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ence to some of their social usages. Now the principle on which a widow takes the life-interest of her deceased husband when there is no male heir, is that she is a surviving portion of her husband (1); and where the rule as to re-marriage is relaxed and a second marriage permitted, it cannot be supposed that the law which these castes follow would permit of the re-married widow retaining the property in the absence of all basis for the continuance of the fiction upon which the right to enjoyment is founded. So far as the enquiries extended which are embodied in Steele's *Hindu Castes* it appears that it is the practice of a wife or widow among the Sudra castes of the Deccan on re-marriage to give up all property to her former husband's relations, had been given her by her own parents; and we have little doubt that the law in this Presidency will not permit the widow who has re-married, and who must be regarded as no longer surviving her husband, to lay claim to the property left by him, now in the possession of the daughter, who, in default of the widow, is the right heir. On these grounds we shall dismiss the Special Appeal.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir W. Morgan, C.J. and Mr. Justice Holloway.

1876. November 10. 1877. January 24.

VALIA TAMBURATTI (DEFENDANT) SPECIAL APPELLANT, *v.* VIRA RA'YAN (PLAINTIFF) SPECIAL RESPONDENT (2).

Act IX of 1871, *Section* 21—*Limitation—Bond—Payment of interest.*

Suit to recover the principal sum and one year's interest due on a bond dated the 11th March 1866. By the terms of the bond the rent of certain land was assigned to the lender as security for interest. No date was specified in the bond for the payment of the principal sum. The interest was regularly paid up to October 1871, and the present suit was brought in June 1874.

Held, on Special Appeal, by HOLLOWAY, J., that assuming that the period of limitation was three years, and that it had run out both before action brought and before Act IX of 1871 came into operation, Section 21 of that Act operated to save

(1) See *Smriti Chandrika*, Ch. XI, s. 1 §4.

(2) Special Appeal No. 661 of 1876, against the decree of H. Wigram, District Judge of South Malabar, dated 21st January 1876, modifying the decree of T. K. Ramen Nair, District Munsif of Calicut, dated 14th September 1875.

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the action : that at the period of that law coming into force there was still a contractual right existing, and that the right of action was restored by the payment of interest.

Vencatáchella Mudali v. *Séshagherri Rán* (1) and *Mokatalla Naganna* v. *Pedda Narappa* (2) distinguished.

Held by MORGAN, C.J., that no question of limitation arose. That the lender having been constituted by the bond a trustee and receiver of the rents and profits of land, it was only on an adjustment of his accounts that the principal became payable.

THE plaint in this suit was filed on the 16th June 1874 to recover Rupees 1,562-8-0, principal and interest due on a bond executed by an agent of defendant's ancestress on the 11th March 1866. By the terms of this bond the rent of certain land was assigned to the lender as security for interest on the principal sum borrowed, Rupees 1,250, but no date was specified for its repayment. Defendant pleaded that the suit was barred by the Limitation Act (IX of 1871), that the agent had no authority to execute the bond, and that there was no consideration. The District Munsif (B. D'Rozario) decided that the suit was barred by Article 66 of Schedule II of Act IX of 1871 and accordingly dismissed the suit. On appeal the District Judge (W. Logan) reversed that decree on the ground that payment of interest was alleged up to October 1871, and remanded the suit for a decision on the merits. On remand the District Munsif (T. K. Rámen Náir) decreed for plaintiff on the merits. The defendant appealed on the ground, among others, that the suit was barred by limitation. The District Judge (H. Wigram) held that the suit was barred as to the principal, but decreed for the plaintiff as to Rupees 312-8-0, being interest accrued since October 1872 with costs.

The defendant preferred a Special Appeal on the grounds that the suit was barred by the Act of Limitation, and that the Lower Appellate Court was wrong in awarding interest on a sum already barred by the Act of Limitation.

The Special Respondent (plaintiff) also filed a memorandum of objection to that part of the Lower Court's decision which disallowed his claim, on the ground that the suit for the recovery of the principal due on the bond mentioned in the plaint was not barred.

(1) 7 Mad. H. C. R., 283. (2) 7 Mad. H. C. R., 288.

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The *Advocate-General* for the Special Appellant.

Mr. *Miller* for the Special Respondent.

[HOLLOWAY, J.—The decision in this case will turn on the question whether the former Act (XIV of 1859) extinguished the obligation.]

Mr. *Miller*.—Act XIV of 1859 barred the remedy only, not the right; and so far as regards this case Act IX of 1871 would operate only to bar the remedy. From 1866 until October 1871 the interest was regularly paid by the defendant and no demand was made for payment of the principal. In 1871 interest ceased to be paid, and in June 1874 the present suit was brought, within three years from the time of the last payment.

[HOLLOWAY, J.—We must start from the point that you would be barred by the Act of 1859. The question is,—Has the Indian Legislature followed the theory that limitation merely bars the remedy or that it bars the obligation.]

Section 29, Act IX of 1871 bars the right in certain cases by express words: this shows that in other cases the right was not intended to be barred.

[HOLLOWAY, J.—The words of this section are precisely similar to those of Section 34 of 3 and 4 Will. IV, cap. 27.]

Section 21 of Act IX of 1871 provides that a payment of interest on a debt made within three years from the time the debt became due gives a new starting point of limitation. We paid interest up to October 1871, and the question for the Court to decide is whether we are barred because the exception of payment of interest is not in the Act of 1859. Under the Act of 1859 we might have been barred as to the principal, but still entitled to recover the interest.

[HOLLOWAY, J.—Von Savigny, *Sys.*, Vol. 5, § 11. If you cannot recover the principal sum due, you cannot recover interest upon it.]

I contend that we are entitled to both. Payment of interest to us within the period prescribed by Act IX of 1871 has been proved.

The *Advocate-General*.—Assuming that under Act XIV of 1859 the remedy is barred, the cases of *Vencatáchella Mudali* v. *Séshagherri Ráu* (1) and *Molakatalla Naganna* v. *Pedda*

(1) 7 Mad. H. C. R., 283.

Nárappa (1) apply to this case. Under the Act of 1859 the right of suit had expired. I submit that the tenor of the Acts is that the right of suit is gone when the time of limitation has expired. Under the Act of 1859 the plaintiff could not have recovered, and that the legislature did not intend by the Act of 1871 to revive suits which had been barred by the Act of 1859 appears from Section 1 of the Act of 1871.

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The Court delivered the following judgments :—

HOLLOWAY, J.—In this case the judgment of the District Judge has held the principal demand barred by limitation, but the interest, for which he has given a decree, not barred.

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Savigny, following Cujas, thus (*Sys.* V, § 311) states the reason of Justinian's decision (2) :—

"When the principal demand is lost by prescription, actions for all sums of interest in arrears are barred with the principal, even when these would (primarily) arise at a very recent time.

The ground of this apparent anomaly is to be found in the accessary nature of these liabilities, which would render the pursuit of them after the loss of the main action a contradiction in terms."

He then, perhaps erroneously, although supported by Coke, refers, as another reason, to the presumption of discharge, on which he supposes such statutes to be based, and he then gives instances of recurring demands which are, from their nature of principal instead of accessary, only subject to limitation from the moment of the arising of each. The logic of the matter is irrefragable, and in the present case there seems nothing in legislation to compel a departure from logical rules. If, therefore, the decision had depended upon the ground taken in the special appeal, the decree must have been reversed. On the face of the proceedings, however, it seemed most doubtful whether the action

(1) 7 Mad. H. C. R., 288.

(2) See C. IV, 32, 26. "Eos qui principali actione per exceptionem triginta vel quadraginta annorum sive personali sive hypothecaria ceciderunt, non posse super usuris vel fructibus præteriti temporis aliquam movere questionem, dicendo ex his temporibus eas velle sibi persolvi quæ non ad triginta, vel quadraginta præteritos annos referuntur, asserendo singulis annis actiones nasci; *principali enim actione non subsistente satis supervacuum est super usuris vel fructibus adhuc iudicem cognoscere.*"

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for the principal was in fact barred, and we have therefore given an opportunity of raising the question.

The question is this. The original demand was subject to the old law of limitation. Payments either of principal or interest while it was in force did not extend the period of limitation, and the Courts did not hold with Savigny and other great lawyers that, until the payment of interest ceased, there was no commencement of prescription (*Sys.* Vol. V, 280), and consequently no question of its interruption. I will assume for the purpose of the present question that the period of limitation was three years, and that it had run out both before action and before the new law came into operation.

The question then is whether Section 21 of the new Act can operate to save this action, which would have been irrevocably gone if the old law had been in force.

The decisions referred to (1) do not touch the question. They were on cases in which it was sought to get out of the effect of the old law, which had begun to operate, by means of a demand, that is, by the aid of the new law, to shift the point at which limitation was to begin. It was quite clear that this could not be done. The period had begun to run, and by the old law as well as the new it must run on unless interrupted by one of the specified modes. There was nothing in the new law to substitute a new period, and neither by the old law nor the new was a demand a mode of interrupting the prescription of the action when it had once commenced.

This is not such a case. Section 21 does give a new starting-point in every case of payment of interest, and in case of payment of part of the principal; but in the latter case, subject to certain special requirements. The reason of this last provision will be found in the wholly different mode in which the inference of an unsatisfied debt is raised by the payment of part of the principal and the interest respectively. (See C. VIII—40—5. Sav. *Sys.* V. 315, and *Tippetts* v. *Heane* (2).)

If the whole matter had occurred under the new law the plaintiff would clearly not be barred. He can, therefore, only

(1) *Venkatachella Mudali* v. *Seshagherri Rau*, 7 Mad. H. C. R. 283: & *Molakatalla Naganna* v. *Pedda Narappa*, 7 Mad. H. C. R. 288.

(2) 1 Cr. M. & R. 252: 3 L.J. N.S. Ex. 281.

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be barred in consequence of a law as to the prescription of actions which has passed away.

It is probable that by making it necessary that the payment and admission should be within the currency as to this part of the law, the makers were governed by the theory now most prevalent that the bar of the action on a personal right and the extinction of the right are coincident, and not upon the contrary doctrine that the bar of the action leaves a subsisting natural obligation which will sustain an action if brought within the proper period after an event legally capable of interrupting the running of the time.

Illustrious names are to be found on both sides, Savigny at the head of the one and Vangerow of the other.

The modern codes have generally adopted the theory of extinction and repel the theory of the survival of a natural obligation. (Code Civil, 1,234; Öster. 993; Sacks § 170 and 153, § 1016).

Those codes have not, however, consistently applied the doctrine. The Saxon Code (Section 1,454) leaves the guarantee of an obligation so barred an actionable demand, yet it would logically as an accessary obligation disappear with the principal. So Section 369 declares the money paid on an obligation so extinguished not to be recoverable. So Section 992 maintains a pledge based on such an obligation after the extinction.

That the English law so regarded the matter the decisions and books abundantly show. Until *Tanner* v. *Smart* (1) the doctrine was that the old obligation and the old action survive together. That case feigned a new action upon a new promise. As in the present Contract Act (2) the only support of that promise in a system which has reduced all obligations to the formula of the innominate contracts of the Roman law must be the moral obligation.

Then come the cases which, following what is called the masterly note in Bosanquet and Puller (3), decided that a promise on a mere moral obligation will not sustain assumpsit although any sham consideration of money or money's worth will. Here

(1) 6 B. & C. 603. (2) IX of 1872.
(3) 3 B. & P., 249.

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again the logical antinomies resulting from conflicting propositions and the absence of principle are very conspicuous.

The present is a case of the introduction of a new mode of interruption, and undoubtedly so far as a prescription already running is concerned, such new interruption would have no effect upon a case in which the period had already run. (See Savigny *Sys.* VIII, 429 fol. and Schewl *Beitrage* I, 144, inferentially).

Savigny and Schewl, however, are discussing the question of the application of a new law barring a *right*, and there is and can be no doubt that if the old statute had this effect, nothing in the new can revive it.

What, however, was the principle of the old law? Express decision and the idiosyncrasy of its makers both show that they did as the English law does, and a long course of traditional jurisprudence elsewhere has done—distinguish between the action and the right, and said nothing on the destruction of the one incompatible with the survival of the other.

The Contract Act clearly takes this view, for it is quite true to the promise and consideration doctrine. It therefore must regard the obligation upon which the action has been extinguished as still subsisting, as Lord Mansfield did.

My view of the matter is that we must give to the old law of limitation the effect which it would itself have had, and not the superadded effect of the probable theory of the new.

One of its own modes of interruption would have saved an action after the full period had run, and I am of opinion that, at the period of the new law coming into force, we are bound to hold, in consistency with its doctrines, that there was still a contractual right deprived of its action, but which could at any time recover it by any mode which the law recognized. After the period had run, a new law of the Forum enacted that payments of interest, which had been going on during the whole period, were sufficient to prevent the bar either of the action or the obligation. If the old law had barred the right, this could have no effect, but its theory was otherwise. As any legal mode of interruption would have revived the action, I am of opinion that it equally survives by the operation of the new law. In consequence of the doctrine which separated the exercise of the action from its rights, the rule becomes one of adjective and not

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of substantive law, and the general rule is applicable that rights are to be enforced according to the processual laws in force at the period of bringing the action. That the statute of limitation has been constantly held, and often very erroneously, to be always a *lex fori* I need not point out. That it is in this case by the manifest, but erroneous, reasons of the law, which are as much legal rules as its express enactments, I am satisfied. I would therefore modify the decree of the Lower Appellate Court and decree for the plaintiff with costs.

MORGAN, C.J.—I think no question of limitation arises under the arrangement disclosed by the document which accompanied this loan. The lender of the money is thereby constituted a trustee and receiver of the rents and profits of land for the benefit of himself and other persons interested, and it is on an adjustment of his accounts that the principal is payable.

If it had been necessary in my judgment to consider the operation of the new Limitation Act, I should have hesitated to hold that it allowed a suit to be brought in any case where the right of suit had already ceased to exist under the old law.

When the appointed period of limitation is, by the law for the time being in force, complete, the remedy by suit is for ever gone unless the legislature thinks fit to make the old right again actionable. I find no such intention expressed in the new Act. The 21st and other sections in Part III do no more than provide for the mode of computation in cases where it becomes necessary to compute a fresh period.

Decree modified.

PRIVY COUNCIL.

RAJAH VURMAH VALIA (PLAINTIFF) *v.* RAVI VURMAH KUNHI KUTTY (DEFENDANTS).

P. C.* 1876. Nov. 30 & Dec. 1.

[On appeal from the High Court of Judicature at Madras.]

Trustees of a religious endowment—Alienation—Custom.

The founder of a Hindu temple who provides that the Urallers (trustees or managers) thereof for the time being, shall be the Karnavans (chiefs) of four

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* *Present* :—Sir J. W. COLVILE, Sir B. PEACOCK, Sir M. E. SMITH and Sir R. P. COLLIER.