ORIGINAL CIVIL.

Before Mr. Justice Tyabji.

MOOSABHAI MAHOMED SAJAN AND ANOTHER, PLAINTIFFS, *v.* YACOOBBHAI MAHOMED SAJAN AND OTHERS, DEFENDANTS.* 1904. *November* 12.

Mahomedan Law—Trust—Will—Reference to trust deed in will for the purpose of confirming it—Testamentary document—Trustee de son tort—Express Trustee—Liability to account—Limitation Act (XV of 1877), section 10.

Under the Mahomedan Law possession is as necessary in the case of trusts as in the case of gifts—not necessarily direct possession of the premises, but the best possession of which the property is capable at the time, either actual, symbolical or constructive.

Where a trust deed is referred to in a will with a view of confirming it, it is confirmed and becomes part of the will.

If express trusts are created by deed or will and some third party takes upon himself the administration of the trust property he becomes a trustee *de son tort* and, as such, is bound to account as if he were the rightful trustee and imitation will not run in his favour under section 10 of the Limitation Act (XV of 1877).

ONE Mahomedbhai Sajan, a Khoja inhabitant of Bombay, was married to Premabai, by whom he had four sons and two daughters, *viz.*, Moosabhai (plaintiff 1), Yacoob (defendant 1), Gulamalli (defendant 2), Gulam Hussein, Mariambai and Padmabai. Moosabhai was married to Kajbai (plaintiff 2) and Yacoob was married to Phoolbai (defendant 3). The two daughters Mariambai and Padmabai were also married. On the 9th October, 1876, Mahomedbhai Sajan made a trust deed with respect to his property, namely, four houses, and appointed Mahomedbhai Rowji, Mahomedbhai Choth and Allanabhai Vishram as trustees. The material portion of the trust deed was as follows:—

The said trustees or trustee for the time being shall hold all and singular the said hereditaments and premises hereby granted or intended and expressed so to be and from time to time and at all times hereafter shall ask, demand, sue for, receive and be possessed of the income, issues, rents and profits arising out of the same and, after thereout reimbursing to themselves all the costs and expenses incidental to the management and execution of the trusts of these presents, pay the net income, issue and profits to the said Mahomed Sajan during his natural

* Original Suit No. 509 of 1903.

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life for the support and maintenance of himself and his said wife Premabai and his family and, after the decease of the said Mahomed Sajan, the trustees shall stand possessed of the net income, issues and profits accruing from the trust premises upon trust to divide the same into as many parts as there may be from time to time co-sharers or cestuis que trustent such as are hereafter mentioned and pay and distribute the same among the co-sharers or cestuis que trustent in such a manner that the male cestui que trust shall get double the amount which the female cestui que trust shall get provided nevertheless that as long as the said Premabai shall be alive she shall be considered as a male cestui que trust and shall get the same share as the male cestuis que trustent. It is hereby agreed and declared that the cestuis que trustent who shall be entitled to share in the income of the said trust fund shall be the said Premabai, wife of the said Mahomed Sajan, the said Moosabhai Mahomedbhai and his wife Kajbai, the siad Yacoobbhai Mahomed and his wife the said Phoolbai, the said Gulamalli Mahomed, the said Gulam Hussein Mahomed, the said Mariambai and any future lawful children of the said Mahomed Sajan begotten by the said Premabai and all the children that have been born and that may hereafter be born from time to time to the said Moosabhai Mahomedbhai and Mahomed Hussein Mahomedbhai by their respective lawful wives each cestui que trust shall get his or her share for his or her sole and separate use absolutely without the power to alien the same by way of anticipation.

On the 18th November Mahomedbhai Sajan made his last will and testament, in which the aforesaid trust deed was referred to in the following terms:—

As to whatever immoveable and moveable property there is belonging to me, the whole thereof has been acquired by my own (personal) earnings. I myself am the *mukhtyar* (a person vested with full and absolute authority) in respect thereof as long as I am alive. Out of the same I have made a "Trust" in respect of 4, namely, four, houses for my family. There is no need whatever to write (anything) about the said matter in this will. Those houses are "Trust" (property). In accordance with (the condition of the said "Trust") the "Trustees" of the said "Trust" are to carry on (the "Trust" affairs). As to what is to be done with regard to the remaining immoveable property and moveable property which there are belonging to me, I direct and bequeath the same in accordance with what is written below. And I appoint my son Yacoobbhai Mahomedbhai the "executor" or "vakil" of this my "will" or testamentary writing. He is immediately to obtain "power" (probate) of my name (? will). And he shall carry out the directions and orders in accordance with what is written below. * * * * * *

My true heirs and true (and) rightful (representatives) are (my) four sons (namely) Moosabhai Mahomedbhai and Yacoobbhai Mahomedbhai and Gulamallibhai Mahomedbhai and Gulam Husseinbhai Mahomedbhai and (my) two daughters (namely) Padmabai, the wife of Mahomedbhai Choth, and Mariambai,

wife of Khoja Fazalbhai Rajanbhai. These my four sons and two daughters are my heirs. * * * * * * *

My sons Gulamallibhai Mahomedbhai and Gulam Husseinbhai Mahomedbhai are young in age (*i. e.*, are minors). They shall therefore live with my "executor" or "vakil" (namely) my son Yacoobbhai Mahomedbhai. During that period their expenses shall be defrayed out of the income of the "Trust" (property) and out of the income of their shares of inheritance. * * * And until they attain their age (of majority), that is to say, until they attain the age of twenty-two years my "executor" or "vakil" (namely) my son Yacoobbhai Mahomedbhai shall take (care of their respective) rights and he shall keep an account of the income of the amount of their shares of inheritance and of the expenditure. But should these two sons of mine or any one of them desire to live separate then my "executor" or "vakil" (namely) my son Yacoobbhai Mahomedbhai shall give to them or him only the income of the "Trust" (property) and the income of the amount of their shares of inheritance for (their or his) expenses. But he shall not give (them or him) the principal "Punji" (assets, wealth or property).

Premabai predeceased her husband Mahomed Sajan. Though Mahomed Sajan made the trust deed he continued in the management of the trust property till his death which took place on the 6th May, 1883. His son Gulam Hussein died three years after, unmarried and intestate. Gulamalli became insolvent in 1900. After Mahomed Sajan's death, his son Yacoobbhai, the executor under the will, began to pay to the other members of the family the income of the trust property according to the shares mentioned in the trust deed till the month of March 1901, when owing to some dispute he stopped payment to Moosabhai and his wife Kajbai. They, thereupon, served him with a notice of demand and, on his failure to comply with the notice, brought the present suit on the strength of the trust deed, alleging, that though the deceased Mahomed Sajan made a deed of settlement and appointed trustees, he himself continued to manage the properties comprised therein till his death; that this circumstance did not invalidate the trusts which were confirmed by the deceased testator; that plaintiffs 1 and 2 and defendants 1, 2 and 3 were the only persons interested in the terms of the settlement; that after the death of the testator defendant 1 began to manage the properties on behalf of those interested therein under the settlement and made payments thereout to the plaintiffs; that if there was any defect in the creation of the trusts, it was cured

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by the trusts being confirmed by the will; that even if the settlement be invalid as a deed of trust or a testamentary disposition, the plaintiff 1 and defendants 1 and 2 would be entitled to the said property as the heirs of the deceased Mahomedbhai Sajan. The plaintiffs, therefore, prayed that the said trust deed and the trusts created therein may be declared valid as such or as a testamentary instrument, and may be construed by the Court and the rights of the plaintiffs and the defendants therein in the events that had happened may be ascertained and declared and have effect given to them; that in the event of the Court holding that there are valid trusts of the said properties created by the said deed, trusts of the said deed may be executed and, if necessary, trustees thereof appointed by the Court; that defendant 1 may be ordered to account for his management of the said trust properties; that a Receiver may be appointed to take charge of the said trust properties and collect the rents and profits of the same; that in the event of the Court holding that said trust deed and the trusts created therein were invalid as such or as a testamentary instrument, the said properties may be partitioned between plaintiff 1 and defendants 1 and 2 according to their respective interests as heirs of the deceased Mahomed Sajan and for that purpose all necessary directions be given and necessary accounts be taken and necessary orders be passed; that the plaintiffs' costs may be provided for and that the plaintiffs may have such further and other reliefs as the circumstances of the case may require.

Defendant 1 contended *inter alia* that the trustees mentioned in the deed of settlement or their representatives were necessary parties; that the plaintiffs' claim, if any, under the deed of settlement was time-barred; that the defendant denied that he was in management of the properties on behalf of those interested in the settlement, or made any payments to the plaintiffs under its terms; that the payments which the defendant made to the plaintiffs were purely gratuitous owing to their extreme poverty; that defendant 2 having become an insolvent his estate and effects became vested in the Official Assignee; that the plaintiffs' claim as the heirs of the deceased Mahomed Sajan was time-barred and that if it be held that the plaintiffs and defendant 2 were entitled to any shares, the defendant 1 was entitled to

claim credit for all moneys which he had expended on their account.

Defendant 2 admitted the statement of facts contained in the plaint and joined with the plaintiffs in the several reliefs claimed by them. He further contended that the trustees or their representatives were not necessary parties to the suit; that defendant 1 managed the properties included in the trust deed on behalf of those interested therein and made payments therefout both to him (defendant 2) and the plaintiffs; and that the bar of limitation could not arise, defendant 1 having all along managed the estate as trustee.

Defendant 3 did not appear.

The suit was originally launched and proceeded with against the three defendants only, but at one of the hearings, which lasted over several days, the Court ruled that the Official Assignee in whom the estate of defendant 2 had become vested owing to his insolvency was a necessary party and that he should be so joined. The Official Assignee was, thereupon, brought on the record as defendant 4 and he supported defendant 2's interest.

Setalvad (with *H. Tyabji*) appeared for plaintiffs.

Scott (Advocate General) with *Lowndes* and *Bahadurji* appeared for defendant 1.

Davar (with *Bhandarkar*) appeared for defendants 2 and 4.

TYABJI, J.:—In this suit plaintiffs Moosabhai Mahomed Sajan and Kajbai his wife sue Yacoob Mahomed Sajan, Gulamalli Mahomed Sajan, Phoolbai, wife of Yacoob Mahomed Sajan, and Mr. Macleod, Official Assignee and assignee of the estate and effects of the 2nd defendant Gulamalli Mahomed Sajan; and they pray that the trust deed mentioned in the plaint and the trusts created therein may be declared valid as such or as a testamentary instrument and may be construed by the Court, and the rights of the plaintiffs and the defendants therein in the events that have happened may be ascertained and declared and have effect given to them; and that in the event of the Court holding that there are valid trusts of the said properties created by the said deed, the trusts of the said deed may be executed and if necessary trustees thereof be appointed by the Court; and that the 1st defendant may be ordered to account for his management

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of the said trust properties; and that a Receiver may be appointed to take charge of the said trust premises and profits of the same; and that in the event of this Court holding that the trust deed and the trusts created therein are invalid as such or as a testamentary instrument, the said trust properties may be partitioned between the 1st plaintiff and the defendants 1 and 2 according to their respective interests as heirs of the said deceased and for that purpose all necessary directions be given and necessary accounts be taken and necessary orders be passed; and for costs and for further and other reliefs.

The facts which led up to this suit are shortly these.

It appears that one Mahomedbhai Sajan, a Bombay Khoja, died on the 6th May, 1883. He left four sons, *viz.* the 1st plaintiff Moosabhai, 1st defendant Yacoob, 2nd defendant Gulamalli, and one Gulam Hussein, since deceased. He also left two daughters Mariambai and Padmabai who are not parties to this suit. He left no widow, his wife having died before his own death. The plaintiff Moosabhai married Kajbai the 2nd plaintiff. Yacoobbhai married Phoolbai the 3rd defendant. Gulamalli became insolvent in 1900; and his estate is now vested in Mr. Macleod, who is now made a defendant, as Official Assignee and assignee of his estate. Gulamalli married on the 27th May, 1880. Gulam Hussein died about 3 years after his father's death unmarried and intestate. The exact age of Gulam Hussein at the time of his father's death or at his own death is a matter in dispute. Mariambai married Fazalbhai on the 27th May, 1880. Padmabai was also married but no details are given in the evidence.

Some years prior to his death Mahomedbhai Sajan executed the deed of trust (Exhibit A), dated the 9th October, 1876. Of this deed he appointed three trustees, *viz.* Allana Visram, Mahomedbhai Virji and Mahomed Rowji. These three trustees were either relations or connections of Mahomedbhai. The trusts of the deed were mainly for the benefit of his sons and daughters and the wives of the sons and his own widow Premabai.

The settlor declared in the deed that each male was to have two shares, and each female to have one share. But Premabai, his widow, was to be considered as a male for the purposes of

this division. It would appear therefore that under the deed Premabai, the widow, would be entitled to two shares, Moosa to two shares, his wife Kajbai to one share, Yacoob to two shares, his wife to one share, Gulamalli to two shares, Gulam Hussein to two shares, Mariambai to one share; there being 13 shares in all. In the event of the death of any of these parties, there are provisions in the will to which I need not refer at this stage.

Mahomedbhai also left a will (Exhibit 2 A) which is dated the 18th November, 1880. Of this will, he appointed the defendant Yacoobbhai *alias* Jaffer his sole executor. By this will he purports to confirm the trust deed of the 9th October, 1876.

Prior to the institution of this suit, the parties were all living in the family house at Nishanpada. The two plaintiffs were in possession of the first floor, and Yacoobbhai was in possession of the ground floor, which he used for his "pehdi" and also of the second floor which he used for his residence. Defendant Gulamalli was in possession of the top floor or "bungli". Gulam Hussein lived and continued to live in the family house up to the time of his death, which was somewhere in 1886.

Plaintiff Moosabhai was receiving from the defendant Yacoobbhai a sum of Rs. 45 a month. This he continued to receive till the month of March, 1901, when in consequence of disputes mainly owing to the schism in the Khoja community—when some Khojas seceded from the party of H. H. the Aga Khan while others continued—Yacoob seceded while other members of the family continued to belong to the party of H. H. the Aga Khan. It seems that owing to these disputes Yacoobbhai discontinued the payment to Moosabhai of the monthly sum of Rs. 45. He also required the plaintiffs to vacate the premises, that is, the first floor of the family house, which the plaintiffs declined to do.

On a demand having been made for the rights of the parties being determined, and Yacoobbhai the first defendant having refused to do so, this suit was filed for the purpose of enforcing the rights of the plaintiffs under the deed.

The plaintiffs' case shortly is this:—The plaintiffs allege that the trust deed of the 9th October, 1876, is valid *per se*, having

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been duly executed and registered. The contention of the plaintiffs and the defendant Gulamalli is that no possession was necessary at all, because this was not (it was argued) a deed of gift but a deed of trust. It was further argued by Mr. Bhandarkar that this case was not governed by the Mahomedan law as the parties were Khojas. The plaintiffs have a second string to their bow, that even if the deed was invalid by reason of want of possession, which was admitted by them, still it was validated and confirmed by the will, and therefore must take effect as a testamentary instrument.

On the part of the 1st defendant Yacoobbhai it was contended that this was in fact a deed of gift and that possession was necessary; and that, secondly, even in cases of trusts, possession is necessary; and thirdly, that the claim of the plaintiffs is barred by the law of limitation, inasmuch as it was argued that the defendant Yacoob had been in adverse possession ever since the death of Mahomedbhai more than 12 years from the institution of the suit. To this it was replied on the part of the plaintiffs and Gulamalli that the defendant Yacoob was an express trustee under the will, and therefore under section 10 of the Limitation Act, no limitation could run in his favour; and secondly, even if he was not express trustee, he was trustee *de son tort* and as such was liable to be treated as express trustee, and that he could not be allowed to plead limitation; and further even if he was allowed to plead limitation, there was no adverse possession, because the plaintiffs argued that their rights had never been in dispute and had all along been admitted; and that the plaintiffs had been in possession, by the receipt of Rs. 45 a month as rent and residence in the family house. It was further contended that as a matter of fact all the brothers were joint in estate and therefore there could be no such thing as adverse possession or exclusion against Moosabhai and Gulamalli.

These were the contentions set up before me during the hearing. The case took many days and very learned and elaborate arguments were addressed to me on both sides.

Two important points put forward are:—1st, as to the question, whether possession was necessary or not. It was not disputed that as a general rule the Mahomedan law requires possession in cases of gift. Possession either actual, symbolical

or constructive is essential. I think this proposition is too elementary and too well established to be called in dispute. This proposition is clearly laid down in page 343 of Wilson's Mahomedan Law. But it was argued that this does not apply to the present case because this is not a case of gift but a case of trust. It was argued that trusts being unknown in the Mahomedan law, the English law must be applied. The proposition came upon me with great surprise, because I am not aware that trusts are unknown in the Mahomedan law. In fact if any system of law enforces and recognizes them it is the Mahomedan law. We find ramifications of trusts throughout almost every branch of Mahomedan law. Therefore in my opinion there is no foundation for the general statement that trusts are unknown to the Mahomedan law. Then why should not possession be quite as necessary in the case of a trust as in the case of a gift? What is this trust deed? It is a deed of gift executed by one man in favour of another without consideration. What is it, but a gift? The only difference being, that in the case of a trust the gift is made through a third party: and in the case of a gift it is made direct to the donee. It was a startling proposition that possession was necessary in the one case and not necessary in the other.

So far as I am concerned, the proposition is not debateable in this Court. Because I have held in the case of *Abdul Cadar* v. *Tajoodin*[1], that possession is necessary in the case of trust as

(1) In the case above referred to, a Mahomedan by a deed of settlement, dated the 30th January, 1897, transferred his immoveable property to four trustees including himself and one of his five sons upon trust, (*a*) to pay the whole of the net rents and profits thereof to the settlor, and upon his death, (*b*) to pay 2 annas in the rupee thereof to his wife for maintenance during her life, (*c*) to pay 2 annas and 4 pies in the rupee to each of his five sons (one of whom was appointed a trustee) during their respective lives and after their respective deaths to their respective wives and their respective children, (*d*) to pay 1 anna and 2 pies in the rupee to each of his two daughters during their respective lives and after their respective deaths to their respective children, and in the absence of their children, their share to go to the settlor's heirs, and (*e*) to allow the settlor's brother and wife to live in the loft of one of the settled properties, without rent until their deaths. The trust deed was registered, but beyond the execution and the registration of the deed nothing further was done. One of the trustees had retired and no one of the remaining trustees

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in the case of direct gifts. I have heard nothing in the course of this lengthy trial which has shaken that conclusion in the slightest degree.

Then it was argued by Mr. Bhandarkar, that in this case the question of possession does not arise, because this is not a case under the Mahomedan law but under the Hindu law. I fail to see what advantage there is in that argument, because the Hindu law requires in the case of gifts possession as much as the Mahomedan law. In both cases possession is necessary, not necessarily direct possession of the premises, but the best possession of which the property is capable at the time. In this case it is admitted that no possession was at any time given by Moosabhai either to the trustees or to any of the *cestuis que trustent*. Therefore inasmuch as no authority has been cited, in support of the proposition that Khojas in cases of gifts are governed by Hindu law, I am not disposed to apply the Hindu law to Khojas more than in decided cases. Further I am of opinion that it makes no difference, whether the Mahomedan law or the Hindu law is applied—possession actual, symbolical, or constructive being absolutely necessary in both cases. I must therefore hold that the deed of gift at the date of its execution and in the life-time of Moosabhai failed as a deed of trust by

took part in the management of the properties. The settlor continued to manage them, recovered the rents and enjoyed them during his life-time precisely as if no deed of settlement had been made. The settlor's wife and one of his daughters predeceased him and he himself died on the 5th October, 1902. Subsequently disputes having arisen between the members of the settlor's family, a question arose as to whether the settlement with respect to the two daughters (defendants 16 and 17) of the predeceased daughter of the settlor was valid. His Lordship (TYABJI, J.) after referring to the provisions of sections 1 and 6 of the Trusts Act (II of 1882) and sections 2, 5 and 129 of the Transfer of Property Act (IV of 1882) in his judgment proceeded :—

"The result, therefore, is that although the Indian Trusts Act does apply to this instrument, because this instrument is not a wakf, yet the Transfer of Property Act expressly preserves for the benefit of Mahomedans all rules relating to the Mahomedan law of gifts. Therefore I come round to the same question as to what is the rule of Mahomedan law in regard to the validity of gifts. Now it is not disputed before me that the Mahomedan law requires that in order to complete a gift, possession is necessary and I have already held that in this case no possession was given to the trustees or donees, therefore it follows logically that the instrument fails as a trust deed *inter vivos*."

reason of no possession having been given either to the *cestuis que trustent* or to any of the trustees.

I now come to the second point, whether the deed was validated by the will. The will refers to the deed in these terms:—

"As to whatever immoveable and moveable property there is belonging to me the whole thereof has been acquired by my own (personal) earnings. I myself am the "Mukhtyar" in respect thereof as long as I am alive. But of the same I have made a "Trust" in respect of four houses for my family. There is no need whatever to write (anything) about the said matter in this will. Those (houses) are trust (property). In accordance with (the conditions of the said trust) the "trustees" of the said trust are to carry on (trust affairs)."

And then he goes on to say: "And I appoint my son Yacoobbhai Mahomedbhai the 'executor' or 'vakil' of this my 'will' or testamentary writing." And then he says that his heirs are not to take objection to the above. Then he further goes on to say that his sons Gulamallibhai and Gulam Husseinbhai are young in age (*i. e.* minors) and appoints Yacoobbhai their guardian in the following terms:—

"They shall therefore live with my executor or vakil (namely) my son Yacoobbhai Mahomedbhai. During that period their expenses shall be defrayed out of the income of the trust (property) and out of the income of their shares of inheritance. As to such household expenditure, the share of each in such expenditure shall be calculated according to the number of men (that is to say) in proportion to the number of men each one may have. And until they attain their age (of majority), that is to say until they attain the age of 22 years my "executor" or "vakil" (namely) my son Yacoobbhai Mahomedbhai shall take care of their respective rights and he shall keep an account of the income of the amounts of their shares of inheritance and of the expenditure. But should these two sons (of mine) or any one of them desire to live separate then my "executor" or "vakil" (*viz.*) my son Yacoobbhai Mahomedbhai shall give to them or him only the income of the trust (property) and the income of the amounts of their shares of inheritance for (their or his) expenses. But he shall not give (them or him) the principal "Punji". But when they attain their age (majority), that is to say when they attain (the age of 22 years) and if they have not fallen into dissolute habits, the said amount of their shares of inheritance shall be given away to my (said) sons who may be of such good conduct. And as to such son (of mine) as may turn out to be of bad conduct, my son Yacoobbhai Mahomedbhai shall make a trust of the amount of his share of inheritance by (investing the same in) immoveable property or in Government (Promissory) Loan (Notes) for his and his family's benefit or maintenance. He has absolute authority in respect thereof."

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It seems to me, therefore, that under the express terms of this will the trust deed becomes part of the will. The testator gives effect to the provisions of the trust deed to the same extent as if he had recapitulated the provisions of the deed in the will itself; and he directs his executors to see that the provisions of the trust deed are carried out. That being so the case of *Bizzey* v. *Flight*(1) seems to me to be directly in point. The head-note there runs as follows:—

> Where a settlement, incomplete as to part of the property comprised in it, is subsequently confirmed by the will of the settlor, the confirmation perfects the settlement, but as a testamentary instrument, so that the doctrines of ademption and lapse apply.
>
> *R. H.* by a voluntary settlement, assigned to trustees several mortgage debts, certain shares in a bank, and some furniture, and directed the trustees to hold the premises and certain consols which had been previously transferred to them, upon trust for herself for life, and then as to part of the trust premises, for specified beneficiaries; and as to the residue, for M. F.
>
> M. F. died in the life-time of the settlor, who in her life-time received some of the mortgage debts (the others being received by the trustees) and died without having duly transferred the bank shares, but having by her will confirmed the settlement. The settlement being valid as to the consols, the mortgage debts received by the trustees, and the furniture, but incomplete as to the mortgage debts received by the settlor, and the bank shares:—
>
> *Held*, that the confirmation could not operate as to the mortgage debts received by the settlor; but that, notwithstanding that the settlement had not been admitted to probate, the confirmation of it by the will, which had been proved, perfected the settlement with regard to the bank shares as a testamentary instrument, and operated as a specified bequest of them; and that the shares therein of *cestuis que trust* under the settlement, who predeceased the settlor, lapsed in favour of the residuary legatee under this will.

Hall V. C. at page 273, in delivering his judgment said:—

"The question is whether the will of *Rebecca Hodges* had to any, and what, extent the effect of confirming the settlement of the 5th of February, 1850. It has been contended that as the settlement was void the confirmation of it by will was wholly inoperative. Some of the moneys on mortgage which were in terms comprised in the settlement were received by the testatrix herself in her life-time, and the bank shares were not duly transferred by her; but although the settlement was thus in-

(1) (1876) 3 Ch. D. 269.

complete, it was not incapable of being confirmed. It was complete as to part of the property it purported to comprise, and the confirmation by will was unquestionably intended to give some further efficacy to it.

"It was competent for *Rebecca Hodges* by a testamentary disposition, to perfect that which was either void or voidable. This is not a case depending upon rigid rules of law; it is a mere question of the intention of the testatrix on the true construction of her will. The settlement was imperfect as to the mortgage moneys received by the testatrix before the date of her will, and the testatrix could not intend to confirm the settlement as to them, but as regards the bank shares, the will might well and should operate. It has been said that the settlement not having been incorporated with the probate of the will, the confirmation of it by will cannot be regarded. I was referred to the case of *Sheldon* v. *Sheldon*[1], but I do not consider the judgment of *Dr. Lushington* in that case an authority to the effect that in no case in which an instrument is not set out at length in the probate of a will, this Court can act upon it as having operation by means of the will.

"The question often arises in the Court of probate whether a particular document shall or shall not be incorporated in the probate of a will by being set out therein. It is often convenient that a document should be so set out. It is, however, I consider substantially a question of practical convenience, and if a will confirms an instrument which is sufficiently identified, and probate passes leaving in the clause containing the confirmation, the instrument must, I consider, be had regard to as if it were set out in the probate."

He further on says:—"This is not a question of election. Election arises when a testator disposes of his own property and at the same time affects to dispose of property which belongs to some one else. This is a mere question of construction and the effect is, that the confirmation of the settlement by the will operates as a specific bequest of the bank shares mentioned in the settlement upon the trusts thereby declared."

(1) (1844) 8 Jur. 877.

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This case is a direct authority for the proposition, that where a document is referred to in a will with a view of confirming it, it is confirmed and takes effect as a testamentary document. Therefore this deed must be given effect to to the same extent as if the provisions had been re-written in the will.

That being so and it not being contended that any of the provisions of the deed are bad in themselves or vicious or irregular or inoperative, the only remaining question is whether the plaintiffs are barred from asserting their rights by the law of limitation.

The settlor Mahomedbhai died on the 6th May, 1883. If Yacoobbhai has been in adverse possession from that date as he asserts and if he can be allowed to plead limitation, it is quite clear that the plaintiffs' suit is barred, because more than 12 years have elapsed. But the plaintiffs' contention is, that, in the first place, Yacoobbhai being an express trustee for a specific purpose no limitation as such in his favour can run. Section 10 of the Limitation Act (XV of 1877) runs as follows:—

"Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property, shall be barred by any length of time."

The question, therefore, is whether the defendant Yacoobbhai is a person in whom this property is vested in trust for any specific purpose. During the argument the expression "express trust" or "express trustee" has been used. I have used it and shall use it as a short expression meaning thereby such an express trust as is contemplated in section 10 of the Limitation Act. The question then is, was this property vested in Yacoobbhai as an express trustee, and if so for what purpose?

Now it seems to me, that he was an express trustee. He was made such by the will, which validated and confirmed the trust deed. It is true the will does not appoint him trustee of the deed but it appoints him executor of the will and directs him to see that the provisions of the trust deed are carried out. The trustees could not take possession of the trust property unless it was given to them by the executor. Various things

would have to be done by the executor to transfer the possession to the trustees. They would have to be put in possession not as trustees under the trust deed, but as trustees reconstituted as such, under the will. Therefore the first and primary trustee under the will was in my opinion Yacoobbhai himself. Further the provision to which I have already referred, show that he was to perform certain duties and functions in regard to the trust estate. He had to look after the interests of his minor brothers Gulamalli and Gulam Hussein till they were 22 years old. He was also to maintain them out of the income of the estate. Therefore he was an "express trustee," so constituted under the will.

But it really does not so much matter if he was not an express trustee under the will, because I am also clearly of opinion that he became an express trustee by his own act, *viz.*, by taking upon himself the administration of the trust property and taking possession of the trust property and by not transferring the trust property to the trustees as he was bound to do under the provisions of the will. In fact the trustees who are now all dead, but who were alive at the time of the testator's death, being relations of the testator seemed to have considered it more convenient to allow the 1st defendant Yacoobbhai to administer the estate, rather than themselves to administer it. Yacoobbhai took possession of the property as the executor and thus it does not lie in his mouth to say that he took possession as a trespasser: and that he is not bound to account as a trustee,—though he was admittedly bound to act in regard to that property in a particular manner. It seems to be established clearly that if express trusts are created and some outside trespasser who has no business to interfere does interfere then he becomes a trustee *de son tort* and as such the Court will make him account as if he were the rightful trustee. It is absurd that any man should assume the administration and the functions of a trustee, and when called upon to account for his administration say that he acted wrongly. He will be always treated as if his acts were lawful and not unlawful. Lewin on Trusts[1], at page 221, para. 24, says:—

(1) 10th Edition.

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"We may add in conclusion, that if a person by mistake or otherwise assume the character of a trustee, when it really does not belong to him, and so becomes a trustee *de son tort*, he may be called to account by the *cestuis que trust* for the moneys he received under colour of the trust."

In *Soar* v. *Ashwell*(1), it was held that a person who was not an express trustee under any deed must still be considered as having been in the position of an express trustee of moneys received by him and that lapse of time did not act as bar to the action. Lord Esher M. R. and Bowen L. J. delivered judgments in this case, which thoroughly support the proposition I have just stated. Then again in *Lyell* v. *Kennedy*(2), it was held, that as to the accumulated rents and profits the defendant had made himself a trustee, and that the action was not barred by the Statutes of Limitation. As to what constitutes an express trustee or specific trustee under the provisions of section 10 of the Limitation Act, I would refer to the case of *Kherodemoney Dossee* v. *Doorgamoney Dossee*(3).

Acting on these authorities I hold that the defendant Yacoobbhai cannot be permitted to plead limitation. First because in my opinion he was an express trustee constituted as such by the will and secondly because he was trustee *de son tort* and therefore liable to account exactly in the same way as if he were an express trustee.

But supposing a different view is taken in this matter, and supposing limitation is allowed in his favour, I would still hold that there was no adverse possession in this case. Throughout the whole period after the death of Mahomedbhai down to the 19th March, 1901, when this dispute arose, the possession of Moosabhai was that of a trustee and in no way adverse. I have already stated in the first place that the plaintiffs have always been in possession of a portion of the trust premises, *viz.*, the first floor, and secondly, Gulamalli has always been in possession (except during the time he was away from Bombay) of a portion of the building, *viz.*, the "bungli," and thirdly, the plaintiff Moosabhai has been receiving a portion of the rents of the trust property, Rs. 45 a month, up to March 1901. I entirely discredit the

(1) (1893) 2 Q. B. 390. (2) (1889) 14 App. Cas. 437.

(3) (1878) 4 Cal. 455.

statement of Yacoobbhai that this sum was paid as a matter of charity. It is ridiculous to urge in this Court, that one brother was acting charitably to another, when what was paid to that brother was what he was entitled to receive under an express instrument executed by their father.

Further the acts of the defendant show that he never considered himself in adverse possession. There are the accounts of the trust kept ever since *Sanvat* 1950 down to the present date, and there must have been—and it is admitted that there were—trust accounts right from the death of the testator. The story told by Yacoobbhai that these trust accounts were opened after the testator's death because the properties were called 'trust property'—is ridiculous. It is obvious that separate accounts were kept because they were trust premises and because he took upon himself the duties and functions of a trustee. Further the absurdity of the story is shown by the fact that the amount of Rs. 45 is entered in the account books exactly in the same terms as similar sums drawn by Yacoob himself. Then again there are separate accounts of the rents and profits of property not forming part of the trust property. It is obvious that in keeping these two separate sets of accounts Yacoobbhai recognized that a portion of the property was trust property and that the other property was the testator's estate to which the other provisions of the will applied.

Again no adverse act or act of exclusive ownership was even pretended by the defendant Yacoobbhai or done by him so as to show that he was in adverse possession. The property remained in the name of the original owner Mahomedbhai right up to 1899, when an application to transfer it into the name of Yacoobbhai was made. All bills were made out in the name of the father Mahomedbhai and not in the name of Yacoobbhai.

As I have said this deed operates not as a trust deed but as a testamentary instrument. It follows that the property sold by the settlor in his life time, *viz.*, the Chinchpogly property in 1886 ceased to be under the operation of the instrument and must go out and must not be treated as a portion of the trust property.

Therefore it follows that the plaintiffs are clearly entitled to the reliefs they seek and I will presently pronounce the decree.

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[His Lordship then referred to some minor and incidental points in regard to which a great deal of evidence was given and passed the following decree.]

I now pronounce the following decree :—

Declare that the deed of trust is confirmed and validated by the will of Mahomedbhai and that it operates as a testamentary instrument from the date of the death of the said Mahomedbhai.

Declare that the trusts and the provisions of this trust deed are valid and operative and that effect should be given to them as if they were comprised in a testamentary instrument.

Declare that the plaintiff Moosabhai is now entitled to two-eighths and his wife to one-eighth, and the first defendant Yacoobbhai to two-eighths and his wife Phoolbai one-eighth and the defendant Macleod as assignee of Gulamalli to the remaining two-eighths of the rents and profits of the trust property according to the deed.

Declare that the defendant Yacoobbhai has been acting as trustee of this trust estate ever since the death of the said Mahomedbhai and that he is liable to account for the same and for the rents and profits of the same in the same way as if he had been sole trustee named in this deed.

Appoint Mr. N. C. Macleod, Receiver of this trust estate without security.

Refer to the Commissioner to take the usual trust accounts and to report who is a fit and proper person to be appointed a trustee of this deed.

Costs : All the costs will be costs in the cause and the first defendant Yacoobbhai must pay his own costs and also the costs of the plaintiff and also the cost of the second and fourth defendants.

All costs in regard to which no specific orders have been made, including the costs of the proposed commission for the examination of the witness Pudmabai, to be costs in the cause to be paid by Yacoobbhai personally and not to be debited to the trust estate.

Attorneys for the plaintiffs : *Messrs. Tyabjee & Co.*

Attorneys for the defendants : *Messrs. Nanu, Hormasji & Co.* and *Messrs. Tyabjee & Co.*

G. B. R.