1943 *Present :* **Howard C.J. and Keuneman J.**

NADAR, Appellant, *and* FONSEKA, Respondent.

346—D. C. Chilaw, 11,687.

Agreement to pay money—Promise implied by terms of document—Acknowledgment of debt—Prescription Ordinance (Cap. 55) s. 6.

A document in which the defendant states that he has "borrowed and received in full from——, the sum of Rs. 275 of lawful money of Ceylon, having promised to pay interest at the rate of 15 per cent. per annum until the sum is paid in full" contains an implied promise to pay the sum borrowed and is a contract, agreement or bargain to pay money within the meaning of section 6 of the Prescription Ordinance.

[1] *43 N. L. R. 529.*

APPEAL from a judgment of the District Judge of Chilaw. The facts appear from the head-note and the argument.

N. Nadarajah, K.C. (with him *E. B. Wikremenayake*), for the plaintiff, appellant.—Document P 1 constitutes a contract in writing and the period of limitation is six years, under section 6 of the Prescription Ordinance (Cap. 55). There is a clear acknowledgment of debt and an implied promise to pay. See *Urban District Council, Matale v. Sellaiyah* [1], *Sonnadara v. Weerasinghe* [2], *Mohideen v. Bandara* [3], *Rodrigo v. Jinasena & Co.* [4]. The English authorities are all reviewed in *Spencer v. Hemmerde* [5].

H. V. Perera, K.C. (with him *Sam P. C. Fernando*), for the defendant, respondent.—The decision of the Divisional Bench in *Dawbarn v. Ryall* [6] is the basis for all later judgments. A written contract cannot be implied by way of an inference of fact. The question is whether a contract can be implied in law. A bare memorandum in writing is sufficient to make a written contract only where it was given in pursuance of a prior oral agreement. In the present case there was no such prior agreement.

A promise in writing must be contained in words of promise. There are no words of promise in P 1, nor is P 1 referable to any other document containing a promise. P 1 is nothing more than a record of a previous transaction, and the District Judge's analysis of it is correct.

N. Nadarajah, K.C., in reply.—There is no difference, in effect, between a promise by inference and a promise implied by law—*Caddick v. Skidmore* [7]; *Walter Pereira's Laws of Ceylon (1913) p. 620; Chitaley & Rao's Commentary on the Indian Civil Procedure Code, Vol. 2, p. 1736.*

Cur. adv. vult.

November 3, 1943. HOWARD C.J.—

In this case the plaintiff appeals from the decision of the District Judge of Chilaw dismissing his action with costs. The only question that arises for consideration is whether the document P 1 can be regarded as a written contract, agreement or bargain under which the defendant agreed to pay a sum of Rs. 275 with interest at 15 per cent. This document was made on April 1, 1936, in favour of one Soona Yana Isak Nadar, was endorsed on October 7, 1940, to the plaintiff, a younger brother of Nadar, and the action was commenced on August 15, 1941. The learned Judge held that P 1 was not an agreement falling within the provisions of section 6 of the Prescription Ordinance and the claim was therefore prescribed. In coming to this conclusion the learned Judge was influenced by the fact that P 1 did not contain a statement that the defendant promised to pay the sum of Rs. 275. In the body of the document the defendant states he has "borrowed and received in full from Soona Yana Isak Nadar the sum of Rs. 275 of lawful money of Ceylon, having promised to pay interest at the rate of 15 per cent. per annum until this sum is paid in full". In the margin it is stated as follows:—"Capital sum borrowed Rupees Two hundred and Seventy-five (Rs. 275)—No interest was deducted—Interest at the rate of fifteen (15) per centum per annum".

[1] *(1931) 33 N. L. R. 14.*
[2] *(1932) 1 C. L. W. 328.*
[3] *(1919) 6 C. W. R. 188.*
[4] *(1931) 32 N. L. R. 322.*
[5] *L. R. (1922) 2 A. C. 507.*
[6] *(1914) 17 N. L. R. 372.*
[7] *(1857) 44 E. R. 907 at 908.*

P 1 purports to be signed by the defendant in front of two witnesses. In his judgment the learned judge referred to the case of *Jinasena & Co. v. Rodrigo*[1] and sought to distinguish it from the present case by reason of the fact that the Statute of Frauds required that the agreement must state what the contract was and the documents D 3 and D 4 in that case contained all the elements of the contract reduced to writing. The learned Judge's attention does not seem to have been invited to the Full Bench case of *Dawbarn v. Ryall*[2], in which it was held that a claim for compensation for a deficiency of land purported to be sold by deed was founded on a written contract of sale and not prescribed within six years. Although the contract made no mention of compensation, it was held that a claim to the same was implied by law. In his judgment in this case Pereira J. stated that he failed to see the distinction that was sought to be drawn by respondent's Counsel between an express undertaking and one that is only implied by law from the terms of a contract. Ennis J. in his judgment also stated as follows :—

> "The terms of the contract in this case were evidenced by the written document, and anything implied by the written document is as much a part of that document as if separate words had been used."

The question, therefore, that arises for consideration is whether an undertaking to pay the sum borrowed, namely, Rs. 275, may be implied from the terms of P 1. Ennis J. seems to think that such implication may arise as a matter of law or as a question of fact. The words "until this sum is paid in full" that appear in P 1 in my opinion imply a promise to pay. I am also of opinion that P 1 is an acknowledgment of the borrowing of a sum of Rs. 275 and from that acknowledgment there arises an implied promise to pay as a matter of law. In this connection I would refer to the following passage that appears on page 620 of *Pereira's Laws of Ceylon* :—

> "From this contract which is unilateral arises an action to the lender or his heirs against the borrower or his heirs to return a like sum of money or quantity of the thing lent, and of the same quality, and this after the expiration of the time limited by the contract, or if no time has been fixed, then after a reasonable time to be determined by the Judge." (*V.d.L. 1.15.2.*)

The judgment of Lord Sumner in the House of Lords case of *Spencer v. Hemmerde*[3] contains a review of the authorities on the doctrine of acknowledgment. In the judgments of Their Lordships the law, as laid down in *Tanner v. Smart*[4] was accepted. In this connection I would refer to the following passage from Viscount Cave's judgment on page 513 :—

> "Since the case of *Tanner v. Smart* the law as there laid down has been uniformly accepted, and it must be held to be settled law (1) that a written promise to pay a debt given within six years before action is sufficient to take the case out of the operation of the statute of James I. ; (2) that such a promise is implied in a simple acknowledgment of the debt ; but (3) that where an acknowledgment is coupled with

[1] *32 N. L. R. 322.*
[2] *(1914) 17 N. L. R. 372.*
[3] *L. R. (1922) 2 A. C. 507.*
[4] *6 B. & C. 603.*

other expressions, such as a promise to pay at a future time or on a condition or an absolute refusal to pay, it is for the Court to say whether those other expressions are sufficient to qualify or negative the implied promise to pay. The decisions upon the Act are very numerous; but in every one of them the law has been assumed to be as above stated and the decision has turned upon the meaning of the particular words used in the case. It is therefore unnecessary to refer to the authorities in detail; but some statements of the principle by distinguished Judges may, I think, be usefully quoted."

It is useful also to refer to three other cases which were cited with approval by their Lordships. In *Smith v. Thorne*[1] Parke B. said:—

"There has been no question, since *Tanner v. Smart* that an acknowledgment of a debt must, in order to take it out of the operation of the Statute of Limitations, be sufficient to support the promise laid in the declaration, namely, to pay on request. By statute *9 Geo. 4, c. 14*, that acknowledgment must now be in writing; but it must still support a promise to pay on request, either by shewing, on the face of it, an unconditional promise to pay, or by the collateral fact of the performance of the condition, or the occurrence of the event, by which the promise is qualified. No doubt a mere acknowledgment of the existence of the debt (as, for instance, an I. O. U.), if unaccompanied by any expressions which control its effect, is sufficient to support an unconditional promise to pay."

In *Chasemore v. Turner*[2] Amphlett B. formulated the rule as follows:—

"The principle I take to be this: First of all, if there be an absolute unconditional acknowledgment of the debt, that is sufficient. If that stands alone, and nothing is said about payment, the acknowledgment of the debt would imply a promise in law to pay the debt. But if there is not only an acknowledgment of the debt, but a promise to pay the debt in words, we then have to look whether the promise to pay is an unqualified unconditional promise, or whether it is a conditional promise; and if it is a conditional promise to pay, and the condition is not performed, then the mere acknowledgment of the debt will not take the case out of the statute."

In *Green v. Humphreys*[3] Bowen L.J. said:—

"I regret that we have had to add one more to the cloud of cases which are collected around this particular point. The law has been clear for fifty years, and all the cases that have been reported since that time are merely illustrations of the way in which the Court applies the principle. It is clearly settled that to take a case out of the statute there must be an acknowledgment or a promise to pay, and that where there is a clear acknowledgment that the debt is due from the person giving that acknowledgment a promise to pay will be inferred. That was laid down by Lord Tenterden in *Tanner v. Smart* and the proposition, as Chief Baron Kelly said in *Quincey v. Sharpe*[4] has never been disputed, and it has been restated over and over again in all the

[1] *18 Q. B. 143.*
[2] *L. R. 10 Q. B. 500, 506.*
[3] *26 Ch. D. 479.*
[4] *(1876) 1 Ex. D. 72.*

Courts. Now, first of all, the acknowledgment must be clear in order to raise the implication of a promise to pay. An acknowledgment which is not clear will not raise that inference. Secondly, supposing there is an acknowledgment of a debt which would if it stood by itself be clear enough, still, if words are found combined with it which prevent the possibility of the implication of the promise to pay arising, then the acknowledgment is not clear within the meaning of the definition; because not merely is there found in the words something that expresses less than a promise to pay (which, as Lord Bramwell pointed out in *Lee v. Wilmot* ', will not necessarily put an end to the implication of the promise to pay), but because the words express the lesser in such a way as to exclude the greater."

In this case there is clearly an acknowledgment of the debt. It is an admission that there is a debt owing. This, in my opinion, is a fair construction of P 1, read by the light of the surrounding circumstances. This acknowledgment, therefore, raises the implication of a promise to pay. The only other point that remains for consideration is whether it is an unconditional promise to pay forthwith. Or is it a promise to pay only in the event of failure to make payments of interest? There is no doubt a promise to pay interest if the principal is not paid. But this express promise does not exclude the implied promise to pay the principal. The promise to pay the principal is therefore unconditional.

In my opinion the appeal succeeds. Judgment must be entered for the plaintiff as claimed together with costs in this Court and the District Court.

KEUNEMAN J.—I agree.

Appeal allowed.