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grant the relief sought. It may be that in the former suit both Courts ought, properly speaking, to have insisted on proper issues being raised, and to have tried those issues upon the best evidence that the parties could adduce. But we are not prepared to say that the course taken by those Courts was *ultra vires*. They considered, rightly or wrongly, that they were not in a position to try the main question in the cause; and it is clear that a question, which was advisedly left undecided in the former suit, cannot be said to have been *heard* and *finally decided* within the meaning of s. 13 of the Code.

As we understand, the plaintiff has now come into Court "with a plaint corrected according to what the Munsiff had shown to be essential to his success," and the first Court has been able to give a decree upon that plaint.

The lower Appellate Court has refused to try the case upon its merits, having found the issue as to *res-judicata* against the plaintiff. We think that this judgment must be set aside, and the case remanded to the lower Appellate Court for trial of the remaining issues. The costs of this appeal will follow the result.

Case remanded.

PRIVY COUNCIL.

GURUDAS PYNE AND RAM NARAIN SAHU.

P.C.*
 1884
 February 21.

[On appeal from the High Court at Fort William in Bengal.]

Limitation Act, IX of 1871, Sch. II, Arts. 48, 60, and 118.

The defendant, as an agent, sold goods entrusted to him by his principal, who died after a decree had been made against him for their conversion; and, as agent for the representative of the deceased, retained the proceeds, which the decree-holder had an equitable right to follow in the agent's hands: *Hold*, that neither Art. 48 of Sch. II of Act IX of 1871, fixing the limitation of three years to suits for moveable property acquired by dishonest misappropriation or conversion, nor Art. 60 of the same schedule, fixing the limitation of three years to suits for "money payable by the defendant to the plaintiff," and to suits "for money received to the plaintiff's use," were applicable to the present suit; but that, as a suit for

* *Present*: SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH and SIR A. HOBHOUSE.

which no period of limitation was provided elsewhere, it fell within Art. 118 of the same schedule, fixing for such suits the limitation of six years.

APPEAL from a decree of a Divisional Bench of the High Court (4th July 1878), reversing a decree of the Subordinate Judge of the Midnapore District (12th September 1876.)

The questions raised in this appeal related to the law of limitation under Act IX of 1871, to a claim for the proceeds of the sale of goods, wrongfully converted by a deceased person, against whom a decree had been obtained on that cause of suit; such proceeds being in the hands of the defendant, who held them as agent for the representative of the deceased.

Mr. *R. V. Doyne* appeared for the appellant, the defendant in the suit, on whose behalf he contended that the sale, having taken place in 1870, and the suit having been brought in 1876, the plaintiff's claim was barred by limitation under Art. 48, or Art. 60, of the second schedule of Act IX of 1871, the law of limitation then in force.

The respondents did not appear.

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—Their Lordships are of opinion that the judgment of the High Court ought to be affirmed.

It appears that, as far back as March 1865, Modhoosoodun, who was the brother of the present appellant, had taken some 1,260 logs of timber which belonged to the plaintiffs, and converted them to his own use. Soon after that, a suit No. 10 of 1865, was brought by the plaintiffs against Modhoosoodun and another for the conversion of the timber, and a decree was obtained on the 30th March 1868, for the sum of Rs. 25,200, in favour of the plaintiffs. That decision was appealed from to the High Court, which, in January 1869, reversed the decree. An appeal was preferred to Her Majesty in Council, and on the 12th December 1873 the decision of the High Court was reversed, and the decree of the first Court established; namely, that the plaintiffs were to recover a sum of Rs. 25,200 from Modhoosoodun and the other defendant. In the meanwhile Modhoosoodun had died, and the decree in the Privy Council was against his widow, as his representative, that the Rs. 25,200

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should be recovered from her. Subsequently an application was made to the District Court of Midnapore to execute the decree, and certain property was attached which the present appellant claimed as his separate property. Only a very small portion of it was held liable to the decree, and the rest was ordered to be given up. Upon that, the present suit was instituted for the purpose of trying whether the plaintiffs had not a right to execute their decree against the property mentioned in the attachment, and which had been ordered to be given up. The plaintiffs, however, did not rely merely on the fact that they had obtained the decree, and that the property was liable to be seized; but they made a further allegation, and stated that "Gurudas Pyne," the present appellant, and the defendant in the suit, "was benefited by the aforesaid timber taken by the *Kurta* Modhoosoodun, and, after the death of Modhoosoodun, himself sold the aforesaid timbers, and appropriated the moneys obtained by the sale of the aforesaid timbers, and regularly conducted the aforesaid case. Both the brothers are, for the reasons mentioned above, answerable under the decree we have obtained in the aforesaid case for the afore-mentioned acts, although the name of Modhoosoodun alone was mentioned in that decree; and therefore we are fully entitled to realise the whole amount by the sale of the properties of both the brothers." Strictly speaking, the claim was to realise the decree from the property of the defendant. The first Court held that a portion of the property which was claimed by the defendant was liable to the execution, but that a great portion of it was not. Upon that an appeal was preferred by the plaintiffs to the High Court, and notice of objections was given by the defendant. The High Court held that, notwithstanding the sale of the timber by the defendant, and his receipt of the assets which were derived from the sale, he was not liable to have his property attached and sold under the execution against his brother; but they went on, and said: "But although the plaintiffs have been ill advised in bringing their suit in the particular form adopted by them, and though we are unable to give them the particular form of relief desired, we think, that on the facts proved, we ought if we can, and that we are able to grant them such relief as they

would have been entitled to obtain on a properly drawn plaint." It is quite clear that in this case the plaintiffs did rely in their plaint upon the fact that the defendant had sold the timber, and had received the proceeds.

That the defendant understood the plaint as intending to make him liable is clear, for in his answer he says: "Afterwards the case of the plaintiffs was dismissed by the Honourable High Court; and an order being passed to release the timbers from attachment, I, according to the permission of Moti Dasi,"—that is, the widow of Modhoosoodu,—“sold the timbers and paid her the moneys that were realised by the sale of the timbers, and took a receipt, and she repaid me the moneys I had expended. But the plaintiffs, notwithstanding these facts, are unjustly placing upon me the liability by falsely alleging that I, as a sharer, conducted the aforesaid suit, and that I myself took the moneys realised by the sale of the timbers.” He knew that the plaintiffs intended to make him liable because he had taken the moneys realised by the sale of the timbers. It is found by the first Court, that “the payment of money to Moti Dasi being disproved, it must be presumed to be in the hands of the defendant, who is the active male member of the house.” Therefore, according to that finding, the money which was the proceeds of the sale of the timber was in the defendant’s hands, and the plaintiff by his plaint showed that he intended to make the defendant responsible, because he had got the assets which were produced from the sale of the timber.

Then the judgment of the High Court proceeds thus: “It is quite clear that, Modhoosoodu having misappropriated the plaintiffs’ timber, the value of the same came into the hands of Gurudas his brother, whence it ought to have passed into the hands of Moti Dasi, and from her the plaintiffs might have obtained it in execution of their decree. We find on the facts that Gurudas has retained the Rs. 22,000 received by the sale of the timber; and this money is the plaintiffs’ property. If a portion of it has been invested in the lands which the plaintiffs seek to sell, then such lands belong to them in equity. Whether Gurudas has appropriated the money without the consent of Moti Dasi, or whether he has done so in collusion with her with

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the object of defeating the plaintiffs' attempt to execute their hard-won decree, the Court ought to compel him to disgorge the amount. We therefore set aside the decree of the lower Court, and in lieu of it we make a decree with costs in favour of the plaintiffs against the defendants jointly and severally for the sum of Rs. 22,000, which plaintiffs will be entitled to realise in execution." They therefore give against the two defendants, the present appellant and the widow, a decree for the Rs. 22,000, which was the amount which the defendant had received, and which they find that he held from the proceeds of the timber of the plaintiffs.

Their Lordships think that the plaintiffs had a right to follow the proceeds of their timber, and, the defendant having received the money, and not having paid it over to Moti Dasi, they have a right to recover the amount from him.

Mr. *Doyne* has contended—and certainly there was a good deal of weight in his argument—that a suit to recover the amount would have been barred by limitation. He said that the timber was sold as far back as the year 1870; that this suit was brought in 1876; and that consequently nearly six years had expired. He contended that if the defendant was liable to the plaintiffs, he was liable only for money had and received to the plaintiffs' use. He relied upon Art. 48, Sch. II of Act IX of 1871; and also upon Art. 60. Article 48 is: "For moveable property acquired by theft, extortion, cheating, or dishonest misappropriation or conversion." Their Lordships think that the case does not come under that article. There was no dishonest misappropriation or conversion. The defendant sold the timber on account of his brother; he held the proceeds on account of the widow; and there was no dishonest misappropriation, although the plaintiffs had a right, finding the money in his hands, to attach it and make him responsible to them.

Article No. 60 is: "For money payable by the defendant to the plaintiff; for money received by the defendant for the plaintiff's use." Mr. *Doyne* contended that in this case the money was received for the plaintiffs' use when the defendant sold the timber in May 1870; but that appears to their Lordships not to be the case. When he sold the timber he was selling it as the agent of Moti Dasi, and he received the money for her. The

suit is to enforce an equitable claim on the part of the plaintiffs to follow the proceeds of their timber, and, finding them in the hands of the defendant, to make him responsible for the amount. That does not fall either within Arts. No. 60 or No. 48; but comes within Art. 118, as "a suit for which no period of limitation is provided elsewhere in this schedule," and for suits of that nature a period of six years is the limitation. Their Lordships think that the plaintiffs had a right at any time within six years from the time when the defendant received the money to hold him responsible to them for the amount so long as it remained in his hands: they might have given him notice not to pay it over, and held him responsible in equity if he had done so.

Their Lordships will, therefore, humbly advise Her Majesty that the decision of the High Court be affirmed and this appeal dismissed. As no appearance has been entered for the respondent, there will be no costs of this appeal.

Their Lordships think it right to add a declaration that any money which may be recovered under this decree shall be treated in part satisfaction of the former decree against Modhoosoodun, or his widow, in the same way as if it had been levied under that decree, and *vice versa*.

Solicitors for the appellant: Messrs. *Lambert, Petch, and Shakespear*.

Appeal dismissed.

VICE-ADMIRALTY APPELLATE JURISDICTION.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Cunningham.

In the matter of the British steam ship or vessel "Mary Stuart."

THE "MARY STUART" (IMPUGNANT) v. "THE NEVADA" (PROMOVENT).*

Vice-Admiralty—Action in rem—Owner indirectly impleaded—Towage Contract.

The "M. S.," a steam tug, was hired to tow the barque "N." down the Hughli, and in consequence of the negligence of the master of the tug whilst so employed, and of his wilful disobedience to the order of the pilot on board the "N." the latter ran foul of a sailing vessel the "S. F.," considerable damage being done to both sailing vessels.

* Appeal No. 24 of 1883 from a judgment of Mr. Justice Norris, dated the 14th August 1883.

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