

[ORIGINAL CIVIL JURISDICTION.]

*Suit No. 175 of 1873, Appeal No. 257.*1875.
January 14.

DAYA'L JAIRA'J Plaintiff and Respondent.

KHATA'V LADHA' and other
defendants (who did not
appeal.) Defendant and Appellant.*Limitation—Act XIV. of 1859—Act IX. of 1871, Sections 1 and 22—
“Instituted”—“Commenced”—Contribution—Partnership—Account.*

Quere:—Whether the word “commenced” in Section 22 of Act IX. of 1871 is equivalent to the word “instituted” in Section 1, and whether Section 1 does not exclude from the operation of the Act all suits instituted before 1st April 1873, even as to defendants added after that date.

Supposing the provisions of Section 22 of Act IX. of 1871 to apply to defendants added by amendment subsequently to 1st April 1873, in a suit instituted before that date, such added defendants will, under the terms of that section, and if that section does not apply, then under a general principle of law, be allowed to reckon the period of limitation on which they rely from the date at which they were added, but the periods of limitation provided by Act IX. of 1871 do not necessarily apply to defendants so added.

The plaintiff and three of the defendants, being four members of a partnership, consisting of seven persons, borrowed, in January and February 1865, on account of the partnership, from the Commercial Finance and Stock Exchange Corporation, two sums of Rs. 1,21,614 and Rs. 1,08,000, for which they gave their joint and several promissory notes, and shortly afterwards two of the partners retired, leaving the plaintiff and the four defendants alone constituting the firm. On 27th September 1865 the plaintiff and first defendant were sentenced to transportation for life, and on 15th April 1867 one of the other defendants became insolvent. On 25th April 1867 the Liquidators of the Commercial Finance and Stock Exchange Corporation obtained a decree against the plaintiff and the three defendants who had joined in the making of the promissory notes for the amount due on their joint and several promissory notes and costs. In March 1868 the immoveable and moveable property of the plaintiff and the moveable property of the first defendant were sold in execution, and the whole of the proceeds of the plaintiff's immoveable property, together with the balance of the proceeds of the moveable properties of the plaintiff and first defendant, after satisfying thereout two prior decrees against them, were applied in part satisfaction of the decree of 25th April 1867, and the moneys so recovered were distributed to the shareholders by the liquidators, who, however, retained in their

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hands such portion as would have been payable in respect of the shares held by the judgment-debtors, and thus the whole decree was satisfied, leaving a balance of Rs. 25,212. The distribution of assets was made on 3rd April 1869, and the final dividend to shareholders other than the judgment debtors paid on 3rd August 1869. The two defendants other than the first and the insolvent took the benefit of Act XXVIII. of 1865, and obtained their discharge in April and December 1869. The plaintiff, therefore, sued the first defendant alone on 18th March 1873, as contributory for the satisfaction of the joint decree, but subsequently, by amendment made on the 6th February 1874, added the other defendants, and prayed for a decree that he was entitled to receive and appropriate the balance of Rs. 25,212, and that the first defendant should pay to the plaintiff the balance of the moneys paid by him in excess of his share in satisfying the decree of 25th April 1867, with interest, after deducting three-fourths of the sum of Rs. 25,212, or that, if necessary, the partnership accounts might be taken, and the plaintiff be paid such sums as might be found to be due to him :

Held—1st.—That the period of limitation as to all the defendants was that provided by Act XIV. of 1859, whether the suit was to be treated as one for a partnership account, or one for contribution of an ascertained sum.

2nd.—That as to the first defendant the period of limitation was to be reckoned back from 18th March 1873.

3rd.—That as to the added defendants the period of limitation was to be reckoned back from 6th February 1874.

4th.—That the giving of the promissory notes was not a partnership transaction so as to debar the plaintiff from a suit for contribution without asking for a general account of the partnership dealings.

5th.—That the first defendant, having by his written statement, pleaded that if a general partnership account were taken, he would be found not to be indebted to the plaintiff in respect of the contribution claimed, could not also plead the Limitation Act as a bar to the taking of such account.

6th.—That the plaintiff's cause of action arose in April 1868, when his property was sold and applied in satisfaction of the joint decree of 25th April 1867, and not on the date of the decree itself.

THIS was an appeal from the decree of Sargent, J. The plaintiff originally sued the respondent alone to recover the sum of Rs. 76,536-7-2, with interest from the 1st March 1868, as money payable by the defendant to the plaintiff for money paid by the plaintiff for the defendant at his request, and for interest on money due from the defendant to the plaintiff, and for money found to be due from the defendant

to the plaintiff on an account stated between them. The plaint was filed on the 18th March 1873, and the particulars of claim annexed to it showed that the amount claimed, Rs. 76,536-7-2, was made up of the item of Rs. 21,212, unpaid contribution payable by the defendant towards the sum of Rs. 2,48,558-8-5 (the amount of a decree in Suit No. 985 of 1866, with interest and costs), and the item of Rs. 55,324-7-2, being the moiety of the excess paid by the plaintiff on account of such decree. The plaintiff, therefore, did not ask for an account, but treating it as unnecessary, sought only for payment by the defendant of an ascertained sum of Rs. 76,536-7-2, as being still due from him as contributory for the satisfaction of a joint decree. The defendant filed a written statement in August 1873, insisting on the Limitation Act as a bar to the suit, alleging that he had already paid all that he was liable to pay, that the accounts of the partnership were still unadjusted, and the other partners or their representatives were necessary parties to the suit, and that an account should be taken, under the direction of the Court, of the partnership dealings and the amounts paid by the plaintiff and defendant respectively in satisfaction of the decree in Suit No. 985 of 1866. The plaint was thereupon amended on the 6th February 1874, under an order of the previous day, by making Henry Gamble, (Assignee in Insolvency of the estate of Dinshá Ardesir Dávar), Bhagwandás Parshotamdás, and Tulsidás Devji, parties defendant. The amended plaint was much extended in the way of statement, many of such statements being to the same effect as those in the written statement, filed in answer to the original plaint, and prayed that it might be decreed that in the events which had happened, the plaintiff was entitled to receive one-fourth of a sum of Rs. 25,212 deposited in the hands of the Accountant General, and forming part of the dividends on certain shares belonging to the partnership, and that the remaining three-fourths might also be received and appropriated by the plaintiff in the manner in the plaint mentioned, that the Accountant General might be ordered to pay the same to the plaintiff, and that the

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At the hearing of the suit, none of the defendants added by amendment appearing, either by counsel or in person, nine issues were framed, of which the first two were :

“ Whether the plaintiff's claim is barred by the Limitation Act,” and “ whether the plaintiff is entitled to an account, as between himself and the first defendant, Khatáv Ladhá, of the partnership transactions referred to in the plaint, supposing the suit to be barred as against the other defendants, viz., Henry Gamble (the Assignee in Insolvency of one Dinshá Ardesir Dávar), Bhagwándás Parshotamdás and Tulsidás Devji.”

By his decree of the same day the learned Judge who heard the suit ordered a reference to the Commissioner to take an account of the dealings and transactions of the partnership in the pleadings mentioned, and reserved further directions and costs until after the report of the Commissioner should have been made. Or, in other words, he found the first issue in favour of the plaintiff and against all the defendants, and reserved his findings on the other issues till after the accounts should be taken.

The defendant, Khatáv Ladhá, appealed against the decree on, in substance, the following grounds : That the claim of the plaintiff to the accounts decreed ought to have been held to be barred by the Limitation Act ; and that, as at any rate, such claim as against the other defendants ought to have been held to be barred, and they were necessary parties to an account as against the defendant Khatáv Ladhá, the plaintiff was not entitled to any account at all of the partnership dealings. The question then for the consideration of the Appellate Court was as to the application to the suit of the Limitation Act.

The appeal was argued before BAYLEY and GREEN, JJ.

Lang and *Inverarity* for the appellant.

Scoble, A. G., and *Latham* for the respondent.

The judgment of the Court was delivered by

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GREEN, J., who, after reviewing the facts stated above, proceeded as follows :—As no evidence was given at the hearing of the suit the facts which we assume as established must be collected from the statements of the plaintiff and written statement, so far as uncontradicted by the other side (and on this footing the learned counsel for the appellant stated in the argument of the appeal that they were willing the matter should be argued), and from certain other admissions, stated to have been made at the hearing below, by the respective counsel who appeared for the parties, and which were repeated at the hearing before us, and we think it desirable to specify those facts which we so assume to be established. In the year 1864 a partnership was formed for the purpose of speculating in shares (whether in shares generally, or only in the shares of the Commercial Finance and Stock Exchange Corporation, is a point in difference between the parties), such partnership consisting of the plaintiff, the defendants Khatáv Ladhá, Tulsidás Devji, and Bhágwándás Parshotamdás, Dinshá Ardesir Dávar, one Robert Taylor, and one Prágji Parshotamdás. Shortly after the formation of the partnership, about the 20th February 1865, Prágji Parshotamdás retired from the partnership, and Robert Taylor made over his share to Dinshá Ardesir Dávar. In January and February 1865, the plaintiff, the defendants Khatáv Ladhá and Tulsidás Devji, and Dinshá Ardesir Dávar (being then Directors of the Commercial Finance and Stock Exchange Corporation) borrowed from the Corporation for and on account of the partnership two sums of Rs. 1,21,614-8-0 and Rs. 1,08,000, and to secure the same gave their joint and several promissory notes, dated respectively 16th January 1865 and 2nd February 1865, and deposited 5,107 shares of the Corporation's own shares, the property of the partnership. On 27th September 1865 the

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plaintiff and the defendant Khatáv Ladhá were tried and convicted at a Criminal Sessions of this Court, and sentenced to transportation for life and to forfeiture of the rents and profits of their immoveable and moveable properties during the period of their transportation under the provisions of the 62nd Section of the Penal Code. In December 1865 the Commercial Finance and Stock Exchange Corporation went into liquidation, and the liquidators afterwards instituted a suit, No. 985 of 1866, against the plaintiff, the defendants Khatáv Ladhá and Tulsidás Devji and Dinshá Ardesir Dávar, to recover the loans of January and February 1865, and in that suit a decree was made against the defendants on 25th April 1867 for the sum of Rs. 2,29,614-8-0, with Rs. 706-8-0 costs and interest on the decree. On 15th April 1867 Dinshá Ardesir Dávar filed his petition in the Insolvent Court, and his estate became vested in the defendant Henry Gamble. The Government having, in the course of the year 1868, waived their rights under the sentence of forfeiture in favour of the creditors of the persons so sentenced, attachments issued against the immoveable and moveable property of the plaintiff, and against the moveable property of the defendant Khatáv Ladhá, respectively, in execution of the decree in Suit No. 985 of 1866, and also in execution of two other decrees, one in Suit No. 965 of 1866 by the Liquidators of the Kutch Financial Association against the plaintiff for about Rs. 20,000, and the other in Suit No. 984 of 1866 by the same plaintiffs against the defendant Khatáv Ladhá for about Rs. 25,448. In March 1868 the immoveable and moveable property of the plaintiff, and the moveable property of the defendant Khatáv Ladhá, were sold by the Sheriff in execution, and realised the amounts following, the immoveable property of the plaintiff Rs. 1,28,750, his moveable property Rs. 10,144-4-5, and the moveable property of the defendant Khatáv Ladhá Rs. 13,109-4-9. The application of the money so realised is by the plaint stated to have been as follows, and the statement, though not admitted, is not denied to be true by the defendant Khatáv Ladhá. The respective proceeds of the moveable properties, viz., Rs. 10,144-4-5 and

Rs. 13,109-4-9, were applied to the extent of Rs. 14,725 in satisfaction of the claims of the Kutch Financial Association under their decrees in Suits Nos. 965 and 984 of 1866, respectively, and the balances of those sums of Rs. 10,144-4-5 and Rs. 13,109-4-9 (viz., Rs. 2,781-14-5 belonging to the plaintiff and Rs. 5,746-10-0 belonging to the defendant Khatáv Ladhá, aggregating Rs. 8,528-8-5), were, together with the sum of Rs. 1,28,750, the proceeds of the immoveable property of the plaintiff, applied in part satisfaction of the claim of the Commercial Finance and Stock Exchange Corporation under their decree in Suit No. 985 of 1866 against the plaintiff, the defendants Khatáv Ladhá and Tulsidás Devji and Dinshá Ardesir Dávar. The order for payment by the Sheriff to the solicitors of the plaintiffs in the suits in which the aforesaid attachments were issued was made on the 28th April 1868. The Liquidators of the Commercial Finance and Stock Exchange Corporation having so recovered the sums of Rs. 1,28,750 and Rs. 8,528-8-5, proceeded to distribute the same to the shareholders, but retaining in their hands such portion as would have been payable in respect of the shares held by the judgment-debtors, namely, the defendants in Suit No. 985 of 1866, and by such retention the whole of the decree in the said suit became satisfied, leaving as a balance (we assume, though it is not expressly so stated,) the sum of Rs. 25,212, stated to be now in deposit with the Accountant General, and to which a portion of the prayer of the amended plaint is directed. This distribution of assets was, it is admitted, made on the 3rd April 1869, the final dividend to shareholders other than the judgment-debtors having been paid on the 3rd August 1869, and in such manner the decree in Suit No. 985 of 1866 was fully satisfied. As for Tulsidás Devji and Bhagwándás Parshotamdás, it is stated by the amended plaint that they had taken the benefit of Act XXVIII. of 1865, and obtained their discharges respectively on the 5th April 1869 and the 11th December 1869, and that the plaintiff is advised that they having included the transactions, the subject-matter of the present suit, in their accounts filed under the said Act, are not liable in respect

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thereof. He has, however, in compliance, we presume, with the contention of the defendant Khatáv Ladhá, in his written statement, made Bhagwándás Parshotamdás and Tulsidás Devji parties defendant. Under the aforesaid circumstances the plaintiff contends that, as nothing can be recovered from the estate of Dinshá Ardesir Dávar, he is entitled to recover from the defendant Khatáv Ladhá the sum of Rs. 76,536-7-2, made up as mentioned in the particulars of demand referred to.

The first question is whether Act XIV. of 1859 or Act IX. of 1871 applies to the suit. So far as the first defendant Khatáv Ladhá is concerned, there is no doubt that the first-named Act applies, and not Act IX. of 1871, as the suit was instituted against him on 18th March 1873, and Section 1 of Act IX. of 1871 provides that Act is not to extend to any suit instituted before 1st April 1873, and it was not disputed that under Act XIV. of 1859 the period of limitation would have been six years. But it was insisted that as the defendants, other than the defendant Khatáv Ladhá, became parties to the suit after 1st April 1873, namely, on 6th February 1874, and that as by virtue of Section 22 of Act IX. of 1871 the suit, so far as they were concerned, was instituted after the 1st April 1873, then that the latter Act applied to them and being a bar to the suit as against them according to the periods of limitation applicable to the case under the last mentioned Act, and they being necessary parties to the suit against the defendant Khatáv Ladhá, the suit could not be maintained against such last mentioned defendant. The section referred to, so far as it is material, is as follows: "When after the institution of a suit a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have commenced when he was so made a party." This section, it is to be observed, does not say the suit as against an added defendant shall, as regards him, be deemed to have been *instituted*, but *commenced* at the time of his so being made a party. Without, however, relying too strongly on this distinction, it seems to us that the reasonable construction of Section 22 is that a defendant added by

amendment is to be allowed to count the period of limitation on which he relies as a bar to the suit (whatever that period of limitation may be) as running not merely down to the time when the suit to which he is added as a defendant was originally instituted, but also down to the time when he is added as a defendant. This, as indeed appears from the case of *Kaj Kishoree Dossee v. Buddun Chunder Shaha (a)*, cited by one of the appellant's counsel, had been held to be the law with reference to Act XIV. of 1859, independently of Act IX. of 1871, and the object of enacting the section in the latter Act was probably to leave no doubt on the point. The section, however, supposing it to apply at all (*i.e.*, supposing Section 1 of Act IX. of 1871 not to exclude the operation of the Act upon all suits instituted before the 1st April 1873, even as to defendants added after that date), does not say that when a defendant has been added the periods of limitation provided by Act IX. of 1871 are to apply; it says nothing expressly as to *what* period of limitation is to apply. The construction of Section 22 of the later Act contended for by the appellant's counsel might, as it appears to us, if adopted, lead to consequences which cannot be supposed to have been intended by the legislature, that inasmuch as by the later Act the periods of limitation are in many cases considerably shorter than those provided by the earlier one, different periods of limitation would be applicable to claims against several persons otherwise jointly liable in respect of the same subject-matter. We were informed, at the hearing of this appeal, that the learned Judge who heard the suit considered that the periods of limitation provided by Act IX. of 1871, and not those provided by Act XIV. of 1859 applied in the case of the added defendants. He considered, however, that under the latter Act also the period of limitation to a suit of the nature of the present one was, as before, six years. We are of opinion that as to all the defendants the period of limitation in a suit of this nature, whether it is to be treated as a suit for a partnership account, or as a suit for contribution of an ascertained sum towards a joint decree, is that

(a) 6 Calc. W. R. 298 Civ. Rul.

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provided by Act XIV. of 1859, viz., six years; that as to the defendant Khatáv Ladhá such period is to be counted back from the 18th March 1873, but that as to the added defendants having regard to Section 22 of Act IX. of 1871, if applicable, and if not, on a principle of law independent of that section, such period is to be counted back from 6th February 1874.

The next point for consideration then is, when did the cause of action arise? With reference to this the contention of the appellant was that the suit could be treated only as one for a partnership account, and that the cause of such suit arose on the dissolution, *ipso facto*, of the partnership upon the conviction and sentence of the plaintiff and the defendant Khatáv Ladhá, on 27th September 1865. We do not, for reasons which will hereafter appear, consider it necessary to decide when the cause of action ought to be deemed to have arisen, had the present been a suit exclusively or primarily for the taking of the partnership account, nor whether the dissolution of the partnership first took place on the occasion of the conviction and sentence of the plaintiff and the defendant Khatáv Ladhá in September 1865, or on the occasion of Dinshá Ardesir Dávar becoming insolvent in April 1867. It was contended that a suit for contribution between partners is not maintainable except in the form of a suit for a general partnership account, and the case of *Sadler v. Nixon (b)* was relied on. This case, as appears from the observations in Lindley on Partnership, where it is mentioned, and from the other cases there cited, has not been considered wholly satisfactory. The general principle, no doubt, is well established where the transaction, in respect of which the right to contribute is sought to be enforced, was a partnership transaction. But was that the case here? At the time the loans were obtained from the Commercial Finance and Stock Exchange Corporation, and at the time the promissory notes were given as security, the partnership consisted of seven persons. The loans, however, were made to,

and the notes given by, four only of those persons, viz., the plaintiff, Dinshá Ardesir Dávar, and the defendants Khatáv Ladhá and Tulsidás Devji. Now *Sedgwick v. Daniell* (c) is a distinct authority that where three persons, being shareholders in a Joint Stock Mining Company (which being unincorporated was, and was treated as, an ordinary partnership), had given a joint and several promissory note to secure moneys advanced to the Company by a third party, and one of the three had paid more than his share, he was entitled to sue for contribution against another of them, notwithstanding that the money was advanced for the purposes of the partnership, and notwithstanding the relationship of partners between the plaintiff and defendant. It was considered by the Court that the promissory note being signed by some only of the shareholders of the Company, must be treated as a transaction separate and apart from the partnership. Bramwell, B., says (d): "But if two or three members of a partnership, not being the whole, think fit to enter into a separate obligation to a third party, upon the security of which he advances money to the partnership, each being liable to pay the whole and bound to indemnify the others against the payment of more than their shares, that cannot be considered as a partnership transaction." We are of opinion that in the present case the loans to the four makers of the promissory notes, though for and on behalf of the partnership, and the giving of the promissory notes, cannot be considered as a partnership transaction in the sense that it cannot be made the subject of a suit for contribution without also asking for a general account. That a suit for recovery of a share of a partnership asset received by one partner after the dissolution of the partnership may be maintainable, even where the right to a general partnership account may have been barred by the Statute of Limitation, is supported by the opinions of at least three of the four learned Lords who took part in the decision of *Knox v. Gye* (e). There a partnership between Gye and Thistlethwaite

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(c) 2 H. and N. 319.

(d) *Id. Ib.*, p. 323.

(e) L. R. 5 Eng. and Ir., App. 656.

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had been dissolved by the death of the latter in December 1854. Some years afterwards (the case states in 1862) a sum of £2,500 was received (under a judgment recovered against one Hughes) by the surviving partner Gye, which would have been part of the partnership assets. A bill was filed in October 1864 by the plaintiff, in the character of executor and legatee of Thistlethwaite, praying for accounts of the partnership from 14th March 1851 to the time of taking the accounts, that the partnership between Gye and Thistlewaite might be directed to be wound up, and the debts of the partnership paid, that an account might be taken of what was due to the plaintiff in respect of his share of a sum of £12,000 (the capital brought in by Thistlethwaite in 1853), including the whole of the judgment-debt due from Hughes and interest, and also of the profits of the partnership between Gye and Thistlethwaite. This bill was dismissed on appeal to the then Lord Chancellor, Lord Chelmsford, on the ground that it was barred by the Statute of Limitations, and his decree was affirmed by the House of Lords, the then Lord Chancellor, Lord Hatherley, who had heard the case originally as Vice Chancellor, dissenting at any rate from the reasons given by Lord Westbury for affirming the decree. Of the four learned Lords who addressed the house, three, viz., Lords Westbury, Colonsay, and Chelmsford, were of opinion that the suit was barred. It is to be observed in the first place that the judgment is based on the words of 19 and 20 Vic., Ch. 97 Section 9, which provides that no action of account, the cause of which arose more than six years before suit, shall be considered as liable to be sued upon after such six years "by reason only of some other matter or claim comprised in the same account having arisen within six years next before the commencement of such action or suit." Lord Westbury appears to have based his decision on this, that the money received from Hughes having been received after the lapse of six years from the dissolution of the partnership by the death of Thistlethwaite in 1854, did not revive the right to an account once taken away by the statute by the lapse of such period of six years. His opi-

nion rather seems to have been that had this sum been received within six years from the dissolution (and this *mutatis mutandis* is the case with regard to the present suit, as the over-payments by the plaintiffs in 1868 were of course within six years from the dissolution of the partnership, whether taking place in 1865 or 1867), the right to an account would have been kept alive. Lords Colonsay and Chelmsford, on the other hand, deal with the case on the footing that the sum recovered from Hughes was received within six years from the death of Thistlethwaite, and hold that the right to an account was nevertheless barred. The Lord Chancellor in dissenting from the views expressed by Lord Westbury, lays down some principles which we consider are very applicable with regard to the present case. He says (*f*):—“ I apprehend that the right view to take of the matter would be this: If the partner who has insisted, and who has a right to insist, upon the benefit of the *Statute of Limitations*, says to the executor of the deceased partner, I am ready to pay you your moiety (that is, if the share should be a moiety,) of those assets which I have received, but I decline to enter into any account that is barred. I concede (as is here done by Mr. Gye) that your testator was once a partner with me. I concede that he was, as my partner, entitled to a share. I concede that I have only received this money by right of the partnership, and that except for the partnership, I could not have received it; conceding that, I am willing to pay you that which is your own, but further than that I will not go; and although I have received this sum and am ready to hand it over to you, holding, as I must, as trustee for you in respect of your interest in the partnership, I will not go back to the partnership accounts, which I say are all settled, and as to which there are no accounts between us. I think Mr. Gye would have a right to say so, but he does not. He says, on the contrary, you are a debtor to me. I believe he says that, and he has a right to say so, I apprehend that it is he who requires the account in order to retain the assets, for he must admit an account to be

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(*f*) *Id. Ib.*, p. 681.

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necessary in order to enable him to retain the assets. That is my view of the case. I confess I have not heard anything that justifies me in abandoning that view beyond a proposition which is to me so novel that I cannot accede to it, namely, that there is no fiduciary relation at all between a surviving partner and the executors of a deceased partner. I cannot accede to that, and not acceding to it, it appears to me that Mr. Gye had only one of two courses open to him, viz., that of handing over the money he had received from Mr. Hughes, or the deceased partner's share of it, to the executors of the deceased partner, assuming that all accounts had been settled up to that period, or to say 'I shall demand an account, and show by an account that the whole of that money is mine.' For anything that appears that might have been the actual result." Lord Colonsay says (g):—"The kind of suit we are now dealing with is a suit for an account of the whole partnership concerns. I do not say that if a sum is unexpectedly recovered after the lapse of six years the executor of the deceased partner, though he has lost the right to sue for an account of the partnership concerns, may not in another kind of suit demand a share of the particular sum so recovered. But I do not think that a suit such as the present suit, demanding an account of the whole partnership concerns, can be brought against the surviving partner after the lapse of more than six years from the period at which he first became liable to be convened in such a suit." And Lord Chelmsford says (h):—"There may be a difficulty in determining what is the right of an executor of a deceased partner where he has allowed the *Statute of Limitations* to run against his claim to an account, and a debt has been recovered by the surviving partner after the six years have elapsed. But this is a difficulty occasioned by his own laches, and I see no reason, if he thinks that his interest in the sum received has not been absorbed by its application to satisfy debts due from the partnership, why he should not have a right to sue for his share in this sum (a very different thing from a suit for an account of all partnership trans-

(g) *Id. Ib.*, p. 678.(h) *Id. Ib.*, p. 687.

actions), the surviving partner being at liberty to defend himself by alleging and proving that the whole of the sum received had been applied, or was applicable, to the payment of partnership liabilities.”

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The present case may be considered as somewhat converse to that suggested by the three learned Lords whose judgments we have cited, viz., the plaintiff, instead of claiming a share of partnership assets received by one partner after a dissolution, the right to an account generally being supposed to be barred, claims to be repaid the excess of the moneys paid by him, under a joint decree against him and three other of the partners in respect of moneys borrowed on account of the partnership, over the amount which the plaintiff was bound to pay as between him and the three co-partners who joined in the notes. His suit, as originally framed, was confined to this object. To a claim so framed the period of six years (the period applicable under Act XIV. of 1859) began to run in April 1868, when the properties of the plaintiff and defendant Khatáv Ladhá were sold and applied in satisfaction of the joint decree of the 25th April 1867 in Suit No. 985 of 1866, and not from the date of the decree itself: *Srimati Bimala Debi v. Srimati Turasundari Debi (i)*, and so had not expired when the suit was commenced against any of the defendants.

It was the defendant Khatáv, Ladhá who first insisted on the general account being taken. Though the plaintiff in his amended plaint does ask for an account, his primary claim is for contribution without an account, and he only asks for an account if it be found necessary. It is the defendant Khatáv Ladhá who insists on the whole partnership account being gone into, and then when granted, relies on the Limitation Act as a bar to such account. He had, it appears to us, two courses, one or other of which he might have pursued, either to pay his share, whatever it might be, of the excess recovered from the plaintiff on foot of the joint judgment, or to say “I allow the plaintiff has paid more

(i) 6 Beng L. R. Appx. 101.

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than his share on account of the judgment alone, but if the whole account were taken I should not be found liable to pay more in respect of that joint judgment than I have already done." He cannot, we think, be allowed to say "I won't pay any further money by way of contribution to an undoubted payment by the plaintiff on account of the joint decree, because if an account were to be taken it would appear that I ought not to be called on to make any further contribution, but I object to such account, as it is barred by the Limitation Act." The alternative for him, we think, is "either pay your contribution without any account, or, if you say an account ought to be taken in *your* interest, waive your objection on the ground of the Limitation Act, and have the account taken." On the grounds, therefore, that the claim as primarily preferred by the plaintiff appears to be justified by the case of *Sedgwick v. Daniell*, and by the opinions, as cited above, expressed by three of the learned Lords who delivered judgment in *Know v. Gye*, and as such claim is not barred as against any of the defendants, and that it is the defendant Khatav Ladhá who insists on the partnership account being taken, and the plaintiff being willing that such partnership account should be taken, and without deciding how the case would have stood had the suit been solely or primarily for a general partnership account, we have come to the conclusion that the appeal must be dismissed, and with costs. •