1887.

HIRÁBÁI v. LAKSHMIBÁI.

Upon the whole we think that the widow Hirábái took a widow's estate in a moiety of the property, and that, subject to such estate, the entire property vested absolutely in Nathu. On the death, therefore, of Nathu the property (subject as aforesaid) vested in his widow as his heir for a widow's estate, and she became entitled to joint possession with the defendant Hirábái. We must, therefore, confirm the decree of the Court below with costs.

Decree confirmed.

Attorneys for the appellant:—Messrs. *Little, Smith, Frere, and Nicholson.*

Attorneys for the respondent:—Messrs. *Payne, Gilbert, and Sayáni.*

ORIGINAL CIVIL.

Before Mr. Justice Jardine; and, on Appeal, before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran.

1887. *May* 6.

WATSON, (ORIGINAL PLAINTIFF), APPELLANT, *v.* YATES, (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation—Limitation Act XV of 1877, *Sec.* 19—*Acknowledgment after period of limitation has expired—Promise to pay—Conditional promise to pay barred debt—Contract Act IX of* 1872, *Sec.* 25.

Where the defendant, after his debt had become barred by limitation, wrote as follows to his creditor in reply to a demand for payment:—"I bear the matter in mind, and will do my utmost to repay this money as soon as I possibly can,"

Held, that this promise by the defendant was only a conditional promise, *viz.*, to pay when he was able; and the plaintiff having failed to prove the defendant's ability to pay, the promise did not operate, and the plaintiff could not recover.

SUIT for Rs. 2,177-1-0. The plaint stated that at and subsequently to the 23rd January, 1879, the plaintiff lent money to the defendant in divers sums and at different times, amounting, with interest thereon, to the said sum of Rs. 2,177-1-0 on the 15th June, 1886; and that no payment had been made by the defendant, except a sum of Rs. 54 paid on the 17th June, 1879.

* Suit No. 489 of 1886.

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The defendant denied the correctness of the account annexed by the plaintiff to the plaint; and, as to the whole of the plaintiff's claim, he pleaded limitation.

In answer to the defendant's plea of limitation the plaintiff relied on the following correspondence :—

"*Bombay, 3rd February 1885.*

"FRANK YATES, Esquire.

"Dear Sir,

"We have been waiting a long time for your account with us.

"Mr. Watson, who is now in charge of this office, would ask you to remember that he lent you the money which you promised to repay in fourteen days, and that you would look upon it as a debt of honour, but up to this time you have not repaid the money. Mr. Watson would request you to call and see him with regard to this matter, as he does not wish to think that you would willingly treat such a transaction with indifference, and decline to adjust it.

"Awaiting your attention to this letter, &c., &c.

W. WATSON & Co."

In reply to this letter the defendant wrote as follows :—

"*Bombay, 14th February 1885.*

"Messrs. W. WATSON & Co.

"Dear Sirs,

"With reference to your letter of the 3rd instant, I write to say that I have to regret that my account to you has not been paid as yet; but I would assure you that I bear the matter in mind, and will do my utmost to repay this money as soon as I possibly can.

Yours faithfully,

FRANK YATES."

Some evidence was given, at the hearing, of the pecuniary circumstances of the defendant. It appeared that he was in receipt of Rs. 1,000 a month, but half his income was under attachment.

Lang for the plaintiff.

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WATSON v. YATES.

Anderson for the defendant:—From the account annexed to the plaint it appears that the last advance made to the defendant was on July 14th, 1879. All the later items consist of interest and postage charged to the defendant. The plaintiff's claim, therefore, became barred in July, 1882. The defendant's letter of the 14th February, 1885, was too late as an acknowledgment (see section 19 of the Limitation Act XV of 1877), not having been given within three years. Nor is it such a promise as will amount to a contract under clause 3 of section 25 of the Contract Act IX of 1872—*Tanner* v. *Smart*(1); *Philips* v. *Philips*(2); *In re River Steamer Company*; *Mitchell's Claim*(3); *Maccord* v. *Osborne*(4); *Edmunds* v. *Downes*(5).

JARDINE, J.:—The present case is similar to the cases of *Tanner* v. *Smart*(6) and *Edmunds* v. *Downes*(7). The promise made by the defendant in his letter was only conditional, and it has not been proved that he is able to pay. Section 25, clause 3 of the Contract Act (IX of 1872) does not, therefore, avail to bar limitation, and I dismiss the suit with costs.

The plaintiff appealed.

Lang and *Russell* for the appellant.

Robertson for the respondent.

In addition to the cases above mentioned, *Chasemore* v. *Turner*(8), *Quincey* v. *Sharpe*(9) and *Skeet* v. *Lindsay*(10) were cited.

SARGENT, C. J.:—We think the decree of the lower Court must be affirmed. In *Chasemore* v. *Turner*(11), Coleridge, C. J., cites the following passage from the judgment in *Philips* v. *Philips*(12), which explains the English law applicable to cases of this nature:—

"The legal effect of an acknowledgment of a debt barred by the Statute of Limitations is that of a promise to pay the old debt, and for this the old debt is a consideration in law. In that sense, and for that purpose, the old debt may be said to be

(1) 6 B. & Cr., 603.
(2) 3 Hare, 281.
(3) 6 Ch. Ap., 822.
(4) 1 C. P. D., 568.
(5) 2 Cr. & M., 459.
(6) 6 B. & Cr., 603.
(7) 2 Cr. & M., 459.
(8) L. R., 10 Q. B., 500.
(9) 1 Ex. Div., 72.
(10) 2 Ex. Div., 314.
(11) L. R., 10 Q. B., at p. 505.
(12) 3 Hare at pp. 299 300.

revived. It is revived as a consideration for the new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it; for which promise the old debt is a sufficient consideration. But, if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him."

In the present case the plaintiff relies upon the defendant's letter of the 14th February, 1885. That letter, no doubt, contains a promise to pay the debt due by him to the plaintiff, but the promise is conditional. The defendant says: "I would assure you that I bear the matter in mind, and will do my utmost to repay this money as soon as I possibly can."

In other words, it is a promise to pay when he is able. It was for the plaintiff to show that the defendant was able, but he has failed to prove that fact. The conditions, therefore, under which the promise was intended to operate, do not exist, and the defendant cannot be held bound.

We dismiss the appeal with costs.

Decree confirmed.

Attorney for the appellant:—Mr. *T. H. Pearse.*

Attorneys for the respondent:—Messrs. *Chalk, Walker, and Smetham.*