

Before Mr. Justice Pontifex and Mr. Justice McDonell.

HAJEE SYUD MAHOMED (PLAINTIFF) *v.* MUSSAMUT ASHRUF-
OONNISSA (DEFENDANT).*

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*Mutual Current Accounts—Limitation Act (IX of 1871), sched. ii, arts.
58, 62, and 87.*

The manager of *A*, the proprietress of an indigo factory, on the 20th December 1869, paid into the *kothî* or bank of *B*, a banker, the sum of Rs. 1,200 to the credit of *A*, and from that time onwards sums of money were drawn by *A*'s manager out of *B*'s bank, and applied to the purposes of *A*'s factory; the balance, though generally against *A*, fluctuated, *A*'s account being usually overdrawn, but there being sometimes a balance in her favour, created by payments made on her account into *B*'s bank. The 2nd of July 1872 was the last occasion that any balance was due from *B* to *A*. Payments continued to be made on behalf of *A* into *B*'s bank up to the 12th of June 1873, when a sum of Rs. 1,083-8 was paid into her account, but, notwithstanding this payment, the balance of account was on that date against her. After the 12th of June 1873, *B* continued to make payments on behalf of *A*, and also to render monthly accounts in which he charged *A* with such payments, and also with the principal of, and interest upon, the balance due on previously-rendered accounts. This continued till the month of January 1874, when *B* for the last time rendered a monthly account to *A*, the last item in which was a payment made on the 6th January 1874. On the 23rd December 1876, *B* instituted a suit against *A* to recover the balance of principal and interest due to him on the footing of the last account rendered by him to *A*.

Held, that the account between *A* and *B* was not, and never had been, a mutual, open, and current account, and that the suit was, therefore, barred by limitation; and that the payments made by *B* on behalf of *A* within the period of limitation, even if authorized, did not have the effect of keeping alive his previous claim against her.

Held also, that even if the dealings and transactions between *A* and *B* could be so construed as to show that there had been at any time a mutual, open, and current account between them, that mutual relation terminated on the 2nd July 1872, or if not, then on the 12th June 1873, when the last payment was made on *A*'s account into *B*'s bank.

In this case, the plaint in which was filed on the 23rd December 1876, the plaintiff, a banker, sued to recover from the defendant, who was the proprietress of an indigo factory, the

* Appeal from Original Decree, No. 286 of 1877, against the decree of W. DaCosta, Esq., Subordinate Judge of Tirhoot, dated the 7th July 1877.

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sum of Rs. 20,060-2-9, being the amount of principal and interest due to him in respect of sums advanced by him to the defendant through her agent, Mr. Wilson, the manager of her indigo factory. The dealings between the plaintiff and the defendant were alleged by the plaintiff to have commenced on the 20th December 1869, and to have continued till the 6th January 1874. From the evidence it appeared, that it had been arranged that the plaintiff should furnish the defendant with monthly statements of account, and that the transactions between the parties commenced by a payment of Rs. 1,200 into the plaintiff's bank made by Mr. Wilson on account, or to the credit, of the defendant, on the 20th December 1869. Between that date and the 31st December 1869, Mr. Wilson drew from the plaintiff's firm, for the purposes of the factory, Rs. 413, leaving a balance of Rs. 787 in favour of the defendant. On the 31st of January 1870, that balance had been overdrawn, and the balance due to the plaintiff from the defendant amounted to Rs. 867-6-2. From that time, the balance continued against the defendant, except on the 2nd July 1870, the 1st December 1870, the 6th March 1871, the 4th February 1872, from the 21st March 1872, until the 10th April 1872, and from the 21st June 1872 to the 2nd July 1872.

The 2nd of July 1872 was the last time at which any balance was due from the plaintiff to the defendant, and on the 31st July 1872, the balance due from the defendant to the plaintiff amounted to the sum of Rs. 1,672-2-4. After that, the balance remained against the defendant, and any sums, which were thereafter paid on her behalf only went in part-payment of her debt to the plaintiff.

The last payment made on behalf of the defendant was made on the 12th June 1873, when a sum of Rs. 1,083-8 was paid in to her credit; but, after giving credit to her for this payment, there was still, at that date, a large balance against her. From this time the transactions between the parties consisted only of payments or advances made by the plaintiff to, or on behalf of, the defendant, the last authorized or undisputed payment having been made on the 19th of September 1873, and on the 30th September 1873, the balance due to the plaintiff amounted

to Rs. 13,646-10-9, as appeared from a statement of account then in due course rendered by the plaintiff to the defendant.

*After the 30th of September 1873, the plaintiff rendered to the defendant four more monthly statements of account, namely, for the months of October, November, and December 1873, and the month of January 1874. These statements, however, did not show any payments made to, or on behalf of, the defendant, except four items entered as payments to the medical adviser of the factory manager: they also contained charges for interest on the principal sum due, which were monthly added to the balance shown to be due by the previous monthly statement. The defendant pleaded that the payments in October, November, December 1873, and January 1874 to the medical adviser of the factory manager were unauthorized, and could not be properly debited against her account; and that, excepting these payments, the whole of the plaintiff's claim was for the principal of and interest upon a sum which, on the plaintiff's own showing, was due and owing on the 30th September 1873, or more than three years before the filing of the plaint in this suit.

The plaintiff replied first, that there had been reciprocal demands between the parties, and the suit was for a balance due on a mutual, open, and current account, and that, therefore, the time from which limitation began to run against him, should be calculated from the time of the last item proved in the account, which was the 6th January 1874, when a payment of Rs. 10 was proved to have been made to the factory manager's medical adviser; and relied upon art. 87, sched. ii of Act IX of 1871; and secondly, that even, if there had not been reciprocal demands between the parties, the suit might be treated as a suit for money payable to him for money found to be due from the defendant to him on accounts stated between them, and that, as his last account rendered, and not disputed, had been rendered by him to the defendant at the close of January 1874, limitation only commenced to run against him from that time.—Art. 62, sched. ii of Act IX of 1871.

The Court of first instance held, that the suit was barred by limitation, as being one which came under the provisos

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of art. 58 of sched. ii of Act IX of 1871, holding first, that the nature of the transactions between the plaintiff and the defendant did not show that there had ever been reciprocal demands between them, for, among other reasons that the plaintiff claimed a right to charge interest upon the balance, which from time to time appeared in his favour, without having allowed a similar advantage to the defendant when she had a balance to her credit; and second, that the case could not come under art. 62 of sched. ii of Act IX of 1871, for the reason that an account stated,—that is, an account rendered by a party and assented to and signed by the other—was one thing, and an account rendered by one party, but neither signed nor expressly assented to by the party to whom it was rendered, was quite another. The Court, however, came to the conclusion and decided that, although the plaintiff could not recover that portion of his claim which had become absolutely due and recoverable on or before the 22nd December 1873, yet, inasmuch as although the principal sum now claimed by the plaintiff was barred by limitation, that principal sum had not been barred on the 23rd December 1873, the plaintiff was entitled to recover the interest due thereon from the 22nd December up to the 6th January 1874. The Court also held, that the payment of Rs. 10, which had been paid to the factory manager's medical adviser on the 6th January 1874, was not barred by limitation; and accordingly gave the plaintiff a decree for ten rupees, and for the interest claimed up to 6th January 1874, with interest thereon from that date up to the filing of the plaint, and dismissed the remainder of the plaintiff's suit, with the usual order for costs in proportion to the amounts allowed and disallowed.

From this decision the plaintiff appealed to the High Court, on the grounds that the suit was not barred by limitation; that arts. 87 and 62 of sched. ii of Act IX of 1871 applied to this case; that art. 58 of that schedule did not apply; and that the fact that no interest was, according to custom and arrangement, allowable on the balance in favour of the defendant, did not take the case out of art. 87.

The defendant also filed a cross-appeal, submitting that she

could not be charged with interest upon a principal sum which the lower Court had disallowed as barred by limitation, and that the Rs. 10 paid to the factory manager's medical adviser on the 6th January 1874 was an unauthorized payment, which could not be charged to her.

Moonshee Mahomed Yusuf for the appellant.

Baboo Chunder Madhub Ghose for the respondent.

The judgment of the Court (PONTIFEX and McDONELL, JJ.), was delivered by

PONTIFEX, J. (who, after shortly stating the facts of the case, continued as follows):—In order to bring the case within art. 87 of Act IX of 1871, and to prevent limitation, the plaintiff would have to show that there was a mutual, open, and current account between the parties, in which there were reciprocal demands. Now I must say that I should have considerable hesitation in holding that there was ever between these parties a mutual account, although, in the instances which I have mentioned, the defendant had in fact paid monies into plaintiff's bank which were in excess of his liabilities; for I do not think that the defendant could at any time have said—“I have an account against you, the banker.” During nearly the whole of that time the banker could have said “I have an account against you, the defendant;” but unless they could each have said to the other “I have an account against you,” I do not see how these could be “mutual” accounts. But even supposing that the accounts between these two parties could be called mutual accounts, and that they were open and current until they were stopped, still it appears to us that they could only be “mutual” down to the 12th June 1873, when the last payment of Rs. 1,083-8 was made by the defendant into the plaintiff's bank. After that time the defendant made no payments whatever, and from that time the account was only one way. But besides the account being mutual, open, and current, there must, to bring it within clause 87, have been reciprocal demands between the parties.

Now, no doubt, when, at the commencement of these accounts, the defendant paid money into the bank, and when at the other

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times that I have mentioned there was a balance due to him from the bank, it might be said that he had a demand against the bank, and that therefore there were reciprocal demands between the parties down to July 1872, which was the last occasion that there was a balance in favour of the defendant; but from that date it appears to us that it cannot be said that there were reciprocal demands between the parties.

Then, under art. 87, the time within which the plaintiff must sue is "the time of the last item admitted or proved in the account." According to my reading of the article, the word "item" means the last admitted item on the defendant's side of the account, or, in other words, the last reciprocal item. But in this case that item would be that of the 2nd July 1872, or at latest the payment in June 1873.

From that time no payments whatever were made by the defendant. In the accounts furnished by the plaintiff it appears that, down to September 1873, the plaintiff did make payments on the defendant's behalf, payments which the plaintiff was authorized to make; but after September 1873, it appears to us that the plaintiff made no payment that was authorized by the defendant.

It is true that, for the purpose of saving limitation, having instituted the suit in December 1876, the plaintiff has included in his accounts certain payments in October, November, and December 1873, and in January 1874,—namely Rs. 10 for Dr. Sandford's fee in each of those months: but of course he is not entitled to rely upon these payments in order to take his case out of the Limitation Act, unless he was authorized by the defendant to make them.

We are satisfied upon the evidence, so far as it was read to us, that the defendant was in no way bound to pay for medical attendance on Mr. Wilson and Mr. McGregor. Mr. Wilson in his examination states,—“I sanctioned Mr. McGregor paying the doctor's fees out of the factory account estimate, intending to refund the same myself if objected to by the defendant.” The payments made to the doctor being, so far as the defendant was concerned, wholly gratuitous and unauthorized, we think the plaintiff is not entitled to rely upon them. So that even

if the case does fall under art. 87, yet the last item on either side of the accounts would be in September 1873, and that being so, the suit would be too late, and must fail on the ground of limitation. But then it is said that the plaintiff can rely upon art. 62, inasmuch as he furnished accounts every month down to January, 1874, and that each of these accounts, so furnished, must be taken as a stated account; and he claims under art. 62 to sue from the time that the accounts were stated,—*i. e.*, from the time that he delivered his last account in January 1874. But we think it clear that even if the account delivered in September 1873 could on that date be treated as a stated account, the plaintiff could not, by adding small and unauthorized items in both November and December 1873, and in delivering his account, renew the statement of account up to January 1874, so as to give him the benefit of art. 62. We think that his case fails on this ground also, and that his suit was properly dismissed on the score of limitation.

There is a cross-appeal with respect to certain sums allowed by the lower Court,—namely, the doctor's fees,—which the plaintiff stated had been paid, and also interest which the lower Court seems to have allowed, although it refused to give a decree for the principal. As we have previously observed, the plaintiff had no authority to make these payments to the doctor, and therefore he is not entitled to recover them; and with respect to the interest that has been awarded, we do not see on what principle a decree can be given for interest when by the judgment of the Court no principal is due. We think, therefore, that the defendant is entitled to a decree on his cross-appeal.

We should have had more reluctance in dismissing the plaintiff's suit on the score of limitation but for certain circumstances. We find that the whole of these transactions between the plaintiff and the defendant occurred during the time that Mr. Wilson was the manager for the defendant. Now the plaintiff must have known very well that Mr. Wilson was discharged in January 1874, and that there were disputes going on between him and the defendant; yet, notwithstanding this,

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the plaintiff, according to his own case, waits to the very last minute before he institutes his suit, though his claim might have materially affected the disputes between the defendant and Mr. Wilson. The plaintiff has himself to blame if now he is not entitled to a decree.

We cannot dismiss this case without remarking that the "paper-book" has been prepared without due regard to the interests of the parties. The vakeels might have agreed to print in the space of half a sheet such items of the accounts as were necessary for the decision of the case, instead of which there have been no less than 70 or 80 pages of unnecessary accounts printed.

We dismiss plaintiff's appeal with costs, and we allow the cross-appeal but without costs.

The result is that plaintiff's suit is dismissed.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

PAYN v. THE ADMINISTRATOR-GENERAL OF BENGAL AND
OTHERS.

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April 29.

High Court—Extraordinary Original Jurisdiction—Transfer of Suit—Letters Patent, cl. 13—Grounds of Transfer.

A suit for an account and for other relief relating to immoveable property situated without the local limits of the ordinary original civil jurisdiction of the High Court, was instituted against several defendants in the Court of the Subordinate Judge of the district within which the property was situated. Upon a petition by one of the defendants, consented to by most of the other defendants and by the plaintiff, the High Court ordered the suit to be removed from the Court in which it had been instituted, to be tried and determined by the High Court as a Court of Extraordinary Original Jurisdiction, on the grounds, that the parties and the witnesses resided in Calcutta, that it would be cheaper to try the suit in Calcutta, and that all parties appearing on the motion desired a transfer.

THIS was a suit for an account, and for other relief relating to immoveable property situated in the district of Hooghly.