

1935

*Present : Koch J. and Soertsz A.J.*PERERA *et al.* v. TOUSSAINT.

153—D. C. Anuradhapura, 1,836.

Prescription—New party added as plaintiff to action—Date of action for purpose of prescription—Book-debt—Ordinance No. 22 of 1871, s. 9.

Where, on objection taken to an action that it was not rightly constituted, a party was added as plaintiff, the crucial date for ascertaining whether the action is statute barred or not is the date on which the right plaintiff came into the case.

A claim to recover money due for board and lodging in a hotel is a book-debt within the meaning of section 9 of the Prescription Ordinance.

A PPEAL from a judgment of the District Judge of Anuradhapura.

H. V. Perera (with him *M. T. de S. Amarasekere* and *D. W. Fernando*), for defendant, appellant.

No appearance for plaintiff, respondent.

August 19, 1935. SOERTSZ A.J.—

One B. Stephen Perera in his capacity as manager of the National Hotel, Anuradhapura, brought this action on December 7, 1932, to recover from the defendant, the manager of her lunatic husband, a sum of Rs. 685.01 which he alleged was the balance due on account of board and lodging provided for the lunatic between October 1, 1929, and December 8, 1931. The total amount incurred by the defendant's husband during this period was said to be Rs. 923.30, but this account was credited with two payments made by one Samaraweera who, in making those payments professed to act for and on behalf of the lunatic. The dates of these two payments are April 30 and of December 8, 1931.

The defendant filed answer on April 26, 1933, and contended, *inter alia*, that the action was not maintainable by the plaintiff (a) as the business name of the hotel which the plaintiff represents has not been registered under the provisions of Ordinance No. 6 of 1918; (b) as the claim preferred by him is prescribed.

With regard to the first legal defence of non-compliance with the requirements of the Registration of Business Names Ordinance, the defendant's proctor admitted that it failed when the certificate of registration was produced and the case was fixed for trial on the question of "prescription". On the trial date, the defendant's proctor raised the further issue: Has the plaintiff any authority to sue on behalf of Haramanis Appu, who is the registered owner of the hotel? Thereupon, plaintiff's proctor moved to add Haramanis Appu as added plaintiff. This motion was opposed, but the District Judge allowed it and made Haramanis Appu added plaintiff. This took place on November 3, 1933. Now, in my opinion, directly the certificate of the registration of business names was produced, it became quite clear that the proper party to sue was not the original plaintiff, the manager of the hotel, but the registered proprietor, and the proper course was to *substitute* him as plaintiff under section 13 of the Civil Procedure Code and not to *add* him as a party. There was no occasion whatever for both the manager and the proprietor continuing as plaintiffs. I do not know whether this course was adopted in order to get round the provisions of the Statute of Limitations. If that was the intention, I do not think it can avail the real plaintiff for that purpose. The crucial date for the ascertaining of whether the cause of action was statute barred or not, is the date on which the right plaintiff, in this case the proprietor, came into the case, and that is November 3, 1933. By that date the cause of action, if it arose from a book-debt, was barred even if the payment of December 8, 1931, be taken into account. Did this cause of action arise from a book-debt? In my opinion, the answer is in the affirmative on the authority of Dalton J. in *Pate v. Mack*¹. In that case the definition given by Lord Esher in *The Official Receiver v. Toilly*² is cited:—"The expression book-debts is not in itself vague. It means debts arising in trade or business in which it is usual to keep books, not necessarily those actually put into books, but those which ought to be booked in ordinary course". In view of that definition it is clear that the debt sued for in this case is a book-debt and as such is barred in our law by section 9 of Ordinance No. 22 of 1871 in one year. For that reason, the plaintiff's action, in my opinion, falls to be dismissed. The difficulty cannot be surmounted by retaining on the record the name of a person who came into the case as plaintiff without a right to do so and by vaguely entering "judgment for *plaintiff* as prayed for with costs". For the bubble is pricked the moment one puts the question "Judgment for which plaintiff"? In my opinion, a motion to add or substitute Haramanis Appu as plaintiff should not have been entertained at the stage at which it was made. As pointed out by Scrutton L.J. in *Mabro v. Eagle, Star and British Dominions Insurance Company, Ltd.*,³ "The Court has always refused to allow a party or

¹ 28 N. L. R. 321.

³ (1932) 1 K. B. 485.

² 56 L. J. Q. B. 30.

a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The Court has never treated it as just to deprive a defendant of a legal defence. If the facts show either that the particular plaintiff or the new cause of action sought to be added are barred, I am unable to understand how it is possible for the Court to disregard the Statute". The District Judge has not considered this view of the matter at all. He has found for the plaintiff on the footing that the case was instituted on December 7, 1932, and that the payment of December 8, 1931, took the debt out of the Statute. Let us assume that this action is to be regarded as having been instituted on December 7, 1932. The question still arises whether the payment of December 8, 1931, by Samaraweera can be considered a payment properly made on behalf of the debtor. There is evidence to show that Samaraweera had been the lessee of Toussaint's land till September, 1930, and had been paying Toussaint Rs. 225 a quarter as rent. After the expiry of the lease Toussaint and the plaintiff—it is not said which plaintiff—saw Samaraweera and "Toussaint asked him to collect the income from the land and pay plaintiff on account of his hotel bill". In pursuance of this he collected Rs. 210 up to the end of April, 1931, and paid Rs. 170 to the plaintiff, and again on December 8, 1931, a further sum of Rs. 68.18. Samaraweera's evidence that the plaintiff and Toussaint both saw him and that it was Toussaint who asked him to collect the income and pay his hotel bill is contradicted by his letter D 5 dated December 23, 1931, addressed to the defendant in which he says, "I paid the income of the land to the manager of the National Hotel as it was he who gave the land over to me". This is the more probable version. The impression one receives from all the evidence in the case is that at this date Toussaint was of unsound mind and could not have done what he is said to have done. If I had been the trial Judge I should have held on D 5 that the payments made by Samaraweera were not payments made at the request and with the authority of Toussaint, but as the result of an arrangement between himself and the manager of the hotel and that, therefore, those payments did not affect Toussaint in the manner suggested. But the trial Judge has found that these payments were made by Samaraweera at Toussaint's request. I will, therefore consider the question on that view of the facts. According to the manager of the hotel, Toussaint and he saw Samaraweera in November or December, 1930. It was, therefore, in November or December, 1930, that Toussaint gave Samaraweera Authority to make payments on his behalf. But directly Toussaint was adjudicated a lunatic in April, 1931, and of this adjudication Samaraweera was aware, his authority was at an end. (Vide *Drew v. Nunn*¹ and *Yonge v. Toynbee*².)

In my opinion, therefore, the payments of December 8, 1931, did not avail to stop the Statute from running and the plea of prescription taken by the defendant is entitled to succeed. I allow the appeal and dismiss the plaintiff's action with costs in both Courts.

Koch J.—I agree.

Appeal allowed.

¹ 4 Q. B. D. 661.

² (1910) 1 K. B. 215.