ORIGINAL CIVIL.

Before Mr. Justice Farran.

DE SOUZA AND ANOTHER, (PLAINTIFFS), *v.* VAZ AND ANOTHER, (DEFENDANTS). *

1887. *July* 21.

Will—Construction—Vesting—Period of distribution—Gift of dividends.

S., a Portuguese inhabitant of Bombay, by his will dated 19th March, 1866, devised all his estate, real and personal, to his executors in trust, to realize the same, and invest the proceeds thereof in the public funds, and directed as follows:—

"(1) The dividends arising therefrom shall be applied, at the discretion of my executors, towards the maintenance and education of my children until each of my sons attain the age of twenty-one years, when his or their share shall be paid unto him or them.

"(2) I desire, further, that whatever may be remaining of the moneys collected by my executors, after all my sons shall have attained the age of twenty-one years and after my daughters shall have been married, shall be distributed, after deducting Rs. 2,000 as dowry given to two daughters, in equal parts between my sons and daughters that may be surviving at the time."

"(5) In case any of my children shall happen to die under twenty-one years, then I give and bequeath the share or shares of him, her, or them, so dying, unto the survivors or survivor of them."

Held, that the gift to the sons, contained in the first clause, was a gift of his share of the dividends to each son on his attaining twenty-one years of age, and that by such gift his share of the *corpus* became vested in each son when he attained that age.

Held, further, that the provisions of the third clause, which related to the distribution, did not divest the shares so vested. Clear words must be used to divest an estate once vested.

Held, also, that only such of the daughters as were surviving at the period of distribution, specified in the second clause of the will, were entitled to a share in the estate.

THIS suit was filed in March, 1886, by the two surviving sons of one Louis Maria de Souza, a Portuguese inhabitant of Bombay, who died in 1865. The plaintiffs prayed to have their father's will construed by the Court, and that the shares and interests of the parties entitled under the said will might be ascertained and declared, &c., &c.

The plaint set forth the following facts:—The said Louis Maria de Souza died in 1865, leaving a will, dated 6th April, 1865,

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of which the defendant João Feleciano Vaz and one Dr. Mathias Antonio Misquita were appointed executors. Probate of the will was granted on the 19th March, 1866. One of the said executors, *viz.*, Dr. Misquita, died on the 25th September, 1875. He also left a will, dated the 24th September, 1875, of which the said João Feleciano Vaz and one Jeronimo Misquita (since deceased) were the executors. This will was duly proved on the 13th March, 1876. At the time of this suit the defendant João Feleciano Vaz was the sole surviving executor of both the said wills.

The first-mentioned testator, Louis Maria de Souza, left him surviving three sons, *viz.*, Louis Gabriel, who died on the 27th June, 1876, and the two plaintiffs, *viz.*, Peter Francis de Souza and Pascoal Philip de Souza, and two daughters, *viz.*, the defendant Rosa, wife of the defendant Louis A. Miranda, and Joana, who died on the 6th November 1877, the wife of Manuel F. Zuzuarte.

The will of the testator was as follows:—

"I give, devise, and bequeath unto my executors, hereinafter named, all my estate and effects, real and personal, that I may die possessed of, or entitled to, in possession or expectancy, upon trust, to, as soon as conveniently can be, after my decease, collect, get in, and receive such parts thereof as shall consist of money or securities for money due on bonds, bills, notes, or other securities, and to invest the same in one or other of the public funds, and the dividends arising therefrom shall be applied, at the discretion of my executors, towards the maintenance and education of my children *until each of my sons attain the age of twenty-one years, when his or their share shall be paid unto him or them.* I desire that of the moneys belonging to me my executors shall give away to my daughters each a sum of Rs. 1,000 as dowry on their being settled in marriage, and shall spend what may be necessary for wearing apparel and other expenses of marriage.

"2. I desire, further, that whatever may be remaining of the moneys collected by my executors, after all my sons shall have

attained the age of twenty-one years and after my daughters shall have been married, shall be distributed, after deducting Rs. 2,000 as dowry given to two daughters, in equal parts between my sons and daughters that may be surviving at the time.

"3. I give, devise, and bequeath my dwelling-house No. 25, all my household furniture, linen, wearing apparel, books, plate, chinaware, and whatever may be found therein at the time of my decease, unto my sons, to be shared by them in equal parts, on all my sons attaining the age of twenty-one years. In the meantime the said house, furniture, &c., shall be held in trust by my executors. My executors may, should they deem fit, rent, for the benefit of my children, a part of my house.

"4. I desire that my estate in the district of Kalyán, in Sálsette, enumerated in the schedule appended to this my will, should be sold by my executors and converted into money, which amount shall be added to the amount to be invested in public funds for the benefit of my sons and daughters as aforesaid. My daughters shall have no share in my dwelling-house or the furniture, &c., therein. I direct that all my just debts, funeral and testamentary expenses be duly paid and satisfied by my executors. And I do hereby nominate, constitute, and appoint Mr. J. F. Vaz and Dr. M. A. Misquita my executors of this my will. And I do hereby declare that my said executors and the survivor of them and the executors and administrators of such survivor shall and may at all times reimburse and indemnify themselves and himself respectively for all such costs, damages, charges, and expenses as they or either of them may be put to, or sustain in and about the execution of the trusts of this my will.

"5. In case any of my children shall happen to die under twenty-one years, then I give and bequeath the share or shares of him, her, or them, so dying, unto the survivors or survivor of them.

"6. And I hereby revoking all my former or other wills by me at any time made, I, the said Louis Maria de Souza, do this, which I declare to be my last will and testament. As witness my hand this 6th day of April, 1865."

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Pascoal Philip de Souza, (the second plaintiff), was the youngest son of the testator, and he attained the age of twenty-one in the month of August, 1883.

Both the executors of the testator's will after obtaining probate managed the estate down to the year 1875, when one of them, *viz.*, Dr. Misquita, died. Subsequently to that time the defendant Vaz remained in sole management of the estate.

The first plaintiff, (Peter Francis de Souza), became insolvent after this suit had been filed, and his estate vested in the Official Assignee, who was thereupon made a party defendant. At the date of the hearing, Pascoal Philip de Souza was the sole plaintiff on the record.

The following clauses of the plaint set forth the plaintiff's contention with regard to the construction of the will :—

"The plaintiff submits that, according to the true construction of the first and second clauses of the will of the said Louis Maria de Souza, the income only and not the *corpus* of the funds and investments mentioned in the first clause is thereby dealt with, and the *corpus* of such funds and investments, after deduction thereout of the dowries of the daughters of the testator, is dealt with by the second clause, so that, in the events which have happened, the *corpus* of the said funds and investments is now divisible between the plaintiff and Peter Francis de Souza, the insolvent, and their sister, the defendant Rosa Miranda, in equal shares.

"7. The plaintiff submits that, according to the true construction of the third clause of the said will of the said Louis Maria de Souza, the plaintiff and Peter Francis de Souza, the insolvent, are, in the events which have happened, entitled, in equal shares, to the house therein mentioned and all that it contained at the time of the said testator's decease, which included not only furniture, but a considerable quantity of valuable jewellery.

"8. The plaintiff submits that, according to the true construction of the said will of the said Louis Maria de Souza, no share in the *corpus* of the funds and investments, mentioned in the first

and second clauses of the said will, and no share of the house and contents thereof, mentioned in the third clause of the said will, ever vested in the said testator's eldest son, the said Louis Gabriel de Souza, deceased, and the said testator's daughter, Joana Zuzuarte, deceased, or either of them, inasmuch as they both died before the said testator's youngest son the plaintiff Pascoal Philip de Souza attained the age of twenty-one years."

The plaintiffs also complained that the executors had mismanaged the estate. In particular they charged that in the year 1866 they paid to the testator's eldest son, Louis Gabriel (since deceased), a sum of Rs. 2,486-3 out of the estate on account of and in anticipation of his then contingent share. The plaintiffs contended that the defendant Vaz and the estate of the deceased executor Misquita should be held liable to make good this sum and all sums improperly paid out of the estate. The plaint prayed that the will might be construed, and for accounts, &c.

The defendant Vaz filed a written statement, in which as to the construction of the will he submitted to the judgment of the Court. He denied all mismanagement of the estate; and as to the payment of Rs. 2,486-3 to Louis Gabriel de Souza, he submitted that the payment was a proper one; that it was made by the executors *bonâ fide*, and in the belief that the said Louis was entitled to it.

Macpherson, (Acting Advocate General), and *Robertson* appeared for the plaintiffs.

Lang and *Russell* for the first defendant.

Jardine and *Chitty* for the fifth defendant.

The following authorities were cited:—*In re Hunter's Trusts*(1); Williams on Executors (8th ed.), p. 1230; *In re Duke*; *Hannah* v. *Duke*(2); *In re Bunn*; *Isaacson* v. *Webster*(3); *Scotney* v. *Lomer*(4); Theobald on Wills (3rd ed.), p. 390; *Ford* v. *Rawlins*(5); *Sansbury* v. *Read*(6); *Vorley* v. *Richardson*(7).

(1) L. R., 1 Eq., p. 295.
(2) L. R., 16 Ch. Div., 112.
(3) L. R., 16 Ch. Div., 47.
(4) L. R., 29 Ch. Div., 535.
(5) 1 Sim. & S., 329.
(6) 12 Ves., 75.
(7) 8 De G. M. & G., 126.

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28th July, 1887. FARRAN, J.:—This was a suit filed for the purpose of having certain clauses in the will of Louis Maria De Souza construed, and the shares of the beneficiaries under the will paid to them. The plaint also sought to have the accounts of the executors under the will taken. The plaintiff now on the record, in view of saving expense, does not any longer desire the taking of the accounts; and, with one exception, has abandoned his objection to the items in those accounts of which he complained. The only matters I have, therefore, to deal with, are the construction of the will, and the ascertainment whether a payment of Rs. 2,486-3 to Louis Gabriel, a son of the testator, ought to be made good to the estate by the surviving executor J. F. Vaz in his own person and as the surviving executor of his deceased co-executor M. A. Misquita.

The will to be construed is as follows:—(His Lordship read the will as above set forth.)

The testator died in 1865, leaving him surviving three sons, Louis Gabriel, Peter Francis, and Pascoal, and two daughters, Rosa Miranda and Joana.

The defendant, João Feleciano Vaz, and Mathias Antonio Misquita (now dead) proved the will on the 19th March, 1866.

The executors about this time made payments to Louis Gabriel out of the *corpus* of the funds in their hands, which aggregated the above mentioned sum of Rs. 2,486-3. Louis Gabriel died on the 27th June, 1876. The defendant Rosa Antonio de Souza is his executrix.

Joana married Manuel Francis Zuzuarte. She died about three years after her marriage in 1877 or 1879, leaving a daughter, who died in childhood, and her husband surviving her. The husband has been made a party defendant to the suit.

Rosa Miranda married Louis Antonio. She and her husband are alive, and are defendants in this suit.

Peter Francis, originally a plaintiff, has become insolvent, and the Official Assignee has been made a party defendant to represent his interest.

The plaintiff Pascoal, the youngest son, attained the age of twenty-one years on or about the 8th August 1883.

I have first to determine what is the correct grammatical construction of the will, and then, having determined that, to ascertain what are the legal rights of the beneficiaries under it.

The will (1) directs the executors to collect the moneys of the testator, and to invest the moneys so collected in the funds. It then (2) provides for the maintenance of the testator's children out of the dividends upon the invested moneys, which are to be applied at the discretion of the executors towards the maintenance and education of the children until each son attains the age of twenty-one years, when his share *of the dividends* is to be paid to him. It then (3) provides for Rs. 1,000 being given as dowry out of the moneys of the testator to each of his daughters and for their marriage expenses being paid. These may be considered as provisions for intermediate expenditure out of the funds. Then (4) the second clause provides for the ultimate distribution of the residue, the bulk of the collected moneys, by directing that, after the testator's daughters shall be married and after all his sons shall have attained the age of twenty-one years, it shall be distributed between the sons and daughters of the testator that may be surviving at the time. This construction of the first and second clauses of the will, which is that for which counsel for the plaintiff contend, is a fair grammatical construction in which the several provisions as to the testator's moneys follow one another in just and logical order. The only objections to it are esoteric objections, based upon the probable intentions of the testator, which, resting, as they must do, upon speculation, are not a safe guide by which to interpret his language.

The alternative construction is to read the dependent sentence in the first clause "until each of my sons attain the age of twenty-one years, when his or their share shall be paid to him or them," which follows the provision for the maintenance and education of the children, as applying to the *corpus* of the fund, as though the words "of the funds" followed the word "share", and to construe the directions for distribution contained in the second clause as applicable only to the economies out of the dividends, or the accumulations of them, which the executors

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might be able to effect or make. This construction would exclude the daughters from all share in the bulk of the moneys, and give them a share only in the economies out of, or accumulations of, the dividends. It is not an ungrammatical, but it is a strained or forced construction, and is open to the following objections: —

(1) It places the direction for the ultimate disposition of the funds out of its proper place amongst the provisions for the intermediate charges upon it.

(2) It involves the testator's entertaining the idea that there would be economies out of, or accumulations of, the dividends, which he has not directed, and, judging from the words he has used, does not seem to have contemplated. His direction is that "the dividends" shall be applied in maintaining and educating the children at the discretion of the executors, and not such portion of the dividends as the executors shall think fit.

(3) It gives a different meaning to the words "moneys collected" in the second clause to that which they bear in the first clause. To these must be added the consideration that the testator in his will evidently contemplates that his daughters would be sharers in the collected moneys; for, when directing in the fourth clause the proceeds of his Kalyán estate to be added to such moneys for the benefit of his sons and daughters, he adds: "My daughters shall have no share in my dwelling-house, &c.," which forms the subject of a specific devise to the sons; and in the fifth clause he refers to a daughter's share going over to the survivors in case of her death under twenty-one. I accept, for these reasons, the plaintiff's reading of the first and second clauses of the will.

The question whether the son and daughter, who died before the period of distribution, having in their lifetime attained the age of twenty-one years are, through their representatives, entitled to share in the distribution; or, in other words, whether the sons and daughters on attaining twenty-one took a vested interest in their shares of the collected moneys, remains to be considered. The case of their having died under twenty-one is governed by the fifth clause, which makes provision for that

event. The answer to this question depends upon authority. As the will in question was made before the 1st January, 1866, the Succession Act does not apply to it.

Before referring to the authorities I remark that the fifth clause affords a key to the intention of the testator. It provides that, if a son or a daughter should die under the age of twenty-one years, his or her share,—*i.e.*, the share given to him or her by the will,—shall pass to the survivors; plainly thereby implying that such share is not to pass to the survivors if the son or daughter, to whom it is given, should die after attaining the age of twenty-one years. At the date of the will, twenty-one years was the age of majority for natives of the testator's class.

The rules of law deducible from the authorities, which have to be considered in connection with this will, appear to be these:—

"When there is a clear gift to an individual, an additional direction to pay when the legatee attains a given age, will not postpone the vesting, the gift being considered *debitum in præsenti, solvendum in futuro*"—Theobald on Wills, p. 384, (3rd ed.)

The same rule applies where there is gift to a class, and the distribution is postponed for the convenience of the estate or of division till all the members of the class attain a certain age, or till the youngest attains twenty-one—*Parker* v. *Sowerby*[1]; *Chaffers* v. *Abell*[2] cited in Jarman on Wills, Vol. II, p. 837, (4th ed.); *Knox* v. *Wells*[3]. The rule is recognized in *Vorley* v. *Richardson*[4]; and see *Re Grove's Trusts*[5].

If the gift to the individual is, in terms, apparently made contingent upon his attaining majority, or a certain age, the giving of the interest upon the legacy to the legatee in the meantime will have the effect of vesting the gift, or rather of showing that it is the testator's intention that the gift shall vest—*Hanson* v. *Graham*[6]; *In re Hart's Trusts*[7]; *In re Bunn*[8]. The case of *Batsford* v. *Kebbell*[9] must either be considered as over-

(1) 1 Dr., p. 488.
(2) 3 Jur., p. 577.
(3) 2 H. & M., p. 674
(4) 8 DeG. M. & G., p. 126.
(5) 3 Giff., p. 575.
(6) 6 Ves., p. 239.
(7) 3 DeG. & J., p. 195.
(8) R., 16 Ch. Div., 47.
(9) 3 Ves., 363.

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ruled, or as having been decided upon the peculiar terms of the particular will there construed—*In re Hart's Trusts*(1).

The same rule, however, does not apply where there is a gift of an entire fund payable to a class of persons equally upon their attaining a certain age. There a direction to apply the income of the whole fund, in the meantime, for their maintenance does not create a vested interest in a member of the class who does not attain that age—*In re Parker*(2); *Leake* v. *Robinson*(3); *In re Hunter's Trusts*(4); *Lloyd* v. *Lloyd*(5).

Lastly, where the only gift to a class is contained in the direction to distribute, those alone, who answer to the description of the persons amongst whom the distribution is to be made at the time of distribution, are entitled to share—*Ford* v. *Rawlins*(6); *Sansbury* v. *Read*(7).

These rules of construction must give way, of course, if the testator, by the words he has used, has excluded their application, as was clearly done in *In re Hunter's Trusts*(8) and as was held to have been done in *Vorley* v. *Richardson*(9) cited above.

I have reviewed the cases in this way, in order to place in their proper category those that have been cited to me. The general rules are clear enough. The difficulty is in deciding upon their application in particular instances.

In the present case there is no direct gift to the testator's children, as a class, contained in the first clause of the will; but there is a direction that the dividends arising from the invested funds shall be applied for their maintenance and education. Then in the second clause there is a direction that, after all the sons shall have attained twenty-one and after the daughters shall be married, the fund shall be distributed in equal parts between the sons and daughters. If the testator had paused there, the rule in *Parker* v. *Sowerby*(10) and that class of cases would probably have applied; but he adds the words "*that may be surviving*

(1) 3 DeG. & J., 195.
(2) L. R., 16 Ch. Div., 44.
(3) 2 Mer., 363.
(4) 1 Eq., 295.
(5) 3 K. & J., 20.
(6) 1 S. & St., p. 328.
(7) 12 Ves., p. 75.
(8) 1 Eq., p. 295.
(9) 8 DeG. M. & G., 126.
(10) 1 Dr., p. 488.

at the time"; thus, as in *In re Hunter's Trusts*(1) and in *Vorley Richardson*(2), excluding its operation.

The testator, however, in the first clause further directs that when each of his sons attains the age of twenty-one years his share shall be paid to him; thus withdrawing him from the general class, and allocating to him a particular interest in the fund. It is true that I have held that, grammatically, the share allocated to him is a share *of the dividends*, but the allocation or gift to a legatee of the dividends of a fund is a gift to him of the fund itself. This has always been a rule of law. It was referred to by Sir William Grant in *Hanson* v. *Graham*(3) in 1801; it is recognized in the Indian Succession Act, sec. 159. The direction to the trustees to pay his share of the dividends to each son of the testator as he comes of age is a gift, and a vested gift, of such share to him. If *Batsford* v. *Kebbell*(4) is not overruled, and the particular expressions used in giving the interest are to be considered, the words here used are strong to show the testator's meaning. The testator directs his share of the dividends, not a share or a proportionate part, to be paid to Louis Gabriel when he reaches twenty-one years of age; and when you consider that direction in connection with clause 5, where it is directed that the share of a son shall pass to the other children if he should die under twenty-one, the intention of the testator is plain to vest each son's share in him when he attains the age of twenty-one. The words "to be paid" can indeed, if the context requires it, be read as referring to vesting, and not to payment—*Martineau* v. *Rogers*(5).

Is, then, the legacy vested in Louis Gabriel taken away by the second clause, which relates to the distribution? Down to that period he and his representatives are plainly entitled to the dividends on his share. No other disposition is made of them. I think the legacy is not so divested. It requires clear words to divest an estate once vested.

(1) 1 Eq., p. 295.
(2) 8 DeG. M. & G., p. 126.
(3) 6 Ves., p. 239.
(4) 3 Ves., 363.
(5) 8 DeG. M. & G., p. 328.

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To prevent that result, the words sons and daughters *then surviving* might be read as referring to the *stirpes*, as was done in *Cooper* v. *Macdonald*(1), or rejected in so far they take away vested estates, as was done in *In re Duke*(2) ; or, without doing violence to the context, might be confined to the daughters, and read as though the sentence ran "shall be distributed in equal parts between my sons and my then surviving daughters."

This construction makes the whole will harmonious. The first clause treats the daughters in the same way as it treats the minor sons, and does not give them a vested share in the dividend upon their attaining majority. They are similarly treated in the second clause if, when the period of distribution arrives, they shall not be then living. They in that case, like sons dying minors, take no share. This was the result which the parties interested in the estate agreed to in 1883. It is said that that agreement is void, as being without consideration ; but it was clearly a family arrangement to prevent litigation. Rosa gave up her claim on Louis Gabriel's share, as the plaintiff gave up his. That is sufficient consideration to support the agreement. The plaintiff does not give evidence that he was *inops consilii* when he assented to it. He had attained his majority three years before the agreement was come to. If the construction of the will had been plain, the plaintiff's alleged abandonment of his legal rights against the executors of his father's estate might have been viewed with distrust ; but, seeing that it was so doubtful that an extremely eminent barrister at different times gave diametrically opposite opinions as to its true construction, the plaintiff would seem to have been well advised to give up a doubtful right of little value, which could only be established by a suit at the expense of the estate.

The construction of the third clause of the will is free from doubt. It falls within the second rule above referred to. The opposite view was but faintly contended for by Mr. Robertson in his opening address. The Advocate General in his reply practically abandoned it.

(1) 16 Eq., 258. (2) L. R., 16 Ch. Div., 112.

I find on the issues (His Lordship stated the findings and continued:)

Declare that, upon the true construction of the will of Louis Maria De Souza, the legal representative of Louis Gabriel De Souza was entitled to share in the distribution of the testator's moneys, directed in the second clause of his will, equally with the defendants Peter Francis and Rosa Miranda and the plaintiff Pascoal; and was also entitled to share equally with the defendants Peter Francis and the plaintiff Pascoal in the house and articles specifically devised by the third clause of the will; and direct that the defendant João Feleciano Vaz do now deal with the estate in accordance with such declaration. Further directions reserved.

As to costs. The executor Vaz will of course have his out of the estate taxed as between attorney and client. As the plaintiff does not press the charges against the executor, it is to be regretted that he did not adopt the suggested course of stating a special case, as was done in *Vorley* v. *Richardson*[1]. It would be improper to give him his costs out of the estate relating to those charges which he has not established; but it does not seem to make much practical difference whether he is given his costs out of the estate, or whether he pays them out of his share in it. The same remark applies to the defendant Rosa Antonio. The fairest way to the defendant Rosa Miranda, who has incurred no costs or very little, would be to leave all parties to bear their own out of their own shares; but as, if the plaintiff had stated a special case, I should have given him his costs out of the estate, I consider the proper order now to make is to give him the equivalent of such costs. I shall direct that his costs, taxed as in a short cause, be paid to him out of the estate. All costs not provided for, will be paid by the parties respectively.

Attorneys for the plaintiffs:—Messrs. *Bicknell and Kángá.*

Attorneys for the defendants:—Messrs. *Tobin and Roughton;* and Messrs. *Hore, Conroy, and Brown.*

(1) 8 DeG. M. & G., p. 126.