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[476] ORIGINAL CIVIL.

Before Mr. Justice Parsons.

NANALAL LALLUBHOY (*Plaintiff*) *v.* HARLOCHAND JAGUSHA AND OTHERS (*Defendants*).* [11th July, 1889.]

Limitation Act XV of 1877, s. 10—*Trustee for specific purposes—Will—Void clause in will and consequent intestacy—Suit by heir against executor as trustee for specific purposes.*

G. died without issue in 1854. By his will he appointed three executors, and after making certain bequests he directed as follows:—"After all the above matters shall have been settled, whatever property of mine may remain, that remaining property shall be disposed of in a righteous manner, in a pious and charitable way, as may appear advisable to all my three executors. It shall be disposed of in such manner that people may speak well of me, and that all my three heirs may acquire great fame." The last surviving executor, (the brother's widow), died in 1868, leaving a will, whereby she appointed four executors, and confirmed and continued the provisions of G.'s will. In 1886 C., one of G.'s heirs, assigned all his interest in G.'s estate to the plaintiff, who in 1887 filed this suit for administration. He contended that the above claim in the will was void for uncertainty; that there was, therefore, an intestacy as to the residue of the estate; and that the executors held such residue in trust for G.'s heirs within the meaning of s. 10 of the Limitation Act XV of 1877; and that the suit was, therefore, not barred.

Held, that s. 10 of the Limitation Act (XV of 1877) did not apply, and that the suit was barred by limitation. The executors of G. were, no doubt, trustees, and for some specific purposes property became vested in them under the will, but with regard to the residue there was no trust declared and no direction given to distribute it among the heirs-at-law. In the absence of such a trust or direction the executors could not be held to be express trustees, or trustees for a specific purpose, and it is to such trustees alone that the section applies.

[R., 32 B. 364=10 Bom. L.R. 117=3 M.L.T. 379.]

THIS suit was brought against the defendants (ten in number) for the administration of the estate of one Ghellabhai Mulchand, who died on the 5th August, 1854, leaving a will dated the 21st June, 1854, and a codicil dated the 4th August, 1854, whereby he appointed his wife Vizivahu, his nephew Gopaldas Javer, and Ashabai, the widow of his brother Tricumdas, to be his executors. The testator left no issue. His nearest male relations were his sister's son (Gopaldas Javer) and some second cousins.

The plaintiff contended that the effect of the will and codicil was that the residue of the testator's estate, (after providing for specific bequests), was left to the executors, who were to manage the same for the benefit of the persons interested therein. He claimed as the assignee of one Chunilal Bhaiji, who was the son of a second cousin of the testator.

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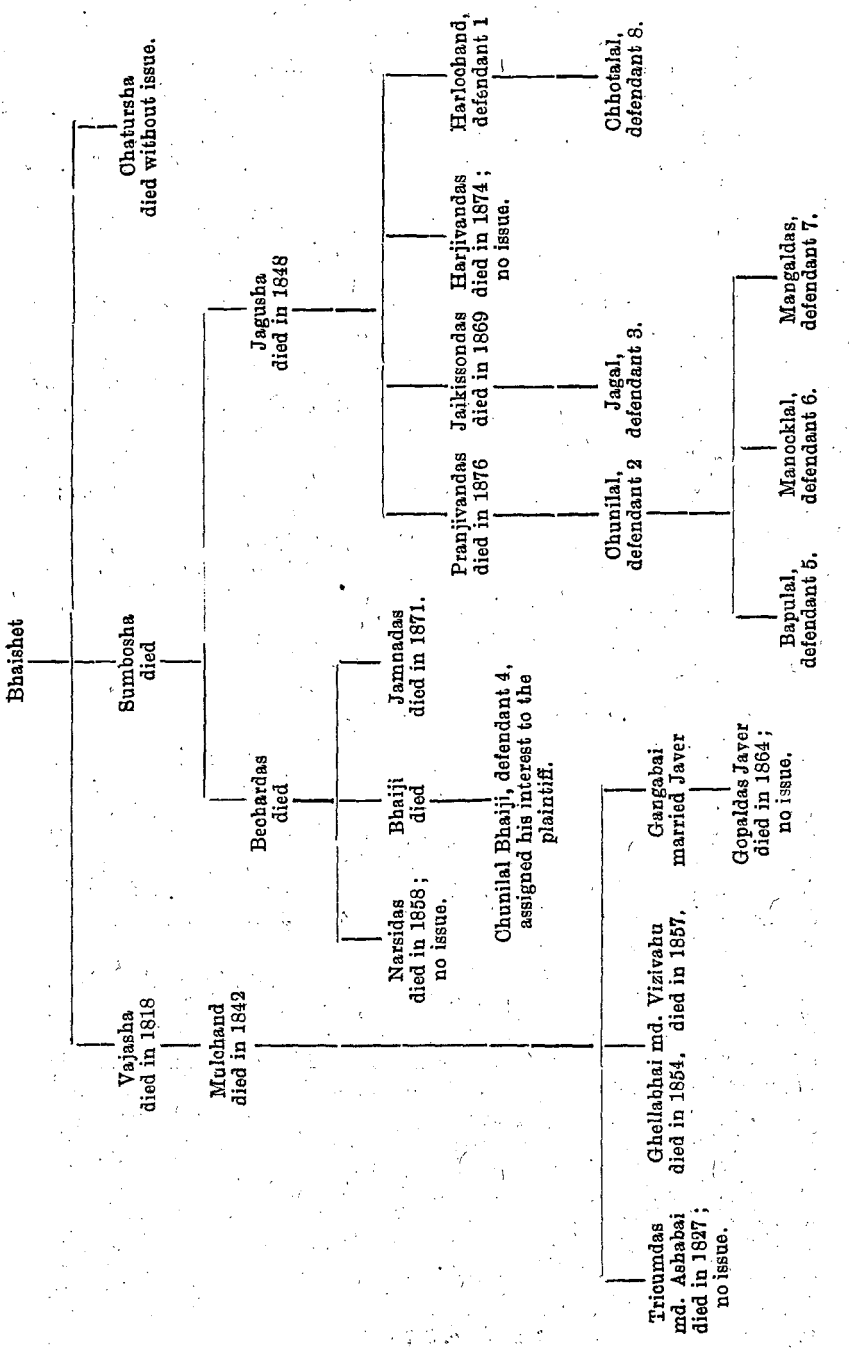
[477] The plaint set forth the following pedigree of the testator's family:—



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[478] It appeared that, including the three executors, there were at the date of the testator's death, in 1854, nine members of his family who might be interested in the undisposed of residue of his estate.

Gopaldas Javer obtained probate in 1854. Vizivahu died in 1857, and Gopaldas Javer died without issue and intestate in 1864. After his death, *viz.*, on the 19th May, 1865, Ashabai took out probate of the will of the testator, Ghellabhai Mulchand, and took possession of the estate and managed it.

Ashabai died on the 7th September, 1868, leaving a will, whereby she appointed the four sons of Jagusha, (Pranjivandas, Jaikissondas, Harjivandas, and the first defendant Harlochand, all of them second cousins of her deceased husband), to be her executors, directing them to continue to manage the estate of Ghellabhai Mulchand, in accordance with his will. The said four executors accordingly took possession of the estate and managed it.

Of the members of the family who were living at the date of the testator's death in 1854 several had died at the date of this suit. In 1858 Narsidas Bechardas died intestate, leaving his brother, Jamnadas Bechardas, and his nephew, Chunilal Bhaiji, the son of his deceased brother Bhaiji Bechardas, his only heirs. In 1871, Jamnadas Bechardas died, leaving the said Chunilal Bhaiji his only heir. Various other members of the family subsequently died, as will be seen by reference to the genealogical table.

On the 16th January, 1886, Chunilal Bhaiji assigned to the plaintiff all his interest in the estate of Ghellabhai Mulchand, or in the estates of Vizivahu and Ashabai.

The plaintiff complained that some of the defendants, (members of the family), had purported to mortgage some of the property in question, and that they had contracted to sell other portions of it. The plaintiff contended that Chunilal Bhaiji's interest in the mortgaged property was not affected by the said mortgage, and he protested against the sale, save as regarded the interest of the vendors.

As assignee of Chunilal Bhaiji's interest he sued for the administration of the estate of Ghellabhai Mulchand, for an injunction and receiver, &c. The suit was filed in 1887.

[479] The defendants pleaded (*inter alia*) that the suit was barred.

B. Tyabji and *Jardine*, for the plaintiff.

Inverarity and *Telang*, for defendants 1, 2, 5, 6, 7, 8.

Lang, for defendant 9 (the mortgagee).

JUDGMENT.

PARSONS, J.—The preliminary point to be decided is that of limitation raised on the third issue.

Plaintiff has brought this suit, as one of the legal heirs of Ghellabhai, against the defendants to obtain (*inter alia*) an order for the administration of the estate of Ghellabhai and for a declaration of the respective rights of the plaintiff and defendants therein, for an account of the dealings of the said defendants with the said estate, and for the recovery of his own share in the residue of the said estate. He sues the defendants as being the executors of the will of Ashabhai, and also, it would seem, as co-heirs with him in the residue of the estate of Ghellabhai. (The relationship of the parties appears from the pedigree.)

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Ghellabhai, who died in 1854, by his will appointed three persons as his heirs and executors, *viz.*, his brother's wife, Ashabai, his own wife, Vizivahu, and his sister's son, Gopaldas. After stating his property and dedicating much of it to numerous charities and leaving many legacies, including bequests to his executors, he directs that, "after all the above matters shall have been settled, whatever property of mine may remain, that remaining property shall be disposed of in a righteous manner, in a pious and charitable way, as may appear advisable to all my three executors. It shall be disposed of in such manner that people may speak well of me, and that all my three heirs may acquire great fame."

It is contended that this latter direction being void for uncertainty, there was an intestacy as to the residue of Ghellabhai's estate, the exact amount of which it is the object of the present suit to have ascertained, and the plaintiff's share therein declared and decreed to him.

Vizivahu died in 1857; Gopaldas, in 1864; Ashabai, the surviving executrix, died on the 7th September, 1868. She made a will in which, without making any particular bequests or **[480]** dispositions of her own, she confirmed and continued the provisions of the will of Ghellabhai. She appointed as her executors the four sons of Jagusha. These four sons would be along with Narsidas and Jamnadas the legal heirs of Ghellabhai. By thus appointing them executors and heirs of her estate she virtually excluded Jamnadas from any share in, or management of the estate of Ghellabhai, and yet it is through Jamnadas that the plaintiff claims as his nephew. There can be no doubt, therefore, that the cause of action accrued to the assignor of the plaintiff, at the latest, on the death of Ashabai,—that is, assuming that Ashabai was the sole heir to Ghellabhai: if she is not, the cause of action would have accrued on Ghellabhai's death. His present suit, then, brought in 1887, must be time-barred, unless s. 10 of the Limitation Act XV of 1877 is applicable.

It is contended that that section does apply, the executors of Ghellabhai being persons in whom the residue of the estate of Ghellabhai vested for the purpose of being distributed among his legal heirs. It is difficult to see how such a construction can possibly be adopted. The executors of Ghellabhai were, no doubt, trustees, and for some specific purposes property under the directions of the will became vested in them; but with regard to the residue there was no trust declared and no direction given to distribute it among the heirs-at-law. In the absence of such a trust, or such a direction, the executors cannot be held to be express trustees—trustees, that is to say, for a specific purpose, and it appears to me that to such trustees alone the section applies.

The only case cited in support of the contention that the section is applicable to the present case is that of *Lullubhai Bapubhai* v. *Mankuvarbai* (1). That case, no doubt, does decide that an executor who by the will is made an express trustee for certain purposes, is, as to the undisposed of residue, a trustee for the heirs of the testator. The case, however, was under s. 2 of Act XIV of 1859, and the *ratio decidendi* was that a resulting trust was such a trust as is contemplated by that section. **[481]** The words of that section are very wide, and simply require that the suit shall be against a trustee. The words of s. 10 of the Act of 1877 are very different. They refer to suits against trustees, but they restrict those suits to suits against persons in whom property has become vested,

(1) 2 B. 388.

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in trust, for a specific purpose. These words have been held in the case of *Kherodemoney Dossee* v. *Doorgamoney Dossee* (1) to be intended to apply to trusts created for some defined or particular purpose or object, as distinguished from trusts of a general nature:—"such as the law imposes upon executors and others who hold recognised fiduciary positions." That construction was followed in the case of *Greender Chunder Ghose* v. *Mackintosh* (2). In that case it is said that although executors are in almost every respect considered, in Courts of Equity, as trustees by virtue of their office, yet that the word trustee in s. 10 is not co-extensive in meaning with the same word as used in Courts of Equity, and that s. 10 is not to be construed as meaning that the assets of a testator when in the hands of an executor should be considered as vested by him in trust for a specific purpose merely by virtue of his office. Garth, C.J. in that case (p. 924) refers to the Bombay case above quoted, and points out that it was decided under s. 2 of Act XIV of 1859, which would appear to apply to all trustees, and which certainly contains no words restricting the scope of the section to trusts for a specific purpose. In the case of *Muhammad Habibullah Khan* v. *Safdar Husain Khan*(3), where there was a resulting trust in favour of the plaintiff, and the defendant became liable to account to the plaintiff for his share, but there was no express trust, it was held that the property did not become vested in him in trust for a specific purpose, within the meaning of s. 10 of the Limitation Act.

Both, then, upon the clear meaning of the words of the section and upon the decisions thereon I hold that s. 10 of the Limitation Act (XV of 1877), does not apply to the present case. I find on the issue that the suit is time-barred. It is, therefore, unnecessary to proceed further with the hearing of the case.

[482] The suit is dismissed with costs, and the defendant No. 9 will have his costs separate from those of the other defendants.

Suit dismissed.

Attorneys for the plaintiff:—Messrs. *Tyabji and Dayabhai.*

Attorneys for the defendants:—Messrs. *Macfarlane, Edgelow and Hemming, and* Messrs. *Payne, Gilbert and Sayani.*

(1) 4 C. 455. (2) 4 C. 897. (3) 7 A. 25.