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March 12
and 20

KAPOOR SAIBO v. MUDALIHAM I BAAS.

D. C., Kandy, 14,387.

Prescription—Claim on an account stated and acknowledged—Ordinance No. 22 of 1871, ss. 8 and 13—“ Acknowledgment or promise by words only ”—Evidence—Parol accounting.

An account stated may be settled orally; but an acknowledgment by words only is insufficient to prevent an action for money due upon an account stated and thus acknowledged being barred under section 9 of the Ordinance No. 22 of 1871.

The plaintiff and defendant having had dealings with each other up to 23rd August, 1897, the defendant orally acknowledged on 19th August, 1898, the account stated by plaintiff, which showed the debts of the defendant and occasional payments made by him in reduction of them. The account did not show mutual debts and mutual payments by way of set-off, and a conversion of the set-off into payments.

The plaintiff came into Court (with his claim for money due upon an account stated) on 1st February, 1901.

Held, that plaintiff could not maintain his action, because the acknowledgment of the defendant was a verbal one expressly declared insufficient by section 13 of the Ordinance No. 22 of 1871.

Ashby v. James (11 M. & W. 544), explained and distinguished, as also *Fernando v. Puncha* (1 S. C. R. 123).

THE plaintiff claimed from the defendant the sum of Rs. 229 on an account alleged to have been stated and acknowledged on 19th August, 1898, and Rs. 82.81 as the value of goods sold and delivered between 27th January and 5th March, 1900. The issues agreed to between the parties at the trial were:—

(1) Whether there was an accounting between the parties on 19th August, 1898;

(2) Whether a sum of Rs. 229.24 was then found to be due by defendant to plaintiff; and

(3) Whether the plaintiff thereafter sold and delivered goods to defendant as specified in the account filed with the plaintiff?

The District Judge delivered the following judgment:—

“ The plaintiff has sought to establish the accounting by parole evidence. That evidence cannot be accepted as proving the accounting. See *D. C., Kandy, 90,241* (5 S. C. C. 169), and *C. R., Kandy, 425* (1 S. C. R. 123). I therefore answer the first and second issues in the negative.

“ The rest of the claim is for goods sold and delivered between 27th January and 5th March, 1900. This action was instituted on 1st February, 1901. The items are all entered in order in the plaintiff’s daybook, a bound paper book. I see no reason to doubt the *bona fides* of that claim. The defendant made payments on

account aggregating Rs. 60 on the 27th January, 15th February, and 9th August, 1900. The balance due is Rs. 82.76.

“ I give the plaintiff judgment for Rs. 82.76, with interest thereon at the rate of 9 per cent. per annum from this date till payment, with costs of an action in the Court of Requests, and at the same time order him to pay to the defendant the amount of the costs which he has been made to incur by the action being brought in this Court.”

The plaintiff appealed. The case was argued on 12th March, 1903.

Van Langenberg, for appellant.

Bawa, for respondent.

Cur. adv. vult.

20th March, 1903. MONCREIFF, J.—

The following dates are material:—23rd August, 1897, last dealing between the parties on the old account; 19th August, 1898, alleged account stated; 27th January, 1900, first dealing on the new account; 1st February, 1901, action instituted.

The plaintiff sued for goods sold and delivered and on an account stated. For goods sold and delivered between 27th January and 5th March, 1900, he recovered Rs. 82.76. So far the Judge's decision may be accepted.

The rest of the claim was on an account stated for goods supplied on or before the 23rd August, 1897. If the claim had been put forward as for goods sold and delivered, it would have been prescribed, because the action was not instituted until the 1st February, 1901; but it is said to be taken out of the Ordinance by an account alleged to have been stated between the parties on the 19th August, 1898. If an account was so stated, this part of the claim would, it is said, fall within section 8 of the Prescription Ordinance, No. 22 of 1871, and could only be prescribed after a delay of three years. On the stating of an account a new and distinct cause of action arises; the plaintiff is said to be thus relieved from proof of the materials on which the account is stated; and in fact it is supposed that the consideration for the account is the setting off of liabilities on each side, and the relief from the necessity for retaining proof of them. The advantage of a definite agreement as to the sum due is sufficient consideration.

This account stated was oral. It is none the less an account stated, if proved. “ But,” says the defendant, “ the account stated, although good in law, cannot be used to defeat the terms of section 9 of the Prescription Ordinance. Even if I did owe the plaintiff money for goods sold and delivered, prescription has run, and it is

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not to be defeated by evidence of an oral acknowledgment or promise on my part." He urges that, by section 13 of the Ordinance—in any of the forms of action referred to in sections 6 to 12—no acknowledgment or promise by words only shall be deemed evidence of a new or continuing contract, whereby to take the case out of the operation of the enactments contained in the said sections or any of them, or to deprive any party of the benefit thereof, unless such acknowledgment shall be made or contained by or in some writing to be (?)* signed by the party chargeable, or some agent duly authorized to enter into such contract on his behalf.

If this claim is brought on a valid account stated, the plaintiff is not suing for goods sold and delivered, nor in a sense possibly upon any acknowledgment of liability for, or promise to pay for goods sold or delivered, nor upon a continuing contract. He is suing upon a new contract, upon a new cause of action which is independent of his liability to pay for goods sold and delivered. Now, this new contract is not to be proved by an "acknowledgment or promise by words only." That is admitted, it cannot be denied; but it is said that the "acknowledgment or promise" in the Ordinance refers to cases where there is only one side of the account.

It was admitted in *Highmore v. Primrose* (5 M. & W. 67), *Laycock v. Pickles* (4 B. & S. 506), and other cases, that an account showing one item might be an account stated; and it would seem to have been thought by some Judges that in such a case, and even when the debtor is given credit for payments on account, the account verbally stated is a promise or acknowledgment by words only within the Ordinance, although the case is different where cross items appear and are struck off until a balance is found. That seems to be the view of the authorities taken by Clarence, J., in *Fernando v. Puncha* (1 S. C. R. 123). See also *Fernando v. Apponsu Baas* (5 S. C. C. 169). It is flatly laid down in *Ashby v. James* (1843), 11 M. & W. 543, that Lord Tenterden's Act (9 Geo. 4. C. 14 S. 1) does not apply to the case of an account stated, where there are items on both sides. The words of our section are identical with those in Lord Tenterden's Act. No reason is given for this opinion, and I confess I find it difficult to say that on oral account stated upon cross-transactions is not a promise or acknowledgment within the terms of our Ordinance. It would appear however that, although in this case credit was given to the defendant for payments, there were no

* The words "to be" in the Ordinance seems to be a misprint for "duly."—ED.

cross-dealings between the parties. The matter therefore does not fall within the case contemplated in *Ashby v. James*. I agree with the District Judge, and think that the appeal should be dismissed with costs.

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J.

LAYARD, C.J.—

I agree. The plaintiff in this case seeks to evade the effect of section 13 of the Prescription Ordinance by alleging an oral agreement to pay a balance found to be due on the 19th August, 1898, as an account stated, giving a fresh cause of action arising on that date, and so enabling him to recover a debt admitted in that account stated, which arose more than a year before action brought.

Admitting that an account stated may be settled orally, and that an account stated gives rise to a distinct cause of action, it remains to be considered whether such an account stated as we have here is anything more than "an acknowledgment or promise by words only," such as by section 13 of our Ordinance adopted from a section of Lord Tenterden's Act, is expressly declared to be insufficient to prevent an action being statute barred.

Now, the only case cited to us in support of the contention that such an acknowledgment is not one within the meaning of the section is *Ashby v. James* (11 M. & W. 544). That however appears to me to be a totally different case from the present. There, there were mutual dealings and mutual debts, and a balance was struck of £12 9s. 6d. in the plaintiff's favour.

In this case the debt's were all on defendant's side; there were no mutual dealings, but the defendant's liabilities were reduced by occasional repayments up to 23rd August, 1897, and on the 19th August, 1898, a certain amount of debt was found to be outstanding. The *ratio decidendi* in *Ashby v. James* (per Alderson, B.) was that the striking of a balance, where there are mutual debts, amounts to a payment at such time of such debts, and so there is a part payment to keep alive the right to sue for a balance. That is quite intelligible, but it does not apply here. There is here no "conversion of the set-off into payments" as there is no real set-off, but only payments more than a year before by the defendant from time to time of what he owed, and a striking off of Rs. 155 owed by one Sayanhamy. It is really an account stated on one side only. I agree with the view of Clarence, J., in *Fernando v. Puncha* (1 S. C. R. 123). What happened on the 19th August, 1898, was a mere verbal acknowledgment expressly declared by section 13 of the Prescription Ordinance to be insufficient to prevent an action being statute barred, and this appeal consequently fails.