1935 *Present :* **Garvin S.P.J. and Maartensz J.**

ANNAMALY CHETTIAR *v.* THORNHILL.

215—D. C. Ratnapura, 4,687.

Account stated—A settlement of accounts—No evidence of cross-accounts—Period of limitation—Ordinance No. 22 of 1871—Civil Procedure Code, s. 192.

A settlement of accounts between two parties, where in respect of their dealings one party always remains the debtor, and there is no evidence of cross-dealings between them, is an account stated within the meaning of section 8 of the Prescription Ordinance.

Section 192 of the Civil Procedure Code reserves the power of the Court to award interest in respect of any period prior to the institution of the action only where the right has been secured by agreement or is recognized in law.

APPEAL from a judgment of the District Judge of Ratnapura.

H. V. Perera, for defendant, appellant.

Keuneman (with him *Gratiaen*), for plaintiff, respondent.

February 6, 1935. GARVIN S.P.J.—

By its decree in this case the Court awarded the plaintiff judgment for the sum of Rs. 54,365.44, with legal interest thereon from June 2, 1927, till payment in full and also his costs of action. The defendant has appealed, but, at the hearing, the only point which was submitted to us in support of the appeal was that the plaintiff's action was barred by lapse of time. The plaintiff claimed various sums of money. The two principal heads under which his claim falls are first, one for rice supplied between August, 1923, and June 14, 1924, and the second for money lent and advanced during the same period. The third item is a small sum of Rs. 10.50, which is hardly worth noticing, and the last is a substantial claim for interest, which the plaintiff says has accrued up to the time when this action was brought. For an alternative cause of action the plaintiff pleaded that on June 24, 1924, an account was stated between the parties in respect of their dealings and that at that accounting a sum of Rs. 54,365.44 was found to be due from the defendant to the plaintiff. The plaintiff claims this sum with interest up to the date of action. He also pleads, that in respect of both causes of action, the Court should exercise its power and grant him interest from the date of action to the date of decree, and, thereafter, upon the aggregate amount in terms of section 192 of the Civil Procedure Code.

In respect of the first cause of action it is, I think, clear that the amounts claimed would clearly have been barred by lapse of time in the absence of any written acknowledgment such as is contemplated by the Prescription Ordinance. But, it has been indicated to us in the course of this argument that there are two letters upon which the plaintiff relied as an acknowledgment, which took this debt out of the bar of limitation. It is hardly necessary to consider whether these acknowledgments are sufficient for the purpose since the claim in respect of the second cause of action is clearly not barred by lapse of time if there was such an

account stated as is pleaded by the plaintiff. It was urged, however, by counsel for the appellant that this was not an account stated within the meaning of the Ordinance and that it is in any event not an account stated which is evidenced by a writing. The second of these two submissions must, I think, be conceded inasmuch as there is no settlement in writing. It remains, therefore to consider whether the contention that this is not an account stated is well founded.

Now the argument that has been briefly outlined to us is that in accordance with the decisions of this Court, a settlement of accounts between parties where, in respect of their dealings, one party remains always the debtor of the other and where there are no cross-dealings, is not an account stated within the meaning of the Prescription Ordinance. There can be no question that there is a long series of judgments of this Court which seem to take the view that such a settlement of accounts is not an account stated and the effect of the decisions of this Court would seem to be that in the absence of a writing there is no account stated within the meaning of the Prescription Ordinance unless there is evidence that there had been cross-transactions and cross-dealings between the parties and that the accounts arising out of these cross-dealings have been examined and the position of the parties definitely ascertained at the accounting. In *Silva v. Silva*[1] I had occasion in view of a similar contention to review the judgments of this Court and state the position in which we are left as a result of those judgments. This was necessitated inasmuch as in the course of the argument my attention was drawn by counsel to a recent decision of the Privy Council in which the decision was irreconcilable with the judgments to which I have referred. Sitting alone, I did not think that it was competent for me to do otherwise than I did in calling attention to the situation in which we are left, particularly in view of the fact that it was possible to dispose of the case upon a somewhat different ground. But the question again arises before this Bench which is differently constituted. The decision of the Privy Council referred to was arrived at in the case of *Firm Bishun Chand v. Seth Girdhari Lal and others*[2]. There their Lordships of the Privy Council had before them a case in which the accounts of a certain money-lender were looked into and an account struck between the money-lender and his debtor. There was no suggestion that there had been any cross-dealings such as I have referred to, but their Lordships, after reviewing certain of the Indian judgments in which a view similar to that taken by our Courts appears to have been the view of those Courts, came to the conclusion that it could not be doubted that that was an account stated and settled within the meaning of the provision of the Indian Limitation Act, which corresponds to a similar provision in our law. That decision, it seems to me, is clearly binding upon us, and though it may mean a departure from the view hitherto entertained there appears to me to be no alternative but to follow the judgment of the Privy Council. In the result the contention that this is not an account stated fails and with it the whole of the defendant's appeal, which must, therefore, stand dismissed with costs.

[1] *36 N. L. R. 307.*

[2] *(1933-34) Times Law Reports 465.*

A cross-appeal has been entered by the plaintiff whose complaint is that the learned District Judge has not awarded him interest on the amount ascertained at the settlement from the date of the settlement up to the date of action. A second ground of appeal is that in the decree while granting him interest from the date of action up to the date of judgment he has failed to direct that from that date onwards interest should be payable upon the aggregate amount of principal and interest as ascertained up to the date of judgment. The second of these two points can be briefly disposed of. Presumably the real explanation is that this was due to an oversight. Section 192 clearly enables a Judge when awarding interest from the date of action to the date of decree to direct also that the successful party should be entitled to further interest at the rate prescribed on the aggregate sum so adjudged from the date of the decree to the date of payment. The decree clearly must in any event be modified to that extent.

It remains to consider the first of the two grounds of appeal taken by the plaintiff. It is urged that the plaintiff is entitled to interest on two grounds, first, that there are circumstances here from which a Court may presume that there was an agreement between the parties that interest should be paid on the amount ascertained as due from the defendant to the plaintiff when the account was settled, and secondly, that apart from such an agreement the Court had the power to direct the payment of interest by the defendant at the rate of 9 per cent. The only circumstance from which we have been invited to infer an agreement to pay interest is the circumstance that in their dealings up to the time of the settlement of the account between them the defendant had paid the plaintiff interest in respect of the money due for the purchase of rice and also in respect of the loans obtained by him from time to time from the plaintiff. A careful examination of the record has failed to disclose any other circumstance of any kind. When an account is stated between parties, as in this case, the law implies a promise to pay the amount ascertained at the accounting to be due from the one party to the other, but I am aware of no rule of law which justifies a Court in implying that there was a promise to pay that sum with interest. There are undoubtedly cases in which such an agreement might be inferred. Had the parties continued their dealings after the amount due from the one party to the other had been ascertained at the accounting, that amount being treated as a balance which was carried forward in the accounts relating to their subsequent dealings, coupled with evidence that interest had been charged thereon and either paid or acquiesced in, there would clearly be material which would justify the inference that there was an agreement to pay interest and possibly evidence that that interest was to be paid at the agreed rate. But there is no such evidence here. In point of fact the dealings between the parties terminated before and certainly after the account had been stated, and I do not think that it is possible in these circumstances to draw any further inference than that the defendant who was found to be the debtor promised to pay to the plaintiff the amount found to be due from him.

It was next urged on the authority of a case from the South African Courts (*West Rand Estates Ltd. v. New Zealand Insurance Co. Ltd.* [1]) that the Court had the power under the common law to award interest wherever the defendant was "*in mora*". The judgment indicates that the Courts of South Africa had apparently departed from, if they had at any time adopted, the rule of the Roman-Dutch law, under which interest in the absence of agreement was only recoverable on the ground of *mora* from the stage of *litis contestatio*. Now, whatever the position may have been in South Africa there is nothing to indicate that our Courts have ever departed from the rule of the Roman-Dutch law except in so far as by the enactment of section 192 of the Civil Procedure Code it has now been definitely laid down that the Courts may award interest not from the stage of *litis contestatio* but from the date on which the action was filed. No judgment has been cited before us in which there has been the slightest departure from what appears to be the uniform rule that in the absence of agreement or of any positive rule of law interest is not recoverable in respect of the period prior to the date of action. The section of the Civil Procedure Code referred to, section 192, appears to me to state quite clearly that the power vested in the Court is to award interest in all cases from the date of the institution of the action. Where a rate has been agreed upon the interest will be at agreed rate. Where no rate has been agreed upon the interest which the Court may award will be at the rate of 9 per cent. The section then goes on to state that the award of interest so made shall be "in addition to any interest adjudged on such principal sum for any period prior to the institution of the action". It has been urged by counsel for the plaintiff-appellant that these words indicate the intention of the legislature to vest these Courts with power to grant interest in respect of a period prior to the institution of the action in addition to the interest which it is expressly authorized to award under the earlier part of the section, that is, interest after action brought. It might be possible to support the contention had it been clear that the words referred to should be read as part and parcel of a special clause commencing "in the absence of any such agreement". But there is nothing in the section which marks it out as a separate clause dealing with a separate and distinct matter. These words appear to me to have been inserted for the express purpose of making it clear that the interest which the Court is empowered to grant from the date of action to the date of decree is not to affect the right of the Court to award interest in respect of any period prior thereto where under the general law a right to interest in respect of such prior period exists. Clearly such a right might have been reserved to the claimant by agreement; it might have been secured to him by a positive enactment of law. For my own part I am unable to see in the terms of the section read as a whole any indication of the intention of the legislature to depart from the rule of the common law as it obtains in Ceylon, as has been done in South Africa, or to adopt what appears to be the rule of the English law in the matter. This question must, therefore, be determined with reference to the law as it has hitherto been understood. In that view the appeal of the plaintiff

[1] *(1926) S. A. L. R. App. Div. 173.*

also fails, except, of course, in so far as he has clearly made out a right to relief by the modification of the decree in the manner hereinbefore indicated and directed. We make no order in regard to the costs of the plaintiff's appeal.

Our attention has been drawn by counsel for the plaintiff to the circumstance that there is a motion paper filed with these proceedings signed by the proctor for the defendant-appellant in which he seeks a dismissal of the plaintiff's action on various grounds set out therein. It is certainly a most unusual motion, but it is hardly necessary to say anything more upon the point as counsel does not support it. It is accordingly dismissed.

MAARTENSZ J.—I agree.

Appeal dismissed.