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THE MAT-
TER OF THE
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urged on behalf of the defendant Nasir Khan that the case was one for a Small Cause Court. This objection was, however, overruled, and the plaintiff's claim was decreed. The same point is now taken before us in revision, and we are of opinion that it must prevail. The suit was for personal, that is, moveable property, or damages in lieu thereof, and it therefore directly falls within the terms of s. 6 of Act XI of 1865. We do not agree with the view of the Judge that fruit growing upon trees is to be regarded as immoveable property; on the contrary, the interpretation clause of the Registration Act of 1877 supplies a definition of what is moveable and immoveable property, which we think may be accepted as a guide. The proceedings of the lower Courts were therefore without jurisdiction and must be set aside, and the plaint must be returned to the plaintiff for presentation to the proper Court. The defendant Nasir Khan is entitled to his costs in the abortive proceedings.

APPELLATE CIVIL.

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August 12.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr Justice Oldfield.

KUNDUN LAL (PLAINTIFF) v. BANSI DHAR (DEFENDANT).*

Suit for money received by the defendant for the plaintiff's use—Fraud—Act XV of 1877 (Limitation Act), s. 18, and sch. ii, Nos. 62, 120.

The plaintiff claimed, as an heir to *N*, deceased, a moiety of moneys which at the time of *N*'s death were deposited with a banker, and which the defendant, the other heir to *N*, had received from such banker. *Held* that the suit was one for money received by the defendant for the plaintiff's use, to which the limitation provided in No. 62, sch. ii of Act XV of 1877 applied, and not one to which the limitation provided in No. 120 applied.

THE plaintiff in this suit claimed, as one of the heirs to the estate of one Nain Sukh, deceased, to be confirmed in possession of a moiety of Nain Sukh's one-third share of a house, and to recover a moiety of a sum of Rs. 376-15-6 which had belonged to Nain Sukh, and which at the time of his death was deposited with one Bhagwat Das, a banker. The defendant was the plaintiff's

* Second Appeal, No. 1299 of 1879, from a decree of Maulvi Sami-ullah Khan, Subordinate Judge of Moradabad, dated the 13th September, 1879, modifying a decree of Munshi Banwari Lal, Munsif of Amroha, dated the 24th March, 1879.

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brother, and the parties were the joint heirs to Nain Sukh. The plaintiff stated the following particulars concerning his claim: "The said Nain Sukh owned one-third of the house mentioned in the plaint: he died in the end of Asadh 1931 (in the year 1874) while on a pilgrimage: his property devolved on the parties in equal moieties: the plaintiff is a patwari in the Bahraich district, and in his absence the defendant realized Rs. 376-15-6 from Bhagwat Das, trustee, and gave a receipt: the plaintiff is in possession of the share of the house he claims, but the defendant wishes to eject him: the cause of action arose in the beginning of August, 1878, on the day the plaintiff became aware that the defendant had realized the money and evaded payment to the plaintiff." The suit was instituted on the 6th November, 1878. The defendant set up as a defence to the suit that it was barred by limitation under No. 62, sch. ii of Act XV of 1877. He further claimed to set-off against the amount claimed by the plaintiff certain moneys which he had expended on the funeral ceremonies of Nain Sukh, and in obtaining a certificate for the collection of the debts due to that person. The Court of first instance fixed the following issue, amongst other issues, for trial, *viz*:—If the defendant realized Rs. 376-15-6 from Bhagwat Das on the 22nd July, 1875, whether the limitation provided by No. 62, sch. ii of Act XV of 1877, applies to the suit. The Court held that it was proved that the defendant had realized Rs. 376-15-6 from Bhagwat Das on the 22nd July, 1875; and that the limitation provided by No. 62, sch. ii of Act XV of 1877, did not apply to the suit, but the limitation provided by No. 120 of that schedule. Its decision on the point of limitation was as follows:—"The limitation provided by No. 62, sch. ii of Act XV of 1877, has no bearing on this case. The amount in dispute was in the hands of the trustee as a deposit. The defendant received that sum from the depository as sole heir of the deceased depositor. The plaintiff seeks to recover his share of the money from the defendant under right of heirship. The limitation of three years does not apply to a suit of this character, and no limitation has been provided for a suit of this kind. Therefore the period of six years applies to this case." The Court gave the plaintiff a decree in respect of the immoveable property in suit, and for a portion of the money claimed, allowing in part the set-off

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claimed by the defendant. On appeal by the defendant the lower appellate Court held that the suit, in so far as the claim for money was concerned, was barred by limitation, the period of limitation applicable thereto being three years as provided by No. 62, sch. ii of Act XV of 1877; and reversed the decree of the Court of first instance in so far as it allowed that claim. The plaintiff appealed to the High Court, contending that the suit, so far as that claim was concerned, was governed by No. 120, sch. ii of Act XV of 1877.

Munshi *Hanuman Prasad* and *Mir Zahur Husain*, for the appellant.

Babus *Jogindro Nath Chaudhri* and *Ratan Chand*, for the respondent.

The following judgment was delivered by the High Court:

JUDGMENT.—The plaintiff sues to be maintained in possession of his share of a house, and to recover his share of a certain sum of money which belonged to the estate of *Nain Sukh*, deceased, which had been left in deposit with certain bankers. Plaintiff claims by right of succession to *Nain Sukh*, and avers that the defendant has realized from the bankers the whole sum deposited and refuses to pay the plaintiff his share. The lower appellate Court dismissed that portion of the claim which refers to the deposit, holding that it is barred by three years' limitation, and that is the only point in appeal. Plaintiff contends that the law applicable is art. 120, and that limitation should run from the date when plaintiff had knowledge of the defendant's appropriation of the money.

We are of opinion that the appeal fails, and that the law of limitation applicable is art. 62, the suit being for money payable by defendant to the plaintiff for money received by the defendant for plaintiff's use. The receipt by the defendant was in law a receipt to the use of the plaintiff, to whom the sum in deposit rightfully belonged. The time will run from the date when the money was received and the claim is in consequence barred, for there is nothing to show fraudulent concealment so as to extend the term under s. 18. Art. 120 is of exceptional application, and

before applying it we must be satisfied that no other provision of the Limitation Act can be applicable. The appeal is dismissed with costs.

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Appeal dismissed.

Before Mr. Justice Oldfield and Mr. Justice Straight.

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BALLABH SHANKAR AND OTHERS (DECREE-HOLDERS) v. NARAIN SINGH
AND ANOTHER (JUDGMENT-DEBTORS)*

Execution of Decree—Res judicata.

On an application being made for the execution of a decree the judgment-debtor made three objections to its execution. The first of these objections the Court executing the decree, the Subordinate Judge, allowed, and refused to execute the decree. On appeal by the decree-holder, the District Judge disallowed all three such objections, holding that the decree should be executed; and remanded the case for that purpose. When the case came back to the Subordinate Judge, the judgment-debtor again raised the second and third of such objections, but the Subordinate Judge refused to entertain them on the ground that they had already been determined by such District Judge. On appeal by the judgment-debtor the successor of such District Judge ordered the Subordinate Judge to determine all three such objections. *Held* that such succeeding Judge could not re-open such questions, his predecessor having already finally determined them, and his predecessor's order, so far as such application for execution of the decree was concerned, was final.

The facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. Conlan and Munshi Sukh Ram, for the appellants.

Babu Jogindro Nath Chaudhri, for the respondents.

The Court (OLDFIELD, J., and STRAIGHT, J.,) delivered the following

JUDGMENT.—The facts are these: The appellants are holders of a decree against respondents, dated the 6th June, 1861. They applied for execution in 1861, and on the 23rd September, 1861, the decree-holders and judgment-debtors entered into an agreement that the judgment-debtors should pay Rs. 500 in cash, and the balance of the decree by annual instalments of Rs. 100, without

* First Appeal, No. 68 of 1880, from an order of R. G. Currie, Esq., Judge of Aligarh, dated the 20th April, 1880, reversing an order of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 28th February, 1880.