1950 *Present:* **Nagalingam J. and Gunasekara J.**

SIVASUBRAMANIAM, Appellant, *and* ALAGAMUTTU, Respondent

S. C. 449—D. C. Jaffna, 3,818

Prescription—Deposit of sum of money—Payment of interest—When cause of action arises—Requirement of formal demand prior to institution of action—In what circumstances necessary—Loan of money belonging to third party—Right of lender to sue in his own name.

On July 25, 1940, plaintiff deposited with the defendant, who was not a banker, a sum of Rs. 928. In acknowledgment a document was given the construction of which indicated that the document had to be surrendered and a request made before payment could be claimed. Plaintiff made demand for the repayment of the money on July 18, 1947.

In an action instituted on September 15, 1947, on the footing that " plaintiff deposited with the defendant a sum of Rs. 928 and the defendant agreed and undertook to pay the said sum with interest at 6 per cent. per annum whenever demanded "—

Held, that the cause of action accrued to the plaintiff only on July 18, 1947, and that the claim was therefore not prescribed.

Held further, that where a person lends out or deposits money belonging to a third party in his own name he is entitled to sue in his own name for the recovery of the sum without joining the owner of the fund.

APPEAL from a judgment of the District Judge, Jaffna.

F. A. Hayley, K.C., with *C. Shanmuganayagam,* for the defendant appellant.

H. W. Tambiah, for the plaintiff respondent.

Cur. adv. vult.

February 7, 1950. NAGALINGAM J.—

An interesting question under the Prescription Ordinance arises for adjudication on this appeal. The defendant-appellant carries on business as a pawnbroker. An ancillary to his main business, he appears to be in the habit of receiving monies from depositors, undertaking to pay interest on the sums so deposited with him. The plaintiff respondent is a first cousin of the defendant and is a widow. From time to time she seems to have made deposits of various sums of money with the defendant in respect of which deposits she was given separate receipts, and there is no dispute in regard to the various sums deposited save and except in regard to the amount which is the subject of this action. On 25th July, 1940, the plaintiff admittedly paid a sum of Rs. 928 into the hands of the defendant, who delivered the document P1 in acknowledgment of the said sum. The plaintiff commenced this action on 15th September, 1947, that is to say, after the expiry of a period of over six years. The action is not framed as a suit based on the contractual relationship arising between the parties on the document but simply on the footing that the " plaintiff deposited with the defendant a sum of Rs. 928 and the defendant agreed and undertook to pay the said sum with interest at 6 per cent. per annum whenever demanded ".

Apart from a defence that the money had been transferred at the request of the plaintiff to the account of another cousin of the parties, by name Thambithurai, and that consequently no money is due to the plaintiff, the defendant has taken a plea under the Prescription Ordinance, contending that the claim is statute barred. This latter question has been the main point debated on appeal. As certain arguments were advanced even in regard to the allegation of novation, I shall briefly touch upon that question before I proceed to consider the point under the Prescription Ordinance.

Notwithstanding the denial of the plaintiff it is clear to my mind that the sum of Rs. 928 she deposited with the plaintiff was the sum which rightly belonged to one Maheswari, the wife of Thambithurai. The several documents produced in the case by the defendant leave no room for doubt but that the plaintiff had been entrusted by Thambithurai and his wife with certain monies for investment. The plaintiff had lent the money out on mortgage repayable either to her or to Thambithurai or to Maheswari by bond D2 of 1937. The mortgage debt with interest was paid and settled on 20th July, 1940, by payment made to the plaintiff—*vide* receipt D3 of the same date. The amount received by her was a sum of Rs. 930 as shown in the document D3. Five days later, that is on 25th July, 1940, it was, that the plaintiff deposited the sum of Rs. 928 with the defendant. The defendant says that the difference between Rs. 930 received by her and the sum of Rs. 928 deposited with him, namely Rs. 2, represents the fee paid for drawing up the receipt D3. I therefore hold that the money that was paid by the plaintiff on this occasion was money belonging to Maheswari. But the law is clear that where a person lends out or deposits money belonging to a third party in his own name he is entitled to sue in his own name for the recovery of the sum without joining the owner of the fund. Nathan [1] says:

> " If a person have lent money belonging to a third party the lender will still have this action if he has lent in his own name and the actual owner of the money will not have this action unless it has been ceded to him by the lender ".

It is therefore clear that the plaintiff is nevertheless entitled to maintain this action because the money was paid by her to the defendant and by document P1 the defendant expressly agrees to repay the sum to the plaintiff.

The learned trial Judge has disbelieved the defendant in regard to the allegation of novation. According to the defendant, the date of novation was 12th May, 1942, when admittedly Thambithurai and his wife were both in Malaya which was then under enemy occupation by the Japanese. No communication between Thambithurai and his wife on the one hand and the plaintiff or the defendant on the other was possible at that date. It is to be noted that Maheswari is a sister of the defendant. It is not unlikely, as has been suggested on behalf of the plaintiff, that the defendant, considering the return of Maheswari or Thambithurai highly improbable and in fact being even doubtful of their being alive at that date, took upon himself to transfer the fund standing to the credit of the plaintiff in his books to the credit of Thambithurai in the hope that he would be in a position to resist any claim by

[1] *1904 ed. Vol. II p. 983.*

the plaintiff if she put forward one in regard to the money which admittedly belonged to his sister and to which he probably would be heir. The defendant was unable to explain why, if the transfer was effected with the consent of the plaintiff, he did not get back the document in which there is an express statement that the defendant should get back the document on payment. His explanation that the plaintiff was a cousin of his is unconvincing. The defendant, who is accustomed to business methods, would not, if his statement be true, have allowed the document P1 to remain in the hands of the plaintiff at least at the date he says he paid the money to Thambithurai, even if he had allowed the document to remain with the plaintiff at the date. of the alleged transfer of accounts. The belated plea put forward by him in the pleadings of payment to Thambithurai does also not inspire confidence in his case. I concur with the finding of the learned District Judge that the defendant's evidence is false on this point and that his further evidence that he subsequently paid the money to Thambithurai is also equally false.

I now come to the plea of prescription. It is urged on behalf of the defendant that if the action be regarded even as one based on a written contract, which in fact it is not, it is prescribed in six years by virtue of section 6 of the Prescription Ordinance (Cap. 55). But it is said that the action as framed is in fact one founded on an unwritten promise and was prescribed within three years of the date of payment to the defendant.

Mr. Hayley contends that the transaction between the parties was no more than one of lending and borrowing and that prescription arose from the date of payment as the cause of action accrued immediately the payment was made. He relied upon the case of *Foley v. Hill* [1] to show that the relationship between banker and customer is that of debtor and creditor. This case was regarded for a number of years in English law as authority for the proposition that a previous demand was unnecessary to sue a banker for the return of the balance standing to the credit of a customer's current account ; in other words, that the Statute of Limitations barred a claim on a current account which has remained unoperated upon for a period of over six years.

Mr. Hayley, however, conceded that the law as held to have been enunciated in the above case received modification in 1921 by a judgment of the Court of Appeal in the case of *Joachimson v. Swiss Bank Corporation* [2], where it was held that to the ordinary relationship of debtor and creditor between banker and customer there was superadded other obligations, and it is only necessary to note for the purpose of this case that a previous demand by the customer was held to be one of the obligations necessary to be performed by the customer before he could institute action against the banker for the recovery of the money. But Mr. Hayley argues that as the parties here are not shown to stand in the relation of banker and customer the special superadded obligations found in the case of *Joachimson v. Swiss Bank Corporation (supra)* are lacking and that no previous demand is therefore necessary. It is true that the well recognised special features relating to a current account

[1] *(1848) 2 H. L. C. 27* [2] *(1921) 3 K. B. 110.*

in a bank, such as that the customer should claim payment by applying on special forms provided by the bank or that payment should be made only at the bank's premises or that payment should be made within banking hours have no application to the transaction I am now considering, and the respondent himself concedes that there is no analogy between a current account and the transaction between the plaintiff and the defendant in this case.

Mr. Thambiah, however, argues that the transaction under investigation is similar to a deposit account with a banker. In regard to deposit accounts it has never been doubted in English Law that a previous demand is necessary to found an action. One particular feature that is always stressed in regard to this class of accounts is that the deposit receipt must be surrendered to the banker before payment can be claimed—see *In re Dillon* [1] per Cotton L.J. But I do not see why the principles of English Law should be transported into the transaction between these parties. The defendant is admittedly no banker in the sense in which the term is understood in law. Section 3 of the Civil Law Ordinance Cap. 66 lets in the Law of England only in regard to the law of partnerships, joint stock companies, corporations, banks and banking, principal and agent, carriers by land, and life and fire insurance ; so that I can see no justification for applying the principles of English Law to the decision of this case.

It seems to me that the Roman Dutch Law should govern the rights of the present parties. Under the Roman Dutch Law, unlike under the English Law, it is for the creditor to seek out the debtor to claim payment. Even in the case of a simple loan, " where no time has been fixed for repayment, it is not immediately claimable but after the lapse of a reasonable time " [2]; so that it would be seen that under our common law a demand is essential before it could be said that a cause of action accrues to a creditor to sue the debtor. But, as was rightly remarked by Bankes L.J. in the case of *Joachimson v. Swiss Bank Corporation (supra)* " In every case, therefore, where this question arises, the test must be whether the parties have or have not agreed that an actual demand shall be a condition precedent to the existence of a present enforceable debt, " and it is therefore necessary to see whether there are any special terms of agreement between the parties throwing light on the question for determination in this case, irrespective of the question whether the English or the Roman Dutch Law applies.

The defendant did not grant a promissory note when the money was paid to him, but he issued the document P1. Document P1 is a printed form in Tamil. Correctly translated, it runs as follows:—

> " On this 10 day of the month of Adi in the year Vikrama to the credit of Alagamuttu widow of Kandiah of Urumpirai debit of the business (shop) of V. Sivasubramaniam of Van East Rs. 928. I shall receive back this document after paying this sum of Rs. 928 with interest at 6 per cent. at any time that she makes demand for it.
>
> Sgd. V. Sivasubramaniam. "

This is not a negotiable instrument to which the Law Merchant can apply, under which it is settled law that no previous demand is necessary to

[1] *44 Ch. D. at p. 81.* [2] *Nathan Vol. II. p. 984.*

commence an action. But this document is one the construction of which indicates that it had to be surrendered and a request made before payment could be claimed. Without surrendering the document, payment cannot be insisted upon—needless to say that other considerations would apply to a lost document. The surrender, by itself, without anything further being said, may also operate as a sufficient demand. It therefore seems to me that a surrender of the document and a demand are both conditions precedent to the institution of the action. The plaintiff affirmed, and it was not denied by the defendant, that for the first time the plaintiff made demand for the repayment of the amount on 18th July, 1947, that is to say, within two months of the date of the plaint.

In this view of the matter, it must follow that the cause of action accrued to the plaintiff only on 18th July, 1947, and that the claim is therefore not prescribed. I would therefore affirm the judgment of the learned District Judge and dismiss the appeal with costs.

GUNASEKARA J.—I agree.

Appeal dismissed.