1958 *Present:* Basnayake, C.J., and de Silva, J.

SIRIPALA, Appellant, *and* MAGIE NONA, Respondent

S. C. 98—D. C. Nuwara Eliya, 3,983

Prescription Ordinance (Cap. 55)—Section 7—"Cause of action"—Loan of money—Action for recovery—Requirement of prior demand for repayment—Civil Procedure Code, s. 5—Death of debtor—Liability of administrator.

By section 7 of the Prescription Ordinance :—

"No action shall be maintainable for the recovery of any movable property, rent, or mesne profit, or for any money lent without written security, . . . or for money due upon an account stated, or upon any unwritten promise, contract, bargain, or agreement, unless such action shall be commenced within three years from the time after the cause of action shall have arisen."

Held, that the cause of action to sue for the recovery of a loan of money given without any agreement as to the time of repayment does not arise until the lender has asked the borrower for the return of the money and the borrower fails to repay the money within the time specified in the lender's demand. The expression "cause of action" is used in section 7 of the Prescription Ordinance in the sense in which it is defined in section 5 of the Civil Procedure Code.

Held further, that if the debtor dies intestate and no demand for the return of the money lent was made in his life-time, any demand from the administrator cannot be made before he receives letters of administration.

APPEAL from a judgment of the District Court, Nuwara Eliya.

H. V. Perera, Q.C., with *E. D. Cosme*, for Plaintiff-Appellant.

A. L. Jayasuriya, with *Norman Abeysinghe*, for Defendant-Respondent.

Cur. adv. vult.

March 19, 1958. BASNAYAKE, C.J.—

This is an action for the recovery of a sum of Rs. 18,196/55 from the administratrix of the estate of the deceased G. S. V. Piyatilleke. It would appear from the statement of account filed with the amended plaint that from January 1947 till April 1950 the plaintiff lent from time to time to the deceased, his brother, various sums of money and that after giving credit for the repayments made by the deceased from time to time there was due at the date of his death on 25th January 1951 a balance sum of Rs. 18,196/55. There is nothing in the pleadings or the submissions of counsel to show that the loans were repayable by a fixed date or that any interest was stipulated. The deceased appears to have made regular payments on account from time to time but as he borrowed more than he repaid the amount he owed continued to increase.

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The plaintiff alleges that after the death of his brother he demanded payment of the debt from the defendant-administratrix, his sister-in-law, and that she failed to comply with his demand.

The plaintiff's action has failed on the ground that his claim is prescribed, and that is the only question that arises for decision on this appeal.

The record of proceedings discloses that without framing any issues of law or fact as required by section 146 of the Civil Procedure Code and without taking any evidence the learned District Judge proceeded to hear counsel for the respective parties on the questions raised by them including the plea of prescription, and that he thereafter proceeded to deliver judgment.

The learned District Judge has failed to observe the provisions of section 146 of the Civil Procedure Code which requires the Court either to determine the issues suggested by the parties or if they are not agreed as to the issues to record the issues on which the right decision of the case appears to it to depend. The provisions of section 146 are imperative and should be observed in every action.

In regard to the plea of prescription the learned District Judge has taken the view that the plaintiff's cause of action arose on 27th April 1950, the date on which the last loan was given. As more than three years had elapsed on 19th October 1955, the date on which this action was instituted, he has held that the action is statute barred.

Before I discuss the submissions of learned counsel for the appellant I shall quote so much of section 7 of the Prescription Ordinance as is material. It reads—

> "No action shall be maintainable for the recovery of any movable property, rent, or mesne profit, or for any money lent without written security, . . . or for money due upon an account stated, or upon any unwritten promise, contract, bargain, or agreement, unless such action shall be commenced within three years from the time after the cause of action shall have arisen."

Learned counsel for the appellant submitted—

(*a*) that for a cause of action to arise there must be a default on the part of the debtor,

(*b*) that there can be no default unless the debtor

(i) fails to pay the loan on the agreed date, where there is a prior agreement as to the time of payment, or

(ii) where there is no such agreement, fails to pay the debt when demanded.

He further submitted that in the instant case there being no agreement as to the time of payment and no demand having been made from the debtor in his life-time the cause of action arose only on the default of the administratrix to pay the debt when demanded.

Loans of money without a fixed date for repayment were known to Roman-Dutch Law. Huber (Vol. I, pp. 484 & 488—Jurisprudence of My Time) refers to them as loans during the lender's pleasure. Such loans were not payable except upon demand and after the time stipulated in the demand. The lender had always to give a reasonable time in his demand for repayment having regard to the purpose for which the money was borrowed (Wessels' Law of Contract in South Africa, Vol. II, Sec. 2892, 2nd Edn. ; Maasdorp, Vol. III, p. 137, 4th Edn.).

The submissions of learned counsel are in my opinion sound. Under our law a loan of money becomes due and payable on the date agreed upon by the parties as the date for repayment. Where there is no such agreement a loan of money becomes due and payable after the lender has made demand. In this connexion it should be noted that our law differs from the English law in that in our law in the absence of an agreement to the contrary it is the duty of the creditor to seek out the debtor (Wessels, Vol. II, Sec. 2902, 2nd Edn. ; Van Leeuwen's Roman-Dutch Law, Kotze, 2nd Edn., Vol. II, p. 329).

The rule in the Digest 50. 17. 14 that in all obligations in which the time of payment is not inserted, the debt is due immediately, has not been accepted by Roman-Dutch writers as applying without modification to contracts of loan of money in which the terms of repayment are not stipulated. There will be no purpose in taking a loan of money if immediately it is given the lender has a right to recall it. In such contracts the lender ought to grant such time as is reasonable having regard to the purpose for which the money is borrowed.

The heading of the Title of the Digest in which the rule occurs is " *De Diversis Regulis Juris Antiqui* "—" Concerning Different Rules of Ancient Law " (Scott), and the rule itself is quoted as from Pomponius on Sabinus, Book V. I agree with the view taken by the Roman-Dutch writers and the Courts in South Africa (*Fluxman v. Brittain*[1] ; *Wellington Board of Executors Ltd. v. Schutex Industries (Pty) Ltd.*)[2] that the rule if applicable at all to contracts of loan of money, and I doubt that it does apply, cannot be applied without modification.

It would appear from the judgment of Tindall J.A. (p. 294) in the case I have mentioned first that where no term is specified for repayment, Pothier takes the view " that the lender ought to grant a time more or less long according to the circumstances, in the discretion of the Judge, for the restitution of the sum lent, and that the borrower has against the demand of the lender, if he sues him before this time, an exception by which he ought to obtain from the judge a delay for the payment."

It is sufficient for the purpose of this judgment to cite a passage from Voet on the topic of loans of money without stipulation as to time of repayment.

" Where no day has been assigned, it must be repaid not forthwith, but after the passage of a moderate time, so that in the meantime the borrower will have been able to enjoy at least some advantage out of the loan and the use of the money. The period will have to be fixed at the

[1] *1941 A. D. 273.* [2] *1952 (3) S. A. L. R. 170.*

discretion of the judge as each case arises. When a loan for use is granted without addition as to time, considerations of humane duty do not allow the use of the thing lent to be taken away untimeously. In the same way it would be unfair for a borrower for consumption, who ought to have the assistance of the kindness, as it were, of the lender, to be mocked, deceived and cheated by the sudden recall of the money paid over. It is quite true that in all obligations to which no time has been attached the debt is presently due. None the less we ought not on that account to take the view that humane feeling and also judicial discretion have been barred out. The result is that when a borrower is sued a moderate period of grace to suit the changing character of the transaction is vouchsafed either by the lender or by the judge. It follows that you would rightly apply to this case the famous saying of Paulus : 'Though law fails me, equity prompts such a conclusion'."

Voet Bk XII, Tit. I, Sec. 19,

Gane's Translation, Vol. 2, p. 772.

Now the cause of action to sue for the recovery of a loan given without any agreement as to the time of repayment does not arise until the lender has asked the borrower for the return of the money and he fails to repay the money within the time specified in the lender's demand. After the last day specified in the demand the lender may sue the borrower. The expression cause of action in my view is used in section 7 of the Prescription Ordinance in the sense in which it is defined in section 5 of the Civil Procedure Code. According to that definition in the case of a loan of money without any prior agreement as to the date of repayment the cause of action arises on the failure of the debtor to return the money on a demand being made and after the last day fixed in such demand. In the instant case the plaintiff states that he demanded the return of the money from the defendant after she received the letters of administration. Any demand made from the defendant before she received letters of administration should not be taken into account because she was under no legal obligation to repay the loan except *qua* administratrix, and he was not entitled to demand the repayment of the loan from her before she was appointed.

The learned District Judge was clearly wrong in holding that the cause of action arose on 27th April 1950, the date of the last loan. On the material before us we are unable to decide the issue of prescription as the date of the issue of letters of administration and the date and nature of the demand made by the plaintiff from the defendant administratrix are not on record.

We therefore set aside his judgment and decree with costs and send the case back for trial after issues have been determined.

The appellant is entitled to the costs of this appeal.

DE SILVA, J.—I agree.

Judgment set aside.