ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

MASEYK *v.* FERGUSSON (No. 2.)

1878
Decr. 12
and 16.

Will—Gift to a Class—Postponement of Period of Distribution—After-born Child — Lapsed Bequest—Double Portions — Succession Act (X of 1865), *s.* 98.

A testator gave his residuary estate to trustees upon trust to invest and "to pay, transfer, or divide the same unto, between, or among the children of my brothers *A* and *B*, respectively, to be paid, transferred to, and divided among them in the proportions and at the times hereinafter mentioned; that is to say, the share of each and every son of my said two brothers shall be double that of each and every daughter, and the shares of each son shall be paid to him or them respectively upon his or their attaining the age of twenty-one years, and the shares of each daughter to be paid to her or them on her or their respectively attaining that age, or previously marrying, with benefit of survivorship between and among all the said sons and daughters." After the death of the testator, and before the period of distribution arrived, a son was born to *B*, and one of the sons of *A* died intestate and unmarried. *Held*, that the after-born son of *B* was entitled to a double portion as one of the male children of the testator's brother, and that the share of the son of *A* was divisible among the surviving male and female children in equal shares.

THE facts of this case, so far as they are material, have been already stated in *Maseyk* v. *Fergusson* (No. 1) *ante*, p. 304. The present suit was instituted in order to ascertain the rights of Charles Bathurst Maseyk, the after-born son of Charles Blake Maseyk, and to decide in what proportions the share of George Maseyk, deceased, should be divided.

Mr. *Evans* and Mr. *Allen* for the plaintiff.

Mr. *J. D. Bell* and Mr. *Pearson* for Mr. Fergusson.

Mr. *Branson* and Mr. *Miller* for Eliza Rose Maseyk and Ella Maud Maseyk.

Mr. *Phillips* and Mr. *Agnew* for Charles Bathurst Maseyk.

Mr. *Evans*.—The questions that now arise are two—*first*, as to the interest of the after-born child; *second*, as to the distribution of the share of the deceased child. Upon the first point I contend, that this being a residuary gift to a class on attaining a certain age, the class must be ascertained at the death of the testator—*Elliot* v. *Elliot* (1), and only the children living at that time take. In *Kevern* v. *Williams* (2), the testator bequeathed the residue of his personal estate in trust for *A* for life, with remainder to the grandchildren of *B*, to be by them received in equal proportions when they should severally attain the age of twenty-five years, and it was held that the class was ascertainable at the death of *A*. The Succession Act provides, s. 98, that where a gift is made simply to a described class of persons, the thing bequeathed shall go only to such as shall be alive at the testator's death. The other side will rely upon the exception, which says, that if property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as shall be then alive, and to the representatives of any of them who have died since the death of the testator. In this case, I submit, that the exception does not apply, because this is in point of fact merely a direction to pay when the legatees attain twenty-one respectively. The meaning of the section is this: supposing that a time is fixed, then those coming into existence before that time arrives, take. Here no time is fixed. A direction to pay when the legatees attain twenty-one does not fix any particular point of time, and therefore, as there is no fixed period to which distribution is deferred, the after-born child does not take. Upon the second point, I contend, that the words "with benefit of survivorship" mean that the legatees shall take the share of one dying in the same proportion as the original gift.

Mr. *Phillips* for Charles Bathhurst Maseyk.—This is a gift to a class distributable at a certain age. It has already been decid-

(1) 12 Sim., 276. (2) 5 Sim., 171.

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ed that the members of the class took vested interests. The period of distribution is postponed, and the rule is well established that where there is a gift to a class distributable at a certain age, and the bequest is vested, an after-born child, who comes into being before the period of distribution arrives, is entitled to share—*Leake* v. *Robinson* (1); *Whitbread* v. *Lord St. John* (3); *Hoste* v. *Pratt* (3); *Oppenheim* v. *Henry* (4). Here possession is deferred to a time later than the death of the testator. Section 98 deals with deferring to such a time, and there is a distinction between the case of an immediate gift, where the period would be the death of the testator, and the case where the possession is deferred. As to the distribution of the share of George Maseyk, this is not an accrued share, and therefore the authorities as to accrued shares do not apply. The interest of George was a vested interest subject to be divested upon the happening of a certain contingency. That contingency has happened, and therefore the estate of George is divested and falls into the residue, and must go according to the trusts of the residue, and therefore the sons take double portions.

Mr. *Miller*.—The shares of the legatees are vested, and in the event of the death of any legatee his share must go to the survivors—*Walker* v. *Main* (5). [PONTIFEX, J., referred to *In re Jarman's Trusts* (6).]

Mr. *Bell* and Mr. *Pearson* did not argue.

Mr. *Evans* in reply.

PONTIFEX, J.—The first question in this case is, whether the defendant, Charles Bathurst Maseyk, who was born after the testator's decease, but before the period of distribution mentioned in the will, can be admitted into the class of nephews and nieces to whom the testator bequeathed his residuary estate. I have already held in a former suit in the matter of this will that the children of the testator's brother took vested interests

(1) 2 Mer., 382.
(2) 10 Ves., 152.
(3) 3 Ves., 730.
(4) 10 Hare, 441.
(5) 1 Jac. and W., 1.
(6) L. R., 1 Eq., 71.

at his death, but it was not determined in that suit whether the class would open to admit an object born after the testator's death but before the period of distribution. Under the English law it is clear that such an object would be admitted into the class. But in this country the question is governed by s. 98 of the Succession Act. I think the intention of the framers of that section was to assimilate the law here to that which exists in England, although the section, with its exception, and illustration (*h*), are not very happily expressed; and I am prepared to hold in the present case that any child of the testator's brothers who was born before the period of distribution is entitled to participate as a member of the class; and that the period of distribution in this gift is the date when any nephew or niece shall attain majority within the provisions of the Succession Act, or when any niece should marry, whichever event should first happen. And consequently I am of opinion that the defendant, Charles B. Maseyk, is entitled to a nephew's share or double portion.

After the testator's death and before the period of distribution, his nephew, George Maseyk, died an infant, and his share therefore became distributable under the words "with benefit of survivorship between and among all the said sons and daughters;" and a second question arises as to this share, namely, whether the surviving sons are to take double portions in George's share as is directed with respect to their own original shares.

Although it is highly probable that the testator had the same intention in regard to the proportionate amounts to be taken in the accruing and the original shares, yet this is not so clear as to amount to what the law considers a necessary implication. In the 2nd volume of Mr. Jarman's book, p. 670 (3rd edn.), he says—"upon the same principle it is clear that when the subject of the gift is disposed of among the original objects in unequal shares, there is no necessary inference, in the absence of any declared intimation of intention to assimilate the accruing to the original share, that the survivors are to take accruing shares in the same relative proportions;" and although there is no very clear authority on the point, I think that is a

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reasonable statement of the law, and is in accordance with the decisions in analogous cases, such as *Gibbons* v. *Langdon* (1), where qualifications expressly applied to original shares are not extended by implication to accruing shares. The case of *In re Jarman's Trusts* (2), which is an apparent exception to these cases, depends, I think, upon the express words of the will in that case, namely, "the share or shares of his daughters under his will to be for their separate use," which words were held to apply to all gifts under the will.

In this case I think there is no necessary inference or implication that the testator intended the accrued share to be enjoyed by his nephews and nieces in unequal proportions, although if left to conjecture alone, I might consider such an intention probable. I must therefore declare that, with respect to George Maseyk's share, it is divisible among the nephews and nieces in equal proportions.

Attorneys for the plaintiffs: Messrs. *Sanderson and Co.*

Attorneys for the defendants: Mr. *Adkin* and Messrs. *Trotman* and *Watkins*.

APPELLATE CIVIL.

Before Mr. Justice Morris and Mr. Justice Prinsep.

1878 *Nov.* 22.

HURRODURGA CHOWDHRAIN (JUDGMENT-DEBTOR) *v.* SHARRAT SOONDERY DABEA (JUDGMENT-CREDITOR).*

Mesne Profits, Decree for—Ascertainment of Amount—Interest.

A lower Court, in estimating in execution of a decree the amount of mesne profits due to the decree-holder, added together the totals of the rents which the ameen found to have been paid in each year to the judgment-debtor, but did not allow interest upon each year's rent.

(1) 6 Sim., 260. (2) L. R., 1 Eq., 71.

* Appeal from Original Order, No. 181 of 1878, against the decree of Baboo Trailokyanath Mitra, Officiating Subordinate Judge of Zilla Mymensingh, dated the 8th of April 1878.