1934 *Present :* **Garvin S.P.J.**

SILVA *v.* SILVA.

130—C. R. Matale, 2,415

Prescription—Running account in respect of goods sold and delivered—Sum acknowledged to be due in writing—Account stated—Period of limitation —Ordinance No. 22 of 1871, ss. 8, 9, 13.

There was an account in respect of goods sold and delivered between plaintiff and defendant, consisting of debit entries in respect of goods sold to the defendant and credit entries in respect of payments by him. On a certain date the accounts were looked into and a balance found to be due, which the defendant acknowledged by signing a document.

Held, that an action to recover the balance was prescribed in three years.

APPEAL from a judgment of the Commissioner of Requests, Matale.

E. Navaratnam (with him *Kottegoda*), for defendant, appellant.

N. E. Weerasooria (with him *Senaratne*), for plaintiff, respondent.

December 20, 1934. GARVIN S.P.J.—

This action as originally filed was a claim for goods sold and delivered. The answer was a denial that the defendant had any dealings with the plaintiff after September 4, 1930, or that the sum of Rs. 148.04 claimed was

due. Inasmuch as the plaint was filed on May 17, 1933, the answer was, in effect, a plea that the claim of the plaintiff was barred by lapse of time. The plaintiff then moved to amend his plaint by adding a paragraph as follows:—

"That the accounts between the plaintiff and the defendant were looked into on September 4, 1930, and the defendant signed a statement admitting the correctness of plaintiff's account."

The application to amend was allowed.

It has been found by the Commissioner that no payment against the plaintiff's claim for goods sold was made by the defendant subsequent to September 4, 1930. He accepted the plaintiff's evidence that accounts were looked into and a balance struck and that the defendant signed the document P. That document is in the following form:—

Bought of—

M. W. Nonis de Silva,
Merchant.

Matale, 4th Sept. 1930.

H. W. Janis Silva, Esq.,
Naula.

To 4 bags gingelly poonac cwt. 4.2.23 at 8.75	.. ..	41 19
Previous balance	.. ..	343 10
Total	.. ..	384 29
By cash	.. ..	10 0
Balance due Rs.	.. ..	374 29

Immediately below the last line of the document there appears a signature which is admitted to be the signature of the defendant.

The Commissioner concludes as follows:—"In my opinion, P is a written settlement of the accounts between the parties". Accordingly he held that the claim was not barred by lapse of time and gave judgment for the plaintiff.

The defendant appeals. It is urged on his behalf that this is not an account stated within the meaning of section 8 of Ordinance No. 22 of 1871 and that the claim is one for goods sold and delivered which falls within section 9 and is barred after the lapse of one year.

The accounts referred to are entries in the plaintiff's books of account and consist of debits in respect of goods sold to the defendant and credit entries of the moneys from time to time paid by him. This is not a case where there have been mutual dealings between the parties and the accounts showing the claim of each against the other have been looked into and set off one again the other and a balance struck which one of the parties acknowledged and promised to pay to the other. It is, on

the Commissioner's finding, a case in which the defendant examined the plaintiff's accounts and acknowledged that they were correct and that the balance shown was due from him to the plaintiff.

It is settled law in Ceylon that where there have been mutual dealings between the parties and their respective accounts have been examined by them and a balance struck settled and stated, an action based thereon is an action for money due upon an account stated within the meaning of section 8 of Ordinance No. 22 of 1871, and as such not barred before the lapse of three years. But with this single exception of an account stated in respect of such mutual dealing our Courts have consistently refused to permit a plaintiff to recover upon an alleged oral statement of accounts in any case in which the action would but for this fall under the classes of action specified in section 9.

The principle upon which our Courts have proceeded is that to do so would be to render nugatory the provision of section 13 that " In any of the forms of action referred to in sections 6, 7, 8, 9 11, and 12 of this Ordinance, no acknowledgment or promise 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 . . . . "

As far back as the year 1883, in the case of *Salman Fernando v. Dumingo Apponsu Bass* [1], Clarence J., with whom Dias J. agreed, said " The mischief is just the same—whether you call the oral evidence evidence of an acknowledgment or evidence of an account stated; and on principle, I think, that a mere parol statement of an existing debt for goods sold and delivered, with a parol promise to pay it, will not support an action ". In *Mohideen Saibo v. Walters* [2], a difference of opinion is manifest between Burnside C.J. and the other two Judges, who were Clarence J. and Dias J. Clarence J. adhered to the opinion expressed by him in the earlier case but agreed to the affirmation of the judgment under appeal on the ground that the case was distinguishable since there were " items on both sides and not on one side only ". In *Fernando v. Puncha* [3], which was also a claim for goods sold and delivered and alternatively on an account stated, Clarence J. re-affirmed his view of the law in the following terms:—" Then, with regard to the claim on account stated, I follow the law as laid down in *Ashby v. James* (*11 M. & W. 542*) and *Clarke v. Alexander* (*12 L.J. Ch. 133*), and cannot accept as evidence for the claim on account stated such evidence as would not have availed to take the original debt out of the Ordinance ". In *Kappoor Saibo v. Mudalihami Baas* [4], we have yet another instance of a claim for goods sold and delivered which it was sought to take out of the provisions of section 9 by pleading an oral account stated. Layard C.J. who expressed his agreement with the view expressed by Clarence J. stated the position as follows:—" Admitting that an account stated may be settled orally, and that an account stated give rise to a distinct cause of action, it remains to be considered whether such an account stated as we have here is anything more than 'an acknowledgment or promise by words only', such as section 13 of

[1] *5 S. C. C. 169.*
[2] *8 S. C. C. 99.*
[3] *1 S. C. R. 123.*
[4] *(1903) 6 N. L. R. 216.*

our Ordinance adopted from a section of Lord Tenterden's Act, is expressly declared to be insufficient to prevent an action being statute barred".

He then referred to *Ashby v. James* (*supra*) as follows:—"The ratio *decidendi* in *Ashby v. James* was that the striking of a balance, where there are mutual debts, amounts to a payment at such time of such debts. and so there is a part payment to keep alive the right to sue for a balance".

Moncreiff J. who also based himself on *Ashby v. James* found some difficulty in understanding the reason for the differentiation, remarking with reference to an oral account stated on cross-transaction—"I confess I find it difficult to say that an oral account stated upon cross-transactions is not a promise or acknowledgment within the terms of the Ordinance". Evidently Moncreiff J. was prepared to reject evidence of an orally stated account even when it related to cross-transactions.

Manthira Nadan v. Kulanthivel[1] is an instance of an oral account stated in respect of transactions in the nature of mutual or cross accounts. Wood Renton J. when dealing with the contention that such a parol accounting was, in view of section 13, insufficient to take the case out of the time bar, referred with approval to the judgment of Layard C.J. and his view of *Ashby v. James,* accepted the differentiation based on that decision and held that in the case of the striking of a balance by consent on mutual accounts there was an account stated within the meaning of section 8, which as such was not barred until after the lapse of three years.

This case was followed by Shaw J. and Schneider A.J. in *Kadiravelpillai v. Paaris*[2], the former expressing himself as follows:—"There can be no doubt that where there have been mutual dealings between the parties and a balance has been struck by consent between them, the plaintiff is entitled to sue on an account stated, and this notwithstanding the absence of any written acknowledgment of the debt on the part of the defendant."

The most recent case is that of *Dias v. Kachinona*[3], which was heard by my brother Maartensz and myself where I summarized the law as settled by the judgments referred to as follows:—"Where there have been mutual dealings and mutual transactions and accounts between parties and it is averred that accounts between them were verbally stated and settled, that constitutes an account stated which would bring the case within the provisions of section 8. But where, as here, it is merely a one-sided account that is said to have been stated and acknowledged to have been correct and where there have been no such mutual dealings, then it would seem to be well settled law in Ceylon that, in the absence of a written settlement, a claim which, in substance, is a claim for goods sold and delivered is barred by the provisions of section 9 and cannot be taken outside the bar imposed by that section except by some written acknowledgment".

[1] *(1905) 8 N. L. R. 372.* [2] *(1920) 22 N. L. R. 91.*

[3] *(1932) 35 N. L. R. 92.*

The language of several of these judgments appears to recognize that there may in a sense be an account orally stated where the only accounts consisted of debit entries in respect of goods sold and delivered or money lent and advanced and on the other side credit entries of payments made by the other party. Such an account stated, however, was only regarded as amounting to a mere acknowledgment of a balance struck in the books of one of the parties, which not being in writing, did not take the claim which in its essence was a claim for goods sold and delivered or money lent or both out of the time set to such claims by the appropriate section of the Ordinance. Where cross-claims arising out of mutual dealings are brought to account on either side, set off by consent and a balance struck and acknowledged to be the correct amount due from one party to the other, an action on accounts so stated whether verbally or in writing is not by reason of the provisions of section 8, barred until after the lapse of three years.

Applying these principles to the case under consideration, there is here no such settlement of mutual accounts as would even in the absence of a written settlement constitute it an account stated within the meaning of section 8. But this case is distinguishable in that there is here a writing which sets out the results of the examination of the plaintiff's accounts and the balance found to be due from the defendant on September 4, 1930. Inasmuch as the document is signed by the defendant the inference is that he agreed to accept the account stated and the balance found to be due from him as correct. The promise to pay the balance is not set down in words but it is implicit in the writing and this is not therefore a case of a promise "by words only" within the meaning of section 13. It is not possible, therefore, to exclude this case from section 8 of the Ordinance on the ground that in the absence of a writing the admission of parol evidence of the account stated would render section 13 nugatory.

If this case is shut out of section 8 it can only be on the ground that there is no consideration to support the promise. To this I cannot assent.

In the course of the argument in this case, my attention was drawn to a judgment of the Judicial Committee of the Privy Council—*Firm Bishun Chand v. Seth Girdhari Lal and another*[1]—in an appeal from the High Court of Allahabad in which it was held, overruling the judgment of the Court of Allahabad, that the words "account stated" in the corresponding provision of the Indian Limitation Act can properly be applied to the case of the ascertainment and settlement of the balance due in respect of a money lending transaction where one party lent to the other and the other merely made payments so that the borrower was always the debtor of the lender.

Their Lordships referred to several judgments of the High Courts of Allahabad and Madras which show that there was in India a conflict of opinion on the point and thought that in the state of the authorities in the Indian Courts they felt "entitled and bound to consider the question as a matter of principle".

[1] *(1933-34) Times Law Reports Vol. L 465.*

In Ceylon on the other hand for fifty years and more our Courts have uniformly refused to treat as an account stated within the meaning of section 8 any oral settlement, or statement of the balance due from one party to the other except where there have been mutual dealings out of which cross-claims arising from such dealings have been set off against each other.

It may in an appropriate case be thought necessary or desirable in view of this judgment of the Privy Council in the Indian case referred to to reconsider the position. Sitting alone, I am bound by the judgments of our Courts to which I have referred and the *cursus curiæ* dating back fifty years. But holding, as I do, that there is here a sufficient writing the case is taken outside the *ratio decidendi* of the judgments of our Courts.

The appeal is accordingly dismissed with costs here and below.

Appeal dismissed.