1889.
August 16.

ANTHO PULLE *v.* CHRISTOFFEL PULLE.

D. C., Colombo, 444.

Trustee and cestui que trust—*Prescription—Ordinance No. 22 of 1871.*

A trustee receiving money on behalf of his *cestui que trust* cannot set up a plea of prescription in bar of the claim of such *cestui que trust.*

THE plaintiff, as executor of the last will and testament of one Lucia Ferdano, deceased, sought to recover from the defendant, as trustee of the said Lucia Ferdano, a certain sum of money, alleging in paragraph 11 of his libel that the defendant had on the 31st October, 1881, filed a final account in testamentary suit No. 3,541 of the District Court of Colombo, wherein he declared that he held in his hands in trust for the said Lucia Ferdano a balance sum of Rs. 8,430; in paragraph 12, that he did not pay this amount to her during her lifetime or to her executor, the plaintiff; in paragraph 14, that he held the said amount in trust for the estate of the said Lucia Ferdano; and in paragraph 15, that the defendant promised to pay the plaintiff the said sum with interest, but failed to do so.

The facts of the case in detail are set forth in the judgment of Mr. Justice Clarence.

Defendant pleaded, *inter alia*, that the cause of action, if any, alleged in paragraph 11 of the libel, and in paragraph 15 thereof, if the alleged promise be in writing, did not accrue within six years before the commencement of this suit (filed on 24th September, 1888); and the cause of action, if any, alleged in paragraphs 12 and 14 of the libel and in paragraph 15 thereof, if the alleged promise be verbal and a cause of action, if any, for moneys had and received to the use either of the plaintiff's testatrix or the plaintiff, did not accrue within three years before the commencement of this suit.

The District Judge upheld the plea of prescription and dismissed plaintiff's action.

On appeal, *Dornhorst* (*Wendt* with him) for appellant.

Layard, S.-G. (*Fisher* with him) for respondent.

Cur. adv. vult.

16th August, 1889. CLARENCE, J.—

In 1868 Anthony Jury and his wife Lucia made a joint will, the provisions of which, so far as is now material, were as follows:—They directed that all their property, movable and immovable, should be under the "power and control of the survivor for life, "and that he or she should possess and enjoy the same with all the "issues and rents and profits thereof." The 14th clause of the will

further directed that the rents and profits of certain properties therein mentioned should be "collected and recovered" by the testator's brother's two sons, Miguel Jury and the defendant, and paid to the testatrix monthly, and the will reserved to her a power, which she never exercised, of appointing some one else in their room in the event of their neglecting their duties. The will further appointed three executors, viz., plaintiff, defendant, and Miguel Jury. The testator died in 1869 leaving the testatrix surviving him, and the will was proved by the three executors. Miguel Jury died in 1872. The testatrix Lucia died in 1873, leaving will by which she gave all her property to the plaintiff and appointed him sole executor. Plaintiff delayed until 1888, and then obtained probate of the will.

He now sues the defendant claiming to be entitled to recover from him a sum of over Rs. 8,000, which he avers to be due from defendant to the estate of Lucia in respect of income of properties subject to the provisions of the joint will. The 7th and 9th paragraphs of the libel are not very explicit in distinguishing between the income of property subject to the provisions of the 14th clause of the joint will, as to which defendant and Miguel Jury were trustees, and subject to the general provisions of the will in favour of Lucia. But the gist of plaintiff's averments seems to be, that between the death of the testator and the death of Lucia the income of the joint estate amounted to Rs. 11,199·25, and deducting sums said to have been received by Lucia during her lifetime, the plaintiff charges that there is a balance due to Lucia's estate of over Rs. 8,000, which he says has never been paid, and is in defendant's hands.

There is a general averment in the 14th paragraph of the libel that the Rs. 11,199·25 above mentioned was received by defendant and Miguel Jury as trustees for Lucia. The libel further alleges that defendant, in an account filed in the "testamentary matter" of the joint will, admitted this indebtedness, and that he promised to pay plaintiff the balance which plaintiff now claims, and that he never did pay.

The defendant, in answer to this libel, sets up defences of *non accrevit infra sex annos* and *non accrevit infra tres annos*, and (as I understand the answer) denies that defendant "collected" the balance sum now claimed, and denies making any admission or promise as alleged.

At the hearing the plaintiff went into the witness-box and made a rather confused statement, intended apparently to suggest that the defendant had in his hands the money now claimed, but by no means distinctly expressing anything.

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CLARENCE, J.

The learned District Judge held that "plaintiff" had proved nothing, and also upheld the defence of prescription. He dismissed the suit with costs.

So far as concerns the defence founded on the Prescription Ordinance, I cannot uphold the judgment. Plaintiff avers that the money which he claims was received by defendant as trustee for Lucia, and if defendant as trustee under the 14th clause of this joint will received income which it was his duty to pay to Lucia, his *cestui que trust*, he cannot, in my opinion, thus set up the Ordinance in bar of the claim of his *cestui que trust*. If authority be needed for this we may find it in *Burdick v. Garrick, L. R. 5, ch. 233*, and *Lake v. Bell, L. R. 34, ch. D. 462*. It was then suggested for the defence that the action should be regarded as an action on account stated, meaning the account already referred to as filed in certain testamentary proceedings. I do not at all, however, view the action as one upon account stated, but as a suit to recover a sum claimed as due by trustee to *cestui que trust*. Reference was also made in the course of argument to the promise alleged as made by defendant, and the case of *Roper v. Holland, A. and E.*, was referred to. I do not think that case touches this case. There may be cases in which the relationship of trustee and *cestui que trust* has come to an end, in which the two parties have come to stand at arm's length, and money which originally accrued under the trust remains in the hands of the whilom trustee in another character than that of trust money. In such a case, no doubt, the statutory term might begin to run from the time when the parties ceased to stand to each other in the character of trustee and *cestui que trust*. I say there may be such cases possibly, but the present is not such a case. The court would certainly watch jealously any proposal to divert the trustee of his fiduciary character, and it is at any rate impossible to hold that the mere fact of a trustee promising to pay his *cestui que trust*, and then breaking his promise, could have any such effect.

The plaintiff's claim therefore has to be considered upon its merits, and as to that I do not dissent from the Chief Justice's proposal to send the case back to the District Court for trial on the merits. If the learned District Judge has expressly recorded that he disbelieved the plaintiff's statements in the witness-box, which are far from being very clear, I certainly, especially in view of the plaintiff's signal delay in taking probate of his testatrix' will, would not have undertaken to disturb the judgment for the defendant; but under the circumstances I am content that the case should go back to the District Court for trial, but I think plaintiff should have costs of this appeal.

BURNSIDE, C.J.— 1889.

BURNSIDE, C.J.

I am unable to agree with the judgment of the learned District Judge. The action is one brought by a *cestui que trust* to recover a sum of money due him under the trust from the trustee. The plaintiff alleges that a certain definite sum is in the defendant's hands, and if he has proved what he alleged, I cannot see any obstacle whatever to his recovering it in this suit. It is true that *cestui que trust* could not sue his trustee at law except in the cases like *Roper v. Holland, 3 A. and E.*, but was compelled to resort to his equitable action of account; but our Courts administer equity as well as law, and I am not aware that in an equitable action a *cestui que trust* could not recover if he alleged, and was able to prove an exact sum due to him without the taking of any accounts. Upon the plea of prescription, the defendant must fail. No proposition is better established than that prescription does not run between trustee and *cestui que trust.* But upon the main issue between the plaintiff and defendant, I think the plaintiff has established a *primâ facie* case to recover the specific amount mentioned, Rs. 8,430·88, with interest. The District Judge has said that the plaintiff has proved nothing. If the District Judge means that the plaintiff has given no evidence bearing on the question, then it seems he has overlooked material parts of the plaintiff's evidence. If he means that what the plaintiff has sworn to is of no probative value, he is mistaken. The joint account of the executors of Anthony showed a balance in the hands of both the executors to the amount mentioned. The plaintiff in his evidence says it was the defendant who had it. Now, if this be true, it establishes that that sum had come to the hands of the defendant for his *cestui que trust*, and the plaintiff's right to receive it is clear. As the learned Judge has, however, miscarried on this point and on the issue of prescription, and perhaps the defendant was content to leave the case as the learned Judge had accepted it, I would send the case back in order that the real issue between the parties may be contested.