that the issue, that is the children of a deceased child, should take their mother's share, share and share alike, and should receive each one his share together with all interest and profits accruing thereon on coming of age, and so brings this case directly within the rule enunciated by Lord *Hatherley* in *Robertson* v. *Fraser* (1) where he says:

> All the authorities go to this, that if there is to be a sharing, the shares must be equal; and division being once imported, the true interpretation must be a tenancy in common.

I, therefore, think that though there may be in one part of the will an expression, which, if it stood alone, would indicate a joint tenancy, the words used are so coupled with provisions and directions, so clearly pointing to a severance and equal division, and separate interests in each of his children, and in each of the children, or issue, of a child dying, for whom the testator was making provision, that the bequest must be treated

(1) L. R. 6 Ch. App. 699.

1880

FISHER v. ANDERSON.

Ritchie, C.J.

as a bequest to such issue as tenants in common and not as joint tenants; in other words, the testator intended division; the whole scope of the will shows that the intent of the testator was that his estate should be divided, and by consequence that there should be no survivorship.

STRONG, J.:—

I am of opinion that the children of the testator's deceased daughter, Mrs. *Fisher*, take the interest bequeathed to them as tenants in common and not as joint tenants.

It is quite clear that Mrs. *Fisher*, having died before the period of division, the legacy to her never vested. The children do not therefore take under the provision of the will which disposed of the reversionary interest in their mother's share, by giving her a power of appointment to the extent of $10,000, and in default of appointment, and as to the residue of the share, gave the fund to her children and grand children absolutely by words which clearly imported a tenancy in common. I think that that disposition has no influence on the immediate gift to the children on which depends the question we have to determine. The children here take under the direct bequest to them, in the event of their mother's death before the arrival of the period of distribution. The testator directs his executors, at the expiration of four years after his death, to divide the residue of his estate into as many just and equal shares as the number of his then surviving children, and of his children who shall before then have died shall amount unto, and shall apportion and set off one such share to each of said surviving children, and one such share to the lawful issue of each of his then deceased children whose lawful issue shall be then surviving, all the issue of each deceased child standing in the place of such deceased child.

It is, I think, clear that there is nothing in this part of the will which indicates an intention that the issue of one of the testator's deceased children should take *inter se* as tenants in common, though, as between a class of such grand children and the testator's surviving sons and daughters, the directions as to apportionment, and other words imputing severance, are amply sufficient to shew that no survivorship was intended, but no such expressions apply to the grand children amongst themselves, who would therefore, if there was nothing more in the will explanatory of the gift, take as joint tenants.

Further, the gift to the children of a child deceased before the period of distribution of the annuity of $1,600 up to the expiration of the four years from the testator's death, does not, in my opinion, bear in any way on the point in dispute. It is clear that this annuity is given to grand-children as tenants in common, the words "to and among the issue of the child so dying," being conclusive in that respect, but the circumstance of the testator having given this temporary provision to his grand-children as tenants in common in no way leads to the inference that he intended them to take their share of the residue, which he bequeaths by a distinct gift, in the same manner. To proceed on such reasoning, would amount to holding that, if a testator gives distinct legacies to the same persons in one bequest, using words of severance, and not applying such words to the other, both legacies would vest in the legatees as tenants in common, a course of reasoning manifestly unsound. If authority is wanted for so plain a proposition, the case of *Crooke* v. *De Vandes* (1) shews that, in the much stronger case of the interest being given with words of severance not extending to

(1) 9 Ves. 197.

1880

FISHER v. ANDERSON.

Strong, J.

the corpus, the *jus accrescendi*, nevertheless, applies to the latter.

Then the will contains this clause: "And that my children and such issue of deceased children being of age, that is to say of the age of twenty-one years, or when respectively they shall attain the age of twenty-one years, shall be severally entitled to receive for their own use the whole of the interests and profits of their share and proportion of my estate to which they may be respectively entitled." I find here expressions which are decisive to show that a tenancy in common, and not a joint tenancy, was contemplated by the testator.

In the first place, the issue of the testator's deceased children are declared to be "severally" entitled to be paid when they "respectively" attain twenty-one—stronger terms for inferring a tenancy in common than these words "severally" and "respectively" could not be suggested, and they must be conclusive, if I am right in considering, as I do, that by the words "interests and profits" of the share it is not intended to direct the payment, in the manner mentioned, to the issue of deceased children, merely of the accrued interest and profits, but of the whole corpus of these legacies. Supposing, however, that this direction has not reference to the payment of the capital, but is confined to the accretions, there remain still words referring to the original gift sufficient to explain the testator's intention to have been to create a tenancy in common; for the "interests and profits" which are to be paid "severally" to the issue as they "respectively" attain 21 are to be of the "share and proportion" of the estate to which they may be "respectively" entitled.

The testator must therefore in this last view be taken as furnishing an explanation of his intention in making the original gift; for if each grand-child was to take a "share and proportion," and the members of the class of

grand-children were to be "respectively" entitled to an interest in the testator's estate, all right of survivorship must be excluded. In *Robertson* v. *Fraser* (1), a much stronger case than this, Lord *Hatherly* determined that a legacy, which *per se* would have been taken in joint tenancy, was so explained by a codicil referring to the original bequest incidentally, and without any reference to the vesting or payment of the legacy, as to amount to tenancy in common, the word used, and which the Lord Chancellor fastened upon as indicating the intention, being one of much less force than the expression contained in the clause of this will which I have quoted.

I need scarcely say that there is no room for arguing that these words "severally" "respectively" "share and proportion" do not refer to the children issue of a testator's child, as well as to the testator's own children; for the direction for payment at 21 of course applies to the grand-children individually, who are therefore, by force of the expression just mentioned, declared to be each entitled to a share in that portion of the testator's estate which is allotted to the class to which they belong.

For these reasons I am compelled to differ from the Court below.

I do not see, however, that we can at present make any order upon this appeal, for we have not any order or decree of the Court below before us—the printed case being in this respect incomplete.

Further, as far as I can see, none of the surviving infant children of Mrs *Fisher* are parties to the record, and without their presence no order for payment to the appellant or declaration of the construction of the will could properly be made. The trustees, it is clear on

(1) L. R. 6 Ch. App. 696.

1880

FISHER v. ANDERSON.

Strong, J.

authority, do not for the purpose of such a suit as this sufficiently represent infant beneficiaries.

In my judgment, the appeal ought to stand over until the order or decree is produced; and, if it then appears that none of the children are parties, the cause ought to be remitted to the Court below with a simple declaration that the suit is defective for want of parties—in which event no order should be made as to costs. If it appears that the children are defendants, then, I think, the construction of the will may be declared in conformity with the opinion I have before expressed, and in that event the costs of all parties should be paid out of the estate.

FOURNIER, J., concurred in allowing the appeal.

HENRY, J.:

I concur. I had at first some difficulty in arriving at the conclusion that the children of the testator's daughter, *M. L. Anderson*, took as tenants in common; but taking the whole will together I have arrived at the same conclusions as my brothers. There are sufficient words in this will to create a tenancy in common. First, he makes provision for his own children, but gives them only a limited control, for they were not even entitled to their share when they arrived at age. Then he directs that a separate account of each share belonging to the lawful issue of each of his then deceased children should be kept, and directs that payments made to, or account of, or for the maintenance and education of each of his said children or *issue*, shall be charged against the share apportioned to such child or children, or wherein such issue shall be interested, so that all accumulations and profits which may arise shall enure to the increase of each several share on which such accumulation or profit shall accrue, &c. I think from that, and for other reasons, we may assume that the estate

was intended to go to the heirs as tenants in common, and therefore I have come to the conclusion that this appeal should be allowed.

GWYNNE, J.:

This a case which raises a question under the will of the late *John H. Anderson*, who died on the 24th Dec., 1870, and the question is, whether the children of testator's daughter, *Mary Louisa Anderson*, who derive a benefit under testator's will, take that benefit as joint tenants, or as tenants in common. The learned Judge in Equity in *Nova Scotia*, and a majority of the Supreme Court of that province, *Weatherbe*, J., dissenting, have held that they took as joint tenants, being of opinion that there is nothing in the will of the testator indicating an intention that they should take in severalty. With the greatest respect and deference for the learned judgments delivered in the courts below, the testator's will does appear to me sufficiently to indicate that intention, the assumed absence of which is made the basis of the judgment appealed from. The rule which governs the case is very emphatically expressed by Lord *Hatherly* in *Robertson* v. *Fraser* (1), namely, that:

> Any thing which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of joint tenancy and to create a tenancy in common; all the authorities go to this, that if there is to be a sharing the shares must be equal, and division being once imported, that the interpretation must be a tenancy in common.

By the clauses of the will, which raise the question, the testator directed that until the expiration of four years from the time of his decease, and until the division of his estate as thereinafter directed, his executors should every year place to the credit of each of his children the sum of $1,600, and if any of his children should have died leaving issue, *then a like sum to and among*

(1) L. R. 6 Ch. App. 696.

1880

FISHER v. ANDERSON.

Gwynne, J.

the issue of the child so dying. Now, that the word "*issue*" in this last sentence is equivalent to "children" is clear upon the authority of *Sibley* v. *Perry* (1) and *Lanphier* v *Buck* (2). We have, then, in the case of one of testator's children dying leaving issue before the period appointed for the division of his estate, which is the event which has happened, a clear gift of $1,600 annually *to and among* the *children* of his child so dying, which upon the authority of all the cases constitutes a tenancy in common, and as this sum is to be placed to the credit of such children, it must be so done in equal parts in severalty.

Subject, then, to the payment of his debts, legacies and the payment of the expenses of the management of his estate, the testator, as regards the division, appropriation and *ultimate* disposition of his estate, directed all the rest, residue and remainder of his estate, and the interest, increase and accumulation thereof to be *distributed, settled, paid* and *disposed of*, to and among his children living at the time of such division and appropriation, and the issue then living of such of his children as might be then dead in manner following, that is to say: That immediately on the expiration of four years from his death, his executors (after making provision for payment of debts, legacies and the expenses of the management of his estate) should *divide* all his remaining estate into as many *just and equal* shares as the number of his then surviving children, and of his children who should have before then died leaving lawful issue them surviving, should amount unto, and should apportion and set off one such share to each of his then surviving children, and one such share to the lawful issue of each of his then deceased children whose lawful issue should be then surviving; all the issue of each deceased child standing in the place of

(1) 7 Ves. 522. (2) 2 Dr. & Sm. 492.

such deceased child. He then directs that a separate account of each of such shares shall be kept, and he declares the object he had in view in directing such separate accounts to be kept—thus: "And it is my will and I direct that from henceforth a separate account shall be kept by my trustees of each share and of the interest and profits thereof, and the payments made to, or on account of, or for *the maintenance and education of each* of my said children *or issue*, shall be charged against the share apportioned to such child or children, or wherein such issue shall be interested, so that *all* accumulations and profits which may arise shall enure to the increase of each several share on which such accumulation or profit shall accrue—it being my intention that after such division shall take place, the maintenance, education and support of each of my children, while under the age of 21 years, shall be drawn from the separate income of such child; and the maintenance and education of the children of any of my children who may have before then died, leaving issue, shall be drawn from the share or shares set apart for the issue of such deceased child or children, and that my children and such issue of deceased children being of age, that is to say of the age of 21 years, or when they *respectively* attain the age of 21 years, shall be *severally* entitled to receive for their own use, the whole of the interest and profits of *the share* and proportion of my estate to which they may be respectively entitled."

Now, the word "*issue*" in this paragraph being, upon the authorities already cited, and the whole context of the will, equivalent to "children of a deceased child," the paragraph commences with a direction that a separate account shall be kept of all payments made *to* or on account of, or for the maintenance and education of *each of the children* of a deceased child, and that the same should be charged against the share wherein the

1880

FISHER v. ANDERSON.

Gwynne, J.

children of such deceased child shall be interested, *so that* all accumulations and profits that may arise shall enure to the increase of each several share on which such accumulation or profit shall accrue, and that the children of a deceased child, when *respectively* attaining the age of 21 years, shall *severally* receive for their own use the whole of the interests and profits of the share and proportion of testator's estate to which they were *respectively* entitled.

The bearing which this paragraph has upon the construction to be put upon the will depends, not upon the fact that it provides that the children of a deceased child shall receive, for their absolute use, the full and ultimate benefit conferred upon them by the testator's will, at different times, namely, when each arrives at 21 years of age, but upon this, that it provides that at that age *each* should receive the whole of the interests and profits of the *share* and *proportion* of the testator's estate *to which each* is entitled, in virtue of the interest which became vested at the expiration of four years from the testator's decease.

The account which was directed to be kept was the means provided by the will, and the sole means for arriving at the amount of such share or proportion of testator's estate which each would be so entitled to receive, and that amount would necessarily depend upon the amount which during minority had already been paid to, or on account of, or for the maintenance and education *of each*; for what was so expended for one could not be charged to the account of, or reduce the amount of the share of the others, or of either of them. The amount expended upon each could only be charged to the share or interest of that one for whom it was so expended.

Now, upon the death of *Mary Louisa Anderson*, wife of the appellant *Chas. H. B. Fisher*, her three children

became entitled as tenants in common to the legacy of $1,600 per annum until the *ultimate* division of testator's estate at the expiration of four years from his decease, when these same children being still living, the share to which their mother, if then living, would have been entitled, became vested in interest in them. The interest so vested in them was made subject to charges, of which an account was directed to be kept, of all payments made to, or an account of, or for the maintenence and education *of each*, which amounts would vary in the several cases according as more or less should be expended upon one than upon another during minority.

The account so to be kept, together with the accumulations upon the shares of each in the legacy of $1,600 per annum, would alone shew, and this is the mode which the will provides for shewing, the amount which each heir arriving at 21 could claim as his own property, already vested in him, but then only payable.

This account so directed to be kept, from the instant of the interest of the children of *Mary Louisa Anderson* vesting, and the charges directed to be entered in it of monies expended upon *each*, necessarily, as it appears to me, involves a severance of the interests of each, and that therefore, according to the rule laid down by Lord *Hatherly* in *Robertson* v. *Fraser* (1), the children of *Mary Louisa Anderson* took as tenants in common and not as joint tenants.

The result is that the appeal should be allowed.

Appeal allowed.

As to costs, the court ordered that the costs be paid by the respondents out of the general residue of the estate of the said *J. H. Anderson*, deceased, but if the said residue should have been distributed then the said costs should be contributed by the persons who should

(1) L. R. 6 Ch. App. 699.

1880

FISHER v. ANDERSON.

Gwynne, J.

have received portions of the said residue ratably according to the amounts of the respective sums received by them.

Solicitor for appellant: *N. H. Meagher.*

Solicitor for respondents: *J. Norman Ritchie.*