

1895.
 October 1.

EPHRAIMS v. JANSZ.

C. R., Galle, 3,407.

Prescription—Goods sold and money lent—Payment on account—Appropriation of payment—Rules relating to such appropriation.

Where plaintiff sued defendant for balance value of goods sold and delivered between 17th December, 1892, and 9th January, 1894, and for money lent on the 11th August, 1893, and it was alleged that defendant paid plaintiff Rs. 5 on the 14th December, 1894—

Held that, in order to save the claim for goods sold from prescription, it was incumbent on plaintiff to allege and prove that at the date of such payment the shop debt and loan were treated by creditor and debtor as one and the same account, and that the creditor, with the consent of the debtor, appropriated the sum to reduce that single account.

In the absence of such proof the payment must, under the Roman-Dutch Law, be applied in reduction of the claim of money lent only.

When nothing is settled at the time of payment, the principle which should actuate the creditor is that of the maxim "Do as you would be done by."

When there are more claims than one, the debtor or creditor should, at the time of payment, constitute with the consent of the other the claim in reduction of which the payment is to go.

If no such appropriation is made at the time of payment, the creditor must apply it to some claims which could be enforced at the time of payment and which at the moment is not in controversy.

Of enforceable claims, the most onerous one must be selected. If there is equality on that score, the older claim must be selected. If the claims are equal as to gravity and time, they must be rateably reduced by the payment.

THE facts of the case sufficiently appear in the judgment.

Seneviratna, for appellant.

Roberts, for respondent.

1st October, 1895. WITHERS, J.—

The plaintiff in this action seeks to recover from defendant a sum of Rs. 54.01 for goods alleged to have been sold and delivered by him to the defendant at Galle between the 17th December, 1892, and the 9th January, 1894, and a sum of Rs. 14.18 being money lent by him to the defendant at Galle on the 11th August, 1893.

At the date of the institution of this action, viz., the 21st June, 1895, the action for the first claim was statute barred, a year being the limit under section 9 of the Ordinance No. 22 of 1871 for actions in respect of goods sold and delivered, and the last item in the account being the sale of a draught on the 9th January, 1894.

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Nor in my opinion does the allegation of payment of a sum of Rs. 5 on the 14th December, 1894, remove the bar in respect of the first cause of action. Even at that date (the 14th December, 1894) action on the shop debt (save an item of 25 cents) was statute barred. To make the payment of Rs. 5 available for the purpose indicated in the 7th paragraph of his plaint, the plaintiff was bound to allege and prove that at the date of payment of the Rs. 5 the shop debt and loan were treated by the creditor and debtor as one and the same account, and that the creditor, with the debtor's consent, at the time of payment, appropriated that sum to reduce that single account, leaving a balance of Rs. 60 odd as due and payable thereon. This has not been done, and the defendant is clearly entitled to have the action against him on the shop debt dismissed on that and another ground to be presently mentioned. The Roman-Dutch Law on the appropriation of payments seems to be quite clear. When there are more claims than one the debtor or creditor should, at the very time of payment, constitute, with the other's assent, the claim in reduction of which the payment is to go. If no such appropriation is made at the time of payment, the creditor is bound to apply it to some claim which could at the time of payment be enforced, and is not, at the moment, in controversy.

Of enforceable claims, the most onerous one must be selected. If there is equality on that score, the older claim must be selected. If the claims are equal as regards gravity and time, they are to be rateably reduced by the payment.

The principle which should actuate the creditor when nothing is settled at the time of payment is contained in the maxim "Do as you would be done by" (*Voet*, 46, 3, 16; *Van Leeuwen*; *Cens For. lib. 4, chapter XXXIII., clause 17*).

The older enforceable claim at the date of the alleged payment was the loan contracted in August, 1893, and to this the payment must be applied. This leaves the defendant indebted to the plaintiff in a sum of Rs. 9.18 for money lent, for which he is entitled to judgment, with interest from the date of action at the rate of 9 per cent., with like interest on the principal and interest so adjudged till date of payment (section 192, Civil Procedure Code).

It was clearly a slip of the Commissioner to exclude the claim for money lent, to which the limit is three years under the 8th section of the Ordinance No. 22 of 1871.

Let the Commissioner of Requests be directed to enter up a decree in accordance with this judgment.

BONSER, C.J.—I agree.