[CIVIL JURISDICTION.]

1925.
July 3.

[ACTION NO. 25, 1925.]

THE PUBLIC TRUSTEE *v.* RUDOLF WILHELM VOLLMER, TINA AMALIE LASA VOLLMER, HANS RUDOLF WILHELM VOLLMER, FREDERICK MARTIN ADOLF VOLLMER, AND ROSIE LIMA VOLLMER AND PASEMACA MELAIA VOLLMER, INFANTS.

Will—construction of—whether gift to legitimate children refers only to children living at time of decease of testator or includes children born after his death.

Held, upon the construction of the terms of the will that any child born after the death of the testator is excluded from benefiting under the provisions of the will.

Sir ALFRED YOUNG, C.J. This matter comes before the Court by way of Originating Summons for the determination of the question set out hereunder arising under the terms of the will of Johan Heinrich Frederick Vollmer, who died on the 13th day of March, 1918. The will provided, *inter alia,* for the sale by the Public Trustee at the request and during the life of the testator's son, Rudolf Wilhelm Vollmer, of a certain plantation, and in the event of a sale the testator directed that the trustee should stand possessed of the proceeds of such sale and any investment representing the same, upon trust as to two undivided one-third shares for all the legitimate children of the said Rudolf Wilhelm Vollmer in equal shares to be absolutely vested on the testator's death and to become payable to each such child on attaining the age of 30 years or at any time prior thereto, at the request of Rudolf Wilhelm Vollmer on any such child attaining the age of 21 years, subject to the direction that the income derived therefrom should be paid to each child on attaining 21 years of age: until such time Rudolf Wilhelm Vollmer was to enjoy the income for his own absolute use and benefit. The testator further directed that if any child of his son Rudolf Wilhelm Vollmer should die in his (the testator's) lifetime leaving issue who or any of whom should be living at his (the testator's) death, such issue living at the testator's death, should take, and if more than one equally between them, per stirpes and not per capita, the share which the parent would have taken under the will, if living at the death of the testator.

At the request of Rudolf Wilhelm Vollmer the Public Trustee sold the plantation referred to and now has in hand the proceeds of such sale amounting to £3,954 for investment.

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At the date of death of the testator in 1918 Rudolf Wilhelm Vollmer had four legitimate children living, one of whom died in 1922, aged 11 years and 7 months. Since the death of the testator Rudolf Wilhelm Vollmer has had two more legitimate children—in these circumstances the Court is asked to determine the following questions:—

1. Whether the gift to the legitimate children of Rudolf Wilhelm Vollmer refers only to the legitimate children of the said Rudolf Wilhelm Vollmer living at the time of the decease of the testator or whether children born after the death of the testator are to be included as beneficiaries under the will of the testator.
2. If the Court shall be of opinion that children born after the death of the testator are to be regarded as beneficiaries under the said will at what period will the trustee be entitled to limit the members of the class.
3. Whether the share and interest under the will of the testator of Letila Lupe Meresene Vollmer lapsed on her death and if not how should the Public Trustee deal with the share and interest of the said deceased child.

Mr. Crompton, K.C., and Mr. Grahame, the respective counsel in the case, have stated that in their opinion any child born after the death of the testator did not share under the provisions of the will, and Mr. Crompton has cited cases (*Armytage* v. *Wilkinson*, 3 A.C., p. 355; *Howlett* v. *Hodgson*, 35 C.D., p. 350; *Emmet's* case, 13 C.D., p. 484; *Knapp* v. *Vassall*, 1895, 1 C.D., p. 91; in re *Bedson's Trusts*, 28 C.D., p. 523; *Elliot* v. *Elliot*, no report available) both in support of this opinion and cases in which children who come in esse after the death of a testator but before the distribution of the fund, have been included in the bequest. After reading and considering all these cases cited and others in addition, I have foımed the opinion that if the income of the shares had been assigned by the testator to the maintenance, education and benefit of the children until their attaining the age of 21 years respectively, there could be no doubt as to the class being ascertainable at the date of death of the testator, and that the interest vested was absolute and indefeasible.

The vested interest however created by the terms of the will has been made subject to or qualified by the direction that " the nett income to be derived from the respective share of each such child for the time being under the age of 21 years " should be paid to the testator's son for his own absolute use and benefit.

Does this qualification derogate from the ordinary and natural meaning of the words "to be absolutely vested on my death."

These words are very clear and expressive and the fact that the father has an interest in the income whilst "each such child" is under 21 years of age does not seem to me to affect the previous direction. I gather from this expression that the intention of the testator was that the class of children to share is to be fixed and ascertained on his death and that the qualification which follows this direction does not, in my opinion, alter that class. Another way appears to me to be open in arriving at the same conclusion. In Williams on Executors, Vol. II, 11th Ed., p. 973, the following is to be found:—

> In ascertaining the intention of the testator in this respect the Courts of equity have established two positive rules of construction—we are now only concerned with the first, viz., that a bequest to a person payable or to be paid at or when he shall attain 21 years of age, or at the end of any other certain determinate term, confers on him a vested interest immediately on the testator's death as *debitum in praesenti solvendum in futuro*, and transmissible to his executors or administrators for the words "payable" or "to be paid" are supposed to disannex the time from the gift of the legacy, so as to leave the gift immediate in the same manner in respect of its vesting, and as if the bequest stood singly and contained no mention of time.

Here we have in the will the express declaration of the testator that on the sale of the plantation at a future date the Public Trustee should stand possessed of the nett proceeds of the sale effected during the life of his son, and any investments for the time being representing the same upon trust, as to two undivided one-third shares therein, for all the legitimate children of Rudolf Wilhelm Vollmer in equal shares, such shares to be absolutely vested on his death, and "to be paid" at a future time in the event of certain happenings on the testator's death. If the bequest is immediate to children in a class, the children in existence at the death of the testator constitute the class (*Rogers* v. *Mutch*, 10 C.D., p. 25).

With the conclusion I arrived at I have the advantage, as stated above, of knowing that both counsel in the case agree.

In answer to question 1 I find that the gift to the legitimate children of Rudolf Wilhelm Vollmer refers only to the legitimate children of the said Rudolf Wilhelm Vollmer living at the time of the decease of the testator, and that the children born after the death of the testator are not to be included.

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Question 2.—On this finding the question in 2 does not arise.

3. In answer to question 3 I find that the share of Letila Lupe Meresene Vollmer did not lapse on her death and that the Public Trustee should retain her share until the trust is put an end to in accordance with the provisions of the will.

The Public Trustee allowed costs out of estate as between solicitor and client.

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[ACTION NO. 21, 1925.]

SUN HING TIY & Co. *v.* EMMA FUKAYAMA.

Payment of a sum of £300 by husband to wife—declaration sought that such payment was void as against the husband's creditors on the ground that it was without valuable consideration and with the intention of defrauding the creditors (13 Eliz. c. 5)—the alienation took place on the marriage of the parties.

Held, there being no evidence in support of the contention that the wife knew at the time of the transfer of the £300 that the gift was in fraud of her husband's creditors or to show that she was a party to any such fraud that the marriage constituted "good consideration"—plaintiffs' claim dismissed.

Quaere, whether action properly brought inasmuch as the plaintiffs were not judgment creditors?

Sir ALFRED YOUNG, C.J.

(Judgment not printed.)