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RAM CHUNDER GHOSAUL *v.* JUGGUT-MONMOHINEY DABEE.

For these reasons I agree that the appeal should be dismissed with costs.

Appeal dismissed.

Attorney for the appellant: Mr. *Hart.*

Attorneys for the respondent: Messrs. *Remfry* and *Rogers.*

Before Mr. Justice Pontifex.

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July 1, 8, & 9.

MASEYK *v.* FERGUSSON AND OTHERS.

Will—Gift of Residue to a Class—Postponement of Period of Distribution—Vesting—Succession Act (X of 1865), ss. 98, 101, 102.

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 share 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." The testator left him surviving his two brothers and a sister *C*. *A* and *B* both died before the eldest of the testator's nephews or nieces attained twenty-one or married. In a suit instituted by the widow and executrix of *A* to have it declared that the above bequests were void under ss. 101 and 102 of the Succession Act, that the testator died intestate as to the residue of his estate, and that she as executrix of *A* was entitled to receive a one-third share of the said estate and the accumulations thereof. *Held*, that the legatees took vested interests subject to be divested on death before the contingencies mentioned in the will happened; that the period of distribution alone was postponed; and that the bequests were valid.

Semble.—Section 98 of the Succession Act applies only to vested interests—*Shum* v. *Hobbs* (1) distinguished.

HENRY SAMUEL MASEYK by his will dated the 21st day of January 1868, after certain specific devises and bequests, gave the residue of his real and personal estate to his trustees upon trust to set apart and invest the sum of Rs. 50,000 and to pay the income arising from such investment to Julia Weber during

(1) 3 Drew., 93.

her life; and immediately after her decease, the testator directed his trustees to stand possessed of the same monies upon trust "for such of the children of the said Julia Weber as being male shall attain the age of twenty-one years, or being female shall attain that age or previously marry, equally to be divided between them," with powers of maintenance and advancement; and as to all his residuary estate the testator directed his trustees to stand possessed of the same upon trust, to invest the same, and "to pay, transfer, or divide the same unto or among the children of my brothers James Wilfred Maseyk and Charles Blake Maseyk 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 share 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;" and the testator directed that no part of the income to arise from the presumptive share of the sons or daughters of his said two brothers should be applied towards his, her, or their maintenance or education, but that it should be accumulated during their respective minorities; such income to follow the destination of the principal. The testator died childless and unmarried leaving him surviving two brothers, James Wilfred Maseyk and Charles Blake Maseyk, and one sister, Georgiana, married to one J. C. Miller, who had not been heard of since 1868.

At the time of the death of the testator, James Wilfred Maseyk had three sons,—namely, Charles Henry Maseyk, James Deverine Maseyk, and George Maseyk; and Charles Blake Maseyk had two daughters—Eliza Rose Maseyk and Ella Maud Maseyk—all of whom were infants. George Maseyk died in 1876 an infant and unmarried. After the death of the testator, but before any of the infants had attained the age of twenty-one, Charles Blake Maseyk had a son, the defendant Charles Bathurst Maseyk, born to him.

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The testator's sister, Georgiana Miller, had by such marriage three children, the eldest of whom died in 1871 intestate; the second, Eliza Sophia, married Charles William Buckley, by whom she had three children, Hope Evermore Nina Buckley, Margaret Bell Buckley, and another daughter whose name was unknown; the third, Georgiana, married Henry Joseph Herd.

James Wilfred Maseyk died in 1876, leaving him surviving his three sons abovementioned and his widow, who was also his executrix, the plaintiff in this suit. Charles Blake Maseyk died in 1872, leaving him surviving his two daughters and one son abovementioned and his widow, the defendant Caroline Maseyk, who subsequently married one Andrew Gilchrist.

In the year 1873 the executors appointed by the will of the testator having all died, the defendant Frederick John Fergusson, the Official Trustee of Bengal, was appointed sole trustee, and he took possession of the estate, and on the eldest son of James Wilfred Maseyk attaining the age of twenty-one years, paid him his share.

The plaintiff now instituted this suit against the Official Trustee, making the representatives and the children and grand-children of the testator's brothers and sisters defendants, in order to have the will of Henry Samuel Maseyk construed, contending that by reason of ss. 101 and 102 of the Succession Act, the bequest of the residue of the estate to the children of the brothers of the testator was void and invalid, and that the testator died intestate as to the whole of the residue of his estate, and that the same vested in and became divisible between his two brothers and sister, and that James Wilfred Maseyk, her husband, became entitled to one-third share of such residue, and that as executrix she was entitled to receive such share.

Mr. *Branson*, Mr. *Bonnerjee*, and Mr. *Stokoe* for the plaintiffs.

Mr. *Hill* and Mr. *Sale* for Mr. and Mrs. Herd.

Mr. *Trevelyan* for the children of Georgiana Miller.

The *Advocate-General* (the Hon'ble *G. C. Paul*), Mr. *J. D. Bell*, Mr. *Phillips*, and Mr. *Evans* for Mr. Fergusson.

Mr. *Jackson* for Mrs. Gilchrist.

Mr. *Agnew* for the children of Charles Blake Maseyk.

Mr. *Branson*.—This is a gift to a class. As the period of vesting is postponed until the youngest child attains twenty-one, as there is no gift of the income in the meantime, and as some of the class might not attain twenty-one within eighteen years of the testator's death, the whole bequest is bad according to the provisons of ss. 101 and 102 of the Succession Act (X of 1865). In *Shum* v. *Hobbs* (1) the words are almost the same as those used in this will, and it was held that the shares were not vested. [PONTIFEX, J.—Does not the case come within s. 106 of the Succession Act? That is like *Shum* v. *Hobbs* (1). Everything is to be construed in aid of the will.] In *Jee* v. *Audley* (2) the will was construed to result in an intestacy. So in *Leake* v. *Robinson* (3) there is no gift except in the direction to pay and divide; the earlier clause gives nothing. No child took a vested interest until the youngest attained twenty-one, and therefore the period of vesting was postponed until more than eighteen years after the death of the testator. [PONTIFEX, J.—What do you make of the words "with benefit of survivorship?" There must be an absolute interest if they are to have any effect; and if so, the period of vesting is not postponed.] In *Vawdry* v. *Geddes* (4) the shares of the legatees were to be accumulated until they attained twenty-two, and there were limitations over in the event of the death of any of them under that age, and it was held that they were not to take vested interests until they attained twenty-two. [PONTIFEX, J.—The class cannot be increased after the eldest child attains twenty-one, but the share of each child is vested.] Where there is no gift except in the direction to pay, the bequest is contingent—*Williams* v. *Clark* (5). In

(1) 3 Drew., 93.
(2) 1 Cox, 324.
(3) 2 Mer., 363.
(4) 1 R. & M., 203.
(5) 4 De G. & S., 472.

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Bland v. *Williams* (1) Lord Langdale said, that if the gift over is simply upon death under the age named, that the gift cannot vest before that age. There the gift over was in case of death "without leaving issue," and it was held that those words created a vested interest. In *Davies* v. *Fisher* (2) and *Harrison* v. *Grimwood* (3) maintenance was given to the children, and that was held to create vested interests. These cases which were followed in *Fox* v. *Fox* (4) show that other parts of the will have to be considered. In *Vorley* v. *Richardson* (5) the fund was divisible on the youngest child attaining twenty-one "with benefit of survivorship," and it was held that survivorship referred to the period of distribution, and that a child did not on attaining twenty-one acquire an indefeasible interest. A gift to a class, or to an individual at twenty-one, or on attaining twenty-one, or when, or as, or if, they or he attain twenty-one, standing alone, is a contingent bequest; but if followed or preceded by a gift of the whole income for the absolute benefit of the legatee in th meantime, then it is a vested gift. *In re Holt's Estate* (6). Here there is an express provision against maintenance. [PONTIFEX, J.—If on death under twenty-one the share goes over, there must be a vested share to go over. What is there to survive if the legatees have not vested interests?] I do not contend that the gift over prevented the shares from vesting, but there are strong circumstances in this case which show that the testator did not intend that they should be vested. He uses the word "presumptive." [PONTIFEX, J.—"Presumptive" means vested; "contingent" means not entitled to anything at all. Suppose that all of several sons but the youngest die before attaining twenty-one, what does the youngest take? He takes the whole; and how? By survivorship because of the death of the persons entitled.] The gift here is bad from its inception according to the Succession Act. [PONTIFEX, J.—Illustration (*f*.) to s. 106 shows that there is a vesting.] There may be a vesting under the illustration, but

(1) 3 M. & K., 411.
(2) 5 Beav., 201.
(3) 12 Beav., 192.
(4) L. R., 19 Eq., 286.
(5) 8 De. G., M. & G., 126.
(6) 45 L. J., Ch., 208.

not under the section. In the illustration there is an absolute gift in the first instance. The bequest in this case comes within the illustration to s. 102.

Mr. *Stokoe* on the same side.—There is no gift irrespective of the direction to pay. It cannot be said that the will contains three separate gifts. It contains three separate sentences, any one of which, if it stood alone, might be considered as a gift, but they must be read together. There is no gift until the testator defines the proportions in, and the time for which the gift is to be enjoyed. The time is as much of the essence of the gift as the proportions.

Mr. *Hill* for Mr. and Mrs. Herd.—The testator has clearly expressed the shares which are to be taken. The age mentioned in the will is the period for payment, and not the time for vesting—*Hunter* v. *Judd* (1), *Crichett* v. *Dolby* (2), and Hawkins on Wills, 261. He also referred to the Succession Act, ss. 98, 101, 102, and 104, Illustration (*e*).

Mr. *Trevelyan* for the children of Mr. and Mrs. Buckley.

Mr. *Bell* for Mr. Fergusson.—In *Shum* v. *Hobbs* (3) the Vice-Chancellor was driven to the conclusion to which he came. In order to adopt that case, the intention of the testator must be strained, and there must be an intestacy. The general rule, that if a bequest is given to a class with a direction to pay at a certain age, the bequest is vested and the time of payment alone is postponed, is recognized in *Shum* v. *Hobbs* (3). The words "presumptive share" in the direction for maintenance show that the testator intended the shares of each of the children to be vested—*Williams* v. *Haythorne* (4) and *Fox* v. *Fox* (5). In *Love* v. *L'Estrange* (6) the testator gave his personal estate to trustees until a legatee should attain twenty-four, and then to him, his executors, administrators, and assigns: the legatee died intestate before attaining twenty-four; and the House of Lords held that

(1) 4 Sim., 455.
(2) 3 Ves., 13 at p. 13.
(3) 3 Drew., 93.
(4) L. R., 6 Ch. App., 782.
(5) L. R., 19 Eq., 286.
(6) 5 Bro., P. C., 59.

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the gift was vested, and that his representatives took. The cases of *Branstrom* v. *Wilkinson* (1), *Saunders* v. *Vautier* (2), *Lister* v. *Bradley* (3), *Merry* v. *Hill* (4), *May* v. *Wood* (5), *Bland* v. *Williams* (6), and *In re Bartholomew* (7), support the broad principle that if there is a gift to a class, a clause postponing payment to a certain age will not interfere with vesting. The Court will, if possible, construe the will so as to avoid an intestacy, especially in the case of a residue. Every intendment is to be made against holding a man to die intestate who sits down to dispose of the residue of his property—*Booth* v. *Booth* (8) and *Pearman* v. *Pearman* (9). Section 101 of the Succession Act does not apply where the gift is vested as it is here; it only applies when the period of vesting is postponed.

Mr. *Phillips* on the same side.—There is a marked distinction between the gift to the children of Julia Weber, which is a contingent gift, and the present gift. The draughtsman was aware of the difference between vested and contingent gifts. If the intention had been the same in both cases, the words used would have been the same. The income in the case of Julia Weber's children is to be applied towards maintenance, and in both cases the shares are spoken of as presumptive; but in one case the testator directs that the income shall be applied towards maintenance, in the other not. This direction must have some application. The testator's intention, apparent on the face of the will, is that the shares of his brother's children shall be vested: after providing the shares, he directs when payment shall be made. The whole scheme of the will is that these interests shall be vested subject to be divested upon death before twenty-one. *Shum* v. *Hobbs* (10) is the only case upon which it can be said that these are not vested interests, and the only thing in common between that case and this is the use of the word "presumptive." As to whether Charles Bathurst

(1) 7 Ves., 421.
(2) Cr. & Ph., 240.
(3) 1 Hare, 10.
(4) L R., 8 Eq., 619.
(5) 3 Bro., C. C. 471.
(6) 3 M. & K., 411.
(7) 1 Mac. & G., 354.
(8) 4 Ves., 399.
(9) 33 Beav., 394.
(10) 3 Drew., 93.

Maseyk, the after-born child, was included in the class, the learned counsel referred to *Kevern* v. *Williams* (1), *Elliot* v. *Elliot* (2), *Andrews* v. *Partington* (3), *Davidson* v. *Dallas* (4), and *Williams* v. *Haythorne* (5).

Mr. *Jackson* for Mrs. Gilchrist.

Mr. *Agnew* for the children of Charles Blake Maseyk.—This is a gift to a class distributable at a certain age; the shares are vested, and the rule is that any child coming into being before the period of distribution arrives is entitled to share—*Gimblett* v. *Purton* (6). [PONTIFEX, J.—That question cannot be decided in the present suit.]

Mr. *Branson* in reply.

PONTIFEX, J.—In this case the plaintiff claims as upon an intestacy as one of the next-of-kin of H. S. Maseyk, alleging that the residuary gift under his will is void for remoteness, in consequence of the Succession Act having confined the period within which a legacy is to vest to a life in being and eighteen years after.

Of course if I could not dispose of this case on the construction of the will, it would be necessary to raise an issue as to the domicile of the testator's brothers. But it seems to me that I may now dispose of the case on the construction of the will.

The plaintiff insists that under the second clause of the will no share vests in any child of the testator's brothers until he or she attains twenty-one years. The contention is, that the residuary gift in the will is in the direction to pay or distribute at twenty-one, or in other words, that the only direction to pay is that in which the element of time is mentioned. In this case, if governed by the Succession Act, it is too remote. I am of opinion that this construction is wrong. The testator directs his trustees to invest the residuary estate "upon trust to pay, transfer, or

(1) 5 Sim., 171.
(2) 12 Sim., 276.
(3) 3 Bro., C. C., 401.
(4) 14 Ves., 576.
(5) L. R., 6 Ch. App., 785.
(6) L. R., 12 Eq., 427

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divide the same unto, between, or among the children of my brothers James Wilfred Maseyk and Charles Blake Maseyk 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 share 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."

Looking merely at the language of the clause, it seems to me that the proper way of reading it is to split it up into two divisions,—the first clause being "to pay, transfer, or divide the same unto, between, or among the children of my brothers James William Maseyk and Charles Blake Maseyk respectively." It seems to me that in construing this will one would be entitled to pause there, as Vice-Chancellor Knight Bruce paused in the case of *Williams* v. *Clark* (1). The second division will be of the rest of the clause as split up: but that again is divided into two sub-divisions, one of which deals with proportion, and the other deals with payment; the clause will run thus,—each son takes a share double that of the daughter's and the shares to be paid at twenty-one or marriage.

I see no difference between the first part and the words "in trust for children of my brothers." The plaintiff argues that there is a distinction, but there is nothing to show in what proportion; the proportion being shown in the first division of the clause, what could be necessary to find out the sub-division? I take it that if there was a sub-division among the brothers directing payment only pending enjoyment at a certain time, the explanation I have given would make them tenants-in-common, whereas under the first words they would be joint tenants. Material principles not being shown by the plaintiff, I am against him as to construction. As to the other point, I am fortified by the context: it is a residuary clause and always con-

(1) 4 De G. & S., 472.

strued so as to avoid intestacy. At the end of the clause we find these words "with benefit of survivorship between and among all the said sons and daughters." The plaintiff was asked the meaning of these words, and his answer was, if after the eldest child attained twenty-one any of the younger children died under twenty-one, his interest would pass to the others. This is clearly wrong. In fact this clause of survivorship deals with the shares of those only who have died. If the share is not vested at birth, it would be dealing with a share upon which the clause could not operate, because there was no share which would survive. Looking to the other parts of the will, which are clearly contingent, there are no words for the benefit of survivorship; the testator does not wish to die intestate.

The case relied upon by the plaintiff—*Shum* v. *Hobbs* (1)—is a peculiar one; it does not seem that the Vice-Chancellor is himself satisfied with the decision, but in order to make it apply to this case, it would be necessary to insert the words "in manner hereinafter appearing." If these words occurred, it would be very difficult to distinguish this case. There are other circumstances which are not in this case, the principle there referred to was both vested and contingent. I think this case is clearly distinguishable from *Shum* v. *Hobbs* (1). The children of James and Charles took vested interests at birth on the death of the testator. The case of *Williams* v. *Clark* (2) also supports the construction I put on this will. I have arrived at this conclusion simply on construing this will. There can be no doubt that the testator never intended that there should be an intestacy. I think it clear testator did not intend to defer payment beyond the majority of the children.

I decide simply on the words contained in the clause and the context; it is not necessary for me to say that s. 98 of the Succession Act applies to this case. It seems to me s. 98 applies only to vested interests.

Attorneys for the plaintiffs and for the defendants Mr. and Mrs. Herd and the children of Georgiana Miller: Messrs. *Dignam* and *Robinson*.

(1) 3 Drew., 93.

(4) 4 De G. & S., 472.

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Attorneys for the defendant Mr. Fergusson: Messrs. *Sanderson and Co.*

Attorney for Mrs. Gilchrist: Mr. *Watkins.*

Attorney for the children of Charles Blake Maseyk: Mr. *Trotman.*

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

1878
June 27.

RUNGO LALL MUNDUL (PLAINTIFF) *v.* ABDOOL GUFFOOR AND OTHERS (DEFENDANTS).*

Landlord and Tenant—Onus of Proof—Non-payment of Rent—Suit for Rent.

When the relationship of landlord and tenant has once been proved to exist, the mere non-payment of rent, though for many years, is not sufficient to show that the relationship has ceased; and a tenant who is sued for rent and contends that such relationship has ceased, is bound to prove that fact by some affirmative proof, and more especially is he so bound when he does not expressly deny that he still continues to hold the land in question in the suit.

THIS was a suit brought to recover arrears of rent for the years 1280—1282 (1873—1876).

The plaintiff stated that he was patnidar of a certain piece of land, a portion of which had been sublet to the defendants at a fixed yearly rental. In support of this statement the plaintiff produced a rent-decree obtained by his lessor in the year 1863 against the first and second defendants and their ancestor. Defendants Nos. 1 and 2 stated that they had relinquished their jamma in the year 1270 (1863).

The other defendants contended that rent never had been realized from them, either during the time of the plaintiff or

* Special Appeal, No. 1021 of 1877, against the decree of H. T. Prinsep, Esq., Judge of Zilla Hooghly, dated the 2nd of March 1877, modifying the decree of Baboo Ram Gopal Chakee, Munsif of Uloobariah, dated the 29th November 1876.