The plaintiff, if he does not choose to sue for partition of the whole estate, can sue to eject first defendant from the house, making his brothers, who refuse to join as co-plaintiffs, defendants in the suit.

The second appeal fails, and we dismiss it with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

NATASAYYAN AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

PONNUSAMI (PLAINTIFF), RESPONDENT.*

1892. September 2. October 7.

Hindu law—Son's liability for his father's debt—Immoral origin of debt—Limitation Act—Act XV of 1877, sched. II, art. 120—Suit by a decree-holder against the sons of a deceased judgment-debtor whose property had passed to them.

A decree was passed against a Hindu for money dishonestly retained by him from the plaintiff's family to which he was accountable in respect of it. The judgment-debtor having died, the decree-holder sought to attach in execution property of the family which had passed into the hands of his sons by survivorship. The sons objected that such property was not liable to attachment, and the decree-holder was referred to a regular suit. He now brought a suit against the sons:

Held, (1) that the suit was governed by art. 120 of the Limitation Act and that time began to run for the purposes of limitation from the death of the father;

(2) that the sons were not entitled to go behind the decree except for the purpose of showing that the judgment-debt was immoral or illegal in its origin;

(3) that the judgment-debt was not of an illegal or immoral nature so as to exclude the pious obligation of the sons to discharge it.

APPEAL against the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in original suit No. 56 of 1888.

Plaintiff, Savarimuthu Nadan and Susai Nadan were undivided brothers, who owned certain property. Part of this property and certain outstanding debts due to the family were sold in 1877 by Savarimuthu Nadan to the father of the present defendants who realised the debts. The plaintiff, alleging that the sale by his brother was not binding on him, brought original suit No. 20 of 1879 on the file of the Subordinate Court of Negapatam against

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* Appeal No. 104 of 1891.

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the defendants' father and obtained a decree, which was substantially confirmed by the High Court in 1883, for his one-third share of the land and of the sum realised on account of the debts and for costs. The then defendants died after decree, viz., in October 1884, and on an application being made for the execution of the decree against the property of the judgment-debtor, the sons objected that the property had passed to them and was not liable in execution. The plaintiff was thereupon referred to a regular suit and now sued in November 1888 to recover the sum decreed together with a certain sum to which he claimed to be entitled on account of mesne profits "from the defendants and on the liability of the family property which is in their hands." The Subordinate Judge dismissed the suit so far as concerned the last-mentioned claim, but otherwise passed a decree as prayed.

The further facts of the case appear sufficiently for the purposes of this report from the following judgment.

The defendants preferred this appeal.

Subramanya Ayyar, *Mahadeva Ayyar* and *Krishnasami Ayyar* for appellants.

Bhashyam Ayyangar for respondent.

JUDGMENT.—Defendants appeal against so much of the decree as makes them liable to pay to plaintiff out of their family property the sum of Rs. 4,002-15-1, together with further interest and proportionate costs. This sum represents items 1, 2, 3 and 4 in the plaint schedule. Of these items 1, 2 and 3 are sums awarded to plaintiff against defendants' father Dorasami Ayyar by the decree in original suit No. 20 of 1879 on the file of the Subordinate Court of Negapatam as modified by the decree of the High Court in appeal No. 152 of 1882. Item 4 is the costs awarded to plaintiff against defendants' father by the same decree. Defendants' father died after the decree and plaintiff sought to execute the decree against the present defendants, but was referred to a regular suit, on the ground that defendants took the family property on the death of their father by survivorship and not as his representatives, and therefore the decree could not be executed against them as his representatives. Hence this suit, in which plaintiff claimed the items which have been decreed to him, and also certain sums on account of mesne profits of lands and a bungalow belonging to his family which were alleged to

have been for some time in possession of defendants' father. This latter part of his claim was disallowed.

The first question to be decided in this appeal is limitation. The Subordinate Judge holds that the suit is governed by article 120 of schedule II of the Limitation Act, which prescribes six years as the period of limitation for suits for which no period of limitation is prescribed elsewhere in the schedule. He holds that the cause of action arose on the death of defendants' father, which he finds to have taken place on 29th October 1884, and therefore the suit brought in 1888 is not barred. For appellants it is argued that limitation runs as to items 1, 2 and 3 from the time defendants' father became accountable for these sums, which, according to plaintiff's case, was in 1876, and that the period of limitation is three years under article 62 of the schedule, and the suit is therefore barred. We think the Subordinate Judge was right in holding that the case was governed by article 120 of the schedule. Article 62 clearly cannot apply, for the money sued for was not received by defendants, but by defendants' father. We can see no other article of the schedule that applies to the case. The suit is one of a special nature, founded on the pious duty imposed on sons by the Hindu law of discharging the debts of their father, other than those contracted for illegal or immoral purposes, and the necessity for the suit arises from the fact that the decree against the father, which might have been executed in his lifetime against the family property, can no longer be so executed after his death, the property having passed to his sons by survivorship. We hold, therefore, that six years is the period of limitation for this suit under article 120 of the schedule. But this decision is not enough to settle the question, for if the cause of action arose at the date contended for by defendants' vakil, the suit would be barred as to items 1, 2 and 3 even if six years be the time prescribed. Article 120 gives as the time from which limitation begins to run 'when the right to sue accrues.' It is argued for appellants that the pious duty of sons to pay their father's debt begins as soon as the debt is contracted, or if the sons are born after the debt is contracted, with their birth, and therefore limitation begins to run from the date of the debt or the date of the son's birth according to circumstances. In support of the position that the son's pious obligation to pay the debt of the father arises at the date of the debt or of the birth of the son,

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the case of *Kunhali Beari* v. *Keshava Shanbaga*(1) is relied on, and the point certainly does seem to have been expressly decided in that case, in favour of appellants' contention. It is true that a *dictum* to the contrary at page 335 of the report of *Arunachala* v. *Zamindar of Sivagiri*(2) was not noticed in *Kunhali Beari* v. *Keshava Shanbaga*(1), but the judgment in this latter case is an exhaustive discussion of all the authorities as to the position of the son by Hindu law with regard to his father's debts, and it expressly negatives the contention there raised that the pious obligation of the son to pay his father's debt arises only on the father's death (see page 67). The authority of this case has not been questioned in later decisions, and it is conclusive upon the question. But we think it does not follow that, assuming that the pious obligation arises at the date when the debt was contracted or the son was born, limitation in the present case therefore runs from the same dates. The question under article 120 of the second schedule to the Limitation Act is, when did the right to sue accrue, and in our opinion the right to sue accrued only on the death of the father. It must be remembered that suits like the present are of a peculiar nature, arising out of the fact that the family property, which might be made available for discharge of the father's debts in the father's lifetime by proceedings in execution of a decree against him, can no longer be made so available after his death, because the sons are not the father's representatives *qua* the family property. It is argued for appellants that plaintiff could have sued in the father's lifetime to have it declared that the shares of the sons were also liable to be taken in execution of a decree against the father and therefore plaintiff's right to sue accrued in the lifetime of the father. No doubt *Ramakrishna* v. *Namasivaya*(3) and other cases are authorities that a judgment-creditor who has sought to attach the sons' shares in execution proceedings under a decree against the father and been defeated on a claim by the son, can bring a suit to establish his right to proceed against the sons' shares in execution. But though plaintiff could bring such a suit, he need not do so if he can obtain his remedy against the sons' shares in execution and, moreover, such a suit is a very different one from the present suit. In such a suit the question would be whether, the liability of the father's

(1) I.L.R., 11 Mad., 64. (2) I.L.R., 7 Mad., 328. (3) I.L.R., 7 Mad., 295.

share being admitted, the sons' shares were also liable. In this suit the father's share having passed to his sons by survivorship, the liability of the whole property has to be established. In short, it is a suit *sui generis*, and in our opinion the right to bring such a suit accrues only on the death of the father, and limitation under article 120 of schedule II of the Limitation Act runs only from that date, and the suit is, therefore, not barred.

The next point taken on behalf of appellants is that they are not bound by the decree against their father, but it is open to them to question it not merely on the ground that the debts which were the subject of it were contracted for immoral or illegal purposes, but generally on every ground on which the father could have contested the suit. It appears to us that this view overlooks the nature and object of suits like the present. It is not a question whether the judgment against the father is a judgment *inter partes* and therefore not binding on the sons. It is settled law that in the father's lifetime the decree against the father could be enforced in execution against the son's shares, and that they could only avoid liability to that decree by establishing the immoral or illegal nature of the debt. By the death of the father the creditor can no longer proceed against the sons' shares in execution, but must have recourse to a suit; but the object of that suit is the same as that of the proceedings in execution in the father's lifetime and the defence allowed to the sons can only be the same. Both to the suit and the proceedings in execution the sons might set up the defence of fraud or collusion between the father and the creditor; but apart from that, equally in the suit as in the execution proceedings the sons can only resist the liability of their shares to satisfy the decree against their father on the ground of the immoral or illegal nature of the debt. We think the Subordinate Judge was right in holding, as we understand he did hold, that defendants could not go behind the decree in this case except for the purpose of showing that the debt was immoral or illegal in its origin.

It is further contended for appellants that the claims 1, 2 and 3 against defendants' father, a share of which has been allowed to plaintiff in this suit against defendants, were in their origin immoral and illegal. Our attention is not directed to any particular portion of the evidence upon this part of the case, but it is argued that the Subordinate Judge's own findings show that

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the debts were tainted with immorality and illegality. What the Subordinate Judge's findings came to is this, that the three items, 1, 2 and 3, in the plaint schedule were sums collected by defendants' father on account of plaintiff's family, but never paid to, or accounted for to, the family. No doubt this was a dishonest transaction on defendants' father's part, but the dishonesty is not of such a nature as absolves defendants from their pious obligation to discharge their father's debts. Much has been said in the course of the argument as to the peculiar notions of Hindus as to what would amount to immorality or illegality in the origin of a debt, and allusion has been made to the exceptions to the rule of the pious obligation recognized by the commentators in the case of such liabilities as a toll or a fine. Without discussing the origin of these exceptions or the exact meaning that the words 'immoral' and 'illegal' bore to the minds of commentators on the Hindu law, it seems to us that there can be no question that debts of the nature of those found by the decree against defendants' father to be justly due by him to plaintiff are not of an immoral or illegal nature, upon any reasonable view of the meaning of those words as used in the rule of Hindu law under consideration. That rule, as we understand it, is that sons are under a pious obligation to discharge the just debts of their father, because otherwise he would be liable to be punished in a future state for non-discharge of these debts. Upon any intelligible principles of morality a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation, and for the non-discharge of which punishment in a future state might be expected to be inflicted, if in any. The son is not bound to do anything to relieve his father from the consequences of his own vicious indulgences, but he is surely bound to do that which his father himself would do were it possible, viz., to restore to those lawfully entitled money he has unlawfully retained. In our opinion the contention of appellants on this point is opposed to all the principles upon which the rule of Hindu law rests, and we agree with the Lower Court that no such immorality or illegality in the nature of the original debts has been shown as would absolve defendants from their obligation to pay them out of the family property. Lastly, it is argued that at least item 4, the costs of the suit, is not binding on defendants. It follows from

the view we have taken that defendants' liability in this suit is the same as it would have been in execution proceedings, viz., to pay the decree amount; that they are also liable for the costs awarded by the decree.

On the whole the appeal fails and is dismissed with costs.

Plaintiff has filed a memorandum of objections in respect of that part of his claim which has been disallowed. It is not pressed except as to a sum of Rs. 304-15-6, the difference between the total claim in the plaint under the heads 1, 2, 3 and 4 and that which the Subordinate Judge finds would be the correct total. The Subordinate Judge, though he says plaintiff's total is founded on a mistake, gives him only what he claims. It is admitted that it is a purely arithmetical mistake. We shall modify the decree by decreeing to plaintiff Rs. 4,307-14-7 and costs proportionate instead of Rs. 4,002-15-1. In other respects, the memorandum of objections is dismissed with costs.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

QUEEN-EMPRESS

v.

VIRAPERUMAL.*

1892.
Oct. 17.
Nov. 18.
Dec. 5.

Oaths Act—Act X of 1873, *ss.* 5, 6, 7, 13—*Examination as witness of a child of tender years—Intentional omission to administer affirmation.*

A child, aged about six years, was called as a witness in a sessions court. The Judge satisfied himself of his intellectual capacity to give evidence, but intentionally omitted to administer an affirmation on the ground that he was of too tender years to render any attempt to bind his conscience expedient or practically operative. The Judge did not examine the child for the purpose of eliciting whether he knew it was wrong not to tell the truth, or whether he knew the differences between right and wrong, but he told him to tell the truth and permitted him to be examined as a witness:

Held, that the child should have been affirmed.

Quœre, whether the omission to affirm the child having been intentional on the part of the Judge, the case came within the provisions of Oaths Act, s. 13.

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* Referred Trial No. 36 of 1892.