APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

SITHAMMA (PLAINTIFF), APPELLANT,

v.

NARAYANA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1889.
March 14.

Limitation Act—Act XV of 1877, sch. II, arts. 120, 123—*Executor* de son tort—*Suit for a share of Government promissory notes by an heir against one falsely professing to hold them under a will.*

Suit in 1887 by a daughter to recover her share of Government promissory notes, being stridhanam of her mother who died in 1880. The property in question had been in the possession of a son of the deceased since her death. He claimed the property under a will, but the will was set aside by the Court as false in 1884 :

Held, that Limitation Act, sch. II, art. 123, is applicable only to cases in which the defendant lawfully represents the estate of the deceased, and that the suit was accordingly barred by limitation.

APPEAL against the decree of C. Ramachandra Ayyar, Acting District Judge of Nellore, in original suit No. 28 of 1887.

The District Judge held that the suit was barred by Limitation Act, Schedule II, article 120, and accordingly passed a decree dismissing it. The plaintiff preferred this appeal.

Bhashyam Ayyangar for appellant.

Subramanya Ayyar for respondents.

The facts of this case, and the arguments adduced on appeal, appear sufficiently for the purpose of this report from the judgment of the Court (Muttusami Ayyar and Parker, JJ.).

JUDGMENT.—This was a suit brought by the appellant to recover her one-third share of three Government promissory notes of the aggregate value of Rs. 9,000 in the possession of the respondent No. 1. The promissory notes belonged to one Bojjamma, who died in September 1880, leaving her surviving a son, respondent No. 1 and three daughters, the appellant and respondents Nos. 2 and 3. Upon Bojjamma's death, respondent No. 1 took possession of her property, including the Government securities. and claimed to hold it under a will, whereby, as alleged by him, the property was bequeathed to him and others. Subsequently litigation ensued regarding the will which was finally set aside by the High Court as false in July 1884. The appellant's case was

* Appeal No. 118 of 1888.

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that the Government promissory notes were Bojjamma's stridhanam, that her daughters were entitled to take them in preference to her son, that he was wrongfully in possession under the forged will, that, as one of three daughters, she was entitled to a one-third share, and that the cause of action arose in August 1884. The plaint was filed in September 1887. The Acting District Judge held that the cause of action arose on the day that Bojjamma died, that article 120 applied, and that the claim was therefore barred by limitation. Hence this appeal.

It is conceded that the appeal must fail whether the three or six years' rule is applicable to the suit. But it is urged that the respondent No. 1 held the Government promissory notes in dispute as executor *de son tort*, and that the suit is therefore governed by article 123, schedule II, of the Limitation Act. Article 123 purports to apply to a suit for a legacy or a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate. According to its true construction, the article applies only to cases in which the defendant lawfully represents the estate of a deceased person. An executor *de son tort* is certainly liable to be treated as incurring the liability of an executor for certain limited purposes, but the point for consideration is whether he represents the estate of the deceased for purposes of limitation in a suit like the one before us. We are of opinion that he does not. If the contention were to prevail, a suit brought by one who claims to be the heir of a deceased person against every defendant who wrongfully retains the movable property belonging to that person under a claim of title, which has no foundation, would not be barred before the expiration of twelve years. In order that a suit for the recovery of movable property instituted by an heir might be treated as a suit for a distributive share of an intestate estate, it must be established that the party in possession is either really an executor or an administrator, or, to use the language of 23 and 24 Vic., Cap. 38, section 13, a legal personal representative of the deceased. This view is in accordance with the decision in *Issur Chunder Doss* v. *Juggut Chunder Shaha*(1), and the *dictum* of Wilson, J., in *Kally Churn Shaw* v. *Dukhee Bibee*(2).

We agree with the Judge that the claim is barred by limitation and dismiss the appeal with costs.

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(1) I.L.R., 9 Cal., 79. (2) I.L.R., 5 Cal., 694.