1915.

Present: Wood Renton C.J. and De Sampayo J.

AMERASEKERA *v.* AMERASEKERA.

222—D. C. Chilaw, 5,103.

Prescription—Defendant allowing plaintiff to occupy house in lieu of interest—Could agreement be proved in the absence of notarial instrument?

A lent B a sum of money in 1897. No interest was paid after 1900; but B allowed A to occupy a house of his (B's) at a rent which was to be paid by his being set off in full against the interest due on the loan. A brought this action in 1914.

Held, that the claim was not prescribed, and that proof of the agreement between A and B as to the house could be proved without a notarially executed instrument.

Mudianse v. Mudianse [1] commented upon.

THE facts are set out in the judgment.

Wadsworth, for the plaintiff, appellant.

Chitty, for the defendant, respondent.

December 17, 1915. WOOD RENTON C.J.—

The plaintiff sues the defendant as the administrator of the estate of his brother, Mr. J. C. Ameresekera, Mudaliyar, for the recovery of a sum of Rs. 1,250, with interest. The money was received by Mudaliyar Ameresekera in 1897 under circumstances which practically invested it with the character of a loan, and the interest payable was fixed at the rate of 15 per cent. The plaintiff alleges that the interest was duly paid until 1900. From that date onwards admittedly no payment was made. The present action was instituted on August 13, 1914, and if there were nothing more in the case, the plaintiff's claim would, of course, be prescribed, whether the debt arose upon a written or upon an unwritten promise. The case for the plaintiff, however, is that his cause of action was kept alive by an agreement on the part of his brother to allow him to occupy a house and garden belonging to him in Kurunegala, at a rent which was to be paid by its being set off in full against the interest due on the loan. The learned District Judge has held that the plaintiff has failed to establish the existence of this agreement, and that this action is, therefore, prescribed. Hence this appeal.

In my opinion the learned District Judge came to a wrong conclusion on this point. The evidence of the plaintiff as to the existence of the alleged agreement is strongly supported by the letter P 7 dated November 26, 1907, and sent by him to his brother. In that letter he says: "You, I am sure, remember what you said once when I spoke to you of the money and the interest I

[1] (1895) 2 *N. L. R.* 86.

ought to get, that your property here gives me more than sufficient to cover up the interest money I should receive."

The statements contained in this paragraph passed unchallenged by Mudaliyar Ameresekera. Had they been untrue, I should have expected him to have taken immediate exception to them. Moreover, the evidence shows that the rental of the Mudaliyar's house and garden in Kurunegala was practically the same in amount as the interest due upon the loan, and an arrangement between the two brothers that the one should be set off against the other was perfectly natural. The force of these observations is, to my mind, in no way weakened by the other passages in the letter P 7, on which the defendant's counsel relied, and in which the plaintiff speaks of his having "kept silence so long" in regard to the property and the money, and of the Mudaliyar's great kindness in allowing him to occupy the house and garden "free of rent." It is obvious from the whole tenor of the letter that he felt considerable delicacy in addressing the plaintiff on the subject at all, and was anxious to make its contents as palatable as possible. The defendant's counsel argued in the first place that there was no evidence of an agreement in writing such as would suffice to take the case out of the operation of the Prescription Ordinance, 1871.[1] and in the next place that, even if there was such an agreement, the period of prescription had commenced to run from 1907, or from a later date sufficient to bar the action. I am not prepared to accept the contention that there is no evidence for an express agreement in this case. The evidence of the plaintiff is to the contrary, and, as I have already said, it is supported by the correspondence. But even if the argument with which I am dealing were sound on the facts, it would, in my opinion, fail on the law. We have here to do, not with a fresh acknowledgment of indebtedness, but with the question whether there was not such a payment of interest as would keep the original debt alive. I see no reason why the existence of an agreement for payment may not be established by implication from the circumstances of a case. There is nothing in the case of *Mudianse v. Mudianse* [2] which compels us to hold that proof of an agreement of this character is barred by the absence of a notarially executed instrument. If the matter were *res integra*, I confess that I should be disposed to agree with the dissenting judgment of Lawrie A.C.J. in *Mudianse v. Mudianse*.[2] But the facts in that case were different from those now before us. The parol agreement there was one for possession of the mortgaged land, of a more or less permanent character, in lieu of the payment of interest. Here the occupation by the plaintiff of the Mudaliyar's property was to all intents and purposes on the basis of a monthly tenancy. I do not think that what happened in 1907 constituted any permanent interruption of the agreement between the plaintiff and his brother, that the rent and

[1] *No. 22 of 1871.*

[2] *(1895) 2 N. L. R. 86.*

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WOOD RENTON C.J.

Amerasekera v. Amerasekera

interest should extinguish each other. The plaintiff was in no way bound by the attitude assumed by his nephew Lionel, who was administering his mother's share of the property in community. The letter P 7 closes that branch of the correspondence. In that letter the plaintiff sets out and relies upon the agreement, and there is nothing to show that it was ever repudiated by Lionel, even if such a repudiation would have operated in the Mudaliyar's favour. In the latter correspondence Mr. Munasinghe, who was a relative, endeavoured to act as a mediator, and his intervention could not affect the plaintiff's strict claim in law. The last point on which it is necessary that a word should be said is the argument of the defendant's counsel that he should be allowed to prove that the plaintiff, by his occupation and perception of the profits of the Kurunegala property, has more than repaid himself the original debt. There is no issue on that point. The learned District Judge has dismissed a claim in reconvention set up by the defendant in his answer based on this very allegation, and there is no cross appeal from that portion of the judgment by the defendant.

On these grounds I would set aside the decree of the District Court, and direct judgment to be entered in the plaintiff's favour for the amount claimed in the plaint. The plaintiff is entitled to the costs of the action and of the appeal.

DE SAMPAYO J.—I agree.

Set aside.