Present : Garvin J. and Maartensz A.J.

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MUTTUNAYAGAM *v.* SENATHIRAJA *et al.*

80—D. C. Colombo, 52,878.

Husband and wife—Debts contracted during marriage—Death of wife—Joint liability—Compensatio—*Roman-Dutch law.*

Where husband and wife are jointly liable for debts contracted during marriage, on the death of the wife the liability on a mortgage debt created by the husband remains the joint liability of the survivor and the heirs of the deceased spouse *in solidum.*

Compensation as known to the Roman-Dutch law is part of the law of Ceylon.

Compensation is the reciprocal extinguishment of debts between the same parties. It differs materially from set off as it is known to the English law and the Civil Procedure Code.

THIS was an action for the recovery of a sum of Rs. 202,066 alleged to be due on three bonds executed by Christopher Brito and assigned to the plaintiff by the mortgagees. The first bond was executed to secure a loan of Rs. 60,000 from W. W. Martin, and the second and third bonds were executed to secure a loan of Rs. 30,000 from the second defendant. Martin assigned his bond to the second defendant, who assigned all the three bonds to his son, the plaintiff. An estate called Dombawinne was hypothecated by the said bonds.

Christopher Brito was married to his wife Tangamma in 1866. Before their marriage they entered into an ante-nuptial agreement excluding community of property. Christopher Brito purchased Dombawinne in 1879 and his wife died in 1900, leaving her surviving four children: first defendant, who died during the pendency of this action; Philip Brito, who was married to the third defendant; Theresa, who was married to the fourth defendant; and C. M. Brito, whose interests are vested in the first defendant. Christopher Brito died in 1910. Till his death he dealt with Dombawinne estate as his own, and by his last will, executed on December 23, 1910, left all his property to the first defendant, appointing the second defendant the executor of his will. The action was defended by the third and fourth defendants. They alleged that the second defendant received the income from Dombawinne from 1905 up to the death of Brito and that by operation of law the debts due on the bonds had been reduced to that extent. The learned District Judge gave judgment for the plaintiff.

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In appeal the questions resolved themselves into four:—

(1) Whether the right of action on the bond was prescribed.

(2) Whether there was a misjoinder of parties and causes of action.

(3) Whether the defendants were entitled to plead *compensatio* in respect to the income of Dombawinne estate.

(4) Whether the defendants' claim in reconvention could be maintained.

The main question argued was one of compensation.

Hayley (with him *Tisseverasinghe*, *Rajapakse*, and *Gnanapragasam*), for third and fourth defendants, appellants.—*Compensatio* is the principle that when the characters of debtor and creditor are merged in one, then whatever money comes into the hands of the creditor (and which he is liable to pay to his debtor) must be applied in reduction of his debt.

No question of prescription can arise as the *compensatio* takes effect as from the date on which the creditor received the money of his debtor. (*Lee's Introduction, p. 237; Voet. XVI. tit. 2 ss. 1, 2, and 4; Binase v. Maklutsana*[1]*; 4 Maas. (2nd ed.) 166*).

The debt must be a " liquid " one. But that means one not necessarily actually and definitely ascertained, but one which could be ascertained or assessed. (*2 Nathan (1913 ed.) 641.) See 1 Pothier, 415, 416, 419 (pt. III. c. 4 s. 3), also p. 422; 4 Maas. 192; Voet XLI. tit. 3 s. 1.*

If community exists, you can set off against the husband's claim a debt due by the wife. (*2 Nathan 648.*)

It can be set up even against a cessionary of the creditor. (*Voet XVI. tit. 2 s. 4 in Lee's Introduction, p. 237.*)

The second defendant cannot plead prescription. He took possession as executor of Christopher Brito, claiming the whole. It was found that the deceased had no right to a half. Therefore, having gone in, in a fiduciary capacity, he must continue to hold in that capacity for those really entitled, that is, the appellants. (*Section 96, illust. (b), Trusts Ordinance, 1917, and s. 111 (5); Trustee Act, 1888 (51 & 52 Vic. c. 59 s. 1); Eheliyagoda v. Samaradiwakara.*[2])

Upon the death of one spouse a division of interests took place and thereafter only the shares of the property inherited by each of the heirs of that spouse could be taken in execution, and that too, only for that heir's proportionate share of the liability of the deceased spouse. (*1 Maas. 153 c. 18 (old ed.), p. 149; Voet XXIII. tit 2 s. 80 (Stoney's Trans., p. 65); 1 Menzies Reports 210; 1 Burge (1st ed.), p. 299; Walter Pereira 244; Grotius Bk. 1. c. 5 s. 22 (Maas. Trans., p. 25); Grotius Bk. II. c. 11. s. 14-17; Lee's Introduction 66; Lang v. Leroux.*[3])

[1] *24 S. C. Reports (Cape) 452.*
[2] *22 N. L. R. 179.*
[3] *(1921) C. P. D. 745.*

H. H. Bartholomeusz (with him *N. K. Choksy*), for second defendant, respondent,—*Compensatio* cannot be pleaded as the debt which is said to have effected an extinguishment, is prescribed. (*Section 12 of the Prescription Ordinance, 1871; Lightwood, pp. 245 and 246; Binase v. Maklutsana* (*supra*).

Second defendant was only a depositary of the income for Christopher Brito; that is the only and the true character in which he received the income of Dombawinne estate into his hands. (*See Voet XVI. tit. 3 s. 1 (Joubert's Trans. 226); also Voet XVI. tit. 3 s. 4; 2 Nathan, s. 1052, also p. 1122; Voet XVI. tit. 3 s. 9; 2 Nathan s. 826.*)

Further, the money on the secondary and tertiary bonds was not due at the material dates (in view of their terms). Hence there can be no *compensatio*. (*See Voet's Pandects XXIII. tit. 2 s. 52; 1 Maas., 38, 39, 42 (Bk. 1. c. 5); Angel v. Angel.*[1]

Hayley, in reply.

December 21, 1926. GARVIN J.—

The parties to this appeal are the representatives in interest of the children of Christopher Brito and his wife Tangamma, who were married in 1866. By an ante-nuptial agreement the spouses excluded the community of goods which under the law then in force would have come into existence but for such exclusion.

Four children—Philip, Christopher, Aloysia, and Theresa—were born to the marriage, which was dissolved by the death of Tangamma on March 31, 1900.

For several years before the death of Tangamma, Christopher Brito was estranged from her and all his children, with the single exception of Aloysia, the wife of A. M. Muttunayagam, the second defendant to this action, and lived by himself on a plantation known as Dombawinne estate which he had purchased after his marriage and before the death of his wife. He regarded himself as the sole owner of Dombawinne estate in the belief that by the ante-nuptial agreement referred to community had been excluded, not only in respect of the property belonging to the spouses at the time of the marriage, but to after-acquired property as well.

During the subsistence of the marriage Christopher Brito created two mortgages over this estate; on August 7, 1874, he executed a primary mortgage as security for Rs. 60,000, which he borrowed from one W. W. Martin; and on January 27, 1896, by bond No. 2,744 of that date he created a secondary mortgage over the premises in favour of A. M. Muttunayagam for a sum of Rs. 30,000.

[1] *(1846) 2 Q. B. 356.*

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After the death of his wife Christopher Brito continued to reside on Dombawinne estate and appropriate to himself the entire profits of the land without any claim of title or protest by any of his children by his wife Tangamma.

On April 11, 1904, he created by bond No. 1,122 a tertiary mortgage over the premises for Rs. 30,000 in favour of Muttunayagam. He appears to have been hard pressed for money at the time and applied to Muttunayagam for the loan.

In the same year he placed the estate in the charge of a nephew, Dr. Muttucumaru, whom he appointed his attorney in Ceylon and went to Trevandrum in India to the house of his daughter Aloysia, the wife of Mr. Muttunayagam, who was a Judge of the High Court of Travancore. He was provided with separate apartments in the house, took up his residence there, and remained there till his death, which occurred on December 26, 1910. Brito lived to himself with his own servants in his own apartments, and not as a member of Muttunayagam's household.

Mr. Christopher Brito was for many years a practising advocate of this court. The evidence shows that he was a strong personality, whose mental vigour remained unimpaired till the end. After he left Ceylon he continued actively to watch his own interests and control the management of his property by his attorney, Dr. Muttucumaru.

Brito had no account in any bank. This meant that the usual commissions and charges had to be paid when moneys were remitted to India by Dr. Muttucumaru. So it was arranged that Muttucumaru should pay such moneys into the account of Mr. Muttunayagam at the Imperial Bank of Madras in Colombo. The moneys so paid in were the nett proceeds after the usual disbursement, and any special payment ordered by Brito had been made by his attorney. Mr. Muttunayagam thus became the custodian of these moneys for Brito and held them at Brito's disposal.

The evidence in the case, which it will be necessary to discuss somewhat more fully at a later stage, shows that these moneys were expended and applied by the second defendant at the request and in accordance with the directions of Christopher Brito.

By his last will, which was proved and probate thereof granted to Mr. Muttunayagam, Christopher Brito left all his property to his daughter Aloysia. In accordance therewith Dombawinne estate was duly conveyed to her by deed No. 137 of April 1, 1912.

By deed No. 18 of July 27, 1912, Mr. Muttunayagam obtained an assignment of the primary mortgage from Martin and thus became the holder of all three mortgages created by Christopher Brito over Dombawinne estate.

Shortly after the death of Christopher Brito his children and their heirs, who had not during his lifetime asserted a claim of title to a share of Dombawinne or entered any protest against the exclusive

perception of the fruits thereof by him, commenced to assert a claim upon the basis that Dombawinne estate, being property acquired during the subsistence of the marriage of Christopher Brito and his wife, became property of the community and that the title as to a half devolved at Tangamma's death on her four children.

The contention that the ante-nuptial agreement, though effective to exclude community of goods in the possession of the parties or inherited by them after marriage, was ineffective to exclude community of the profits and therefore in property acquired by either of the spouses during the marriage was first foreshadowed in a letter (D 5) of January 5, 1901, written to Mr. Muttunayagam by Mr. E. S. W. Senathiraja, the husband of Brito's daughter Theresa, in the course of which he stated that his wife would be willing to sell her interests to Mr. Muttunayagam. The offer was declined. The claim was never proferred to Christopher Brito and was not heard of again till 1908 when Senathiraja again wrote P 18 of March 26, 1908, in which he repeated his offer to sell to Muttunayagam the one-eighth share of Theresa, who was then dead. On July 7, 1914, Margaret Elizabeth Brito, the widow and executrix of the last will of Philip Brito, instituted in the District Court of Negombo an action, No. 9,993, claiming a declaration of title to one-eighth share of Dombawinne estate and damages as from July 7, 1911.

Mr. Senathiraja, the husband and executor of the last will of Theresa, instituted action No. 10,204 in the same court on December 16, 1924, claiming a similar declaration and damages as from December 16, 1911.

Both actions were dismissed, but on appeal the contention that the *communio quaestuum* was not excluded was upheld and the declaration prayed for allowed.

Upon appeal to His Majesty's Privy Council the judgment under appeal was affirmed and the title of the plaintiff admitted, but declared to be subject to the two mortgages created by Christopher Brito during the marriage and also to the third mortgage created after the death of Tangamma to the extent that it was created for the payment of debts incurred during the subsistence of the marriage.

It was later agreed by the parties that the mortgage to the extent of Rs. 25,000 was created for the purpose of the payment of the debts of the community, and decree was entered accordingly on May 15, 1919.

During the pendency of these two actions Mr. Muttunayagam by deed No. 961 dated March 12, 1917, assigned his interests in all three mortgages to his son, who as plaintiff instituted this action on April 7, 1919, to realize the amount due thereon. To this action he joined as party defendants the following:—

His mother Aloysia as first defendant;

His father A. M. Muttunayagam as second defendant;

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Margaret Elizabeth Brito, executrix of the last will of Philip Brito, as third defendant;

E. S. W. Senathiraja personally and as executor of the last will of Theresa Brito as fourth defendant; and

A. M. Muttunayagam in his capacity of executor of the last will of Christopher Brito as fifth defendant.

As a result of a settlement entered into after the death of Christopher Brito the interests, if any, of his son, C. M. Brito, passed to Aloysia, the first defendant.

The plaintiff claimed the following sums:—

On the primary bond No. 2,652 of August 7, 1894, Rs. 60,000 as principal and Rs. 32,066.66 as interest;

On the secondary bond No. 2,744 of January 27, 1896, Rs. 30,000 as principal and Rs. 30,000 as interest;

On the tertiary bond No. 1,122 of April 11, 1904, the claim in accordance with the agreement entered in the Negombo cases was restricted to Rs. 25,000 as principal and Rs. 25,000 as interest.

The total amount claimed was Rs. 202,066, for which the plaintiff prayed for judgment against the first, third, and fourth defendants in the proportion of three-fourths, one-eighth, and one-eighth and for a decree that in default of payment by any of the parties his or her share be sold and the proceeds applied in payment thereof. Alternatively he prayed for a decree for the full amount against all the defendants, and that in default the premises be sold and the proceeds applied in payment of the amount decreed.

The first and fifth defendants consented to judgment, but a defence was entered by the third and fourth defendants. The answer alleges a conspiracy between Christopher Brito and the second defendant to misappropriate the income derived from Tangamma's half share of Dombawinne estate and to defraud the heirs by keeping alive " to all appearances mortgage debts over the said Dombawinne estate which could and ought to have been paid off years ago from the income of the estate."

They further pleaded that the second defendant, being the holder of the secondary and tertiary mortgages, had received into his hands the whole income of Dombawinne estate for the period 1904-1916 and had the primary mortgage assigned to him after the death of Christopher Brito " pretending that he had paid for the same with his own money " and that all the mortgages and the debts due thereon had become " wholly compensated and extinguished by law."

Finally, they each claimed in reconvention a sum of Rs. 53,840 more or less as the respective share of each of them of the " arrears of income " from Dombawinne estate.

After the trial, which consisted of the argument of counsel, the District Judge entered judgment for the plaintiff and referred the defendants to a separate action for an accounting which he regarded as the substantial defence to the claim.

In appeal this judgment was affirmed on the ground that this claim, being a claim against the second defendant as executor, was not maintainable in this action. *(19 N. L. R. 38.)*

An appeal was taken from the judgment of this Court to the Privy Council. The judgment was in substance set aside and the case sent back for the determination by the District Court of the amount, if any, due on the mortgage bonds in suit and any other issues arising on the pleadings, with liberty to the third and fourth defendants to raise by amendment of the pleadings or other proper procedure as they may be advised " their contention that by the receipt, if any, of such rents and profits of the mortgaged estates as came into the hands of A. M. Muttunayagam either in his representative capacity or otherwise any sum due and payable by the appellants on the mortgages were in whole or in part compensated or extinguished." *(20 N. L. R. 327.)*

Such defences were to be raised within eight months of His Majesty's Order.

Certain amendments of the answer were made within the time prescribed, and after trial judgment was once again entered for the plaintiff. A large number of issues were framed, and these have all been specifically answered by the learned Judge. It is to be noted that the Judge ruled that the onus was on the third and fourth defendants. From this order the third and fourth defendants intimated their intention to appeal. Whereupon, and to save further delay, the second defendant, Mr. Muttunayagam (who so far as the real matter in dispute is concerned is the virtual plaintiff) undertook the onus. He entered the witness box and has given at great length and with the fullest detail his story of the circumstances under which he became the holder of these bonds and of his relations with Christopher Brito, and has accounted for the moneys which, in accordance with the arrangement to which reference has already been made, were received and held by him to the use of Christopher Brito.

The learned District Judge has formed a strong opinion in favour of the second defendant and has accepted his evidence *in toto*. He was satisfied that the second defendant was scrupulously honest in his dealings with his father-in-law and had fully accounted for the money which came into his hands.

The third and fourth defendants have once again appealed. No reason whatever was urged in the course of the argument, and none has appeared for supposing that the learned District Judge's confidence in the testimony of Mr. Muttunayagam was misplaced.

The grounds upon which it was sought to obtain relief from the judgment were that there had been a misjoinder of parties, and, secondly, that the mortgages and the debts due thereon must be deemed to be compensated and extinguished to the extent of the moneys admittedly received by the second defendant or to the extent of a half of the amounts as received, or at least to the extent of a quarter which is the share claimed by the third and fourth defendants together.

It was also urged that the claims on the secondary and tertiary bonds in favour of the second defendant were barred by prescription on the ground that the payments of interest thereon admittedly made by Christopher Brito could only keep the debt alive in so far as his half share was concerned, but were ineffective to prevent the running of time against the rights to recover in respect of his wife's half share which at her death vested in her children.

The facts proved, the judgment of the Privy Council in the Negombo cases, and the agreement thereafter arrived at by the parties clearly established that the two mortgages created by Christopher Brito during the subsistence of the marriage and the third mortgage to the extent of Rs. 25,000 as principal were all valid charges on Dombawinne estate.

It is also settled that title to Dombawinne estate by reason of the *communio quaestuum* vested in Christopher Brito and his wife in equal shares, and that at the death of his wife her half share devolved on her four children.

The principal debtor on each of these bonds was Christopher Brito, though the debt was validly charged on the whole property.

It is contended, however, that on Tangamma's death the liability to pay this debt was severed and devolved proportionately on each of those on whom her interest devolved, and became chargeable as to such proportionate share on the share of the land which devolved on each heir. In effect the contention is that the mortgage is no longer one but must be construed and applied as several separate mortgages, and that the mortgagee must sue each heir *pro parte* in a separate action.

The immediate effect of the death of one of the spouses is to put an end to the community of property and of profit and loss. But all debts contracted by the husband during the marriage will remain the liability of the joint estate. The joint liability of the husband and wife becomes, where the husband survives, the joint liability of the husband and the heirs of the wife *in solidum*. As between the spouses, or rather between the surviving spouse and the heirs of the deceased spouse, each is liable to be debited with a half share of the post-nuptial debts.

But the creditor may, if he pleases, recover the whole debt from the husband " because he is the chief party to the contract," in which case the husband has a right of recourse against his wife's heirs to the extent of half. He may, in the event of the husband dying first, sue the wife for a half share. (Vide *Lee's Introduction, p. 90; and Voet XXIII. tit. 11 s. 52.*) The rule is that husband and wife are jointly liable for debts contracted during the marriage, and in the event of dissolution of the marriage by death, the liability remains the joint liability of the survivor and the heirs of the deceased spouse *in solidum*. I know of no authority for the proposition that as between the creditor and the heirs of a deceased spouse there is the further separation and subdivision of the liability contended for by counsel. As between themselves each heir is entitled to his proportionate share of the inheritance and is liable to his proportionate share of the debt. So far as the creditor is concerned, the heirs are the representatives of the person whose interests they claim, and are bound as a group by the contracts of the person they represent to the extent of the property of that person which came to them by inheritance.

The debt in this case is the debt of Christopher Brito. The liability for that debt was by reason of the community which existed between them his wife's as to a half and was chargeable as to the whole on their joint estate. All that is sought and need be sought against the heirs of his wife in this action is a hypothecary decree declaring the whole of Dombawinne estate executable for the debt.

A wife may in respect of a debt of the community resist execution against her half of the joint estate for more than her half of the debt, but always provided " that the husband during the marriage has not pledged the property of his wife for such a debt, which he can by virtue of his marital power, because a pledge is not released except by the payment of the whole." (*Voet XXIII. tit. 2 s. 53; Stoney, p. 50.*)

" Neither by the Roman Law nor by our usage can a creditor be compelled against his will to divide the hypothecary action competent to him and to sue a plurality of persons *pro parte*, pledge being considered indivisible. For, on the one hand, if a single thing has been mortgaged (by a deceased) and been adjudicated to one of a number of heirs of the debtor, or been divided in shares among them, or a part of the pledge being alienated by the debtor or his heirs it is both open to the creditor to discuss for the entire debt either the entire thing so assigned to one of the heirs, or the portion of it which has come to one person by division or alienation; so that no possessor can prevent

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discussion either of the whole or of the portion possessed by him, although he may be willing to pay a rateable share of the debt or even has already done so."—*Voet XX. tit. 4 s. 4. (Berwick's Translation).*

I am unable to see how or why this action is said to be bad for misjoinder. The creditor was clearly entitled to sue husband and wife in this hypothecary action; the heirs of the wife on her death take her place and are properly joined. Indeed it is well settled law in Ceylon that there is but one action now available to a mortgagee on his bond, and to that action there must be joined as parties all persons whom it is necessary to join if the decree is to be made effective.

There can be little doubt that the creditor is not bound to take a decree *pro parte* and can insist on a decree for the whole amount charged on the property as a whole.

This latter aspect of the matter is only of academic interest as counsel for the respondents have consented without prejudice to their rights to allow a decree to be entered by which each of the first, third and fourth defendants is declared liable only for an amount proportionate to his or her interest in the estate and that amount made separately chargeable on his or her share of the estate. The estate has, pending this litigation, been partitioned under the provisions of the Partition Ordinance, No. 10 of 1863, and each of the co-owners is now entitled to a share in severalty.

It is convenient here to consider the submission that this action is barred by lapse of time. The plea is limited to the half of the liability for which the half share of Tangamma would ordinarily be chargeable. All payments of interest are admitted. They were all made by Christopher Brito and will operate to keep the bonds alive and effective against him and his heirs. It is urged, however, that the payments of interest by Christopher Brito cannot avail the plaintiff against the plea that his claim to levy on the wife's half share is barred. So far as this Court is concerned the point is concluded by the decision of the Full Court in *Wijewardene v. Aponso,*[1] that payment of interest by the surviving spouse kept the encumbrance in force against the other moiety as well. In the case of *Gunawardana v. Liyana,*[2] also a judgment of the Full Court, Burnside C.J. took the view that " so long as the liability of one of the joint and several debtors remained and was not prescribed, the whole property which had been pledged to meet the liability of either debtor continued bound for the ' purpose ' "; and the decision of the Court was that the payment of interest by the surviving husband kept the debt alive as against the wife's share in the land hypothecated.

[1] *7 N. L. R. 198.*

[2] *7 S. C. C. 183.*

In this instance the debt which was contracted by Christopher Brito is fully alive and a judgment against him and his heirs cannot be resisted on the ground of prescription. The property validly hypothecated as security for that debt remains chargeable for the whole debt.

The real defence to the action is the plea that " by the receipt by A. M. Muttunayagam of the whole of the rents and profits of the mortgaged estate which came into the hands of the said A. M. Muttunayagam in his representative capacity or otherwise any sum due and payable by these defendants on the mortgages, if any, were wholly compensated and extinguished by operation of law."

The allegation that " the whole of the rents and profits of Dombawinne estate " reached the hands of the second defendant has wholly failed of proof, and counsel in appeal restricted his claim to the specific sums of money which the second defendant admitted he had received. No part of the profits of Dombawinne estate from the death of Tangamma to the end of 1904 reached the hands of the second defendant.

From 1905 till the death of Brito on December 26, 1911, the sums received by the second defendant amounted in the aggregate to Rs. 47,839. By reasons of the actions in the District Court, Negombo, the third defendant has received all mesne profits in respect of her one-eighth share from and after July 7, 1911, and the fourth defendant his share from and after December 6, 1911.

The argument in appeal proceeded upon the footing that the moneys in respect of which this plea of compensation could be raised are those which together make this sum of Rs. 47,839 and a certain proportion of the total nett income for the year 1911 which the second defendant says was Rs. 19,614.

It was also admitted that this plea of compensation was not sustainable in respect of the primary bond in favour of Martin as the second defendant only obtained the assignment of that bond in 1912.

There is no proof that the income of Dombawinne in the year 1911 reached the hands of the second defendant. If it did, there is every indication that it has been accounted for in the testamentary proceedings. The second defendant's evidence is that he transferred the whole estate subject to the debts to his wife. In so far as this is a claim to a share of the income for that year against the estate it is clearly barred by lapse of time. That it is not sustainable as such was realized by the third and fourth defendants, whose actions in the District Court of Negombo restricted their claim to damages to the period of three years immediately prior to the bringing of those actions.

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What remains for decision is whether the claims based on the second and third bonds in suit are extinguished by operation of the principles of compensation in whole or in part in consequence of the receipt by the second defendant of various sums of money in the period 1905 to the end of 1910 aggregating Rs. 47,839.

Compensation is the reciprocal extinguishment of debts between the same parties by setting one against the other. (*Vanderlinden 1. tit. 18 s. 4.*) Compensation takes place by operation of law when a person who is a creditor of another becomes his debtor of a sum of money or other matter susceptible of compensation. The plea is only available when there are mutual debts and credits.

Compensation must be pleaded, and when it is pleaded successfully its effect is to extinguish the debt in whole or in part as from the time when the mutual debt accrued. " Since this plea tends not to introduce set off but rather to point out that it already existed of right *a jure* as far back as when the mutual debt accrued; nor does it extinguish an obligation, but ' shows that it is already extinguished.' " (*Voet XVI. tit. 2 s. 2; Searle and Joubert, p. 17.*)

Compensation is classed with payment under the head extinction of obligations. Its effect is similar to payment in that the mutual debt is extinguished or diminished *pro rata*. Compensation differs materially from set off as it is known to the English Statute Law and our own Code of Civil Procedure. It is not a claim to set one demand against another. It is a plea that the claim is not sustainable in whole or in part on the ground that it has been extinguished in whole or in part as effectively as by payment.

For my own part I am not aware of a single case in which this plea has been maintained or sustained in our Courts, and there is to my knowledge only one reported case in which the plea was raised or considered—the case of *Vanderstraaten v. De Latre.*[1]

It is convenient at this stage briefly to consider the submission that the effect of section 12 of Ordinance No. 22 of 1871 is to abrogate the Roman-Dutch law of compensation. The bar introduced by that section relates to " claims in reconvention or by way of set off." The words themselves and the enactment in which they occur—which is based on the English Statute—indicate that what is barred is a claim to set off a demand against another. I do not think that they can fairly be construed to shut out proof that the debt of the plaintiff has been extinguished in any manner in which such a debt may be extinguished under the Common law. It must, I think, be admitted in the absence of a more definite declaration of its intention by the Legislature that *compensatio* as known to the Roman-Dutch law is a part of the living law of the land.

[1] *Ramanathen (1820-33) 1.*

Compensation need not be pleaded. It is open to a debtor if he wishes to pay. He may prefer to pay instead of pleading compensation, and it may be in his interests to pay and recover what is due to him by separate action. (*Voet XVI. tit. 2 s. 3.*) No authority, however, has been cited for the proposition that it may be pleaded by one co-debtor on behalf of another, and in the absence of such authority I should be reluctant to hold that one co-debtor may insist that a debt due by the creditor to his co-debtor should be set off against their common debt.

This is exactly what the defendants are seeking to do, for they maintain that the whole of these moneys, including Christopher Brito's half share, must be deemed as they reached the hands of the second defendant to have automatically gone in reduction of the two mortgages in his favour.

The evidence points clearly and unmistakably to the conclusion that Christopher Brito did not want these moneys or any part of them applied in reduction of the debts due by him to the second defendant or even in the regular payment of the interest on the debts. He has had the full benefit of this money, and the plea that his half share should be set off against these debts is unsustainable.

The interests of Aloysia extend to one-eighth in her own right and one-eighth by right of acquisition of the interests of C. M. Brito. The evidence shows that she regarded the whole of these moneys as the separate property of her father and approved and ratified the application of the moneys in accordance with her father's instructions. She does not raise the plea of set off, and under the circumstances it is impossible to admit any right in the third and fourth defendants to insist on her share being applied in reduction of the debt.

Assuming that the defendants can show the co-existence of all these conditions which must be present before a plea of compensation can be admitted, their plea is available to the extent of the one-fourth share of claim.

In the first place they must show that at all material times the second defendant by virtue of these mortgages was their creditor, and they his debtors. It was Christopher Brito who was personally liable on these bonds, and no personal judgment against them for even a proportionate share of the debt could then, or can now, be entered against them. Their position is not different, so far as any liability to pay this debt rests on them, from that of a person who purchases land which is under hypothecation. Such a person is not the debtor of the mortgagee.

If the plea of the third and fourth defendants is to succeed, they must also show that as to a one-fourth of these moneys the second defendant was their debtor. The submission on this point is that

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a one-fourth of these moneys which reached the hands of the second defendant was money had and received by him to their use and as such was a debt due to them.

It is beyond question that both Christopher Brito and Muttunayagam, the second defendant, believed that Dombawinne estate was the separate property of the former. He had for several years after the death of his wife remained in exclusive possession of the estate and had taken and appropriated the whole crop. The only one of the heirs to whom it seems to have occurred that the antenuptial agreement was ineffective to exclude the *communio quaestuum* was the fourth defendant, Mr. Senathiraja. For reasons best known to himself he did not bring his claim to the notice of Christopher Brito. It was suggested that it was thought that such a course may have antagonized this self-willed old gentleman and might have resulted in his making dispositions of his property away from any child rash enough to incur his displeasure. However that may be, the fact remains that Brito was permitted till his death in December, 1910, to possess and enjoy the whole land exclusively. They knew that for ten long years after the death of Tangamma he appropriated the whole income of Dombawinne, which was for many years the sole source of his income, and spent and applied it as he pleased. Not a single protest was raised. As to the income of this estate from 1904 they either knew that his attorney in Ceylon paid it into the second defendant's account or they did not. If they did know, then they must have known that he received it on behalf of Christopher Brito, and they must also have known that he held the money's at Brito's disposal. Indeed there are transactions referred to in the evidence which show that large sums of money which could only have come from this source were being disposed of by Brito to the knowledge of these defendants. If they did not know that these moneys passed through the second defendant's bank account their position is no better and his no worse. At Brito's request and for his convenience he received what he believed were Brito's moneys and expended them in accordance with his directions. The defendants know that Brito was appropriating what they now allege was theirs and acquiesced in it. If it be the fact that they only came by the knowledge that these moneys were paid into the second defendant's banking account after his death they might possibly if they were his heirs—which they are not—seek an account of those moneys. They might if any part of that money still remains in the second defendant's hands claim that a share of the moneys proportionate to their interests in Dombawinne estate, in so far as such a claim is not barred by prescription, should be paid to them. But they may not under the circumstances seek to recover or obtain credit for a share of the whole of the amount as

money received by the second defendant under circumstances from which the Court will imply a promise on his part to pay them.

The one circumstance stressed by counsel for the appellants was the letter D 5 of January 5, 1901. This, as I have already said, was an offer by the fourth defendant, Senathiraja, to sell to the second defendant the one-eighth share to which he thought his wife was entitled. The offer was declined. This notice, such as it is, was three years before a single one of these sums were paid into second defendant's account. The second defendant's own view of the matter was that the claim was without foundation. In the three years which followed Christopher Brito remained ostensibly the sole and undisputed owner of the estate to the knowledge of Mr. Senathiraja, who now seeks to utilize this letter for a purpose which he never contemplated and to which, in my opinion, it cannot under circumstances be put.

Before the second defendant can be called upon to set off this money against the debt which is undoubtedly due to him there must be evidence that he had clear notice that the moneys, or at least a part of the moneys paid into his account, were the moneys of the defendants which they claimed in his hands.

It appears to me to be unnecessary to consider the plea that the appellants have failed to establish privity or any of the requirements to an action for money had and received. Counsel for the appellants urged that he was entitled to relief on the broad principle that " where a person has received money which *ex aequo et bono* he ought to refund the Courts will not permit him to retain it."

The facts and circumstances of this case leave no room for the application of this principle in the interest of the defendants. They have been grossly negligent in the protection of their interests. They have done more—they have acquiesced in the appropriation by Christopher Brito of the share they now claim of the income of this estate. They had it in their power to take measures which would have ensured the perception by them of their share of the fruits of this estate or the payment to them of their share of the rents and profits. How can it now be contended that the second defendant, who was merely the conduit pipe through which these moneys or the benefit of the application thereof passed to Christopher Brito, must in justice and good conscience pay this money to the defendants?

The third and fourth defendants have failed to establish that as between them and the second defendant there existed at the dates on which these moneys were received by the second defendant such mutual debts as must by operation of law be deemed to have been extinguished or diminished as to the second defendant's debt by the receipt of these moneys.

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It was urged that the second defendant had failed to prove that the moneys paid into his account had been paid to Christopher Brito or expended by him on his account as alleged. There is on this point the sworn testimony of Mr. Muttunayagam himself which the District Judge has accepted. He produced two documents, P 36 and P 37, and a book of accounts kept by his wife, the first defendant, in which she entered from time to time the amounts expended on account of Christopher Brito and the particulars of such expenditure. All these documents were objected to by counsel for the third and fourth defendants. P 36 is a statement of accounts showing the application of these moneys up to May, 1908. It was submitted to Christopher Brito and returned by him after some days without comment. The second defendant claims for this document the value which would ordinarily be given to an account passed by the person to whom it was submitted as correct. The District Judge has accepted it as such, and I can see no reason why it should not be given the value claimed for it. The evidence and documents filed of record in this case indicate strongly that had Christopher Brito any reason for doubting the accuracy of the account he would have expressed himself vigorously by an endorsement on this document. As to the document P 37, it is merely a statement made by Mr. Muttunayagam prior to the trial and has no special value.

The document P 55, which is the account kept by Mrs. Muttunayagam, the first defendant, and which would clearly have been available as evidence had she survived these protracted proceedings, is now objected to as not being a statement made in the ordinary course of business.

It is not necessary to consider this objection as the second defendant is not driven to rely upon this document. His own evidence and the documents P 36, P 28, and P 29 sufficiently establish his statement that the moneys he received were expended in accordance with Christopher Brito's instructions. He has accounted for the moneys which came into his hands and were received by him as Brito's money and held at his disposal.

The learned District Judge has held that the plea of compensation is not available in this case, in that the debt which the third and fourth defendants seek to set off is not liquid. The claim as formulated by the defendants in their answer might possibly have been resisted on this ground. But the trial which took place has cleared the ground, and in so far as the plea is restricted, as it has been in appeal, to the specific amounts (which together aggregate the sum of Rs. 47,839 admittedly received by the second defendant), a measure of certainty as to amount is disclosed. The defence of compensation fails for the reasons already given.

It is hardly necessary to say anything in regard to the claim in reconvention. The third and fourth defendants have made no

attempt to prove that the second defendant received any part of the income of Dombawinne estate additional to or in excess of the amount admitted by him, either in his representative capacity or otherwise. In so far as it is a claim against the estate of Christopher Brito it is not maintainable in this action. And whether it be regarded as a claim against the second defendant personally or against him as representing the estate of Christopher Brito it is barred by lapse of time.

The appeal fails on all points and must be dismissed, with costs.

Statements of objections to the decree have been entered both by the plaintiff and by the second defendant. The plaintiff contends that he should have been allowed interest on the aggregate amount of the principal and interest as from the date of the first decree entered in this case, *i.e.*, October 20, 1919. His grievance is that but for the appeals entered by the third and fourth defendants and the delay consequent thereon he would, in terms of the decree referred to, have been entitled to be paid interest on that aggregate amount of that decree. But upon appeal to His Majesty the decree was set aside, and upon the new trial the learned District Judge could only allow the plaintiff interest on the principal sum claimed up to the date of the decree entered by him. The order made by him on this point is correct and cannot be varied.

The second defendant's contention is that he should be allowed his costs. The plaintiff, who has rightly been awarded his costs, is the son of the second defendant and only nominally plaintiff in the case. The contest was between the second defendant and the third and fourth defendants. The interests of the plaintiff and the second defendant are identical. There was but one contest, and the third and fourth defendants should only be called upon to pay one set of costs. It is immaterial whether these costs be paid to the plaintiff or to the second defendant, for they are one. The District Judge was, I think, right in awarding one set of costs.

As to the costs of the claim in reconvention, I am not satisfied that the second defendant has in consequence thereof incurred any special costs additional to those of the main contest save those of proctor and counsel. The second defendant was entitled to such assistance as a decree against him was prayed for. He is entitled to the costs chargeable in respect of the appearance on his behalf of proctor and counsel at the trial. He is also entitled to his costs of appeal.

Since the plaintiff and the second defendant have consented to take a decree against the first, third, and fourth defendants *pro parte* I would direct that the decree be varied and that a decree be entered in the terms set out in the judgment of my brother.

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This is an action for the recovery of a sum of Rs. 202,066 alleged to be due on three bonds executed by Christopher Brito and assigned to the plaintiff by the mortgagees.

The first bond No. 2,652 dated August 7, 1894, was to secure a loan of Rs. 60,000 with interest at 8 per cent. from William W. Martin.

The second and third bonds, Nos. 2,744 (dated January 27, 1896) and 1,122 (dated April 11, 1921), were executed to secure a loan of Rs. 30,000 each with interest at 8 per cent. from the second defendant.

The estate called Dombawinne was hypothecated by the said bonds.

Martin by deed of assignment No. 18 dated July 27, 1912, assigned his bond No. 2,652 to the second defendant.

The second defendant by deed No. 961 dated March 12, 1917. assigned all three bonds to his son, the plaintiff.

Christopher Brito died on December 26, 1910, leaving four children—the first defendant, who died during the pendency of this action; Philip Brito, who was married to the third defendant she is the executrix of his will; Theresa, who was married to the fourth defendant; and C. M. Brito whose interests are now vested in the first defendant.

The action was defended by the third and the fourth defendants, who appeal from a decree entered against them.

The appellants set up various defences to the claim, and it is necessary to refer to Christopher Brito's relations with his wife and children for the purpose of considering these defences.

Christopher Brito was married in June, 1866, to Tangamma Nanny Tamby. Before their marriage they entered into an ante-nuptial contract, to which Tangamma's father was a party, by which an estate called Plopalle was settled on the spouses and survivor in life interest, and after their death on the children of the marriage, whom failing, on the heirs of the lady. In consideration of this settlement Tangamma renounced all right to community so far as the property, estate, and effects of Christopher Brito were concerned.

Christopher Brito purchased Dombawinne estate in 1879, his wife died in 1900, leaving her surviving the four children already mentioned.

Brito, till his death in 1910, dealt with the estate as his own, and by his last will executed on December 23, 1910, left all his property to the first defendant and appointed the second defendant the executor of the will.

No claim was made to a share of the estate to Brito by any of his children, but the fourth defendant by letter (D 5) dated January 5, 1901, wrote to second defendant as follows:—

> "We are also willing to sell you my wife's interest in Dombawinne estate if you care to buy it. According to the ante-nuptial settlement made at the time of the marriage of Mr. and Mrs. Brito community of property between husband and wife was excluded. But community of profits was not excluded. An estate purchased during the marriage falls in Roman-Dutch law—which governs the matter—under the heads of profits. In the theory of Roman-Dutch law community is strictly a partnership, and everything that has not been expressly excluded falls into the community. It is therefore as clear a proposition as any in law that on the death of Mrs. Brito a half share of the Dombawinne estate passed to her heirs, viz., to the four children of the marriage. If you are willing to buy my wife's share on that estate, we shall be pleased to sell it to you."

The second defendant says that he thinks that he replied that he had no money or that he did not want the property. He said one thing or the other. He says in his evidence that he believed fourth defendant had no right to the property and was trying to pass to him a property to which he (fourth defendant) had no right.

The fourth defendant took no further action till 1908, when he wrote letter (P 18) dated March 26, in which he says:—

> "You are aware that my late wife was entitled to one-eighth undivided share of the Dombawinne estate by right of her mother, subject of course to the mortgages. It is in this way: When her father and mother married, the law of Ceylon was that there was community between husband and wife in all the property and estate of one another. The law recognizes two kinds of community: First, community of property, that is, all the property which either of the spouses possessed at the time of the marriage or which they inherited subsequently: and secondly, community of profits being any acquisition made by them during the marriage. The community, however, can be excluded by an ante-nuptial contract. In this case there was an ante-nuptial contract which excluded the community of property only, but the community of profits was not excluded by the agreement. Dombawinne was admittedly an acquisition during the marriage, and so it is liable to the community of profits. So when Mrs. Brito died her half share of the property devolved on each of the children in equal share. Consequently my wife was entitled to an

undivided one-eighth share. I think that undivided one-eighth share after deducting debts is now worth about Rs. 30,000. Year after year its value is likely to increase as it is a young plantation. I have taken out probate to my late wife's estate in the inventory of which, filed in Court, I had included the above one-eighth share. I have a right to sell and convey it, and can thereafter give a valid legal title. What I propose to do is this. If you approve of it I propose to sell and convey to you if you will take it in full satisfaction of my mortgage debt to you over (Tamil characters) . . . ."

In the meantime Christopher Brito, whose relations with his other children appear to have been strained, went to live with first and second defendants in Trevandrum, South India, in 1904, and lived with them till his death.

In 1914 the third and fourth defendants filed actions No. 9,993 and No. 10,204 in the District Court of Negombo on July 7 and December 16 respectively against the first and second defendants. The latter was made a party both in his personal capacity and as executor of Brito's will, in which they each prayed for a declaration of title to a one-eighth share of the estate and for damages for three years immediately preceding the action.

They failed in the District Court, but succeeded in appeal before this Court and before the Privy Council.

The contention of the fourth defendant was that set up in the letters referred to, namely, that the ante-nuptial contract did not extend to property acquired after the marriage of Brito and Tangamma.

The third and fourth defendants filed voluminous answers in this present action, on which several issues were framed. In appeal, however, the questions between the parties resolved themselves into four, viz.:—

(1) Whether the right of action on the bonds was prescribed;

(2) Whether there was a misjoinder of parties and causes of action;

(3) Whether the defendants were entitled to plead *compensatio* in respect to the income from Dombawinne estate; and

(4) Whether the defendants' claim in reconvention could be maintained.

The defendants do not appear to have pressed the plea of prescription in the Court below in view of the endorsements of payment of interests on the bonds, and there is no definite issue of prescription.

The contention in appeal is that the third and fourth defendants are not affected by the payments of interest made by Christopher Brito. The appellant's counsel, however, conceded that the case

of *Wijewardena v. Aponso (supra)*, where it was held that as the joint matrimonial estate of the mortgagor and his spouse was originally liable on the obligation incurred by the husband, such liability could not be affected by the death of husband and that the heirs of the deceased husband could not resist the mortgagor's action on the plea that the payment of interest by the widow after his death did not keep his share of the obligation alive, was an authority against him, which is binding on this Court, as it was a decision of a Bench of three Judges.

The plea of prescription must, therefore, fail.

The main question argued in appeal was the one of compensation.

In dealing with this part of the appeal, I should state at the outset that it was admitted that compensation could not be claimed against the bond executed in favour of Martin, and that it could not be pleaded in respect to the income during the period 1900-1904.

The claim is put forward in this way: The third and fourth defendants allege that the second defendant received the income derived from Dombawinne estate from 1904 up to the death of Brito on December 26, 1910, and that by operation of law the debts due on the bonds had been reduced to that extent; in the alternative they plead that they are entitled to claim that the debt has been reduced by the second defendant receiving during that period one-half the income of the estate which had devolved on Tangamma's children.

The reply to these pleas is that (1) no *contra* debt was created between the second defendant and Brito; (2) that the second defendant has accounted for all moneys he has received; (3) that the defendant's claim is not a liquid claim; and (4) that the defendants are not entitled to plead *compensatio* as the claims are barred by prescription.

The last objection of prescription may, I think, be conveniently disposed of first, as it will enable me to consider the scope of the doctrine of *compensatio* and determine whether it finds a place in the law of Ceylon.

Compensatio was recognized by the Roman law as a way in which an obligation might be extinguished. It is the reciprocal extinction of debts between two persons each of whom is indebted to the other (*Digest XVI. tit 2 s. 1*) and was adopted by the Roman-Dutch law.

Vanderlinden (1. tit. 18. s. 4) describes it as the reciprocal extinguishment of debts subsisting between the same parties by setting one against the other.

In order to constitute the right of set off it is necessary: first, that the thing due is of the same kind as the subject of the debt against which it is a set off, *e.g.*, money may be set off against money, but not money against grain; second, that the debt which is set off is of such a nature that the time of payment has arrived;

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third, that the debt which is set off is liquid; fourth, that the debt is due to the person himself who claims the set off; and fifth, that the debt which is set off is due by the person himself against whom it is set off (*Vander Keesel 827*).

As to debts of a liquid nature a debt is liquidated when it is evident that it is due and to what amount *cum certum est an et quantum debeatur.* A disputed debt then is not liquidated and cannot be opposed in compensation unless the person who opposes it has proof at hand and is in a situation to justify his claim properly and summarily. Even if it be evident that it is due, if it is not clear to what amount it is so, and if the liquidation depends upon an account of which a long discussion would be necessary, the debt is not liquidated and cannot be opposed in compensation (*Pothier III. tit. 4 s. 1*).

The effects of set off by operation of law are:—

(1) That in case my creditor with whom I have deposited effects as a security afterwards becomes my debtor I can demand these effects back provided I offer him the balance due to him.

(2) That when a debt carries interest and the debt to be set off against it does not bear interest, the debt bearing interest is extinguished to that amount and the interest in the same proportion.

(3) That although my creditor is not bound to accept a partial payment, yet, however, when he becomes my debtor for a less sum than I owe him, he is obliged to abate his demand *pro tanto* as the legal consequence of set off.

(4) That having paid a debt already extinguished by set off, we are entitled to recover back the money so paid as not being due unless such payment be paid in satisfaction of a judgment. (*Vanderlinden I. tit. 18 s. 4.*)

Pothier says—

Compensation takes effect *ipso jure*, that is to say, by the mere operation of law without being pronounced by the Judge or opposed by the parties. As soon as a person who is creditor of another becomes his debtor of a sum of money or other matter susceptible of compensation with that of which he is creditor and *vice versa*, as soon as a person who is debtor of another becomes his creditor of a sum susceptible of compensation with that of which he is debtor a compensation is made and the respective debts are thenceforth extinguished to the extent of their concurrence by virtue of the law of compensation.

Although a creditor is not bound to receive payment of the debt due in instalments, yet if he becomes debtor to his debtor for a less sum, he is obliged to suffer a partial discharge of his debt by virtue of compensation.

Where A is indebted to B on several separate accounts and he is B's creditor in a certain sum of money the compensation ought to be made against that debt which is most to A's advantage to discharge provided it had been contracted before B's debt to him. (*III. tit 4 s. 3.*)

In his *Institutes of Cape Law* (*Vol. IV., p. 193*) Maasdorp states the law thus:—

"The effect of a debt which is capable of being set off is exactly the same as that of actual payment, that is to say, it extinguishes or reduces *pro tanto* the debt against which it may be pleaded. This extinguishment takes place *ipso jure* and requires no action or admission on the part of the persons concerned in it, though it can only be given effect to by judicial decree."

At page 156 he says on the authority of the case of *Binase v. Maklutsana* (*supra*) that prescription cannot be pleaded against a claim in reconvention which is capable of being set off against the claim in convention, such set off taking effect *ipso jure*, and acting as a payment from the time of the mutuality of debts coming into existence.

The Cape of Good Hope Act, No. 6 of 1861, for amending the law regarding the period of time, by the lapse of which certain suits and actions become barred by prescription, has no section corresponding to section 12 of the Ceylon Prescription Ordinance, No. 22 of 1871.

Section 12 of the Prescription Ordinance, No. 22 of 1871, enacts that "no claim in reconvention or by way of set off shall be allowed or maintainable in respect of any claim or demand after the right to sue in respect thereof shall be barred by any of the provisions hereinbefore contained."

The plaintiff contends that this section governs the plea set up by the third and fourth defendants.

I am unable to accept this contention. The section speaks of a claim by way of set off, but it is clear from the Roman-Dutch law authorities that a plea of compensation is not the same as a claim by way of set off.

In the former case the debt is extinguished by the coming into existence of the *contra* debt. It is, as stated by Maasdorp, tantamount to a payment of the debt to the extent of the *contra* debt.

In the latter case the defendant admits the existence of a debt sued for, but sets up a cross-claim on which the person against whom the claim is brought is excused from payment and is entitled to judgment on the plaintiff's claim.

The English law does not recognize set off as tantamount to a payment. Lord Halsbury in his *Laws of England* (*Vol. XXV. s. 854 at p. 484*) sets out the difference between payment and set off thus:—

> "Where there has been payment the party against whom the claim is brought pleads payment or accord and satisfaction which in effect alleges that the claim no longer exists. The plea of set off, on the other hand, in effect admits the existence of the claim and sets up a cross-claim as being ground on which the person against whom the claim is brought is excused from payment and entitled to judgment on the plaintiff's claim. Until judgment in favour of the defendant on the ground of set off has been given the plaintiff's claim is not extinguished."

The concluding words clearly show the difference between compensation under the Roman-Dutch law and set off under the English law. In one case the debt is extinguished *ipso jure;* in the other it is not extinguished until judgment is given. It is therefore a good answer under the English law to a plea of set off that the debt sought to be set off was statute-barred at the date of action brought if the statute is pleaded in reply, but not that it has become statute-barred after the commencement of the action and before the defence was delivered.

Section 12 was, I think, intended to apply to claims by way of set off contemplated by the law of England. Either intentionally or inadvertently the Ordinance makes no provision with regard to a plea set up under the doctrine of compensation, according to which, as I have observed before, a debt is extinguished by the coming into existence of a *contra* debt as from the date the latter came into existence.

The plea of compensation has not come up before within my experience of nearly twenty-eight years on the Bench and at the Bar, but it was pleaded and recognized in the old case of *Vanderstraaten v. De Latre* (*supra*). There the official administrator of the estate of one Kronenberg sued for the recovery of 797/2 rix dollars due to Kronenberg on a contract with the defendant. Defendant admitted the amount but claimed damages for breach of contract. The law regarding compensation was considered and the plea rejected on the ground that it was not a liquid claim.

The plea of compensation, being one which might be set up under the law of Ceylon and not governed by the provisions of section 12 of the Prescription Ordinance, it becomes necessary to deal with the other objections to the plea raised by the respondents.

I am of opinion that the plea that it is not a liquid claim cannot be sustained.

The second defendant in case No. 9,993 D. C., Negombo, agreed to damages being assessed at Rs. 20,000 per annum being the nett income derivable from Dombawinne estate, and the third and fourth defendants set up a plea of compensation on that basis.

In this action the second defendant took upon himself the burden of proof and produced statements of accounts (P 36 and P 37) to establish what sums had reached his hands on account of Dombawinne estate and how he had expended them, and the appellants are willing to restrict their plea to the amounts shown as received in these statements of accounts.

I therefore find it difficult to say that the claim suffers from the defects which under the Roman-Dutch law would disqualify it from being pleaded as a liquid claim.

The accounts no doubt had to be looked into in the course of the trial, but the inquiry was not on the plea set up by the appellants but the result of the second defendant's plea that he had accounted for the money received by him.

The next question is whether the second defendant has accounted for the moneys received by him and, if so, whether it is a defence in law to the appellants' plea of compensation.

I shall first deal with the second defendant's contention that he has accounted for all moneys received by him.

He says in his evidence that when he received the second letter from the fourth defendant in 1908 he anticipated that he would have to face litigation and prepared an account of all moneys received by him on Christopher Brito's account and handed it to Brito, who returned it without any remarks. The second defendant hoped that Brito would write something or initial it to indicate that it was correct. He says: I could not go and ask him like a banker to sign and give me a receipt. I was dealing with a peculiar gentleman with a peculiar temperament. "

The learned District Judge has accepted the second defendant's evidence, and this statement with regard to his account P 36 must be accepted.

Appellants' counsel objected to the admission in evidence of the account P 37, which I shall presently refer to, but conceded that he could not object to P 36 if second defendant's evidence regarding it was accepted.

According to P 36 a sum of Rs. 23,874 was received by second defendant from Dr. Muttucumaru, who had been placed in charge of Dombawinne estate by Christopher Brito and a sum of Rs. 22,769 expended.

The appellants contended that the second defendant was not entitled to debit Christopher Brito with the sum of Rs. 1,050 paid for the property called Bartons Hill and Rs. 16,000 paid for the

house called Silver Oaks. It was argued that the District Judge was wrong in accepting second defendant's evidence with regard to these two items.

I am unable to accept this argument. The second defendant appears to have given his evidence very frankly and to have impressed the learned District Judge very favourably.

His evidence with regard to Silver Oaks is borne out by the recital in the deed of sale (P 46) executed on November 2, 1907, that the sum of Rs. 16,000 is a sum given to the vendee by her father for the purpose of purchasing and owning absolutely the property thereby conveyed.

It must be remembered that the recital was made before the fourth defendant's second letter, and I see no reason to think that the recital was made with the object of defeating any claim that might thereafter be made by the heirs of Tangamma.

The statement made by second defendant's counsel at the Bar that the recital was required by the law of property in India was not challenged.

With regard to Bartons Hill the defendant says he bought it on behalf of Brito from the Indian Government, by whom it was sold for an absentee owner. After the sale considerable time elapsed before a conveyance could be executed because a power of attorney had to be obtained from the owner. When it was received a conveyance was executed in the name of the bidder.

This evidence that Bartons Hill was bought for Brito is corroborated by the letter written by Brito to second defendant (P 50) in which he proposes to visit Bartons Hill next day to point out to the "overseer" the place for building to be afterwards used as a store or kitchen. He adds that if he is not well enough to go, Muttunayagam should point out the place, and he ends by saying: "My pleasure need not be much thought of as I cannot hope to occupy it long; that is certain. So any spot that you select will suit me."

I am of opinion therefore that the second defendant has accounted for the sum of Rs. 22,769.

Account P 37 was objected to as inadmissible in evidence. It is not necessary for us to decide that question as the bulk of the items can be otherwise proved.

The items which cannot be proved are the sums entered as paid for Brito's personal expenses, and certain other sums such as funeral expenses, doctor's bills, and donations amounting to Rs. 7,857. Personal expenses amount to Rs. 5,907, which, apart from accounts, seems to be an extremely reasonable amount.

I see no reason to doubt that the other amounts were expended in the way set out in the statement.

The sum of Rs. 1,500 for building a bungalow on a hill was particularly challenged; this was the money expended in building the bungalow on Bartons Hill, and for the reasons given by me for accepting the second defendant's evidence that Bartons Hill was bought for Brito I accept his evidence that the bungalow was built for Brito.

As regards the other items, the fourth defendant himself has signed on the book, P 56, for the cheque for Rs. 1,722.

The payment of the sum of Rs. 5,000 is proved by the letters P 28 and P 29, written by Muttucumaru to Muttunayagam on December 1 and 7, 1908.

The payment of interest Rs. 6,500 is proved by the endorsements on the secondary and tertiary mortgage bonds.

Apart from the evidence that the second defendant has accounted for all moneys received by him, I am of opinion that there is no evidence that the Dombawinne estate money received by him created between Philip Brito and him the relationship of debtor and creditor.

It is clear from the evidence that Muttucumaru was in charge of Dombawinne estate on behalf of and under the control of Christopher Brito, and that the nett income was deposited to second defendant's account in the Madras Bank, Colombo, for the sake of convenience and to save commissions.

I have also no doubt that the second defendant kept this money in his account on behalf of his father-in-law.

With regard to Tangamma's half share of the income, the appellants contended that second defendant is liable for the amount in any event as money " had and received " for their benefit.

It was argued that second defendant was fixed with notice of fourth defendant's claim by the letter D 5 written in 1901 and later by the letter P 18 written in March, 1908.

This is a startling proposition, and I am unable to accept it.

At the time the letter D 5 was written Christopher Brito was in Ceylon and in full possession of the whole of Dombawinne estate and no part of the income reached second defendant.

No action of any sort was taken on this letter, and Britto, after he went to India—so far as the evidence goes—continued in active possession of the whole estate. Brito and the second defendant had not the slightest reason for thinking that the fourth defendant really believed he had a claim to the estate.

What Brito's views may have been with regard to his title we do not know. The second defendant says that he (second defendant) believed that fourth defendant had no right to the property. The belief formed by him when he received letter D 5 cannot but have been confirmed by fourth defendant's neglect to pursue the matter further.

I am, therefore, of opinion that the letter D 5 cannot be construed as a notice to the second defendant to hold any moneys received by him on account of the Dombawinne estate for the benefit of the fourth defendant.

With regard to his letter P 18 written in 1908, beyond a mere offer to sell his share the fourth defendant lays no claim to any share of the profits. Here too the second defendant had every reason to believe that it was a mere attempt on the part of the fourth defendant to induce him to enter into a compromise and avoid entering into litigation—a view also confirmed by the fourth defendant's neglect to take any proceedings in the matter.

With regard to the income after the death of Brito between December 26, 1910, and the date from which damages were claimed in D. C. Negombo, Nos. 9,993 and 10,204, there is only a period of about seven months in the case of the third defendant and one year in the case of the fourth defendant. For this sum the second defendant has accounted in the testamentary action, and the amount cannot be pleaded as compensation in this case.

The third and fourth defendants have claimed the sum of Rs. 53,840 in reconvention against the second defendant. This claim is clearly prescribed and must fail. Appellants' counsel suggested that Brito and Muttunayagam were trustees for the third and fourth defendants. Christopher Brito could at the most have been only a constructive trustee, and a constructive trustee is not precluded by section 111 of the Trusts Ordinance, 1917, from pleading prescription.

It was next argued that the second defendant could not set up that defence as there was an express trust created by the will.

I am quite unable to appreciate this argument, but I need not discuss it as, if the plea of prescription fails, they cannot escape from the plea that the sum claimed in reconvention on account of income received after Christopher Brito's death should have been claimed in the Negombo actions; and not having been claimed in those actions, the claim is barred by the provisions of section 207 of the Civil Procedure Code, which provides that—

> " All decrees passed by the Court shall, subject to appeal, when an appeal is allowed, be final between the parties; and no plaintiff shall hereafter be non-suited.
>
> "*Explanation.*—Every right of property or to money, or to damages or to relief of any kind which can be claimed, set up, or put in issue between the parties to an action upon the cause of action for which the action is brought, whether it be actually so claimed, set up, or put in issue or not in the action, becomes, on the passing of the final decree in the action, a *res adjudicata*, which cannot afterwards be made the subject of action for the same cause between the same parties."

The pleas of misjoinder of parties and causes of action were reduced in importance by reason of the fact that the plaintiff and second defendant agreed to accept a decree similar in form to the decree entered on October 20, 1919.

The appellants relied on the following passages in *Voet. XXIII. tit. 2 s. 80* where after dealing with debts contracted by the spouses prior to the marriage he says:—

> " It is otherwise with those debts which were contracted during the marriage, since after the dissolution of the marriage the wife or her heirs can be sued for the half of them and the husband and his heirs for the whole. " (*Stoney's Trans.*)

But in an earlier passage (section 52) after stating that in Holland the husband alone or his heir *in solidum* can be sued for a debt contracted during the marriage, because the husband is the chief party to the contract, and he can afterwards proceed against his wife or her heir for the half of the debt, but the wife or her heirs ought not to be sued except for the half, he adds this proviso:—

> " Provided that the husband during the marriage has not pledged the property of his wife for such a debt, which he can do by virtue of his marital power, because a pledge is not released except by payment of the whole debt. "

And in *Lib. XX. tit. 4 s. 4* he lays down that:—

> " Neither by the Roman Law nor by our usages can a creditor be compelled against his will to divide the hypothecary action competent to him, and to sue a plurality of persons *pro parte* each for a part, pledge being considered indivisible. For on the one hand, if a single thing has been mortgaged (by a deceased), and been adjudicated to one of a number of heirs of the debtor or been divided in shares among them, or a part of the pledge been alienated by the debtor or his heirs, it is both open to the creditor to discuss for the entire debt either the entire thing so assigned to one of the heirs, or the portion of it which has come to one person by division or alienation; so that no possessor can prevent a discussion either of the whole or of the portion possessed by him, although he may be willing to pay a rateable share of the debt or even has already done so. "

The passage relied on by the appellants cannot therefore apply to mortgage debts contracted by a husband during the marriage, and the pleas of misjoinder of parties and causes of action must fail.

I accordingly affirm the judgment appealed from, but vary the decree as hereinafter directed.

As regards costs, the third and fourth defendants must pay the costs of the plaintiff both here and in Court below.

1926.

MAARTENSZ A.J.

Muttunayagam v. Senathiraja

In view of the plaintiff's consent to a decree against the third and fourth defendants in proportion to their shares the following decree is substituted for the decree dated October 2, 1925:—

Decree:—It is decreed that the substituted first defendant and the third and the fourth defendants do pay the plaintiff the sum of Rs. 202,066, together with interest on Rs. 115,000 at the rate of 9 per cent. per annum from April 7, 1919, to October 2, 1925, and further interest at 9 per cent. per annum on the aggregate amount from October 2, 1925, in the proportion of three-fourths by the first defendant, one-eighth by the third defendant, and one-eighth by the fourth defendant, being the shares in which the property mortgaged and hypothecated as security for the due payment of the said aggregate amount is seized and possessed by the first, third, and fourth defendants respectively on or before March 22, 1927.

It is further ordered and decreed that the third and fourth defendants do pay the plaintiff's costs of this suit.

It is further ordered and decreed that the following property, to wit—all that land called and known as Dombawinne estate described in the title deeds thereto as all that tract of land called Dombawinne mukalana, situated between Udugaha pattu of Hapitigam korale and Dungaha pattu of the Alutkuru korale, in the District of Negombo, Western Province, with the building constructed thereon, bounded on the north, east, south, and west by land belonging to private individuals, containing in extent seven hundred and twelve acres one rood and thirty-three perches, which said estate is at present said to contain in extent seven hundred and fifty-eight acres and one rood or thereabouts, specially mortgaged by bonds No. 2,652 dated August 7, 1894, and attested by W. M. Rajapakse, Notary Public; No. 2,744 dated January 27, 1896, and attested by W. B. de Fry of Colombo, Notary Public; and No. 1,122 dated April 11, 1904, and attested by P. A. Prins, Jr., Notary Public —and the same is hereby declared bound and executable for the said sum of Rs. 202,066 and interest. And in default of payment by any of the said parties of his or her proportionate share of the said sum, interest and costs of suit that the share of the said premises to which such party is entitled as legal representative of a deceased child of Christopher Brito be sold by Mr. A. Y. Daniel, licensed auctioneer, by public auction after such advertisement in the *Government Gazette* and in at least one of the local newspapers as the said auctioneer may consider sufficient upon the annexed conditions of sale, and the said auctioneer is hereby authorized and directed to allow the plaintiff or anyone else on his behalf to bid for and purchase the said premises and in the event of the plaintiff becoming the purchaser thereof to allow the plaintiff credit to the extent of claim and costs.

It is further ordered and decreed that the Secretary of this Court do execute the necessary conveyance in due form of law in favour of the purchaser or purchasers at such sale on his or their complying with the conditions of sale. And on being satisfied, if the purchaser be the plaintiff, that he has been allowed credit, and in the event of the purchaser or purchasers being a third party or parties that the purchase money has been deposited in court.

It is further ordered and decreed that the proceeds of such sale be applied in and towards the payment of the proportionate share of the sum of Rs. 202,066, interest, and costs of suit.

With regard to the costs of the claim in reconvention, I agree with the order made by my brother Garvin.

The plaintiff has filed objections claiming interest on the aggregate amount of principal and interest from October 2, 1919. I am of opinion that this objection cannot succeed as the amount due was not ascertained till the decree appealed from was entered on October 2, 1925. I accordingly dismiss the plaintiff's cross objection and make no order as to costs.

Judgment varied.