of two months (the period of notice) should be deducted in computing limitation. If this period is deducted all the payments of 1919 are in time and the plaintiff will be entitled to a decree to that extent. In the result, the decree of the lower Appellate Court is set aside and the plaintiff's suit is decreed with full costs here and in the Courts below to the extent indicated above.

N.R.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Chief Justice and Mr. Justice Krishnan.

LANKA TULASAMMA (PLAINTIFF), APPELLANT,

1925, January 27.

v.

GUNTUPALLI VENKATASUBBAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Widow—Suit to recover possession of her husband's property—Defendant mixing up his own funds with those of the propositus—Burden of proof as to property belonging to the plaintiff's husband or to defendant—Rule as to Trustee mixing up trust funds with private funds.

Where a trustee, or a person who puts himself in the same position of accountability as a trustee, such as an executor *de son tort* by virtue of his intermedelling with the estate of another, is proved to have amalgamated monies of the testator with his own, and especially if he can be reasonably suspected of having destroyed the evidence which would otherwise be available to separate the two estates, on a suit being instituted by the beneficiary to recover the property from the intermeddler alleging that the property formed part of the estate, the burden of proof is on the intermeddler to show that the property did not belong to the plaintiff's estate but to himself.

* Appeal No. 205 of 1921.

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Lupton v. *White*, (1808) 15 Ves., 432, applied; *Magaluri Garudiah* v. *Narayana Rangiah*, (1881) I.L.R., 3 Mad., 359, referred to.

This principle applies to a case where a Hindu widow sued to recover properties alleged to belong to her husband's estate from his son-in-law, who had intermeddled in the management of the properties after her husband's death.

APPEAL against the decree of K. SUNDARAM CHETTIYAR, Additional Subordinate Judge of Guntūr, in Original Suit No. 40 of 1918.

The plaintiff sued, as the widow of one Lanka Narasayya, to recover the properties of her late husband which were taken possession of by the first defendant who was his son-in-law and husband of the second defendant, who was the daughter of the late Narasayya by his first wife. The first defendant had, after Narasayya's death, been in management of his estate on behalf of the plaintiff and in the course of his management had collected outstandings belonging to Narasayya and had got renewals of his pro-notes, bonds, etc., in his own name, and had mixed up his own funds with those of Narasayya. He latterly set up title to them as his illattom son-in-law, and instituted a suit for a declaration of his title as illattom son-in-law of the late Narasayya and therefore entitled to all his properties. The plaintiff consequently brought this suit against him, his wife and his three minor sons, to recover her husband's properties in their hands. The two suits were tried together; the former suit was dismissed, while the widow's suit was decreed in her favour, but some of the items claimed by her were disallowed by the Sub-Judge on the ground that the widow had not proved that those items had belonged to her husband's estate; the widow preferred this appeal.

A. Krishnaswami Ayyar and *K. Kameswara Rao* for appellant.—The first defendant is in the position of a

trustee *de son tort*. He admittedly mixed up Narasayya's funds with his own. In such a case the burden of proof is on the accounting party to show that the items were his sole property. See *Magaluri Garudiah* v. *Narayana Rangiah*(1), *Burugapalli Sriramulu* v. *Nandigam Subbarayudu*(2), *Lupton* v. *White*(3). Lewin on Trusts, page 332.

T. V. Venkataraina Ayyar and *V. Suryanarayana* for respondents.—The first defendant is not in the position of a trustee. He was not in a fiduciary relation to the plaintiff. The first defendant had considerable property of his own. The plaintiff should prove that any property which she claims formed part of her husband's estate, and in the absence of specific proof in respect of any specific item, her claim must be dismissed. The plaintiff must first show that the funds belonging to her husband's estate came into the hands of the first defendant, then alone the latter will have to account for such funds and to prove that the items in question were his own property.

COUTTS TROTTER, C.J.—The question that arises in this appeal is that raised by the twelfth paragraph of the Memorandum of Appeal. This was a suit brought by Narasayya's widow to reclaim certain properties and chooses in action as being part of her husband's estate, though actually in the hands of the defendant, the plaintiff in the adoption suit. The son-in-law, to use a term that will cover him in both the suits, has admitted at page 322 of the record that he adopted a course of business which resulted in his mixing up monies which he contends are his own with monies which in some cases he himself says are, and in other cases which are alleged by the other side

(1) (1881) I.L.R., 3 Mad., 359.
(2) (1911) 10 M.L.T., 313. (3) (1806) 15 Ves., 432.

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to be, monies belonging to the estate of Narasayya. It also appears from page 316 of the record that there are the gravest reasons to suspect, as the learned Judge suspected, that the son-in-law after the death of his father-in-law had suppressed documentary evidence in the shape of account books which might have thrown light upon the question to whose estate these various suggested items in the account belonged.

The learned Judge appears not to have had his attention drawn to the authorities applicable to a case of this nature. He took the view that the plaintiff having claimed certain specific items of property was bound to give evidence with regard to each item sufficient to make a prima facie case that the particular item belonged to the estate of her deceased husband. As we understand the authorities, that is not the law. The law appears to be this, and it has been settled by a long chain of authorities both in England and in this country; where a trustee, or a person who puts himself in the same position of accountability as a trustee, such as an executor *de son tort*, by virtue of his intermeddling with the estate, is proved to have amalgamated monies of the testator with his own and especially if he can reasonably be suspected of having destroyed the evidence which would otherwise be available to separate the two estates, then he is called upon to account for all sums that he alleges to be his own and to prove his ownership in them. That was laid down in the leading case of *Lupton* v. *White*(1) and the head-note is this: "Agent, or Bailiff confounding his principal's property with his own, charged with the whole except what he can prove to be his own; and, in this instance, the case of a breach of the terms upon which the Court dissolved an injunction, the inquiry was directed with costs." That is clear

(1) (1808) 15 Ves., 432.

authority for the proposition that, where there has been such an amalgamation, the burden will be passed from the person in the position of a *cestui que trust*. That has been consistently followed in the English Courts of Equity, and a comparatively recent application of it will be found in the case of *In re Oatway; Hertslet* v. *Oatway*(1), and the doctrine is by no means unknown to India. It was followed in two cases in this Court which have been cited to us—*Magaluri Garudiah* v. *Narayana Rungiah*(2) a decision of Sir CHARLES TURNER, C.J. and MUTHUSWAMI AYYAR, J. and more recently in a case decided by BENSON and SUNDARA AYYAR, JJ., *Burugapalli Sriramulu* v. *Nandigam Subbarayudu and others*(3). In those cases the principle laid down by Lord ELDON has been fully recognized and acted upon, viz., that the onus of proof clearly rests on the person responsible for confounding the two funds and thereby rendering identification difficult on the plaintiff's part.

We therefore think that this case must be referred back for a finding in accordance with the view of the law that we have laid down, namely, that this man must prove that all the items enumerated in paragraph 16, sub-paragraph 4 of the judgment belong to himself, the burden being on him. There is general evidence to lead to a very strong suspicion that he has got into his hands some considerable portion of the deceased man's estate. There is evidence that it was a large estate at one time, and there is evidence that just a few years before his death it amounted to Rs. 40,000. And there are available sources of evidence which are not before us but can be resorted to by the learned Judge in the Court below as to how much of that estate is now left in the hands of

(1) (1903) 2 Ch., 356. (2) (1881) I.L.R., 3 Mad., 359.
(3) (1911) 10 M.L.T., 313.

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the widow. If there is a deficit after taking into account the sums of money recovered by the receiver, then the burden will lie upon the defendant. The general principle is clear that this man must show that those items which he alleges to be his own monies belong to him. It is no great hardship in this case, because the debts are mostly evidenced by promissory-notes and it cannot be very difficult if his case is a true one to rebut the presumption that they are really notes taken by him in respect of monies due to Narasayya's estate, by proving that he himself lent the money at a particular date, that it was his own money and that the negotiable security was given to him to secure a debt due to himself and to nobody else. The case must go back for a finding with regard to those items with the onus of proving that they are his cast upon the defendant. Both parties can adduce fresh evidence. Finding will be returned in three months. Ten days will be allowed for objections.

KRISHNAN, J.

KRISHNAN, J.—I agree.

K.R.

APPELLATE CIVIL—SPECIAL BENCH.

Sir Murray Coutts Trotter, Chief Justice, and Mr. Justice Krishnan.

1925, February 5.

THE COMMISSIONER OF INCOME-TAX, MADRAS, REFERRING OFFICER,

v.

THILLAI CHIDAMBARAM NADAR, ASSESSEE.*

Secs. 23 (2) *and* 63 (2) *of Income-tax Act* (*XI of* 1922)—*Unregistered firm—Service of notice under the Act on one member of the firm, sufficient service on the firm.*

By virtue of section 63 (2) of the Income-tax Act (XI of 1922) an unregistered firm is validly served with notice

* Referred Case No. 19 of 1924.