APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1904. *August 2.*

LAKHMICHAND NEMCHAND (ORIGINAL PLAINTIFF), APPELLANT, *v.* JAI KUVARBAI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Executor—Failure to produce fund at appointed time—Advisory duty—Appointment of an agent—Degree of care in the appointment—Want of diligence—Breach of duty—Loss caused to the estate—Liability of executor—Trusts Act (II of 1882), section 30.

When those entrusted with a fund for the benefit of another cannot produce it at the appointed time, *primâ facie*, they are liable for the loss which thereby accrues. One who undertakes a duty is bound to know what his duty requires.

Where a testator by his will committed the management of the property to his widow along with two out of the five executors including the widow, it is not open to one of the executors who was not specifically entrusted with the management to contend for the purpose of avoiding liability as executor that his duties were purely advisory, that he was but one of many, that votes of the majority of the executors governed, and that the real management was entrusted two of the executors in co-operation with the widow.

In the appointment of an agent to carry on business it is incumbent on an executor to act with the same degree of care as a man of ordinary prudence would in his own affairs. But where there is want of diligence on the part of the executor both in the selection and supervision of the agent, and the loss sustained by the estate can reasonably be connected with the want of such diligence, the loss must fall on the executor.

The indemnity clause of section 30 of the Trusts Act (II of 1882) casts the onus of proof on those who seek to charge a trustee with loss arising from the default of an agent, when the propriety of employing an agent has been established. But where there is a clear breach of duty in the employment and supervision of the agent the liability of the trustee for breach of trust arises.

APPEAL against the decision of Lallubhai P. Parekh, First Class Subordinate Judge of Poona, in original suit No. 285 of 1899.

One Nemchand Panachand of Junnar died on the 24th February, 1882, after making a will at Poona, dated the 28th January, 1882. The will, among other things, provided as follows:—

* * * * * * *

A. 1. Under the aforesaid decree which has been passed there are due from Lalchand Chatra Set and others Rs. 35,100 (thirty-five thousand and one hundred).

* Appeal No. 153 of 1901.

The moveable and immoveable property is as described above. The same shall be managed after my death by the panch mentioned below. The said panch are:

1. Ti(rthasvarup) Lalchand Chatra Set, my paternal uncle.
1. Ti(rthasvarup) Tarachand Chatra Set, my paternal uncle.
1. Sav(bhagyavati) Jai Kuvar, my wife.
1. Manikchand Kapurchand Set, residing in Shanvar Peth in Poona.
1. Lakhmichand Motichand, residing in Ravivar Peth in Poona.

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The aforesaid five panch shall by a majority of votes carry on *vyavastha* (management) in the manner mentioned below. If one panch or more panch decline (to act) the remaining panch have the authority to appoint proper persons (as panch).

B. 1. After my death such boy as the panch may deem proper shall be given in adoption (and placed) on the lap of my wife Jai Kuvar and my name shall be continued.

C. 1. Until the said boy whom the panch may place on the lap (of my wife) attains majority the panch shall carry on management of the whole of my property and keep supervision over the boy. As to the expenses which may be required to be made for his food and drink, the same shall be made in the manner the panch may deem proper. When the boy attains majority according to law and the custom of the caste, if he is a well-behaved (boy) and a fit person the property belonging to me which there may be with the panch shall be given to him together with the debts and outstandings.

* * * * * * *

D. 1. As to the amount belonging to me which shall come into the hands of the panch under the aforesaid decree with the same a trade shall be carried on (by investing the same) with solvent traders and others according to the opinion of the panch and interest realized (therefrom). Out of the same expenses should be incurred as mentioned below. As to the expenses which may have to be incurred in connection with the trade and outstandings the same shall be incurred with the consent of the panch. A large expense shall not be (allowed to be incurred).

* * * * * * *

E. 1. Among the panch appointed as above my wife has been included. Therefore the management of all the aforesaid things shall be carried on in the one way which may be agreed to with the consent of my wife and two other panch, these three persons.

F. 1. Out of the panch appointed as mentioned above my paternal uncle Lalchand Chatra Set shall carry on management as mentioned above. He shall keep an account in respect thereof and shall render the same to the remaining panch in Divali every year. Should there be any dispute or should any difference be noticed regarding the same the remaining panch shall entrust (? the

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management) to any panch they like, make all arrangements as mentioned above and take an account.

G. 1. After my death the panch shall carry on management in the manner mentioned in the aforesaid clauses. Should the panch deem it proper to make any change in the said management they shall do so by a majority of votes. To the same I have no objection. * * * *

Of the said executors Lalchand died in 1885, Tarachand in 1889 and Lakhmichand in 1899.

In the year 1899 the plaintiff, the son adopted by Jai Kuvarbai, in pursuance of the direction in the will, brought the present suit against the surviving executors, namely, Jai Kuvarbai and Manikchand Kapurchand, alleging that after his adoption he became entitled to the property of the deceased which chiefly consisted of outstandings of which one amounted to Rs. 35,000; that out of the property mentioned in the will plaintiff was in possession of one house only; that after he attained majority he called on the defendants to render him accounts but they failed to do so; and that as the defendants undertook to manage the estate they were bound to act according to the directions contained in the will and were responsible for the losses that resulted from their negligence, want of proper supervision, fraud, etc. The plaintiff, therefore, prayed for the following reliefs:—

(*a*) To recover from the defendants the amount that may be found due to him on taking accounts of the debts and moveable property of the deceased Nemchand Panachand received and recovered by them, of the sums lent by them, of the gifts and expenses made by them, of the income of the business carried on by them, and of the income of the estate if the business had been carried on according to the directions contained in the will of the deceased.

(*b*) To recover the amount that would have been found due to him if the management of the estate of the deceased had been made according to the directions contained in the will, making the defendants responsible for their negligence, fraud, want of proper care and mismanagement.

(*c*) To hold the defendants personally responsible for the expenses that may have been incurred in excess of those mentioned in the will.

(*d*) To recover all papers and account books that may be with the defendants.

(*e*) To obtain such other relief as the Court may deem proper to award.

Defendant 1, Jai Kuvarbai, answered, *inter alia*, that though she was mentioned in the will as an executrix the estate was managed by the other four executors; that she was not able to read and write and consequently she did not understand accounts; that the other executors had appointed gumástás to manage the estate and they kept supervision over the business; that the accounts, bonds, etc., relating to the business were in the shop and she had no objection to their being taken by the plaintiff, and excepting that she had brought suits on four or five of the bonds to recover money she had no knowledge of the transactions effected by the other executors or their gumástás.

Defendant 2, Manekchand Kapurchand, stated that he never took possession of the property of the deceased and never managed it; that as provided in the will defendant 1 and the uncles of the deceased managed his estate through a gumásta; that after the plaintiff attained the age of discretion he began to manage the estate; that the deceased knew that he (defendant) lived at Bombay and it was not possible for him to live at Junnar, therefore he was not responsible to the plaintiff for accounts; that the plaintiff had an account with the defendant's firm at Bombay and that Rs. 97-8-0 were due by the plaintiff to that firm.

The Subordinate Judge (L. G. Fernandez) framed the following issues:—

1. Whether the defendants or either of them managed the estate of the deceased Nemchand Panachand as alleged by the plaintiff?

2. On an account being taken what amount, if any, would be found due from the defendants or either of them?

3. Whether the plaintiff is entitled to the relief sought?

The findings on the above issues were:—

1. Defendant 1 had actually and directly managed the estate of Nemchand Panachand, deceased, but defendant 2 had not directly managed it as alleged by the plaintiff, but he used to give advice to defendant 1 in respect of the management of the estate.

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2. The finding on this issue to be arrived at after the plaintiff has taken accounts.

3. The plaintiff is entitled to recover the moveable property, account books, bonds and other papers belonging to Nemchand Panachand and to take accounts of the estate from defendant 1, Jai Kuvarbai, but not from defendant 2.

The Subordinate Judge, on the above findings, passed the following decretal order:—

As it is not practicable to decide the second issue before the accounts are taken I leave it for decision at the time of execution.

I then declare that the plaintiff is entitled to take accounts of the estate of the deceased Nemchand Panachand from the defendant Jai Kuvar and order that he do recover the account books, mortgage-deeds, bonds and other papers and all other moveable property belonging to the estate from her (defendant No. 1). I further order that defendant No. 1 do give accounts of the estate from the date of the death of her husband up to the date of giving the accounts.

I also declare that defendant No. 2 is responsible for the consequences of any improper advice given by him to the first defendant since the date of the death of Nemchand Panachand and of the advice to withhold the charge of the estate and the account books thereof since the date of plaintiff's attaining the age of majority, *viz.*, 31st July, 1897. Defendant No. 1 is also liable for the same as she appears to have acted according to the advice. I further order that on plaintiff taking the accounts and showing the consequences of any improper advice given by the second defendant to the first defendant and of the advice to withhold the account books and charge of the estate, the second issue be decided and the liabilities of both the defendants be ascertained and declared and on that being done the plaintiff be given a further decree to recover the amounts that may be awarded to him from the defendants. In taking the accounts the principle laid down in the will regarding lending money to solvent and industrious persons is not to be taken into consideration. If the value of the property that may be recovered by the plaintiff exceeds the amount of the claim the plaintiff is to give the requisite additional court-fees. On taking the accounts the liabilities, if any, of the defendants arising out of fraud, negligence, mismanagement, etc., are to be determined. The plaintiff do recover his costs from both the defendants who are to bear their own costs.

The plaintiff appealed and defendant 2 preferred cross-objections under section 561 of the Civil Procedure Code (Act XIV of 1882).

Ganpat S. Rao, for the appellant (original plaintiff).

Gokuldas K. Parekh, for respondent 2 (original defendant 2).

At the hearing of the appeal the High Court (Jenkins, C. J., and Batty, J.) on the 19th November, 1902, sent down the issues which are set out below in the judgment of Jenkins, C. J.

JENKINS, C. J.—(After hearing arguments His Lordship delivered the following judgment):—The plaintiff has brought this suit (*a*) to recover from the defendants the amount that may be found due to him on taking accounts of the debts and moveable property of the deceased Nemchand Panachand received and recovered by them (defendants), of the sums lent by them, of the gifts and expenses made by them, of the income of the business carried on by them, and of the income of the estate if the business had been carried according to the directions contained in the will of the deceased; (*b*) to recover the amount that would have been found due to him (plaintiff) if the management of the estate of the deceased had been made according to the directions contained in the will, making the defendants responsible for their negligence, fraud, want of proper care and mismanagement; (*c*) to hold the defendants personally responsible for the expenses that may have been incurred in excess of those mentioned in the will; (*d*) to recover all the papers and account books that may be with the defendants; (*e*) to obtain such other relief as the Court may deem proper to award.

The obligation to answer these claims is said to arise under the will, dated the 28th of January, 1882, of Nemchand Panachand, who died on the 24th of February, 1882. Thereby the testator after enumerating the items of his estate directed as follows:—

"The moveable and immoveable property is as described above. The same shall be managed after my death by the panch mentioned below.

The said panch are:

Ti. Lalchand Chatra Set, my paternal uncle.

Ti. Tarachand Chatra Set, my paternal uncle.

Sow. Jai Kuvar, my wife.

Manekchand Kapurchand Set, residing in Shanwar Peth, Poona.

Lakhmichand Motichand Set, residing in Ravivar Peth, Poona.

The aforesaid five panch shall by a majority of votes carry on *vyavastha* (management) in the manner mentioned below. If one panch or more decline

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(to act) the remaining panch have the authority to appoint proper persons as panch."

He then proceeds to direct that his wife should take in adoption a boy; that until he came of age the panch should manage the whole estate and take care of him and when he attained majority hand over to him the property in their possession with all debts and outstandings if he was of good character and fit to be entrusted with the management; that the money recovered under the decree therein specified was to be employed as therein indicated; that if the testator's wife and two other panch agreed upon any point the property should be managed according to their opinion; that out of the executors Lalchand should look after the management of the property and keep accounts and render them to the rest of the panch at the Divali of every year, but that in the event of a dispute the rest of the panch should entrust the management to anyone of the panch; and that the majority of the panch could make a change in the management of the business.

The plaintiff is the son adopted under the provisions of the will. Lalchand and Tarachand died, respectively, in 1885 and 1889. In July, 1897, the plaintiff attained his majority. Lakhmichand died in 1899, and in the same year the plaintiff commenced this suit. His case is that, apart from the immoveable property, the whole of his father's estate has been lost, and he maintains that the defendants as survivors of the panch are liable to make good the loss. No objection is made that the defendants alone are sued. The case in the first instance came before Mr. Fernandez, the Subordinate Judge at Poona, who passed a decree from which the plaintiff appealed with the result that the case was sent back for the determination of the following issues:—

1. What part of the trust estate has been lost, and when and under what circumstances?

2. Was it proper for the trustees to use the agency of Jaysing for the purpose of conducting the business of the trust?

3. If so, whether the loss took place without any misconduct or default on the part of Manekchand, having regard to the terms of his appointment and the circumstances of the case?

4. Did the plaintiff take any and, if so, what part in the management of the business and during what period?

The case has been returned with the following findings on these issues:—

1. About Rs. 6,079-15-6 have been lost.

2. It was not improper for the trustees to use the agency of Jaysing who was the son of the old gumástá after plaintiff's father (*sic*) although subsequently he was discovered to be anything but an honest fellow.

3. The third issue was found in favour of defendant 2.

4. The plaintiff did never take any active part in the management of the business.

The property alleged to have disappeared is (1) a mortgage-bond of Rs. 900, (2) ornaments valued at Rs. 4,000, and (3) the sum of Rs. 35,100 secured by the decree against Lalchand. The claim before us, however, has been limited to the third of these items.

The plaintiff's case as to the Rs. 35,100 is first that Rs. 29,020-0-6 alone has been recovered and that the defendants have wrongly failed to get in the balance, and secondly, that the sum of Rs. 29,020-0-6 is not now forthcoming. In any case it is said the defendants are responsible for the whole of the Rs. 35,100.

It is not disputed that the proceeds of the decree were used in a money-lending business carried on at Junnar, the management of which for many years was entrusted to two successive gumástás, Hirachand and his son Jaysing.

The will contemplated that the proceeds of the decree should be applied to purposes outside the scope of ordinary trust investments and be utilized in business, for it is provided as follows:—

"As to the amount belonging to me which will come to the hands of the panch under the aforesaid decree with the same a trade shall be carried on (by investing the same) with solvent traders and others according to the opinion of the panch and interest realized therefrom. Out of the same expenses should be incurred as mentioned below. As to the expenses which may have to be incurred in connection with the trade and outstandings the same shall be incurred with the consent of the panch. A large expense shall not be allowed to be incurred."

The plaintiff's grievance against the 2nd defendant is not that the money was employed in a money-lending business, but that the supervision exercised by him was so defective as to have

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resulted in the loss of the fund entrusted to the agent for the purposes of that business.

We start with the fact that when the plaintiff attained his majority in July, 1897, it became the duty of the panch to give to him the testator's property which might be with them together with the debts and outstandings, for no suggestion has been made that the plaintiff was not "a well-behaved boy and a fit person."

But in fact the panch gave none of the testator's property to the plaintiff.

Yet this omission was not for want of demand on the plaintiff's part, but on the ground that he was not within his rights in making the demand. Thus on the 11th of February, 1898, the 2nd defendant writes to the 1st:

> You write that Lakhmichand demands possession of account books, ornaments and trinkets, cash, etc.—all these I have noted the same. The same cannot be given into his possession from this day. (Even) the natural parents so long as they are alive do not give possession to sons born of their own loins. How then can possession be given to an adopted son? I have written a good deal about this to Lakhmichand. I do not see any objection to your showing him the account books, as also to giving the same to him.

From this it appears that Manekchand approved of the plaintiff being excluded from the property, to the possession of which he was entitled under the terms of the will.

But now when he is willing that the property should be handed over to the plaintiff, it is not forthcoming. How this has happened does not appear with clearness.

When the case was last before us it was hoped that the remand for the determination of the issues then framed might have thrown a light on the matter, but the enquiry has not proved of much use. The defendant has been unable, or at any rate has failed to explain the loss, and acting apparently on advice he has held aloof from the enquiry directed and lent no assistance in the investigation of the matter involved in this litigation. It seems that of the decretal amount the greater part was received and found its way into the money-lending business, but the payment of the balance was never enforced. Though, as I have

indicated, the precise manner in which the amount recovered has been lost does not appear, there is strong reason to connect this loss with misconduct on the part of Jaysing, and we know that in the spring of 1898 Jaysing absconded and that in a suit, No. 172 of 1899, commenced against him by the present defendants it was alleged:

> For the purpose of managing the property and carrying on the business of banker, trader, etc., the father of the defendants Nos. 1 and 2, Hirachand Sadaram Gujar, was engaged as gumástá in Samvat 1938. He performed those duties till Kartak Sud 4th, Samvat 1948. During the lifetime of Hirachand Sadaram from Kartak Sud 5th, defendant No. 1 was engaged as gumástá to do the abovementioned duties. From that time to Vaisakh, Samvat 1954, *i. e.*, 25th April, 1898, he acted as gumástá.
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> The defendant No. 1 has made frauds in the discharge of his duties and swallowed a considerable amount of balance and carried away pledged articles. He has also kept accounts fraudulently and has made away some of the account books, thus he has done damage to us in various ways, and besides he has contracted debts. In this way on Vaisakh Sud 4th, Samvat 1954, *i. e.*, 25th April, 1898, he left his duties and absconded. Afterwards, when it was found out on 10th August, 1898, or about that time, the defendant No. 1 was asked to show us the accounts and pay the balance that would be found due after deducting the proper items of expenditure but he did not do so.

When those entrusted with a fund for the benefit of another cannot produce it at the appointed time, *primâ facie* they are liable for the loss. So we first have to see in what relation the 2nd defendant stood towards the funds representing the proceeds of the decree, with a view to determining whether there is anything in the circumstances of this case exonerating him from this liability. The case has been argued before us on the basis of the 2nd defendant's having been an executor or trustee, though the argument for him has been that in that capacity his only duty was to advise. In the will the 2nd defendant and those associated with him are described as a panch, an expression which in the context may be taken as the equivalent of the appointment as trustees or executors of those to whom it relates. But in addition to this the will assigns expressly to the panch certain duties. Clause A of the will contains the terms of the actual appointment which places the management of the testator's moveable and immoveable property in the hands of the panch named by him with the proviso that the same shall be carried on by a majority of votes.

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This management is to be carried on till the adopted son attains majority, and then the testator says: "If he is a well behaved (boy) and a fit person the property belonging to me which there may be with the panch shall be given to him together with the debts and outstandings."

Then, after provision for certain ceremonial expenses with the consent of the panch, the clause as to investment comes, and after that the following provision:—

"Among the panch appointed as above my wife has been included. Therefore the management of all the aforesaid things shall be carried on in the one way which may be agreed to with the consent of my wife and two other panch. —these three persons. Out of the panch appointed as mentioned above my paternal uncle Lalchand Chatra Set shall see to the management as mentioned above. He shall keep an account in respect thereof and shall render the same to the remaining panch in Divali every year. Should there be any dispute or should any difference be noticed regarding the same the remaining panch shall entrust (? the management) to any panch they like, make all managements as mentioned above and take an account. After my death the panch shall carry on management in the manner mentioned in the aforesaid clauses. Should the panch deem it proper to make any changes in the said management they shall do so by a majority of votes. To the same I have no objection."

It is to be noticed that each of the panch attested the document, and three of them, including the 2nd defendant, wrote: "What is written above is agreed to." Manekchand also states that the will was made in his presence.

In his deposition he says:—

Till Samvat 1941 we five used to manage the estate. Till Samvat 1945 we four used to manage. The 3rd executor Lakhmichand died in Samvat 1955, till then we three executors used to manage the estate, and we two used to manage the estate for a year or so. I relinquished the management 1½ years ago because I did not receive any letters from the defendant. For 2 or 3 months before 1½ years from this time the plaintiff and defendant Jai Kuvar were not on good terms. It was not my business to manage the property of Nemchand. It was the business of defendant No. 1. I have not from the first made any management of the property.

It appears that the 2nd defendant was concerned in fixing the pay of Hirachand the 1st gumástá: he took part in the appointment of Jaysing, and he joined the 1st defendant in bringing the suit against Jaysing.

I therefore hold that the 2nd defendant did accept the office of panch and undertook the duties imposed by the will.

The defendant's contention before us, however, has been that his duties were purely advisory, that he was but one of many; that the votes of the majority governed; that the real management was entrusted to two of the panch in co-operation with the widow and this in the circumstances of the case must have meant those of the panch who resided at Junnar; and that the defendant's residence in Bombay excluded the idea that he was to do more than advise.

But what were the facts? True the majority of votes governed and two with the widow were to carry on the management. But in no respect does it appear that defendant No. 2 was outvoted, while from 1889 defendant No. 2, Lakhmichand and the widow were the only survivors of the panch, so that on these three, according to the express terms of the will, the management devolved, and from that date it was no longer open to the defendant to shelter himself behind the clause which committed the management to the widow and two members of the panch.

The argument that Manekchand's duties could not have been more than advisory has been largely founded on the hypothesis that the three to whom the management was entrusted must have meant the three resident at Junnar: but for this argument there is no foundation. It was no doubt asserted before us as a fact that Lalchand, Tarachand, and the widow all resided at Junnar, but it afterwards turned out that there was no warrant for the statement that Tarachand lived in Junnar, and Mr. Gokuldas, when questioned, had to admit that there was nothing in the evidence to support his statement. On the contrary it appears there are strong indications that he was residing at Baroda, and so was more out of reach of Junnar than the 2nd defendant.

I therefore think that there is no ground for the suggestion that Manekchand's position, as distinct from that of the rest, was purely advisory. But then how far is the question affected by the circumstance that the fund was in the hands of an agent?

It may be conceded that Manekchand could not reasonably be expected himself to conduct the business, and that the

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appointment of a proper agent for that purpose was reasonable and permissible. But in the selection and supervision of the agent it was incumbent on Manekchand to act with the same degree of care as a man of ordinary prudence would in his own affairs. How far has Manekchand complied with that standard? Jaysing's appointment as gumástá was made in December, 1895, with Manekchand's approval. His age at that time was not more than 22 or 23, and yet he was placed practically in uncontrolled management of this considerable fund: for we know that according to his own case Manekchand did not consider he was called on to do more than advise—and it is not suggested that in this respect there was any difference between him and Lakhmichand—while the widow has been described before us as illiterate.

The justification for this appointment is said to have been Jaysing's knowledge of the business acquired during the gumástáship of his father; but I do not know that there was anything in the character of the business that required the appointment of Jaysing on this score, nor was there apparently anything in his previous record that warranted confidence in him.

To Manekchand's knowledge a criminal charge had been brought against Jaysing in the previous year in connection with a Kanthi, and though he was not convicted it was not an incident favourable to Jaysing. Moreover, it is clear from Manekchand's correspondence that he had not a high opinion of Jaysing, and he very frankly admits that he would not have entrusted him with the control of his own business. Though I desire not to judge of Manekchand's conduct in the light of after-events I think it cannot be said that the choice was a prudent one, and in any case it clearly was one which made it especially incumbent that an adequate supervision should be exercised. This supervision could hardly have been expected from the widow, and there was no one else to exercise it but Lakhmichand and Manekchand. The need for an effective supervision grew the more pressing as it became apparent that Jaysing was acquiring an influence over the widow, who (probably as a result of it) became more and more alienated from her adopted son, the plaintiff.

The selection then being thus wanting in prudence, I turn to see what Manekchand did by way of supervision. During

the period of 17 years from the testator's death in 1882 down to 1899 he received a few balance-sheets: he asked for others, he says, but did not obtain them: his justification is stated to be that he was put off when he asked for the balance-sheets, but so far from this being a justification it was a reason for greater insistence and vigilance on his part. And this is all he did by way of supervision: he never examined the books, nor did he ever depute any one to examine them, and yet had he done so, it seems obvious from the Commissioner's report, it would at once have been found from the state of the books that they were not properly kept, and suspicions as to the probity, or at any rate the fitness, of the gumástá would have been aroused.

It is true that the books were at Junnar, but even if it would have been inconvenient for Manekchand to go to Junnar, he might have sent one of his clerks there—for there is no reason to suppose any obstacle would have been placed in his way—and in any case there would have been no difficulty in his requiring the books to be brought for his inspection to Poona where he had a place of business, and where he went from time to time. This is what was done in the end, but then it was too late. So even assuming that Junnar was the proper place for the money-lending business, I think Manekchand could have exercised an effective supervision and there is no substantial basis for the suggestion that to require this of him would be to impose an obligation unreasonable in the circumstances of the case.

In this view it is unnecessary to consider whether Junnar was the only place at which the money-lending business could have been carried on, but I feel bound to say that I am not satisfied that the business carried on there after the testator's death was a continuation of one existing in his lifetime; for though Manekchand has so stated before us, it is remarkable, if this be so, that no mention is made of this business or any debt connected with it in the enumeration of the assets contained in the will.

Manekchand then did practically nothing, and yet the testator contemplated that even during Lalchand's *régime* accounts of the management should be rendered to the remaining panch in the Divali of every year and this, be it noted, was a precaution to which at the time Manekchand expressly assented.

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Is it possible under these circumstances to hold that Manekchand acted as carefully as a man of ordinary prudence would in his own affairs? I think not: in fact the 2nd defendant practically admitted as such, and his explanation has been that he was made a trustee simply for the purpose of giving advice, by which apparently is meant that he was exempt from any obligation to supervise.

I am unable to construe the will as placing this limit on the 2nd defendant's responsibilities. It may be that Manekchand thought his legitimate functions were limited in the way that has been suggested, but this affords no answer: for one who undertakes a duty is bound to know what his duty requires. As it was Manekchand left the widow and the minor at Jaysing's mercy, though from the knowledge acquired by him as the banker of the business he was aware that Jaysing was pursuing a course of trade that was in his opinion speculative and risky. He substantially did nothing; he thought his duty was performed by the writing of some sarcastic letters, and the result has proved that his acceptance of the trust has been no safeguard to the interests he was intended to protect. Had he declined to act it might have been better, for then perhaps some one could have been appointed in his place.

I come therefore to the conclusion that though the appointment of an agent was in the circumstances justifiable, still the facts established show that there was a want of due diligence on the part of the 2nd defendant both in the selection and supervision of the agent. But can the loss sustained be reasonably connected with this want of diligence? I think so. Had a trustworthy man been employed to conduct this business it is fair to assume that he would have acted honestly and would not have misappropriated the moneys entrusted to him: but the panch in employing Jaysing did not, as far as I can see, take any steps to assure themselves of his trustworthiness, and they obviously could not rely on a long career of honest work as a guarantee for his good character. Then I think the absence of supervision must have increased the peril to the fund. Had accounts been rendered and examined from year to year, this would undoubtedly have been a check on dishonesty; and I do not think we can assume that false accounts would have been furnished, had Manekchand insisted that they

should be rendered. As it was, the absence of supervision was not merely the disregard of an obvious and valuable safeguard; it must have operated as an encouragement to dishonesty.

If the supervision had been carried further and an independent examination of the books undertaken from time to time the peril would have been still further diminished. I therefore think the loss may fairly be connected with a want of diligence on Manekchand's part, and in this connection it is important to bear in mind that what we have to consider is not an isolated instance of imprudence, but a long and continued omission to take an ordinary precaution in the conduct of the affairs of the trust.

It has been urged that the 2nd defendant is protected by section 30 of the Trust Act, but in applying this section it must be borne in mind that it is expressly subject to the provisions of the instrument of trust and of sections 23 and 26 of the Act. So far as the defendant's argument proceeds on the basis that it was the 1st defendant alone who received and is liable for the money and not the 2nd, it is not supported by the facts. The proceeds of the decree employed in the money-lending business must be treated as having come into the hands of the gumástá as agent of the panch, who must therefore be regarded as having received this money. It appears that a considerable amount of the funds employed in the business actually passed through the hands of Manekchand as banker, and he therefore must have known of its receipt.

Then so far as reliance is placed on that part of the section which exonerates trustees from liability for those in whose hands trust property is placed, I think it does not in the circumstances of the case help Manekchand. This indemnity clause no doubt casts the onus of proof on those who seek to charge a trustee with loss arising from the default of an agent when the propriety of employing an agent has been established: *In re Brier* (1). But here (in my opinion) a clear breach of duty in the employment and supervision of the agency has been established, and the fact the plaintiff is not in a position to furnish us with more precise information of the circumstances under which the loss arose is owing to the failure of the panch to see that proper accounts were kept.

(1) (1884) 26 Ch. D. 238.

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LAKHMI-CHAND v. JVI KUVAR-BAI.

Section 30 does not help Manekchand for his liability arises out of distinct breach of trust.

Then it was urged that for some time prior to Jaysing's absconding the plaintiff had been in control and therefore the 2nd defendant cannot be held liable, but I am of opinion that this has not been proved. Certain letters are no doubt in the plaintiff's handwriting and he may have done some work, but he was never given control of the business: indeed it is one of his grievances that he was not put into possession on attaining his majority.

His demand on this head was refused and it is clear on the correspondence that the refusal had the 2nd defendant's sympathy and approval: to him it appeared that all the plaintiff could reasonably demand was inspection of the accounts and their possession. It was the duty of the defendants to give on demand information to the plaintiff with respect to the mode in which the property had been dealt with and its actual state of investment and to give him the opportunity of ascertaining that the statements were correct.

Then it is urged that the whole sum cannot have been lost; that part of it must now be in the possession of the plaintiff or his adoptive mother, and in support of this reference is made to the fact that the plaintiff is now carrying on a business involving the possession of assets.

The plaintiff has given his explanation of this and the 2nd defendant has placed before us no materials which would justify us at this stage in ignoring it. It is not for lack of opportunity that the 2nd defendant is thus unfortified with facts: but he has refrained from taking part in any investigation which might have thrown a light on this point.

The conclusion then to which I come is that the defendant No. 2 is liable at the suit of the plaintiff. It is not without regret that I have come to this conclusion, for, I believe, he has acted throughout with honesty and has merely failed in his duty because he did not realize the extent of the obligation which (in my opinion) he undertook. He has failed to exercise the care and supervision which was necessary in the circumstances and

the loss which has resulted must fall on him rather than on the plaintiff whose interests were committed to his charge. It would be a grave misfortune if we should allow it to be supposed that the standard of duty for which the 2nd defendant contends, represents the requirements of the law.

Too often do cases in this Court disclose a disregard (to use no harsher term) of minors' interests by those to whose care they have been committed, and were we to hold that the 2nd defendant in this case has performed his duty and has come under no liability, we should be giving an encouragement to the idea that this disregard may be indulged in with impunity. The 1st defendant has been held liable to account by the 1st Court and from that determination no appeal has been preferred and she has not even appeared before us to question its correctness. In my opinion we must hold that the 2nd defendant is also liable to account.

I have already pointed out that the whole of the decretal amount has not been recovered from the judgment-debtor. It was the duty of the panch to acquaint themselves with and realize the amount due under the decree and *primâ facie* there would be liability in respect of so much as was allowed to remain unrecovered.

The present suit has been brought against the surviving members of the panch alone, but no request has been made for the joinder of other parties.

Had Manekchand taken part in the issues we sent down, then we might have been able to dispose of the case now, but having regard to all the circumstances and the fact that he acted under the advice of his pleader, I hesitate to deprive him of the opportunity of showing what is now due.

We therefore pass the following preliminary order:—

It is ordered that the following enquiries be made:—

1. An inquiry how much of the decretal sum of Rs. 35,100 has been received by the panch or anyone on their behalf.

2. An inquiry whether any and what parts of the amount so received has been lost or misappropriated and when and by whom and under what circumstances.

3. An enquiry whether any and what part of the amount so received as aforesaid has come into the hands of the plaintiff or anyone on his behalf.

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It is ordered that the above inquiries be made and certified to this Court within three months from this date.

In the meantime it is ordered that this suit do stand adjourned for making the final decree and that there be liberty to apply.

In the investigation of these inquiries it must be borne in mind that the defendants are the accounting parties.

Order accordingly.

G. B. R.

ORIGINAL CIVIL.

Before Mr. Justice Tyabji.

Ex parte AMERCHAND MADHOWJI.

1905. *January* 21.

Administrator General's Act (V of 1902), section 4, clause 2—Indian Trusts Act (II of 1882), section 72—Discharge by Court of an executor—Vesting of property in the continuing executor.

The Court has power to discharge an executor on his own application if a proper case be made out. An executor so discharged remains liable for anything he has done or left undone while an executor—it only relieves him from the duties of his office from the date of the discharge.

THIS was a petition by Amerchand Madhowji, one of the executors and trustees of the will of one Mowji Madhowji, who died in 1897. He discharged his duties as such executor and trustee for several years. Owing to ill health which obliged him to give up all business and to live out of Bombay, the petitioner applied to the Court by a notice dated 6th December, 1904, for his discharge from his office of executor and trustee.

Raikes, for petitioner:—The Court has power under section 4, clause 2, of Act V of 1902, to discharge the petitioner; the funeral and testamentary expenses, debts and legacies having been satisfied and the surplus invested upon the trusts of the will, the Court had power to "discharge" the petitioner under