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a case in the Small Cause Court; on that account, therefore, an application for a review of judgment might legally be made. The Court made an order to this effect, subject, however, to the opinion and order of the High Court.

Baboo *Opendro Nath Mitter* for the petitioner.

The judgment of the Court (JACKSON and TOTTENHAM, JJ.) was delivered by

JACKSON, J.—We think there can be no doubt upon this question. It appears that, by the second schedule of the Code of Civil Procedure, chap. xlvii, which deals with review of judgment, is extended absolutely to Courts of Small Causes constituted under Act XI of 1865. It is also true, as the Judge of the Small Cause Court points out, that s. 21 of Act XI of 1865 has not been repealed. What will be the effect of the simultaneous retention of that section with reference to new trials, is a question which we are not at present called upon to determine. The legislature unequivocally expresses its intention that the procedure in review of judgment shall be applicable to Courts of Small Causes, and if so, the Small Cause Court is of course at liberty to entertain an application of that sort and in so doing must proceed strictly under the rules contained in that chapter, and the procedure relating to new trials under s. 21 of Act XI is not to be mixed up with those rules.

ORIGINAL CIVIL.

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

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BROJOMOHUN DOSS AND OTHERS (PLAINTIFFS) v. HURROLOLL DOSS (DEFENDANT).

Enforcement of Religious or Charitable Trusts—Security for Costs—Pleading—Parties.

The representatives of a testator, who has created trusts for religious or charitable purposes, in which the representatives are not personally interested, may institute proceedings to have abuses in the trust rectified, there being no officer in this country who has such power of enforcing the due administra-

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tion of religious or charitable trusts by information at the relation of some private individual, as is possessed by the Attorney-General in England.

A suit for this purpose should not be admitted, unless the plaintiff gives sufficient security for costs.

In order that a decree for an account may be made in favour of the plaintiff in such a suit, he must allege substantially in his plaint that which must be a distinct breach of trust; it is not sufficient for him to make out a case of mere suspicion, or to rely on particular passages in the defendant's written statement.

The Attorney-General v. *The Mayor of Norwich* (1) followed.

APPEAL from judgment of WILSON, J.

This was a suit for the construction of the will of one Choonelal Dass, praying that a scheme of the trusts should be drawn up by the Court, for an account, and for an injunction restraining the executor from further interfering with the trust property.

The plaintiffs, who were the sons of the sisters of the testator, and as such his heirs-at-law, stated, that Choonelal died in 1858, having duly made his will, of which he appointed the defendant Hurrololl sole executor, bequeathing to him his entire estate on trust, amongst other things, to pay Rs. 5 per month to defray the expenses of the daily service of "Sri Sri Isur Sreedhur;" to spend on every festival and holiday a sum proportionate to the extent of his property; to pay certain legacies (amongst which was a legacy of Rs. 250 to the plaintiffs); and, after payment of his debts and legacies, to hold the residue of his said property upon certain religious and charitable trusts.

Probate of this will was taken out in 1858. The plaintiffs further stated, that the executor had mismanaged and misapplied the greater portion of the moveable property of the testator, and had fraudulently transferred certain of the immoveable property to himself, and had also neglected to carry out the charitable bequests of the will; and that therefore they, as persons interested in the worship of the idol, and as heirs-at-law of the testator, had a good right to sue.

The defendant Hurrololl denied the charges brought against him, and stated that the testator's estate was indebted to him in the sum of Rs. 62,000, expended on behalf of the testator by

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the defendant in his lifetime; and demanded that an account might be taken of his dealings with the testator's estate, and an order made that the sum (if any) found due might be paid over to him from the estate; and that as regards the legacy to the plaintiffs, this had been offered to him, but that he had refused to receive the same.

Mr. *Bonnerjee* and Mr. *Trevelyan* for the plaintiffs.

Mr. *Phillips* and Mr. *T. A. Apear* for the defendant.

The judgment of the Court was delivered by

WILSON, J.—I think the plaintiffs have made out no case; they put their case in alternate forms—

First they say they are entitled to have the trusts of the will enforced: the trusts are these:—after payment of 5 rupees per month to defray the expenses of the daily service of the idol, to pay and spend on every festival and holiday a sum proportionate to the extent of the property; also to pay certain legacies; and after payment of debts and legacies in the will mentioned, to hold the residue of the property, and thereout entertain and feed Brahmins on the anniversary of the demise of the testator's father and mother, and also perform his *sradh* and other acts for the repose of his soul annually, and to carry on the worship of the deities. Now, in the first place, it is necessary to establish that these trusts are valid. As to that I express no opinion. In the second place, it must be shown that the plaintiffs are sufficiently interested to entitle them to have those trusts carried out. As to that also I express no opinion. In the third place, some ground must be shown why the Court should intervene, and why the powers of management which the testator has entrusted to trustees should be taken away from them. No such ground has been shown. It has not been shown that the executor does not entertain and feed Brahmins; as to the *sradhs* it is said, indeed, that the plaintiffs were not invited to attend them, but it is not shown that they ever claimed or offered to be present or to perform them. Then it is said that the worship is not performed on the former

scale, but there is really no evidence that the executor does not properly carry on the worship of the idol, either daily or periodically, and for twenty years the plaintiffs have found nothing to complain of.

I am of opinion that the plaintiffs have made no case on the ground of breach of trust: they, however, put their case in another alternative way; they say, if the trusts are invalid or the property not exhausted, they are entitled as heirs of the testator. In my opinion, having regard to the cases cited, it is clear that any claim of that sort is barred by limitation. The suit must, therefore, be dismissed with costs on scale No. 2.

The plaintiffs appealed.

Mr. *Kennedy* (with him Mr. *Bonnerjee*) for the appellants.

Mr. *Bonnerjee*.—The will was made on the 23rd August 1856, and the testator died on the 24th August 1856. Probate was taken out in 1858, but the executor filed no inventory till February 1878; the present suit being instituted in March 1878. [PONTIFEX, J.—There was no necessity for the executor to take out probate, as the testator was a Hindu and the will was made before the Hindu Wills Act (1).] Limitation cannot be pleaded, as the cause of action is a recurring one, and therefore, although it may be contended that the suit is barred, art. 123, sched. ii of Act XV of 1877 cannot apply. [PONTIFEX, J.—The real question is, whether you as heirs have any right to sue at all; to do so the trusts in the will must be shown to be continuing trusts. GARTH, C. J.—You must prove some breach of trust before we can interfere; there is nothing in your plaint to show that you made any application to the executor to enable you to discover if any breach of trust had taken place.] As regards some of the property belonging to the testator, we are directly at issue with the executor; the executor does not deny that he mortgaged certain properties. [Mr. *Phillips*.—You have not shown that you were interested.] We have a right to perform the *sradh*—*Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mozumdar* (2). We have an interest; see Shamachurn

(1) Act XXI of 1870. (2) 5 B. L. R., 15.

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Sircar's Vyavastha Darpana, pp. 224, 225. [PONTIFEX, J.—In England, in a case of this kind, where no specific breaches of trust are alleged, the defendant would demur, and the plaintiff's suit would be dismissed, but here you have filed a written statement.]

Mr. *Phillips* (with him Mr. *T. A. Apcar*) for the respondent. —There is no ground for taking an account; the first question is, whether a person who is interested in these trusts only to the extent of administering to the *sradh* of his ancestors, can bring a suit? There is no authority for showing that the representative of the testator is the person entitled to an account, and therefore to sue. [PONTIFEX, J.—Some one must have a right to sue; and in this country the Advocate-General, it seems, has no right in cases of private charities.] The plaintiffs inspected our books after the filing of the suit, and previously to the hearing; they have, therefore, had every opportunity of bringing forward any amount of evidence, but they have omitted to do so.

Mr. *Kennedy* in reply. [GARTH, C. J.—It seems to me that, under the circumstances, the right heirs of the testator are the proper persons to sue; but I should wish you to show that you have a cause of action.] The question then is, was there sufficient evidence for the Court to act upon in order to decide the case in favor of the plaintiffs, in the absence of any evidence on the other side? There are, however, admissions on the part of the defendant which go a long way towards supporting our case. [PONTIFEX, J.—Lord Cottenham has laid down in *The Attorney-General* v. *The Mayor of Norwich* (1), that it is for a plaintiff to allege the grievance of which he complains; and if he does not on the record sufficiently allege it, the defendant is not called upon to answer at all.] I am in a higher position than a relator, as I have a direct interest in some of the trusts. I think, therefore, that I am not bound so strictly in proving a direct breach of trust before I have a right to sue. [PONTIFEX, J.—Your case, if you ask to amend your plaint, is exactly on the same footing as *The Attorney-General* v. *The Mayor of Norwich* (1). GARTH,

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C. J.—We are willing to give you leave on your application to bring a fresh suit on payment of all costs.]

The judgment of the Court was delivered by

GARTH, C. J. (PONTIFEX, J., concurring).—In this case we agree with the opinion of the lower Court, that even if the plaintiffs have proved themselves to be the heirs of the testator, they are excluded by his will from taking any interest in his estate. The will devotes his estate to religious and charitable trusts exclusively.

But the plaintiffs have argued before us, that even if they have no personal interest, still they are entitled as heirs to see that the religious and charitable trusts are properly carried out, inasmuch as there is no one else to put the Court in motion, and thus obtain the due administration of the trusts.

It has never yet, we believe, been decided that the representatives of a testator are entitled to sue for the enforcement of trusts created by him for religious or charitable purposes, but in which they are not personally interested. In England the due administration of charitable and religious trusts is enforced by the information of the Attorney-General at the relation of some private individual. But in this country there is no public officer endowed with such a faculty. As it would lead to great abuse in trusts of this nature, unless some person was able to bring them under the control of the Court, and as in this country there is no properly constituted authority for the purpose, we should, as at present advised, be disposed to hold, that the representatives of a testator, who had created such a trust, are the persons who would be entitled, if a proper case were made out, to institute proceedings for the purpose of having abuses in the trust rectified; but with the qualification that it would be inadvisable for a Court to admit a suit of this nature, unless the plaintiff gave sufficient security for costs, in the same way as the Attorney-General in England would refuse to allow his name to be used to an information except at the instance of a responsible relator.

But assuming that the plaintiffs in this case are the represent-

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atives of the testator, and as such entitled in a proper case to enforce the due performance of the trusts, the question remains whether they have made such a case.

Now it seems to us that the principal motive of the suit was to obtain a declaration that they had some personal interest in the testator's estate, and that in this they have failed.

They now desire to go beyond this, and to obtain a decree for the administration of the trusts.

They do, indeed, by their plaint raise a case of suspicion; but in our opinion that is not enough to entitle them to a decree for an account. Of course, if they were personally interested under the will, or in the estate, they would, as of right, be entitled to an account against the executor or trustee.

But that is not their position. The decree which they now ask for, they solicit in the interests of the charity, and not in their own interest; and to be entitled to such a decree, we think it is not sufficient for them to make out a case of mere suspicion or to rely on particular passages of the defendant's written statement. They must allege substantively in their plaint that which must be a distinct breach of trust, whatever construction may be put upon it, to entitle them to a decree.

As Lord Cottenham said in *The Attorney-General* v. *The Mayor of Norwich* (1): "So strongly was it felt, indeed, that there might be cases in which the corporation would be justified in making these payments, that Sir William Follett, in his reply, was driven to use this argument, that if any particular circumstances did exist, it was for the defendants, in their own justification, to state and explain them in their answer, and that it was sufficient for the relator to make a *primâ facie* case. That is contrary, however, to the known and established rules of pleading. It is for the plaintiff to allege the grievance of which he complains; and if he does not in his record sufficiently allege it, the defendant is not called upon to answer at all. If the case, as stated in the record, brings before the Court allegations on which two constructions may be fairly put, one consistent with the innocence of the defendant, and the other implying a breach of trust on his part, it is contrary to all the rules of pleading to presume, that that is wrong which the plaintiff has not

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thought proper to allege as wrong, by not setting forth those circumstances which are necessary to make it so."

We observe that in this case the defendant, by his written statement, has expressed his readiness to account; but we think that, in a case like the present, the plaintiffs are not entitled to pick out passages from the defendant's written statement to supplement the weakness of the case made by themselves. And as in our opinion the plaintiffs have failed to allege a sufficient case for the interference of the Court, we must affirm the decision of the Court below, and dismiss the appeal with costs. But we do so without prejudice to the institution of any properly constituted suit against the defendant, leave to institute which we reserve, if it is necessary to do so.

Appeal dismissed.

Attorney for the appellants: Baboo *Mohendronath Bonnerjee.*

Attorneys for the respondent: Messrs. *Pittar* and *Wheeler.*

Before Mr. Justice Wilson.

SHAM KISHORE MUNDLE v. SHOSHIBHOOSUN BISWAS.

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Practice—Code of Civil Procedure (Act X of 1877), ss. 121, 125, 127, 136—Ex parte Order—Order giving leave to interrogate—Interrogatories, Application to strike out.

Section 121 of the Code of Civil Procedure contemplates (1) leave to interrogate and (2) the service of the interrogatories through the Court. It is the duty of the Court under that section to determine whether the applicant should be allowed to interrogate the other side, but not to determine at that stage what questions the party interrogated should be compelled to answer.

Where an *ex parte* order is made in chambers giving leave to interrogate, the party ordered to answer has a right to come into Court to have the order set aside if the case is one *in which interrogatories* should not have been allowed.

When an order for the administration of interrogatories is properly made, a party objecting to the interrogatories administered may, at his peril, omit to answer the interrogatories to which he objects; but the more prudent