1939 *Present :* **Keuneman and Wijeyewardene JJ.**

DHARMAWARDENE *v.* ABEYWARDENE.

294—D. C. Galle, 36,942.

Prescription—Mortgage bond—Part payment—Acknowledgment of debt and promise to pay balance—Circumstances attending payment—Promise rebutted.

A part payment of a debt in order to prevent prescription from running against the debt must be made in circumstances which indicate an acknowledgment of the debt and a promise to pay the balance.

The implied promise may be rebutted by special circumstances attending the payment.

Arunasalam v. Ramasamy (17 *N. L. R.* 156) followed.

[1] *(1890) 15 N. L. R. 223.*

APPEAL from a judgment of the District Judge of Galle.

E. B. Wickremanayake (with him *Stanley de Zoysa,*) for defendant, appellant.

U. A. Jayasundere (with him *Chandrasena*), for plaintiff, respondent.

Cur. adv. vult.

March 31, 1939. KEUNEMAN J.—

The plaintiff brought action against the defendant on mortgage bond No. 2,118, dated November 6, 1925. The defendant had earlier been appointed as legal representative of the estate of Don Noris Appu for the purposes of this action. The action was filed on October 2, 1938. To take his case out of prescription, the plaintiff averred that a sum of Rs. 150 out of the principal, and all interest due up to November 22, 1935, had been paid, and stated that a balance sum of Rs. 325 was due on the bond.

The defendant pleaded (1) that the claim was prescribed, and (2) that the full amount due to the plaintiff was paid.

The issues framed at the trial were:—

(1) Is the bond prescribed ?

(2) Has the amount due on the bond been settled by payment ?

In proof of the fact that part payment had been made to him, the plaintiff produced document P 1, signed by the defendant, which runs as follows :—

(*Translation*).

"A part of the principal due on mortgage bond No. 2,118, attested by H. L. M. Senaratna, Notary Public, from my father, M. W. Noris Dharmawardene to Don Louis Abeyawardene of Haburugala was paid by me and the balance Rs. 325 is due which I agree to pay in instalments and thus promising sign this on a six cents stamp and got the complete discharge of the said bond ".

(Sgd. in English)
22.11.35 ".

The plaintiff also produced letter P 2, signed by the defendant, which runs as follows :—

" Maramba, 22nd November, 1935.

Respectfully submitted,

That writing is herewith sent. If the same is not satisfactory when I come on the first I respectfully submit that a writing in any manner you want could be given.

Yours obediently,

(Sgd. in English) ".

After hearing the evidence for the plaintiff and the defendant, the learned District Judge delivered judgment holding that the defendant made certain payments and gave writing P 1 on November 22, 1935, that the defendant was one of several heirs of Don Noris Appu, and had no authority to represent the estate of Don Noris Appu. The plaintiff's action against the defendant as representative of Don Noris Appu was dismissed.

The District Judge, however, went further and held that so far as the defendant himself was concerned, the writing and the payments made by him operated to take the case out of prescription. He thought it unnecessary to refer the plaintiff to a separate action against the defendant personally, and entered mortgage decree for the plaintiff against the defendant in his personal capacity for Rs. 325 and interest from November 22, 1935, less Rs. 50 paid on November 7, 1936. The mortgage decree was to bind the share of the property in question inherited by the defendant from Noris.

Against this judgment the defendant appeals, and the plaintiff has also given notice of objections under section 772 of the Civil Procedure Code.

As regards the defendant's appeal it is contended that the learned District Judge was not justified in converting this action from one against the defendant as legal representative of Don Noris Appu into one against the defendant personally. On the issues before the Court, the liability of Don Noris Appu's estate was alone in question, and the defendant had not been sued as an heir of Don Noris Appu. Had he been sued personally other defences were open to him, which were not raised or decided at the trial. The respondent's Counsel found difficulty in supporting the finding of the District Judge, and I am of opinion that the order made by the learned District Judge must be set aside.

Counsel for the respondent, however argued that the dismissal of the action against the defendant in his representative capacity was wrong. He contended that a payment made by one out of several heirs of a deceased mortgagor prevented prescription from running against the estate of the deceased. He depended on section 13 of Ordinance No. 22 of 1871, and especially on the words :—

> "Where there shall be two or more joint contractors, or heirs, executors, or administrators of any contractor, no such joint contractor, or heir, executor, or administrator shall lose the benefit of the said enactments, or any of them, by reason of any written acknowledgment or promise made by any other or others of them. Provided always that nothing herein contained shall alter or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever."

Counsel for the respondent argued that the effect of a payment of principal or interest was different from the effect of a written acknowledgment, and while in the latter case the acknowledgment was only operative against the person who gave it, in the latter case the payment ensured to the benefit of all the parties liable, and therefore prevented prescription from running against all the parties concerned.

It has undoubtedly been held by our Courts that a part payment of the debt sued for prevents the statutory bar from attaching (*cf. Sathappa Chetty v. Ramen Chetty* [1]). In this case it was held that the effect of the earlier Ordinance of 1834 was "to place part payment of the debt sued for on the footing of an act from which the Court might and should infer that the debt had not been satisfied, and an act taking the debt out of the limiting operation of the Ordinance". It was further held that the effect of Ordinance No. 22 of 1871 was to "save in favour of part payments their effect alike under the Ordinance of 1834, and under the Statute of James I. before the decision in *Tanner v. Smart* and Lord Tenterden's Act". Further, it was laid down that it was the duty of "the plaintiff who relies on payment as having the effect of preventing the statutory bar, to show that it was made on account of the debt sued for and as a part-payment".

Similarly, in *Arunasalem v. Ramasamy* [2], it was held that a payment on account is necessarily an acknowledgment of the debt and implies a promise to pay the balance. This, however, may be affected by qualifying circumstances. "The implication of a promise may be rebutted by any special circumstances attending the payment, as where the payment is not on account but purports to be in satisfaction of the entire demand, or where the debtor says he will not pay the balance, or where the payment is compulsory under some legal proceeding" (*per* de Sampayo J.).

Now, it is necessary to consider the circumstances of this case and to see whether the payment can be regarded as establishing a promise to pay the debt. We have to consider the effect of document P 1. The document is in Sinhalese, and a translation has been put in. The first part of the document contains a statement that a part of the principal due on the mortgage bond No. 2,118 was paid, and that Rs. 325 is due. Then follows an agreement to pay this sum in instalments, and there follow the words "and thus promising sign this on a six cents stamp and got the complete discharge of the said bond".

The plaintiff in his evidence contended that the Sinhalese word "ganimi" and not "gathimi" was used, thus putting the discharge of the mortgage bond into the future and not into the past. It is clear, however, and it is admitted by Counsel that the actual word is "gathimi". In any case the matter we are now investigating is not what the plaintiff understood of the circumstances, but the actual circumstances attending the payment by the defendant. It is true that in P 2 the defendant offered to give a different writing, if the plaintiff was not satisfied with P 1. But no action whatever was taken by the plaintiff to obtain any other form of document. From P 1 it appears that the defendant when he made the part payment regarded the mortgage bond as extinguished. It is true that he promised to pay the balance sum of Rs. 325, but this cannot be regarded as an acknowledgment of the existence of the bond, or of the liability of the defendant thereunder. The promise to pay Rs. 325 may amount to a novation of the contract, as a simple contract, and it may support an action against the defendant for that sum. I do

[1] *5 S. C. C. 62.*

[2] *17 N. L. R. 156.*

not think, however, I can regard P 1 or the payment made as an acknowledgment which keeps the mortgage bond alive.

I think this is a sufficient ground for the decision of this appeal. As regards the further point whether a part payment by one heir of a deceased contractor can prevent prescription running against the estate of the deceased contractor, no definite authority has been cited to us, and the matter is one of difficulty. *Lightwood on Limitations (1909 ed., p. 360)* sums up the law as follows:—"It appears then that under each of the statutes the payment may be made by any person who is liable, or interested, or entitled to pay, or who is in such a relation to the debtor that a payment by him operates as an admission by the debtor". Whether this correctly sets out the law applicable in Ceylon, and if so, whether the defendant falls within these terms must be left for determination in a case where that point arises for express decision. In this case any expression of opinion would be merely an *obiter dictum.*

The appeal is allowed with costs, and the plaintiff's action is dismissed with costs.

Appeal allowed.

WIJEYEWARDENE J.—I agree.