1932 *Present :* **Dalton and Drieberg JJ.**

HOARE & CO. *v.* RAJARATNAM.

81—D. C. Colombo, 35,309.

Prescription—Acknowledgment of debt—Request for time not granted—Benefit of condition—Plea in bar raised in appeal.

Where the acknowledgment of a debt is coupled with a request for time, which was not granted,—

Held, that the creditor was not entitled to avail himself of the benefit of the condition he had rejected, in bar of prescription.

A plaintiff cannot rely upon a ground of exemption from the law of limitation raised for the first time in appeal.

APPEAL from a judgment of the District Judge of Colombo.

Nadarajah, for defendant-appellant.

N. E. Weerasooria, for plaintiff-respondents.

April 29, 1932. DALTON J.—

The respondent firm has obtained judgment in the lower Court against the defendant (appellant) for the sum of Rs. 1,357.85 in respect of goods sold and delivered and work and labour supplied. The defendant pleads that the amount is prescribed.

The last item in the account attached to the plaint is dated January 16, 1928. The plaint was filed on October 30, 1929. The plaint did not set out, as it should have done under the provisions of section 44 of the Civil Procedure Code, the ground upon which the exemption from the bar of lapse of time was claimed, but, at the opening of the case on the day of trial in the lower Court, counsel for plaintiff produced a letter of September 28, 1928 (marked P 1), by defendant to the plaintiff firm apparently, as the judgment shows, for the purpose of setting it up as an

acknowledgment of defendant's indebtedness, and as a bar to the plea of prescription. Defendant does not deny that it is an acknowledgment of his indebtedness. This document P 1 is in the following terms:—

Sivagirie Estate,
Undugoda,
28th Sept., 1928.

Messrs. Hoare & Co.,
Colombo.

Bungalow Roof.

DEAR SIRS,—IN reply to your letter of 5th instant, on account of the fall of rubber prices, you will have to wait another couple of months for settlement.

In the meantime please send your contractor to put right the leaking roof, &c., as promised in your letter of 2nd November, 1927.

I am, Dear Sirs,
Your's faithfully,
(Sgd.) R. N. RAJARATNAM.

The trial Judge held this letter to be an unconditional promise to pay on the expiration of two months from the date of the letter, and that therefore, plaint having been filed on October 30, 1929, within twelve months of the expiration of those two months, plaintiff's claim is not prescribed.

Plaintiff's failure to comply with the peremptory provisions of section 44 of the Code has been the chief cause of his difficulty in stating precisely the ground upon which exemption from the bar of prescription is claimed. If that failure was intentional to give scope for future eventualities, one can have little sympathy with him. No objection was however taken on behalf of defendants to this failure on the part of plaintiff, although the bar must have been apparent on the face of the plaint with its account of particulars attached. Possibly reference to the document P 1 by counsel for plaintiff at the opening of the case was accepted by both sides as making any amendment of the plaint unnecessary, for it has been held that the Judge may *ex mero motu* recognize the bar and give effect to it. (*Arunasalam v. Ramanathan*[1].)

Considerable correspondence passed between the parties, and it is quite clear, from the answer sent by the plaintiff firm to this letter P 1, that they did not interpret that letter as the trial Judge has done. The letter D 8 of October 2, it is agreed, is a reply to P 1, although on the face of it it appears to be an answer to a letter of September 26. After dealing with the matter of the damaged roof the firm declines to grant any further time and asks for a cheque in settlement by return. On first reading the letter P 1, it appeared to me to be an acknowledgment of defendant's indebtedness with a request for a time, a request, no doubt put in somewhat peremptory terms. Nothing I have heard during the argument has removed that impression from my mind. It has, in fact, been strengthened by the other evidence, and it is clearly shown by D 8 that that is how the plaintiff firm read the letter. I am unable to agree with the learned trial Judge that the letter was an unconditional

[1] *9 S. C. C. 190.*

promise to pay at the expiration of two months. It is an acknowledgment of the defendant's indebtedness at the date the letter was written, to which has been added an intimation that he cannot raise the money for two months, implying a request to the plaintiff firm to wait for that time, which request was refused.

The law applicable here is very concisely set out in *Buckmaster v. Russell* [1] quoting from *Philips v. Philips* [2] "The legal effect of an acknowledgment of a debt barred by the statute of limitation is that of a promise to pay the old debt, and for this purpose the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise and not the old debt is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay, for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise given him.

The fact that to the acknowledgment is added a request for time (to be distinguished, be it noted, from a promise to pay within a definite time), does not, it seems to me, make the acknowledgment any less a promise to pay. Here the request for time was refused. The plaintiff firm is nevertheless seeking to obtain as against the defendant the benefit of those two months for itself in order to prevent the bar of prescription from running, when it refused the request of the defendant to allow him the two months he asked for. There is no doubt that the firm could have sued the defendant to recover the debt at once. To hold defendant bound by his offer or request to pay after the lapse of two months, when his request had been definitely rejected by the other side, would be unjust, and applying the authority cited, the simple question, therefore, is whether independently of the request to pay in two months there is an absolute and unqualified acknowledgment of the existence of the debt. I am of opinion that there is.

The action having been started more than twelve months after the acknowledgment P 1 was made, which acknowledgment does not take the claim out of the Ordinance, the action is therefore prescribed. Why action was delayed for ten months after the final letter of December 28 threatening immediate legal proceedings does not appear.

Further reliance was placed by plaintiff's counsel during the course of the argument before us upon the letter D 10 dated October 21, 1928. This is a letter written by defendant after plaintiff had refused his request for time, in which defendant says he is unwilling to pay "unless and until the bungalow roof being mended properly". It is argued that this is a conditional acknowledgment, upon which liability to pay arises when plaintiff repaired the roof, and that defendant by his own acts and conduct took it out of the power of the plaintiff firm to do the repairs. All one need say on this point is that it was never suggested in the lower Court either in pleadings or issues or argument that the claim was taken out of the Ordinance by any acknowledgment other than that contained

[1] *10 C. B. N. S. at p. 750.* [2] *3 Hare at p. 299.*

in the letter P 1. I can find no local precedent on this point, but as a general rule according to Indian practice, under the equivalent provision of the Code of Civil Procedure, Schedule I., Order VII., r. 6, a plaintiff is not to be allowed to rely upon a ground of exemption from the law of limitation raised for the first time in the Appeal Court. In the absence of any good reason being advanced why this practice should not be followed in this case, I think under all the circumstances we should follow it.

The claim of the defence that the debt is prescribed has been made out, and the appeal must be allowed with costs. The decree entered by the local Judge must be set aside, and the plaintiff's action must be dismissed with costs.

DRIEBERG J.—

This is an action for goods sold and delivered in which judgment was entered against the appellant for Rs. 1,357.85. The only question is whether the respondent's claim is prescribed.

The last purchase was on January 16, 1928, no payment was made thereafter, and action was brought on October 30, 1929. The cause of action having arisen beyond the time allowed by law for instituting the action, which is one year, the plaint should have stated the ground on which exemption was claimed—section 44 of the Civil Procedure Code—but this was not done. After the issues were framed, counsel for the respondents in dealing with the issue of prescription produced the appellant's letter P 1 of September 28, 1928, in which he said the appellant asked for two months' time to pay. The respondents contended that prescription began to run from the expiry of the two months. If this is so, the action is not prescribed.

A letter by the appellant, D 10 of October 21, 1928, to the respondents was produced by the appellant at the trial. Mr. Weerasooria sought to use this letter for the purpose of avoiding prescription. It is sufficient to say that he was not entitled to do so, for the respondents must be held to have relied on P 1 only.

By P 1 of September 28, 1928, the appellant wrote to the respondents "In reply to your letter of the 5th instant. On account of the fall of rubber prices, you will have to wait another couple of months for settlement. In the meantime please send your contractor to put right the leaking roof, &c., as promised in your letter of the 2nd November." The respondents' letter of September 5 was merely a demand for payment.

The respondents replied to this by their letter D 8 of October 2, 1928, which is as follows:—"We have for acknowledgment your letter dated the 26th ultimo, and would refer you to our letter of the 3rd September, wherein we pointed out that the damage to the roof was caused by being walked on, and as such we were not prepared to undertake the work without a definite order from your good self.

"The account outstanding is seriously overdue and we see no reasonable cause for your withholding same so long. We are closing our books for the financial year and our Auditors insist on all long outstanding accounts

to be paid at once, and we, therefore, request you to be good enough to favour us with a cheque in settlement per return." "26th ultimo" is an error for 28th September.

If not for the letter P 1 the action should have been brought by January 16, 1929; the plaint was filed on October 30, 1929, which was within a year of the expiry of the two months mentioned in P 1. The respondents having by D 8 refused to agree to the proposal of the appellant that he would settle at the end of two months, the question for decision is whether the respondents in these circumstances can rely on the promise to pay for the purpose of taking the case out of the operation of the Ordinance under section 13.

Section 13 of Ordinance No. 22 of 1871, which follows the wording of section 1 of Lord Tenterden's Act (*9 Geo. IV.*, c. *14*), enacts that "no acknowledgment by words only shall be deemed evidence of a new or continuing contract, whereby to take the case out of the operation of the enactments contained in the said section, or any of them, or to deprive any party of the benefit thereof, unless such acknowledgment shall be made or contained in some writing to be signed by the party chargeable or by some agent duly authorized to enter into such contract on his behalf".

The words "acknowledgment or promise" need some explanation, for it was suggested at the argument that the acknowledgment in P 1 would suffice and could be availed of by the respondents, apart from the promise. The original Statute of Limitations of James I. contained no provision such as was made later by Lord Tenterden's Act, but in many cases, of which I need only refer to *Tanner v. Smart* [1] it was held that a new promise would take a case out of the statute for an action could be based on the new promise provided it was unconditional, or when it was conditional if the condition was fulfilled, and a simple acknowledgment was regarded as a fresh unconditional promise.

In *Fettes v. Robertson* [2], Bankes L.J. pointed out that the reason for introducing the word "acknowledgment" into Lord Tenterden's Act was to cover the case of promises which the Courts imply from certain classes of acknowledgments. He said "It is, I think, an assistance in cases like the present never to lose sight of the fact that what a plaintiff has to prove is a promise express or implied, to pay the debt, made within six years before action, and that any consideration of an acknowledgment is merely for the purpose of seeing whether the acknowledgment is expressed in such language that an unqualified promise to pay can be implied from it".

He quotes from the judgment of Baron Channel in *Lee v. Wilmot* [3], "I agree, that to take a case out of the statute, there must be a promise or acknowledgment in writing, and I doubt whether the Act meant two different things when it said 'promise or acknowledgment'". If there be a distinct acknowledgment it is not necessary that it should contain a promise in explicit terms, but from the acknowledgment a promise may be inferred, unless it be accompanied by a refusal to pay, or by any other circumstance which includes that inference.

[1] *16 B. and C. 603.* [2] *37 T. L. R. 581.*

[3] *L. R. 1 Ex. at p. 367.*

There is here an express promise to pay on the expiry of two months. and the action has to be brought with reference to this promise. In *Philips v. Philips,*[1] which was approved in the case of *Spencer v. Hemmerde*[2] it was held that "the legal effect of an acknowledgment of a debt barred by the Statute of Limitations is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law. In that sense, and for that purpose, the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's right."

If there is a condition attached to the promise the condition must be fulfilled before the plaintiff can claim the benefit of the promise.

In this case the respondent's claim that the condition has been fulfilled for the reason that they brought this action within a year of the expiry of the two months requested in P 1, but can they by now saying that they observed the conditions gain the benefit of the promise which they had expressly rejected? The case of *Buckmaster v. Russell*[3] is a direct authority to the contrary; it was there held that a special promise is one which will not bind unless accepted by the plaintiff to whom it is preferred, and that where a proposal is rejected it cannot be relied on as an acknowledgment to bar the statute.

I agree with the order made by my brother Dalton.

Appeal allowed.

[1] *3 Hare at p. 299.*
[2] *H. of L. (1922) 2 A. C. 507.*
[3] *(1861) 10 C. B. new series 745 and 4 L. J. 552.*