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had, on a former occasion, criminally prosecuted us, and even in that matter this Court held that no notice was necessary.

There was no appearance for the respondent (defendant).

ORDER.

SARGENT, C. J.—Both the Courts have found that the new wall was built on the sight of the old wall including the old foundations. Section 33 of Act VI of 1873, therefore, did not apply, as in point of fact according to the above finding there was no addition to any existing building. The Municipality would, therefore, be liable in damages for any expense the plaintiff may have been put to by their pulling down his wall. Those damages have been assessed at Rs. 48 by the Subordinate Judge, and no objection was taken to the amount in the lower Court of appeal by either party. We must, therefore, for clearness sake, amend the decree of the Court below by adding the words "on its old foundations" after the words "in rebuilding his wall" and also direct that the defendant do pay plaintiff Rs. 48. The plaintiff to have his costs throughout.

Decree amended.

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Before Mr. Justice Farran.

THE ADVOCATE GENERAL OF BOMBAY (*Plaintiff*) v. BAI PUNJABAI AND OTHERS (*Defendants*).* [18th June and 3rd July, 1894.]

Charity—Trust—Will—Deeds not carrying out will—Misapplication of funds—Mistake—Liability of trustee—Limitation—Fraud—Accounts when directed—Discretion of Court to order accounts—Jurisdiction of Court where charity established by will is outside the jurisdiction—Advocate General, right of—Advocate General barred by decree in prior suit brought by trustees of charity—Civil Procedure Code (XIV of 1882), s. 43.

One Bhimsi Ruttonsi, a Jain, died in February 1863, leaving a will. His widow Bai Punjabai (defendant No. 1) obtained letters of administration with the will annexed. The testator died possessed (*inter alia*) of a half share of certain property in Bombay known as the "Bhimpara property." The remaining half share belonged to two other persons, *viz.*, Hirji Dossa and Muddon Tejsi. By his will the testator directed that a moiety of the rental of his half share should be spent on the *sadharm* (charitable or religious) endowment of a temple at Jackhoo in Cutch, and the other moiety thereof in establishing two *sadavarats*, one at Jackhoo and the other in Palitana. He also set apart a sum of Rs. 1,26,000, of which Rs. 1,01,000 were to be expended in building a temple at Jackhoo, and the balance of Rs. 25,000 in erecting a market near the temple at Jackhoo, or, if that was impossible, it was to be spent in Palitana. The plaintiff complained that of the Rs. 1,26,000 about Rs. 60,000 had been spent in buying a property in Bombay, called the "school property," for the purpose of establishing a school there, and about Rs. 50,000 had been expended in erecting a temple at Jackhoo, but that nothing had been done with the balance, nor had a market been established at Jackhoo. All that had been done there was to erect three shops which cost about Rs. 2,000. The plaintiff further stated that in 1868 Bai Punjabai (defendant No. 1) had made over the "school property" and the "Bhimpara property" to three trustees on trusts, not strictly in accordance with the testator's will as above set forth. Under this deed the trustees were to apply one moiety of the net rents (1) in *Sadavarat* or alms-giving at Jackhoo and Palitana, ; (2) in feasting the caste people in Bombay and Jackhoo annually; (3) in the worship called *satarbhadi* at the *derasar* (temple) in

* Suit No. 103 of 1892.

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Bombay and Jackhoo, and (4) in entertaining and clothing the *gorip* (poor) in Bombay and Jackhoo. Of the remaining moiety of the rents (5), one-half was to go to *sadharm* (charities) of the *derasar* (temple) at Jackhoo, and (6) the other half to charities at such places as the trustees should think fit.

In the following year, *viz.*, on 17th April, 1869, Bai Punjabai (defendant No. 1) and the owners of the other moiety of the "Bhimpura property" conveyed the whole of that property to trustees, who were to apply a moiety of the rents (which was to be considered as rent from Punjabai's share of the property) (1) in *sadavarat* and almsgiving at Jackhoo and Palitana; (2) in feasting the caste people in Bombay and Jackhoo annually on the anniversary of Bhimsi Ruttonsi's death; (3) in the worship of the [552] *derasar* called *satarbhadi*, and in the entertainment and clothing of the *gorip* (poor) in Bombay and Jackhoo. The deed also directed the application of the rents of the other moiety of the "Bhimpura property," part of which was to go to a temple at Tera in Cutch and part to another temple at Jackhoo. This later deed, it will be observed, omitted altogether trusts (5) and (6) of the earlier one of 1868 in favour of *sadharm* for the temple of Jackhoo and for *sadharm* generally. The trustees appointed by the two deeds were not the same, though some of the trustees of the first were also the trustees of the second. The second deed did not recite or in any way refer to the first. At the date of suit all the trustees named in the deeds were dead except the second defendant. By subsequent deeds, however, new trustees had been appointed, and they were all parties to the present suit. Defendants Nos. 2, 3, 4, 5, 6, and 7 were trustees of the Bhimpura property, and defendants Nos. 8, 9, 10 and 11 of the school property. The plaintiff filed on the 10th March, 1892, at the relation of two members of the Jain community of Cutch prayed that the charitable trusts of the testator's will might be carried out, and sought for accounts against the widow of the testator and the trustees of both the deeds, and for a scheme, &c.

Held, that the High Court of Bombay had jurisdiction to make a decree declaring the trusts upon which the trustees of the deed of October, 1868, held the property comprised in that deed and for rectifying the deed in accordance with such declaration, but that the Court could not go further in settling a scheme.

Semble, when money is bequeathed for the purpose of founding a charity outside the jurisdiction, the Court hands the money to the trustees named by the testator, leaving it to the Courts of the country in which the charity is to be established to settle the scheme.

Held, also, that the suit was not barred by limitation. It was not one for rectification of the deed of 1868, but rather one against Punjabai (defendant No. 1) and her assigns the trustees of the deed of 1868 and 1869 for the purpose of following the trust property in their hands and having it applied to the proper purposes of the trust, and, therefore, came within s. 10 of the Limitation Act (XV of 1877).

Charges of fraud and dishonesty made against trustees of a charity must be established at the hearing of the case, and cannot be allowed to be reserved and proved subsequently in the course of taking accounts.

Where the trust deed of a charity executed subsequently to the death of a testator under whose will the charity was established, does not strictly conform to the provisions of the will, it is not the practice of the Court, when the discrepancy has been made by mistake, to visit the past consequences of the mistake upon the trustees.

The plaintiff in this suit demanded an account from Bai Punjabai of the Bhimpura property from the testator's death to the execution of the deed of 13th October, 1868, and of the school-house property from the date of its purchase to the same time, and also an account against the trustees of the deed of 17th April, 1869, of the income of the Bhimpura property, and of its application.

Held, that accounts ought not to be required from Bai Punjabai. She had made over the property in question to trustees in 1868. There was no evidence that she had ever used any of the income for her own purposes, and the presumption was that she had faithfully discharged her duty. The account was probably barred by article [553] 120 of the Limitation Act (XV of 1877). The trustees of the deed of 1869 had paid over the income received by them to the trustees of the earlier deed of 1868, who were entitled to receive it; and, therefore, no account would be decreed against them.

The plaintiff further prayed for an account against the representatives of Rupsi Bharmal, who had been trustee of the deed of 1868 from the date of its execution to his death in 1899. Under a decree passed in a previous suit (No. 113-

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of 1889), dated 10th August, 1893, brought by the trustees, they had received from Rupsi's estate the balance which in that suit they had claimed to be due from him to the charity. In that suit the trustees had not asked for an account against him.

Held, that the Advocate General as plaintiff in the present suit was barred by the decree in that suit under s. 43 of the Civil Procedure Code (XIV of 1882). The trustees having then omitted to ask for an account could not sue again. The Advocate General represented the same interests as they did, and was, therefore, equally bound. Even, however, if that were not the case, the Court in the exercise of its discretion would not direct the account asked for.

[R., 20 B. 495 (499) ; 21 B. 257 (264) ; 32 B. 364=10 Bom. L.R. 117 (123).]

THE plaint in this case was filed by the Advocate General of Bombay at the relation of Hirji Hansraj, Khimji Vardhman and Jaitha Maneck, who were leading members of the Jain Jackhoo Dossa Oswal caste of Cutch residing at Bombay.

The plaint stated that one Bhimsi Ruttonsi, a member of the above caste, died on the 3rd February, 1863, leaving a will dated 31st January, 1863, and letters of administration with the will annexed were granted to his widow Bai Punjabai (the first defendant) on the 20th July, 1866.

The said testator died possessed of a half share of a certain property in Bombay, known as the "Bhimpura property," which half share yielded an annual rental of about Rs. 2,500. The other half share belonged to Hirji Dossa and Muddon Tejsi. By his will the testator directed that a moiety of the rental of his half share should be spent on the *sadharam* (charitable or religious) endowment of the *derasar* (temple) of Jackhoo in Cutch and the other moiety in establishing two *sadavarats*, one in the town of Jackhoo and the other in Sri Palitana. He also set apart a sum of Rs. 1,26,000, of which Rs. 1,01,000 were to be expended in building a temple at Jackhoo, and the balance of Rs. 25,000 to be spent in erecting a market near the temple at Jackhoo, or, if that was impossible, to be spent in Sri Palitana.

The plaint stated that the relators believed that of the Rs. 1,26,000 set apart by the testator, about Rs. 60,000 had been [554] spent in purchasing a property in Bombay (called the "school property") for the purpose of establishing there a school, and about Rs. 50,000 had been expended in erecting a temple at Jackhoo, but nothing had been done with the balance, nor had a market been established at Jackhoo. All that had been done there was to erect three shops, which did not cost more than Rs. 2,000.

It was further alleged that, after obtaining letters of administration, Bai Punjabai (the first defendant) had at first handed over the management of the testator's estate to the testator's brother Jewraj Ruttonsi, who continued to manage for a short time until he became insolvent. On his insolvency, Bai Punjabai (defendant No. 1) had caused a certain deed, purporting to be a trust-deed, to be prepared and executed, by which she purported to convey, as absolute owner in her own right, the "school property" and the half share in the "Bhimpura property" to trustees for purposes duly set forth. The said deed was executed by her on the 13th October, 1868.

On the 17th April, 1869, a second deed was executed by her, as owner in her own right, of the testator's said half share of the "Bhimpura property," and by the owners of the other half share of it. By this deed the whole of the said "Bhimpura property" was vested in trustees on trusts, more or less similar to those created by the first deed. The trustees, however, of the two deeds were not the same, though some of

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the trustees of the first were also trustees of the second; nor did the second deed recite or in any way refer to the first.

The trustees named in the said two deeds were all dead at the date of suit except Walji Natha (the second defendant). By subsequent deeds, however, new trustees had been appointed, and these were all parties to the present suit. The defendants Nos. 2, 3, 4, 5, 6 and 7 were trustees of the "Bhimapura property," and defendants Nos. 8, 9, 10 and 11 were the trustees of the "school property."

The plaintiff further stated that by the testator's will, as by the said two trust-deeds, it was provided that money for certain purposes was to be sent to Jackhoo, but that none whatever had [555] been sent there for several years. It complained that no *sadavarat* had been established at Sri Palitana, and only a very small sum had been sent each year by the trustees for the *sadavarat* at Jackhoo.

One Rupsi Madan *alias* Bharmal was from the first a trustee of both deeds and continued a trustee until his death in 1889. It was he who chiefly collected the rents of both the "school property" and the "Bhimapura property" and kept the books of account, and the relators charged that during his management he and the testator's widow Bai Punjabai (defendant No. 1) had misappropriated and converted to their own use the greater part of the income of both these properties amounting to Rs. 40,000 or thereabouts. Rupsi Madan (*alias* Bharmal) being dead at the date of suit, his heirs, Dhanji Kessowji and Dhanbai, were made parties (defendants Nos. 12 and 13).

The plaintiff stated that the relators had been advised that it was doubtful whether the said trust-deeds were good and effectual dispositions of the property which they purported to dispose of: that many of the trusts thereof were not in accordance with the directions of the will and were consequently void, and they desired that the Court should decide how far the deeds were valid, and should provide for the proper administration of the religious and charitable trusts created by the will. They, therefore, prayed for a declaration as to what were the charitable devises and gifts of the will; for an account against the first defendant and, if necessary, for administration of the testator's estate; for a scheme for the management of the several charities created by the testator; for an account against the trustee defendants, and that the heirs of Rupsi Madan *alias* Bharmal (defendants Nos. 12 and 13) should be ordered to pay what should be found due from his estate; for an injunction and receiver, &c.

The defendants denied all the allegations made against them and pleaded limitation.

The issues raised (*inter alia*) the following points:—

(1) Whether the trust-deeds were not executed *bona fide*, and whether, even if not in strict accordance with the testator's will, the Court would now interfere?

[556] (2) Whether the trust moneys had not been properly expended, and whether, even if misapplied by mistake, the Court would order a refund after so long a lapse of time?

(3) Whether there was not a misjoinder of causes of action in the suit?

(4) Whether the proceedings in a former suit (No. 113 of 1892) were not a bar to this suit, wholly or in part?

(5) The general issue.

Lang (Advocate General) and *Anderson* for the plaintiff.

Inverarity and *Rivett-Carnac* for defendant No. 1.

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Scott and Lowndes for defendants Nos. 2, 3, 6, 11.

Inverarity and Robertson for defendants Nos. 4, 5, 7, 9, 10.

Inverarity and Scott for defendant No. 13.

Defendants Nos. 8, 12, 14 did not appear.

Inverarity for first and other defendants:—There is a misjoinder of causes of action. The plaintiff repudiates the trust deeds. He, therefore, cannot join the trustees of those deeds with Punjabai, and sue them all together. He cannot approbate and reprobate. Nor can he join two sets of trustees under two separate deeds in one suit. By the deeds the trustees are given a large discretion in expending the trust money which the Court will not interfere with. Punjabai as administratrix acted *bona fide* in executing the trust deeds—*Advocate General v. Vishwanath*(1); *Tudor on Charities* (3rd Ed.), p. 1—11; *Goodman v. Mayor of Saltash*(2); *Andrews v. M'Guffog*(3); *Tudor on Charities* (3rd Ed.), p. 302.

The suit against Punjabai is barred by limitation. She is not a trustee within s. 10 of the Limitation Act (XV of 1877)—*Kathiswar Trading Co. v. Virchand*(4). The trustees accepted the trusts declared in the deeds executed by Bai Punjabai. There is no allegation of fraud or breach of trust against them. An account is also sought against Rupsi Bharmal whose representatives have been made parties. But Rupsi's liability in respect of these matters has been already ascertained in suit No. 113 of [557] 1892, in which the trustees of the charity were plaintiffs, and his estate was ordered to pay a certain sum. The question of his liability is *res judicata* and cannot be re-opened in this suit. The Advocate General and the trustees of the charity represent the same interests. Whatever binds them binds him. In the former suit they omitted to ask for an account against Rupsi Bharmal, and they could not ask for it now: see s. 43 of the Civil Procedure Code. Neither, therefore, can the Advocate General, who has no independent right: *Tudor on Charities* (3rd Ed.), p. 295; *Attorney General v. Cullum*(5). As to the trusts of the deed, *Tudor on Charities* (3rd Ed.), p. 127; *Mayor of Lyons v. Advocate General*(6); *Attorney General v. Caius College*(7); *Attorney General v. Shearman*(8).

Lang (Advocate General) for plaintiff:—The trusts of the deeds are at variance with the trusts of the will; *Tudor on Charities* (3rd Ed.), p. 309. Trustees must be ordered to account—*Attorney General v. Earl of Stamford*(9); *Attorney General v. Exeter*(10).

JUDGMENT.

3rd July, 1894. FARRAN, J.—It will be convenient, before stating the nature of the pleadings and the questions which arise for decision, to refer to certain main facts which are not in dispute between the parties.

Ruttonsi Bhimsi, by his will dated the 31st of January, 1863, directed that one-fourth of the income of a certain property called the "Bhimpura property," in which he had a half-share, should appertain to the *sadharm* account of the *derasar* at Jackhoo in Cutch, and the remaining one-fourth share should be kept for his *sadharm* account, out of which two *sadavara*ts were to be established, one in Jackhoo and one in Palitana. He also directed that the amount of the *devdharm* and *sadharm* money should be Rs. 1,26,000—Rs. 1,01,000 for *devdharm* and Rs. 25,000 for *sadharm*.

(1) 1 B.H.C.R. App., 9.

(4) 18 B. 119.

(7) 2 Keen, 150 (163).

(10) Jacob, 443.

(2) 7 Ap. Ca. 633 (642).

(5) 1 Keen, 104.

(8) 2 Beav. 104.

(3) 11 Ap. Ca. 313.

(6) 1 Ap. Ca. 91.

(9) 1 Ph. 747.

It will be necessary to refer more in detail to these charitable bequests hereafter. He appointed his wife, the defendant Punjabai, the heiress of his whole property after his death, and Hirji Dossa and Bojraj Devsi *upris* over her.

[558] The testator was of the Jain religion. Jackhoo in Cutch was his native town. He had built a temple there in his life-time. He died in February, 1863. At the time of his death he was reputed to be and was, in fact, a very wealthy man, but the greater part of his money was employed in the firm of Hirji Bhimsi & Co., in which he was a partner. The firm failed in Samvat 1925 (1864-1865), and the whole of his capital embarked in it was lost, and decrees for considerable amounts were passed against his widow Punjabai in consequence of her connection with the firm.

Soon after the death of the testator, Punjabai expended the Rs. 1,26,000. She purchased a house, now called the "school house," and laid out the balance in erecting and adorning a temple at Jackhoo, close to the temple built by the testator. The Advocate-General in his opening speech stated that he did not quarrel with this expenditure or ask for an account of it.

On the 13th October, 1868, Punjabai by a deed of that date conveyed the "school-house" and the testator's moiety of the "Bhimpura property" to Ramji Jetha, Rupsi Bharmal and Vardhman Punsu in trust for charitable and pious purposes in the indenture more particularly described. The trusts of the net rents were:—

(1) As to one moiety to apply the same in *sadavarat* or almsgiving at Jackhoo and Palitana, and in feasting the caste people in Bombay and Jackhoo annually on the anniversary of the death of Bhimsi Ruttonsi, in the worship called *satarbhadi* at the *derasars* in Bombay and Jackhoo, and in the entertainment and clothing of the *gorip* in Bombay and Jackhoo.

(2) As to one-fourth part, to apply the same towards *sadharm* charities of the *derasar* at Jackhoo.

(3) As to the remaining fourth part, to apply the same towards *sadharm* (charities) at such places as the trustees should think fit.

On the 17th of April, 1869, Punjabai and the owners of the remaining moiety of the "Bhimpura property," *viz.*, Hirji Dossa and Muddon Tejsi, who were each entitled to one-fourth share therein, conveyed without reference to the deed of the 13th October, 1868, the Bhimpura estate to Ramji Jetha, Rupsi [559] Bharmal, Lalji Kessow, Nagsi Kirpal, Jaitha Muddon and Velji Nathu in trust:—

(1) As to one moiety of the net rents, which was to be considered as derived from the share of Punjabai, to apply the same in *sadavarat* or alms-giving at Jackhoo and Palitana, in feasting the caste people in Bombay and Jackhoo annually on the anniversary of the death of Bhimsi Ruttonsi, in the worship of *derasar* called *satarbhadi*, and in the entertainment and clothing of the *gorip* in Bombay and Jackhoo.

(2) As to one-fourth part of the net rents, which was to be considered as derived from the share of Hirji Dossa, to apply the same for the benefit of a certain temple of Tera in Cutch.

(3) As to the remaining fourth part of the net rents, which was to be considered as derived from the share of Muddon Tejsi, to apply the same for the benefit of another temple at Jackhoo in Cutch.

It will be seen that the trusts (2) and (3) in favour of *sadharm* for the temple of Jackhoo and for *sadharm* generally, declared in the indenture of

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October, 1868, are omitted in the later indenture. It is submitted on behalf of Punjabai—and her evidence tends to support the submission—that this omission arose from an error or oversight. It is not necessary to decide this absolutely, for Punjabai having divested herself of all interest in the Bhimpura property by the deed of October, 1868, and having declared the trusts defined by that deed, could not convey the same property to other trustees upon different or less extensive trusts, nor could she indeed validly convey it at all. The first two trustees of the later deed, being the same persons as the first two trustees of the earlier deed, had notice of the contents of the earlier deed, and through them, I think, that all the trustees of the later deed had similar notice. As to Punjabai's half share in the rents and profits of the "Bhimpura property," the trustees of the later deed were, therefore, bound to hand them over to the trustees of the earlier deed, who were legally entitled to them. Had they refused to do so, the trustees of the earlier deed could have recovered them as money received to their use. This will be an important circumstance when I come to consider the question of account.

[560] The second deed seems to have been intended as machinery for the more easy management and collection of rents of the Bhimpura estate, having regard to the sub-division of interests therein. It was evidently so regarded by the original trustees. The Bhimpura rents were collected, and its repairs were effected in common by one trustee of the deed of 1869 acting on behalf of all. At the close of each year the net rents were divided into four parts, of which two were made over to Rupsi Bharmal and Ramji Jetha on behalf of what I may call Punjabai's charities, while the remaining two-fourths were made over—one-fourth each—to the two trustees who were supposed to represent the charities of Hirji Dossa and Muddon Tejsi respectively. The half share received by Punjabai's trustees was brought into the account kept by the trustees of the deed of October, 1868. It must, therefore, be taken that the "school-house" and "Bhimpura" properties have been held since 1868 upon the trusts declared by the deed of October, 1868, by the trustees of that deed, though the rents of the Bhimpura estate have been, in fact, collected by the trustees of the later deed.

It is not denied that the trusts declared by the deed of October, 1868, are not in strict accordance with the directions contained in the will of Bhimsi Ruttonsi, and that the Court, if its aid had been invoked in time, and if it has jurisdiction in the matter, might properly have been called upon to ascertain the trusts of the will and those declared by the deed so as to bring them into accordance with the wishes of the testator, and for that purpose to frame a scheme. This is the main object of the suit. Such relief is prayed for in paragraphs (a) and (d) of the prayer of the plaint. Issues 2 and 22 raise the questions (1) as to whether the suit is not too late, and (2) as to whether the Court will undertake the administration of a trust to be executed in foreign territories. The question whether the Advocate-General can sue on behalf of the charities in question, is not directly or indirectly raised in the pleadings or issues, nor was it alluded to in argument. I must take it, therefore, that his right to sue is not disputed. See *Re Frazer* (1).

[561] First as to jurisdiction: The properties which are admitted to be held in charitable trusts are in Bombay, and the trustees of such properties are also in Bombay. The *derasar* at Jaokhoo, one of the

admitted objects of the trusts, complains (through the Advocate-General) that the deed under which the trustees hold does not correctly define the trusts created in its favour by the testator, and prays the Court to declare this and to rectify the deed. On principle I can see no objection to the Court granting this relief. How does the case stand upon the authorities? I do not think that a strictly analogous case has arisen or could arise in England. The cases referred to in Tudor on Charitable Trusts (3rd Ed.), p. 157, notes (m) (n) and (o), are all cases of bequests of money to found a charity in territories out of the jurisdiction of the Court. What the Court in such cases does, is to hand the money to the trustees named by the testator, leaving it to the Courts of the country in which the charity is to be carried out, to settle the scheme in accordance with which the trustee is to deal with the money. They certainly do not decide that if the trustee for a charity abroad does not carry out the trusts in favour of such charity, the Court will not assist the charity, the trustee and the fund being in England. In a very recent case, where a fund was bequeathed to a trustee in trust for the benefit of the blind in Inverness Shire, the Supreme Court in London directed the Attorney-General to apply to the Court of Session in Edinburgh to settle a scheme for its administration with a view to handing over the fund to the trustees indicated in such scheme, and thus in effect applied the money to the purpose indicated by the testator—*Re Frazer* (1). The case of *The Mayor of Lyons v. East India Company* (2) is, I think, direct authority for the making of a decree declaring the trusts upon which the trustees of the deed of October, 1868, held the properties comprised in that deed and for rectifying the deed in accordance with such declaration. I do not think that I ought, upon the authorities, to go further in the way of settling a scheme in this case.

Secondly, as to lapse of time: Independently of the Law of Limitation, I do not think that Courts in England have ever refused to stop the improper application of funds of a charity however [562] long the misapplication has continued—*Attorney General v. St. John's Hospital, Bedford* (3); Tudor's Charitable Trusts (3rd Ed.), p. 299. In the Limitation Act (XV of 1877) there is no specific article, that I can find, which is applicable to the present suit; but if it is not excluded from the Limitation Law by s. 10 of the Act, art. 120 would no doubt apply to it. This would give the Advocate General six years to sue for a rectification of the deed of 1868 from the time when his cause of action arose. The Advocate General, however, contends that this is not the nature of the case, but that it is a suit against Punjabai and her assigns, the trustees of the deeds of 1868 and 1869, for the purpose of following the trust property in their hands and having it applied to the proper purposes of the trust. He relies, in support of his contention, on the judgment of the Privy Council in *Balwant Rao v. Purun Mal* (4). I think that his contention is correct. If the deed had provided that half of the income of the premises was to be paid to Punjabai, it seems to me that the tenth section of the Act must have applied. Does it make any difference if the income is directed to be applied in part to some charitable object not within the scope of the original trust? I am of opinion that it does not. It is not like the case of a lease improperly granted, where the statute begins to run in favour of the lessee from the date of the lease—*Magdalen College v. Attorney General* (5). It is the case of a volunteer holding trust lands to whom the statute does not apply,

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(1) 22 Ch. D. 827.

(2) 1 M. I. A. 175.

(3) 2 De G. J. and S. 621.

(4) 10 I.A. 90.

(5) 6 H. L. C. 189.

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and in whose case notice is immaterial. The question is not free from difficulty, but I have come to the conclusion that the suit is not time-barred.

There is not much difficulty in declaring the trusts of the will of Bhimsi Ruttonsi and in indicating the lines of amendment required to bring the deeds into conformity with the declaration. As to the Bhimpura property, the will directs that half the net income of the testator's moiety is to be held in trust for *sadharm* account of the *derasar* at Jackhoo, and the other half of such income is to be held in trust for *sadharm* account generally, and that out of such last mentioned *sadharm* account, *sadavarats* are to be established at Jackhoo and Palitana. [563] Subject, therefore, to the establishments of such *sadavarats* the half of the net rents of the moiety of Bhimpura are applicable to *sadharm* generally. Of the Rs. 1,26,000 set apart for *devdharm* and *sadharm*, divided into Rs. 1,01,000 for *devdharm* and Rs. 25,000 for *sadharm*, Rs. 65,000 in round numbers have been already spent in *devdharm* works, which I think is properly applicable to the *devdharm* fund. The school-house represents the remaining Rs. 61,000. Its rents are applicable in the proportion of 36 to 25 to *devdharm* and *sadharm* objects respectively. When the funds are permanently invested, there does not appear to be any practical difference between these objects.

The important question is, whether the feasting of the caste upon the anniversary of the death of Ruttonsi Bhimsi can be legitimately kept up out of the net income of the charity property not specifically appropriated. If it can, the provisions of the deed of 1868 will require but little modification. Mr. Inverarity argued in favour of this contention very ingeniously. He started with the proposition that *sadharm* meant, as translated in the will, religious or charitable purpose. He cited authorities to show that a trust for the benefit of a particular class of the inhabitants of a parish or town was a charitable trust—*Goodman v. Mayor of Saltash*(1), and then drew the conclusion that the feeding of the caste on the anniversary in question was a charitable trust, and that the *sadharm* fund was, therefore, applicable to it. The reasoning is, I think, rather too fanciful. It starts with the assumption that *sadharm* is the equivalent of the English word "charitable" as judicially interpreted. This is really begging the question. If it is, his argument is correct. The argument fails if it is not. The real inquiry should be whether a Jain in the position of Ruttonsi Bhimsi could reasonably be held to include such feasting within the expression of *sadharm*. In the 12th clause of his will he directs as follows:—"In the *derasar* in the town of Jackhoo in Cutch and in Bombay, *satarbhadi puja* is to be performed and our caste is to be annually feasted one day each and every year." He sets apart no fund for this purpose. Linking the feasting of the caste with a particular worship seems to indicate that he placed them in the same category. As he set apart no fund for these purposes, it may not unreasonably be [564] supposed that the clause is a further direction as to how part of his *sadharm* is to be expended. That was apparently the construction which Punjabai and her *upris* put upon the will more than twenty-eight years ago—a construction which has been acted upon ever since, and which, therefore, ought not to be lightly disregarded. To do so now would be to defeat one particular object which the testator had in view in order to further an object which he expressed only in general terms, both being

charitable. I have not evidence before me sufficient to enable me to determine whether the testator can be intended to have used "*sadharm*" in such a sense as to include this feast. I shall hear further evidence upon the point before I rectify the deed in accordance with this judgment. As to the deed of 1869, it will be sufficient if it is altered by striking out the particular charitable trust as to Punjabai's moiety, and directing that moiety of the rents to be held on the trusts of the deed of 1868 as amended by this decree.

I now come to the charges made in the plaint against the trustees and Punjabai, and to the accounts which are prayed for. It is objected that the plaint in this respect is multifarious. I do not consider that it is open to that objection, but I need not decide it. The decree which I shall make will not err in that respect.

Para. 11 of the plaint states that the trustee Rupsi Madan *alias* Bharmal chiefly collected the rents and profits of the charitable properties and kept the account relating thereto, and the relators charge that during his management the said Rupsi Madan and with his aid and connivance the defendant Bai Punjabai misappropriated and converted to their own use the greater part of the income of the said properties amounting to the sum of Rs. 40,000.

Issues 7 and 21 were raised on behalf of Punjabai and the representatives of Rupsi Madan respectively to challenge that charge. The Advocate General closed his case without offering a particle of evidence in support of it; but during the address of Mr. Inverarity, who was counsel for Punjabai and Rupsi Madan's representatives, he stated that he had called no evidence about the accounts, as the Court had intimated that it would not itself take the accounts. I allowed him at the close of Mr. Inverarity's [565] address to call such evidence as he might be advised. That which he called was of the most unsubstantial nature upon which to base so grave and serious a charge. (His Lordship discussed the evidence upon this point and continued:—)

Under these circumstances I must hold that the charge of fraud and dishonesty against Punjabai and Rupsi Bharmal has not been established. The Advocate General urges that, if the accounts are taken, he may still be able to establish it. Such a charge, however, if put forward, must be established at the hearing, and cannot be allowed to be reserved—*Lalbai v. Kavasji* (1). I must, therefore, find the 7th and 21st issues in the negative. The plaint, in so far as it charges fraud and dishonesty against Punjabai and Rupsi Madan, will stand dismissed with costs.

Now as to the accounts. Admittedly the expenditure of the charitable income has not been in exact conformity with the will of Bhimsi Ruttonsi; but, if the deed of October, 1868, and the expenditure under it do not strictly conform to his directions I consider that this was the result of a *bona fide* mistake on the part of Punjabai, and it is not the practice of the Court to visit the past consequences of such a mistake upon the trustees of a charity—*Attorney General v. Wax Chandlers Co.* (2); *Andrews v. M'Guffog* (3); *Tudor on Charitable Trusts* (3rd Ed.), p. 303. For the consequences, therefore, of her execution of the deed of October, 1868, not being in accordance with Bhimsi Ruttonsi's will, no accounts will be directed against Punjabai, nor *a fortiori* against the trustees appointed under that deed, whose duty it was to carry out its provisions. The Advocate General in the course of Mr. Inverarity's address admitted the application

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(1) 8 B.H.C.R. 209 (214). (2) L.R. 6 H.L. 1. (3) 11 Ap. Ca. 313.

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of this principle, and said that he would be content if the accounts were taken, so that the trustees of the several deeds, including Punjabai, should account on the footing of their own deeds.

The accounts which the Advocate General eventually insisted were—

(1) An account against Punjabai of the income of the "Bhimpura property" from the death of Bhimsi Ruttonsi to the execution [566] of the deed of the 13th October, 1868, and of the income of the "school-house property" from the date of its purchase to the same time;

(2) An account against the trustees of the deed of 17th April, 1869, of the income of Bhimsi Ruttonsi's moiety of the "Bhimpura property," and of its application;

(3) An account against the trustees of the deed of 13th October, 1868, of the income of both properties and of its expenditure according to the trusts of the deed. As I understood him, Punjabai was to render, or be liable upon, this account with the trustees of the deed.

I deal with them in order :

(1) It appears to me that it would, at this distance of time, be a hardship, amounting to a positive injustice, to direct Punjabai to bring in the first mentioned accounts even if, having regard to the Law of Limitation, I have the power to do so. She made over the property to trustees in 1868. Down to then she says that her *upris* managed the property under her directions, and she swears that an anna of its income she never used for her own purposes. There is no evidence to the contrary to show that she did. The presumption, under the circumstances, is that she faithfully discharged her duty, and no account should be directed against her—*Attorney General v. Earl of Stamford* (1). I am inclined to think, however, that such an account is barred under art. 120 of the Limitation Act, even admitting that she was, as I consider that she was, a trustee in whom the trust property was vested as the heiress appointed by the will of Bhimsi Ruttonsi. The evidence does not afford any ground for supposing that Punjabai has trust property in her hands which it is sought to follow. The claim is now reduced to a simple claim against her as trustee for an account of income and disbursement and for the balance, if any. It falls within the ruling in *Saroda v. Brojo Nath* (2) followed in *Shapurji v. Bhikaiji* (3). The remarks of the Judges in *Metropolitan Bank v. Heiron* (4) do not militate against this view. Cotton, L.J., there assumes a [567] fund in the hands of a trustee and his waste or misapplication of it. These two facts proved, time, in England, does not bar the suit. These facts are not both proved here. In the absence of proof of dishonesty and fraud, no account can be directed against Punjabai in conjunction with the trustees of the deeds which she has executed, even if hers have been the hands, of which there is no proof, to administer the funds of the charities—*Attorney General v. Chesterfield* (5). No account will, therefore, be directed.

(2) The remarks which I have made in an early part of my judgment dispose of the second account. Regular accounts of the income of the "Bhimpura property" have been kept and adjusted each year, and the share of the net income appertaining to Bhimsi Ruttonsi's charities has been from time to time made over to Rupsi Bharmal. With the receipt of these sums from time to time the trustees of the deed of 1868 will be charged, and, as far as the trustees of the deed of 1869 are concerned, the

(1) 1 Ph. 747.

(2) 5 C. 910.

(3) 10 B. 242.

(4) 5 Ex. Div., 319.

(5) 18 Beav. 596.

matter ends there and an account is unnecessary. The defendants Nos. 2, 3, 4 and 11 are the present trustees of that deed, who are not also trustees of the deed of 1868. No account will be decreed against them. Two of them desire to retire. They can do so on taking the proper steps.

(3) The real difficulty is as to whether an account should be directed against the trustees of the deed of 1868 and as to the nature of such an account if it be directed.

The original trustees of the deed are all dead. Vardhman Pungsi died on 10th November, 1880; Ramji Jetha died in 1885. Rupsi Bharmal then remained the sole surviving trustee, and continued so until his death on the 10th March, 1889. By an order of Court dated 26th August, 1889, the defendants Jethabhai Vardhman, Damji Ramji, Khesi Jetha and Tejpal Coresi were appointed trustees of the deed, and are now its trustees. Since their appointment there has been considerable litigation in reference to the "school-house property." There can be no objection to directing them to bring in the account, so that on further directions the exact state of the funds may be known. It is not suggested [568] that there is any difficulty in bringing in this account, or that these trustees have not done what they could to carry out the trusts of their deed. Their accounts will be a mere matter of form from the date of their appointment. The representatives of Vardhman Pungsi and Ramji Jetha respectively, as such, have not been made parties to these proceedings, so that the account which the Advocate General presses for, is an account against the representatives of Rupsi Bharmal. Ought I to grant it? It is admitted that it is a matter for the exercise of the discretion of the Court as to how far back the accounts should be directed. If directed here it would have to embrace the whole period from 1868, because, in order to arrive at the balance in any particular year to start with, the accounts of the preceding years would have to be investigated. Since the death of Rupsi the trustees of the deed have received from his estate the balance which they considered to be due from him to the charity. The decree awarding them that relief was passed in suit No. 113 of 1892, and is dated 10th August, 1893. The proceedings in that suit are relied upon as a bar to this claim. The trustees in that suit could have asked for an account, and did not. They omitted to sue in respect of that portion of their claim, and under s. 43 of the Code of Civil Procedure could not now sue in respect of it. The Advocate General, it is urged, represents the same interests as the trustees, and he is equally barred with them in now asserting his claim to an account. I am, I confess, much struck with this reasoning, and do not at present see the answer to it. The trustees and the Advocate General both represent the Jain community; the Advocate General has no right independent of that community—*Magdalen College v. Attorney General* (1). The trustees represent the *derasar*, and so does the Advocate General. It is not suggested that there was any fraud or collusion in the obtaining of the decree in suit No. 113 of 1892. The defendants in that suit objected to a decree being passed against them on the ground that this suit upon the same cause of action was then pending. The Advocate General was himself counsel for the plaintiffs in that suit, and notwithstanding the defendant's plea pressed for a decree. I hold that the decree in suit No. 113 of [569] 1892 is a bar to the present claim of the Advocate General against the representatives of Rupsi Bharmal.

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(1) 4 H. L. C. 189.

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Assuming, however, that I am wrong in that view, I still consider that I ought not to direct the accounts. I must consider the evidence laid before me, and having done so I think that it would not benefit the charities to direct this account. So far as I can judge, it would result in nothing of importance even if a few errors were detected in the accounts. It would be a long and costly account, and at this distance of time the books would be the only evidence in the case. The Court can see now pretty nearly what they would show. The cost of taking the account would most probably fall on the charity. On the whole I think that I am exercising a wise discretion in refusing to open up these accounts. I must decree accordingly.

The minutes of the decree will declare that the trusts declared by the deeds of 1868 and 1869 are not in accordance with the directions declared in the will of Bhimsi Ruttonsi, and that they ought to be amended so as to bring them into accordance with such last-mentioned direction.

Declare that the trusts declared by the will of Bhimsi Ruttonsi as set out in the judgment, and let the Judge in chamber rectify the deeds so as to bring them into accord with the trusts as declared by the judgment. Declare that the charges of fraud and dishonesty made against Punjabai and Rupsi Bharmal respectively have not been established.

Let an account be taken of the net income and profits of the properties comprised in the deed of 1868 and of all other moneys which have come to the hands of the defendants, the present trustees of the deed of 1868, as such trustees, and let it be ascertained what sum they now hold as such trustees.

The relators to pay the costs of the defendants Punjabai and Rupsi Bharmal's representatives occasioned by the charges of fraud and dishonesty and of the claim for an account against them and to pay their own costs on these heads. The Advocate General to have his general costs, except as aforesaid, paid out of the trust funds.

[570] The trustees of the deed of 1869 to have their costs out of the trust funds taxed as between attorney and client.

The trustees of the deed of 1868 to have their costs out of such funds taxed as between attorney and client.

Decree accordingly.

Attorneys for plaintiffs:—Messrs. *Ardesir, Hormasji and Dinshaw.*

Attorneys for defendants:—Messrs. *Payne, Gilbert and Sayani*, Messrs. *Little, Smith, Nicholson and Bowen*, and Messrs. *Wadia and Gandhi.*