1871.
Collector of Ratnágiri v. Vyankatráv N. Sarve.

which belong to them as well as to himself. If there be such a custom, it lay upon the Collector to adduce evidence of it; and as he has failed to do so, and has not shown that the plaintiff has cut more timber than he was entitled to cut, we have no choice but to confirm the Judge's decree. The plaintiff has not appealed against Mr. Lyon's order, disallowing one-half of his claim; and it is not, therefore, necessary for us to express any opinion as to the propriety of that portion of Mr. Lyon's decree.

The case has been very imperfectly put forward on behalf of Government in the court below; and our present decision which is given under peculiar circumstances, must be held to be limited to the particular case before us, and not to prejudice the right of Government, in any similar case which may hereafter arise, to give evidence on the points upon which, in the present case, Government has failed to shed any light.

Jan. 17.

Special Appeal No. 457. *of* 1870.

MULCHAND GULÁBCHAND... ... ...*Appellant*
GIRDHAR MÁDHAV *et al.*, sons & heirs of MÁDHAV GHELLÁ, deceased ... ...*Respondents.*

Limiation—Account stated.

Although to make an account a stated account it is not necessary that it should be signed, yet, unless it is signed by the debtor, the intention and effect of Sec. 4 of Act XIV. of 1859 is to prevent it being made the foundation of an action to recover a debt which would otherwise be barred by that Act.

Where there has been a running account between the plaintiff and the defendant, consisting of advances made by the former, and part-payments by the latter, the plaintiff is entitled to recover only in respect of advances made by him within three years preceding the institution of his suit, but he has a right to appropriate any payments made within that time to the reduction of the general balance, even though the recovery of such balance may be barred by time.

THIS was a special appeal from the decision of E. T. Candy, Acting Assistant Judge at Ahmedábád in Appeal Suit No, 593 of 1869, confirming the decree of the Subordinate

1871.
Mulchand Gulabchand v. Girdhar Mádhav et al.

Judge of Dholká in Original Suit No. 165 of 1869. The appeal was argued before MELVILL and KEMBALL, JJ.

Nanabhai Haridas for the special appellant.

Nagindas Tulsidas for the special respondent.

The facts sufficiently appear from the following judgment:—

MELVILL, J.:—In this case the appellant has sued to recover from the respondents the amount due on a running account between himself and the deceased respondent, Mádhav Ghellá, which extends over several years.

The account shows a series of advances by the appellant, and part-payments by the deceased respondent, the balance being throughout in favour of the appellant.

Under the law of limitation in force in this country, a part-payment of a debt has ordinarily no effect in taking a case out of the operation of the statute. Unless, therefore there exist some other special ground for extending the period allowed by the statute, we must hold that the cause of action in regard to each advance arose on the date of such advance, and that those advances only are recoverable which were made within three years immediately preceding the institution of the suit.

It has been argued that such special ground exists in the circumstance that there was a settlement of accounts between the parties at the end of the year Samvat 1823.

The nature of this settlement is very vaguely stated; but, at the most, all that occurred was that a balance was struck in the deceased respondent's presence, and was verbally admitted by him to be correct.

Now, although it is undoubtedly true that in order to make an account a stated account it is not necessary that it should be signed by the parties, yet we think that, unless it is signed by the debtor, the intention and effect of Sec. 4 of Act XIV. of 1859 is to prevent it being made the foundation of an action to recover a debt which would otherwise be

1871.

Mulchand Gulabchand v. Girdhar Madhav *et al.*

barred by that Act. An account stated is nothing more than the admission of a debt, and though, for other purposes, it may be immaterial whether the admission has been made by words or in writing, yet the law expressly provides that a time-barred debt shall not be recoverable by virtue of an admission unless such admission has taken the form of an acknowledgment in writing signed by the debtor.

We have been referred to the case of *Umedchand Hukamchand et al.* v. *Sha Bulakidas Lalchand et al.* (*a*) as being opposed to the view which we have expressed; but we do not see that it is so. In that case it was held that an account stated involves an implied contract to pay the balance due, and that the period of limitation applicable to such implied contract is six years, and not three years as would be the case if there had been an express contract to pay. This is not the question in the present case. It is immaterial to the appellant whether he be allowed six years or three years from the date of settlement of accounts; in either case his claim would be within the limit. But the question is whether he is to be allowed any extra time at all on account of the settlement of accounts. It has been admitted that if an account stated be regarded merely as an admission of a debt, Sec. 4 of Act XIV. of 1859 prevents the appellant from availing himself of it. But the case set up is that the appellant does not seek to avail himself of the admission as a means of extending the period limitation applicable to the original debt, but that her claims upon the new contract which arises by implication out of the admission. This argument might be equally well applied to the case of every admission of a debt, of whatever description; and Sec. 4 would be absolutely inoperative. An admission of a debt doubtless implies a promise in law to pay it; but an admission not made in the manner which the law prescribes for the purpose of preventing a debt from becoming barred by time does not at all imply a promise to pay such debt, if it should become barred by time.

(*a*) 5 Bom. H. C. Rep., O. C. J. 16.

We do not, of course, say that in such cases a new period of limitation would not arise if there were a new and distinct contract to pay the sum found to be due on the settlement of accounts. But it would be necessary to prove an express contract of this kind; and it would not be sufficient to infer such a contract, as implied by the debtor's admission of the correctness of the balance.

We are of opinion that the Assistant Judge was right in holding that the appellant could only recover in respect of the advances made within three years before the institution of the suit. But, on the other hand, we think that he was in error in setting off against these advances all payments made by the deceased respondent during the same three years. These payments were made in reduction of the general balance standing against the deceased respondent on the date of each payment, and the appellant has a right to appropriate them to the reduction of such balance, even though the recovery of the balance due at a particular date may be barred by time. An account must be taken on the principle that the appellant is entitled to recover in respect of all advances made by him between the 29th of January 1866 and the 29th of January 1869, and the respondent are entitled to set off only so much (if any) of the payments made during the same period as may be in excess of the balance standing against the deceased respondent on the 29th of January 1866.

We should have taken this account ourselves if we had been able to dispose of the case; but this we cannot do, as there is a question as to the liability of the different respondents which has not been gone into; and we, therefore, remand the case in order that an account may be taken according to the principle which we have laid down, and that the liability of the different respondents may be determined.

KEMBALL, J., concurred.

MELVILL, J., subsequently added the following observations:—

Since delivering judgment in this case, my attention has

1871.

Mulchand Gulabchand v. Girdhar Madhav *et al.*

been directed to the case of *Ashby* v. *James*, 11 M. & W, 542. In that case it was decided that where A has an account against B, some of the items of which are more than six years old, and B has a cross-account against A, and they meet and go through both accounts, and a balance is struck in A's favour, such settlement of account takes the case out of the statute of limitation. If the judgment in that case is (as Tindal, C. J., held it to be in *Clark* v. *Alexander*, 8 Scott N. R. 165) bes supported on the ground suggested by Alderson, B., "that the going through the account with items on both sides' and striking a balance, converts the *set-off* into *payments*," then it has no application to the case before us, for under Act XIV. of 1859 a part-payment of a debt does not take a case out of the statute, though I am happy to say that, on the recommendation of the Chief Justice of this court, a provision to that effect has been inserted in the Limitation Act just passed. But the decision in *Ashby* v. *James* rests on another ground, namely, that a settlement of account under such circumstances as existed in that case is as Rolfe, B., said, "a transaction between the parties out of which a new consideration arises for a promise to pay the balance." But in that case there were mutual accounts and cross-demands, and the settlement of account was an agreement that the debts due to the defendant should be set off against the debts due to the plaintiff, and the balance be paid by the defendant. That is a different cases from the one before us, in which there were no mutual transactions, and nothing of the nature of a set-off, but only the plaintiffs accounts showing a debt due, and payments from time to time made by the defendant. The distinction is stated in Leake on Contracts, p. 70: "An account stated respecting a debt, which has not accrued due within six years of the action brought for its recovery, must be in writing, signed by the party chargeable thereby, under Lord Tenterden's Act, 6 Geo. IV., c. 14, s, 1, which requires the acknowledgment of debt to be made in that from in order to take the debt out of the statute of limitations. But where an account is stated respecting debts on both sides, and it is agreed that the cross demands shall

be set off and a balance stated, it is no objection to such account that some of the earlier items were barred by the statute of limitations, and that there is no valid acknowledgment within Lord Tenterden's Act, because the agreement to set off operates as payment of the items to which it applies: *Ashbey* v. *James*, 11 M. & W. 542; *Clark* v *Alexander* (8 Scott N. R. 147, 166)."

I may remark that my judgment is in accordance with the decisions of all the other High Courts: *Doyle* v. *Allum Biswas*, 4 W. R. (S. C.) 1, followed by the Full Bench of the Ágrá High Court in *Kunbia Lall* v. *Bunsee*, 1 Ágrá F. B. 94; *Subbarama* v. *Eastulu Muttusami*, 3 Mad. 378. The reports of all these cases show that *Ashbey* v. *James*, was relied on by the defendants, and considered by the Courts

Special Appeal No 124 * *of* 1870.

January 19.

DULIÁ KÁSAM.....*Appellant.*

ABRÁMJI SÁLE.....*Respondent*

Revenue Survey Act—Right of Tenant to hold Land upon payment of reasonable Assessment—Usage—Special Contract varying Usage.

Sec. 36 of Bombay Act I. of 1865 applies only to lands to which a revenue survey has been extended under that Act.

Prior to the passing of the above Act, by usage having the force of law, Government was unable to eject an ordinary tenant of land so long as the latter was willing to pay the reasonable assessment upon the land occupied by him.

This usage might be limited or varied by special contract, *e g*, by the terms of a lease inconsistent with it.

THIS was a special appeal from the decision of C. G Kemball, District Judge of Surat, in Appeal Suit No. 199 of 1869, confirming the decree of the Second Class Subordinate Judge of Olpár.

The plaintiff (and respondent), Abrámji Sále, sued to recover possession from the defendant of 10 *bighas* 17 *pans* and 5 *kathas* of land situate in the *bhagdari* village of Adajan,

* S. A. Nos. 125 and 126 were dependent upon, and governed by, the judgment in this case.