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income or savings of it in the testator's hands. Accordingly we heard evidence on the point the effect of which is that the Government Promissory Notes for Rs. 20,000 were purchased out of the income of the joint family property, and having regard to the extent of the property I do not think that Rs. 20,000 to his daughter was "a gift through affection" so large as to be unreasonable: see Mayne, p. 423 (6th Edition).

The decree will be varied accordingly and the order as to costs as set out in the judgment of the learned Chief Justice just delivered.

Attorneys for the appellant: Messrs. *Maganlal, Jamsetji and Gulabbhai*.

Attorneys for respondents: Messrs. *Edgelow, Gulabchand and Wadia*; and Messrs. *Mulji and Dharamsi*.

Decree varied.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

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 June, 128.

JIVRAJ GULABCHAND (ORIGINAL DECREE-HOLDER), APPELLANT, v. BABAJI APA KHADAKE (ORIGINAL JUDGMENT-DEBTOR), RESPONDENT.*

Limitation Act (XV of 1877), sections 7, 9, 13, schedule II, article 179, clause (4)—Execution of decree—Application by minor after previous application presented in time by deceased decree-holder—Minor's application beyond time—Disability—Inability.

A decree-holder, after making various applications for execution of a decree, each of which was within time, died. His son, a minor, made an application for execution of the decree within three years of his father's death but more than three years after the date of his deceased father's last application.

H'd that under section 9 of the Limitation Act (XV of 1877) the minor's application for execution was time-barred, it not being a case of initial disability but of subsequent disability.

PER JENKINS, C. J.—Inability to sue is distinct from disability which means want of legal capacity and for the purposes of the Limitation Act (XV of 1877) is the state of being (as section 7 indicates) a minor, insane or an idiot. A subsequent disability does not stop time that has once begun to run.

Lolt Mohun v. Janoky Nath⁽¹⁾ distinguished.

* Second Appeal No. 152 of 1904.

(1) (1893, 2 J. Cal., 714 at p. 716.

SECOND APPEAL from the decision of B. C. Kennedy, District Judge of Sholapur, confirming the order of J. M. Shukla, Subordinate Judge of Mádha, in an execution proceeding.

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One Zumabai, widow of Dharamchand, obtained a decree against Babaji bin Apa Khadake on the 13th October, 1891. Execution was taken out once in 1894 and again in 1897. The last application for execution was made on the 30th September 1897 by Zumabai's adopted son Gulabchand who died on the 24th July, 1900. After Gulabchand's death his son Jivraj, a minor, represented by his mother and guardian Navalbai, presented a third application for execution of the decree on the 20th June, 1903, that is, within three years from the death of Gulabchand and more than three years after the previous application of the 30th September, 1897. The Subordinate Judge dismissed the application as time-barred under article 179, schedule II, of the Limitation Act (XV of 1877). On appeal by the judgment-creditor the Judge confirmed the order.

The judgment-creditor preferred a second appeal.

J. R. Gharpure, for the appellant (judgment-creditor).

G. K. Dandekar, for the respondent (judgment-debtor).

JENKINS, C. J. :—The sole question in this case is whether by reason of the minority of the present applicant the darkhást for execution is within time.

The decree was passed on the 13th October, 1891, and applications for execution were made in 1894 and in 1897, that of 1897 being on the 30th September and admittedly within the time permitted by the Statute of Limitations.

The application of 30th September, 1897, was made by Gulabchand, a major. On the 24th of July, 1900, he died, and then the present applicant, who was a minor, became entitled. He made no application for execution until 1903. Under these circumstances both the lower Courts held the application to be barred.

The case has been argued before us with considerable ability by Mr. Gharpure, who has urged two points. First he says that having regard to clause 4 of article 179 in the 2nd schedule to the Limitation Act he is within time. As assisting him in his

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argument he has referred us to the decision of the Calcutta High Court in *Lalit Mohun Misser v. Janoky Nath Roy*⁽¹⁾. But that case differs in an essential feature from the present, because it appears that the application there, from which time had to be reckoned under article 179 (clause 4) was made by the applicant then before the Court while he was still a minor, and so it was held that, a fresh starting point having arisen in his favour at the time of his application, his minority had the effect of entitling him to the increased period of time indicated by section 7 of the Limitation Act.

In this case, however, the application from which it is sought to date the period of limitation was made by an adult, and it was only on his subsequent death within the period of three years and after time had commenced to run that the present minor applicant became entitled to apply.

This difference in the facts of the two cases is vital, because section 9 provides that when once time has begun to run no subsequent disability or inability to sue stops it.

What we have here is not an initial disability, but a subsequent disability, and as a consequence section 9 applies, and this, in our opinion, distinguishes the present case from the decision of the Calcutta High Court in *Lalit Mohun v. Janoky Nath*⁽¹⁾.

Then it has been argued as a separate point that inasmuch as the period of inability to sue is excluded from computation (whether that inability exists at the beginning of the period or subsequently comes into existence), the period of disability should be excluded. Mr. Gharpure bases his argument upon the fact that where a defendant is absent from British India, the time of his absence is to be excluded and so he says that by parity of reasoning the period of disability should be excluded. But his argument proceeds upon a fallacy. In the first place I am not prepared to assent to the proposition that the absence of the defendant from British India amounts to an inability to sue, and in the second place if it does the obvious answer to the argument is that the result which follows from that condition is

(1) (1898) 20 Cal. 714, 716.

prescribed by section 13 of the Limitation Act, while there is no provision which entitles a period of subsequent disability to be excluded. To assent to Mr. Gharpure's argument would have the effect of striking section 9 out of the Limitation Act.

Inability to sue is distinct from disability, which means want of legal capacity, and for the purposes of the Limitation Act is the state of being (as section 7 indicates) a minor, insane or an idiot, and having regard to the terms of section 9 of the Limitation Act, it is clear subsequent disability does not stop time that has once begun to run.

Therefore we are of opinion that the contention before us fails and the decree of the lower Appellate Court must be confirmed with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

RAMCHANDRA KASTURCHAND (ORIGINAL DEFENDANT I), APPLICANT, *v.*
BALMUKUND CHATURBHUJ (ORIGINAL PLAINTIFF), OPPONENT.*

1904.
August 15.

Civil Procedure Code (Act XIV of 1882), sections 545, 244—Execution of decree—Order refusing stay—Appeal—Deliberate exercise of discretion by lower Court.

An order refusing to stay execution of a decree under section 545 of the Civil Procedure Code (Act XIV of 1882) is not appealable.

Musaji Abdulla v. Damodardas⁽¹⁾, doubted.

Courts of appeal should not lightly interfere with a discretion deliberately exercised by a lower Court.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against an order passed by G. C. Whitworth, District Judge of Sátára, refusing to stay execution of a money decree.

One Balmukund Chaturbhuj, manager of the firm of Navalram Chaturbhuj, obtained a money decree for Rs. 2,523-9 against the

* Application under extraordinary jurisdiction No. 168 of 1904.

(1) (1888) 12 Bom. 279.