(1868) 04 CAL CK 0002

Calcutta High Court

Case No: None

Payne		APPELLANT
	Vs	
Constable		RESPONDENT

Date of Decision: April 22, 1868

Judgement

Markby, J.

It is in no way necessary, in the view I take, to express any opinion on the point, whether if the defendant wished to raise the defence of the Act, he was bound to raise it in the mode pointed out by Rule 19, because it is stated in this case, that he did not raise it at all. And I by no means say that even if this was a question of jurisdiction, it necessarily follows that the Judge was bound or competent to notice it; but upon that I need express no opinion, because I am of opinion, that it is not in any sense a question of jurisdiction; that the Judge has no jurisdiction, in the strict sense of the word, seems to me hardly capable of argument. If so, all the proceedings before him would foe coram non judice, and void, his decision in favour of the defendant worthless, and we, sitting here, should have no jurisdiction to hear this case. What I apprehend is meant is this:--That there is something prohibitory in the language of Act XIV, which requires the Court, whether the defendant raises the question or not, as soon as it appears that the case falls within any one of the rules of limitation laid down by the Act, to call upon the plaintiff to bring the case within one of the exceptions, and if he fails to do so, to decide the case in favour of the defendant. There is, it is true, great conflict between the decisions of the Courts in this country upon various matters connected with [08] the law of limitation, and the procedure by which that question can be raised; but I do not consider it necessary to examine them at length, because I consider that there is a decision of a Superior Court, which is conclusive on the point now before us.

2. The law which governed this question generally in India, prior to the passing of Act XIV of 1859, is contained in Regulation III of 1793, Section 14, and Regulation II. of 1805. If that law were now in force, and the matter were res integra, I confess there would be no slight ground for contending that there has been an actual

legislative prohibition, whenever limitation applies, binding upon the Judge in all cases, whether the parties choose to take advantage of it or not, and which he is bound to notice at any stage of the case at which he first discovers it. The language of the earliest Regulation on the subject, that contained in the plan for administration of justice in 1772, and of several subsequent Regulations prior to 1793, is very similar to that of the Regulation of that year, and all are strongly prohibitory. The Regulation of 1793 is as follows: (reads).[3] By Regulation II of 1805, the application of these provisions is somewhat modified; but there is nothing which affects the previous Regulation in respect of the matter now under consideration. The words of Section 1 of Act XIV of 1869, are (reads). See ante 49, Note 2. It will be seen from a comparison of the language of the Regulation of 1798 with that of Act XIV of 1859, how much stronger the earlier provision is than the later; the former provision is addressed directly to the Courts themselves and they are expressly" prohibited from hearing, trying, or determining the merits of any suit whatever," after the period of limitation has expired. The latter is the language of the English Statute of Limitation, which, in the year 1859, had received a well-known and well-defined construction, namely, that it constitutes only a defence which the defendant must put forward, if he wishes to rely on it.

3. Whilst the Regulation of 1793 was in force, in the year 1835, a suit was brought by certain persons, eventually represented by Musst. Imam Bandi and often, against one Hargobinda Ghose, to recover certain lands, which the plaintiffs claimed as part of their mouza Akbarpore. The defendant claimed to hold, these lands as part of his mouza Raipore Hussun, and the Zillah Court decided the ease in favour of the plaintiff. The case came up to the Sudder Court on appeal, and Mr. Wigram Money reversed the decision of the Zillah Judge on the merits. The case then went before Mr. Smyth, who concurred with the Zillah Judge, and the ease was, therefore, referred to a third Judge, Mr. Tucker. It is in this "proceeding," as it is called in the printed papers, that I find the first mention of the question of limitation (see volume XVIII of Cases appealed from the Sadder Dewany Adawlut Courts in India, p. 165.) Mr. Tucker there stated that he told the (plaintiff''s) respondent''s vakeel, that after the land in question had been submerged, it reappeared in 1801, or 1802, and asked him whether he had any documentary proofs to prove his client''s possession of it from the date of its reappearance, to the date of the action. The answer of the vakeel is stated partly in his own words, and partly in the words of Mr. Tucker, but I take-it to amount in substance to this: that this enquiry as to possession was never made before by any of the Judges, consequently he had taken no measures to get himself acquainted with that fact, or even to ask his client on the subject; and, further, that the land re-appeared in such small parcels, that possession could scarcely be applied to it, but when much had appeared, from that time, his cause of action commenced; and he added, that as part of the land being under water, up to 1824, was admitted by both parties, lapse of time could have no application to the case.

4. Mr. Tucker gave his decision in favour of the defendant on three grounds: the first of which was the law of alluvion, and the second of which was that "with reference to the lapse of time from the time the first suit" had begun, after a lapse of full eighteen years from 1209 Fusli, when the land" had began to reappear, the plaintiff''s claim to the land in dispute is altogether" inadmissible and unworthy of the Court''s hearing," (p. 238). The third was an admission of the plaintiff in a previous suit. But as this decision was based on grounds different from that of Mr. Money, the ease was referred to a Fourth Judge, Mr. Lee Warner. This Judge, in his judgment, recites the opinions delivered by his three predecessors, but only mentions the first of the grounds relied on by Mr. Tucker, and omits all mention of the question of limitation. Nor does Mr. Lee Warner base his own opinion on the ground of limitation; but he concurs with Mr. Tucker on the first ground, and on that ground decrees the appeal.

5. I have gone thus minutely into this case, in order to show exactly how the matter stood when it came before the Privy Council. In that Court, (see 4 Moore''s Indian Appeals, 403) the defendant did rely specially on the limitation created by Section 14 of Regulation III of 1793; he also attempted to support the decision of the Sudder Court on the merits. The Privy Council, however, reversed the decision of the Sudder Court on the merits, and with respect to the question of limitation, they dispose of it in these words: Two[4] of the Judges "relied on another objection to the (plaintiff''s) appellant''s claim, viz., that it was barred by length of "time. It is very doubtful, upon the facts, as they now appear, whether such "an objection, if it had been raised by the (defendant) respondent, could have "prevailed; but it is sufficient to say that the objection was not raised, and that "the appellants, therefore, had no opportunity of meeting it by evidence."

6. If this was the law under the Regulation of 1793, which expressly prohibits Courts from "hearing, trying, and determining suits barred by limitation," I think a fortiori, it is so under a provision like that of Section 1 of Act XIV of 1859, which really lays down a general rule of procedure.

7. I take the law to be now, as it was then, that after the time has been passed by when the facts of the case were investigated upon the evidence, a Judge cannot, of his own motion, notice the point of limitation, and call upon the plaintiff to show, either upon the facts as they stand, or by adducing fresh evidence, that he can maintain the suit.

8. I, therefore, answer the Judge''s first question indirectly by saying, that in my opinion, in the form in which he has stated the case, it does not arise; and that the true question, namely, whether it is competent for a Judge to notice the point of limitation where, when the facts were under investigation, it was not noticed at all, ought to be answered in the negative.

9. I believe we are not quite agreed as to what the Judge means to represent as having taken place, but I take him to mean that after both sides had given all the evidence which they thought necessary, and each had, therefore, according to the usage of all tribunals with which I am acquainted, closed their case upon the facts, the Judge himself then suggested that the claim was barred by limitation. Whether he called upon the plaintiff then to produce further evidence, or whether he called upon the plaintiff to answer the objection taken by himself, on the facts as they stood, or whether the plaintiff did or did not ask to be allowed to adduce further evidence, is, in my opinion, immaterial. I think all these views of the case are covered by the decision of the Privy Council to which I have referred, which shows that the Judge was wrong at that stage of the case to raise the question at all.

10. Whether or no it may be open to a Judge of the Small Cause Court, notwithstanding the words of Rule 19, at the hearing, to call the attention of the defendant to the defence of the act, and ask him whether he wishes to avail himself of it, I express no opinion. And if it is open to him to do this, I express no opinion whatever, whether, having regard to the class of people who are frequently defendants in his Court, he ought to exercise this power. The former is a question of law which, as it appears to me, does not arise in this case. The latter is a question for his discretion, over which we have no control.

11. I only wish further to add that I have considered this question entirely indecently of any of the provisions of Act VIII of 1859.

Norman, J.

12. The legislature, in the 26th Section of Act VIII of 1859, treats it as the duty of a plaintiff to show that he has brought his suit within the period allowed by law for commencing such a suit. Now this clause does not appear to me to contain any enactment shifting the burden of proof. It merely deals with the law as elsewhere laid down, and prescribes a form by which the provisions of that law are to be carried into effect. Act VIII was passed shortly before Act XIV of 1859, but in framing the clause referred to, the legislature may not improbably have had in view the provisions of Act XIV, which was under consideration at the same time.

13. The chief Regulations of limitation in force at the time of the passing of Act VIII, were Regulation III of 1793, Section 14, and Regulation II of 1805. By the first of these Regulations, the Zillah Courts are prohibited "from hearing, trying, or determining any suit whatever, if the '' cause of action shall have arisen twelve years before any suit shall have been "commenced on account of it, unless, &c." In Regulation II of 1805, Section 3, Clause 3, nothing, &c., "shall be held to authorize the cognizance of any suit" whatever, in any Court of Justice, if the cause of action shall have arisen sixty " years before the institution of such suit." Now, it will be observed, that under each of these Regulations, the prohibition is particular, and by way of exception; and, according to ordinary rules, a party seeking to set up such a

defence, would have to plead specially the facts, showing that his case falls within the terms of the exception.

14. So again by Statute 21, Jac. 1, c. 16, it was enacted that the actions therein mentioned shall be commenced and sued within the time of limitation therein expressed, and not after. At one time this enactment was treated as being in the negative; "that the plaintiff shall not maintain the action but within the time" limited by the statute." See Brown v. Hancock (Cro. Car., 115). This is not quite an accurate statement of the language of the Act. After much discussion, it was eventually settled, that no advantage could be taken of the Statute of James the First, except by pleading, 2 Wms. Saunders, 63a. Different reasons have been assigned for the rule; but they may be summed up in this, that, reading the whole Act together, and looking at the possibility of the remedy having been kept alive by latitat, or a new promise, the bar under the statute is the exception.

15. Whether the rule, that it is not incumbent on a plaintiff, to show, in the first instance, that his suit was brought under the time limited by 21 Jac. 1, c. 16, was correct or not, it was certainly exceptional. In a writ of right, in the action of ejectment, and in penal actions, it was always incumbent on the plaintiff to show, that he had brought the suit within the period allowed by law for that purpose.

16. The language of Act XIV of 1859 differs essentially from that of the earlier Regulations of Limitation. We have seen that it commences with an enactment which is in form not a particular, but a general prohibition. "No suit is to be brought, unless within the period limited." The terms of the enactment, according to the ordinary rules of logic and pleading, would appear to make it incumbent on a plaintiff to show, affirmatively, that he has brought his suit within time.

17. The language of the 32 Hen. 8, c. 2, limiting the period within which writs of right could be brought, and of the 2nd Section of the same statute, relating to actions possessory, is precisely similar in its form to that of Act XIV of 1859. Under the Act of Hen. 8, it has always been deemed necessary for a plaintiff to show that he brought his suit within the time limited; see Dally v. King, (1 H. Blackstone, 1); Dumsday v. Hughes, (3 Bingham''s New Cases, 439); Widdowson v. The Earl of Harrington, (1 Jacob and Walker, 532); and see Section 6 of the statute above referred to. That same 6th Section was referred to by Mr. Woodroffe, as prescribing a form of pleading under the Act, and as putting a construction upon the 2nd and 3rd Sections. But if carefully read, it appears to be passed with the object of declaring that the plaintiff shall be precluded from bringing a future suit, by a finding against him on a traverse of the allegation of seizing within the period named.

18. The 4th Section of the Statute of Frauds, 29 Car. 2, c. 3, provides that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement shall be in writing, and signed. It has always been held incumbent on a

plaintiff to prove an agreement in writing, and it was never deemed necessary for the defendant to plead it.

19. The cases of Richard Spooner and Bomanjee Nowrojee vs. Juddow , are strong authorities in favour of Mr. Thomson''s opinion, that he was bound to notice the point of limitation. In the former case, Lord Kenyon says: "Here is a general law of which we are bound to take notice, which says, that "no action shall be brought against any person residing within the jurisdiction," for any debt not amounting to 40s. How then, can we say that the plaintiff "shall recover it against the positive direction of the Act?" In the latter case, Lord Campbell says: "If the Court is forbidden by law to try the cause, neither the new rules, nor any omission of the defendant, would give the Court jurisdiction over it. The facts ousting the jurisdiction having been brought judicially to the notice of the Judge, and with perfect regularity, he usurps a jurisdiction which does not belong to him, if he proceeds and gives judgment for the plaintiff; therefore, on these facts coming out for the first time on the trial of an issue, though they may seem irrelevant) to that issue, he must have power by directing a non-suit, or by some other means, to stop the trial."

20. I concur with Mr. Justice Markby in thinking that the defence of limitation is not a question of jurisdiction. Upon the institution of this suit, the Court had jurisdiction in respect of the person of the plaintiff, and the subject-matter of the suit. On its appearing, or being proved that the facts brought the ease within the provisions of Section 1 of Act XIV of 1859, the Court was bound to pronounce a judgment that the suit should not be maintained. The language of the Act seems to make that plain. If the Judge had no jurisdiction, we could not have pronounced any judgment at all. An enactment obliging a Judge to pronounce a particular judgment, does not deprive him of jurisdiction. Suppose the plaintiff failed to prove his case, and it appeared plainly there never was any cause of action, it might as well be said that the Court would have had no jurisdiction, because it would have been bound to dismiss the suit.

21. Mussumat Imam Bandi and Wajid Ali Khan vs. Hurgovind , the case referred to by Mr. Justice Markby, does not appear to me to lay down the broad and general rule, which he supposes to be deducible from it. It is evident that their Lordships of the Privy Council did not think so. The case is reported in the same volume of Moore''s Indian Appeals as Spooner v. Juddow and The Maharajah of Burdwan v. The Bengal Government, (4 Moore, I.A., 466). The judgment in this case was delivered by the same Judge, the Bight Hon''ble T. Pemberton Leigh, afterwards Lord Kingsdown, who gave judgment in Musst. Imam Bandi''s case. It was a suit instituted in a Court in which there were no pleadings, and their Lordships allowed the defence of limitation to be raised, though it had not been set up in the Lower Court.

22. The case of Musst. Imam Bandi is most peculiar in its circumstances. The suit was for land which had been submerged by a change in the course of the river Ganges, and after several years reappeared. The case had been originally tried with the greatest care, before Sir James Harrington, the Judge of the Patna Court, who resided close to the spot. It came on appeal to the Sudder Court. After two hearings by different Judges, it went before a Third Judge, Mr. Tucker, who, for the first time, asked the vakeel for the plaintiff, whether he had any documentary evidence of possession within twelve years,--documentary proof of possession, which may have consisted in going on the lands after the water left it, from time to time, as by consolidation its surface became capable of bearing the weight of a man. Not getting an answer satisfactory to him, the answer being that the question had never before been raised, he and another Judge appeared to have decided that the suit was unworthy of being heard: Surely their Lordships were justified in saying, that "it was very doubtful, upon the facts, as they appeared before them, whether such an objection, if it had been raised by the respondent, could have prevailed; but it was sufficient to say that the objection was not raised, and that the appellants, therefore, had no opportunity of meeting it by evidence."

23. I need not give any opinion as to what would be the duty of the Judge, if the defendant, in express words, waived the point of limitation. I am strongly inclined to think that the law of limitation is one introduced for the benefit of defendants, and that the principle, quilibet potest renunciare juri pro se introducto, would apply to such a case. In books where this maxim has been discussed, the defence under statutes of limitation is always referred to as matter which falls within it. It is well settled that when an enactment is passed in ease or for the benefit of a particular class of persons, none but such persons can take advantage of it. Bishop''s Leases are instances of the application of this principle.

24. With regard to Rule 19, it seems inapplicable to the defence of limitation, under Act XIV of 1859. The object of that Rule appears to have been to prevent plaintiffs being taken by surprise, or the Court misled, and for that purpose it provides that the defendant shall in person support the special pleas mentioned in it. The form of the Rule is not negative; it does not say, "no such defence shall be admitted, unless so raised." Suppose the case is heard u/s 43 of Act IX of 1850, in the absence of the defendant, and on the hearing of the plaintiff''s own evidence, it appears that the defendant is an infant, and the contract sued on, one on which an infant is not liable. The Court in deciding the matter in a summary way, as directed in Sections 25-41, would certainly not be justified in giving judgment that the plaintiffs should recover monies shown not to be legally due to them.

Sir Barnes Peacock, Kt., C.J.

25. All that we have to do, is to answer this question; we are not bound to say that the Judge, in deciding the question gave proper or sufficient reasons for his decision.

26. It does not appear that the plaintiffs represented to the Judge that there was any matter of fact which they wished to prove, for the purpose of showing that the point of limitation raised by the Judge was inapplicable to the ease. I mention this for the purpose of showing that there are no grounds for contending that the plaintiffs were taken by surprise, and that they had no opportunity of proving any facts which might have shown that limitation did not apply to the case. Even if it had so appeared, this Court could not have interfered in that respect, as they can only answer the questions submitted for their opinion.

27. I quite agree with both of the learned Judges, that lapse of time did not oust the Court from jurisdiction. It was the duty of the Court, when the facts were before it, to decide whether, according to the law of the land, the plaintiffs were entitled to recover the debt from the defendant or not? I apprehend that it is the duty of every Court which is not trammelled by rules of pleading or other technical rules, to administer the law of the land, and to apply that law to the facts as they appear in evidence before the Court; and if this is the rule applicable to Courts in general, it is still more necessary that it should be acted upon in Courts of Small Causes, which exercise a summary jurisdiction. In those Courts, poor ignorant parties constantly appear, who cannot, in reality, be supposed to know what the law of the country is, notwithstanding the fiction that every man is supposed to know the law. In such cases all that the parties can do, or can be expected to do, unless they have the advantage of counsel, or agents versed in the law, is to lay before the Court the facts of their case, and to leave the Court to administer the law applicable to the facts. "When the facts have been proved before the Judge, he is bound to administer the law, whether the parties point out to him, in their arguments, or not, what the law is, which ought to be applied to the case.

28. Act XIV of 1859 says, that no suit shall be maintained in any Court of Judicature within any part of the British Territories in India, in which this Act shall be in force, unless the same is instituted within the period of limitation thereinafter made applicable to a suit of that nature, any law or Regulation to the contrary notwithstanding. If it appear to the Court, upon the facts, that the suit was commenced after the period of limitation applicable to it, the Judge has jurisdiction to try whether the suit is maintainable or not; but in deciding the case, he is bound to hold that the suit cannot be maintained after the period limited by law, unless it falls within one of the exceptions. Limitation is a bar to a suit, but it does not deprive the Judge of jurisdiction to try and determine whether the suit is barred or not? It stands upon the same principle as any other bar to the maintenance of the suit.

29. The next question is, was there any valid rule which trammelled the Judge and prevented him from administering the law as applicable to the facts of the case? It is said that he was bound by the 19th Rule of Practice of the Small Cause Court, and that inasmuch as the defendant did not appear personally in Court, and orally plead before the Judge that the suit was not maintainable by reason of lapse of time, the

Judge, although he saw that the case was one in which the law declared that the suit should not be maintained, ought to have pronounced a decree for the plaintiffs, and to have held that the suit was maintainable. The Rule was made before Act XIV of 1859 was passed, and I am of opinion that even if it were a valid Rule under the old law, it did not preclude the Judge from holding that the suit was not maintainable. It does not say that if the defendant shall not orally plead such defence, the Judge shall give a decree against him, even though it should appear according to the law, that the suit was not maintainable. It is merely directory.

30. If a plaintiff should bring a suit against a child five years old, and should represent upon oath to the Judge that the child came into his shop and bought a diamond ring upon credit, would the Judge be bound upon that evidence to give a decree for the plaintiff for the price of the ring, if the child should not appear and orally plead infancy as a defence? Yet the Rule is applicable to infancy to the same extent as it is to limitation. It appears to me that the point would be too clear for argument, and that the Judge would be bound, upon the plaintiff''s own showing, to dismiss the suit. So, if a man should apply for a summons to the Small Cause Court against an old gentleman living in the Punjab, and should state that when this old gentleman was living in Calcutta, in the year 1800, he bought a dozen of Fort Wine, would the Judge be justified in summoning the defendant to come down and answer such suit, when on the plaintiff''s own showing it would be clear that, under Act XIV of 1859, the suit was not maintainable. According to the argument, the Judge would be bound to summon the gentleman, and should he not appear personally in Court, and plead limitation orally, to pass a decree against him. So, according to the contention before us, a decree might pass against a married woman, and an infant in her arms, as co-defendants, if they should not orally plead infancy and coverture respectively. The Rule says, that the defendant shall plead these defences, but does not say that if the defendant does not plead it, the Judge is bound to violate the law.

31. Again, it is contended, that the law of limitation is a law passed in case of defendants; most laws are passed in case, or for the benefit of some one or another; but because it was once said that the statute of limitations was a law passed in ease of defendants, it is contended that a defendant may waive a law which has been passed for his benefit, and that such a law is one of a peculiar nature which the Judge is not bound to administer in favour of the defendant, unless he asks to have the benefit of it. How many poor ignorant creatures are there who are daily summoned to the Small Cause Court, who never heard that there was such a law as the law of limitation, and who are, consequently, unable to set it up in their defence, or to ask the Judge to give them the benefit of it.

32. If Rule 19 of the Rules of the Small Cause Court intended to declare that no person should be entitled to the benefit of infancy, coverture, the law of limitation, & unless he should appear personally and orally plead, and ask to have the benefit of it, it appears to me that it was a Rule which the Court of Small Causes, even with the

assent of the Supreme Court, had no power to pass. They were to make Rules of Practice, and to regulate the proceedings of the Court; but when by Section 25, the legislature declares that these suits were to be tried summarily, it never intended to allow the Court to make rules of pleading which would trammel the Judges, and prevent them from administering justice according be law.

33. I am of opinion, therefore that the Judge was right in holding that the plaintiff''s suit was not maintainable, notwithstanding that the defendant did not appear personally in Court, and orally plead the statute of limitation as a defence, or ask the Judge to give him the benefit of it.

34. There is one case which I intended to mention. It is that of the Maharajah of Burdwan v. The Government of Bengal, (4 Moore, I. A., 466). In that case it was held that the Courts of the Revenue Collector, and the Special Commissioner appointed under Regulations II of 1819 and III of 1828, were Courts of Civil Justice within the meaning of the Regulations of Limitation. An objection was raised, for the first time, at the hearing of the appeal before the Privy Council, that the Government''s right to sue was barred by lapse of time under the provisions of the Regulation of Limitation (II of 1805). In delivering judgment, Mr. Pernberton Leigh says: "The more important matter was that the point does not appear to have been raised in the Courts below, and is not distinctly stated in the printed cases here. It was suggested that there may be circumstances which are not known to us, which may prevent the application of a law which apparently is distinctly applicable to the case. Now, in the first place, the proceedings in the "case were not proceedings in a regular suit," (using the words regular suit in contradistinction to summary suits which were brought in the Mofussil). "There were no pleadings, and, "therefore, it would be rather hard to bind the parties by an objection of so "technical a nature, especially if, on investigation, it is found to have a valid "ground of defence. But since this case was heard, we have had produced to "us a copy of a judgment pronounced a twelve month after the decision of this "case in the Court below, in which it was held that the Regulation did apply to "a case similar to that now before this Court." In this case, the same principle was applicable. It was a suit, which, according to the Small Cause Court Act, was to be tried in a summary manner, in which there were no regular pleadings, and in which it never could have been the intention of the legislature, that the parties should be bound to plead specially, either orally or in writing. It was a Court formed for the purpose of deciding small causes, in which the parties might not be able to afford legal assistance, or in which the amount at stake might be too small to justify them in prudence in expending money to obtain it, and in which they ought to be bound merely to state the facts of their case, leaving it to the Judge to administer justice according to the law.

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[1]The 19th Rule of Practice is, "when a defendant intends to rely on the special defence of the statute of limitations, he must be personally present in Court on the

day of appearance to the summons, and orally plead such defence before the Judge."

[2]Section 1 of Act XIV of 1859.--"No suit shall be maintained in any Court of Judicature within any part of the British Territories in India in which this Act shall be in force, unless the same shall be brought within the period of limitation hereinafter made applicable to a suit of that nature, any Law or Regulation to the contrary notwithstanding."

[3] Section 14 Regulation III of 1798--"The Zillah and City Courts are prohibited from hearing, trying, or determining the merits of any suit whatever, against any person or persons if the cause of action shall have arisen previous to the 13th of August 1765; or any suit whatever against any person or parsons, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it, unless the complainant can show, by clear and positive proof, that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money; or that he directly preferred his claim within that period, for the matter in dispute, to a Court of competent jurisdiction, to try the demand, and shall assign satisfactory reason to the Court why he did not proceed in the suit, or shall prove that either from minority or other good and sufficient cause, he had been precluded from obtaining redress."

[4] [This appears to be an error: one Judge of the Sadder Court only, Mr. Tucker, relied on this objection--per Markby, J.]