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fully been given Keshav, notwithstanding anything in the certificate.

*Náráyan G Chandávárkar* for the plaintiff:—The bond was obtained in the plaintiff's name alone, and his elder brother was not a party to it. The right to sue on the bond, therefore, belonged to the minor plaintiff: see *Khodabux* v. *Budree Narain*(1). The fact that a minor is for a time represented by a guardian does not remove his disability: see *Anantharámá Ayyan* v. *Karuppa m*(2). This suit is within time, being brought within three y from the date of the plaintiff's attaining his majority.

The ppearance for the defendant.

—As Keshav (plaintiff's brother) was not a party on 8 of the Limitation Act XV of 1877 has no he bond was passed to the plaintiff alone by his ardian; and the right of action accrued to him on ly, 1873. Being then a minor, time did not begin to he attained his majority on the 11th March, 1882. t is, in our opinion, therefore, not barred.

(1) I. L. R., 7 Calc., 137. (2) I. L. R., 4 Mad., 119.

## ORIGINAL CIVIL.

*Before Mr. Justice Scott.*

SHA'PURJI NOWROJI POCHA'JI, PLAINTIFF, *v.* BHIKA'IJI, DEFENDANT.*

*tation Act XV of* 1877, *Sec.* 10—*Express trust—Administration suit—Executor—Suit for an account against an executor or his representative.*

in 1865, leaving a will of which his nephews P. and S. were the executwill provided that after payment of all debts, &c., the residue of his uld remain in the hands of the executors, who were "to maintain the same manner as I used to maintain the family in my house." h of both the executors the residue was to be apportioned among his nephews in equal shares. On the death of the testator, P. of the estate, and died on the 10th January, 1876. S. remained 7th August, 1884, when he took out probate of R.'s will. On the 5, he filed the present suit against the defendant as widow and praying for an account of the estate of R. that had come to

*Suit, No. 22 of 1885.

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the hands of P., and also for an account of the estate of P. The plaintiff contended that R.'s estate came into the hands of P. as a trustee; that the suit was to recover the property for the purposes of the trust, and that section 10 of the Limitation Act (XV of 1877) applied. The defendant alleged that all the moneys belonging to R.'s estate, which had come into the hands of P., had been expended in paying R.'s debts, and that there was no residue left for the purposes of the trusts of the will, and she contended that the suit was barred by limitation.

*Held*, that the suit was barred by article 120 of Schedule II of the Limitation Act XV of 1877, being primarily not a suit to follow trust property in the hands of a representative of a trustee, but really to ascertain whether any trust remained to be administered after the testator's debts and funeral expenses had been paid. No breach of trust was alleged. The suit was merely for an account against the executor or his representative. To such a suit section 10 of the Limitation Act XV of 1877 does not apply.

THE defendant was sued as widow and administratrix of one Pestonji Nowroji Pocháji, who died on 10th January, 1876.

The said Pestonji Nowroji Pocháji and the plaintiff were the executors of one Ratanji Pestonji Pocháji, who died on the 5th November, 1865, leaving a will dated 31st October, 1850. By his said will he appointed the said two persons his executors, and bequeathed to them the residue of his estate, after payment of all debts and charges, upon the trusts therein declared.

The plaint alleged that after the said testator's death the said Pestonji Nowroji Pocháji took possession of all the testator's estate, part of which consisted of a large sum standing to the credit of the testator in the books of the firm of Cursetji Nusserwánji Cámá & Co., in which firm the said Pestonji Nowroji Pocháji was a partner; that, subsequently, the said Pestonji Nowroji Pocháji in his lifetime drew from time to time large sums of money from the moneys so deposited in the said firm, but never rendered any account of the sums thus come into his hands, or of any other moneys belonging to the estate of the said testator.

Pestonji Nowroji Pocháji died, as above stated, on the 10th January, 1876, and the defendant, his widow, obtained letters of administration to his estate on the 15th September, 1876.

The plaintiff alleged that he had frequently called on the said Pestonji Nowroji Pocháji in his lifetime, and after his death

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upon the defendant, to account for the management of the testator's estate, but no account had been rendered. The plaintiff further stated that a large sum was due to the estate of the testator by the estate of the said Pestonji Nowroji.

On the 27th August, 1884, the plaintiff obtained probate of the will of the testator. The plaintiff prayed that the defendant might be ordered to account for the property of the testator come to the hands of Pestonji Nowroji Pocháji, or of the defendant as his administratrix, and that the estate of the said Pestonji Nowroji Pocháji might be administered by the Court.

In her written statement the defendant (among other defences) pleaded that the suit was barred. At the hearing only the issue raised upon this plea was decided.

*Farran* (with him *Macpherson*) for the plaintiff:—The suit is not barred. The case comes within section 10 of the Limitation Act XV of 1877. Pestonji was a trustee for the present plaintiff, who was the only other devisee under the testator's will. The property was vested in Pestonji for the purpose of proving the will. Defendant admits that her husband received money belonging to testator's estate.

*Starling* (with him *Lang*) for the defendant:—This is a suit for an account of money. It is not a suit to follow any specific property in the hands of Pestonji, which can now be followed in the hands of the defendant as his administratrix—*Saroda Pershad Chattopadhya* v. *Brojo Náuth Bhuttáchárjee*(1); *Anund Moye Dabi* v. *Grish Chunder Myti*(2).

SCOTT, J.:—In this case one Ratanji died in 1865, leaving a will in which he made his nephews, Pestonji, (the defendant's late husband), and Shápurji, the plaintiff, his executors; and the provision of the will, with which I am now concerned, runs as follows:—

"After the settlement of all my claims, debts and expenses, whatever residue of my property there may be left as a surplus, shall remain in the possession of the two persons, my above-named executors, and with the interest thereof they are to main-

(1) I. L. R., 5 Calc., 910. (2) I. L. R., 7 Calc., 772.

tain the family in the same manner as I used to maintain the family in my house." And then further on the will says:—

"The same residue shall remain in the possession of both my above-mentioned executors during their lives, and after the life-time of both the said executors the residue shall be apportioned amongst the children of my nephews in equal shares."

Pestonji entered into possession of the estate, which included Rs. 6,400 in the hands of Cursetji Nusserwánji Cámá & Co. Pestonji died on the 10th of January, 1876. Shápurji, the present plaintiff and co-executor, took no steps until the 27th of August, 1884, when he took out probate of Ratanji's will. Then on the 23rd of January, 1885, he filed this suit, praying for an account of the moneys of the estate of Ratanji that came into the hands of Pestonji, and also for an account of the estate of Pestonji. The widow of Pestonji defends the suit, and pleads, first, that the suit is barred by lapse of time. She admits the facts I have above stated, but says that Pestonji expended the Rs. 6,400 and a large additional sum in payment of the debts of the testator and his funeral and other expenses. She further says that, if the claim to an account is not barred, she is willing that it should be taken. The sole question I have, therefore, to consider is, whether this suit is barred.

As eight years had elapsed since the death of Pestonji before the suit was filed, the claim clearly is barred, unless it comes within section 10 of the Limitation Act XV of 1877, which lays down special rules of limitation as regards express trusts.

It is admitted that the first executor received certain property, and the plaintiff's right as co-executor is clear to insist on an account from Pestonji, or, after Pestonji's death, from his representatives, provided he has done so in due time. At the same time, it must be remembered that the suit is not for a breach of trust, but only for an account. The real question of difficulty is, whether the plaintiff has forfeited his right to an account by delay. That depends on the further question whether there was specific property in the hands of Pestonji, and whether this suit is for the purpose of following in his hands or in the hands

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of his representatives such property. There was admittedly specific property, and the terms of the will also show a specific purpose to which that property was to be applied, a purpose specified by the testator. Upon this basis the plaintiff argues as follows:—

"The trust money came into the hands of Pe—nji, the trustee; he has died worth considerable property. He has rendered no account of how he disposed of the trust money. I am entitled to have an account. As asking for the account is for the purpose of recovering the property for the trusts in question, I am following it in the hands of the representatives of the trustee. Therefore my suit comes within section 10, and is not barred."

The defendant, on the other hand, replies that some money did come into the hands of the trustee, but it has been properly applied in paying the debts of the testator. There was no residue to form the trust, and no trust was, therefore, ever founded. Consequently section 10 does not apply.

In considering which contention is the right one, I must bear in mind the terms of the will, by which it is ordered that the estate should first be applied to the payment of debts, and the residue only was to be formed into a trust fund. It is necessary, therefore, first, to ascertain whether there was any residue. The defendant says there was not, and that is the point in issue in the present case.

This suit is, therefore, not a suit primarily to follow trust property in the hands of representatives, but really to ascertain whether any trust remained to be administered after the testator's debts and funeral expenses had been liquidated. It must be borne in mind that the suit does not charge any breach of trust; it merely claims an account for the administration of the testator's estate. I find it difficult to say that such a claim comes within section 10 of Act XV of 1877. That section is as follows:—"No suit against a person in whom property has become vested in trust for any specific purpose, or against his representatives for the purpose of following in his or their hands such property, shall be barred by any length of time." The Privy Council in *Balwant Ráo*

*Bishwânt Chandra Chor* v. *Purun Mal Chaube*[1] has interpreted the expression "for the purpose of following in his or their hands such property." Their Lordships say that it 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."

Mr. Farran urged with much force, that the present suit, though ostensibly for an account, had for its primary object the charging of the estate of the executor Pestonji with the trusts of the will; and that as he admittedly received trust money, and no evidence is offered to show that it has all been properly expended, this is a suit to follow property within the meaning of section 10.

But I find that the Calcutta High Court has already decided such a suit, as the present one is, not to be within section 10 —*Saroda Pershad Chattopadhya* v. *Brojo Náth Bhuttácharjee*[2].

White, J., says: "To claim the benefit of section 10, the suit against the trustee must, amongst other things, be for the purpose of following the trust property in his hands. The present suit has no such object. 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 the plaintiff's behalf, and to be paid any balance which may be found due by him on taking accounts. I think, therefore, that the learned Judge is in error in holding that the suit falls under the description of suits mentioned in section 10."

This was a decision of White and Maclean, JJ., and it is followed by Macdonell and Field, JJ., in *Jibunti Náth Khán* v. *Shib Náth Chuckerbutty*[3].

Sitting as a Judge of first instance, I think, I ought to follow this ruling, especially as there are very strong arguments in favour of it.

(1) L. R., 10 Ind. Ap., 96. (2) I. L. R., 5 Calc., 910.
(3) I. L. R., 8 Calc., 819.

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In the first place, it is not clear that any trust property was left to be administered after the debts were paid; and until that is ascertained, I doubt if any question, beyond one of mere account, can be raised. In the second place, no breach of trust is alleged on the pleadings, and no order could be made in the suit as it stands, charging any default against the trustee. It thus becomes, not a suit for the purpose of recovering trust property, but only a suit for an account against an executor or his representative. Such a suit, Mr. Starling argues, comes within section 120 of the second schedule, and is barred in six years.

The six years have already elapsed, and to admit the suit now would be tantamount to a suspension of the operation of section 120 while the Commissioner ascertains by an account, (1) whether there was any trust money, and (2) whether there was any breach of trust sufficient to charge the estate of the deceased executor. Section 10 could hardly have been intended to cover such a suit.

I hold, therefore, that section 10 does not apply. That being so, section 120 of the second schedule becomes applicable; and as Pestonji died in 1876, and this suit was instituted in 1884, this suit is barred.

The suit must be dismissed with costs, including costs of *de bene* issue.

*Suit dismissed.*

## ORIGINAL CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Scott.*

1886. *March* 26.

DEVKA'BA'I, (ORIGINAL PLAINTIFF), APPELLANT, *v.* JEFFERSON, BHA'I-SHANKAR AND DINSHA', RESPONDENTS.*

*Costs—Next friend—Administration suit—Unnecessary suit—Liability of next friend for costs—Adoption of suit by plaintiff—Costs of solicitor of next friend where suit unnecessary—Solicitor's lien on estate recovered or preserved by suit—Preservation of estate from future risk—Appointment of receiver—Insane executrix.*

The plaintiff, who was a minor, sued by her next friend (her husband) for the administration of her father, Purshotam Rámji. The defendants in the suit were the plaintiff's mother, Nánbái, who was the widow and executrix of Purshotam

* Suit No. 375 of 1880.