## UDUMA LEBBE *v.* SEYADIN MARIKKAR.

1902.
*January 28.*

*D. C., Puttalam, 1,333*

*Prescription—Mortgage bond by three debtors—Payment in part by two debtors—Right of action against third debtor.*

In the case of a joint and several mortgage bond, payments made by two out of three of the mortgages prevent prescription from running in favour of any of them.

ACTION instituted on 6th May, 1899, upon a mortgage bond dated 18th October, 1883. It was granted by three persons, Muttu Meera Nachia. Assen Meera Lebbe, and Seeni Umma. All three having died, in 1891, 1897, and 1886, respectively, their legal representatives were sued. The plaintiff alleged that in 1889 the first debtor paid Rs. 275, and the second debtor Rs. 250, on account of the debt due. It appeared that the third debtor, who had died in 1886, was the wife of the second debtor, and made no payment on account of the bond. The first and second defendants, who represented the first and second debtors, being absent, decree nisi was entered against them, and it was subsequently made absolute.

The third defendant, who represented the third debtor, appeared and urged that, as nothing had been recovered from the third debtor since 1883 by the plaintiff, the action against him was prescribed. The plaintiff contended that, as the lands given as security by each of the debtors was for the due payment of a joint and several debt, the lands of the third debtor included in the mortgage bond were liable to be sold, like the lands of the other two debtors, and he moved to be allowed to lead evidence that the payment made by the second debtor was on behalf of the third debtor.

The District Judge over-ruled these contentions and dismissed the action as against the third defendant.

Plaintiff appealed.

*Sampayo*, for appellant.—The bond sued upon is joint and several. The translation of the Tamil deed shows this to be so.

*H. Jayawardene*.—That translation is not correct. Counsel in the Court below cited *Rámanathán, 1876, p. 320*, in order to show that in the case of an obligation *in solidum*, payment by one debtor bars prescription in favour of the other debtors. The authority would not have been cited except for the contention that the translation before the Court was not correct. [BONSER, C.J.—The translation was not formally objected to in the Court below. We are bound by it.]

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*Sampayo.*—Mr. Justice Clarence withdrew the opinion he expressed in the case reported in *Ramanathan, 1876. p. 320.* That was in *Julis v. Mathes (7 S. C. C. 183).* Assuming that the debt is prescribed, the land mortgaged by the third debtor is still subject to the mortgage (*7 S. C. C. 183*).

*Jayawardene.*—That case does not apply to the present case. Here the three debtors mortgaged separately. The prescription pleaded by the third debtor is a bar to plaintiff's action against her.

28th January, 1902. BONSER, C.J.—

In this case three persons were sued in an action by the mortgagee to realize his security. The three defendants represented the three original mortgagors, and the present appellant was the only one of the defendants to appear at the trial. The District Judge held that the action was prescribed as against the appellant, although payments had been made by the other mortgagors. Inasmuch as the mortgage bond was a solid obligation, it was clear that, according to the Roman-Dutch Law, the payment by one of the mortgagors prevented prescription running in favour of any of them, and those payments have at all events kept the debt alive as against the hypothecated land. Therefore the District Judge was wrong in holding that the action could not be maintained against the appellant. It was suggested in the course of the argument that the bond was not a joint and several bond, but was merely a bond to which one of the parties was only liable for his aliquot share. But the translation which was filed in the case clearly shows that it was a joint and several bond. No objection was taken to the correctness of that translation in the Court below, although the proctors on both sides were Tamils, familiar with the language in which the mortgage was expressed, and it seems to us that we cannot, on the mere suggestion by counsel at this stage of the proceedings, entertain any such objection. We therefore think that the appeal must be allowed with costs.

WENDT, J., agreed.

H. C. COTTLE, ACTING GOVERNMENT PRINTSR, COLOMBO, CEYLON.