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limitation is that a payment to prevent the barring by statute must be an acknowledgment by the person making the payment of his liability, and an admission of the title of the person to whom the payment is made: see *Harlock* v. *Ashberry*(1)

Ghanasham Nilkant Nadkarni, contra.

The Court discharged the rule with costs.

(1) 19 L. R. Ch. Div. 539, reversing Fry, J.'s judgment in 18 Ch. D. 229.

ORIGINAL CIVIL.

Before Mr. Justice Latham,

May 1, 2, 3.

MERWANJI HORMUSJI (PLAINTIFF) v. RUSTOMJI BURJORJI AND NUSSERWANJI ARDESIR WADIA (DEFENDANTS).*

Partnership—Limitation—Suit by representative of a deceased partner for a share of a specific asset of the partnership recovered after the right to a general partnership account is barred.

A suit may be brought by the representative of a deceased partner against the surviving partner of a firm to recover a share in a sum received by the surviving partner in respect of a partnership transaction within the period of limitation, although a suit to take partnership accounts generally would be barred.

H. J., the plaintiff's father, and the defendant R. were partners in the firm of Hormusji and Rustomji which carried on business in China. In the year 1862 the firm of N. K. & Co. was largely indebted to the firm of Hormusji and Rustomji. At the end of that year the latter firm ceased to do business, but no formal dissolution of the partnership ever took place. In 1869 the defendant R. filed a suit (No. 461 of 1869) in the High Court of Bombay in his own name and that of H. J., his former partner, against the firm of N. K. & Co. for an account of the dealings of that firm with the firm of Hormusji and Rustomji, and by a decretal order dated 19th March, 1870, the suit was referred to the Commissioner to take the accounts as prayed for. On the 17th December, 1872, H. J. died at Hongkong intestate. On 22nd February, 1873, the defendant R. assigned to the second defendant W. for Rs. 20,000 the claim of the firm of Hormusji and Rustomji against the firm of N. K. & Co. The plaintiff did not know of this arrangement, and he only became aware of it in 1880. The plaintiff alleged that of the said sum of Rs. 20,000 the second defendant W. paid to the first defendant R. Rs. 10,000 in 1873, and for the remaining Rs. 10,000 gave a promissory note payable in July or August, 1881. The plaintiff took out letters of administration to his father H. J., and brought this suit on 16th July, 1880, claiming a moiety of the Rs. 10,000 already paid by the defendant W. to the first defendant R.

* Suit No. 344 of 1880.

and praying that he might be declared entitled to a moiety of the remaining sum of Rs. 10,000 payable by the defendant W., and that the same might be paid over to him.

The defendant R. alleged that he had assigned the claim against the firm of N. K. & Co. to the defendant W., and had received the consideration for such assignment in February, 1873, and contended that if the plaintiff had ever any claim to any portion of the said money (which he denied) such claim was barred by limitation. He also alleged that he had carried on the Suit No. 461 of 1869 without any assistance from the plaintiff's father H. J., or from the plaintiff, who, although applied to, refused to assist him, and he submitted that under no circumstances was the plaintiff entitled to any of the monies claimed by him without giving credit to the defendant for his (plaintiff's) share of the expense of prosecuting the said suit and for the amount of proper remuneration to the defendant for the time and labour bestowed by him in the said suit. He also claimed that the partnership accounts of the firm of Hormusji and Rustomji should be taken, and alleged that on such accounts being taken a large sum would be found due to him from the partnership. The second defendant W. paid into Court the Rs. 10,000 due on the promissory note above mentioned, and was dismissed from the suit. At the hearing the Judge found that, of the other moiety of the consideration for the assignment of February, 1873, a sum of Rs. 1,000 was paid by the defendant W. to the defendant R. in January 23,1878, and a sum of Rs. 6,000 on September 13, 1879.

Held that the suit was not barred by limitation in respect of the said sums of Rs. 1,600, Rs. 6,000 and Rs. 10,000, and that the plaintiff was entitled to recover a half share of these sums from the defendant R., deducting all sums expended by the defendant in the prosecution of the Suit No. 461 of 1869. no allowance, however, being made to him as remuneration for conducting the suit.

Held, also, that the defendant might deduct the amount (if any) which might be found due to him on taking the partnership accounts, although a separate suit for such account would be barred by limitation.

In this case the plaintiff, who was the son of a deceased partner of the firm of Hormusji and Rustomji alleged to have been dissolved in 1862, sued to recover from the first defendant, as surviving partner, a half share of a sum of money paid by the second defendant to the first defendant in 1873 as the purchase-money of a claim which the firm of Hormusji and Rustomji had against the firm of Nursey Kessowji and Company.

The plaint alleged that, prior to the year 1862, Hormusji Jiwanji, the father of the plaintiff, had been in partnership with the first defendant and had carried on business at Hongkong and at Macao in China under the firm of Hormusji and Rustomji as merchants, brokers and commission agents as partners with equal shares. About the end of the year 1862 the first defendant

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was tried in China on a criminal charge, and was convicted and sentenced to eight years' imprisonment. The plaintiff stated that he believed that after that time the firm carried on no fresh business, but that no formal dissolution of the partnership ever took place.

Prior to the events above stated, the firm had had dealings with Nursey Kessowji and Company, and in respect of those dealings Nursey Kessowji and Company was largely indebted to the firm.

In the year 1869 the first defendant, a part of whose sentence had been remitted, filed a suit (No. 461 of 1869) in the High Court of Bombay in his own name and that of his partner (the plaintiff's father), Hormusji Jiwanji, against the firm of Nursey Kessowji and Company, praying for an account of the dealings between the said firm and the firm of Hormusji and Rustomji. By a decretal order, dated 19th March, 1870, the said suit was referred to the Commissioner to take the accounts as prayed for.

The plaintiff's father, Hormusji Jiwanji, died at Hongkong on the 17th December, 1872, intestate.

On 22nd February, 1873, the first defendant assigned to the second defendant, Nusserwanji Ardesir Wadia, for the sum of Rs. 20,000 (together with certain other claims of the firm) the claim of the said firm of Hormusji and Rustomji against the firm of Nursey Kessowji and Company. The said assignment was made without the knowledge of the plaintiff, who only became aware of it early in 1880. The plaint further alleged that of the said sum of Rs. 20,000 the said Nusserwanji Ardesir Wadia paid Rs. 10,000 to the first defendant in 1878, and that for the remaining Rs. 10,000 a promissory note was given to the first defendant payable in the month of July or August 1880.

The plaintiff took out letters of administration to his father, Hormusji Jiwanji, in July 1880, and then brought this suit, which was filed on the 16th July, 1880, claiming a moiety of the sum of Rs. 10,000 already paid by Nusserwanji Ardesir Wadia to the first defendant, and praying that he might be declared entitled to a moiety of the remaining sum of Rs. 10,000

payable by Nusserwanji Ardesir Wadia, and that the same should be paid over to him.

In his written statement the first defendant denied that he had assigned to the second defendant the claim of the firm of Hormusji and Rustomji against the firm of Nursey Kessowji and Company, but admitted that he had assigned *his own claim* against the said firm to the second defendant, and he alleged that he had received the consideration for such assignment in February, 1873, and submitted that if the plaintiff ever had any claim to any portion of the said monies (which he denied) such claim was barred by limitation. He further stated that he had received from the second defendant a sum of Rs. 6,000 (not Rs. 10,000) and a promissory note for Rs. 10,000.

The concluding paragraphs of the first defendant's written statement were as follows:—

6. "This defendant (without prejudice to the defences hereinbefore raised) says that he filed the said Suit No. 461 of 1869 without any assistance, pecuniary or otherwise, from the plaintiff's father or the plaintiff himself, and this defendant thereafter at great labour and expense to himself and without receiving any assistance, pecuniary or otherwise, from the plaintiff's father or the plaintiff prosecuted the said suit until the date of the assignment hereinbefore mentioned to the second defendant. This defendant was obliged to assign his interest in the said suit in consequence of his being without any means to prosecute the said suit, this defendant having had to pay large sums for his solicitors' and counsel's costs in the said suit. The plaintiff, although frequently applied to by this defendant, always refused to assist this defendant by contributing monies towards the expenses of the said suit, or by helping this defendant to raise money from others. The plaintiff, who is a lawyer's managing clerk, also declined to give any personal help or advice to this defendant in and about the said suit. This defendant submits that under no circumstances is the plaintiff entitled to any of the monies claimed by him without giving credit to the defendant for the plaintiff's share of the expenses of prosecuting the said suit and for the amount of proper remuneration to this defendant

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for the time and labour bestowed by this defendant on the said suit. This defendant will, if necessary, seek to set off the said amounts, and will also, if necessary, ask to have all necessary accounts taken and directions given. This defendant will also contend (as the fact is) that the plaintiff has abandoned all interest or claim in the said suit.

7. "This defendant says that, when he was convicted and sentenced as alleged in the plaint, the plaintiff's father took possession of all the property, assets, books, &c., of the said firm of Hormusji and Rustomji, and appropriated the same to his own use, and neither the plaintiff's father nor the plaintiff have ever accounted to this defendant for the said partnership property or proceeds thereof, nor have the partnership accounts ever been adjusted. This defendant says that, on the accounts being taken, a large sum will be found due to this defendant from the said partnership, and this defendant will contend that under no circumstances is the plaintiff entitled to anything except to have credit in the said account given to him for his share (supposing him to have any) of the monies claimed in this suit.

8. "The share of this defendant in the said partnership was twelve annas, and of the plaintiff's father four annas in the rupee."

The second defendant filed a written statement in which he alleged that the assignment to him of the 22nd February, 1873, was an assignment of the whole claim of the firm of Hormusji and Rustomji against Nursey Kessowji and Company, and not merely an assignment of the first defendant's share therein. The second defendant subsequently paid into Court Rs. 10,000 due on the promissory note above mentioned, and by an order of the Court dated 22nd March, 1882, he was dismissed from the suit.

At the hearing the following issues were raised :—

1. Whether the plaintiff's claim was not barred by limitation ?

2. Whether the plaintiff had not abandoned all interest in and claims to the monies which formed the subject-matter of the Suit No. 461 of 1869 and of the assignment of 23rd February, 1873 ?

3. Whether the first defendant received from the second defendant any and what sum over and above the Rs. 6,000 admitted in his written statement?

4. Whether the plaintiff was entitled to any and what share in the sums received by the first defendant, and paid into Court in respect of the said assignment?

5. Whether the first defendant was not entitled to credit for the sums of money expended by him in and about the prosecution of Suit No. 469 of 1869, and for remuneration to him for the time and labour expended by him in prosecuting the said suit?

6. Whether the defendant was not entitled to have the partnership account of the firm of Hormusji and Rustomji taken under the direction of the Court?

Starling (*Lang* with him) relied on *Knox* v. *Gye* (1) as showing that the plaintiff's claim was not barred by limitation.

Branson (*Inverarity* with him) for the first defendant.—If this suit were brought against the firm it is improperly framed, for it is brought for a share in a specific transaction without claiming a general account: *Dayal Jairaj* v. *Khatav Ladha*(2). The fact that the plaintiff is not a partner, but the representative of a deceased partner, makes no difference. This case also shows that, if plaintiff gets a decree, the defendant is entitled to have the whole of the partnership account taken.

Even assuming that *Knox* v. *Gye* (3) and *Dayal Jairaj* v. *Khatav Ladha* (4) recognize the right of the representative of a deceased partner to sue the surviving partner for a share of a specific asset recovered, although the right to a general partnership account is barred, yet that right (if the plaintiff ever had it) is now barred, as his suit must be for money had and received to his use. The money for the assignment was paid by the second defendant to the first defendant in 1873: Limitation Act XV of 1877, Sch. II, cl. 62. The ignorance of the plaintiff, that the money had been paid, would not in the absence of fraud prevent limitation from running: *Azroal Singh* v. *Lalla Gopee-*

(1) L. R. 5 Eng. & Ir. Ap. 656.
(2) 12 Bom. H. C. Rep. 97.
(3) L. R. 5 Eng. & Ir. Ap. 656.
(4) 12 Bom. H. C. Rep. 97.

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nath (1). The only way in which plaintiff can evade limitation is by alleging a fiduciary relationship on the part of the first defendant, but *Knox* v. *Gye* (2) is against this contention. There would, moreover, have to be an express trust for a specific purpose under the Limitation Act, XV of 1877, sec. 10: *Kherodemoney* v. *Doorgamoney* (3); *Geender Chunder Ghose* v. *Mackintosh* (4); *Saroda Pershad* v. *Brojo Nath* (5).

We contend that *Dayal Jairáj's* (6) case is distinguishable from this. The Limitation Act does not apply to a defendant who sets up his right to an account, but only to the case of a plaintiff. A plaintiff who has neglected to sue within the time allowed cannot by that neglect prevent a defendant in his defence from claiming to have the accounts taken. If this were so, a plaintiff would be permitted to take advantage of his own laches.

LATHAM, J.—The first defendant and Hormusji Jiwáji Metha, the father of the plaintiff, about 1859 were partners in business carried on at Hongkong and Maccao under the name of Hormusji and Rustomji. The business of that firm continued until 1862, when the defendant was convicted by the Criminal Court of Hongkong, apparently on a charge of theft, but the conviction is not in evidence. No business seems to have been done by the firm after this, but the partnership was not formally dissolved. The defendant was discharged from custody, and came to Bombay about 1868, and in 1869 filed a suit (No. 461 of 1869) in the name of himself and his co-partner Hormusji against Kessowji Naik and another to recover monies alleged to be due by the firm of Nursey Kessowji and Company to the Hongkong firm. A decree referring that suit to the Commissioner was made on March 19, 1870. The suit is still pending in the Commissioner's office, and the proceedings in that office have been the subject of appeal to this Court. Hormusji died towards the end of 1872, and on the 22nd of February, 1873, the defendant, the surviving partner and plaintiff in that suit assigned his claims against Nursey Kessowji and Co. as well as those against other specified persons to Nusserwánji Ardesir Wádia for the consideration of Rs. 20,000. The present

(1) 8 Calc. W. R. (Civ. Rul.) 23.
(2) L. R. 5 Eng. & Ir. Ap. 656.
(3) I. L. R. 4 Calc. 455.
(4) I. L. R., 4 Calc. 897.
(5) I. L. R., 5 Calc. 910.
(6) 12 Rom. H. C. Rep. 97.

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suit is brought by the plaintiff as administrator of his father Hormusji to recover a half share of the sum of Rs. 20,000, or of the monies paid under the assignment.

The partnership between the first defendant and Hormusji was dissolved at latest by the latter's death in 1872, and any suit to take the accounts and obtain a share of the profits of that partnership is long since barred: Limitation Act XV of 1877, Sch. II., art. 106. The plaintiff, however, contends that he is entitled to a share of the monies paid under the assignment of 1872, and that a suit in respect of these particular monies is not barred, although a suit to take the general accounts of the partnership would be so. In support of the contention he relies on *Knox* v. *Gye* (1).

I think that the opinions of the majority of the Law Lords in that case do establish that a suit may be brought by the representative of a deceased partner against the surviving partner to recover a share in a sum received by the surviving partner in respect of partnership transactions within the period of limitation, although a suit to take the partnership accounts generally would be barred. Such is the interpretation put on the case by Green, J., in his judgment in *Dayal* v. *Jairáj Khatáv Laáha* (2). (His Lordship read portion of the judgment of Green, J. See 12 Bom. H. C. Rep., pp. 107—111.)

In that case Green, J., extended the principle of those opinions to the case of a suit for contribution to a partnership debt paid by one partner within the period of limitation, and allowed a surviving partner to sue as plaintiff. That decision was overruled on a minor point as to the effect of the Limitation Act of 1871 in *Abdul Karim* v. *Mánji Hansráj* (3), but the principles laid down on the point now at issue are not affected by the later case. I think that Lord Westbury would probably have dissented from this view (4), and it was he who moved the judgment of the House in *Knox* v. *Gye*: nevertheless the opinions of majority of the Law Lords appear clearly to be the other way.

(1) L. R. 5 Eng. & Ir. Ap. 656.
(2) 12 Bom. H. C. Rep. 97.
(3) I. L. R. 1 Bom. 295.
(4) L. R. 5 Eng. & Ir. Ap. 673—676.

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It seems strange that no relief was given to the plaintiff in that suit in respect of the sum of Rs. 2,500 by the receipt of which these opinions were suggested. I can only suppose that the pleadings in that case must have accounted for this, but the report does not enable me to find a satisfactory explanation.

The main question, therefore, is, was the amount received by the defendant under the assignment of February 22, 1873, or any and what part thereof, received at such a time or times that the present suit in respect thereof instituted on July 23, 1880, is not barred by limitation ? It is admitted by Mr. Starling that his client cannot claim the benefit of section 10 of the Limitation Act XV of 1877, and I think that the admission is clearly right. But he claims the benefit of section 18 of that Act, on the ground that the plaintiff has by the first defendant's fraud been kept from the knowledge of his right. I cannot accede to this argument. I see nothing in plaintiff's evidence to show misrepresentation by the defendant. I am not going to attempt to define what fraud would suffice to satisfy that section, nor do I say that there may not be silence under such circumstances as itself to be fraud within its meaning ; but I see none such here. Moreover, diligence is required of a plaintiff who claims the benefit of that provision : *Willis* v. *Lord Howe*(1); and when I find the plaintiff, a solicitor's clerk, professing ignorance of the assignment till nearly three years after it was filed in the Commissioner's office, I cannot credit him with diligence.

The real point, then, is, what was the date on which the consideration for the assignment was received ? The first defendant alleges that the consideration of Rs. 20,000, mentioned in the assignment of February 22, 1873, was paid on that date in the presence of the late Mr. Arthur Peile, who attested the receipt for that sum indorsed on the deed of assignment. He says that, a few days later, he deposited Rs. 19,000 out of the Rs. 20,000 with Nusserwanji Ardesir Wadia, and that he subsequently brought Suit No. 506 of 1878 against Nusserwanji Ardesir Wadia to recover the balance of that deposit after deducting some trifling payments. It was to settle that suit

(1) 29 W. R. 70.

that Wadia on September 13, 1879, paid defendant Rs. 6,000 and gave him the promissiory note for Rs. 10,000, the amount of which has been now paid into Court. The defendant contends, therefore, that limitation runs from February 22, 1873. But I am not satisfied with the evidence of payment on that date. The defendant comes into Court with a stain on his character for honesty, and gives his evidence with a volubility on favourable and a collapse of memory on unfavourable points which does not incline me to accept his statements on points where he is uncorroborated. Mr. Peile's signature shows that the receipt of the consideration was acknowledged in his presence, but I do not think it fair to attach further weight to it in the absence of any specification in the receipt as to how the money was paid. The defendant says the money was paid in two cheques, one on the Oriental, the other on the Mercantile Bank, the amounts of which he cannot fix, that he cashed these cheques, and a few days after returned Rs. 19,000, part of the proceeds to Wadia. Wadia has not been called to corroborate this statement, nor have the cheques or any evidence from the banks been produced. When I refer to the proceedings in Suit 506 of 1878, I can see a remarkable change in defendant's attitude after Wadia had acknowledged this deposit by his affidavit of September 1, 1877. I cannot help suspecting that that affidavit was a manœuvre in the campaign between Wadia and Kessowji Naik of which the defendant took a skilful advantage. Be this as it may, I am by no means satisfied that the Rs. 20,000 was paid at all on February 22, 1873; but without deciding on this, when I have regard to the return of the Rs. 19,000 and the subsequent proceedings, I am satisfied that if any money passed from Wadia to the first defendant it was a mere jugglery, and that the only real payment on that date was Rs. 1,000. The real dates of the payments by Wadia to the defendant before September 13, 1879, I take from exhibit C to defendant's plaint in Suit No. 506 of 1878, exhibit No. 2 in this suit; and the result is that the present suit is not barred in respect of Rs. 1,000 paid on January 23, 1878, Rs. 6,000 paid on September 13, 1879, and Rs. 10,000 paid into Court by Wadia in this suit.

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The defendant next contends that the plaintiff has abandoned all interest in Suit No. 461 of 1869 and the assignment of February 22, 1873. This contention may be very shortly dealt with. The defendant's own evidence, if implicitly believed, does not show such abandonment. His application to the plaintiff in 1873 for loans to carry on the suit was made to a wrong person, as at that time Hormusji was alive. The conversation on the point after the assignment as reported by the defendant is full of defendant's allegations why he should have the whole of the consideration money, but the report shows that the plaintiff so far from abandoning asserted his right to a share of that consideration. Further, for the reasons above given, I am not disposed to accept the defendant's evidence on these matters with implicit confidence.

I have next to consider in what shares the plaintiff, as his father's representative, and the defendant are entitled to the amount above mentioned. Plaintiff says that his father told him at Hongkong at the time of entrusting him with the partnership accounts that the shares were equal, and Hongkong witnesses have been called whose evidence may be received to the extent that they know nothing to displace the ordinary presumption to that effect. The defendant stated that he had a twelve-annas' share in consideration of his influence and of his providing the partnership funds. I have already said that I was not favourably impressed with the plaintiff's evidence; nor does his previous income, as a servant, of Rs. 25 a month make his possession of influence or his superiority of capital probable. I cannot accept his evidence as displacing the ordinary presumption embodied in the Contract Act, section 253, cl. (2), and I hold the shares equal.

Next comes the question, what deductions the defendant is entitled to make from this amount? He is clearly entitled to deduct therefrom all sums expended by him in the prosecution of the suit, and I see no reason for limiting these sums to those expended before 1870. The arrangement of that year was superseded by the assignment of 1873; it is, of course, for him to prove the amount so expended. I cannot allow him any

remuneration for conducting the suit; no authority has been cited in support of such a claim, and until late, *i. e.* 1872, he was plainly acting as a partner on behalf of the firm, and the claim is excluded by Contract Act, sec. 253, cl. (4). After that date Wadia seems to have been really conducting the suit.

A more difficult question is, can defendant deduct the amount (if any) which may be found due to him on taking the partnership accounts, a suit in respect of which is admittedly barred? I think he can, on the authority of the same cases which establish plaintiff's right to maintain the suit. I think that Lord Westbury would have denied the right to this deduction, but then he would have denied the plaintiff's right to maintain the suit. Lord Hatherley expressly says that such a defence is admissible: *Knox* v. *Gye* (1). Lord Colonsay passes over the point *sub silentio,* and Lord Chelmsford says (p. 687) that "the surviving partner may 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." He does not define what liabilities, but I see no reason why they should not be explained in Lord Hatherley's words. The same view was taken by Green, J., in *Dayal Jairaj* v. *Khatav Ladha*(2) and the defence might be possibly considered less appropriate in such a case than in the present. I may add that the rule in *Clayton's Case*(3) as to the appropriation of payments seems to me not without bearing on this question, though not directly in point. Here, again, the burden of proof will be on defendant to establish that there was a debt due to him from the partnership and its amount. From the evidence given in the case I apprehend that it will be impossible for him to establish this; nor indeed do I believe that the affirmative of any matter relating to the accounts of the partnership can now be proved. I feel, however, bound by authority to allow him the opportunity, if he desires it, of making this defence; and I am the less loth to do so, as there is money enough in Court to provide for plaintiff's half share, even if no deduction be proved.

(1) L. R. 5. Eng. & Ir. Ap. 656. (2) 12 Bom. H. C. Rep. 111.

(3) 1 Mer. 1, Tudor's Lead, Cas.