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

SOOSAIPILLAI *v.* VAITALINGAM *et al.*

308—D. C. Jaffna, 3,355.

Prescription—Action on joint promissory note—Payment by one co-debtor—Interrupts prescription in favour of the other—English Common Law—of Exchange Ordinance, No. 25 of 1927, s. 97 (3).

A payment by one of two joint-debtors on account of principal and interest takes the debt out of the Prescription Ordinance as against the other.

THE plaintiff sued the defendants to recover á sum of money as part capital and interest due on a promissory note made by the defendants jointly in favour of one Emmanuel Pillai and endorsed to the plaintiff for valuable consideration. The note was made on August 26, 1924. On December 10 the first defendant paid the plaintiff a sum of money in part payment of the principal and interest. The first defendant filed no answer and the plaintiff obtained judgment against him. The second defendant filed answer in which he pleaded that no payment had been made on the note and that the action was prescribed as against him. The learned District Judge held that a payment had been made and that it arrested prescription as against the second defendant.

P. Tiyagarajah, for second defendant, appellant.—The makers of the note are liable "jointly" (*Chalmers Bills of Exchange, 9th ed., p. 319*). Payment by the first defendant did not arrest the running of time against the appellant (*Chalmers Bills of Exchange, 9th ed., p. 349, 2 K. B. 933 (1918)*). The claim on the note is prescribed as against the appellant (section 13 of Ordinance No. 22 of 1871). This section is identical in terms with section 1 of the Statute of Frauds (Amendment) Act, 1828 (*9, Geo. IV. c. 14*). See the Mercantile Law Amendment Act, 1856 (*19 & 20, Vict. c. 97*), section 14. Although section 97 (3) of Ordinance No. 25 of 1927 repeals section 2 of Ordinance No. 5 of 1852, section 92 (2) of Ordinance No. 25 of 1927 restores the provisions of section 2 of Ordinance No. 5 of 1852. Section 92 (2) of Ordinance No. 25 of 1927 has been given as wide an interpretation as section 2 of Ordinance No. 5 of 1852 (see *Ponniah v. Kanagasabai*[1]). In any event section 98 (2) of Ordinance No. 25 of 1927 was not intended to repeal the law of prescription as regards payment by the joint-maker of a note.

L. A. Rajapakse (with him *H. N. G. Fernando*), for plaintiff, respondent.—The terms of section 98 (2) of Ordinance No. 25 of 1927 are clear. This introduces only the Common law of England and not the Statute law. At common law part-payment by a joint-contractor arrested prescription as against the other contractor (see *Lindley on Partnership, 9th ed., p. 337; Burleigh v. Stott*[2]; *(1871) 2 Doug. 652*).

[1] *35 N. L. R. 128.*

[2] *8 B. & C. 36.*

December 19, 1935. DALTON S.P.J—

In this action the plaintiff sought to recover the sum of Rs. 3,904.16, amount alleged to be due in local currency, for part of the capital of and interest on a promissory note for 2,000 dollars made by the first and second defendants jointly in favour of one P. Emmanuelpillai and endorsed to the plaintiff' for valuable consideration. The note was made at Ipoh, in the Federated Malay States, on August 26, 1924, and endorsed to the plaintiff a month later. On December 10, 1926, the first defendant paid the sum of 1,250 dollars to the plaintiff in part payment of the principal and interest. This action was commenced on December 2, 1932.

In this action the first defendant filed no answer and did not appear to defend the claim. The plaintiff accordingly obtained a decree against him in due course. The second defendant filed answer, in which he pleaded that no payment had been made on the note by the first defendant as alleged, and that in any event the note was prescribed as against him (the second defendant). Other defences were raised, which, for the purposes of this appeal, it is not necessary to state. The trial Judge found that the sum of 1,250 dollars was paid, as alleged by the plaintiff, and that that payment by the first defendant arrested prescription as against the second defendant, who was therefore liable for the amount claimed. From that decision the second defendant now appeals.

The only matter argued on the appeal is the question of prescription under the law in force in Ceylon. The period of prescription, under section 7 of the Prescription Ordinance, 1871, is six years. Did the payment on December 10, 1926, by the first defendant prevent the Ordinance from running in favour of the second defendant, his co-debtor?

To answer this question, it is necessary to ascertain what law is applicable.

By Ordinance No. 5 of 1852, which imported the law of England to Ceylon in certain matters, it was enacted by section 2 that in respect of all contracts and questions arising upon or relating to bills of exchange, promissory notes, and cheques, and in respect of all matters connected with any such instruments, the law to be administered shall be the same as would be administered in England in the like case at the corresponding period. This section, however, is repealed by section 97 (3) of the Bills of Exchange Ordinance, No. 25 of 1927. That Ordinance is based upon the English Bills of Exchange Act, 1882. Section 98 (2) of the Ordinance enacts that the rules of the Common law of England, including the law merchant, save in so far as they are inconsistent with the provisions of this Ordinance or any other Ordinance in force, shall apply to bills of exchange, promissory notes, and cheques. It will be noted how this section differs from the provisions of section 2, Ordinance No. 5 of 1852.

There is nothing in the Bills of Exchange Ordinance dealing with the effect on the benefits given by the Prescription Ordinance of an acknowledgment or part-payment by a joint-debtor, but counsel for the appellant

relies upon the proviso to section 13 of the Prescription Ordinance. Section 13 is taken from the Statute of Frauds Amendment Act, 1828, section 1 (*9 Geo. IV., c. 14*). That Act was amended by the Mercantile Law Amendment Act, 1856 (*19 & 20, Vict. c. 97*), by section 14 of which it was enacted that "when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally . . . . no such co-contractor or co-debtor . . . . . shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors . . . . ." The said enactments referred to are Statutes of Limitation, the earliest being the Limitation Act, 1623 (*21 Jac. 1., c. 16*).

There is no enactment in Ceylon bringing into force the provisions of the English Act of 1856, apart from the Ordinance No. 5 of 1852, which provided in section 2 that the law to be administered shall be the same as would be administered in England in the like case at the corresponding period. When that section was repealed in 1927, we were thrown back upon the Common law of England on this matter. Counsel for the appellant, however, asks us to read that Act into section 13 of the Prescription Ordinance.

Prior to this enactment in England in 1856, it would appear that as regards payment, the law on this subject, so far as this case is concerned, was that if one of serveral joint debtors paid any money on account of the principal and interest due from them all, the payment took the debt out of the Statutes of Limitation, not only against the debtor making the payment but as against all jointly liable with him. (See *Lindley on Partnership, 9th Ed., p. 337.*) This is also clearly laid down in several cases cited in the course of the argument. In *Burleigh and others v. Stott*[1] Lord Tenterdon C.J. in 1818 states "Suppose the note had been joint only, there could not have been any doubt that a part-payment by one of the joint promisors would . . . . operate as an admission by all the joint promisors that the note was unsatisfied, and therefore as a promise by all to pay the residue." The doctrine that payment by one co-debtor took the debt out of the Statute rested on the ground that in making the payment he acted for the others. In *Whitecomb v. Whiting*[2], which was an action on a joint and several note, executed by the defendant and three others, Lord Mansfield says, "The question, here, is only whether the action is barred by the Statute of Limitations . . . . Payment by one is payment for all, the one acting virtually as agent for the rest".

There is no Statute in England, prior to the Act of 1856, dealing with this particular matter, and the "old law" prior to that Act mentioned by the learned author of *Lindley on Partnership at p. 337*, to which I have referred above, would appear to be the Common law. The doctrine was certainly applied by the Common law Courts in England, as opposed to the Courts of Equity, and, in the absence of any provision in the Statute law until the amending Act of 1856, I think one is entitled to come to the conclusion that it was part of the Common law of England. It is the Common law of England on this question which is in force in Ceylon

[1] *8 B. & C. 36.*

[2] *(1781) 2 Douglas 652.*

since 1927, so far as bills of exchange, promissory notes and cheques are concerned, and therefore applying that law in this case, part-payment of the note by the first defendant operates as a payment to take the debt out of the Prescription Ordinance, as against his co-debtors, the second defendant, also, and therefore his plea of prescription must fail.

I should like here to call attention to the provisions of section 58 (2) of the Sale of Goods Ordinance, No. 11 of 1896, which, so far as contracts for the sale of goods are concerned, imports into Ceylon the rules of the "English law", save in so far as they are inconsistent with the provisions of that Ordinance. The English law there referred to is presumably the English law in force at the date of the Ordinance. If that is so, it follows that there is an anomaly in so far as the effect of part-payment by one joint co-debtor is concerned, since in the case of a contract governed by the Sale of Goods Ordinance the English law in force in 1896 applies, whilst in the case of bills of exchange, promissory notes and cheques, the English Common law applies. This may have been due to an oversight in drafting section 97 (3) when the Bills of Exchange Ordinance was enacted in 1927.

For the above reasons the judgment of the lower Court must be affirmed and the appeal dismissed with costs. No decree against the second defendant appears to have been drawn up and signed. That must be done. It seems to have been an oversight. Judgment was delivered against him on May 21, 1934. Thereafter on May 31 the plaintiff moved for a decree *nisi* as against the first defendant. This was allowed and the decree was signed, the absence of a decree against the second defendant being apparently overlooked.

MAARTENSZ J.—I agree.

Appeal dismissed.