Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Gopeekishen Goshamee v. *Brindabunchunder Sircar Chowdhry and Sreeschunder Sircar Chowdhry, from the High Court of Judicature at Calcutta; delivered the* 12*th of July*, 1869.

Present:

MASTER OF THE ROLLS.
SIR JAMES W. COLVILE.
JUDGE OF THE ADMIRALTY COURT.
SIR JOSEPH NAPIER.

SIR LAWRENCE PEEL.

THE material questions in this case are, first, whether the Kurarnamah on which the suit is based was executed for the consideration, and by and to the parties alleged in the Plaint; and secondly, whether the Complainant has brought his case within the exception in the law of limitation, which prohibits the hearing and determining the merits, if the cause of action shall have arisen twelve years before the commencement of the suit, "unless the Complainant can show by clear and positive proof that he had demanded the money or matter in question, and that the Defendant had admitted the truth of the demand, or promised to pay the money, &c."

In addition to the reasons set forth in the Judgment of Mr. Justice Bayley, in support of his opinion that the Kurarnamah was executed as alleged in the Plaint, their Lordships think it proper to observe that no evidence has been offered, in order to disprove the handwriting of the parties by whom the Kurarnamah purports to have been

executed, or of the attesting witnesses thereto. Instead of giving or producing any such evidence, the principal Defendant has confined himself to the surmises and arguments of his pleader in his answer to the Plaint.

Their Lordships are of opinion that the first question should be answered in the affirmative. Taking it then as established by the evidence that the Kurarnamah was executed by the principal Defendant and his father as alleged, it is next to be considered whether the defence of the law of limitation has been met by proof of demand and admission, sufficient to bring the case within the exception in this law.

The action, though in form a claim of the entire sum secured to the Plaintiff and his brother (Gungapershad) by the Kurarnamah, with interest thereon, is in effect for the Plaintiff's moiety. Gungapershad does not make any claim on his own behalf for the other moiety; he refused to join as co-Plaintiff, and was made a Defendant *pro formâ*, for the reasons alleged in the Plaint, but he has not filed any answer thereto. He was, however, examined as a witness.

It is clear upon his evidence that, between the years 1847 and 1857, he received from the principal Defendant upwards of 12,500 rupees on account of a larger claim; and he does not bring forward evidence of any claim which he then had against this Defendant, other than for his share of the debt which was secured by the Kurarnamah to himself and his brother jointly. These payments were made after the death of the father of the principal Defendant, who, with the principal Defendant, had executed the Kurarnamah. There is adequate proof that after these payments were made to Gungapershad, the principal Defendant tried to induce the Plaintiff to settle the claim for his moiety upon terms such as those which Gungapershad was alleged to have accepted, but that the Plaintiff insisted on payment in full.

Their Lordships are satisfied upon the evidence that the payments made to Gungapershad were, on account of his moiety of the joint claim, under the Kurarnamah; and that the offers made to the Plaintiff related to his claim to the other moiety. No other claim is proved, or could be presumed,

to which these payments and offers were appropriate. (Mandertson *v.* Robertson and another, 4 Man. and Ryl. 440.)

These offers were made not to buy off vexatious or doubtful litigation, but to settle a claim secured by an obligation, which fixed its amount.

Their Lordships consider that upon the true construction of the law of limitation applicable to this case, and in order to bring the case within the exception, it was sufficient for the Plaintiff to show, by "clear and positive proof," that within the prescribed period he asserted his claim to what was secured to him by the Kurarnamah, and that the Defendant admitted this claim to be as of right. It was not necessary that a precise sum should have been mentioned by either party; or that a promise to pay should have been made by the Defendant.

"Clear and positive proof" is such as, upon the case made, leaves no reasonable doubt as to the matter required to be proved, the truth of which it establishes to a moral certainty; and it is by the combined effect of the whole evidence that we have to judge whether the proof is "clear and positive."

It was contended that there is no proof that a demand of the amount of debt in dispute was specifically made by the Plaintiff; or that the Defendant admitted the truth of such a demand, or promised to pay it: that as to the admissions of indebtedness, there is some doubt whether any of them were made to the Plaintiff himself; and that there was not any which amounted to a promise to pay the debt due under the Kurarnamah, or to an acknowledgment of any specific sum; that they were but attempts at a compromise, which failed.

The authorities which have been mainly relied on, in order to show that there has not been a sufficient acknowledgment within the period of limitation in the present case, were cases of actions on promises, decided on the statutes of 21 Jac. I, and 9 Geo. IV, cap. 14. The principle of these decisions is not applicable to a case like the present. They depend not upon the effect of an exception in the statute, but upon the principles of the common law with respect to the cause of action. The issue joined, made it incumbent on the Plaintiff to prove a promise made within six years, and such as to agree with that laid in the Declaration. In such cases,

acknowledgments, whether by words or acts, are of no avail, save so far as they sustain the promise alleged; there is no exception within which they come; and these cases are to be regarded simply as actions brought on promises made within six years. But the cases in which acknowledgments are operative by way of exception, are of a different character. In these, the action must be maintained on the original security; and an acknowledgment within the prescribed period of limitation, shows that the obligation was then subsisting and unsatisfied; a promise to pay is not required.

It has therefore been decided that in an acknowledgment within the 3 & 4 Wm. IV, cap. 27, sec. 40, it is not necessary that the amount of the debt should be specified, nor a promise made to pay it.—(Carroll *v.* Darcy, 10 Ir. Eq. Rep. 329.) It has also been held that an admission of a bond debt contained in the answer of the executors of the obligor, although in a suit to which the obligee was not a party, was sufficient to take the case out of the operation of 3 & 4 Wm. IV, c. 42 (Moodie *v.* Bannister, 4 Drewr., 432).

It is one thing to acknowledge a debt and another to promise to pay it, and this distinction is recognized by the terms of the law relied on by the Defendant. The decisions on the sufficiency of acknowledgments within the exceptions in recent Statutes of Limitation, have (as Sir Edward Sugden has observed) "proceeded on a liberal but yet a fair and just construction of these Statutes" (Blair *v.* Nugent, 3 Jo. and Lat. 677).

Giving a like construction to the law of limitation that applies to the present case, their Lordships are satisfied that all that is required to be shown to bring the case of the Plaintiff within the exception, has been shown sufficiently. If the conclusions at which they have arrived upon the material facts of the case needed confirmation, they are fortified by the omission of the principal Defendant to tender himself as a witness in support of his defence in a case, the circumstances of which were all within his own knowledge; and by the unsatisfactory character of the evidence given by Gungapershad, who has kept back (evidently from hostility to the Appellant) the books which he ought to have produced. Such a course suggests the natural inference, that the

evidence which has not been produced, was felt to be adverse, and subjects the parties who take such a course, to the construction that is least favourable to the views and interests which they seek to support by imperfect or inferior evidence.

Their Lordships will therefore humbly advise Her Majesty that the Appeal should be allowed; that the Judgment of the High Court at Bengal, and the Judgment affirmed thereby, should be reversed and set aside; and that the Appellant should have Judgment for his moiety, with interest at the full legal rate and costs. He must also have the costs of this Appeal.

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