1905. November 15.

MANTHIRA NADAN *v.* KULANTHIVEL.

D. C., Colombo, 21,685.

Account stated—Cross accounts—Striking balance—Acknowledgment in writing—Prescription Ordinance (No. 22 of 1871), sections 8, 13, 15.

Where the plaintiff and the defendant had cross accounts and on a particular day the state of accounts between them was examined by them both in each other's presence, and a balance struck which the defendant admitted to be correct—

Held, that there was a "valid account stated" between the parties within the meaning of the Prescription Ordinance, notwithstanding the absence of any written acknowledgment on the part of the defendant.

Ashby v. James (11 M. and W. 542) followed.

THE facts and arguments appear in the judgment.

Bawa and *E. W. Perera*, for appellant.

Van Langenberg, A.S.-G., and *F. M. de Saram*, for respondent.

15th November, 1905. WOOD RENTON, J.—

In the present case the plaintiff-respondent, as administrator of one Muttu Nadar, sued the defendant-appellant for a sum of Rs. 566.65, being the balance of an alleged account stated between them for goods sold and delivered between the 30th June, 1895, and the 30th October, 1902. Two issues were framed raising respectively the questions of the sale and delivery of the goods and the stating of the accounts as the plaintiff alleged. We were informed by counsel for the defendant that the point as to whether the plaintiff's claim was barred by prescription (see "The Prescription Ordinance, 1871," sections 15, 8, 13) was argued in the court below. No reference, however, to the question of prescription appears in the record, and the learned District Judge decided the case in the plaintiff's favour simply on the ground that the evidence clearly established the fact of an account having been stated between the parties. In regard to that issue the material facts were these. The plaintiff alleged that there had been a course of transactions between his intestate and the defendant; that on the 30th October, 1902, the state of accounts between them was examined by them both in each other's presence; that the balance of Rs. 366.65 sued for in the action was struck; that the defendant acknowledged it to be correct; and that there were transactions of later date and similar character between them. These allegations were denied by the defendant, but the learned District Judge believed the plaintiff's story, and we accept his finding on that point as correct. We have satisfied ourselves by referring to the

books that the transactions between the parties were in the nature of mutual or cross accounts. Mr. Bawa, for the defendant, argued that even accepting the plaintiff's version of the facts as the true one, his claim was barred by prescription, inasmuch as the account stated had been settled orally, and it has been held by the Supreme Court of this Colony that such a parol accounting is insufficient to take a case out of section 13 of " The Prescription Ordinance, 1871," which recognizes only written acknowledgments of indebtedness as arresting the operation of that enactment (*Kappoor Saibo v. Mudalihami Baas* (1903), 6 *N. L. R.* 216). Mr. Bawa further relied on the English case of *Cottam v. Partridge* (1842) 4 M. and G. 271, in which it was held that an open account between two tradesmen for goods sold by each to the other, without any agreement that the goods delivered on the one side should be considered as payment for those delivered on the other, did not constitute such an accounting as would bring the case within the exception of the English Statute of Limitations (21 *Jac.* I. *C.* 16, *S.* 3) in regard to merchants' accounts. In the same case it was held that since Lord Tenterden's Act (9 *Geo. IV. c.* 64, *s.* 1) the existence of items within six years in an open account will not operate to take the previous account out of the Statute of Limitations. The same principle was laid down by the Supreme Court in the recent case of *Usuf Saile v. Punchi Menike* (1904), 1 Balasingham, 36. But in none of the cases—whether English or Colonial—that I have cited had there been any mutual dealings between the parties or had a balance been struck by consent on cross accounts between them. The effect of such a state of matters was, however, considered in England in the case of *Ashby v. James* (1842), 11 M. & W. 542. In that case there had been mutual accounts between the parties. A short time before the action the plaintiff and defendant met for the purpose of adjusting the accounts between them. On the plaintiff's demand being read, the defendant said it was correct, but claimed a set-off. His set-off was also investigated, and finally a balance was struck in favour of the plaintiff for a certain sum. It was contended on behalf of the defendant that his mere parol acknowledgment of the debt, by virtue of the express provision of Lord Tenterden's Act, that acknowledgments in order to be effective must be in writing, was insufficient to take the case out of the statute. The Court of Exchequer, however, overruled this contention and gave judgment for the plaintiff. It is obvious that the facts of this case bear the strongest analogy to those with which we have now to deal, and that the decision, if applicable in this Colony, will govern the present appeal. In both the Ceylon cases above-mentioned (*Kappoor Saibo v. Mudalihami Baas* and *Usoof Saile v. Punchi*

1905.
November 15.
WOOD RENTON, J.

Menike) it was assumed (see 6 *N. L. R.* 219 and 1 *Balasingham*, p. 38), that mutual accounts would stand in a different position from accounts which were all on one side, and Sir Charles Layard, C.J., expressly refers to *Ashby v. James* as embodying a " quite intelligible " principle where it applies.

We have now, however, apparently for the first time, to consider whether *Ashby v. James* ought to be followed in this Colony. I am of opinion that this question should be answered in the affirmative. I cannot see that the *ratio decidendi* in that case in any way depends on the English doctrine of consideration. Both Lord Abinger, C.B., and Baron Alderson treat the striking by mutual consent of a balance on cross accounts, as an appropriation by the parties of items on the one side to the satisfaction *pro tanto* of the account on the other side. It is true that Baron Rolfe speaks, in the terminology of English law, of a " new consideration " arising out of the transaction for a promise to pay the balance. It appears to me that this is only another way of stating, as was stated by Mr. Justice Moncreiff in *Kappoor Saibo v. Mudalihami Baas* (6 *N. L. R.*, 218), that if a claim for goods sold and delivered is based 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."

Mr. Bawa pressed us finally with a decision of Mr. Justice Moncreiff in a case (*Horsfall v. Martin* (1900), 4 *N. L. R.* 70) which came before him on appeal from the Court of Requests. It was there held that though money due for goods sold and delivered on three months' credit may be money due upon an unwritten promise, yet the action brought for the recovery of it falls under section 9 of " The Prescription Ordinance, 1871," and as such is prescribed within one year after the debt became due. I do not think that this decision can find any application here. If, as I hold, following the principles laid down in *Ashby v. James*, the striking by consent of a balance on mutual accounts creates a " valid account stated " within the meaning of the Prescription Ordinance, then, as Mr. Justice Moncreiff has himself pointed out in the passage quoted above, a claim for goods sold and delivered based on that account is no longer an action for goods sold and delivered. It is an action on an account stated, as to which the Legislature has fixed the prescriptive period at three years. The decision of the learned District Judge must, in my opinion, be affirmed.

GRENIER, J.—I entirely agree.