ORIGINAL CIVIL.

Before the Honourable Chief Justice Farran and Mr. Justice Starling.

1895. *July* 30.

RIVETT-CARNAC, ADMINISTRATOR GENERAL OF BOMBAY (ORIGINAL PLAINTIFF), APPELLANT, *v.* GOCULDA'S SOBHANMULL, BHUGWA'NDA'S MITHA'RA'M AND LIMJI NAVROJI BA'NA'JI (ORIGINAL DEFENDANTS), RESPONDENTS.*

Partnership—Death of partner—Subsequent recovery of asset by surviving partner —Suit by administrator of deceased partner against surviving partner for recovered assets—Suit for partnership account—Limitation Act (XV of 1877), *Secs.* 7 *and* 17*—Jurisdiction.*

In 1889 one Hemábái, a widow and a partner in a firm carrying on business in partnership with two persons, *viz.* Goculdás and Bhugwándás (defendants Nos. 1 and 2), in Sind and at Behrin in the Persian Gulf, died, and the partnership was then dissolved. She had no children, but it was alleged that she had adopted one Purshotam, the brother of the second defendant. On the 13th February, 1890, the guardian of one Kissondás, a minor (her husband's nephew), applied to the High Court of Bombay for letters of administration to her estate, alleging that Kissondás was her heir and next of kin. A *caveat* was filed by her father and others, in which they denied that Kissondás was her heir, and alleged that Purshotam had performed her funeral ceremonies. The matter came on as a suit on the 19th February, 1894, when an order was made, without prejudice to any of the questions raised by the issues, dismissing the application and ordering letters of administration to Hemábái's estate to issue to the Administrator General of Bombay. Letters of administration were accordingly granted to him on the 30th March, 1894.

In the meantime, however, *viz.*, on the 12th April, 1893, Bhugwándás (defendant No. 2) had filed three suits in the High Court of Bombay, in the name of himself and Goculdás (defendant No. 1), as surviving partners of Hemábái's firm, to recover certain debts due to that firm. Disputes subsequently arose between Bhugwándás and Goculdás, and by a consent order of the 22nd July, 1893, it was ordered that any moneys recovered in the said three suits should be paid over to a receiver (defendant No. 3), to be held by him until further order. On the 1st August, 1893, consent decrees were passed in the above three suits for a total sum of Rs. 28,335, which was forthwith handed over to the receiver.

On the 22nd April, 1894, this suit was filed by the Administrator General of Bombay as administrator of Hemábái appointed as above stated. He claimed to recover the whole sum paid to the receiver, alleging that the first and second defendants as her partners were largely indebted to the firm, and that the money really belonged to her estate. He prayed that the receiver might be directed to pay over the money to him, and that, if necessary, the partnership accounts should be taken. The second defendant (*inter alia*) pleaded that the suit was one for partnership accounts, and was barred by limitation, and also that the High Court of Bombay had no jurisdiction to try it.

* Suit No. 210 of 1894; Appeal No. 867.

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Held, that the Court had jurisdiction to hear the suit. The cause of action alleged was that the second defendant was endeavouring, under cloak of his position as surviving partner, to get into his hands a sum of money within the jurisdiction of the Court, with a view to deprive the representatives of his deceased partner of it, and to employ it for his own purposes. That was, at all events, part of the cause of action, and leave to sue had been obtained under clause 12 of the Letters Patent, 1865.

Held, also, that section 17 of the Limitation Act (XV of 1877) applied, and that under its provisions the suit was not barred.

SUIT by the plaintiff as administrator of the estate and effects of one Hemábái to recover certain moneys in the hands of the third defendant as receiver which were claimed by the second defendant.

Hemábái died on the 1st September, 1889. She was the widow of one Hamanmull Rámdássáni, who in his lifetime had carried on business in partnership with the first defendant (Goculdás) at Karáchi in Sind and in the Persian Gulf. He died in 1884, and his widow and heiress, Hemábái, then carried on the business with Goculdás in the name of Hamanmull and Goculdas.

Hamanmull had left a nephew (his brother's son), named Kissondás, who was a minor. His guardian alleged that he (Kissondás) was heir to Hamanmull, and as such entitled to his property. The matter was referred to arbitration, with the result that a sum of money was paid over for the benefit of Kissondás, and a release was executed by his guardian which declared that the rest of the estate was "the sole property of Hemábái and her heirs."

On the 7th August, 1889, a new firm was constituted, and the second defendant, Bhugwándás (Hemábái's nephew), was admitted a partner. It was to be carried on in the names of Hamanmull, Goculdás and Bhugwándás. A partnership agreement was drawn up and signed in Sind by Hemábái, Goculdás and Bhugwándás (defendants Nos. 1 and 2). The first two clauses were as follows:—

"1. This partnership writing we, the undersigned 3 persons, have made amongst ourselves; the particulars thereof of the names are as follows:—1, Mother Hemábái Punj Tirathdássáni, *seth* of the firm; 2, Bhai Goculdás Sobhanmuláni; 3, Bhai Bhugwándás Mitharámáni,—in all three persons.

"2. The original firm which was carried on at Behrin in the names of Punj Hamanmull Punj Rámdássáni (and) Bhai Goculdás Sobhanmulláni, is discontinued from this day's date, and the accounts, books (and) papers are cleared (? made up). On the other hand, now from this day's date the firm at Behrin will be carried on in the names of Punj Hamanmull Punj Rámdássáni, Bhai Goculdás Sobhanmulláni and Bhai Bhugwándás Mitháráméni for the up-country and local (? business)."

The agreement declared the shares of the parties and provided that Hemábái was to give Rs. 2,100 to the firm as capital, &c. The firm carried on business in Sind and in the Persian Gulf.

In less than a month after this agreement was signed, *viz.*, on 1st September, 1889, Hemábái died and the partnership was dissolved.

Hemábái had no children. On the 13th February, 1890, Tulsábái, the mother of Kissondás, as his guardian applied to the High Court of Bombay for letters of administration to Hemábái's estate. She claimed that Kissondás was Hemábái's heir and next of kin.

To this application the second defendant, Bhugwándás (Hemábái's nephew) and two others (Hemábái's father and another nephew) filed a *caveat*. They denied that Kissondás was Hemábái's heir and next of kin, and alleged that her funeral ceremonies had been performed by one Purshotam Mitháram, the brother of Bhugwándás (defendant No. 2), who (it was stated at the hearing) had been adopted by her. They denied that Kissondás had any claim to the estate, and alleged that Hemábái had left a will. The matter was then duly filed as a suit, and it came on for hearing on the 19th February, 1894, before Bayley, J., who made an order "*without prejudice to any of the questions raised by the issues*" dismissing Tulsábái's application and ordering letters of administration to Hemábái's estate to issue to the Administrator General of Bombay. Letters of administration were accordingly granted to him on the 30th March, 1894.

In the meantime, *viz.*, on the 12th April, 1893, Bhugwándás (defendant No. 2) had filed three suits in the High Court of Bombay (Nos. 187, 188 and 189 of 1893) in the name of himself and Goculdás (defendant No. 1) as surviving partners in the firm established under the agreement of the 7th August, 1889,

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to recover debts due to that firm. Disputes having subsequently arisen between them, Goculdás on the 29th June, 1893, presented a petition, alleging that Bhugwandás excluded him from taking part in the proceedings and was endeavouring to secure for himself the sums claimed in these suits. He further alleged that the deceased partner Hemábái had the largest interest in the assets of the firm, and that on accounts being taken, Bhugwándás would be found largely indebted to the firm. By a consent order, dated the 22nd July, 1893, it was ordered that any sums which might be recovered in the said three suits should be paid over to Limji Navroji Bánáji (defendant No. 3) as receiver, to be held by him until the further order of the Court.

On the 1st August, 1893, consent decrees were passed in the above three suits for a total sum of Rs. 28,335, which was forthwith handed over to the receiver (defendant No. 3).

On the 22nd April, 1894, this suit was filed by the Administrator General of Bombay as administrator of Hemábái appointed as above stated. He claimed to recover the whole of the moneys in the hands of the receiver (defendant No. 3). The grounds of his claim are set forth in the following paragraphs of the plaint:—

"3. The said Hemábái died on or about the 1st September, 1889. At the time of her death the said first and second defendants were each indebted to the partnership, and had nothing to receive therefrom, as will be found on taking the accounts thereof if the same be found necessary. The said partnership was dissolved by the death of the said Hemábái."

"6. The plaintiff claims that inasmuch as the first and second defendants have nothing to receive, but on the contrary have to contribute to the said partnership, he (the plaintiff) is the person entitled to receive the said moneys now in the said receiver's hands. The plaintiff is apprehensive that, unless restrained, the first and second defendants may obtain possession of the said moneys from the said receiver in the said suits, and that the same may be lost to the estate of the said Hemábái."

The prayer of the plaint was as follows:—

"A. That it may be declared that the said moneys in the hands of the said receiver, the third defendant, belong to the estate of the said Hemábái, and that the plaintiff is entitled to the same, and that the third defendant may be directed to hand over the the same (after making all proper deductions therefrom) to the plaintiff.

"B. That if necessary for the purposes of this suit the account of the said partnership between Hemábái and the first and second defendants may be taken by and under the directions of this Honourable Court.

"C. That the first and second defendants may be restrained by this Honourable Court's injunction from receiving the said moneys in the possession of the third defendant."

The first defendant did not file a written statement and did not contest the suit. The second defendant filed a written statement in which he denied the Court's jurisdiction to try the suit, inasmuch as neither he nor the first defendant resided or carried on business in Bombay. His other contentions were raised in the following paragraphs of his written statement:—

"6. This defendant denies that he has to contribute anything to the said partnership as in the 6th paragraph of the plaint alleged. This defendant says that the accounts of the said partnership have never been taken, and that the plaintiff's right to demand the account thereof is barred by limitation.

"7. This defendant further says that the plaintiff has no right to sue for the moneys claimed in the plaint after the time when the right of the said Hemábái's representatives to claim a partnership account became barred by limitation, since the moneys claimed in this suit would have been included in such account as outstandings due to the said partnership.

"8. This defendant also says that, if the plaintiff has any right of action in respect of the said moneys, he is not entitled to sue for more than $\frac{8}{17}$ths thereof as representing the share of the said Hemábái therein."

Subsequently to the filing of this suit the plaintiff recovered a sum of Rs. 5,292 from another debtor of the firm established by the agreement of the 7th August, 1889. The second defendant thereupon filed a supplemental written statement claiming to set off his share in the said sum against any sum which might be recovered by the plaintiff.

At the hearing the following issues were raised:—

1. Whether this Court has jurisdiction to try this suit?

2. Whether, if so, this suit is not barred by limitation?

3. Whether in any event plaintiff is entitled to recover more than $\frac{8}{17}$ths share of the moneys claimed in the plaint?

4. Whether defendant No. 2 is not entitled to set off $\frac{3}{17}$ths of the sums recovered by the plaintiff as stated in paragraph 1 of the supplementary written statement?

Rivett-Carnac (with him *Lang*, Advocate General, and *Inverarity*) for plaintiff:—This Court has jurisdiction. The moneys claimed were recovered from debtors in Bombay. These assets of

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the firm are now here and in the hands of a receiver appointed by this Court. That of itself gives this Court jurisdiction. The cause of action is the receiving by the defendants in Bombay of moneys belonging to Hemábái. Part of the cause of action has at all events arisen here, and leave has been obtained for this suit under clause 12 of the Letters Patent, 1865.

The suit is not barred by limitation. Section 17 of the Limitation Act (XV of 1877) applies. The plaintiff only obtained letters of administration on the 30th March, 1894. Hemábái's heir, Kissondás, is a minor, and until letters were granted, there was no legal representative capable of suing. See also section 7 of the Limitation Act; *Lawless* v. *The Calcutta Landing and Shipping Co., Ld.*(1); *Atkinson* v. *Bradford Equitable Society*(2).

But we contend that even if section 17 does not apply, the suit is not barred. The suit is not for a partnership account. It is for a share in specific assets which have been recovered. Such a suit lies, although the right to an account may be barred —*Dayál Jairáj* v. *Khatáv Ladhá*(3); *Merwánji Hormusji* v. *Rustomji Burjorji*(4); *Knox* v. *Gye*(5).

Kirkpatrick and *Scott* for the second defendant:—This Court has no jurisdiction to order accounts of a firm in Sind and the Persian Gulf. The mere fact that a debt is due or is received from debtors living in Bombay does not give jurisdiction to this Court to order a partnership account—*Suganchand Shivdás* v. *Mulchand*(6); *Luckmee Chand* v. *Zorawur Mull*(7); *Kessowji Dámodar* v. *Luckmidás Ladha*(8). Leave to sue under clause 12 of the Letters Patent, 1865, is not conclusive of jurisdiction—*Nagamoney Mudaliar* v. *Janakirám Mudaliar*(9). It was by consent of the parties that the moneys due in Bombay were paid to a receiver. The receiver's possession, therefore, does not give jurisdiction in

(1) I. L. R., 7 Cal., 627.
(2) 25 Q. B. D., 377.
(3) 12 Bom. H. C. Rep., 97.
(4) I. L. R., 6 Bom., 628.
(5) 5 Eng. and Ir. App., 656.
(6) 12 Bom. H. C. Rep., 113 at p. 125.
(7) 8 Moo. I. A., 291 at p. 307.
(8) I. L. R., 13 Bom., 404.
(9) I. L. R., 18 Mad., 142.

another suit brought by a third person. For the purposes of this suit it must be assumed that the money is in the hands of the defendants—Kerr on Receivers (3rd Ed.), 135.

The suit is barred by the Limitation Act (XV of 1877), article 106; Contract Act (IX of 1872), section 253. Section 17 does not apply. We deny that Kissondás is Hemábái's heir. At all events, there is a dispute as to his right, and it has not been proved. Further, this section provides only for cases where the cause of action might have arisen in the lifetime of the deceased partner, but did not, in fact, arise until after his death. Here it was Hemábái's death that gave the cause of action.

The moneys received by the defendants were barred debts which Hemábái herself could not have recovered. The debtors, however, consented to pay these barred debts to the defendants. The defendants are entitled to keep them. The mere fact that they have got this money does not give Hemábái or the plaintiff as her representative a new right to recover it. The plaintiff can only sue them for a share if Hemábái's right to an account was not barred. *Knox* v. *Gye*[1] is no authority that a suit for a share in a specific asset will lie, although a suit for account is barred. It is rather an authority to the contrary. *Dayál Jairáj* v. *Khatáv Ladha*[2] was a suit for contribution—Banning on Limitation (2nd Ed.), 223.

CANDY, J.:—The main facts of this case are clear. There was a firm in Sind, of which the partners were Hamanmull Rámdassáni and Goculdás Sobhanmull. Hamanmull having died in 1884, his widow, Hemábái, carried on the business with Goculdás in the name of Hamanmull and Goculdás. On 7th August, 1889, the said Hemábái, Goculdas and one Bhugwándás (nephew of the deceased Hamanmull) entered into a partnership agreement, according to which Hemábái was to be the *seth* of the firm, furnishing a capital of Rs. 2,100, not bearing interest, but drawing interest at 6 per cent. per annum on all her moneys employed in the firm over and above that sum, and Goculdás and Bhugwándás were to be the other partners, with the right to draw Rs. 250 and Rs. 200 per annum respectively from the firm without interest,—sums

(1) 5 Eng. and Ir. App., 656. (2) 12 Bom. H. C. Rep., 97.

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beyond that to be drawn by them with the consent of Hemábái and to bear interest at 6 per cent. The old firm, which had been carried on in the names of Hamanmull and Goculdás, was discontinued and the accounts closed. The new firm was to be carried on in the names of Hamanmull, Goculdás and Bhugwándás, the profits being shared in the following proportions:—One-fourth anna to charity, eight annas to Hemábái, five annas and half to Goculdás, and three and a quarter annas to Bhugwándás.

Hemábái died in Sind in September, 1889, and thus the partnership was dissolved. Hemábái was a childless Hindu widow, and the usual disputes ensued. On 13th February, 1890, Tulsábái as guardian of Kissondás, a minor nephew of Hemábái's husband, applied to the Bombay High Court for letters of administration of the estate of Hemábái, the scheduled list of property including certain property in Bombay, namely, cash and goods deposited with certain parties in Bombay. This petition was opposed by the above-mentioned Bhugwándás and two others, and the case was then filed as a suit, No. 7 of 1890, which terminated on 2nd March, 1894, by the Judge ordering letters of administration to be granted to the Administrator General of Bombay.

In the meantime, on the 12th April, 1893, Bhugwándás filed three suits in the Bombay High Court (Nos. 187, 188 and 189 of 1893) in the names of Goculdás and himself as surviving partners in the firm of Hamanmull, Goculdás and Bhugwandas, to recover certain debts due to the said firm. The debts were apparently the same as the assets in Bombay in the schedule above alluded to. In those suits Goculdás made petitions, dated 29th June, 1893, alleging that Hemábái had the largest interest in the firm of which she had been a member, and that an account being taken, Bhugwándás would be found largely indebted to the firm. I am not now taking it that these allegations were true. I am merely relating the facts of the allegations which led to the Judge appointing a receiver in those suits, which he did on 22nd July, 1893. On 8th August, 1893, consent decrees were passed in those suits; and the moneys recovered under them are now in the hands of the receiver, L. N. Bánáji, who is the third defendant in the present suit.

The Administrator General having taken out letters of administration of the estate of Hemábái as directed by the Judge (see above), filed the present suit on 21st April, 1894, against Goculdás and Bhugwándás and the receiver, reciting certain of the above facts, and alleging that at the time of her (Hemábái's) death, which dissolved the partnership, the first and the second defendants were each indebted to the partnership and had nothing to receive therefrom, as will be found on taking the accounts thereof, if the same be found necessary. Therefore, the plaintiff claims that inasmuch as the first and second defendants have nothing to receive, but on the contrary have to contribute to the said partnership, he (the plaintiff) is the person entitled to receive the said moneys now in the receiver's hands. He prayed as follows:—(His Lordship read the prayer of the plaint and continued.)

Goculdás does not defend this suit, and it appears that he is willing that plaintiff should recover all the moneys in question. Bhugwándás has pleaded that—

1. This Court has no jurisdiction, because neither the first nor the second defendant resides or carries on business or personally works for gain in Bombay.

2. Hemábái carried on business with both the first and second defendants in the Persian Gulf, not in Bombay.

3. He (the second defendant) has nothing to contribute to the partnership, and the plaintiff's right to demand an account is barred by limitation.

4. The right to an account being thus barred, the plaintiff has no right to sue for the moneys in question, since they would be included in such account.

5. If the plaintiff has any right of action in respect of the moneys, he is not entitled to more than $\frac{8}{17}$ths as representing Hemábái's share in the profits of the firm.

6. He, the second defendant, is entitled to a set-off, namely $\frac{3}{17}$ of a sum of Rs. 5,292, which the plaintiff has since the institution of the suit recovered from a debtor of the firm.

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On these pleadings the following issues were raised:—(His Lordship stated the issues and continued.) Mr. Inverarity (with him the Advocate General and Mr. Rivett-Carnac) appeared for the plaintiff, and in opening his case treated the moneys in question as due to a firm of which the second defendant was not a partner. He said: "There is no question of account between us and the second defendant, because he is not a partner in these outstandings." Subsequently he was doubtful on the point and asked the Court not to take the statement as an admission either way. Subsequently the plaintiff, when appealed to, seemed doubtful as to which partnership these assets belonged. He said: "I claim the whole of the moneys in question, whether of the old or new partnership, because if they are of the old, then the second defendant has no interest in them, and if of the new, then the second defendant is indebted to Hemábái's estate more than his share of these items." In the same way, he expressed his inability to say who were the members of the firm at the time when the debt became due which he had recovered since the institution of the suit, and which formed the subject of the set-off claimed by the second defendant.

In answer to these pleas, Mr. Kirkpatrick for the defendant urged that the plaintiff must be confined strictly to the prayers of his plaint, and I am of the same opinion. It is impossible to read the 3rd and 6th paragraphs of the plaint taken with the prayers A and B without seeing that plaintiffs claim the whole of the moneys, solely because the first and second defendants are indebted to the partnership. There is not a word about the debts having been due to the firm represented by Hemábái and Gokuldás only.

No application was made to amend the plaint, and, therefore, I shall confine myself solely to a consideration of the case as first stated. Indeed, if the debts covered by the decrees in Suits Nos. 187, 188 and 189 of 1893 were really due to the partnership of Hamanmull and Goculdás only, then it would appear that those debtors are still liable to the person who can legally recover the debts of that firm. The sums now in the hands of the present third defendant represented debts due to the firm of Hemábái,

Goculdás and Bhugwándás. If the debtors in question should really have paid to another firm, this firm has not lost its right to recover its dues unless barred by limitation. Goculdás (defendant No. 1) in those suits treated the debts as due to the firm formed by the partnership agreement of 7th August, 1889 (see B). He is on the present plaintiff's side. There is, therefore, no reason to allow the plaintiff now in the face of the plaint to turn round, and say that he claims the whole of the sums, because they were really due to another firm in which the second defendant had no interest.

The suit is, therefore, by the administrator of a deceased partner claiming assets of the partnership which have been recovered by the surviving partners; the whole and not a share of those assets being claimed because, if an account of the partnership is taken, it will be found that the whole of these assets would fall to the estate of the deceased partner. If the suit be taken as one for a partnership account, then it is apparently barred under article 106 of the Limitation Act (XV of 1877), Hemábái's death on 1st September, 1889, having dissolved the partnership, and the suit having been filed in April, 1894. For the plaintiff it is contended that under section 17 of that Act the period of limitation should be computed from the time when the Administrator General was directed to take out letters to administer the estate of Hemábái, as until that happened there was no legal representative of the deceased capable of instituting a suit. But that is not so. Here it was open to Tulsábái on behalf of Kissondás, the minor nephew of Hemábái's husband, to have instituted a suit in the District Court at Karáchi for an account of the partnership at any time within three years from Hemábái's death. The parties are Hindus, not affected by section 179 of the Indian Succession Act (X of 1865). Now, after the grant of letters to the plaintiff no other person han the plaintiff can act as representative of Hemábái (section 82 of Act V of 1881). But there was no reason why the person claiming to be Hemábái's heir should not have before 1st September, 1892, filed a suit for partnership account.

It seems doubtful whether a suit for a partnership account would, in this case, lie in the Bombay High Court. The defendants at the time of the commencement of the suit did not dwell or carry on business or personally work for gain within the

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limits of the ordinary original jurisdiction of this Court, and it is difficult to see how the cause of action in such suit can be said to have arisen, wholly or in part, within such limits. The fact that certain assets of the partnership were and are in Bombay would not affect "the ground of origin of the right" (see remarks of Phear, J., in *Harjiban Dás* v. *Bhagwán Dás*[1]). Here, to adopt the language of the Privy Council in *Luckmee Chand* v. *Zorawur Mull*[2], Karáchi was undoubtedly the central place of business. At Karáchi the partnership books were kept; at Karáchi the partners would have recourse to those books for the purpose of ascertaining the state of the transactions between them. As Mr. Justice Green said in *Suganchand* v. *Mulchand*[3], "where else could the cause of such action be said to arise, except where, by consent of the parties, the head-quarters of the partnership had been established, the moneys advanced, the accounts kept, &c."

I have not overlooked the fact that the plaint in this suit was endorsed by the admitting Judge "under clause 12 of Letters Patent." But every plaint is admitted under that clause, and those words do not, *per se*, indicate that the leave of the Court had been first obtained, on the ground that the cause of action arose in part only within the jurisdiction. For the purpose of first obtaining leave one would expect an application with a statement of the grounds of the application. The language clearly points to something granted when asked for. Here assuming that the words above noted are meant to show that the leave of the Court had been first obtained, it would be interesting to know the grounds for supposing that the cause of action in this case had arisen in part only within the limits of this Court's jurisdiction. No doubt, as was pointed out by Mr. Justice Bittleston in *Bavah Meah Saib* v. *Khajee Meah Saib*[4], the language of clause 12 of the Letters Patent "gives rise to nice questions as to what is sufficient in any particular case to constitute a part of the cause of action."

But in the view which I take of the case it is unnecessary to pursue this point further, for the case may be put thus: a suit

(1) 7 Beng. L. R., 102, at p. 110.
(2) 8 Moo. I. App, 291 at p. 307.
(3) 12 Bom. H. C. Rep., 113, at p. 126.
(4) 4 Mad. H. C. Rep., 218 at p. 226.

for a general partnership account being barred by limitation, will a suit for the whole or a share of these assets lie? It is admitted that if it will be for a share, then the plaintiff's share is $\frac{8}{17}$ths. The prayer for a reference to the Commissioner is not that a limited account should be taken, enough to show that Goculdás and Bhugwándás are so heavily indebted to the firm that there can be no doubt that Hemábái's estate is entitled to the whole of these sums (I doubt whether such a reference would in any case be valid), but here the prayer is for a reference to the Commissioner that the partnership account may be taken, and what that is, is well known (see *e.g.* Schedule IV, No. 132, Civil Procedure Code, Act XIV of 1882).

The question thus assumes a double aspect. The claim for a general partnership account being barred by limitation, has plaintiff any right of action at all in regard to these assets which have been recovered by the surviving partners? If he has, then can he claim the whole of these assets? In considering the answer which should be given to these questions, counsel naturally referred to the judgments delivered in the House of Lords in the case of *Knox* v. *Gye*[1] as interpreted by the Court of Appeal of this Court in *Dayál Jairáj* v. *Khatáv Ladha*[2], which interpretation was followed by a Judge of this Court in *Merwánji Hormusji* v. *Rustomji Burjorji*[3].

Now it is evident, on a perusal of the report of *Dayál Jairáj* v. *Khatáv Ladha*[2], that the judgment of the Appeal Court on the facts of that case cannot be directly applied to the facts of the present case. In that case 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, claimed to be repaid the excess 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. The period of limitation began to run from the time when the properties of himself and the partner Khatáv Ladhá (whom he sued) were sold and applied in satisfaction of the joint decree. The defendant Khatáv Ladhá pleaded that the

(1) L. R., 5 Eng. and Ir. App., 656. (2) 12 Bom. H. C. Rep., 97.
(3) I. L. R., 6 Bom., 628.

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accounts of the partnership were still unadjusted, that the claim was barred by Limitation Act, and that all the partners should be made parties. The plaint was accordingly amended, the other partners or their representatives being made parties, the claim being extended, including a certain sum deposited in the hands of the Accountant General, and praying that, if necessary, the partnership accounts should be taken and such sums as might be found due to the plaintiff might be ordered to be paid to him by the defendant Khatáv Ladhá. The other defendants did not appear or plead. The Judge of the Division Court found that the claim was not barred by the Limitation Act, and reserved his findings on the other issues till an account of the partnership dealings and transactions had been taken by the Commissioner to whom a reference was ordered. It was that decision which was confirmed by the Appeal Court on the following grounds:—(*a*) That the claim as primarily preferred was a suit for contribution, not in regard to a partnership transaction, and, therefore, it could be made the subject of a suit without also asking for a general account —*Sedgwick* v. *Daniell*[1]; (*b*) that the claim as primarily preferred was justified by the opinions of three of the learned Lords in *Knox* v. *Gye*, which were that a suit for recovery 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 amount may have been barred by the statute of limitations; (*c*) that it was the defendant Khatáv Ladhá who insisted on the partnership account being taken. Therefore, without deciding how the case would have stood had the suit been solely or primarily for a general partnership account, the order directing a general account of the partnership to be taken was confirmed.

In the present case, though the prayer of the plaint is that "if necessary" the partnership account should be taken, it is evident that for the recovery of the whole of the assets the taking the general partnership account must be the sole and prime reason.

Next, as to *Knox* v. *Gye*, it is unnecessary to repeat at full length the quotations from the judgments which are given by Mr. Justice

(1) 2 H. and N., 319.

Green in his judgment in the case just noted. But stress may be laid on one or two points. It was a suit filed in October, 1864, by the representative of a deceased partner, who had died in November, 1854, against the surviving partner for a general partnership account, including an asset which had been recovered by the surviving partner and from one Hughes. Vice-Chancellor Wood held that the application of the statute of limitation was excluded by the fiduciary relation existing between the deceased and the surviving partner, and by the fact that the money recovered from Hughes was received within six years before the institution of the suit. On appeal this was reversed by the Lord Chancellor (Lord Chelmsford), who held that the claim was barred by the statute of limitations. On further appeal to the House of Lords the decision of Lord Chelmsford was upheld.

Lord Westbury noted that it was on the fact of a receipt of the sum from Hughes within six years before the institution of the suit that the plaintiff chiefly relied: but Lord Westbury pointed out that, if, as an answer to the statute, it was intended to rely upon the receipt of the debt due to the partnership, it should have been alleged and proved that the sum was received within six years from the death of the deceased partner, whereas the sum was apparently recovered in June, 1861 (the case as put in the Report, p. 661, says in 1862). Therefore, if the right to the account was taken away by the statute previously to the receipt of such item, the subsequent receipt could not remove the bar and restore the title to the account.

Applying that ruling to the present case it will be seen that the assets now in question were recovered in 1893, *i.e.*, more than three years (the statutable period) from the death of the deceased partner Hemábái.

Lord Westbury then went on to show that a Court of Equity will not after the lapse of the statutable period, without acknowledgment, decree an account between the estate of a deceased partner and a surviving partner. He said:

"It must be recollected that the representative of a deceased partner has no specific interest in or claim upon any particular part of the partnership estate. The whole property therein accrues to the surviving partner, and he is the owner thereof, both at law and in equity. The right of the deceased partner's representative con-

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sists in having an account of the property, of its collections and application, and in receiving that portion of the clear balance that accrues to the deceased's share and interest in the partnership. Another source of error in this matter is the looseness with which the word 'trustee' is frequently used."

The rest of the judgment of Lord Westbury is taken up with his reasons for dissenting from the opinion of Vice-Chancellor Wood that there was anything fiduciary between the surviving partner and the dead partner's representative. It is evident that according to Lord Westbury's judgment the present suit, whether simply for a share of a partnership asset or for an account of the partnership in order to obtain the whole of an asset, would be bad.

Lord Westbury was followed by Lord Colonsay. He treated the case briefly:

"The deceased partner died in November, 1854, and the bill was filed in 1864, but it is said that in the interval, *viz.*, in January, 1859, a considerable sum was received by the surviving partner as a compromise of a debt of a larger amount due to the partnership estate; and it is contended that as a period of six years had not run from that date of recovery until the filing of the bill, the statute does not apply. I cannot adopt that view. If adopted, the result would be that a new period would run from the date of every recovery of partnership debts, and that would in effect make the statute valueless in regard to partnership accounts; and I see no reason for it, because the account, if sued for within the statutory period, must have comprehended all debts and claims, whether recovered or unrecovered, and whether good, bad or doubtful."

So here the fact that a period of three years has not run from the date of the recovery of the assets until the filing of the present action, does not avoid the bar of limitation in a suit for an account. But Lord Colonsay went on to say: "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." The value of this *obiter dictum* is diminished by the fact that no illustration was given of an unexpected recovery, nor was it stated what should be the form of the other kind of suit.

Lord Colonsay was followed by the Lord Chancellor (Lord Hatherley), who as Vice-Chancellor *Wood* had given the original decision, and he devoted his judgment to a strong expression

of dissent from the opinion of Lord Westbury, that there is nothing fiduciary between a surviving partner and the executors of his deceased partner. He said: "It appears to me that the case we have had to consider here is this. I will assume that an account had been taken upon the death of the deceased partner or immediately after the death of the deceased partner; that everything which could be ascertained had been ascertained and adjusted, that the account was complete, and that releases were given." Then he assumed that this complete adjustment had not included a debt to the partnership "say of the amount of £ 20,000 which was left outstanding, and which was subsequently received by the surviving partner by right of his survivorship as partner; then and then only would the executors of the deceased partner have a right to a moiety (assuming that the partners were partners in moieties) of that money, *viz.*, £ 10,000. I apprehend that it would be an extraordinary answer for that partner to make to any such a claim: True it is you were entitled to this once, but you have settled all accounts more than six years ago; the parties who were indebted to the firm were not at that time able to pay their debts, they have paid them since, the money has been collected by me, the surviving partner who alone could collect it, but having collected I say that I hold no fiduciary position towards you."

Then Lord Hatherley showed by an instance which he quoted that the case put by him was not imaginary. He says: "It is not imaginary that a large sum of money may be received long after the ordinary accounts of the partnership have been closed." And then he applied the principle laid down by him to the case before the House of Lords in the passages quoted by Mr. Justice Green and to be found at pages 109-110 of 12 Bom. H. C. Rep. He held that the surviving partner would have a right to say to the executor of the deceased partner: "I am willing to pay you that which is your own, but further than that I will not go. . . . 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. . . . . It appears to me that Mr. Gye (the surviving partner) had only one of two courses open to him, *viz.*, that of handing over the money that he had received, 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.'"

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If I have correctly quoted the judgment of Lord Hatherley, it would appear that the whole of his case is based on the assumption that the accounts of the partnership had been taken within the statutable period after the dissolution of the partnership by the death of one of the partners. Subsequently an asset not included in that account is recovered by the surviving partner. He holds that in trust for the estate of the deceased partner; and if sued by the executors of the deceased partner, he must hand over the share belonging to the estate of the deceased partner, assuming that all accounts had been settled up to that period; or if he pleads that since that settlement there have been fresh accounts, which, if taken, would show that the asset the subject of the present suit belonged entirely to him, he has a right to have that account taken.

But here, in the case now before me, no attempt has ever before been made to settle the partnership accounts. After the statutable period the representative of the deceased partner sues the surviving partner who has recently collected some assets and says: "Give me my share, and not only so, but give me the whole, because I demand that a general partnership account be taken by which I can show that I am entitled to the whole of these assets." It is not the defendant who demands an account in order that he may retain the whole of the assets. The only case in which Lord Hatherley said the surviving partner was bound to hand over the share of the assets to the executors of the deceased partner, was when it is one in which it was assumed that all accounts had been settled up to that period. Therefore to the present plaintiff Lord Hatherley would apparently have said: "You can get neither a general partnership account, nor a share of these assets."

I must admit that the point is not clear beyond all doubt, for just before the passage quoted above Lord Hatherley said: "Now, as regards the right to an account, I cannot quite conceive that the right of the executors of a deceased partner will be barred by the statute of limitations if they do not assert their right to the account within the statutory period, and that equity will follow the law in that respect, and that it will adopt, as to a suit, the limit which the law has assigned with reference to the com-

mencement of an action." These words, if not governed by the sentence above quoted, would seem to be general. And so possibly they were taken by Lord Chelmsford, who followed Lord Hatherley. He held that the receipt of the money due from Hughes did not prevent the statute from continuing to run, and he dissented from a remark "almost incidentally made by Lord Hatherley that 'the statute of limitations would not apply to a partnership account of this description,' but that the statutes are applicable to the present case, appears to me to be clear." Then after quoting cases to show the limitation to six years of actions of account applied to bills in equity for an account, he proceeded:

"The statute of limitations then being applicable, and beginning to run in November, 1854, upon what ground is it alleged that it was stopped in its course, and that although six years afterwards elapsed, it did not operate as a bar to the suit for an account? The ground taken is that the debt due from Hughes to the partnership was satisfied by the payment in discharge of his liability in the month of January, 1859, and that the bill was filed within six years of such payment. * * * The question to be determined is whether when a right to demand an account of a partnership arises, and afterwards six years elapse, the payment, before the expiration of the six years, of a debt owing to the partnership when the time of limitation began to run will take the case out of the statute."

Lord Chelmsford then went on to show that this question must be answered in the negative.

"Now in taking the accounts of a partnership all outstanding debts due to the partnership must necessarily enter into the account. * * * If the effect of the payment of Hughes's debt is to create a new right to an account, then every debt due to a partnership, which is received after a dissolution, must in like manner give a fresh right to demand an entire account of the whole of the partnership concern, and this equally whether six years have elapsed or not, after a suit for an account might have been commenced before the debt due to the partnership was received, the consequence of which would be that when a partnership is dissolved by death, and there are outstanding debts to be collected by the surviving partner, the statute of limitations could never operate as a bar to a suit for an account against him."

Then shortly afterwards is the passage quoted by Mr. Justice Green (12 Bom. H. C. Rep. at pp. 110—111):

"There may be a difficulty in determining what is the right of an executor of a deceased partner (in the case put by my noble and learned friend, *i.e.*, Lord Hatherley,) 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 why he should not have a right to sue for his share in this sum . . . . . the

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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."

So if Lord Chelmsford's words be taken in a general sense, then though twenty years may elapse after the dissolution of a partnership by the death of a partner, and no account of the partnership is ever taken, and after the twenty years an asset is recovered by the surviving partner, he can be sued by the representative of the deceased partner for the share of the asset due to the estate of the deceased. But if the words are to be confined to the case put by Lord Hatherley, and that case assumes a general partnership account taken within the statutable period, this asset being excluded from that account, then and then only can a suit lie for a share of that asset, the surviving partner being at liberty to defend himself by showing that the asset though not included in the previous account had been applied or was applicable to the payment of partnership liabilities. It is evident that Mr. Justice Green put the general interpretation on the passage quoted. In *Dayál Jairáj* v. *Khatáv Ladha*[1] he said "that a suit for a 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 general partnership account may have been barred by the statute of limitations, is supported by the opinions of at least three of the four learned Lords who took part in the decision of *Knox* v. *Gye*;" and Mr. Justice Latham in *Merwánji* v. *Rustomji*[2] said: "I think that the opinions of the majority of the Law Lords in that case (*Knox* v. *Gye*) 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 *Dayál Jairáj* v. *Khatáv Ladhá*[1]."

Were the matter *res integra* I should be inclined to doubt whether the *obiter dicta* of the learned Lords are clearly enough expressed to found on them such an important proposition. Lord

(1) 12 Bom. H. C. Rep. 97 at p. 107. (2) I. L. R., 6 Bom. 628, at p. 635.

Colonsay's remark referred to an "unexpected recovery," which would seem to show that he contemplated a previous partnership account having been taken, from which this asset had been inadvertently excluded. Lord Hatherley founded his remarks on the assumption that a general partnership account had been taken within the statutable period, the asset in question having been excluded therefrom. Lord Chelmsford's remarks referred to the case put by Lord Hatherley. But if (to adopt Lord Chelmsford's words above quoted with a slight alteration) the effect of the payment of any debt due to the partnership to the surviving partner is to create a right to a share in that asset in favour of the representative of the deceased partner, then every debt due to a partnership which is received after a dissolution must in like manner give a fresh right to a share in each asset, and this equally, however many years have elapsed since the dissolution, and however negligent the representative of the deceased partner may have been in never asking for an account. The right to an account (amongst other things) of an outstanding debt, which must be included in the account as part of the partnership assets to be collected, cannot be affected by payment of that debt which merely converts into realized assets what was previously uncollected, and cannot stop the course of the statute of limitations which was running against the claim to an account of the partnership concerns. It was said that upon payment of the debt a new right accrued to the representative of the deceased partner. But the right to sue for what? The answer must be for an account. But *that* he was entitled to sue for all along, and the account must have included this very debt, the receipt of which is supposed to have created a new right to an account (per Lord Chelmsford p. 687). And then follows the passage in which Lord Chelmsford said that he saw no reason why in the particular case put by lord Hatherley, the executor of a deceased partner should have a right to sue for his share in an asset received by the surviving partner after the lapse of the statutable period for a claim to an account.

It must be admitted that when the remarks of the learned Lords are considered from this point of view, there does seem some difficulty in giving a general interpretation to them. But

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the Court of Appeal having read those remarks in a different way, and the point being one of great nicety and doubt, I think that I am bound to follow the general interpretation which has hitherto been adopted in this Court. All the four learned Lords in *Knox* v. *Gye* would have refused the present plaintiff's prayer for an account. I feel no doubt about that.

The plaintiff, therefore, is entitled to a share. What he can recover is Hemábái's $\frac{8}{17}$ths and the $5\frac{1}{2}$ annas' share of Goculdás, who does not contend the plaintiff's claim. I have felt some doubt with regard to Goculdas' share, the plaintiff being strictly entitled only to the share due to Hemábái's estate, his claim to an account in order that he may show that he would be also entitled to the share of Goculdás and Bhugwandás being undoubtedly bad. But as Goculdás evidently wishes that plaintiff should take his share, and Bhugwandás does not raise any plea showing that he is entitled to retain Goculdás' share, I shall allow the plaintiff's case in this respect.

With regard to the set-off, it is clear from the letter of the pleader of the debtor (Exhibit 2) that the debt was paid to the plaintiff as due to the firm of which the defendants Nos. 1 and 2 were partners. This also is borne out by the copy of the indemnity bond (Exhibit 4). Therefore, there is an ascertained sum to which the second defendant is certainly entitled as much as plaintiff is entitled to a share in the sums recovered by the decrees Nos. 187, 188 and 189. Indeed, it is difficult to say how plaintiff has recovered the debt due from Hiránand. The representative of a deceased partner has no specific interest in, or claim upon, any particular part of the partnership estate. The whole property accrues to the surviving partner (see remarks of Lord Westbury in *Knox* v. *Gye* quoted above, p. 675). The executors of a deceased partner have an interest in those assets which the surviving partner can alone get at (per Lord Hatherley, p. 679). But it is unnecessary to consider that point further. It is enough that the second defendant is entitled to recover from the plaintiff the sum as claimed by him. I find then on the issues:—

1. As regards the claim to a share in the moneys in question, this Court has jurisdiction.

2. The claim for this share is not barred by limitation. The claim for a general account is barred.

3. Plaintiff is entitled to recover $\frac{8}{17}$ths and also Goculdas' $\frac{5}{17}$ths.

4. Defendant No. 2 is entitled to the set-off as prayed by him.

I direct that the costs of the suit be paid out of the estate in the hands of the third defendant.

The plaintiff appealed and the second defendant filed cross-objections to the decree.

Macpherson (Acting Advocate General) and *Inverarity* for appellants (plaintiffs) :—This is not a suit for a partnership account. We do not desire an account. This is a suit to recover property really belonging to Hemábái as the principal partner of the firm. The whole of the money really belongs to her, as both the defendants are indebted to the firm. The property is in Bombay and in the hands of a receiver appointed by this Court. There is, therefore, jurisdiction. The fact that the property is here is, at all events, part of the cause of action, and leave to sue has been obtained, and where that is the case there is no distinction between partnership suits and other suits. It is a question of discretion whether the Court will entertain the suit.

Next we contend that the suit is not barred. We claim the benefit of sections 7 and 17 of the Limitation Act (XV of 1877). On Hemábái's death, Kissondás was the heir. He is a minor and there was no "legal representative capable of instituting a suit" until the plaintiff was appointed administrator on the 30th March, 1894. A minor cannot sue. A suit is instituted for him. The words "legal representative capable of instituting a suit" in the section mean a person who has taken out probate or letters of administration. The plaintiff now represents Hemábái and all her property vests in him. See section 4 of Act V of 1881.

A suit by the representative of a deceased partner to recover a share in assets received by the surviving partners may be brought, although a suit for a general partnership account may be barred by limitation—*Knox* v. *Gye* [1] ; *Dayál Jairáj* v. *Khatáv Ladhá* [2] ;

(1) 5 Eng. and Ir. App., 656. (2) 12 Bom. H. C. Rep., 97.

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Merwánji Hormusji v. *Rustomji Burjorji* (1). Reference was also made to the Contract Act (IX of 1872), section 45; Lindley on Partnership, pp. 549, 550.

Kirkpatrick and *Scott* for respondent (defendant No. 2):—This is a suit for partnership accounts. A right to an account is the only right a partner has against his co-partner. The plaintiff cannot claim the money without an account, and we may keep it until an account is taken See as to a partner's rights *Knox* v. *Gye* (2); *Keshav Gopál* v. *Ráyapa* (3); *Kramibhai* v. *The Conservator of Forests* (4); *Ashworth* v. *Munn* (5); *Joharmal* v. *Tejrám* (6). But a suit for an account is now barred by limitation. See Limitation Act (XV of 1877), article 106; *Noyes* v. *Crawley* (7). Sections 7 and 17 do not apply. We deny that the minor Kissondás is the heir, and say that Purshotam, who is not a minor, is. The question between them has not yet been tried and is not decided. A mere unproved allegation that a minor is the heir does not give a third person (*e. g.* the plaintiff) the benefit of sections 7 and 17. The existence of a dispute as to heirship does not extend the period of limitation, either for the disputants or for third persons. Ignorance of his rights on the part of the heir, whoever he may be, or his neglect to enforce them, does not extend the period of limitation so as to enable a third person to sue after the period has expired—Banning on Limitation (2nd Ed.), p. 117. If Kissondás proves his heirship, he may hereafter perhaps be entitled to sue under section 7. But it is only the minor himself who can claim the benefit of that section. A third person cannot—Starling on Limitation (3rd Ed.), p. 37; *Rudra Kant* v. *Nobo Kishore* (8). Further we say the claims of Kissondás have been released. If so, then, he could not sue. Can a third person claim under section 7 to do what the minor himself cannot do? The plaintiff here does not pretend to represent the minor and is not suing on his behalf. Why should he be allowed the benefit of section 7, which is given only to the minor himself? This suit was barred before the plaintiff obtained letters of ad-

(1) I. L. R., 6 Bom., 628.
(2) 5 Eng. and Ir. App., at p. 673.
(3) 12 Bom. H. C. Rep., 165.
(4) I. L. R., 4 Bom., 222.
(5) 15 Ch. D., p. 369-70.
(6) I. L. R., 17 Bom., at p. 253.
(7) 10 Ch. D., 31.
(8) I. L. R., 9 Calc., 663.

ministration. A minor can sue (Civil Procedure Code, Act XIV of 1882, section 440), or in this case a receiver might have been appointed—*Yeshwant Bhagwant* v. *Shankar Rámchandra* (1). Among Hindus in the Mofussil there is always a legal representative capable of suing without probate or letters of administration which Hindus and Mahomedans in the Mofussil are not required to obtain—*Lálchand Rámdayál* v. *Gumtibái* (2); *Shaik Moosa* v. *Shaik Essa* (3); Mitra on Limitation (2nd Ed.), p. 221, note. Therefore section 17 does not apply. If it is held to apply to Hindus they will be able to sue at any time after the period of limitation has expired by adopting the expedient of taking out probate or letters of administration and claiming a new period dating from the grant. Counsel also referred to *Chandmull* v. *Ránee Soondery Dossee* (4); *Badri Náráin* v. *Jai Kishen Dás* (5); *Jánaki* v. *Dhanu Lál* (6). The arguments and authorities on the points of jurisdiction, &c., were the same as in the lower Court.

FARRAN, C. J. :—The dispute between the parties to this appeal is with reference to a sum of Rs. 28,335 now in the hands of the third defendant, L. N. Bánáji, as receiver appointed by this Court in Suits Nos. 187, 188 and 189 of 1893. The Division Court has by its decree directed the money to be divided between the plaintiff as administrator of the estate of Hemábái, deceased, and the defendant Bhugwándás in certain proportions. The plaintiff claims that he has established his title to the whole fund. Hence this appeal.

The defendant Bhugwándás has filed cross-objections, contending that the Court ought to have dismissed the suit altogether on the grounds (1) that it was barred by limitation, (2) that the Court had no jurisdiction to entertain it. The defendant Gokuldás does not claim that any part of the fund should be paid t him. He has not appeared upon the appeal.

In the view which we take upon the question of limitation, it will be unnecessary to consider the law, much discussed in the judgment of the Division Court, as to the rights of the individual

(1) I. L. R., 17 Bom., 388.
(2) 8 Bom. H. C. Rep., 140.
(3) I. L. R., 8 Bom., 241.
(4) I. L. R., 22 Calc., 259 at p. 262.
(5) I. L. R., 16 All., 483 at p. 487.
(6) I. L. R., 14 Mad., 454.

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partners on the one hand and of the representatives of a deceased partner on the other hand *inter se* in cases where assets of the firm have been recovered by the surviving partners after the right of such representatives to sue for an account of the partnership dealings and transactions has been time-barred; we advisedly refrain from giving any decided opinion upon this part of the case.

The facts which it is necessary to have before us in order to understand how the questions raised by the defendant Bhugwándás have arisen, may be concisely stated. Hamanmull Ramdássáni was an inhabitant of Sind and carried on business there and in the Persian Gulf. The respondent Goculdás was his partner. Hamanmull died in 1884, leaving a widow Hemábái and no issue. This widow as his heiress and Goculdás continued to carry on the same business in partnership until 1889. Goculdás, according to the evidence of Náráyandás Assammal, was a working partner in the firm and brought no capital into it. This may be taken, we think, as an established fact, as Goculdás has never claimed any share in the assets of the firm, and Náráyandás affirms that it was so.

On the 7th August, 1889, the respondent Bhugwándás was admitted as a partner in the firm. On that day a partnership-deed was drawn up. It recited that the original firm had been closed and the books and the papers thereof had been cleared, and that from its date a new firm would be carried on, of which Hemábái was to be the *seth* or owner and in which Goculdás and Bhugwándás were to be partners. It further provided that the capital of the firm was to be Rs. 2,100 to be paid by Hemábái, and that as to the other moneys of Hemábái which might be employed in the firm, interest therein should be paid to Hemábái at ½ per cent. The partners Goculdás and Bhugwándás were to draw Rs. 250 and Rs. 200 respectively per annum without interest for their household expenses and were to be at liberty to draw further sums with Hemábái's consent on auspicious occasions, paying interest thereon at ½ per cent., and as to such moneys as should remain credited to them in the firm, they were to be paid interest thereon at the like rate.

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Then followed the clause as to the shares. It runs thus :—

"As to whatever net profit and benefit will be made in the firm, the same will be divided, the same will be divided as per Re. 1-1-0 (seventeen annas) in this manner; the particulars thereof are as follows :—¼ anna of Shri Govardhannáthji (a charity account), 8 annas of Seth Mata Hemábái, 5¼ annas for Bhai Goculdás Sobhanmaláni, 3¼ annas of Bhai Bhugwándás Mitháramáni."

The partnership deed was executed in Sind, probably at Tata, where the defendants Goculdás and Bhugwándás reside and Hemábái resided, and the business was to be carried on at Behrin in the Persian Gulf and its outstations. The terms of the deed as we have set them out show, we think, that the moneys with which the business was to be carried on in addition to the capital were to be supplied by Hemábái alone, though it contemplates the probability of the partners having money in the firm. Read as a whole it constitutes, we think, Hemábái the real owner of the firm, and Goculdás and Bhugwándás working partners therein.

Hemábái died on the 1st September, 1889, a little more than three weeks, consequently, after the date of the partnership, which, by operation of law, thereupon became dissolved. For reasons presently to be assigned, it must, we think, be taken for the purposes of this suit that her heir was Kissondás, her husband's brother's son. He was then and still is a minor, having been in 1890 about ten years of age.

In April, 1893, Goculdás and Bhugwándás, the surviving partners in the firm, filed three suits (Nos. 187, 188 and 189 of 1893) against debtors of the firm in Bombay. Bhugwándás in this matter acted for Goculdás, who did not then leave Tata. Subsequently, on Goculdás coming to Bombay, he presented a petition to the Court in Suit No. 187 of 1893, in which he stated that Hemábái, deceased, had the largest interest in the business and assets of the firm, and that Bhugwándás on the accounts being taken would be found largely indebted to the firm. He further alleged that Bhugwándás had excluded him from the management of the suits, and that he was apprehensive that Bhugwándás would secure in his own hands the amount admitted by the defendants, and apply it to his own use. This petition resulted in a consent Judge's order of the 22nd July, 1893, under which

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the sums received in the three suits were paid to the third defendant, the receiver, to be by him held and invested until further order of the Court.

On the 30th March, 1894, letters of administration to the estate of Hemábái were granted to Mr. Carnac, the Administrator General, who on the 22nd April following filed the present suit setting out the above facts, and alleging that Goculdás and Bhugwándás were each indebted to the partnership and had nothing to receive from it; and further alleging that he was apprehensive that Goculdás and Bhugwándás would receive the moneys in the hands of the receiver and that they would be lost to the estate of Hemábái; he prayed (1) for a declaration that the whole fund belonged to Hemábái's estate and that the receiver should be ordered to pay it to him as administrator of Hemábái, (2) if necessary for the purpose of the suit, that the accounts of the partnership should be taken, and (3) for an injunction against the defendants Goculdás and Bhugwándás receiving the fund. Goculdás, as we have stated, does not put forward any claim to it. The contention is between Bhugwándás and the plaintiff only.

It is admitted that the accounts of the firm have not been formally made up and adjusted between the estate of Hemábái and the surviving defendants. Until the Administrator General was appointed her administrator there was, in fact, no one with whom they could be made up. By counsel for Bhugwándás it has been contended that, as surviving partners in the firm, Bhugwándás and Goculdás were entitled to this asset of the firm, and that the only right of the administrator of Hemábái was to an account against the surviving partners, and payment of the balance at foot of such account, and that as the claim of the administrator of Hemábái to such an account was barred by limitation, the right of Goculdás and Bhugwándás to hold the asset was established. In support of this proposition he relied upon the judgments delivered in the House of Lords in the celebrated case of *Knox* v. *Gye* (1) and more particularly upon the judgment of Lord Westbury in that case. We are not prepared to hold that that contention is well-founded even on the assumption that the claim of

(1) 5 Eng. and Ir. App. at p. 675.

the plaintiff to an account is time-barred. We are inclined to think that the difference between Indian and English law on this subject alluded to in the course of the argument and the peculiar nature of the partnership-deed in the present case distinguish it from the case put by Lord Westbury; but we do not pursue the question, because we are of opinion that the claim of Hemábái's administrator to an account of the partnership dealings is not time-barred.

The dates as above stated are these: Hemábái died on the 1st September, 1889. The plaintiff was appointed administrator of Hemábái's estate on the 30th March, 1894. The present suit was filed on the 22nd April, 1894.

Now section 17 of the Limitation Act (XV of 1877) provides that when a person who would, if he were living, have a right to institute a suit, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased *capable of instituting* such suit.

Upon this the question arises whether when Hemábái died there was a legal representative of Hemábái capable of instituting a suit for an account against the partners. Soon after her death, Tulsábái as mother and guardian of Kissondás applied to this Court for letters of administration to her estate limited until Kissondás should come of age. The defendant Bhugwándás and Tirathdás, the father of Hemábái, entered a *caveat* to the application. They alleged that Hemábái had left a will, of which Tirathdás had been appointed executor; but no such will had ever been proved or judicially adjudicated upon, though Hemábái has been dead for four years. For the purposes of this suit the allegation has not been in any way proved, and may be disregarded. The order appointing the plaintiff administrator of Hemábái's estate inferentially negatives the existence of a will, but being made without prejudice to the questions raised by the issues it is not conclusive between the parties.

The affidavits made in support of the *caveat* did not suggest that Hemábái left a nearer heir than Kissondás, nor is it here shown that she did. We must, therefore, assume that Kissondás

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is her heir. This of course will not affect the ultimate claim to the moneys in the hands of the Administrator General if any one hereafter shall prove that he has a title to oust the *primâ facie* title of Kissondás.

Now Kissondás being an infant when Hemábái died, and being her heir, there was, we are of opinion, no legal representative of Hemábái capable of suing until letters of administration were granted to the Administrator General. The expression "capable of suing" in section 17 is, we cannot doubt, the antithesis to "not under legal disability to sue." It cannot, we apprehend, refer to incapacity arising from want of means or absence of other physical causes. What legal disabilities incapacitate from suing, are pointed out in section 7, amongst which infancy is foremost. If this were not so, the strange result pointed out in argument would result, *viz.*, that up to the moment of the administrator to Hemábái's estate being appointed, the claim for an account was admittedly not time-barred. By the very act of appointing an administrator to protect the estate, the claim became time-barred. Any reasonable interpretation which avoids such an anomaly should be accepted. Here the interpretation which we adopt is both reasonable and obvious. This view does not, we think, at all come into conflict with the decision in *Rudra Kant Surma Sircar* v. *Nobo Kishore Surma Biswas*[1] which was a decision under section 7 of the Act and was determined upon wholly different considerations.

The further question arises whether the Court has jurisdiction in this case, and we are quite unable to bring ourselves to feel any doubt upon the subject. Leave to file the suit has been given under clause 12 of the Letters Patent. So the Court has jurisdiction if any part of the cause of action arose within the local limits of the High Court. What is the cause of action alleged? It is that the defendant Bhugwándás is endeavouring under cloak of his position as surviving partner to get into his hands a sum of money within the jurisdiction of the Court, nay in the hands of its officer, with a view to deprive the representatives of his deceased partner (who according to the case made in the plaint are solely entitled to it and all the assets of the firm) of the fund,

(1) I. L. R., 9 Cal., 663.

and to employ it for his own purposes. Is not that a cause of action arising within the jurisdiction of the Court? It may not be the whole cause of action, but is it not a most substantial part of one? Is the Court's aid to be withheld? Is its arm to be paralysed by the answer "The Court can't prevent this injustice—this positive wrong—because the accounts of the firm have not been adjusted?" Our answer is an emphatic negative. It might be a good defence to such a suit (we do not say it would be) for the defendant to plead thus—"I am receiving the money for the benefit of the partners at large. I shall duly account for it when the account is taken." That, if credited, might be a good answer; but this is not the case of Bhugwándás. He says the fund is his own and he is entitled to have it and spend it. No doubt it would be necessary in such a case incidentally to take the partnership account if the defendant alleges that he has a claim to the money; but that is immaterial. The Court often has to decide a collateral issue in respect of which it has not direct jurisdiction. The case of rent sued for in the Small Cause Court is an instance. Such a suit is not defeated by reason of the Court having incidentally to determine a question of title to land on which directly it has no jurisdiction—*Bápuji* v. *Kuvarji*[1]. There is no reason which occurs to us why this Court should not, if necessary, take the accounts. The defendant cannot complain. It is his own wrongful act which gives the Court jurisdiction incidentally to take it. The plea to the jurisdiction, therefore, fails.

When these technical objections are brushed aside, there is really no defence to the suit upon the merits. The terms of the partnership deed and the dates are strong to show that Bhugwándás can have no interest in this fund. The books of the firm kept by Bhugwándás and Goculdás show that he is indebted to the firm, and do not contain a trace of his having brought capital into it. In one of his answers to interrogatories (put in, we cannot help thinking, rather inadvertently by the plaintiff) Bhugwándás says that he brought in some goods, but he betook himself out of Bombay when the suit was coming on, and gave no evidence at the trial. The plaintiff has made out the several allegations in

(1) I. L. R., 15 Bom., 400.

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his plaint by strong *primâ facie* evidence which there is nothing to rebut. It is said that the defendant's advisers had not a full opportunity of inspecting the books, and that they were taken by surprise when the books were produced and put in at the trial. They did not, however, ask for a postponement on that ground; nor have they since discovered anything in the books which has been brought to our notice which would help the defendant. In truth, on the merits this suit was undefended, and upon the merits we think it ought to have been decided.

The decree must be varied by making a decree in the terms of paragraphs (A) and (B) of the prayer of the plaint, and the defendant Bhugwándás must pay the costs of the suit throughout.

We have not referred to the set-off; it follows from our judgment that Bhugwándás has no claim under it.

Attorneys for the plaintiff:—Messrs. *Bhâishankar and Kánga*.

Attorneys for the defendant:—Messrs. *Ardesir, Hormasji and Dinha*.

ORIGINAL CIVIL.

Before Mr. Justice Starling.

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August 13.

DINSHAW NOWROJI BODE, PLAINTIFF, *v.* NOWROJI NASARWA'NJI BODE AND PEROZSHAW DINSHAW BODE, DEFENDANTS.*

Trust—Trustees—Trustees raising money by mortgage of trust property—Sanction of Court.

A testator by his will devised property in Bombay to trustees on certain religious and charitable trusts. The income of the property was more than was required for the purposes of the trust, and the trustees had a surplus of Rs. 19,000 in their hands. They were obliged to pull down a certain chawl which stood upon the land for the purpose of rebuilding upon it, and they proposed, with a view to improve the property, to erect a larger and more substantial building than the former one. They expended the surplus of Rs. 19,000 which was on their hands, but found that to complete the work a further sum of Rs. 20,000 was necessary. This they proposed to rai by mortgaging the trust property. They calculated that the whole mortgage-debt would be paid off out of the surplus rents of the trust property within three years. They filed this suit, praying that the Court would sanction the proposed mortgage. The Court, however, refused its sanction, and dismissed the suit.

* Suit, No. 331 of 1895.