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contributing; as for instance (to use an illustration put by Sir Barnes Peacock) one of them might have acted as servant and by the command of the others, or the others might have been the only persons benefited by the wrongful act; in which case those who were alone benefited, or who ordered the servant to do the act, would not be entitled to contribution.

It is therefore necessary, that the case should go back to the Court of first instance, in order that it may be ascertained what were the circumstances of the former suit, and what was the nature of the wrongful act of which the defendants were found guilty; and if the wrong was of such a nature as to justify a suit for contribution, then it must be further ascertained, what part these defendants took in the matter, and whether they ought to contribute at all or in what proportion.

Mr. Sandel appears to have offered very fair terms of compromise to his opponents, which, it may be very wise for them to accept; but unless the matter is so settled within a fortnight from this date, the judgments of both the lower Courts will be reversed, and the case will be remanded to the first Court for retrial, having regard to the foregoing observations.

The costs will abide the ultimate result.

Case remanded.

ORIGINAL CIVIL.

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

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GOCOOL CHUNDER GOSSAMEE AND OTHERS (PLAINTIFFS) *v.* THE ADMINISTRATOR-GENERAL OF BENGAL (DEFENDANT).

Practice—Civil Procedure Code (Act X of 1877), s. 372—Revivor—Plaint taken as Petition to revive.

A suit was instituted by the trustee appointed under a will, against the executrix, for the purpose of having the trusts of the will carried into execution. A decree was made, and certain directions were given for the purpose of having a scheme settled, by which the trusts were to be carried out; but before the scheme was finally settled and approved, and while the proceedings were pending, the case was struck out of the board for want of prosecution. Subsequently, both the plaintiff and defendant died. The heirs of the plaintiff then instituted a suit against the Administrator-General as

representing the estate of the defendant for carrying the trusts into execution, and prayed that their suit might be considered as supplemental to the original one.

Held, that the original suit, though no longer upon the board, was capable of revival, and that if no person were living whose consent might be obtained, or to whom notice might be given, the Court might give leave without any such consent or notice, and that the proper course to pursue was to allow the plaintiffs to amend their plaint by putting it in the form of a petition under s. 372 of the Civil Procedure Code, the defendant being at liberty to put in any answer which he might have done, if the proceeding had been by petition in the first instance.

Per PONTIFEX, J.—The words "pending the suit," in s. 372, relate to a suit in which no final order has been made.

APPEAL from original decree.

This was a suit brought against the Administrator-General of Bengal, as administrator of the estate of Kassinauth Mullick, by the seven sons of one Gobind Chund Gossamee, deceased, (who was the *guru* under the will of Kassinauth Mullick) claiming, as the *gurus* appointed under the same will after the death of Gobind Chund, to have the trusts of the will administered by the Court.

It appeared that Kassinauth Mullick appointed Rungomoney Dossee executrix of his will, and that a suit had been brought against her for the same purposes as the present suit, in 1869, by Gobind Chund; that, in the same suit, a decree was obtained and certain enquiries directed; both the plaintiff and the Registrar of the Court submitted schemes for the execution of the trusts, but no further steps were taken to carry out the decree, and the suit was ultimately abandoned and struck off on the 14th August 1875, under No. 375 of the Rules of Court.

On the 12th March 1879, Rungomoney Dossee transferred the executrixship of Kassinauth's will to the Administrator-General; and subsequently, on the 14th April 1879, died, having made a will, of which she appointed the Administrator-General executor; it did not, however, appear that the will had been proved by the Administrator-General.

On the case coming on for settlement of issues, Mr. Justice Broughton held, that no decree could be made against the Administrator-General, as he was not a party in his capacity of

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representative of Rungomoney Dossee; and that, further, the suit was barred under s. 13 of Act X of 1877.

The plaintiffs appealed.

Mr. *Phillips* (with him Mr. *Stokoe*) for the appellants.—The real question in the suit is, whether or no the proceedings taken by us are in regular form. [PONTIFEX, J.—Was not your proper course to apply by petition to revive the suit, adding yourselves as representing the plaintiff, and the Administrator-General as representing the defendant?] We could not do so when the suit was struck off; who was then to make the application? We were not parties; we are trustees, and not the representatives of the plaintiff in the original suit. The parties to the original suit were dead, and there is no provision in the Code for reviving a suit under the circumstances; under the Judicature Act it has been held that the rules as to reviving do not apply to the death of a sole plaintiff or defendant. [PONTIFEX, J.—Surely you can revive under s. 372 of Act X of 1877; it is either a "creation or devolution."] That section cannot apply, as there were no parties to the suit at the time, and the suit had abated. We were, therefore, obliged to bring this suit as supplemental to the original suit. The other side may rely on s. 361, but that section does not apply to the death of a sole plaintiff or defendant—*Jackson* v. *The North-Eastern Railway Co.* (1), *Eldridge* v. *Burgess* (2). If, therefore, these authorities are correct, the suit has abated. We are not representatives, and cannot be joined as parties with the original plaintiff; our character is that of a trustee holding an office, and not as the heirs of the original plaintiff. [PONTIFEX, J.—The evident intention of s. 372 was to deal with all cases not otherwise mentioned. Mr. *Bonnerjee*.—As regards that section, Mr. Justice Broughton has decided that the words "pending suit," refer to the suit before decree: *Cally Churn Mullick* v. *Bhugobutty Churn Mullick* (3). PONTIFEX, J.—In Daniel's Chancery Practice, it is laid down that where a "scheme has not been settled," the suit is considered "pending."] That would be so if the suit had not been struck out. [PONTIFEX, J.—In

(1) L. R., 5 Ch. D., 844. (2) L. R., 7 Ch. D., 411. (3) 5 C. L. R., 108.

England, where a scheme is settled by the Court on a petition, the certificate of the Charity Commissioners is required to such petition. In the case of *Jarvis's Charity* (1), it was held that the petition for the appointment of new trustees was a petition presented "in a suit actually pending."] The present suit is not pending, because the suit has abated. The necessity for our proceeding was, that the suit had ceased to be pending on the death of the parties. [GARTH, C. J.—Supposing we gave you liberty to use these proceedings as a petition to revive, we think that either by supplemental bill, or petition under s. 372, you have a right to relief.]

Mr. *Bonnerjee* (with him Mr. *H. Bell*) for the respondent.—I appear for the Administrator-General, and am willing to consent to any order the Court may think right to make. I would, however, point out that this present suit seems to me an entirely new suit for the administration of the estate of Kassinauth Mullick, and cannot be said to be supplemental to the old suit.

The judgments of the Court were as follows:—

GARTH, C. J.—The only question in this case is, whether the plaintiffs have taken the proper course in bringing a fresh suit, instead of reviving the former one.

The former suit was brought on the 4th of June 1869 by Gobind Chund Gossamee, the father of the plaintiffs, and the trustee named in the will of Kassinauth Mullick, against Rungomoney Dossee, the executrix of the will, for the purpose of having the trusts of that will declared and carried into execution.

A decree was made in that suit, by which the will was established, and directions were given for the purpose of having a scheme settled, by which the trusts were to be carried out. Before this scheme was finally settled and approved, and whilst the proceedings were pending, the case was struck out of the board, upon the ground that the plaintiff was not prosecuting it with due diligence; and he and the defendant, executrix, have since died. The property is in the hands of the Administrator-General, and this suit has been filed by the present plaintiffs,

(1) 1 Dr. and Sm., 97-98.

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claiming to be the trustees of the will in the place of their father, and virtually for the same purposes as the former suit.

Mr. Phillips contends that this is a supplemental suit to the other, but praying for certain necessary additional relief; and that the plaintiffs, upon whom has devolved the interest of the original trustee, were bound to bring this new suit, because the language of s. 372 of the Civil Procedure Code did not admit of their reviving the old suit under that section.

That the plaintiffs (if they are in fact trustees of the will) are entitled, and bound to take some proceedings to have the trusts carried out, I have not the slightest doubt. The only question is, in what form these proceedings should be taken.

The difficulty Mr. Phillips points out in reviving the old proceedings under s. 372 is this:

The section says, that "in other cases of devolution of any interest pending the suit, the suit may, with the leave of the Court given either with the consent of all parties, or after service of notice in writing upon them and hearing their objections, if any, be continued by or against the person to whom such interest has come."

Mr. Phillips contends that this case does not come strictly within the terms of the section;—1*stly*, because the old suit is no longer pending; and 2*ndly*, because all the parties to it were dead, and the consent or notice mentioned in the section could not be given.

No doubt, the strict language of the enactment does create this difficulty; but I think that a case of this kind is within the spirit of the section, and that it was never intended that persons in the position of the plaintiffs should be put to the expense of a fresh supplemental suit; convenience is certainly much in favor of that view.

The original suit, though no longer upon the board, is, I think, capable of revival, and if no persons are living whose consent may be obtained, or to whom notice may be given, I consider that the Court may give leave without any such consent or notice.

Then, considering that the difficulty has arisen from the language of the section, and that it was clearly right and necessary

for the plaintiffs to take some proceeding to enforce the trusts, I do not think we ought to dismiss the suit, but that the proper course will be to allow the plaintiffs to amend their plaint by putting it into the form of a petition under s. 372.

They should be allowed to make such amendments as may be necessary for that purpose, and the defendant should have liberty to put in any answer, which he might have done if the proceeding had been by petition in the first instance.

Then if the plaintiffs can show that they are entitled to revive the suit, both parties should get their costs of these proceedings, so far as they have gone, out of the estate; but, if they fail to do so, they (the plaintiffs) must pay the costs in both Courts.

PONTIFEX, J.—I wish to add a few words with regard to s. 372. I am of opinion that the words "pending the suit," in s. 372, relate to a suit in which no final order has been made. In the former suit respecting this will, there was a decree that a scheme should be settled. That decree was not proceeded with, and no scheme was settled, and no final order has been made in the suit. I am of opinion, therefore, that proceedings in that suit have not terminated, and for the purposes of s. 372 it must be still treated as a pending suit.

Appeal allowed.

Attorneys for the appellants: Messrs. *Trotman* and *Watkins*.

Attorney for the respondent: Baboo *Mooraly Dhur Sen*.