1936 *Present:* **Akbar S.P.J. and Koch J.**

SILVA *v.* LEIRIS APPU.

164—D. C. (Inty.) Tangalla, 2,838.

Judgment-debt—Appropriation of payments by judgment-debtor after decree—Principle of Roman-Dutch law.

The rule of the Roman-Dutch law that a payment by a debtor should be applied by the creditor to the liquidation of the most onerous part of the debt has no application to a judgment-debt.

APPEAL from a judgment of the District Judge of Tangalla.

L. A. Rajapakse (with him *Olegasegaram*), for defendant, appellant.

N. E. Weerasooria, for plaintiffs, respondent.

Cur. adv. vult.

July 3, 1936. AKBAR S.P.J.—

By mortgage decree dated August 15, 1929, the defendant-appellant was ordered to pay Rs. 882 being principal and interest due on a mortgage bond with interest at 9 per cent. from date of decree till date of payment and also costs of the action. In default of payment of this amount. interest, and costs on or before August 31, 1929, the mortgaged property was to be sold and the proceeds applied towards the payment of the amount, interest, and costs. On January 30, 1930, the application of the plaintiff for execution of decree was allowed. The amount mentioned in the application was Rs. 1,031.42, which was made up as follows: Rs. 882 (amount of principal and interest in decree), Rs. 33.48 (interest from date of decree till date of application), and costs Rs. 115.94. This order to execute the decree was recalled, as defendant had made a part payment on the decree of Rs. 250 on March 19, 1930. On March 16, 1931, plaintiff again applied for execution for Rs. 862.20, which was made up as follows; Rs. 781.42 (being the difference between Rs. 1,031.42 and Rs. 250), Rs. 77.18 (being interest from January 22, 1930, to March 14, 1931, on Rs. 781.42), and Rs. 3.60 (costs for the reissue).

The defendant again made a part payment of Rs. 250 on May 29, 1931, and the order to execute was again recalled. The defendant made further payments of Rs. 250 on June 21, 1931, and Rs. 100 on August 31, 1932. On October 12, 1932, plaintiff applied for execution for the

balance then due of Rs. 327.59. Objection was taken to this application on the ground that the part payments should have been set off, as they were made against the more onerous portion of the decree, viz., Rs. 882, which was liable to interest and not as against the full amount of the decree including costs which were not liable to payment of interest. The District Judge ruled against the defendant, hence this appeal. In my opinion the appeal fails on two grounds. In the first place the part payments were made after the issue of the order for execution, and defendant had full notice of the manner in which the plaintiff was applying the part payment as he had indicated this in his application for execution dated March 16, 1931.

In spite of this application which is in the record, the defendant made three further payments of Rs. 250, Rs. 250, and Rs. 100 on May 29, 1931, June 21, 1931, and August 31, 1932. In the next place although the Roman-Dutch law is clear that part payments should be set off against the more onerous debt when the debtor is indebted on two or more obligations, I do not think this will apply to a judgment-debt which comprises and is made up of two or more debts, some of which are more onerous than the others. The judgment-debt is one debt and the order for execution issued to the Fiscal or Commissioner is in effect an order to levy one sum, which is found to be due on the date of demand by that official, whatever the component parts of this lump sum may be or in whatsoever a manner they may be made up.

Under the Roman-Dutch law (which will be found in *2 Nathan, p. 593; Morice's Roman-Dutch Law*, p. 97) the debtor has the choice of indicating to his creditor to which debt the part payment is to be appropriated. There was no such evidence in this case. In the absence of any such indication the appropriation would be set off against the more burdensome debt. This rule cannot, I think, be applied to the case before me, which was a case of one judgment-debt, although made up of the mortgage debt carrying interest and the costs which were not liable to interest. The debt is one whole debt which gets its efficacy from the decree of the Court, which decree clearly stated that if the sum due on a particular date was not paid, the sale was to be carried through.

For the reasons stated by me the order of the District Judge appears to me to be correct and the appeal will therefore be dismissed with costs.

KOCH J.—

A somewhat novel point arises for decision on this appeal and that is whether the Roman-Dutch law on the subject of appropriation of payments as between creditor and debtor applies once a decree has passed in favour of the creditor-plaintiff. It is postulated by Mr. Rajapakse that it does. The point arises in this wise. The plaintiff-respondent obtained a hypothecary decree with interest and costs. Certain part payments were made by the defendant to the plaintiff who placed them against costs in the first instance. The defendant argues that they should have been primarily placed against the principal debt in the decree which carried continuing interest and not against the costs which did not carry any interest at all. Now it is clear that our Common law in regulating appropriation of payments stresses considerations of

advantage to the debtor (*Voet XLVI. 3, 16 ; Pothier III. 1, 7 ; Ramanathan Chetty v. Sarkunam* [1]), and in doing so appropriates a payment to the most onerous debt. It is equally clear in the present case that under the decree in question that part of it which includes the money claim and interest is more onerous than that part for costs, but can it be said that the rules of appropriation apply even after a decree has been entered ? I think not, for I feel that these rules were intended to govern the contracting parties so long only as actual contractual relations exist. Once the intervention of a Court has been sought and once a decree has been entered, the contractual relations are determined and the liability of one to the other is no longer under the contract but under the decree which takes its place, and which is the formal expression of the results arrived at by the judgment (*Fernando v. The Syndicate Boat Co., Ltd* [2]). The parties thereupon pass out of the domain of contract and enter that of a decree. Once this happens the Common law ceases to operate so far as the decree holder's executory powers are concerned, and the provisions of the Civil Procedure Code come into play. Unfortunately a party in whose favour a decree has been made is designated a judgment-creditor and a person against whom such a decree has been entered is called a judgment-debtor (section 5, Civil Procedure Code). This has led to a confusion of ideas owing to the terms "creditor" and "debtor" being still maintained. A less ambiguous expression would have been "decree holder" and party against whom a decree is entered. The Code however, in section 217, sets out various types of decrees and includes decrees other than those to pay money, for example, a *rei vindicatio* or possessory decree without damages, a decree for divorce without alimony or damages, &c. We can therefore conceive of instances of decrees that have to be obeyed or executed, into which money obligations do not enter and yet the holder of such a decree may legally be styled a judgment-creditor. I therefore think that that argument of Mr. Rajapakse is unconvincing. The code provides for the execution of decrees and for their satisfaction. The former step is through the Fiscal who, according to the terms of section 226, after receiving the writ is obliged to call on the judgment-debtor and require him to pay the amount of the writ, a tender by the judgment-debtor of anything short of this amount must be rejected—a requirement which the ordinary creditor is not bound by. Again, in the case of entire or partial satisfaction of the decree no such adjustment, unless certified under section 349 in the record, is recognizable by the Court different from payment to and acceptance by a creditor during the pendency of his contract. Also any claims or remedies, or any payments or other defences under the contract that the creditor or debtor has failed to advance at the trial which preceded the decree cannot be raised after the Court has pronounced on the contract (section 207 of the Civil Procedure Code). The relevancy of these observations is to indicate that the Common law relations of the parties appear to be at an end at the moment a decree is entered and fresh rights and obligations emerge from under the decree which can only be enforced procedurally in terms of the Civil Procedure Code.

[1] *15 N. L. R. 334.*

[2] *2 N. L. R. 106*

I therefore agree with my brother that the rules of appropriation under the Roman-Dutch law do not apply to the case of a judgment-debt. I also agree with my brother's remarks in regard to the effect of the notice the appellant had of the manner in which the respondent had been applying the part payments made by the appellant after decree. The appeal fails and must be dismissed with costs.

Appeal dismissed.