[ORIGINAL CIVIL JURISDICTION.]

1875. June 28

Suit No. 371 *B. of* 1869.

M. A. DE SOUZA.....*Plaintiff*

IGNACIO FRANCISCO DE SOUZA and others ....*Defendants.*

Will—Trust—Executor—Investment—Shares—Conversion—Liability of an executor in Bombay to make good the loss occasioned to the estate by his neglect to convert the shares owned by his testator.

The rules and decisions of the Court of Chancery in England, relative to the duty of an executor to convert in the absence of any special direction to that effect in the will, do not, without great qualifications, apply in the High Court of Bombay, and the Supreme and High Courts of Bombay have not, by any general rule or uniform practice, adopted any Government security accessible to a private executor or trustee in such manner as to form an authoritative guide to him in his administration of the estate.

Therefore, where the will of a Portuguese testator contained no special direction for conversion, nor any sufficient indication of an intention on the part of the testator that the residuary devisees and legatees should enjoy the residue successively *in specie*, so as to exempt the executors from the duty of conversion, and the executors did not convert certain shares belonging to their testator, which subsequently became much depreciated in value,

Held that the executors were not liable for the loss so occasioned to the estate of the testator.

MANOEL de Souza, a Portuguese, died on the 2nd February 1862, having previously made his will, bearing date the 1st March 1860, by which instrument he appointed Antonio Domingo de Souza—his eldest son, one Francis Fernandes, and the first defendant Ignacio Francisco de Souza (his nephew), his executors. Francis Fernandes, one of the executors, died on the 20th May 1867, and the son, Antonio Domingo de Souza, on the 24th July 1867. This suit, for the administration of the trusts of the will, was then instituted by Manoel Antonio de Souza, the grandson of the testator and a legatee and devisee under the will, against the surviving executor and the legal representatives of the two deceased executors, with the object of making chargeable the surviving executor, Ignacio Francisco de Souza, and the estates of the deceased executors, Antonio Domingo de

Souza and Francis Fernandes, with certain alleged breaches of trust on the part of such executors in relation to their administration of the testator's estate.

A reference was made to the Commissioner to take the accounts of the estate, and in the course of the investigation before him an account No. I, entitled "an account of the personal and moveable estate of the testator, Manoel de Souza, deceased, come to the hands of Antonio Domingo de Souza, deceased, late one of the executors of the said testator," was exhibited by the defendants Leopoldina de Ga, Francis Xavier Pereira, and Joseph de Silva, as the executrix and executors of the said Antonio Domingo de Souza. To this account the plaintiff filed a surcharge, claiming to be credited, in such account, against the estate of Antonio Domingo de Souza, with two sums, Rs. 4,092 and Rs. 36,046 respectively, the first being the value of 44 shares of the Chartered Mercantile Bank of the nominal value of Rs. 11,000 together with the premium, as of the 28th February 1863, at Rs. 93 per share (viz., Rs. 4,092), after deducting Rs. 11,000 admitted in the account, and the second being the value of 36 shares of the old Bank of Bombay, namely Rs. 36,000 (the nominal value of the shares) and premium as of the 28th February 1863 at Rs. 93 per share, but deducting Rs. 3,302 received in respect of such shares by the receiver in the suit. The Commissioner disallowed these two items of surcharge, and at the request of the plaintiff's solicitors certified such disallowance on the 23rd March 1875. The matter then came before the Court in the form of a motion on behalf of the plaintiff to reverse or vary the finding of the Commissioner on these two items as contained in his certificate.

Latham, for the plaintiff, in support of the motion.

Pigot, (with him *Farran*,) for the defendants, *contra*.

GREEN, J.:—It was contended on the part of the plaintiff's counsel that the Commissioner ought to have allowed these items of surcharge on the ground that, having regard to the provisions of the will of the testator and to the general rule of law applicable in this behalf, it was the duty of the exe-

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cutors of Manoel de Souza to have sold and converted the bank shares, which the testator held at the time of his death, within a reasonable period, say a year after such event, and, loss having, by such neglect and by reason of the depreciation in value of the shares so retained unconverted, occurred to the testator's estate, that the surviving executor and the estates of the deceased executors (amongst which was that of Antonio Domingo de Souza) were bound to make good such loss.

It will be desirable, in the first place, to state the provisions of the testator's will which have any possible bearing on the question at issue. After bequeathing divers pecuniary legacies and giving an annuity to a widowed daughter "to be paid by his executors out of the income of the residue of his property," the testator desires his executors to invest Rs. 10,000 in the purchase of Government promissory notes, and directs the income to be paid to a grand-daughter, Angela, for life, and after her decease to her children. The testator then devises certain specified immoveable estate to sons and grandsons, charging certain portions of it for certain religious or charitable purposes. The only portion of these clauses, relating to his real estate, which may possibly be material, is contained in the clause enabling his trustees, in the case of the minority of any of the devisees, to apply such part of the net balance of rents and profits as the trustees think proper for the maintenance and advancement of such minor, and "to accumulate the residue of the said rents and profits in the way of compound interest by investing the same and all the resulting income thereof in the names or name of the said trustees or trustee, with power to vary the same at their or his discretion," &c. The testator then bequeaths to his trustees "the sum of Rs. 20,000 invested in Government promissory notes" upon certain trusts for two of his grandsons and their children. He then bequeaths to his trustees "the further sum of Rs. 10,000, invested in like Government promissory notes," upon certain trusts for the benefit of certain great-grandsons and their children, and "the further sum of Rs. 10,000 in like Gov-

ernment promissory notes" upon certain trusts for the children of another grandson. The will then proceeds: "And as to all the residue of my property after payment of the legacies hereby bequeathed, my just debts, funeral and testamentary expenses, I give, devise, and bequeath the same unto the said Antonio Domingo de Souza, Francisco Fernandes, and Ignacio Francisco de Souza, their heirs, executors, and administrators, upon the following trusts, that is to say, upon trust that my said son, Antonio Domingo, shall be permitted to receive the income thereof for his life, and, after his decease, upon trust to pay the said income to my said grandson, Manoel Antonio de Souza (*i.e.*, the plaintiff), for his life, and, after his decease, upon trust to hold the said residue and the annual income thereof for all the sons or any the son of the said Manoel Antonio de Souza who shall survive him and attain 21 years, and, if more than one, in equal shares." Then follow provisions for the case of default of issue of Manoel Antonio.

The will, in providing for the minority of persons taking under the residuary disposition, (amongst other things) provides that the trustees should, in the case therein mentioned of the minority of a devisee, accumulate the residue of the annual income (after providing for maintenance, &c.,) of the share or interest of such minor "by investing the same and the resulting income thereof from time to time in or upon any such investments as are hereinbefore mentioned." The will, in giving express powers to the executors with reference to getting in, satisfying, compromising, and taking security for, any debts or liabilities of the estate, gives them authority "generally to act in regard thereto as they shall think expedient without being responsible for any loss thereby occasioned." Then follows a clause making the receipt of the acting trustees or trustee a good discharge "for the purchase money of premises sold or for any moneys, funds, shares or securities which may be paid or transferred to them or him in pursuance hereof of any of the trusts hereof." The will concludes with clauses providing for the appointment of new trustees.

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Though not providing for any investment of the residue generally, the testator does, as we have seen, provide for the investment of accumulations in the case of minors taking under the residuary disposition "in or upon any such investments as are hereinbefore mentioned," though what this may refer to, is by no means clear. The only investment specifically mentioned is Government promissory notes; though the testator had, according to the construction which I put on his will in a previous clause, authorized the investment of accumulations of rents and income of real estate specifically devised "at the discretion of the trustees or trustee". Lastly, in the receipt clause, it will have been observed, the testator seems to have contemplated the *acquisition* by the trustees of something more than Government promissory notes, as he provides that their receipt shall be a discharge for (*inter alia*) "moneys, funds, shares, or securities" paid or transferred to the trustees, though nowhere do the trusts of the will *expressly* authorize the transfer to the trustees of shares.

It will be seen that the will contains no directions as to the kind of securities in which the residue of the testator's property is to be invested, nor, indeed, except in a particular state of circumstances, any direction at all for its investment. In fact, the only express direction as to the kind of investment is the one in the early part of the will with relation to the Rs. 10,000 bequeathed to his grand-daughter Angela. The gifts, in a subsequent part of the will, of Rs. 20,000, Rs. 10,000, and Rs. 10,000 for certain of his grandsons and great-grandsons are, it will have been observed, not of sums to be invested in Government securities, but of sums apparently already invested and held by the testator in such securities. The power to invest the accumulations of income of real estate, in case of the minority of a devisee, is very general, and the words "at their or his discretion", in my opinion, refer as much to the first investment of such accumulation as to the subsequent varying of such investments when made. This construction seems to me to follow from the consideration that otherwise (that is to say, if the

trustees were restricted to one form of investment, viz., Government promissory notes) what effect could be given to the words to vary such investment, when there is only one investment which can be resorted to? The gift of the residue of the testator's property to the trustees, it will have been observed, is unaccompanied by any direction or power to invest the same; the first trust on which it is to be held, is that his son, Antonio Domingo, shall be permitted to receive the income *thereof*.

In the English Chancery there are several rules relative to the matter now under consideration which have been established by a course of decisions. These rules have, however, to a certain extent been modified by a recent statute, as will be hereafter mentioned. Unless the residue of the estate of a testator, after satisfying debts, can be at once distributed to the objects intended to take beneficially, it is the duty of the executor or trustee of the will to invest such residue on some proper security so as to yield income. In cases where the residue is given for life, with remainders over, it is further his duty, in the absence of special provisions, to see that the funds be not only properly invested as to security, but also that the securities be of a permanent and not perishable or terminable nature, so that those in remainder may, as nearly as possible, have an equal benefit, in respect of income, as those in immediate enjoyment. Where any particular securities or class of securities are indicated by the creator of the trust as the mode of investment intended by him, the executor or trustee will not be justified in going beyond such mode of investment from any belief, well founded or otherwise, of thereby benefiting the *cestuis que trustent*. In the absence of any power expressly given by the will, it is the general duty of an executor to adopt, as the mode of investment, one of the Government or bank annuities as answering best the requisites of security and permanance, and the proper one to select is that in which the Court itself has been in the practice of making the investment of the monies of suitors, viz., the 3 per cent.

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consolidated bank annuities. If property is found, at the death of the testator, in a state of investment other than Government 3 per cent. consolidated annuities and not corresponding with that authorized by any express provision of the will, the executor or trustee, within a reasonable time, is bound to convert it and place it in the state authorized. If no special mode of investment is expressly authorized, it is the general duty of the executor or trustee, by investment of such property as is not invested at all and by sale and conversion of such as is already invested, to place the estate in such state of investment as the Court, as general trustee, would place it, *i.e.*, in 3 per cent. consolidated annuities; and the period from the testator's death, within which the Court, by a rule of convenience, considers the conversion may and ought in general to be made, is twelve months. When, however, a residue is given to several in succession in such terms as to indicate that the testator intended that they should successively enjoy the income of the property in specie and as it was at the testator's death, then the duty of conversion into 3 per cent. ceases, and the executor or trustee may, and is in fact bound to, retain the property, or such portion of it as was in fact invested in the state of investment it happened to be at the testator's death, and this whether or not such state of investment was such as, in other circumstances, would have been considered secure and permanent. An executor or trustee, investing any portion of the estate in a way not authorized by the will and not being a way which the Court itself is in the habit of adopting for its investments, is held liable to make good to the *cestui que trust* any loss occasioned by such breach of duty. Further, where an executor or trustee is expressly directed to convert the estate either immediately or within a reasonable time, and he retains investments, made by the testator, without reasonable excuse, he will be charged, in case of loss or depreciation, with the amount which such investment would have produced if disposed of at the time when the Court, in the particular case, deems that the conversion ought to have been made. These rules and principles are amply illustrat-

ed by the cases of *Howe* v. *the Earl of Dartmouth* (*a*) and *Brice* v. *Stokes*, (*b*) and the notes to those cases in Vol. II. of White and Tudor's Leading Cases in Equity. I do not find, however, among the cases there cited, any case, and the learned counsel for the plaintiff admitted that he had not been able to find one, where, in the absence of an express direction in the will to convert, an executor or trustee had been held personally liable to make good the loss occasioned by the mere retention of an investment held by the testator at the time of his death. The question, however, has arisen and been discussed in several of the cases, and the duty of the executor or trustee to convert in that case also has been laid down, but in those cases it was not sought to fix the executor or trustee with personal liability, but rather to apportion the benefits which had arisen from non-conversion as between those entitled for life and those in remainder, as if such conversion had taken place. Though the present case, which is one of seeking to make the estate of Antonio Domingo de Souza immediately liable for a neglect or omission to convert the shares in the old Bank of Bombay and the Chartered Mercantile Bank, may not be exactly covered by any actual decision, I cannot but be of the opinion that, had the case arisen in the English Court of Chancery, Antonio Domingo de Souza would not have been held justified in retaining, as he did, these shares from 1862 down to the time, at least, of his own death in 1867. I say Antonio Domingo de Souza, and not the executors generally, as the question here immediately arises with refrence to a surcharge on the estate of Antonio Domingo de Souza, and I have no materials before me to form any opinion, and do not express any, as to any question of liability of the first defendant and the estate of Francisco Fernandes for this matter. I may here mention also that I must treat this case on the footing that there is no sufficient indication of intention on the part of the testator that the residuary devisees and legatees should enjoy the residue successively in specie, so as to exempt the executors, on this ground, from the duty of

(*a*) 7 Ves. 137; see p. 151. (*b*) 11 Ves. 319.

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conversion. I think the case of *Thornton* v. *Ellis* (*c*), and not *Boys* v. *Boys* (*d*), is applicable in this point.

But it has been argued that, whatever may be the rule or whatever would have been the decision of this case in the Court of Chancery in England, there is no instance to be found of the application of such rule in the Indian Presidency Courts as is here sought to be applied in charging the estate of the executor. There are further, in my opinion, certain considerations which appear to me sufficient to make this Court hesitate, for the first time, to apply the principle sought to be enforced here. Had there been any express trust or direction in this will to convert the residue and invest it in any particular way, there would, of course, have been little difficulty in the case. Though the executors would, in that case, have been allowed a reasonable time and a certain period of delay within which, in the exercise of their discretion, to proceed in the operation of conversion, yet I am of opinion that, with the express directions of the testator to guide the executors, a delay of four or five years would not have been excusable. But here we have a case of absence of any trust or direction to convert and invest the residue; and the fact of the absence of such trust or direction, in relation to the residue, may be considered to have some additional importance from the fact that, in respect to one particular legacy, that of Rs. 10,000 to his granddaughter Angela, the testator *does* give directions as to investment in Government promissory notes.

The considerations, however, which I have mentioned as making me hesitating in applying to the present case what probably would have been the rule applied, had this been dealt with by the Court of Chancery in England, are the following :—The practice of the last-mentioned Court in investing the monies of suitors in its hands in 3 per cent. consolidated bank annuities has been treated by that Court as furnishing a rule or example by which trustees and executors should, in the absence of special directions by the creator of the trust, govern their conduct in respect to the

(*c*) 15 Beav. 193. (*d*) 28 Beav. 436.

investment of the trust estate. It must, however, be remembered that the practice of the Court in making such investment had been long established before the rule was established, or at least in force; and the fact, that such practice had been long established and notorious, was treated as the ground for imposing on executors and trustees, in the absence of special provisions in the instrument appointing them, the obligation of pursuing a like course. The rule itself, however, was of gradual growth, though it may be considered to have been established in England for upwards of a century. Had the circumstances of India been the same in respect of this matter as those of England, I should not have felt the difficulty I do in applying the rule of English Equity Courts to this matter, even though no reported precedent may be producible of its application by the Supreme or High Courts of India. Though, no doubt, there have been public securities, which may be treated as Government securities, in existence in India for a very considerable period, (I do not here, of course, refer to the capital stock of the East India Company,) they have, to by far the larger extent, been the creation of the present century and in fact of the last twenty-five years. In conjunction with this I do not find that it has been, by any means, the uniform practice of the principal Court of original jurisdiction in Bombay to invest the monies of suitors in such funds. From some official correspondence, with which the Acting Accountant General, Mr. Gordon, has obligingly furnished me, I find that previously to 1814 the Recorder's Court used to deposit suitors' monies in the Government Treasury, the Government allowing interest on such deposit. In 1814 the system was altered by reason of the Government declining any longer to allow interest on such deposits. Then for some years the practice appears to have existed of the Recorder's Court directing the Accountant General to invest such deposits in Government securities, but *still oftener* to lend them out, at interest at a variety of rates, to individuals on the security of Company's papers deposited with him. In 1820 the former system was revert-

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ed to, of the Government receiving such monies as deposits in their Treasury and allowing interest at 4 per cent. This system received express recognition by the charter of the 8th December 1823, establishing the late Supreme Court. By one of the later clauses of this charter it is provided that all monies, securities, and effects of the suitors, paid into Court, are to be paid to or deposited with the Governor or President in Council at Bombay to be by them kept and deposited with the cash and effects of the Company, and power is given to the Court of Directors to appoint an Accountant General of the Court to execute and carry into execution the orders of the Court relating to the payment and delivery of suitors' money, effects, and securities, and taking them out again, and keeping the accounts with the Governor and Council and Registrar of the Supreme Court. The correspondence, which I have mentioned, shows that this system of deposit at interest in the Government Treasury was in existence in 1837, and, so far as I can learn by inquiry, was in existence down to a much later period, and, so far as I can discover, is the only specific mode which has ever been sanctioned by any provision of a charter or Act of the Legislature, or general rule of Court, for the investment of the monies of suitors in the hands of the Court. I say a *general* rule of Court, as there is no doubt that, for a considerable period (the commencement of which, however, I have not been able to discover), it has been the practice of the Court, by its decrees and orders in each particular suit, to direct the Accountant General to invest funds, paid in to the credit of such suit, in promissory notes of the Government of India.

The rules of the Supreme Court are, it appears, quite silent on this head. The Indian Succession Act of 1865 (which, however, would not be applicable to this will) contains provisions, Sections 301-307, with regard to the duty of an executor as to investment. The language of these sections seems to me rather to imply that, at the time of passing the Act in 1865, the High Courts had not, in

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fact, by any general rule, indicated any securities as the proper ones for investment by executors; and I am not aware that the High Court of Bombay has, ever since that time, by any general rule, given any authority or direction with regard to class of permissible investments. I consider, therefore, that the statement is supported by the facts that down to the present day the Supreme and High Courts of Bombay have not, by any general rule or uniform practice, adopted any Government security accessible to a private executor or trustee in such manner as to form an authoritative guide to him in his administration of the estate. I say accessible to a private executor or trustee for the reason that, though a deposit at interest in the Government Treasury may be said to be equivalent, in regard to security, to investment in promissory notes of the Government of India, yet it has not been a mode of investment available for an individual trustee or executor in the absence of a suit in Court, and, on this account, such individual trustee or executor could not, if he would, as in England, take as his example the practice of the Court. It is also to be observed that, at the time of the testator Manoel de Souza's death in 1862, the rule in England had been considerably modified by Section 32 of 22 and 23 Vic., c. 35, and the section was made retrospective by Act 23 and 24 Vic., c. 38, s. 12. By this provision, trustees and executors may, in the absence of express *prohibition* in the instrument of trust, invest trust funds in, amongst other things, stock of the Bank of London or Ireland or in East India stock. By this provision the principle of requiring trustees and executors to invest in Government securities was departed from, for it may be observed that stock of the Bank of England or Ireland are no more Government securities than were shares in the old Bank of Bombay.

I am not, in the present case, in any way pressed by the consideration of the necessity of providing a rule for the future guidance of executors, as that object will be attained so soon as the High Court may exercise the powers, conferred upon it by Sections 301-307 of the Indian Succession

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Act, of making general rules which will be a guide to executors in this matter, and I intend to call the attention of the Chief Justice and my colleagues to the necessity, as shown by the present case, of at once framing such rules.

For the foregoing reasons, and chiefly having regard to the fact that the circumstances, by reason of which the rules in question have been imposed on executors and trustees in England, have not existed in India, I feel so much difficulty in the absence of any precedent, in declaring them applicable in the present case, that I must refuse the motion to vary the Commissioner's certificate, and do confirm the same. It is not, in my opinion, a proper case to make an order as to costs of the motion, except that the parties respectively do bear their own.

[APPELLATE CIVIL JURISDICTION.]

July 8.

Application under Extraordinary Jurisdiction.

VARAJLA'L SHIVLA'L...(*Original Plaintiff*) *Applicant.*

DALSUKH VARAJLA'L...(*Original Defendant*) *Opponent.*

Contract—Consideration—Compromise.

When a claim is once compromised, and a new contract entered into, the promisor is estopped from pleading illegality or absence of consideration for the new contract, the real consideration for it being the withdrawal of the claim itself, irrespective of the possibility of its being prosecuted to a successful issue. The new contract can only be questioned on the ground of fraud, such as want of good faith in making the claim compromised.

THIS was an application for the exercise of the High Court's extraordinary jurisdiction. The plaintiff's claim was rejected by the Subordinate Judge of Kapadwanj, and on appeal to the District Judge this decree was confirmed.

The application was heard by KEMBALL and LARPENT, JJ.

Nagindás Tulsidás for the applicant.

Gokaldás Kahándás for the opponent.

The facts fully appear from the following judgment of the Court delivered by