ORIGINAL CIVIL.

Before Mr. Justice Davar.

1908. *January* 17.

AYESHABAI, WIDOW, PLAINTIFF, *v.* EBRAHIM HAJI JACOB AND ANOTHER, DEFENDANTS.*

Will—Executor—Intermeddling with estate—Degree of interference necessary to charge executor—Suit for account against executor—Account on footing of wilful default—Practice—Limitation—Limitation Act (XV of 1877), section 10, schedule II, Art. 120.

In law a very small interference or intermeddling with the estate of his testator on the part of a party appointed executor under a will is sufficient to charge him with liability as executor.

An executor once having acted unquestionably as an executor cannot renounce that character and all the liabilities which attach to it and having once acted, the subsequent renunciation is void, and he continues liable to be sued in the character of an executor.

Rogers v. *Frank* (1), followed.

Modern practice allows of an order charging wilful default being made at any time during the action on a proper case being shown.

The plaintiff brought a suit against the executors of the will of her grandfather, praying for a declaration that she was absolutely entitled to the property of her grandfather and for an account of the property in the hands of the executors. The plaintiff claimed as heir and not under the will.

Held, she was only entitled to accounts for six years preceding the suit as she took no interest in the property under the will, and the executors were not trustees for *her* and the property did not vest in them for any specific purpose in her favour. Such a suit is not a suit for the purpose of *following such property in the hands of the executors and trustees.*

THIS was a suit filed by the plaintiff Ayeshabai praying that it might be declared that she was absolutely entitled to the property moveable and immoveable left by her grandfather Haji Cassum Sooleiman deceased, that the defendants might be ordered to account for all the abovementioned property come into their hands and for the rents and other income of the same, and that they might be ordered to deliver possession to the plaintiff of the said property together with accretions thereto and the title deeds.

* Suit No 221 of 1905.

(1) (1827) 1 Y. & J. 409.

The said Haji Cassum Sooleiman, a Cutchi Memon, died on 21st October 1894, leaving, surviving him as his heirs his widow Fatmabai, one son Haroon, a grandson Aboobakar, and a granddaughter Ayeshabai, the plaintiff.

By his will Haji Cassum Sooleiman appointed his brother Rahimtoola Sooleiman and his grandnephew Ebrahim Haji Jacob, the first defendant, his executors and trustees. He devised and bequeathed all his property moveable and immoveable to his trustees in trust that they should enter into and remain in possession of rents and profits and should pay Rs. 50 per mensem for the maintenance of the said Fatmabai, the said Haroon and his wife Hawabai and the said Aboobakar until the death of the last survivor of them, and that upon the death of such last survivor the trustees should convey the said immoveable properties absolutely to the child or children of the said Aboobakar.

Aboobakar died in December 1895 intestate and unmarried.

Haroon died in October 1896 leaving a widow, Hawabai, and a daughter, the plaintiff.

His widow Fatmabai died in August 1897.

Hawabai, the widow of Haroon, died in August 1899.

The plaintiff claimed that on the death of Hawabai she became absolutely entitled to the properties left by her grandfather.

Rahimtoola Sooleiman died in January 1903 leaving a widow, Ayeshabai, the second defendant. The first defendant denied that he ever took possession of any of the testator's properties either by himself or by others, but he was willing to account for the property after the death of Rahimtoola Sooleiman.

The second defendant denied the plaintiff's right to demand accounts for a period previous to six years from the date of the suit.

Bahadurjee with *Raikes* for plaintiff:—Only a very slight act of intermeddling by an executor will amount to acceptance of office: see Williams on Executors, Vol. II, p. 1434, note (*k*) (10th edition). See *Cummins* v. *Cummins*[1], *Suddasook Kootary* v. *Ram Chunder*[2].

(1) (1845) 8 Ir. Eq. Rep. 723

(2) (1890) 17 Cal. 620.

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If the first defendant has not received what he ought to have received by due diligence he is liable *de son tort*. We demand an account on the footing of wilful default. *Mayer* v. *Murray*(1). Where case of wilful default is made out an account on the footing of wilful default can be directed: Williams on Executors, Vol. II, p. 1510 (10th edition). See judgment of Fry, J., in *Barber* v. *Mackrell*(2). If, on taking accounts before the Commissioner, a case of wilful default is *primâ facie* made out the Court can, on further directions, order accounts on footing of wilful default. *In re Symons*(3).

Scott (Advocate General) and *Strangman* for defendant 1:—We are only liable to account from January 1903: see Williams on Executors, pp. 1291—1445 (10th edition). They also referred to Seton on Decrees, Vol. II, p. 1162 (6th edition), and *In re Brier*(4).

Padshah with *Wadia* for defendant 2:—Referred to *Hemangini Dasi* v. *Nobin Chand Ghose*(5), *Saroda Pershad Chattopadhya* v. *Brojo Nauth Bhuttacharjee*(6), *Shapurji Nowroji Pochaji* v. *Bhikaiji*(7), *The Advocate General of Bombay* v. *Bai Punjabai*(8).

DAVAR, J.:—The plaintiff seeks in this suit a declaration that she is absolutely entitled to the property both moveable and immoveable left by her grandfather Haji Cassum Sooleiman, a Cutchi Memon merchant of Bombay, who died on the 21st of October 1894, and prays that the defendants may be ordered to deliver up possession of the said property to her. She further prays that the defendants may be ordered to account for all the property of Haji Cassum come into their hands and for the rents and income thereof.

Previous to his death the said Haji Cassum on the 31st of July 1894 made a will, whereby he purported to make certain dispositions of his property. He left a widow, Fatmabai, who died in 1897—a son Haroon, who died in October 1896—a grandson, Aboobakar, who died in December 1895. Haroon's widow Hawabai died in August 1899. The plaintiff is a daughter of

(1) (1878) 8 Ch. D. 424 at p. 426.
(2) (1879) 12 Ch. D. 534 at p. 538.
(3) (1882) 21 Ch. D. 757.
(4) (1884) 26 Ch. D. 238.
(5) (1882) 8 Cal. 788 at p. 807.
(6) (1880) 5 Cal. 910.
(7) (1886) 10 Bom. 242.
(8) (1894) 18 Bom. 551.

the testator's son Haroon. She contends that in the events that have happened she is now absolutely and solely entitled to the whole of the property left by her grandfather Cassum Sooleiman. Under the will she takes no interest in the estate of the testator. Some of the provisions of the will are said to be invalid as being in favour of unborn children of the testator's grandson Aboobakar. The plaintiff's right to succeed to all the property of Cassum Sooleiman is not disputed or challenged and therefore it is unnecessary to discuss any further the provisions of the will.

By the will the testator appointed his brother Rahimtulla Sulliman and his grand-nephew Ebrahim Haji Jacob, the first defendant herein, the executors thereof. It is not disputed that Rahimtulla during his life-time managed the property of the testator. He died on the 13th of January 1903. The second defendant is his widow and heir. She has been adjudged a lunatic since the institution of the suit. Her counsel does not dispute her liability to account to the plaintiff in her capacity of heir to her deceased husband. The only question submitted by him to the Court is whether the plaintiff's right to ask for accounts for a period previous to six years from the date of the institution of the suit is not barred by the law of limitation. He admits her liability to account for her husband's management as his heir, from a date beginning with six years previous to the institution of the suit up to the date of the death of her husband. It is not alleged that she was in possession of the testator's estate after her husband's death.

The first defendant originally and in his written statement denied all liability to account. In his written statement he says "he never took possession of any of the testator's properties either by himself or with others", and submits that the plaintiff "is not entitled to any of the reliefs prayed as against him." At the hearing, it seems, wiser counsel prevailed, and the Advocate General said he was willing to account after the death of Rahimtulla. His case is that after Rahimtulla's death the testator's property was managed by two sons of Abdulla, a son of the testator's brother, Noor Mahomed, who is supposed to have been

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adopted by Rahimtulla. It was stated on his behalf that the accounts were regularly and properly kept by these two young men and he was willing to adopt them and render accounts to the plaintiff after Rahimtulla's death. His counsel, however, have denied his liability to account during Rahimtulla's life-time. His case is that during Rahimtulla's life-time he was not in possession and management of the estate of the testator and that he had not accepted the office of executor at all events till Rahimtulla's death. The Advocate General however admitted that his client had intermeddled only in one respect during Rahimtulla's life-time. This was by joining in filing a suit. This admission does not stand by itself. This defendant's cross-examination and the entries from the books put in at the hearing prove that he joined Rahimtulla in giving a power-of-attorney as the executor of the will of Cassim Sulleman to one Haji Ebrahim Haji Adam to file or continue a suit at Karáchi in respect of the testator's property. This was in 1896. The defendant's answers were very evasive at times and he took refuge in the statement that Rahimtulla was like his grand-father and he merely did what Rahimtulla directed him to do. The plaintiff being a woman is not of course conversant with the details of the management of her grand-father's estate and I feel that the first defendant could tell a great deal more than what he has chosen to state in the witness-box and that his memory is not so bad as his answers indicate. Whatever may be the true facts, this one act of his is clearly established. He knew all about what he was doing when in 1896 he gave a power-of-attorney as executor jointly with Rahimtulla. He appears to have gone to the Solicitors' office and paid the late Mr. Turner his fees for preparing the power. He must be taken to have jointly filed or continued a suit for the purpose of recovering the property of his testator. Is this one act, which is proved, sufficient to charge him with a liability to account as executor? In my opinion this act is a clear indication that at all events about this time the first defendant accepted the office of executor. This power seems to have been executed somewhere about the 17th of August 1896, as appears from the dates of the entries. See Exhibit L.

In law a very small interference or intermeddling with the estate of his testator on the part of a party appointed executor under a will is sufficient to charge him with liability as executor. In Williams on Executors, 10th edition, 1905, at page 199, it is stated:—"An executor who has intermeddled cannot subsequently renounce;" and at page 1434, Note (*k*), it is stated that "a very slight act of intermeddling by the executor will amount to the acceptance of the office of executor."

In *Rogers* v. *Frank* [1], Lord Chief Baron Alexander holds that an executor once having acted unquestionably as an executor cannot renounce that character and all the liabilities which attach to it and that having once acted the subsequent renunciation is void and he continues liable to be sued in the character of an executor. In this view Barons Garrow and Vaughan concur.

I hold on the evidence before me that the first defendant accepted office as executor under the will of Cassim Sulleman in August 1896 and that he is accountable as such executor from that time.

By her amended plaint the plaintiff claimed an account against the first defendant on the footing of wilful default. Her counsel at the hearing attempted to make out a case for a reference to the Commissioner on that footing, but he did not succeed in placing before the Court any materials which would justify the Court in making a reference on the footing of wilful default and he asked the Court in the end to reserve to him liberty to apply to the Court for directions to have the account taken on the basis of wilful default against the first defendant if he is able to gather sufficient materials for that purpose while the accounts are being taken before the Commissioner. No special leave seems to be necessary to make this application. Modern practice allows of an order charging wilful default being made at any time during the action on a proper case being shown. See Williams on Executors (10th edition), p. 1626, and Note (*t*) on the same page. If such leave, however, is necessary I have no hesitation in granting it having regard to the fact that the acts complained of against the first defendant related to the manage-

(1) (1827) 1 Y. & J. 409.

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ment of the Worlee property on the assumption that the whole of the property belonged to the testator. This question as to whether the whole of the Worlee property belonged to the testator as contended by the plaintiff or only a moiety thereof as contended by the first defendant was partly gone into before me at the hearing. Mr. Bahadurji at one time insisted on this question being gone into before the Court and in this suit. The first defendant contended that a moiety of the Worlee property belonged to the estate of his grand-father Moledina, a brother of the testator Cassum Sulleman. It was pointed out that the heirs of Moledina were not parties to this suit and no decision I would give in this suit would bind them, but Mr. Bahadurji insisted at first and stated that in order to establish his right to have accounts taken on the footing of wilful default it was necessary that he should prove that the whole of the Worlee property belonged to his client's grand-father and now belonged to the plaintiff.

Plaintiff's counsel, however, realised the difficulties in his way in establishing his title to the whole of the property in this suit and at that stage and before the conclusion of the case he asked permission to withdraw the first issue with liberty to him to file a separate suit against Moledina's heirs to establish his client's right to the moiety of the Worlee property claimed by them. This application the defendants' counsel did not oppose and it seems to me that that is the proper course to be followed. I do not think anything done in this suit will preclude her from filing a suit against Moledina's heirs even if I did not give her liberty, but to avoid all possible controversy I do so.

The only other question that remains to be discussed is that of limitation. Is the plaintiff entitled to claim accounts against the defendants for a longer period than six years previous to the date of the filing of this suit? Mr. Bahadurji contends that there is no period of limitation applicable to his claim and relies on section 10 of the Limitation Act. Defendants' counsel contended that the claim to accounts previous to the six years preceding the filing of the suit is barred under Article 120 of the Second Schedule to the Act. In approaching the considera-

tion of this question I had my sympathy entirely with the plaintiff. Looking at the papers and proceedings in this case I find that the plaintiff has not been treated with either candour or fairness. She has been kept at arms length and the first defendant's attitude towards her has been far from friendly. There is a good deal of force in Mr. Bahadurji's complaint at the way in which she has been treated. My inclination was to give her all the accounts her counsel so strenuously fought for but I am unable to do so in the face of the authorities which are too strong to enable me to give the plaintiff the accounts for a period previous to the six years preceding the filing of the suit. The first defendant is not—nor was Rahimtulla a trustee for her—they are trustees under the will and she takes no interest in the estate of their testator under the will. The property of the testator did not "become vested in them in trust for any specific purpose" in the plaintiff's favour and her suit cannot be said to be a suit "for the purpose of following in their hands such property" according to the interpretation put upon these words by the decided cases.

In *Saroda Pershad Chattopadhya* v. *Brojo Nauth Bhuttacharjee*[1], White, J., in delivering the judgment of the Court, says :—

"In India, suits between a *cestui que trust* and trustee for an account seem to be governed solely by the Indian Limitation Act, and unless they fall within the exemption of section 10 are liable to become barred by some one or other of the Articles in the second schedule of the Act. To claim the benefit of s. 10, the suit against the trustee must (amongst other things) be for the purpose of following the trust property in his hands . . . It is plain that its object is not to recover any property in *specie*, but to have an account of the defendant's stewardship, which means an account of the money received and disbursed by the defendant on plaintiff's behalf, and to be paid any balance which may be found due to him on taking the account."

Mr. Bahadurji tried to distinguish this case from the one before me by contending that in this case the plaintiff claimed both property *and* account, but the distinction, if any, disappears in the

(1) (1880) 5 Cal. 910 at p. 914.

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light of the case of *Hemangini Dasi* v. *Nobin Chand Ghose*[1] where plaintiff submitted that certain of the trusts and provisions of the will in that case were invalid in law, that consequently a large portion of the testator's property remained undisposed of at his death and she claimed a share of this residue as one of the heirs of the testator. She also claimed accounts. Mr. Justice Field, after giving to the plaintiff her share in the property, says at page 807 :—

"Then, as to the account asked in respect of the Hadul property, we think that the plaintiff is entitled to such account for six years only preceding the institution of the present suit, upon the authority of the case of *Saroda Pershad Chattopadhya* v. *Brojo Nauth Bhattacharjee*." In *Shapurji Nowroji Pochaji* v. *Bhikaiji*[2] Mr. Justice Scott held that a suit which was *primarily* not a suit to follow trust property in the hands of a representative of a trustee was barred by Art. 120 of the Second Schedule of the Limitation Act. He follows the case of *Saroda Pershad Chattopadhya* v. *Brojo Nauth Bhattacharjee*[3] and I think he meant to follow the case of *Hemangini Dasi* v. *Nobin Chand Ghose*[4], but by some mistake in the report the reference is given to another case of *Jibanti Nath Khan* v. *Shib Nath Chuckerbutty*[5].

Mr. Justice Parsons' decision in *Nanalal Lallubhoy* v. *Harlochand Jagusha*[6] and Mr. Justice Farran's decision in the *Advocate General of Bombay* v. *Bai Punjabai*[7] are to the same effect. In the latter case in the course of his judgment, Mr. Justice Farran refers to the cases of *Saroda Pershad Chattopadhya* v. *Brojo Nauth Bhattacharjee*[8] and *Shapurji Nowroji Pochaji* v. *Bhikaiji* [9] and follows them.

In *Mathuradas* v. *Vandrawandas* [10] Mr. Justice Batchelor holds that s. 10 of the Limitation Act does not apply to a resulting trust.

(1) (1882) 8 Cal. 788.
(2 (1886) 10 Bom. 242.
(3) (1880) 5 Cal. 910.
(4) (1882) 8 Cal. 788.
(5) (1882) 8 Cal. 819.
(6) (1889) 14 Bom. 476.
(7) (1894) 18 Bom. 551.
(8) (1880) 5 Cal. 910.
(9) (1886) 10 Bom. 242.
(10) (1906) 31 Bom. 222: 8 Bom. L. R. 328.

These cases cited at the Bar leave no doubt in my mind that the plaintiff is not entitled to claim exemption under s. 10 of the Limitation Act. The question however becomes perfectly clear by the language of the judgment of the Privy Council in the case of *Balwant Rao* v. *Puran Mal*[1].

The judgment of the Privy Council says:—

"Their Lordships are of opinion that the expression used by the Legislature 'for the purpose of following in his or their hands such property' means for the purpose of recovering the property for the trusts in question; that when property is used for some purpose other than the proper purpose of the trusts in question, it may be recovered, without any bar of time, from the hands of the persons indicated in the section."

Plaintiff does not sue to recover property *for* the trust created by the will of her grandfather: she seeks to recover the property for herself and in doing so she claims an account from the persons in possession. Her right to sue for the whole of the testator's property accrued when the last beneficiary under the will—the testator's daughter-in-law, Hawabai—died in August 1899. Her plaint was admitted on the 30th of March 1905. She is entitled to accounts from the defendants for only six years preceding this date.

I must now find on the issues: Issue No. 1. I allow the plaintiff to withdraw her claim to the moiety of the Worlee property claimed by Moledina's heirs with liberty to her to file a suit against them to establish her claim thereto if she desires to do so.

Issue No. 2. I find in the negative. The plaintiff will be at liberty any time during the continuance of this action to apply for an order to have accounts against the first defendant taken on the footing of wilful default if she is able to make out a sufficient case for that purpose.

Issue No. 3. The second defendant is accountable only as the heir of her deceased husband Rahimtulla up to the death of Rahimtulla on the 13th of January 1903.

(1) (1883) 6 All. 1 at p. 9.

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With the exception of the moiety of the Worlee property there is no dispute as to the property of Cassam Sulleman to which the plaintiff is entitled and therefore it is not necessary to refer to the Commissioner to ascertain what that property is.

I pass a decree for the plaintiff declaring that she is absolutely entitled to the property both moveable and immoveable left by her grandfather Haji Cassam Sulleman.

Declare that the property of Haji Cassam Sulleman is the compensation paid for the house at Parell now in the hands of the Receiver in the suit—his share in the family house at Nagdevi Street and half share in the Worlee property. The decree will recite that I give the plaintiff leave to withdraw her claim to the other half of the Worlee property with liberty to file such suit as she may be advised against the heirs of Moledina who claim a moiety of the said property.

I direct the Receiver to hand over to the plaintiff the moneys in his hands in respect of the house at Parell after deducting therefrom his commission. This will be without prejudice to the plaintiff's right to apply to have the Receiver's commission paid by the first defendant if she establishes that the appointment of a Receiver was necessitated by his misconduct or any wrongful act or acts on his part. I refer the suit to the Commissioner to take an account of the management of the property and of the rents and profits thereof. The first defendant will account as an executor and the second defendant as the heir of the deceased executor. The accounts to be rendered must be from the 30th of March 1899. The second defendant will account only up to 13th January 1903 and the first defendant up to the time a Receiver was appointed in this suit.

I have carefully considered the question of costs. I think it would be fairest to all parties if at present I refrain from making any order as to the payment of costs. Myself or some other Judge before whom the case may come on after the accounts are taken will be in a much better position to judge of the contentions of the parties after the result of the taking of accounts is before the Court. By the time the accounts are taken the plaintiff will have had an opportunity of filing a suit in respect

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of the moiety of Worlee property and the result of the suit if she files one will have a bearing on the question of a portion of the costs incurred at the hearing before me.

I reserve further directions and the question of all costs.

Note.—Mr. Bahadurji on behalf of the plaintiff undertakes not to charge, alienate or transfer her admitted share in the Worlee property so as to safeguard the defendants in case costs are ordered to be paid out of the estate.

Attorneys for the plaintiff :—*Messrs. Mehta & Dadachanji.*

Attorneys for the defendants :—*Messrs. Payne & Co. and Messrs. Captain & Vaidya.*

B. N. L.

APPELLATE CIVIL.

1908.

February 12.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

VITHU DHONDI AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* BABAJI BIN BAHIRU BHISE AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 46, 47†*—Conciliator's certificate obtained in the name of one co-parcener—Suit on behalf of the family—The remaining co-parceners joining as plaintiffs to the suit—Hindu Law—Manager—Powers to represent the family.*

In a suit brought on behalf of a joint Hindu family the Conciliator's certificate required by section 46 of the Dekkhan Agriculturists' Relief Act

* Second Appeal No. 281 of 1907.

† The sections run as follows :—

46. If the person against whom any application is made before a Conciliator cannot after reasonable search be found, or if he refuses or neglects, after a reasonable period has been allowed for his appearance, to appear before the Conciliator, or if he appears but the endeavour to induce the parties to agree to an amicable settlement or to submit the matter in question to arbitration fails, the Conciliator shall, on demand, give to the applicant, or when there are several applicants to each applicant a certificate under his hand to that effect.

47. No suit and no application for execution of a decree passed before the date on which this Act comes into force, to which any agriculturist residing within any local area for which a Conciliator has been appointed is a party, shall be entertained by any Civil Court, unless the plaintiff produces such certificate as aforesaid in reference thereto.