

possessor of immoveable property before Act IX. of 1871 was passed, inasmuch as neither by express words nor by clear implication does there appear to have been any intention on the part of the Legislature to take away any such right or title, it is unnecessary for us to consider this case with reference to Act XIV. of 1859, or to pronounce any opinion upon the cases which have been cited for the appellant as to that Act.

We must reverse the decrees of the Courts below, and make a decree for the defendant (appellant), with costs of the suit and of both appeals.

### [APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 135 of 1876.*

ABDUL KARIM (PLAINTIFF AND APPELLANT) *v.* MANJI HANSRAJ AND OTHERS  
(DEFENDANTS AND RESPONDENTS).

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*Limitation—Act XIV. of 1859—Act IX. of 1871, Section 22 and Schedule II.,  
Article 60—Evidence—Onus probandi—Proof of payment—Misjoinder.*

On 2nd August 1872, A. K. filed a plaint against M. H. and M. R., in which he alleged that on 1st April 1870 M. R. had given a *hundi* for Rs. 500, for value received, to A. K.; that on 27th March 1871 M. H. purchased this *hundi* from A. K., promising to pay him Rs. 534 for it; that M. H. gave the *hundi* to his brother I. H., for the purpose of obtaining payment of the amount from M. R., and that I. H. subsequently informed A. K. that the *hundi* had been lost. A. K. accordingly prayed that the defendants M. H. and M. R. might be decreed to pay to him Rs. 534 with profit and interest. M. H. denied that he had purchased the *hundi* from A. K., who, he alleged, had given the *hundi* to I. H. for the purpose of getting it cashed. M. R. admitted that he had executed the *hundi*, and had given it to A. K. for Rs. 500. He further alleged that it had been presented to him for payment by I. H., to whom he had paid the amount with interest on 31st March 1871, and he produced the *hundi* with a receipt, purporting to be by I. H., indorsed on it. The trying Judge, after settlement of the issues, on 25th June 1874, added I. H., as a party defendant. I. H. alleged that A. K. had given him the *hundi* for the purpose of getting it cashed, denied the payment by M. R., alleged the indorsement on the *hundi* to be a forgery, and pleaded limitation.

*Held* that the admission by M. R. of the drawing of the *hundi* for value received, laid on him the burden of proving payment, and that, though the possession by M. R. of the *hundi* was a circumstance in his favour, yet, as it did not in itself amount to proof of payment, the *onus probandi* was not thereby shifted to the plaintiff.

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*Held also*, with reference to Section 22 of Act IX. of 1871, that the law of limitation applicable to the suit, so far as I. H. was concerned, was Schedule II, Article 60 of that Act, and that, therefore, if the payment by M. R. to I. H. were not proved to have been made within three years before 25th June 1874, the day on which I. H. was added as a defendant, the suit as against him was barred.

*Dayál Jairáj v. Khatáv Laldá* (12 Bom. H. C. Rep. 97) and *Chinnasami Iyengar v. Gopalacharry* (7 Mad. H. C. Rep. 392) dissented from.

*Quere*—whether suits barred under Act XIV. of 1859 before Act IX. of 1871 came into force, could, by reason of the alteration of the periods of limitation in the latter enactment, be now sustained.

THIS was a special appeal from the decision of A. D. Pollen, Acting Assistant Judge at Ratnágiri, reversing the decree of T. Taylor, 1st Class Subordinate Judge at the same place.

Abdul Karim brought this suit against (1) Manji Hansráj and (2) Muhammad Raisi, and alleged that on the 1st April 1870 he took a *hundi* for Rs. 500 from the second defendant and paid him the money; that, on the 27th March 1871, Manji (the first defendant) purchased the *hundi* from the plaintiff, and promised to pay him Rs. 534 and profit; that Manji gave the *hundi* to his brother Ibráhim for the purpose of realizing it from Muhammad (the second defendant) at Karwar; and that Ibráhim informed the plaintiff that the *hundi* had been lost; the plaintiff, therefore, sued to recover the sum of Rs. 534 with profit and interest. The plaint was filed on the 2nd August 1872. Manji (the first defendant) denied the purchase of the *hundi* from the plaintiff, and said that it had been given by the plaintiff to Ibráhim for the purpose of cashing it, and paying the amount to the plaintiff. Muhammad (the second defendant) answered that he had given the *hundi* to the plaintiff on receiving the value thereof; that it had been presented to him, for payment, by Ibráhim, to whom he paid the money, including interest, on the 31st March 1871; and that he had the *hundi*, with the receipt of payment by Ibráhim indorsed thereon. After the settlement of issues, the Subordinate Judge, Mr. Chintáman Sakharam Chitnis, under Section 73 of Act VIII. of 1859 on 25th June 1874, made Ibráhim Hansraj a co-defendant in the suit. No objection was made to this either by Ibráhim himself or by either of the other defendants. The new defendant answered that the plaintiff had given him the *hundi*, and request-

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ed him to cash it, and to pay him the money, if recovered. He denied that Muhammad (the second defendant) paid him the amount of the *hundi*, and charged the indorsement of payment on it to be a fabrication. He also pleaded limitation. The Subordinate Judge then amended the issues, one of which raised the question of limitation as against Ibráhim (the third defendant), and on taking evidence on them held that Manji and Ibráhim (the first and third defendants) were liable for the amount claimed by the plaintiff, and that the suit was not barred against Ibráhim (the third defendant). The Subordinate Judge, accordingly, made a decree for the plaintiff for Rs. 534, but dismissed his claim for interest and profit. Against this decision both the plaintiff and the first and third defendants appealed. The Assistant Judge in appeal remanded the case to the Court of first instance to determine whether Manji (the first defendant) received the amount of the *hundi* through his brother Ibráhim (the third defendant). On remand Mr. T. Taylor (who had in the meantime succeeded Mr. Chintaman Sakharam Chitnis) found that the amount of the *hundi* was not recovered by Manji (the first defendant) through his brother Ibráhim (the third defendant), and expressed his opinion that Muhammad (the second defendant) had obtained possession of the *hundi* from Ibráhim (the third defendant) by some foul means; and that the receipt by Ibráhim (the third defendant) indorsed on the *hundi* had been fabricated. On the return of the proceedings the Assistant Judge held that the plaintiff did not give the *hundi* to Manji (the first defendant) on the understanding that he—Manji—was personally liable for the amount of it to the plaintiff; that the claim was barred against Ibráhim (the third defendant) under Act IX. of 1871, Section 22; that the plaintiff could claim nothing from Muhammad (the second defendant), because he—Muhammad—produced the *hundi* with satisfaction indorsed on it, and the plaintiff had failed to prove, as he was bound to do, that Muhammad (the second defendant) had obtained the *hundi* by theft, or that he had forged the indorsement thereon. The Assistant Judge, accordingly, reversed the decree of the first Court, and rejected the plaintiff's claim, as against all the three defendants. He seemed to think that there was a mis-joinder of the defendants in the case, and that the possession of the *hundi* by Muhammad (the second defend-

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ant) with the indorsement of satisfaction thereon was a suspicious circumstance.

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The special appeal was argued before WESTROPP, C.J., and NA'NA'BHA'I HARIDA'S, J.

*Pandurang Balibhadra* for the appellant :—The Assistant Judge was wrong in placing upon the plaintiff the burden of proving that Muhammad (the second defendant) had obtained the *hundi* by theft, and that he had forged the indorsement on it. Muhammad has distinctly admitted that he gave the *hundi* to the plaintiff on receipt of the value ; and that when it was presented to him by Ibráhim he paid the money and got the *hundi* back with the receipt indorsed on it by Ibráhim. After these admissions he was bound to prove the alleged payment and the *bond fide* receipt of the *hundi* from Ibráhim. The point of limitation raised in the present case is similar to that decided by Bayley and Green, JJ., on the Original Side of this Court in *Daryál Jairáj v. Khataw Ladha* <sup>(1)</sup>. No objection was taken to the joinder of all the defendants in the present suit, and one or other of them being liable to pay the amount of the *hundi* to the plaintiff, the Assistant Judge ought to have ascertained which of them was to pay.

*Shieshunkar Govindram*, for the first and third respondents, relied upon Section 22 of Act IX. of 1871, and contended that, as expressly provided therein, the suit must be regarded as having commenced against Ibráhim (the third defendant) on the 23rd June 1874.

WESTROPP, C. J. :—The Assistant Judge having found, as a fact, that the first defendant Manji did not receive the *hundi* from the plaintiff, or undertake the collection of its proceeds for him, this Court is bound by that finding, and must, so far as the decree of the Assistant Judge relates to the liability of the first defendant, affirm the same with costs.

As the second defendant Muhmamad Raisi has not, nor has either of the other defendants, made any objection in the Courts below on the ground that he (Muhammad Raisi) ought not to have been joined as a co-defendant with the first and third defend-

(1) 12 Bom. H. C. Rep. 97

ants; we must consider this case on its merits as against him. He admitted that in consideration of Rs. 500 received by him from the plaintiff, he (Muhammad Raisi) drew the *hundi*; hence it became necessary for him to discharge himself from the liability consequent upon that act. He attempted to do so by pleading payment of it to the third defendant, Ibráhim Hansráj. That defence subjected the second defendant (Muhammad Raisi) to the task of proving that he did pay to Ibráhim Hansráj the amount due upon the *hundi*. No burden whatever properly lay upon the plaintiff; the whole weight of proof of payment, and consequently of the genuineness of the receipt, was imposed by law upon the second defendant, who alleged the payment, and relied upon the receipt which he had produced. Yet the Assistant Judge has most distinctly shifted the *onus* to the plaintiff's shoulders, and has required him to prove that the receipt indorsed on the *hundi* was a forgery, and that the second defendant was guilty of theft. No doubt, the possession of the *hundi* by the second defendant was a circumstance in his favour, but that circumstance did not in itself amount to proof of payment, nor absolve him from the necessity of proving that he paid the amount of the *hundi* to the third defendant. We must, therefore, reverse the decree of the Assistant Judge in so far as it affects the second defendant Muhammad Raisi, and remand the cause for a new trial on the merits. Costs throughout, as between the plaintiff and that defendant, must abide the result of the new trial.

If the second defendant fail to prove payment of the *hundi* to the third defendant, the suit will not be sustainable against the third defendant, and there must be a decree in his favour with costs throughout to be paid to him by the plaintiff, but to be repaid to the plaintiff by the second defendant.

If, on the other hand, the second defendant prove that he did pay the amount of the *hundi* to the third defendant, then it will become necessary for the re-trying Court to determine when that payment was made. If it were not made within three years before the 25th day of June 1874, on which day the third defendant was added as a party to this suit, which was instituted against the first and second defendants on the 2nd of August 1872, we think

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that the suit must be regarded as barred against the third defendant by lapse of time, inasmuch as, in our opinion, the Law of Limitation applicable to it, so far as that defendant is concerned, is Act IX. of 1871, Sch. II., Art. 60.

In opposition to this view, *Dayál Jairáj v. Khatáv Ladhá*<sup>(1)</sup> has been cited. There the suit had been instituted against Khatáv Ladhá before the 1st of April 1873 (when Act IX. of 1871 came into force), but subsequently to that day other defendants, alleged to be jointly liable with him, were made parties, and the Appellate Court held that Act XIV. of 1859, Section 1, Clause 16, was applicable to them as well as to Khatáv Ladhá, and not Act IX. of 1871. Sir Charles Sargent, however, who had heard that cause in the first instance, was of opinion that the period of limitation provided by Act IX. of 1871 and not that provided by Act XIV. of 1859, was applicable to the added defendants. In his opinion we, after consulting our brothers Melvill and Kemball, who hold the same view, concur. The Appellate Court there noticed, without, however, strongly relying on the distinction, the use of the words "instituted" and "commenced" in the 22nd Section of Act IX. of 1871. We see between those words no distinction upon which it would be possible to build an argument. Reading that section with Section 1, Clause (a), and Section 4 of the same Act we think that when to a suit filed against A., before the 1st of April 1873, B. is made a co-defendant subsequently to that day, the suit must be regarded as both instituted and commenced against B. subsequently to that day, and, therefore, that, under Section 4, the period of limitation applicable in such a case as the present, would be that prescribed in the second schedule to Act IX. of 1871, Art. 60, viz., three years before B. was made a party to the suit. We attach no importance to any argument *ab inconvenienti* resting upon the incongruity of applying different periods of limitation to persons jointly liable. That is an inconvenience occasioned solely by the plaintiff's own default in not bringing his suit in the first instance against all proper parties. The *argumentum ab inconvenienti*, although forcible in the law<sup>(2)</sup>, is only applicable in cases of doubt, and not where the legislation is clear<sup>(3)</sup>, as it appears to

12 Bom. H. C. Rep. 97.

(2) Co. Lit. 66a, 97a, 97b.

(3) Per Erle, J., 9 Scott N. R. 969.

us to be in the present instance. Further, we are of opinion, and so are our learned brethren, whom we have consulted, that, even if Section 22 of Act IX. of 1871 had never been passed, the period of limitation, which would have been applicable to the third defendant, would be Art. 60 of Schedule II. of Act IX. of 1871, for the decisions upon Act XIV. of 1859 (which contained no provision similar to Section 22 of Act IX. of 1871), both in Calcutta and here, were to the effect that a suit would not be regarded as instituted or commenced (we care not which phrase be used) against a new defendant until the time at which he was made a party to it, and the effect of Sections 1 and 4 of Act IX. of 1871, combined with that pre-existing law, would be to render the period of limitation applicable to him that which might be prescribed in Schedule II. of that Act, if he were so made a defendant after the 1st of April 1873.

The case of *Chinnasami Iyengar v. Gopalacharry*<sup>(1)</sup> was a suit brought, after the 1st of April 1873, on a promissory note executed while Act XIV. of 1859 was in force, but not barred under that Act on the 1st April 1873 when Act IX. of 1871 came into force, and it was there held that the period of limitation ought to be computed as it would have been under Act XIV. of 1859, (although that Act is silent on the point) from the date of the note<sup>(2)</sup>, and not, as prescribed by Act IX. of 1871, Sch. II., Art. 72, from the time of demand. We have, however, already in *Rámchandra v. Soma* (a recent reference from the Court of Small Causes at Ahmednagar)<sup>(3)</sup> stated our reasons for being unable to concur in that decision.

It was in the Madras case said<sup>(4)</sup> that "the new Act (IX of 1871) differs from the old (Act XIV. of 1859) merely as to the period at which, for the purposes of prescription, the action is to be considered as born. It does not on this point differ in any way either as to the period of prescription itself, or as to the modes by which the period can be extended. A demand by the creditor

(1) 7 Mad. H. C. Rep. 392.

(2) See 2 Mad. H. C. Rep. 472; Byles on Bills 320 (8th edn.) 2 M. & W. 461, 3 Post. & Fin. 149, Cro. Eliz. 548, 12 Mod. 444, Irish T. R. 242, 5 Bom. H. C. R. 150 A. C. J.

(3) See note at end of this case. (4) 7 Mad. H. C. Rep. 394.

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can have no such effect. When it was made, the Statute (Act XIV. of 1859) was already operating upon an action born previously to the new law coming into force, and that law could not, and did not, destroy that action for the purposes of limitation. If the new Act had made a demand a mode of extending the period, the case would be different. It merely alters the time, as to notes executed after its enactment, from which the period is to be reckoned. The point of time had already been fixed by the law applicable to it, and this suit is clearly barred." There is not, however, any exception in Act IX. of 1871 of bills, notes, or other transactions on which the period of limitation had begun to run, but was not completed under other enactments. There is an exception of "suits instituted before the 1st day of April 1873," and two other exceptions not affecting such suits as the present, and, independently of the strong inference arising from those special exceptions that none others were intended, there is the express enactment in Section 4 that "subject to the provisions contained in Sections 5 to 26 inclusive," (none of which affects this case), "every suit instituted, &c., after the period of limitation, prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence;" and that enactment must be coupled with the circumstance (already noticed) that in order to give timely notice of the new law of limitation, although it received the Governor-General's assent on the 24th of March 1871, and came into force generally on the 1st July 1871, its operation as to suits, &c., was deferred until the 1st of April 1873. Such a provision for the suspension of the operation of a new statute indicates that, from the day to which its operation is deferred, the Legislature intended it should regulate the bringing of suits on causes of action which had accrued before that day: *Towler v. Chaterton*<sup>(1)</sup>, *The Queen v. The Leeds and Bradford Railway Company*<sup>(2)</sup>, *Cornill v. Hudson*<sup>(3)</sup>, *Pardo v. Bingham*<sup>(4)</sup>. In the Madras case, no doubt, the effect of the alteration in the law made by Act IX. of 1871 was in favour of the creditor; but in the present case, having regard to the view, taken in this Court, of implied contracts not specifically provided

(1) 6 Bing. 258, 264. (2) 18 Q. B. 343; S. C. 21 L. J. N. S. Mag. Ca. 193.

(3) 8 Ell. & Bl. 429; S. C. 27 L. J. N. S. Q. B. S. (4) L. R. 4 Chanc. 735.

for by Act XIV. of 1859 (*Umedchand Hukamchand v. Sha Bulá-kiddás Lálchand* <sup>(1)</sup>, *Náro Ganesh Dátár v. Muhammad Khán* <sup>(2)</sup>, *Fathá Jetháji Váni v. Shivshankar Bháishankar* <sup>(3)</sup>), the alteration in the law is unfavourable to the creditor, whose claim being for money alleged to have been received to his use by the third defendant, *i.e.*, a claim upon an implied contract not specially provided for by Act XIV. of 1859, and, therefore, falling within the general Clause 16 of Section 1 of that Act, he (the creditor) would, under that clause, have had six years from the time at which the money was received, but under Act IX. of 1871 he has only three years from that event.

In the Madras case (*Chinnasami Iyengar v. Gopalacharya* <sup>(4)</sup>) the period of limitation, fixed by Act XIV. of 1859 for such a suit, not having elapsed before the 1st of April 1873, when Act IX. of 1871 came into force, the latter enactment, by extending the period of limitation, did not deprive the defendant of any right to treat the claim against him as barred. That case, therefore, differed in a most important point from three other cases reported in the same volume: *Vencatachella Mudali v. Sashagherry Rau* <sup>(5)</sup>, *Molakatalla v. Pedda* <sup>(6)</sup>, *Vencataramanier v. Manche Reddy* <sup>(7)</sup>, in all of which the plaintiff's claims had become barred under Act XIV. of 1859 before the 1st of April 1873, and if Act IX. of 1871 had been held applicable to such a state of facts, the result would have been to give such an *ex post facto* construction to that enactment as would have taken away from each defendant a right already acquired under Act XIV. of 1859. But in the Madras case which we first mentioned (*Chinnasami Iyengar v. Gopalacharya* <sup>(8)</sup>), not only had the right to treat the claim as barred not been acquired under Act XIV. of 1859 on the 1st of April 1873, but that Act stood unconditionally repealed upon that day by Act IX. of 1871. It is, indeed, in a certain sense, true, that when once time has commenced to run under a law of limitation, it cannot be stopped. But that rule is dependent on the continuance in force of the enactment under which time has been run-

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(1) 5 Bom. H. C. Rep. 16 O. C. J. (2) 9 Bom. H. C. Rep. 280.

(3) Sp. Ap. 129 of 1875, decided 1st August 1876.

(4) 7 Mad. H. C. Rep. 392. (5) 7 Mad. H. C. Rep. 283. (6) *Ibid.* 288.(7) *Ibid.* 298.

(8) 7 Mad. H. C. Rep. 392.

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ning. If the statutory pressure be removed by the total repeal of the Act, there is nothing to cause time to run against the creditor, unless the Legislature re-enact the old, or substitute some new, rule of limitation. This latter course, we think, it did adopt for such suits as that of *Chinnasami Iyengar v. Gopalacharya* (1) by the 72nd Article of Schedule II. of Act IX. of 1871. We have said so much as to that case, because the principle of it seems to be that Act IX. of 1871 is not applicable to suits although instituted since the 1st of April 1873, if founded upon causes of action which accrued before that day ; and if we had concurred in that principle, we should have been compelled to hold in this case that if the second defendant Mahomed Raisi made the payment alleged by him to the third defendant at any time within six years before the 25th day of June 1874, upon which day this suit was commenced against him by making him a party thereto, the plaintiff would not be barred from maintaining it. As, however, we think that Act IX. of 1871 is, from the 1st of April 1873, when it came into force, applicable to suits not then barred under previous enactments, we are bound to say that, unless it appear that the alleged payment were made by the second to the third defendant within three years before the 25th June 1874, the suit must be regarded as barred against the third defendant. If the re-trying Court be of opinion that the payment *was* made to the third defendant, but not within the three years just mentioned, there should be such order made by that Court with regard to the costs of this suit and of both appeals as to that Court shall, under such circumstances, seem just.

In *Sitarám Vásudev v. Khanderáv Bálkrishna* (2) it was held in this Court, within the last few days, that a suit instituted since the 1st of April 1873 for a share of immoveable property was barred, inasmuch as the defendant had uninterrupted and exclusive possession of that property for more than thirty years, as well before the commencement of the suit, as before the 1st of April 1873, and that Act IX. of 1871, Sch. II., Art. 127, was inapplicable to the suit. The reasons given were that before that Act came into force the defendant had, by the operation of Reg.

(1) 7 Mad. H. C. Rep. 392.

(2) *Supra*, p. 287.

V. of 1827, Sec. 1, Cl. 1, acquired a right to the property, and that the Legislature had not, in Act IX. of 1871, either by express words or direct implication, shown any intention of taking away that vested right, although it had repealed the Regulation. We regarded Reg. V. of 1827, Sec. 1, Cl. 1, as a prescriptive enactment.

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Whether a suit either as to moveable or immoveable property which had become barred under any of the provisions of Act XIV. of 1859 before Act IX. of 1871 came into force, could, by reason of the alteration of the periods of limitation in the latter enactment, be now sustained, is a point which we have not as yet had occasion to decide, and do not now give any opinion upon. The three Madras cases<sup>(1)</sup> already mentioned are adverse to the maintenance of such suit.

*Note.*—The case of *Ramchandra v. Soma*, mentioned in the judgment reported above, was referred, for the opinion of the High Court, by C. M. Cursetji, Judge of the Court of Small Causes at Ahmednagar, under Act XI. of 1865, Sec. 22, with the following observations :—

“The bond on which the above suit is brought is dated the 31st July 1870, and is made payable on demand. The suit was filed on the 25th January 1876.

“Following the analogous case of *Jeannissa Begam v. Māneikji Karsetji*<sup>(2)</sup> and the case of *Hempammal v. Hanuman*<sup>(3)</sup>, I consider that the period of limitation on the said bond began to run from the date of the bond, and that as the bond was executed before the passing of Act IX. of 1871, Article 58, Schedule II. of the said Act does not apply to it.

“I am accordingly of opinion that the plaintiff’s suit is barred, as not having been brought within three years from the date of the bond sued on.

“In arriving at the above conclusion I have followed the cases recently decided by the High Court of Madras: *Vencatachella Mudali v. Sashagherry Rau*<sup>(4)</sup>, *Molakattalla v. Pedda Narappa*<sup>(5)</sup>, *Vencataramanier v. Manche Reddy*<sup>(6)</sup>, *Chimasa-mi Iyengar v. Gopalacharya*<sup>(7)</sup>. These cases appear to me to be conclusive, and I should not have felt myself justified in referring this case, had it not been for a somewhat conflicting decision at page 487 of Vol. 10, Bombay High Court Reports,<sup>(8)</sup> which leaves the matter in doubt.

(1) 7 Mad. H. C. Rep. 283, 288, & 293.

(2) 7 Bom. H. C. Rep. O. C. J. 36. (3) 2 Mad. H. C. Rep. 472.

(4) 7 Mad. H. C. Rep. 283. (5) *Id. Ib.* 288. (6) *Id. Ib.* 298.

(7) *Id. Ib.* 392. (8) *Mādhavbhāi Shivbhāi v. Fattesing Nathubhāi*.

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"I have, therefore, the honour to submit, for the opinion of the Honourable the High Court, the question as under :—

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"Whether a suit on a bond, payable on demand, but executed long previous to the passing of the present Limitation Act (IX. of 1871), brought more than three years after the date of such bond, is barred."

The reference was considered by WESTROPP, C.J., and NA'NA'BHA'I HARIDA'S, J. and the following was the judgment of the Court :—

The Judge of the Court of Small Causes at Ahmednagar has referred for the opinion of this Court the question whether a suit, instituted upon the 25th of January 1876, upon what he has described as a bond, but which not, as we understand, being under seal in the English manner, we prefer to call a promissory note, dated 31st July 1870 and payable on demand, is to be governed by Act IX. of 1871 or Act XIV. of 1859. The circumstance of chief importance to be noted is that the period of limitation, which under Act XIV. of 1859 commenced to run from the date of the note (1) had not expired upon the 1st day of April 1873, when Act IX. of 1871 came into force with respect to suits, &c., and from which day also Act XIV. of 1859 stood repealed (2).

The learned Judge has referred to 7 Mad. H. C. Rep., pp. 283, 288, and 298; but those three cases are not in point, as in all of them the right of suit had been barred by Act XIV. of 1859 before the 1st of April 1873, when Act IX. of 1871, Parts II. and III., came into force. The defendants in those cases had become entitled, under Act XIV. of 1859, to regard the claims sued upon as barred, and if the Court had held that Act IX. of 1871 had conferred upon the plaintiffs a fresh starting point, it would have given such a retrospective construction to Act IX. of 1871 as would have deprived the defendants of the right to treat the claims as barred—which construction, in the absence of express words or clear implication of a retrospective intent, Courts of Justice avoid—and the High Court of Madras declined in those three cases so to construe the Act. The point there involved does not present itself here, and, therefore, we limit our remarks to distinguishing those cases from the present case, and refrain from giving any opinion upon them. But we should add that *Mádhavbhái v. Fattasing* (3) must not be regarded as opposed to those cases, inasmuch as, although the dates in that case, when now examined, show that the right of suit had been barred before Act IX. of 1871 came into force, that circumstance escaped the attention of the Court, and did not at all enter into its consideration when deciding the case. That case, too, was not argued, there not having been counsel or pleaders retained on either side.

*Chinnasami Iyengar v. Gopalacharya* (4) is in point, but we are unable to concur in that decision. There, as here, the right of action had not been barred when

(1) 12 Mad. Rep. 444; Cro. Eliz. 548; Irish Term Rep. 242; 2 M. & W. 461; 3 F. & F. 149; 2 Mad. H. C. Rep. 472; 5 Bom. H. C. Rep. 150; Byles on Bills 320, 8th Ed.; 6 Beng. L. R. 292.

(2) By the effect of Sec. 1, Cl. a, Sec. 2, and Sch. II. of Act IX. of 1871 combined.

(3) 10 Bom. H. C. Rep. 487. (4) 7 Mad. H. C. Rep. 392.

Act IX. of 1871 came into force on the 1st of April 1873; and although it is true that when once time begins to run under a law of limitation it does not stop, that rule must depend upon the continuance in force of the enactment under which time was running, and if, before the appointed period of limitation is accomplished, the enactment be repealed, there ceases to be any motive force to keep time running under the extinct Act. Again, although in the particular case of notes and bills of exchange payable on demand, the alteration as to the time at which the period of limitation begins to run is favourable to the creditor, yet there are many instances in which the alteration is disadvantageous to him. For instance, according to the rulings of this Court (1), suits on implied contracts, not otherwise specifically provided for by Act XIV. of 1859, were held to fall within the general provision in Clause 16 of Section 1 of that Act, which prescribed the six years' limit, but for many of those (*ex.gr.* money paid for the debtor, money received for the creditor, money due upon an account stated) Act IX. of 1871 prescribes the three years' limit (2). If the claim be in existence before, but not barred when Act IX. of 1871 came into force as to suits (1st April 1873), time having then ceased to run under the repealed Act, we cannot perceive what law of limitation would be applicable to suits brought after that date upon such a cause of action, if it be not Act IX. of 1871. A careful perusal of that Act leads us to the conclusion that it was the intention of the Legislature that Act IX. of 1871 should apply to suits brought after it came into force, upon causes of action which existed before that day (1st April 1873), and on which causes of action the periods of limitation prescribed by Act XIV. of 1859 had not run their full course before that day. There is an exception in Act IX. of 1871, Section 1, Clause *a*, of suits instituted before the 1st of April 1873, but none of suits brought after that day upon causes of action not already barred by previous enactments, and which had accrued before that day—*Exceptio unius est exclusio alterius*. Section 4 expressly enacts that, "subject to the provisions contained in Sections 5 to 26 inclusive (none of which affects this cause), every suit instituted, &c., after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence." The postponement of the operation of Act IX. of 1871, which received the Governor-General's assent on the 24th March 1871, to the 1st of April 1873, which postponement gave to creditors a period of more than two years within which they might bring their suits, upon the pre-existing enactments, and the repeal of these enactments, at the expiration of that period, are, we think, conclusive to show that thenceforth the law of limitation applicable to suits subsequently brought upon causes of action which had accrued previously to the day to which the operation of Act IX. of 1871 stood deferred, and which had not been barred under previous enactments, as well as to suits upon causes of action which accrue afterwards, is Act IX. of 1871. That such is the effect of deferring the operation of a statute is strongly exemplified in *Towler v. Chatterton* (3), where the postponement was much shorter than that in the case of Act IX. of 1871. As will be seen from the report of that case, the Court of Common Pleas there followed previous decisions to the same effect by Hullock, B., and Lord Tenterden, C.J., the parent of the statute. *Towler v. Chatterton* has itself been

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(1) 5 Bom. H. C. Rep. 16 O. C. J.; 9 Bom. H. C. Rep. 230; and many similar unreported cases.

(2) Sch. II., Art. 59, 60, 62.

(3) 6 Bing. 253.

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acted upon recently in *The Queen v. The Leeds and Bradford Railway Co.* (1). Coupling the postponement of the operation of Act IX. of 1871 with the circumstance already noticed, that the construction, which we propose to give it, does not take away any right which parties had acquired, under previous enactments, before Act IX. of 1871 came into force (2), we think that either Article 58 or 72 of the second schedule of that Act is applicable to this case. Both of those articles provide that, where the money is payable on demand, the period of limitation of three years begins to run when the demand is made. This suit will, therefore, be sustainable, if there has not been a demand made more than three years before the filing of the plaint.

(1) 18 Q. B. 343; S. C. 21 L. J. N. S. Mag. Ca. 193.

(2) See the observations of Lord Hatherley in *Pardo v. Bingham*, L. R. 4 Chanc. 735, explaining *Moon v. Durden*, 2 Exch. 23, and *Jackson v. Wooley*, 8 E. and B. 778, and see *Cornill v. Hudson*, 8 E. & B. 429; S. C. 27 L. J. N. S. Q. B. 8.

## [APPELLATE CRIMINAL JURISDICTION.]

1876.  
 August 21.

REG. v. BHISTA BIN MADANNA.

*Act XXXI. of 1860, Section 32, Clause 6—Fine—Imprisonment—Penal statute—Construction—Sentence.*

Under Act XXXI. of 1860, Section 32, Clause 6, a sentence of fine only, or of imprisonment only, is a legal sentence.

A penal statute should, when its meaning is doubtful, be construed in the manner most favourable to the liberties of the subject, and this is more especially so when the penal enactment is of an exceptional character.

THE accused Bhistá was tried by J. K. Spence, Magistrate, First Class, at Sirsi, in the District of Kanara, under Act XXXI. of 1860, and on the 28th July 1876 was sentenced to pay a fine of Rs. 5, under Section 32, Clause 6 of that Act, for having had in his possession a matchlock without a license. The Magistrate of the district (Mr. A. R. Macdonald) being of opinion that the sentence was illegal, because no imprisonment was awarded, referred the case for the consideration of the High Court.

The case first came before MELVILL and NA'NA'BHA'I HARIDA'S, JJ., and was by them referred to a Full Bench, the learned Judges being of opinion that certain previous decisions of the Court, which were in accordance with the opinion expressed by the Magistrate, ought to be reconsidered. Accordingly the case