1941 *Present :* **Soertsz and Hearne JJ.**

## PERERA *v.* PERERA *et al.*

*195—D.C. Chilaw, 11,273,*

*Prescription—Admission of debt by administrator in administrative proceedings—No acknowledgment of debt—Payment of debt by one co-debtor—No interruption of prescription against the others—Prescription Ordinance (Cap. 55), s. 12.*

**The admission of a debt by an administrator in administration proceedings does not amount to an acknowledgment as would serve to take the case out of the operation of the Prescription Ordinance.**

**Where on the death of a debtor each of the adiating heirs becomes liable for the debt *pro rata*, part payment of the debt by one such heir does not interrupt prescriptions as regards the others.**

APPEAL from a judgment of the District Judge of Chilaw.

*H. V. Perera, K.C.* (with him *J. R. Jayawardana* and *Dodwell Gunawardana*), for the plaintiff, appellant.

*N. E. Weerasooria, K.C.* (with him *H. Wanigatunga*), for the defendants, respondents.

*Cur. adv. vult.*

February 27, 1941. SOERTSZ J.—

The plaintiff-appellant brought this action to recover from the defendants-respondents a sum of Rs. 3,000 together with interest at 12 per centum per annum from July 7, 1938.

Her case was that she had lent one G. G. Perera a sum of Rs. 4,000 in the year 1938, that he had promised to repay to her this sum on demand with interest at the rate of 12 per centum per annum ; that he had paid her Rs. 1,000 out of the principal and all the interest due up to May 10, 1935, that is, up to the date of his death; that the defendants who are his brothers and sisters " have adiated his estate, and are now in possession of the property left by the said G. G. Perera ".

It is clear from the averments that the plaintiff bases the liability of the defendants to be sued for this debt on the fact that they are heirs in possession of the estate of the deceased debtor. The defendants while admitting that they are the only heirs of the deceased and that they have adiated his estate and are now in possession of it, put the plaintiff to the proof of the loan, and also plead that her claim is barred by the Prescription Ordinance.

In regard to the plea of prescription, the action was instituted on July 7, 1938, more than three years after the last payment of interest alleged to have been made by the debtor, but the plaintiff seeks to save her claim from the statute by virtue of certain payments which she alleged the third defendant made to her on account of interest—the last of these payments is said to have been made on November 21, 1936; and also by virtue of the fact that the first defendant who is the administrator of the estate of the deceased debtor, showed this debt as a liability of the estate in the administration proceedings.

The trial Judge found that G. G. Perera contracted a debt of Rs. 4,000 and later paid a sum of Rs. 1,000. But he was not satisfied with the

plaintiff's evidence regarding the payments of interest alleged to have been made by the debtor up to the date of his death. He had no doubt that the third defendant made the payments on the dates mentioned by the plaintiff, namely, July 24, 1935, August 29, 1935, September 24, 1935, and November 21, 1936.

On appeal, Counsel for the respondents submitted that the payments made were not on account of interest, but benefactions by the third defendant to a poor relation. Quite apart from the fact that this suggestion was not made in the Court below, the letters P 3 to P 6 are a complete refutation of that submission, and I have no hesitation in associating myself with the trial Judge so far as his findings on questions of fact are concerned.

On these findings, two questions arise for determination. Firstly, what is the effect of the fact that the first defendant, the administrator of the deceased's estate, showed a debt of Rs. 3,000 as due by the deceased? Secondly, what is the effect of payments made on account of interest by the third defendant? In regard to the first question, the facts are that on July 12, 1935, the first defendant as administrator swore an affidavit stating that the liabilities of the estate amounted to Rs. 3,000 "amount borrowed from Miss Justitia Perera of Madampe". Again in the declaration of November 25, 1935, made in compliance with the Estate Duty Ordinance, he showed, "Miss Justitia Perera creditor; the deceased the debtor; money borrowed Rs. 3,000", the description of the debt. Lastly in the final account submitted by him to the Court in July, 1936, he showed, "value of property left in the estate for distribution among the heirs subject to debts due by the estate, Rs. 3,189". Do these documents, or any of them, amount to such an acknowledgment as by virtue of section 12 of the Prescription Ordinance would serve to take the case out of the operation of the statute? They satisfy the conditions in section 12 to the extent that they are "made or contained by or in some writing signed by the party chargeable". But they are not effective to take this case out of the operation of the Ordinance inasmuch as they are not acknowledgments made to the creditor from which a promise to pay her can be inferred, but are merely admissions of the debt in proceedings for administration. See (*Re Wolmershansen 1890—62 Law Times 541*). It is well established that acknowledgments to be effective must be made to the creditor or to his or her agent, for they operate as a fresh contract, and a contract presupposes a promise. *Fuller v. Redan*[1]. An acknowledgment to a stranger is ineffectual. *Stamford Banking Co. v. Smith*[2]. A memorandum in the books of a company not communicated to the creditor is not sufficient. *Bush v. Martin*[3]. I therefore hold that the first question must be answered against the plaintiff.

In regard to the second question, it is to be observed that the first proviso of section 12 of the Prescription Ordinance says that nothing contained in section 12 "shall alter or lessen the effect of any payment of any principal or interest made by any person whatsoever". That means that acknowledgment by payment is put on a different footing from

[1] *(1895) 26 Beva. 614.*
[2] *(1892) 1 Q. B. 765 C. A.*
[3] *(1863) 2 H & C. 311.*

acknowledge in writing and that in order to answer this second question it is necessary first of all to determine the position in which the third defendant who made the payments on account of interest, stood in relation to the debt and in relation to the other debtors. When he made those payments was he the agent of the debtors as well?

On the authority of Pothier, it is clear that on the death of the debtor each of the adiating heirs became liable for the debt *pro rata*, and not in *solidum*. (See *Vol. I, Exan's Translation, pages 189—190*). From this it follows as pointed by Wessels in his *Law of Contract Vol. I, pp. 490, 505, and 506,* that "where each debtor is liable *pro rata* a co-debtor is not debarred from pleading prescription because it has been interrupted in the case of the other co-debtors" whereas when the debtors are liable in *solidum,* that is to say, are *correi debendi* "if the common creditor takes action against one co-debtor it will have the effect of interrupting prescription against them all . . . . and where an act operates *ad perpetuendam obligationem* it applies to all the joint debtors". Even if this question is examined on the basis of a co-ownership of the defendants of the estate left by the deceased, one co-owner is not an agent real or implied, of the others (*Lindley on partnership, 1934, page 48.*) The second proviso to section 12 of the Prescription Ordinance read in the light of the law as stated above leads to the conclusion that the plaintiff is entitled to succeed against the third defendant but fails against the other defendants.

The case of *Bacho Appu v. Ramblan*[1] has hardly any application in view of the facts of the case we are considering. In that case it was laid down that a stranger cannot bind a debtor or his estate by making a payment on account of the debt to the creditor. The payment in that instance, was made by a person professing to be the widow of the deceased debtor, but who, the evidence disclosed no more than his quondam mistress, and this Court held that payment by such a person, or even by the widow, would not bind the administrator of the estate of the deceased. The position would have been different if the payment in that case had been made by the real widow, and she had been sued as one of the heirs who had adiated the estate, for her share of the debt.

I set aside the judgment of the trial Judge and direct that decree be entered against the third defendant for Rs. 500 which is his liability on the principal amount of Rs. 3,000 that was due at the date of the death of the deceased—and coincidently, that appears to be the extent to which the third defendant has benefited from the estate of the deceased—together with interest thereon at twelve per cent. per annum from the date of action to the date of this decree, plus interest at the same rate on the same amount from the date of the death of the deceased to the date of the institution of this action; with interest at the same rate on the aggregate sum from the date of this decree to the date of payment less the sum of Rs. 120 admitted to have been paid. The third defendant will pay half the plaintiff's taxed costs here and below. The plaintiff's action and appeal against the other defendants are dismissed but, in all the circumstances, I make no order for costs as between them.

HEARNE J.—I agree.

*Judgment varied.*

[1] *14 N. L. R. 1.*