1932 *Present :* **Macdonell C.J. and Dalton J.**

BANDARA *v.* PUNCHI BANDA.

314—D. C. Kandy, 40,698.

Prescription—Action to recover purchase money—Simple money debt—Ordinance No. 22 of 1871, s. 8.

An action, to recover purchase money, which was expressed in the conveyance to have been previously paid, is prescribed in three years.

APPEAL from a judgment of the District Judge of Kandy.

N. E. Weerasooria, for plaintiff-appellant.

Navaratnam, for defendant-respondent.

August 4, 1932. MACDONELL C.J.—

This appeal came before us on the question whether the plaintiff-appellant's claim was prescribable within six years under section 7 of the Prescription Ordinance, No. 22 of 1871, or prescribable within three years under section 8 of the same. The facts were these:—

The plaintiff-appellant by notarial deed No. 1,739 of August 24, 1927, conveyed certain lands to the defendant-respondent for the consideration of Rs. 800. It is admitted that no part of this Rs. 800 was ever paid to the plaintiff-appellant, but the deed states that the grant is made "for and in consideration of the sum of Rs. 800 of lawful money of Ceylon well and truly paid to the vendor by . . . . the purchaser (the receipt whereof the vendor hereby acknowledges)". The plaintiff-appellant filed action in the present case on January 16, 1931, that is over three years and four months after the execution of the deed No. 1,739. His action raises a precise issue:—if he is suing "upon a written promise, contract, bargain, or agreement", then his claim is prescribed within six years under section 7 of the Ordinance and he has brought this action in time; if he is suing "upon an unwritten promise, contract, bargain, or agreement", then his claim is prescribed within three years under section 8 of the Ordinance and he has not brought his action in time.

One further fact has to be mentioned. In the deed No. 1,739 the plaintiff-appellant admits having received the consideration but in his answer to the plaint in this action, the defendant-respondent himself admits that no consideration ever has been paid to the plaintiff; the deed says it has, the defendant admits candidly enough that it has not.

To succeed in this action, plaintiff-appellant must show that he is suing "upon a written promise, contract, bargain, or agreement," but it would appear that he is not suing upon a document but against one. If his action be based upon a document—"a written contract"—i.e., deed No. 1,739, then that document contradicts his claim, for it contains an admission by him that he has received money that satisfies his claim. His claim is rather upon an executed consideration; he has conveyed the land, and now seeks payment for it, and to ascertain what the amount of that payment must be, he refers to a document, a written contract, deed No. 1,739, but does not claim under it but against it. If so, his claim would seem to be one "upon an unwritten promise, contract, bargain, or agreement" and if so, one prescribed in three years.

The authority cited to us on this matter was the case of *Thommasie v. Kanavathipillai Murugasoe*[1] in which the owner of the land conveyed it to a purchaser, the conveyance reciting the consideration as previously paid. More than three years after the date of the conveyance the vendor sued the purchaser for the purchase money averring that it had not been paid. Clarence J. said "I think the plaintiff's action is a simple action of debt, and that it does not fall within the 7th section of the Ordinance No. 22 of 1871 as contended by plaintiff".

It will be seen that no other reasons are given in the report of the judgment for this decision, but the case has never been dissented from and reasons for the decision have been given in later cases referring to it. Thus in *Dawbarn v. Ryall*[2] which was an action by vendee against his vendor for deficiency in the extent of land sold to him by notarial conveyance and wherein it was held that his claim to the deficiency, or rather to damages in lieu thereof, arose directly out of the written contract of sale between him and his vendor, Lascelles C.J. said: "In *Thommasie v. Kanavathipillai*, it was held that a claim for purchase money which was expressed in the conveyance to have been previously paid was a simple money debt which would be prescribed in three years. This does not seem to me to be inconsistent with the plaintiff's contention, for the conveyance in that case, so far from importing any promise to pay the purchase money, proceeded on the footing that it was already paid." In *Lamatena v. Rahaman Doole*[3], *Thommasie's case* was referred to as follows:—"Although that was an action to recover the consideration for a land sold to the defendant, the claim did not arise on the deed of sale, as the deed stated that the full purchase money had been received by the vendor. In fact, the deed of sale negatived the claim and it could not be said to have been based on or to have arisen from the deed." It is difficult to escape from this reasoning, namely, that in *Thommasie's*

[1] *(1883) 5 S. C. C. 174.* [2] *(1914) 17 N. L. R. 372.*
[3] *(1924) 26 N. L. R. 406.*

case plaintiff's claim was not upon a written contract but against or in spite of it, and the decision seems one by which we are bound.

It has been argued however that the facts in this case distinguish it from *Thommasie's case*. There the defendant seems to have denied that the consideration was in fact unpaid, here the defendant-respondent admits that it is in fact unpaid; but it is not easy to see that this makes an essential difference between the two cases. The plaintiff-appellant here must go against the written contract to make out his case, he must contradict its statement that the consideration he now seeks payment of, was in fact paid, and it can make no difference to the essence of his action whether he establishes that contradiction by his own evidence or by an admission from the defendant; in either case it remains a contradiction of the document and, if so, he cannot well say that he sues "upon a written contract" and so brings himself within section 7 of the Ordinance. Then, if he is not suing upon a written contract, he must be suing upon an unwritten one and if so, is within section 8 of the Ordinance which means that his action not having been brought within the three years is prescribed.

It was argued to us that the words in deed No. 1,739, "the receipt whereof the vendor hereby acknowledges" merely referred to the means of fulfilling the contract. No authority was cited to us in support and I would rather incline to the view that the words are a statement of fact. It should be noticed that the argument and the judgment in *Nadaraja v. Ramalingam*[1] proceeded on the assumption that such a recital in a deed of conveyance, namely, that consideration had passed, was a statement of fact and, if incorrect, then to be disproved in the same manner as any other statement of fact that is impugned.

For the foregoing reasons, I am of opinion that the plaintiff-appellant's claim was upon an unwritten agreement made more than three years before he brought action and, if so, prescribed by section 8 of Ordinance No. 22 of 1871. The appeal therefore fails and must be dismissed with costs.

DALTON J.—I agree.

Appeal dismissed.

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