1941 *Present :* **Moseley S.P.J.**

UDUMANACHY *v.* MEERALEVVE.

114—C. R. Kalmunai, 950

Prescription—Mortgage bond—Death of creditor—Minority of heirs—Payment to administrator—No new cause of action.

On November 29, 1940, the plaintiffs, sued the defendant on a mortgage bond dated November, 1912, granted by the defendant in favour of plaintiffs' intestate. The latter died in 1916, leaving as his heirs, the plaintiffs, who were minors. An administrator was appointed to the estate to whom a payment on account was made in 1917.

Held, that the action was prescribed.

Tillainathan v. Nagalingam (39 N. L. R. 118) followed.

Held, further, that the payment on account could not be regarded as a new cause of action. It merely extended the period of prescription.

APPEAL from a judgment of the Commissioner of Requests, Kalmunai.

M. Tiruchelvam for plaintiffs, appellants.

M. M. I. Kariapper (with him *A. H. C. de Silva*), for defendant, respondent.

Cur. adv. vult.

October 9, 1941. MOSELEY S.P.J.—

The defendant-respondent borrowed a quantity of paddy on a mortgage bond dated November 21, 1912, from one Seeny Mohamadu. The latter died on June 27, 1916, leaving the plaintiffs-appellants, who were then minors, as his heirs. An administrator was appointed but appears to have taken no steps to recover the money due under the bond. A payment on account was made to the administrator in 1917. Within the last ten years all the appellants have attained their majority, and on November 29, 1940, brought an action for the value of the paddy still outstanding and interest. The respondent pleaded prescription and the parties went to trial on that issue alone. The appellants relied upon section 13 of the Prescription Ordinance (Cap. 55), a section which has on many occassions come up for judicial interpretation in similar circumstances. In the present case prescription began to run against Seeny Mohamadu in 1912. It seems to have been settled beyond doubt that, where prescription has begun to run, its progress cannot be arrested merely by the subsequent incapacity, *e.g.*, minority, of the person entitled to sue. This principle was clearly laid down by a Court of three Judges in *Sinnatamby v. Viravy* [1] and was followed by Moncreiff A.C.J. in *Sinnetamby v. Meeralevve* [2], Soertsz J. in *Tillainathan v. Nagalingam* [3], after considering the above-mentioned authorities, was of the same opinion.

Counsel for the appellants, however, contends that the position in this case is altered by the fact of the appointment of an admistrator. It seems to me that in a case where, at the time when a cause of action

[1] *1 S. C. C. 14.*

[2] *6 N. L. R. 50.*

[3] *39 N. L. R. 118.*

arose, the party entitled to sue is a minor, the existence of an administrator would not affect the right of the minor to take advantage of the provisions of section 13. But in the present case time had already begun to run, and it does not seem to me that the position of the minors, while in no way weakened by the appointment of an administrator, is in any way bettered. See *Manuel Pillai v. Saverimuttu*[1].

The further point is raised on behalf of the appellants that the payment on account in 1917 does not merely extend the period of prescription, but creates a new obligation, that is to say, a new cause of action. Counsel relied on *Arunasalam v. Ramasamy*[2] where De Sampayo A.J. said: " A payment on account is necessarily an acknowledgment of the debt, and the law, in the absence of anything to the contrary, implies from the acknowledgment of the debt a promise to pay the balance. This implied promise creates a new obligation and takes the debt out of the operation of the statute, and this is so even though at the date of payment the debt may have been already statute-barred ".

The learned Commissioner, to whom the above-mentioned authority was cited, found, with some justification, the point to be very interesting. He found the argument based on that authority, viz., that a new cause of action was created, to be " interesting and ingenious ". He was, however, unable to agree with it.

The case of *Tanner v. Smart*[3], was assumed to have set at rest a doubt which had apparently existed since the passing of the Limitation Act, 1623. Until 1827 opinions seem to have varied whether, in order to take a claim out of the operation of the statute a mere admission of the claim was sufficient, or whether the acknowledgment must amount to a promise to pay. Then, in *Tanner v. Smart (supra)*, Lord Tenterden C.J. in the course of his judgment in which he held that an acknowledgment of a claim on a simple contract will only keep it alive if the acknowledgment amounts to a fresh promise to pay, said:—" The only principle upon which it (*i.e.*, the acknowledgment) can be held to be an answer to the statute is this, that an acknowledgment is evidence of a new promise, and as such, constitutes a new cause of action. . . . . ".

The authorities on this point were exhaustively reviewed by Lord Summer in *Spencer v. Hemmerde*[4]. He found (at page 524) " that the great preponderance of the cases is against regarding the new promise as a new cause of action, and it seems to me that reason also is against it. Surely the real view is, that the promise which is inferred from the acknowledgment . . . . is one which corresponds with and is not a variance from or in contradiction of that promise ".

It seems therefore that, in the present case, the payment on account cannot be regarded as creating a new cause of action; it merely extended the period of prescription. The plaintiffs' action is therefore clearly prescribed.

The appeal is dismissed with costs.

Appeal dismissed.

[1] *Ramanathan's Reports 1863-68 p. 335.*
[2] *17 N. L. R. 156.*
[3] *(1827) 6 B. and C. 603.*
[4] *(1922) 2 A. C. 507.*