1936 *Present :* **Abrahams C.J. and Fernando A.J.**

BABY NONA *v.* CAROLIS APPUHAMY.

81—D. C. Colombo, 2,222.

Evidence—Action on mortgage bond—Endorsement on mortgage bond by deceased mortgagee regarding payment of interest—Interruption of limitation—Entry not against interest and inadmissible—Ordinance No. 14 of 1895, s. 32 (3).

Where an undated endorsement, made by a deceased mortgagee on a mortgage bond which was prescribed, in the following terms :—" Paid one year's interest, Rs. 40 ; afterwards received three years' interest " was relied upon to prevent the debt being barred,—

***Held,* that the entry was inadmissible as the endorsement cannot be said to be against the interest of the deceased within the meaning of section 32 (3) of the Evidence Ordinance, in the absence of evidence *dehors* the instrument that the endorsement was made before the debt was prescribed.**

***Semble,* evidence *dehors* the instrument must mean evidence to support the inferences which can be drawn from the instrument itself.**

THIS was an action instituted by the plaintiff as administratrix of the estate of her deceased husband for the recovery of a sum of Rs. 500 due upon a mortgage bond executed by the defendant on September 26, 1923, in favour of the deceased. It was alleged in the plaint that a sum of Rs. 190 had been paid by the defendant on account of interest on the bond. The defendant denied any payment of interest and claimed that the bond was prescribed. In proof of payment of interest an endorsement on the mortgage bond in pencil in the handwriting of the deceased was put in evidence. The learned District Judge held that no interest was paid and that the action was prescribed.

H. V. Perera, for plaintiff, appellant.—The endorsement on the back of the mortgage bond is in the handwriting of the deceased. It is admissible in evidence as the entry is against the pecuniary interest of the person who made it. (Section 32 (3) Evidence Ordinance.) Further, no evidence was given by the defendant denying payment of the sums mentioned in the endorsement. In these circumstances, the learned District Judge ought to have held that the evidence of the chauffeur was verified by the pencilled endorsement, and that, in view of the fact that payment was made within the period of limitation, the learned Judge should have held that the bond was not prescribed. It can be inferred in all reasonable probability that the endorsement was made before the debt was barred by lapse of time, because in the first place the deceased was not likely to have created evidence to support a claim which was to be made after his death, and secondly, if he did make it in anticipation of ante-mortem proceedings he would have been hardly likely to have omitted so important a circumstance as the date. Further it does not really matter whether the endorsement was made before or after the period of limitation had expired, since a debt is never extinguished while it is unpaid, but merely barred and that since a statute-barred debt can be revived by acknowledgment that the money is due, the endorsement will preclude the creditor from taking action in respect of the amount mentioned in the endorsement and therefore to that extent the entry was against the interest of the deceased.

N. Nadarajah (with him *J. L. M. Fernando*), for defendant, respondent.—The endorsement on the back of the bond is not admissible in evidence for the reason that there is nothing to show at what time it was made. If it is to be admitted as being against the pecuniary interest of the person making it, it must be shown by the party seeking to admit the evidence that it was against such pecuniary interest at the time of making the endorsement. To do this it will be necessary to lead evidence and prove the exact time the endorsement was made. Where there is no evidence as to the exact date of the making of the endorsement the evidence of such endorsement cannot be admitted. Further, no evidence has been led to show that the deceased made the endorsement except the opinion of a witness that the handwriting was that of the deceased. (*Ameer Ali, p. 316.*)

The claim is prescribed on the face of the plaint. The mere plea of payment will not entitle the Court to put the burden on the defence. The plaintiff must prove the payment to take the claim out of prescription. (*Soysa v. Soysa*[1], *Appuhami v. Perera*[2].)

September 1, 1936. ABRAHAMS C.J.—

The plaintiff-appellant was the administratrix of the estate of her husband who died in 1934, and in that capacity she sued the defendant-respondent for the recovery of a sum of Rs. 500, being principal Rs. 250 and interest Rs. 250, due upon a mortgage bond executed on September

[1] *17 N. L. R. 118.*

[2] *5 S. C. C. 32.*

26, 1923, by the respondent in favour of the deceased. It was stated in the plaint that the defendant had paid a sum of Rs. 190 on account of interest due on the said bond. The answer of the defendant was *inter alia* a denial that he had paid Rs. 190 on account of interest; that about August, 1930, he actually settled the claim by payment of Rs. 450; and that, finally, the plaintiff's claim, if any, on the bond was prescribed.

At the trial the issues were as follows:—

(1) Did the defendant pay a sum of Rs. 190 on account of interest on or about August, 1930 ?

(2) Did the defendant pay and discharge the mortgage bond ?

(3) Is the mortgage bond sued upon prescribed ?

The learned District Judge held that as on the face of the plaint the bond was prescribed, the onus was on the plaintiff to prove the contrary. To discharge this *onus*, one Jayasundera, who was called, stated that in August, 1930, he was chauffeur of the deceased. The mortgage bond was shown to him, and he purported to recognize as the handwriting of his late master this endorsement in pencil, "Paid one year's interest Rs. 40, afterwards received three years' interest", and he said that, by the direction of his master, in August, 1930, he added these words in ink, "After that received Rs. 30 in lieu of interest". He said that on the day that he wrote these words the defendant came and paid the deceased Rs. 30, and that the pencil endorsement was already on the mortgage bond. The learned District Judge rejected this evidence on grounds which do not appear to me to be unreasonable, and he came to the conclusion that the Rs. 190 had not been paid and that the bond was prescribed. He made no reference whatsoever in his judgment to the pencil endorsement.

The appellant now contends that this endorsement, being in the handwriting of the deceased, was admissible in evidence as being against the pecuniary interest of the person making it (section 32 (3) of the Evidence Ordinance), and that as no evidence was given by the defendant in denial of the payment of those sums mentioned in the endorsement, the learned District Judge ought to have held that the evidence of the chauffeur was verified by the pencilled endorsement, and that, therefore, payment having been made within the limitation period, the bond should have been held not to have been prescribed.

The question therefore is, is the pencilled endorsement a statement against the pecuniary interest of the person making it ? It is objected on behalf of the respondent that there is nothing to show, on the face of it, when this writing was actually put upon the bond. It might have been before the period of limitation had expired or it might have been after, in which latter event it clearly could not have been against the interest of the deceased person to have written the endorsement. It was argued for the appellant that it can be inferred in all reasonable probability that it was written before the debt was barred by lapse of time, because, in the first-place, the deceased was hardly likely to have created evidence to support a claim which was to be made after his death, and secondly, if he

did make it in anticipation of ante-mortem proceedings, he would have been hardly likely to have omitted so important a circumstance as the date. I think the answer to that is that the date must appear on the face of the instrument. It is quite impossible to say what was in the deceased person's mind when he omitted to insert it. The fact of the date ought to be proved by the instrument itself and not by an uncertain inference.

It is then said that it does not matter whether the endorsement was made either before or after the period of limitation had expired, since a debt is never extinguished while it is unpaid but merely barred, and that since the remedy in respect of the debt which has become statute barred can be revived by an acknowledgment that the money is due, the endorsement would preclude the creditor from taking action in respect of the amount mentioned in the endorsement and therefore to that extent the entry was against his interest. This argument is more attractive than effective, for an entry against interest, means an entry against interest at the time it was made. It cannot be said that if a debt was statute barred it was against the interest of the creditor to make it, because at some subsequent date a contingency which might never arise would make the entry against his interest. In fact the entry is *primâ facie* in his interest, not against it. So much for the logic of the argument. As regards the law, the following extract from *Woodroffe and Ameer Ali's Law of Evidence (1921 ed.), p. 316,* on the interpretation of the enactment in question, makes the matter perfectly clear. It runs as follows :—

> A class of statements which may be admissible under this Clause are endorsements or entries in respect of the payment of interest due on bonds and similar instruments. Such endorsements or entries, if made *before* the claim became barred by the law of Limitation, would be against the interest of the payee, inasmuch as they are admissions of payment ; but if they are made *after* the claim became so barred they would be for and not against the creditors' interest, inasmuch as by the admission of a small payment he would be enabled to recover the larger remaining portion of the debt, such payment having the effect of preventing the claim to the capital sum from being barred. Whether then the endorsement or entry is admissible, as an entry against interest, depends upon the question whether it was *bona fide* made before the claim became barred by Limitation, and it ought not to be admitted until it be shown by evidence *dehors* the instrument that it was made at a time when it was against the interest of the creditor to make it.

This extract repeats in condensed form the views expressed in *Taylor on Evidence,* section 696.

I do not think it was argued that the date of the endorsement can be proved by evidence outside the instrument itself, in this case by that of the chauffeur. I think if it had been so obvious, the answer is that before any outside evidence can be admitted it must be apparent on the face of the entry itself that it was made on the date contended for. I think the

rule relating to evidence *dehors* the instrument must mean evidence to support the inferences which can be drawn from the instrument itself. But in any event the learned District Judge refused to treat the chauffeur as a credible witness.

I would dismiss the appeal with costs in both Courts.

FERNANDO A.J.—I agree.

Appeal dismissed.