LEGAL DECISIONS AFFECTING BANKERS IN INDIA

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(1920-1947)

By
P. S. SITARAM

WITH A FOREWORD BY
C. R. TREVOR

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To

Sir Chintaman D. Deshmukh, C.I.E.,
Governor, Reserve Bank of India.
This Book is By Kind Permission
Respectfully Dedicated

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FOREWORD

MR. P. S. SITARAM, M.A., M.L., C.A.I.I.B., deserves to be congratulated on his work of editing important legal decisions affecting bankers in India from 1920–1947. I have read with interest some of these decisions as they appeared from time to time in the *Journal of the Indian Institute of Bankers*, Bombay. The decisions deal with the legal aspect of some practical problems that arise in the day to day business of a bank and a knowledge of the decisions would prove useful to practical bankers and enable them to conduct their business on legally sound lines. The book has been edited in a methodical manner and the subjects have been dealt with in alphabetical order for the purpose of convenient reference. The book is, I believe, the first of its kind in India and I have no doubt that it would prove to be a useful addition to the literature on banking law and practice in India.

C. R. TREVOR.

RESERVE BANK OF INDIA,
CENTRAL OFFICE, BOMBAY,
Dated the 28th February, 1947.

EDITOR'S NOTE

SINCE I joined the service of the Reserve Bank of India as Legal Assistant in 1941, I have been frequently contributing to the *Journal of the Indian Institute of Bankers*, Bombay, on the subject of legal decisions affecting bankers. These decisions of the various High Courts in India and the Privy Council are reported in full in law reports and law journals and with a view to spread the knowledge of these decisions amongst bankers in this country, I have been editing and reporting them in the *Journal of the Indian Institute of Bankers* for the benefit of its readers. Some of the decisions edited in this volume have already appeared from time to time in the pages of the *Journal*. The decisions have been edited from the point of view of a practical banker so that a knowledge of these decisions would help him to understand how the Courts in India have decided on the legal aspects of some banking problems that arise in the day to day business of a bank and the banker could thus learn from the experience of other bankers. I considered that it would be of advantage to the bankers in India, if all the important legal decisions affecting bankers since 1920 are collected, edited and published in book form. The present volume is an attempt in this direction and contains all the important decisions affecting bankers in India from 1920 to 1947. As some readers might be interested to see the full reports of the judgments in the law reports, I have given reference and cross reference to some of the law reports in which the decisions have been reported. I must acknowledge my indebtedness to all the law reports which I have consulted and references to which are appended to the cases.

The editing of this collection of legal decisions affecting bankers in India has been done by me in my leisure moments and due to pressure of other official work it has been considerably delayed. In view of the rapid progress that banking is making in this country, it is hoped that a work of this nature would prove to be a useful contribution to banking law and practice in India.

I may add that this work was undertaken by me in my personal capacity and has nothing to do with my official position as the Legal Assistant of the Reserve Bank of India, Central Office, Bombay. The responsibility for the views expressed in this book is entirely my own.

I should make a special mention of my indebtedness to Sir Chintaman D. Deshmukh, C.I.E., Governor, Reserve Bank of India, Mr. C. R. Trevor, C.I.E., Deputy Governor, Reserve Bank of India, and Mr. R. W. Hoe of the Bank of India Ltd., Bombay, for the interest they took in the progress of this work.

P. S. SITARAM.

RESERVE BANK OF INDIA,
BOMBAY,
Dated the 14th February 1947.

NOMINAL INDEX

Legal Decisions Affecting Bankers in India

BENGAL NATIONAL BANK LTD. ... ... *Plaintiff*

versus

JATINDRA NATH MAZUMDAR AND OTHERS ... ... *Defendants*

(Lort-Williams *J.*)

I.L.R. 56 Calcutta 556 : A.I.R. 1929 Calcutta 714.

Banker—Customer, a firm—All partners eligible to operate upon the account—Dissolution of the firm—No notice to the Bank—Subsequent transactions—Acknowledgment by a partner—Liability of retired partner.

THE material facts of the case were as follows :—The defendants carried on business in partnership under the firm name of Banerjee Mukherjee & Co. and opened an overdraft account with the plaintiff bank. It was arranged that each partner should be eligible to sign cheques in the firm name, adding thereto his own initials, and that the bank would advance money to enable the defendants to purchase materials and on receipt of the bills given in payment for goods supplied by defendants to customers would collect these on commission and deduct the balance from the overdraft. The plaintiff bank filed the suit against the defendants for the balance due under the account.

The defendant, Jatindra Nath Mazumdar, one of the partners contested his liability while the other partners admitted that the firm was liable. He stated that the partnership became dissolved in 1921, that the plaintiff bank had notice thereof, and in respect of the loans granted subsequent to the dissolution he was not liable. He also contended that the claim was barred by limitation.

His Lordship held on the evidence that the plaintiff bank had no notice of the dissolution of the partnership and as regards the plea of limitation, the other partners had acknowledged the liability of the firm, though subsequent to the date of the alleged dissolution of the firm.

Held on the authorities that in view of the above facts, such an acknowledgment had the effect of extending the period of limitation.

The suit was decreed with costs against all the defendants.

Note.—A retiring partner of a firm which has an account with a banker should give due notice of his retirement from the firm or about the dissolution of the firm to the banker. Otherwise he will continue to be liable for the transactions of the firm even subsequent to his retirement. (*See* Section 45 of the Indian Partnership Act, 1932.)

JIVAN DASS ... ... { *Defendant* / *Appellant*

versus

PEOPLES BANK OF NORTHERN INDIA, PLAINTIFF AND OTHERS, DEFENDANTS ... ... *Respondents*

(Addison and Din Mohammad *JJ.*)

A.I.R. 1937 Lahore 926.

Banker—Loan on a promissory note to a joint Hindu family—Personal liability.

THE material facts of the case were as follows :—The Peoples Bank of Northern India Ltd. (in liquidation) instituted a suit for recovery of Rs. 15,101-1-6 against Amir Chand, Jowala Das, Kanshi Ram, Ram Lal, Attar Chand and Jiwan Das by the sale of the properties described in the plaint. The suit was in respect of a promissory note executed by the first three persons named above for Rs. 14,341-6-6 on the 1st January 1932. The executants had mortgaged to the Bank the properties in suit by deposit of title deeds. The defendants put forward various pleas against the plaintiff Bank's claim but the Subordinate Judge decreed the plaintiff's claims. It appeared that the Subordinate Judge held that the defendants were also personally liable.

In the appeal to the High Court, it was contended on behalf of Ram Lal and Attar Chand that though they were members of a joint Hindu family along with the executants of the promissory note, they could not be held personally liable in respect of the loan as they were not parties to the execution of the promissory note. Their liability was limited to their interests in the joint family property in respect of the debt incurred for a family purpose by the manager.

Held that " there is ample authority in support of the proposition that if a member of a Hindu joint family does not participate in executing a promissory note, he cannot be held to be personally liable for the loan, his liability only extending to his interest in the joint family property as a member of the Hindu joint family."

Held that Ram Lal and Attar Chand were not personally liable.

Note.—The ordinary rule as to the liability on a negotiable instrument is laid down by the Privy Council in Sadusuk Janki Das *vs.* Sir Kishan Pershad : " No person is liable upon a hundi or a bill of

exchange unless his name appears upon the instrument in a manner which, upon a fair interpretation of its terms shows that the name is the name of the person really liable." (46 Calcutta 663). Under the Hindu Law, where the managing member borrows money on a promissory note for family purposes his co-parceners are also liable to pay the debt out of their shares in the joint family property. The co-parceners who are not parties to the execution of the promissory note or for contracting the loan are not personally liable.

PUNJAB NATIONAL BANK LTD., LAHORE ... ... { *Plaintiff* / *Appellant*

versus

JAGDISH SAHAI AND OTHERS ... ... { *Defendants* / *Respondents*

(Jai Lal and Sale *JJ.*)

A.I.R. 1936 Lahore 390 : 163 Indian Cases 114.

Banker—Loan to manager of a joint Hindu family in respect of ancestral business—Adult members of the family participating in the business and contracting debts—Adult members are personally liable for the debts in addition to the liability of the joint family property.

THE material facts of the case were as follows :—N. D. Hari Ram and Sons was a joint family trading concern which carried on ancestral business. It consisted of Rai Sahib Lala Gobind Ram and his five sons one of whom was a minor. Rai Sahib Lala Gobind Ram was the Karta of the family and described himself as the managing proprietor of the firm. On the 17th November 1925, Rai Sahib Gobind Ram as the managing proprietor of the firm N. D. Hari Ram and Sons executed a registered mortgage deed for Rs. 37,200-7-0 in favour of the Punjab National Bank Ltd. The major sons of Rai Sahib Gobind Ram signed the mortgage deed but it did not appear from the document itself whether they signed as parties or as witnesses. The sons alleged that they signed merely as witnesses.

The Punjab National Bank Ltd. filed this action for recovery of the money due on their mortgage above mentioned. Rai Sahib Gobind Ram having died, his five sons were impleaded as defendants. In addition to the usual prayer for sale of mortgaged property, a personal decree was claimed against the sons of Rai Sahib Gobind Ram. They defended the suit principally on the ground that they were not personally liable under the Hindu Law.

The Subordinate Judge found on the evidence that (i) Rai Sahib Gobind Ram and his sons constituted a joint Hindu family which carried on ancestral business, (ii) Rai Sahib was the Karta of the family and carried on the business in that capacity, and (iii) the major sons of Rai Sahib Gobind Ram actually participated in the carrying on of the joint family business and operated upon the account which N. D. Hari Ram and Sons had with the Punjab National Bank Ltd. to satisfy which the mortgage deed in favour of the Bank was executed. The learned Subordinate Judge however held that these facts were

not sufficient to make the major sons personally liable and decreed the Bank's claim only against the joint family property in the possession of the defendants.

The Bank preferred an appeal to the High Court contending that on the facts found by the trial Judge, the major sons ought to have been held liable personally in addition to the liability of the joint family property. The Bank conceded that the minor son could not be held personally liable beyond the liability of his interest in the joint family property.

His Lordship Jai Lal stated : " In my opinion the facts found by the learned Subordinate Judge as to the part taken by defendants 1 to 4 in the joint family business are sufficient to make them personally liable in this case in the same manner as an ordinary partner in a contractual partnership would be liable for the debts due from the firm. The rule of the Hindu Law that under certain circumstances the adult co-parceners are liable only to the extent of their interest in the joint family property for the debts incurred by the manager of the joint Hindu family business, has no application to the facts of this case, because here, the adult co-parceners by their conduct in operating upon the account and by participating in the business of the firm have made themselves liable as contracting parties."

Held that the major sons were personally liable for the debts in addition to the liability of the joint family property and the appeal of the Bank against them was allowed with costs.

MERCANTILE BANK OF INDIA LTD., DELHI ... ...{*Plaintiff* / *Appellant*

versus

P. S. SHEIGLE AND CO. AND ANOTHER ... ...{*Defendants* / *Respondents*

(Addison and Bhide *JJ.*)

I.L.R. 11 Lahore 678 : A.I.R. 1930 Lahore 576.

Banker and customer—Advance of moneys for purchase of goods and storing them—Accommodating creditor—Rights that of a pledgee.

THIS was an appeal by the bank in an action for recovery of money due from the defendants in respect of bills accepted by them but not paid for on the due date. The material facts were as follows :—" The defendants entered into an agreement with the Mercantile Bank of India, the plaintiff, on the 17th July 1920, by which the plaintiff was to purchase drafts upto a certain limit, accompanied by the usual shipping documents drawn on the defendants. The defendants agreed to accept them and pay them at maturity. On the 23rd June 1920 the defendants had already deposited with the plaintiff Rs. 2,000 as margin for the retirement of the drafts. It was stated in the agreement that the insurance was to be made available for the benefit of the bank by the deposit of the policies or otherwise and the bank was given power to effect insurance on the goods at the expense of the defendants. Accordingly the bank purchased a draft of date the 13th August 1920 for £800 on the defendants. It was accepted by the defendants on the 22nd September 1920 as of £800 and as payable on the 20th November 1920 at the current rate for bank demand with interest at 8 per cent. per annum from the date of the document." The defendants did not pay for the documents on the date of maturity but requested the bank to clear the goods and forward them to Delhi at defendants' expense. The bank did so at a cost of Rs. 1,101-7-9 which the defendants paid. The bank stored the goods in their godown at Delhi and tried to collect the money due from the defendants. The money was demanded and finally notice of sale of goods was given both by the bank and the auctioneer employed by them. On the 31st July 1921 the defendants wrote to the bank to postpone the threatened sale and stated that they were willing to pay interest and godown charges. The goods were sold in September and November 1921. The bank then brought the present suit for Rs. 6,320-3-1 being the amount of short fall.

" The defendants pleaded that the contract was that the bank was to open a credit account in their favour to the extent of £800 the equivalent amount in Indian currency being debited to the defendants on the 23rd June 1920. As exchange had fallen by the due date a finding to this effect would benefit the defendants. It was further pleaded that the bank had no right to sell and that the sale was not a *bona fide* one."

" The trial Court held that the defendants were liable to pay for the draft in Indian money on the due date (i.e., 20th November 1920) and also interest at 8 per cent. per annum from the date of the document. This point was not contested in appeal. The plaintiff's suit was however dismissed by the trial Court on the ground that the goods were not bailed to the bank, that they had no right to sell the goods and having done so, had no right to recover the short fall.

In appeal their Lordships held that the bank had the right to sell the goods and after referring to the facts of the case stated : " In these circumstances there can be no question but that it was intended that the goods stored were in reality bailed with the bank as collateral security for repayment of the money advanced and thus the possession of the bank was that of a pledgee as defined in Section 172 of the Indian Contract Act, 1872. The bank had thus the power to sell the goods under Section 176 of the Act. The rights of a creditor who accommodates his customers by storing goods for the purchase of which he has advanced money are higher than those of an ordinary bailee who has a general lien under Section 171 of the Act in so far that in the former case there is an implication that the security shall, if necessary, be made effectual to discharge the obligation."

The appeal was allowed with costs.

Note.—It is held in this case that the position of an accommodating creditor who has made advances for the purchase of goods and stores them in his custody is that of a pledgee and on the failure of the debtor to pay on the due date the creditor has the right to bring the goods to sale after notice to the debtor. Though the point has not been raised in this case, a banker's general lien under Section 171 of the Indian Contract Act 1872, is considered as an " implied pledge " and gives him the right to sell the security on default of the debtor.

BHOWANIPUR BANKING CORPORATION, LTD. ... *Petitioner*

versus

BEJOY KUMAR ADDY AND OTHERS ... ... *Opposite Party*

(B. K. Mukherjea and Sen *JJ.*)

A.I.R. 1942 Calcutta 556 : 204 Indian Cases 222.

Banker and customer—Bank as creditor appointed receiver by Court in partition suit between members of a joint Hindu family—Moneys received by bank as receiver deposited in a current account with itself—Held that the bank was a trustee for the amount.

THE material facts of the case were as follows :—The opposite party was a joint Hindu family called the Addy family of Chetla. In a partition suit filed in the Subordinate Judge's Court at Alipur among the members of the family the petitioner Bhowanipur Banking Corporation, Limited, who was a creditor of the Addy family for a considerable sum was appointed a receiver to the joint estate of the family pending the hearing of the partition suit. By an order of the Court, dated the 17th April 1939, it was directed that all realisations made by the receiver from the estate of the Addys with the exception of certain sums of money that were necessary to meet the immediate expenses were to be kept in the current account of the bank and disbursements were to be made in accordance with the directions which the Court might give from time to time. The balance lying in the said account to the credit of the Addys' estate on 6th May 1942 was Rs. 69,926-7-6. On the afternoon of 6th May 1942, the bank which was in financial difficulties for sometime past temporarily suspended payment to its depositors until further orders. On 8th May following, one of the members of the opposite party made an application to the Court for a direction on the receiver to deposit all moneys belonging to the Addys' estate which was held by it in the Government Treasury or in some other safe place like the Reserve Bank of India at Calcutta. The Court called for a report from the receiver which was submitted on 11th May 1942. On the same date the petitioner Bank filed an application in the Calcutta High Court under Section 153 of the Indian Companies Act, 1913, with a proposal for composition with its creditors and the High Court passed orders for holding the meetings of the shareholders and depositors for the purpose of approval of the scheme. On 13th May 1942 the Bank reported to the Court that as it had already made an application under Section 153 of the Indian

Companies Act and the matter was fixed for hearing on the 26th June 1942, it was not possible for it to bring into Court the money lying in its current account to the credit of the Addys' estate. The Court after hearing all the parties made an order on 18th May 1942 directing the petitioner to deposit all moneys belonging to the Addys' estate either in some Government Treasury or in the Reserve Bank of India, Calcutta. When the Supervisor of the estate formally wrote to the Bank requesting it to deposit the sum of Rs. 69,926-7-6 as per order of the Court, the Accountant of the Bank replied by saying that till the final determination of the proceedings under Section 153 of the Indian Companies Act, 1913, the Bank was not legally competent to make any preferential payment. The matter was reported to the Court and the Subordinate Judge by his order dated 22nd May 1942 confirmed his previous order and directed the receiver to deposit the money either in the Government Treasury or in the Imperial Bank of India or Central Bank of India within the time already fixed failing which the premises where the Bank held its office was directed to be attached and sold.

The Bank preferred this petition to the High Court against the order of the Subordinate Judge. It was contended on behalf of the Bank as follows :—

(i) Under orders of the Court it opened a current account with itself in the capacity as receiver of the estate of Addys, the legal position was the bank *qua* receiver became its own creditor.

(ii) The money deposited in the current account no longer remained the money of the Addys and it became the Bank's money which the Bank was only bound to repay in accordance with the usual terms under which it held the depositor's money.

(iii) The Bank had already started a proceeding under Section 153, Indian Companies Act, 1913, and the receiver to the Addys' estate would be in the same position as any other creditor of the Bank. It could not very well frustrate the scheme by giving preference to one of the creditors.

(iv) In these circumstances the receiver was legally incompetent to withdraw any money from the Bank and it could only recover the money in terms of the scheme as might be finally sanctioned.

It was argued on behalf of the opposite party that whatever the position might have been if the Bank as receiver had opened a current account with another bank and that bank had entered into a composition with its creditors under the Companies Act, the position was quite

different when the Bank opened an account with itself. The moneys were obtained by the Bank in its capacity as a receiver to the Addys' estate, then so long as they were retained they would remain the money of the Addys' estate in its hand and it was immaterial whether it was kept in its current account or not or in any other manner. The money would not become the assets of the Bank and would not be divisible among its creditors in the event of a winding up proceedings. If the Bank wanted to enter into a composition with its creditors it should frame a scheme on the footing that this sum of money did not form part of its assets.

His Lordship (Mukherjea *J.*) after referring to the authorities on the point agreed with the contentions on behalf of the Addys' estate and stated :—

(1) " The primary question that arises for determination in the present case is whether the Bank as receiver did and could become in law its own creditor by going through the formality of operating a current account with itself. It is an elementary proposition of law that there must be two persons to make a contract. No person either an individual or a body corporate can be his own creditor."

(2) The Bank in its capacity as a bank was appointed a receiver to the estate of Addys and made realisations from the properties of which it was put in possession. The receiver and the Bank were one and the same person both in fact and in law and the Bank for the purpose of facilitating the realisation of its dues became a receiver of the debtor's estate.

Held for the above reasons that in whatever form the money of the Addys might have been kept by the Bank it did not become the Bank's money but remained the money of the Addys in the hands of the Bank as receiver.

The petition was dismissed with costs.

Note.—As a rule the receipt of money by a banker from or on account of his customer constitutes him merely a debtor to the customer. The banker is not in any sense a trustee for the customer. But if a banker receives money for a specific purpose or in a fiduciary capacity —as in the present case as a receiver—he will be a trustee for the amount.

SIMLA BANKING AND INDUSTRIAL CO., LTD. ... ... *Defendant Appellant*

versus

MT. BHAGWAN KAUR ... ... *Plaintiff Respondent*

(Shadi Lal *C.J.* and Broadway *J.*)

A.I.R. 1928 Lahore 316 : 111 Indian Cases 554.

Banker and customer—Banker's lien—Amount due under fixed deposit receipt and payable to either or survivor—Bank cannot appropriate the money towards debt due by one of them alone.

THE Simla Banking and Industrial Co., Ltd., issued a fixed deposit receipt for Rs. 500 on the 23rd February 1922 in favour of Mt. Bhagwan Kaur and her son Raghunandan Singh, the amount being payable on the 6th January 1923 to either or survivor. Subsequent to 23rd February 1922, Raghunandan Singh succeeded in obtaining an overdraft from the bank and on 6th January 1923 was indebted to it in the sum of Rs. 33,000 or thereabouts. The bank credited the amount due under the fixed deposit receipt to this overdraft on the 6th January 1923, and on Mt. Bhagwan Kaur, demanding payment informed her of the action taken on it and refused to pay. Mt. Bhagwan Kaur thereupon, brought an action against the bank for the recovery of the amount due under the fixed deposit receipt.

The bank pleaded a "general lien" and claimed to have acted within its rights in appropriating the amount as it had done.

The trial Court decreed the plaintiff's claim and an appeal by the bank having been dismissed by the District Judge, there was a second appeal to the High Court. That too was dismissed and the present appeal was under Clause 10 of the Letters Patent.

It was contended that as in the present case the presentation of the receipt was not essential and either of the two could demand payment at the due date, the "general lien" held by the bank entitled it to regard the money as belonging to Raghunandan Singh and to appropriate it towards the debt due by him alone. Their Lordships negatived this contention and dismissed the appeal stating that the plaintiff's claim was rightly decreed.

Note.—A banker has the right of lien or set-off when the debts are in the same right. This is not so in the case of a joint deposit withdrawable by either or survivor and the banker cannot credit the amount due on it to a debt owing by only one of the joint depositors.

ROCHALDAS GIDOOMAL AND CO. ... ... *Plaintiffs*

versus

THE MERCANTILE BANK OF INDIA, LIMITED ... ... *Defendants*

(Aston *A.J.C.*)

A.I.R. 1925 Sind 142.

Banker and customer—Banker's lien on securities—When entitled.

THIS was a suit filed by the plaintiffs for the recovery of Rs. 3,600 from the defendants, Rs. 3,500 being a sum telegraphically remitted to the plaintiffs on the 8th February 1922 from Colombo through the defendant bank and Rs. 100 being claimed by way of damages on account of the wrongful conduct of the defendants in withholding payment. The facts were that one Verhomal, a partner of the plaintiffs requested the Mercantile Bank of India at Colombo to telegraph to their agent at Karachi the fact that they had sold to Rochaldas Gidoomal and Co. a transfer on Karachi for Rs. 3,500 in favour of Rochaldas Gidoomal and Co.

The defendants did not pay the plaintiffs at Karachi but contended that they were entitled to retain this sum of Rs. 3,500 as a set-off against the sums due under two dishonoured bills drawn for valuable consideration in favour of the defendants and accepted by the plaintiffs. The defendants claimed this set-off as a banker's lien and that they were entitled to amalgamate the various accounts of the plaintiffs with themselves as bankers and set-off a credit in one against a debit in another account.

The plaintiffs on the other hand contended that since the money was given to the bank at Colombo for a specific purpose, namely, to be telegraphically transmitted to the plaintiffs in Karachi, the money was not subject to any lien and could not be retained by the bank against sums alleged to be due under dishonoured bills. The plaintiffs further contended that one of the two dishonoured bills was not accepted by them but by another firm of the same name doing business in Sukkur.

The Judicial Commissioner following the authorities stated the law on the subject as follows :—" The bankers most undoubtedly have a general lien on all securities deposited with them as bankers by a customer unless there be an express contract or circumstances that show an implied contract inconsistent with lien. A banker is entitled

to set-off what is due to a customer on one account against what is due from him on another account although the moneys due to him may in fact belong to other persons. Bankers have a general lien on securities deposited with them as bankers but they cannot successfully claim a lien on securities delivered to them for a special purpose inconsistent with the existence of the lien claimed."

In the present case the Judicial Commissioner held that the sum of Rs. 3,500 could not be considered to have been deposited with the defendants as bankers. The transaction was the sale of a telegraphic transfer entered into for the purpose of speedy transmission of funds to Karachi. The paintiffs were not depositors but vendees and the defendant bank as vendors were under an obligation to deliver what they had sold. The sum of Rs. 3,500 was paid for a specific purpose and could not be set-off in exercise of the right of a banker's lien. His Lordship was of opinion that unless the banker on taking the money for transmission stated that he did so subject to his right of lien he waived it. In the present case the money was paid to the Mercantile Bank of India Ltd. at Colombo for a specific purpose and it could not be set-off.

His Lordship admitted the plaintiffs' claim for Rs. 3,500 with costs but negatived the claim of Rs. 100 for damages. An appeal preferred against this judgment by the defendants was dismissed with costs.

Note.—Section 171 of the Indian Contract Act 1872 states that bankers, factors, wharfingers, attorneys of a High Court, and policy-brokers may, in the absence of a contract to the contrary retain as security for a general balance of account any goods bailed to them. A banker has a general lien over the securities deposited with him by a customer except in cases where the deposit is for a particular purpose or where there is an agreement or contract inconsistent with the lien. This decision holds that where money is handed over to a bank for transmission to another place and the bank issues a demand draft, the money must be deemed to be held by the bank under a special contract which excludes the banker's lien.

AHMED MOOLA DAWOOD AND ANOTHER ... ... *Appellants*

versus

S.R.M.M.C.T. PEREINAN CHETTY FIRM ... ... *Respondents*

(Heald and May Oung *JJ.*)

A.I.R. 1924 Rangoon 264 : 80 Indian Cases 261.

Banker and customer—Bank paying on forged cheque—Negligence of customer in the custody of cheque book—Held bank liable.

THE appellants were the executors of Yacoob Abdul Gunny's estate. They sued the respondents a firm of Chetty money lenders to recover Rs. 3,741-9-9 which they alleged to be the amount standing to the credit of Yacoob Abdul Gunny's account with the respondents. The appellants stated that a cheque for Rs. 3,500 with which the respondents claimed to debit the account was a forgery.

The respondents denied that the cheque was a forgery and said that the amount standing to Yacoob Abdul Gunny's credit was Rs. 241-9-9 only which amount they paid into Court.

The trial Judge found that the appellants failed to prove that the cheque was a forgery and gave them a decree for Rs. 241-9-9 only, allowing special costs against them.

The appellants appealed on the ground that they had succeeded in proving that the cheque was a forgery and that the respondents were negligent in cashing it.

The appellate Court after considering the evidence in detail came to the conclusion that the cheque was in fact a forgery and the question was whether the appellants or the respondents should bear the loss.

Their Lordships after referring to leading English and Indian cases on the subject stated : " It seems to be well settled that before a banker can debit his customer's account with the amount of a forged cheque he must prove negligence on the part of his customer which was intimately connected with the drawing or encashment of the cheque which was the proximate cause of the loss." Their Lordships also referred to the case of the Governor and Company of the Bank of Ireland *vs.* The Trustees of Evan's Charities in Ireland (1855) 5 H.L.C. 389 where the House of Lords laid down : " If a man loses his cheque book or neglects to lock the desk in which it was kept and a servant or stranger should take it up it is impossible in our opinion to contend the banker paying his forged cheque would be expected to charge his

customer with that payment." Their Lordships stated that all that was alleged in this case against the appellants on the score of negligence was that they or their agent were negligent in the custody of their cheque book and of their rubber stamps which were used on their cheques. Their Lordships held that even if that were proved it would not on the authorities be sufficient to charge the appellants with the loss which resulted from the forgery of a cheque stolen from their cheque book and the fraudulent use of their stamps and as the respondents cashed the forged cheque and have not been able to establish such negligence as would in law render appellants liable they must bear the loss.

The appeal was allowed with costs.

Note.—There is no duty cast on a customer that he should take precautions against his signature being forged by others. A customer would be liable for the loss only if the negligence on his part was intimately connected with the drawing or encashment of the cheque which was the proximate cause of the loss.

L. PIRBHU DAYAL ... ... *Plaintiff Applicant*

versus

THE JWALA BANK LTD.... ... ... *Defendant Opposite Party*

(Mohammad Ismail *J.*)

I.L.R. 1938 Allahabad 634 : A.I.R. 1938 Allahabad 374.

Banker and customer—Bank paying on forged cheque—Liability.

THIS was an application in revision against an order of the learned Judge of the Small Cause Court, Agra. The plaintiff was a customer of the defendant bank. On 16th March 1936, a cheque was presented at the bank purporting to have been signed by the plaintiff Pirbhu Dayal in favour of one Bhai Kashi Nathji. A servant of the defendant bank honoured the cheque and paid the amount to the person presenting the cheque. The plaintiff on finding himself debited with this amount informed the bank that he had not drawn the sum of Rs. 57-8-0 debited to him. The bank however refused to make good the amount on the ground that the cheque in question was received in the bank in the usual course of business and that the plaintiff's signature on the cheque fully tallied with his specimen signatures. The plaintiff thereupon brought the present suit.

The trial Judge upon a consideration of evidence found that the signature on the forged cheque did not tally with the plaintiff's admitted signature. It was also found that if the bank had acted with slight care and caution in the matter, the forgery could have been detected at once and the payment of the cheque would have been refused. The trial Judge however held that the bank was not legally liable to return the amount of the cheque to the plaintiff, as it had not been shown that the payment of the same was made by it dishonestly and knowing that it was a forged cheque. The Court was also further influenced by the fact that the plaintiff had admitted in his evidence that the cheque book often remained in the small *baithak* of his house where other persons had also access and that the box containing the cheques remained unlocked in day time.

His Lordship stated : " It has been held in numerous cases that a document in cheque form to which the customer's name as drawer is forged or placed thereon without authority is not a cheque but a mere nullity and that unless the banker can establish adoption or estoppel, he cannot debit the customer with any payment made on

such a document." His Lordship after referring to leading English and Indian authorities on the subject held that the negligence of the plaintiff in leaving his cheque book in an unlocked box was not the proximate cause of the loss to the defendant bank. It was the duty of the employees of the bank to be able to identify the signatures of their customers and if they failed to discharge their duty and thereby suffered loss there was no reason why the plaintiff should make good that loss. As Beven on Negligence (Edition 4, Volume II, Chapter 3, page 1471) stated : " The banker's obligation is to honour his customer's cheque. To that end he is bound to know his customer's handwriting. If in any way he is deceived without the instrumentality of his customer, he must himself abide the loss."

The bank relied on Rule 4 of rules of business which ran as follows :—

" Constituents should keep all bank cheque forms under lock and key, otherwise the bank is not responsible for any loss in this connexion."

His Lordship held : " The loss in the present case was entirely due to the negligence of the employees of the bank in not comparing the signature on the forged cheque with the specimen signatures of the plaintiff. I see no reason under the circumstances to hold that the plaintiff was responsible for the loss that was sustained by the bank."

The plaintiff's claim was allowed with costs.

Note.—A banker who pays a cheque to which the customer's name as drawer is forged is not entitled to debit the customer's account merely on the ground that he was negligent in keeping the cheque book in proper custody. But a banker may be entitled to debit his customer's account even in the case of forgery of the signature of the customer as drawer where adoption or estoppel can be pleaded against him.

SAHUKARA BANK LTD. ... ... *Defendant / Petitioner*

versus

FIRM JAGAN NATH DIWAN CHAND JAINI ... ... *Plaintiff / Respondent*

(Harris *C.J.* and Meher Chand Mahajan *J.*, Lahore High Court.)

(1944) 14 Company Cases 166.

Banker and customer—Bill for collection—Liability of collecting banker on failure of sub-agent after realisation.

THIS was an application in revision from a decree of the Judge, Small Cause Court, Gujranwala, dated the 9th March 1940, decreeing the suit of Firm Jagan Nath Diwan Chand against the Sahukara Bank Ltd.

The material facts of the case were as follows :—The plaintiff sued the defendant for recovery of Rs. 135 with interest and costs on the allegation that a hundi was given to the defendant bank for collection from Messrs. Jodh Singh Ishar Das of Chakwal. The hundi that was given by the plaintiff to the defendant bank at Gujranwala for collection was sent by the defendant to the Civil and Military Bank at Chakwal. That bank after collecting the amount due on the hundi went into liquidation with the result that the defendant bank failed to realise the amount from its sub-agent, the Civil and Military Bank at Chakwal and consequently the Sahukara Bank Ltd. did not pay the amount to the plaintiff. The defendant bank contended that the plaintiff had instructed the collection of the hundi through the Civil and Military Bank at Chakwal and that bank stood directly in the position of an agent to the plaintiff firm as principal, the transmission of the hundi being authorised, the defendant bank were not liable for the default. The trial Judge on the evidence came to the conclusion that there was neither express nor implied authority given by the plaintiff to the defendant bank to name an agent on behalf of the plaintiff and that there was no privity of contract between the plaintiff and the agent. The trial Court gave the plaintiff a decree for Rs. 135. The defendant bank preferred this revision to the High Court.

His Lordship, Mahajan *J.*, after discussing the law and authorities on the point referred to the decision of the House of Lords case Mackersy *vs.* Ramsays (1843) 57 R.R. 183 at page 205 where Lord Cottenham observed as follows :—

" If I send to my bankers a bill or draft upon another banker in London, I do not expect that they will themselves go and receive the

amount, and pay me the proceeds, but that they will send a clerk in the course of the day to the clearing house and settle the balances, in which my bill or draft will form one item. If such clerk, instead of returning to the bankers with the balance, should abscond with it, can my bankers refuse to credit me with the amount ?

" Certainly not. If the bill had been drawn upon a person at York, the case would have been the same ; although instead of the bankers employing a clerk to receive the amount, they would probably employ their correspondent at York to do so ; and if such correspondent received the amount, am I to be refused credit because he afterwards became bankrupt whilst in debt to my bankers ? "

Held on the authorities that the trial Court rightly decreed the plaintiff's claim against the defendant bank.

The revision petition was dismissed with costs.

Note.—A banker who undertakes the duty of collecting money on a negotiable instrument and for that purpose sends it to another bank to collect, thereby becomes liable for any loss caused by the default of the other bank.

JYOTI PRASAD SINGH DEO BAHADUR ... ... *Appellant*

versus

CHOTA NAGPUR BANKING ASSOCIATION AND OTHERS . *Respondents*

(Das and James *JJ.*)

I.L.R. 8 Patna 413 : A.I.R. 1929 Patna 193.

Banker and customer—Cheque drawn on one branch cashed by another—Effect of—Cashing is done on the credit of the person presenting the cheque.

THE appellant was the first defendant in the suit. On the 30th January 1924, defendant 3 drew a cheque in favour of defendant 1, for Rs. 5,000 upon the Chota Nagpur Banking Association, Dhanbad branch. Defendant 1 endorsed it in favour of his manager defendant 2 for collection who received payment from the Purulia branch of the Chota Nagpur Banking Association on the 1st February 1924. The Purulia branch sent the cheque on to the Dhanbad branch. On the 2nd February 1924 the Dhanbad branch informed the Purulia branch that the money was not arranged for and the cheque was dishonoured. On the 4th February 1924, the Purulia branch gave notice of dishonour to the defendants 1 and 2 and on the 4th April 1924, the plaintiff Chota Nagpur Banking Association instituted an action against the three defendants for recovery of the money.

The suit was resisted on behalf of defendant 1 on the ground that the cheque was discharged by payment made on the 1st February 1924, and there was no power left in the Purulia branch of the bank to give notice of dishonour.

The learned Subordinate Judge who heard the case in the first instance held that the Purulia branch paid the money to defendant 1 not on the credit of defendant 3 but on the credit of the endorsement of defendant 1 who was a big zamindar in Purulia and decreed the plaintiff's claim.

On appeal their Lordships of the High Court, after reviewing in detail the various authorities on the point, agreed with the Subordinate Judge and held that if a cheque drawn on one branch was in fact cashed by another the latter did not act on the matter of cashing it as the bank of the drawer but relied upon the credit of the person presenting it.

The claim of the Purulia branch was decreed and the appeal was dismissed with costs.

Note.—A bank is bound to pay the cheques of a customer at that branch only at which he keeps his account. Though branches are

agencies of one principal, they may be regarded as distinct for special purposes, example that of estimating the time at which notice of dishonour should be given or of entitling a banker to refuse payment of a customer's cheque except at the branch where he keeps his account. This case decides that if a cheque drawn on one branch of a bank is cashed by its another branch, the latter does it not as the bank of the drawer but on the credit of the person presenting the cheque and can hold him liable in case the bank is put to any loss.

INDIAN HUME PIPE CO., LTD. ... ... *Appellant*

versus

TRAVANCORE NATIONAL AND QUILON BANK LTD. BY OFFICIAL LIQUIDATOR ... ... *Respondent*

(Leach *C.J.* and Byers *J.*)

A.I.R. 1942 Madras 646 : (1942) 2 Madras Law Journal 128.

Banker and customer—Cheque given to branch at B for collection and being remitted to the branch at N where the customer had an account—B branch collecting amount but not remitting to N—Failure of bank—Held customer entitled to priority.

THE Indian Hume Pipe Co., Ltd., carried on business at Nagarcoil in the State of Travancore and at Bombay. The company had a current account with the Nagarcoil branch of the bank. The Travancore National and Quilon Bank Ltd., had a branch at Bombay but the company had no account there. On 14th June 1938 the company instructed the Bombay branch of the bank to collect Rs. 5,000 the amount of a cheque drawn in its favour on the Indian Bank at Bombay and to remit the proceeds to the Nagarcoil branch of the bank to the credit of the company's account. The cost of collection and remittance was Rs. 4-11-0 which the company paid. The Bombay branch of the bank collected the amount the next day but did not carry out its instruction to remit the money to Nagarcoil. The bank suspended payment on 20th June 1938. When the bank went into liquidation the money remained with its Bombay branch and was never sent to Nagarcoil. In these circumstances the company claimed that it was entitled to an order directing the Official Liquidators to pay to it the sum of Rs. 5,000 on the ground that it represented money held by the bank in trust.

The trial Judge dismissed the claim of the company on the ground that the entrustment of the money to the Bombay branch of the bank for the purpose of transmission to its Nagarcoil branch could not be considered to be money received by the bank for a special purpose. He regarded the position as being one merely between creditor and debtor.

Their Lordships in appeal, after referring to leading English authorities on the point stated : " In the present case the cheque was collected by the bank before suspension but it did not send the money

to Nagarcoil and it could not claim the proceeds as part of its assets until it had done so . . . Although branch banks are agencies of one principal firm it is well settled that for certain special purposes of banking business, they may be regarded as distinct trading bodies. So far as the company was concerned, the Nagarcoil and Bombay branches of the bank were distinct business concerns and the ordinary relationship between a bank and a customer keeping a current account with the bank never existed between the company and the bank in Bombay. . . . Undoubtedly, if the money had got into the company's account at Nagarcoil, the bank's position would no longer have been that of an agent holding his principal's moneys."

Held that the company was entitled to claim the sum of Rs. 5,000 in full as trust money in priority to the ordinary creditors of the bank.

Note.—The points in this case are that (i) so long as the bank's duty is merely to collect and remit, it is only an agent and there is no relationship of debtor and creditor and (ii) branch banks though agencies of one principal firm, for certain special purposes of banking business they may be regarded as distinct trading bodies.

ALLIANCE BANK OF SIMLA IN LIQUIDATION, *In re.*

(C. C. Ghose *J.*)

A.I.R. 1925 Calcutta 54 : 40 Calcutta Law Journal 223.

Banker and customer—Cheques treated as not finally cleared as per rules of the Clearing House—Collecting bank going into liquidation—Money represented by the cheques is not part of the assets of the bank in liquidation.

THIS was an application on behalf of the Chartered Bank of India, Australia and China for an order that the Liquidators of the Alliance Bank of Simla Ltd. be directed to pay the Chartered Bank the amount of three debit clearing vouchers referred to in the petition in full and that the costs of the application be paid out of the assets of the Alliance Bank of Simla, Ltd.

The facts were as follows :—The Imperial Bank of India were performing in Calcutta the functions of a clearing house to the various banks. The Chartered Bank and the Alliance Bank were members of the said Clearing House. On 27th April, 1923, certain cheques of which particulars are mentioned below were drawn on the Chartered Bank and delivered to the Alliance Bank by certain of the latter's customers for credit of their accounts. The cheques were in accordance with the usual practice handed by the Alliance Bank's clearing clerk and credits and debits were according to the applicant bank, provisionally made by the Imperial Bank of India in the accounts of the said two banks with the Imperial Bank of India. The Alliance Bank received provisional credit for the cheques delivered and the Chartered Bank was provisionally debited with the amount of the said cheques. The cheques were then brought away by the Chartered Bank's clearing clerk to the Chartered Bank for examination. On examination, however, it was found that the said cheques were not in order, and they were accordingly dishonoured by the Chartered Bank and returned the same day to the Alliance Bank with a memo attached giving the reason for dishonour. In exchange for the cheques the Alliance Bank handed to the Chartered Bank vouchers described as debit vouchers. According to the applicant bank, these vouchers would in the ordinary course of business have been sent in by the Chartered Bank to the Clearing House the following morning in order that the provisional entries relating thereto might be readjusted. At the close of business on 27th April, 1923, the Chartered Bank held three debit clearing vouchers on the Alliance Bank for Rs. 64, Rs. 112-8-0 and Rs. 8,537-8-0 amounting in all to Rs. 8,714.

The Alliance Bank of Simla, Ltd. closed its doors and suspended payment at the close of business on 27th April, 1923. Owing to this event the Imperial Bank of India refused to put the three debit clearing vouchers through the clearing on the morning of 28th April 1923 and to readjust the entries accordingly. The result was that the Alliance Bank received credit in the clearing for the said three debit clearing notes amounting to Rs. 8,714 and consequently it was alleged that they held funds to which they had no claim whatsoever but to which the Chartered Bank was entitled. The Chartered Bank requested the Liquidators of the Alliance Bank to pay the amount of the said three debit clearing vouchers in full but the Alliance Bank failed and refused to do so and as a consequence the present application was filed by the Chartered Bank.

According to the Liquidators of the Alliance Bank of Simla Ltd. there were no provisional credits or debits as suggested by the Chartered Bank but that they were irrevocable.

His Lordship referred to the relevant rules of the Clearing House and stated that the object of the Clearing House was really to dispense with the use of coins or bank notes in the settlement of large transactions that necessarily took place there. The other important question was the position of the Alliance Bank of Simla, Ltd. when they received the cheques in question from their customers for credit of their accounts. Did they receive as agents for collection or as holders for value of the cheques ? It appeared that after the dishonour of the cheques in question by the Chartered Bank, the Alliance Bank of Simla, Ltd. reversed their original credit in their constituents' accounts in respect of these very cheques. This action was consistent only with their having received the cheques as agents for collection and with the fact that they never placed any money to their customer's credit to draw upon. If as a matter of fact the proceeds of these cheques had been actually collected and the relationship of banker and customer established it would not have been open to the Alliance Bank to reverse their original credit to their constituents' accounts. On these facts his Lordship held that the cheques in question were not finally cleared and that the moneys represented by these were never in fact collected by the Alliance Bank of Simla, Ltd. at a time when they were entitled to claim them as part of their assets. There was in fact no relationship of debtor and creditor as between the Alliance Bank and their customers. His Lordship held that in the circumstances the Liquidators of the Alliance Bank of Simla, Ltd. should pay out of the assets in their hands the full amount claimed by the Chartered Bank in their application and costs.

Note.—This decision deals with the practice of making provisional credit and debit entries in a Clearing House. A collecting banker cannot treat the amounts represented by such credit entries as his money until the cheques representing the entries are finally cleared. On failure of the collecting banker before final clearance such cheques do not form part of his assets in liquidation.

CHAMPION AUTOMOBILES LTD. ... ... { *Plaintiffs* / *Petitioners*

versus

CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA, MADRAS ... ... { *Defendants* / *Respondents*

(Venkatramana Rao *J.*)

A.I.R. 1937 Madras 858 : (1937) 2 Madras Law Journal 546.

Banker and customer—Collecting banker—Duty to intimate date of arrival of goods by parcel—Failure to do so—Negligence—Collection of money by bank after the return of goods as unclaimed—Bank liable to buyer for loss.

THE plaintiffs, the Champion Automobiles, Ltd., entered into a contract with Eis Manufacturing Company, New York, in and by which they indented for certain goods. Under the terms of the contract an invoice had to be sent in the name of the Champion Automobiles, Ltd., the bill to be drawn on them through the Chartered Bank of India, Australia and China, and the despatch of goods to be by post parcel and the condition as regards payment to be 30 days after sight—documents against payment.

On 12th December 1932 the Chartered Bank of India, Australia and China presented a bill of exchange drawn on the plaintiffs by Eis Manufacturing Company and endorsed in their favour in and by which the drawees were to pay the amount within 30 days after sight and it was accepted by the plaintiffs on 12th December 1932. The bill became due and payable on 14th January 1933, adding the customary days of grace and the due date was stamped on the bill itself.

On 14th January 1933, the bank presented a memorandum of the amount payable by the plaintiffs and in accordance therewith the plaintiffs paid a sum of Rs. 214-1-0. The defendants delivered an invoice and a second bill of exchange. The plaintiffs complained that these documents would not enable them to obtain delivery of the post parcel, and thereupon the defendants on 17th January 1933 gave a letter of authority to enable the plaintiffs to obtain delivery of the parcel from the post office.

When the plaintiffs applied to the post office to deliver them the parcel the post office authorities replied by their letter dated 24th January 1933 that the parcel had arrived on 12th December 1932, that due intimation thereof had been given to the defendant bank,

but the bank had requested the post office, by a letter dated 16th December 1932 to keep the parcel in deposit, and as the parcel had not been taken delivery of within the prescribed period, namely, 30 days, it had been returned to London on 12th January 1933 with remarks " Not claimed."

The plaintiffs filed this suit in the Court of Small Causes, Madras, for the recovery of the amount paid to the defendants on the ground of failure of consideration and as money had and received for their use.

The defendants denied liability, alleging that they were only a collecting bank, that by letters dated 23rd December 1932 and 6th January 1933, they duly intimated the arrival of the parcel to the plaintiffs, that they were under no obligation to keep the parcel in the post office, that they were not liable for the payment of the amount and that there was no cause of action against them.

The trial Judge gave a decree in favour of the plaintiffs on the ground that the defendant bank was guilty of negligence in not keeping the parcel until the due date of payment. On appeal to the Full Bench of the Court of Small Causes, the judgment of the trial Judge was reversed on the ground that the bank was under no obligation to keep the parcel and that there was no warranty given by them about the genuineness of the documents or the usefulness of the documents which they delivered to the plaintiffs. The civil revision to the High Court was preferred against this decision.

The question was whether the bank was liable to refund the amount paid by the plaintiffs. On a fair reading of the terms of the contract it was clear that the plaintiffs were entitled on payment to have delivery of all the documents which would enable them to have delivery of the parcel consigned to them. It appeared from the correspondence between the parties that a letter of authority from the bank to the post office authorising the post office to deliver the goods to the plaintiffs was apparently treated as one of the documents which the plaintiffs were entitled to get from the bank on payment. The parcel was consigned to the Chartered Bank of India, Australia and China and without such a letter there could be no valid tender. Such a letter was tendered in this case only on 17th January 1933 and the plaintiffs might have contended that by non-delivery of such a letter on the 14th January 1933, the bank did not perform what was expected of them and there was a breach of the terms of the contract. But this point was not urged by the plaintiffs. The point in controversy between the parties was whether the bank was under any obligation to keep the goods in the post office until the date of payment, and if the bank was not, was it liable ?

His Lordship referred to the rule regarding the liability of a collecting banker stated thus in Hart on Banking : " The collecting banker is under no special duty as such, to protect the interests of the person to whom he presents a draft for acceptance or payment. So long as he does not give any personal undertaking or make any misrepresentation, he incurs no responsibility to him." His Lordship added that it might be that the bank in the present case was under no obligation to keep the goods but it was under a duty to see that the buyer was not prevented from taking delivery of the goods by any act or omission on that part of the bank.

His Lordship held that in the circumstances of the case it was the duty of the bank to inform the plaintiffs that the goods arrived on the 12th December 1932 so that the plaintiffs might be aware of the fact that if the goods were not cleared by the 12th January 1933 they would be sent back. The defendants' letters dated 23rd December 1932 and 6th January 1933 simply stated that the goods had arrived and should be cleared early. They did not intimate the date of arrival.

The omission of the bank to intimate the date of arrival and their conduct in taking the money when they were aware or must be deemed to have been aware that the goods were sent back to the consignors amounted to a misrepresentation within the meaning of the rule enunciated by Hart. The plaintiffs' claim was allowed but in the circumstances of the case each party was ordered to bear his own costs.

Note.—The duty of a collecting banker in the case of delivery of goods by parcel post is dealt with in this case and is of importance to bankers. A collecting banker is under a duty to see that the drawee is not prevented from taking delivery of the goods by any act or omission on the part of the banker. In the particular facts of this case, the bank was held to be guilty of negligence in not intimating the date of arrival of the goods to the drawees.

FIRM BANSILAL ABIRCHAND ... ... { *Defendant* / *Appellant*

versus

SADASHEO GANESH BHOPATKAR ... ... { *Plaintiff* / *Respondent*

(Niyogi *J.*)

I.L.R. 1943 Nagpur 687 : A.I.R. 1944 Nagpur 17.

Banker and customer—Countermand of cheque by customer—Payment of the cheque by banker—Held the banker was negligent and liable to make good the loss to the customer.

THE material facts of the case were as follows :—The plaintiff respondent who was the manager of a picture house at Bombay had for sometime resided at Jubbulpore in connection with his business. While at Jubbulpore he opened current account with the appellant firm at Jubbulpore. As he had to leave for Bombay he left some blank cheques bearing his signatures with his assistant manager to fill in the amount when required and draw money from the bank. On 7th September 1937, the assistant manager found a cheque bearing No. 32235 missing from the cheque book. He immediately informed the cashier of the appellant bank, who according to the usual practice, made a note in a book called " Patha book " with the remark " do not pay the amount of cheque No. 32235." The cheque for Rs. 650 was, however, presented to the appellant sometime in October 1937 by an unknown person and was cashed. The amount consequently came to be debited in the respondent's account. The plaintiff filed this suit to recover the sum of Rs. 650.

The defendant bank admitted that the cashier had noted the instructions of the assistant manager but pleaded that the cashier had clearly warned the assistant manager that he would not be liable in case his instructions were overlooked in the rush of business. It was, however, agreed that to obviate any foul play in regard to the cheques which the assistant manager would issue in future he should put his initials on the left hand bottom corner to distinguish them from the missing cheque. The cheque in question came to be honoured as it bore the initials of the assistant manager which reasonably led the cashier of the appellant bank to believe that it was a cheque duly issued by the assistant manager. Lastly, it was contended that the false presentment of the cheque by an unauthorised person was

directly due to the negligence on the part of the plaintiff and that consequently he ought to abide the loss.

The suit failed in the First Court but succeeded on appeal. The Lower Appellate Court held that there was no contributory negligence on the part of the plaintiff and that even if there was any, it was not the proximate cause of the fraudulent presentment of the cheque. It held that the failure to detect forgery of the cheque when it was presented for payment was directly due to the negligence on the part of the cashier in his omission to look at the number of the cheque.

The defendant firm preferred this appeal to the High Court at Nagpur. It was urged on behalf of the appellant that it was on account of the negligence on the part of the respondent in leaving the blank cheques bearing his signatures with the assistant manager and in allowing him to keep the cheques otherwise than under lock and key and in letting strangers know about the understanding between the respondent and the cashier that the assistant manager was to put his initials on the left hand bottom of the cheques, that the fraud became possible and consequently that the appellant was not responsible for the payment.

His Lordship Niyogi, J. after elaborately referring to the authorities on the point stated : " It is unnecessary to pursue the discussion of the law as the question whether there was negligence as between banker and customer is in any case a question of fact. The circumstances of this case do not prove any negligence on the part of the respondent. He left the cheques with his assistant manager who would, in usual course, be the person to take charge of his business in his absence. There is nothing to show that the assistant manager did not take such precaution as a man of ordinary prudence would do in respect of the cheque. The stealing of the cheque was no less possible had it been in the custody of the respondent than when it was in the custody of the assistant manager. One could hardly guard oneself against the commission of crime, although a man of prudence would take the usual care.

" Even on the assumption that there was negligence on the part of the plaintiff or his agent, that was fully covered up by the prompt information given to the cashier of the appellant bank about the cheque being missing with instructions not to cash the cheque on presentment.

" It is impossible to believe that the cashier was misled by the initials found on left hand bottom corner of the spurious cheque. If the banker is under an obligation to honour his customer's cheques, he is equally under an obligation not to cash them if he receives in good time express instructions of the customer countermanding payment. It is true that there is no express provision in the Indian Law corres-

ponding to Section 75 of the English Bills of Exchange Act, 1882, which invalidates payment made after a countermand by the customer but the Indian Law recognises a payment to be valid only when it is ' payment in due course ' as defined in Section 10, Negotiable Instruments Act, viz., in good faith and without negligence. It is incredible that the cashier had overlooked the number of the spurious cheque ; if he did overlook after having made a note of the number of the stolen cheque in his " patha book " he was clearly guilty of negligence. He was expressly prohibited from paying the cheque bearing the specified number and it was, therefore, his duty to take care to particularly observe the number of each cheque as it came to be presented for payment. He betrayed a reprehensible lack of diligence, if not of good faith and the payment made by him cannot be treated as a payment in due course."

Held that the appellant bank should abide the loss.

The appeal was dismissed with costs.

PUNJAB INDUSTRIAL AGENCY LTD. ... ... { *Defendant* / *Appellant*

versus

MERCANTILE BANK OF INDIA, LTD. ... ... { *Plaintiff* / *Respondent*

(Zafar Ali and Dalip Singh *JJ.*)

I.L.R. 11 Lahore 667 : A.I.R. 1930 Lahore 852.

Banker and customer—Countermand of payment of cheque by drawer—Bank making payment through mistake—Bank not entitled to refund of amount from payee.

THE facts were that the firm of Messrs. Sukhdeo Singh Joti Parshad arranged with the plaintiff, the Mercantile Bank of India, Ltd., Delhi for an overdraft. On 14th September 1922 the firm drew a cheque on the said bank for Rs. 2,000 in favour of the defendant, the Punjab Industrial Agency Ltd. Before the cheque was presented for payment the firm Sukhdeo Singh Joti Parshad countermanded payment by a letter to the bank dated 3rd January 1923. The defendant presented the cheque for payment on 3rd February 1923 to the plaintiff bank and the cheque was cashed on that date in forgetfulness of the order of the firm countermanding the payment. On 19th March 1923 the bank discovered the mistake and demanded refund of the amount paid from the defendant. The defendant refused to pay. The bank filed the present suit for the recovery of the money so paid.

The trial Court as well as the lower appellate Court decreed the plaintiff's claim. The matter was taken up in second appeal to the High Court. His Lordship after reviewing the various authorities on the point stated that in this case the bank expressly pleaded that whether there was a debt due from the drawer to the holder or not it made no difference. His Lordship was of opinion that it did make a great difference and on the pleading he assumed that the debt was due from the drawer to the holder of the cheque. The holder of the cheque was entitled to know on presentation of the same whether the cheque was going to be paid or dishonoured. If he received the payment he was entitled to proceed on the assumption that the debt due to him by the drawer had been *pro tanto* discharged and in this particular case he did so proceed and credited the drawer with that amount. His Lordship stated that he failed to see how on general principles it could possibly be held that the laches of the bank should cause the holder of the cheque to suffer loss. There was no principle of equity in

asking a man to refund the money received by him to which he was entitled and the mistake if any had arisen entirely through the negligence of the bank.

The appeal was allowed and the suit of the plaintiff bank dismissed with costs throughout.

Note.—Section 72 of the Indian Contract Act, 1872, provides that a person to whom money has been paid by mistake must repay or return it. It has been held in several cases that this section merely gives legislative expression to the principle of equitable restitution. Regarding recovery of money paid by mistake in respect of a negotiable instrument there are two points of view: (i) If a holder has had the money for such an interval of time that his financial position may, not necessarily will, be affected he can keep it, (ii) The above rule does not apply to cases when the notice of mistake is given within a reasonable time and no loss has been occasioned by the delay in giving it. In the particular facts of this case, their Lordships have taken the first point of view.

COMMISSIONERS OF TAXATION ... ... *Appellants*

versus

ENGLISH, SCOTTISH AND AUSTRALIAN BANK, LTD. ... *Respondents*

(Lord Dunedin.)

A.I.R. 1920 Privy Council 88.

Banker and customer—Customer—Definition of—"Customer signifies a relationship in which duration is not of the essence."

THE facts of the case were as follows :—" On 6th June 1927, Mr. A. Friend, York Street, Sydney, put a cheque drawn by himself on the Australian Bank of Commerce for £786 18*s.* 3*d.* into an envelope along with some other cheques drawn by other members of his family, and addressed the envelope to the Commissioners of Taxation, George Street North, Sydney. He gave the envelope to a clerk to deliver, and the envelope was duly delivered by being placed in a box put for the purpose of receiving such letters in the Taxation Department. The cheque was in payment of an assessment for income tax and was in the following terms : " pay 053 or bearer the sum of £786 18*s.* 3*d.*" It was crossed with the word " Bank " that is to say, generally not specially. The figures " 053 " correspond with the final figures on the number of the cheque and this method of filling up a bearer cheque seems to be a common habit in Sydney. Attached to the assessment notice sent to Mr. Friend there is the following instruction :—

" Collectors will not call for payment of taxes, but the taxpayer should (*a*) pay the tax at the Taxation Office, George Street North, Sydney, in cash or bank notes, cheques or postal notes, payable in New South Wales ; or (*b*) remit the same to the Commissioners at Sydney, by bank draft payable on demand or cheque crossed and marked Commissioners of Taxation—not negotiable—payable in N.S.W. or by Post Office money order, or by postal note, marked " Commissioners of Taxation—not negotiable.

" It is therefore to be observed that in making his payment by means of a bearer cheque delivered at the Office Mr. Friend was acting in strict accordance with the instructions issued. The cheque in question was stolen by some person unknown and was never cashed by the Commissioners of Taxation.

" On 7th June, a man who gave his name as Stewart Thallon entered the head office of the respondents' bank at Sydney and stated

that he wished to open an account. He was received by the accountant of the Bank who went through the usual procedure of taking his name and address which he gave at certain well-known residential chambers in Sydney and making him sign the signature book. Being asked how much he wished to bank, he replied " £20 " and handed that sum in bank notes to the accountant. The accountant filled up a " paid-in " slip and handed it and the money to the teller. Thallon said he would take a cheque-book and was given one, the charge being debited to his account. He then told the accountant that every cheque he signed for cash would be accompanied by an order to pay and the accountant added a note to that effect to be entered in the ledger account. A ledger account was opened in the ordinary form but no inquiry was instituted to check the authenticity of the address.

" On 8th June, the cheque in question was handed in with a pay-in-slip to be credited to Thallon's account which was done. Later in the same day the cheque was cleared in the ordinary manner and was paid by the Australian Bank of Commerce. On 9th, 11th and 12th June, three cheques for £483 16*s.* 6*d.*, £260 10*s.* 0*d.* and £50 12*s.* 6*d.* respectively drawn by Thallon were presented for payment by persons each accompanied with an order signed by Thallon to pay. No more was ever seen of Thallon ; no person of that name lived at the address given and it may be taken as certain that the name Thallon was an assumed one."

The Commissioners of Taxation filed the present action against the respondent bank the ground of liability being conversion of the cheque. The defence of the bank was Section 88 of the Bills of Exchange Act 1909 (Commonwealth of Australia) Federal which read as follows :—

" (1) Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself and the customer has no title or defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment. (2) A banker receives payment of a crossed cheque for a customer within the meaning of this section notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof."

The appellants in reply contended that (i) in the circumstances of the case, Thallon was not a customer, and (ii) the bank had been guilty of negligence in receiving payment. The trial Court as well as the lower appellate Court decided in favour of the respondent bank. On appeal to the Privy Council their Lordships stated : " As regards the first point, namely, whether Thallon was a customer in the sense of

the Act their Lordships are of the opinion that the word " customer " signifies a relationship in which duration is not of the essence. A person whose money has been accepted by a bank on the footing that they undertake to honour cheques up to the amount standing to his credit is in the view of their Lordships a customer of the bank in the sense of the statute irrespective of whether his connection is of short or long standing. The contract is not between an *habitue* and a newcomer, but between a person for whom the bank performs a casual service such as, for example, cashing a cheque for a person introduced by one of their customers and a person who has an account of his own at the bank. Thallon was therefore a customer, though one of short standing."

As regards the question of negligence, their Lordships held that as the cheque was payable to bearer and there was nothing on the face of the cheque to arouse inquiry, there was in the circumstances of the case no negligence on the part of the respondent bank.

The appeal was dismissed with costs.

In the matter of Travancore National and Quilon Bank Ltd.

DHARMAMBAL AMMAL ... ... *Applicant*

versus

JAMES VOCE PIRRIE, CYRIL GILL AND JOHN STANLEY GOODWIN (OFFICAL LIQUIDATORS) ... ... *Respondents*

(Venkatramana Rao *J.*)

A.I.R. 1940 Madras 98 : 50 Madras Law Weekly 939.

Banker and customer—Customer directing bank to apply deposit in particular manner when occasion arises—Bank if a trustee—Failure of bank—Priority in liquidation.

THIS was an application by a subscriber to a chit conducted by the Travancore National Subsidiary Co., Ltd., for payment of a sum of Rs. 820 standing to the credit of the applicant in the accounts of the Travancore National and Quilon Bank Ltd., in preference to the ordinary creditors of the bank. The applicant Dharmambal was a subscriber to a B Class chit. According to Rule 1 (*a*) of the rules governing the chit she had to subscribe at the rate of Rs. 40 each month for 25 successive months as the chit amount was Rs. 1,000. She subscribed to the chit on 17th January 1938 and on the same day she deposited with the Mylapore branch of the Travancore National and Quilon Bank, Ltd., a sum of Rs. 990. Her case was that the said amount of Rs. 990 was deposited for the specific purpose of paying the subscriptions to the chit every month as and when they fell due and the bank undertook to pay the same as and when they fell due and therefore as the amount was received by the bank for the specific purpose, it was trust money in their hands. The Subsidiary Company also failed and the chit came to a close. The applicant claimed to be entitled to be paid the balance of Rs. 820 remaining after payment of the instalments which fell due prior to the date on which the Company was wound up.

The Official Liquidators of the bank contested the claim and stated that the applicant was only an ordinary creditor of the bank and that she was not entitled to any priority.

His Lordship after referring to the relevant rules of the Chitty Savings Bank Account and the facts of the case, stated that *prima facie* the relationship of the subscriber and bank was that of creditor and debtor. His Lordship added : " In substance the transaction is that

instead of the subscriber operating on the account every month by drawing the required amount of subscription payable and paying it to the company, he gives a standing order to the bank to pay every month on his behalf the subscriptions as and when they fall due. It is nothing more than a mandate given to the bank ; that is to apply the money which he has to his credit in a particular manner. The mere fact that a customer gives directions to a banker to apply the money to the credit in a particular manner would not clothe the bank with a trust."

His Lordship after discussing the leading authorities on the point held that the applicant was not entitled to any preferential payment and could only rank as an ordinary creditor.

Note.—As pointed by His Lordship in the judgment : " Where a sum of money is paid to the general account of the customer with a direction that it must be applied in a particular manner when occasion arises, until the said sum of money is appropriated in the manner directed no question of trust would arise. The matter would rest in a mere mandate."

IMPERIAL BANK OF CANADA ... ... *Appellants*

versus

MARY VICTORIA BEGLEY ... ... *Respondent*

(Lord Maugham.)

A.I.R. 1936 Privy Council 193 : 44 Madras Law Weekly 128.

Banker and customer—Customer granting power-of-attorney to agent to get investments at a higher rate of interest for his money on deposit—Agent withdrawing amount to discharge his own debt to the bank—Bank acting without consulting the customer—Liability of the bank.

THIS was an appeal from a judgment of the Supreme Court of Canada. The action was for the recovery of a sum of $13,356 with costs from the appellants. The trial Judge gave judgment in favour of the respondent. The judgment was reversed and the action was dismissed by the Appellate Division. The Supreme Court of Canada restored the judgment of the trial Judge in respect of the claim for $8,500 and the appeal by the Bank to the Privy Council was concerned with the claim for $8,500 and interest.

The material facts of the case were as follows :—The respondent was the widow of one Robert Wilson Begley a farmer who died on 26th December 1928 leaving a will under which she was sole executrix and sole beneficiary. She was in no sense a business woman and instead of taking out probate herself, she gave a power-of-attorney to one J. W. McElroy, also a farmer who had been a neighbour and close friend of the respondent and her husband for many years. He administered the estate for the respondent and was duly discharged after completion. The respondent had had for a considerable time a small savings account with the appellants, the Imperial Bank of Canada at their Calgary branch and on the completion of the administration of the estate, the proceeds of the estate were deposited to the respondent's credit and the total sum to her credit in the said account was about $18,081.

Mr. McElroy had also an account with the same branch of the appellants which was generally in debit and it exceeded $8,000 in debit at this period. The Bank was pressing its claim. Mr. McElroy told the Bank that he would try to sell his lands and discharge the debt failing which he would borrow from the respondent a sufficient sum to pay his debt.

The respondent contemplated visiting certain places in the United States of America and desired that Mr. McElroy should attend to the investment of her money in her account with the appellants. On 24th June 1929 she executed a power-of-attorney in his favour using for the purpose a printed form in very wide terms supplied by the appellants.

The respondent before she left for the United States visited the Bank to arrange for the transfer of some money for her use in Hamilton and Ontario where she was going to pay a visit. There was no mention to her by the Bank officers about the suggested discharge of Mr. McElroy's indebtedness to the Bank out of the moneys standing to her credit.

On 26th June 1929 the respondent left for Hamilton and three days after her departure that is on 29th June 1929 Mr. McElroy purporting to act under the power-of-attorney transferred from the respondent's savings account to his own account a sum of $8,500 which together with a small sum of his own was sufficient to discharge the whole of his debt to the appellants. The cheque was signed " Victoria Begley, per J. W. McElroy, Attorney " ; it was drawn in favour of " J. W. McElroy or order " and was endorsed " Deposited to the credit of J. W. McElroy." Mr. McElroy executed a promissory note payable on demand with interest at 7 per cent. per annum in favour of the respondent and left it with Mr. Chambers the Assistant Manager of the Bank. Mr. Chambers took the promissory note but did not ask on the respondent's behalf for security nor did the Bank communicate in any way with the respondent or her solicitor Mr. Moyer who was in Calgary.

The action of Mr. McElroy was clearly a fraud on the respondent who had never authorised such a use of the power-of-attorney. The object of the power-of-attorney was clearly explained at a meeting between the respondent, Mr. McElroy and Mr. Moyer, the Solicitor of the respondent and it was to make arrangement for the investment of the money in her savings account and that Mr. McElroy was to try to get subject to Mr. Moyer's approval investments at a higher rate of interest than the ordinary bank rate on deposits.

Their Lordships after referring to the part played by the officers of the Bank in the transaction which was reprehensible stated : " There can indeed be no question that in the circumstances of the case McElroy when he signed the cheque in his own favour on the authority of the power-of-attorney, apart from any liability at common law became a constructive trustee of the sum of $8,500. Nor can it be doubted that the appellants who for their own benefit concurred in the transaction without any inquiry became subject to a fiduciary

obligation similar to that by which McElroy was bound." Their Lordships also referred to the leading English cases on the subject.

The main contention of the appellants disputing their liability was rested on the subsequent conduct of the respondent on her return to Calgary during a period exceeding two years. They relied on two points ; first that the respondent was estopped from maintaining the action and secondly that the respondent though entitled to repudiate the action by Mr. McElroy in fact had elected to affirm and ratify it. Their Lordships after dealing with the evidence on these points in detail negatived both the contentions. Their Lordships stated that there was no evidence to support the view that the respondent's silence that is her delay in complaining to the Bank that McElroy had used the money drawn from her account improperly and without her authority, had caused the appellants to alter their position in any way. Regarding the second argument that the respondent though entitled to repudiate the act of Mr. McElroy had chosen with full knowledge to ratify it, their Lordships stated : " In the first place there is no evidence to suggest that the respondent had any intention whatever of releasing the appellants. In the second place there was no consideration for such a release and since there was no deed this alone would be fatal. In the third place the respondent could not be held in equity to have released the appellants unless she had full knowledge of her rights and it seems to be clear that until shortly before the commencement of her action against the appellants she had no such knowledge."

Their Lordships also stated that in law there could have been no ratification in the circumstances of the case. The first essential to the doctrine of ratification with its necessary consequence of relating back was that the agent should not have been acting for himself but should have intended to bind a named or ascertainable principal. Mr. McElroy did not profess to represent the respondent in paying his own debt to the Bank without the knowledge or consent of his principal and his act in doing so was not one to which the doctrine of ratification could be held applicable.

Their Lordships added : " The contention that the respondent " adopted " the transaction *ab initio* means nothing in law except that after discovering the fraud she made a contract with Mr. McElroy which changed his liability into one of debt, instead of one of damages for breach of duty or for breach of trust. The appellants of course cannot set up or rely on such a contract since they are not parties to it. It is clear that in the circumstances the respondent was not put to her election to sue either Mr. McElroy or the appellants : she could sue both or either, subject of course to this that she could not recover more than the total sum due to her. She could indeed have released

Mr. McElroy and yet have pursued her remedies against the appellants, for there is no question here either of joint liability or of the liability of principal and surety."

The claim of the respondent was allowed and the appeal was dismissed with costs.

Note.—A banker who is in a fiduciary position in respect of his customer's account must not be a party to the application of the customer's money inconsistent with his fiduciary position. A banker who is knowingly a party to or derives benefit out of such misapplication will be held liable to make good the amount to the customer.

THE CHETTINAD MERCANTILE BANK LTD. ... ... { *Appellant* / *2nd Defendant*

versus

PL. A. PICHAMMAI ACHI (PLAINTIFF) AND ANOTHER (1ST DEFENDANT) ... ... *Respondents*

(Somayya *J.*)

(1945) 15 Company Cases 93 : (1945) 2 Madras Law Journal 100.

Banker and customer—Customer purchasing draft in his name in contravention of the instructions of his principal—Claim by principal of the amount payable under the draft—If banker entitled to set-off the amount due under the draft against liability of the customer in private account—Held that the customer was a trustee in respect of the draft amount and the banker could not set-off the trust money against the liability of the customer in his private account.

THE material facts of the case were as follows :—The plaintiff Pichammai Achi instructed the first defendant, a customer of the Chettinad Mercantile Bank, Ltd. to purchase a draft for Rs. 4,000 payable to her at Madras. The first defendant instead of purchasing the draft in the name of the plaintiff purchased in his own name a draft for Rs. 4,000 payable at Madras on the 10th August 1937 from the Chettinad Mercantile Bank, Ltd. and refused to endorse it in favour of the plaintiff when she required him to do so. The plaintiff by a notice dated the 31st October 1938 wrote to the appellant bank stating that the amount represented by the draft belonged to her and not to the first defendant and that the bank should not pay the amount to the first defendant. The bank, however, gave no reply. Thereupon the present suit was filed against the first defendant and the bank as second defendant for a declaration that the plaintiff was entitled to the beneficial interest in the draft. The suit was contested by the second defendant bank. The main defence was that the first defendant owed large sums of money to the appellant bank and that the appellant bank was entitled to adjust the sum represented by the draft against the sums due by the first defendant by way of right of set-off. The trial Court dismissed the suit but on appeal the District Judge of Ramnad granted a decree against the appellant and the bank preferred his second appeal to the High Court at Madras.

His Lordship Somayya, *J.* after referring to the authorities and facts of the case stated that the appellant bank by giving the draft in

question to the first defendant had enabled third parties to acquire rights in it and it was not shown that the right of set-off claimed by the bank arose before the third parties acquired rights in the draft. If the first defendant had endorsed the draft to another it was conceded by the Counsel for the appellant bank that the bank would be liable to the endorsee. The draft in question though in the name of the first defendant was in the possession of the plaintiff. His Lordship added, " On the facts found by the lower Court, the first defendant became a trustee for the plaintiff. When he obtained the draft in his own name, he committed a breach of trust and the law says that the property obtained by the first defendant under those circumstances must be held by him for the benefit of the plaintiff, i.e., a trust was created in favour of the plaintiff in respect of the amount of the draft. This is certainly analogous to the case of an assignment. If in the case of an assignment for value, the assignee would be entitled to get the amount from the appellant bank, it seems to me, the answer must be the same in the case of the plaintiff who seeks to recover the amount as the beneficiary under the trust created by law in her favour. She had already paid for the draft."

Held that the plaintiff was entitled to the amount due under the draft.

The appeal was dismissed with costs of the first respondent.

Note.—The right of set-off between a banker and his customer can be exercised only when the parties occupy the position of debtor and creditor to each other respectively in the same right. As stated by Sheldon in his Practice and Law of Banking (5th Edition, page 200): " Debts due in different rights cannot be set-off on the principle that one man's money cannot be used to pay another man's debt." A banker who has notice that his customer is a trustee cannot set-off the trust funds against the liability of the customer in his private account.

In re TRAVANCORE NATIONAL AND QUILON BANK, LTD. (IN LIQUIDATION)

(Venkatramana Rao *J.*)

A.I.R. 1942 Madras 377 : (1942) 1 Madras Law Journal 241.

Banker and customer—Delivery of cheques for collection for being credited to current account—Relationship of debtor and creditor when created—Held that the cheques must have been realised and also ascertained in accordance with the rules of the Bank.

A CUSTOMER of the Bombay branch of the Travancore National and Quilon Bank Ltd. maintained a current account with them. He paid in on 16th June 1938 for realization and credit to his current account a cheque bearing that date for Rs. 1,500 drawn in his favour on the Anderson branch of the bank at Madras and another cheque for Rs. 433-2 drawn in his favour on the same branch. Under the rules of the bank, the cheques were available for drawing only after they were realised and intimation thereof had been given to the customer. The customer contended that before he received any such intimation the bank suspended payment and, therefore the moneys realised by the bank must be held to be moneys held in trust for him and he was, therefore, entitled to rank as a preferential creditor in respect thereof.

The sum of Rs. 1,500 in respect of the cheque dated 16th June 1938, was realised by the Anderson branch on 18th June 1938, and the sum of Rs. 433-2 in respect of the second cheque was realised on 20th June 1938. The bank suspended payment on 21st June 1938. The question was whether in respect of these cheques the relationship of debtor and creditor was established between the bank and the customer.

Held on the authorities that the receipt by the Anderson branch at Madras of these sums on the respective dates must be held to be receipts by the bank and the proceeds must be said to have been realised by the Bombay branch of the bank on the respective dates.

Held further that so far as the proceeds of the cheque for Rs. 1,500 were concerned, it must be held that there was ascertainment. The amount was realised on the 18th June 1938, and certainly it would have been open to the customer to draw upon the bank and he could easily have ascertained that the amount was realised by the bank. There was the relationship of debtor and creditor with regard to this sum. But in regard to the second cheque, it was difficult to hold that there was ascertainment within the meaning of the rules of the bank. Therefore, the customer was held entitled to rank as an ordinary creditor for Rs. 1,500 and as a preferential creditor for Rs. 432-2.

NAYAR MODERN BANK, LTD., PALGHAT ... ... *Applicant*

versus

OFFICIAL LIQUIDATOR, TRAVANCORE NATIONAL AND QUILON BANK, LTD. ... ... *Respondent*

(Venkatramana Rao *J.*)

A.I.R. 1940 Madras 149 : 1939 Madras Weekly Notes 1174.

Banker and customer—Deposit of money in bank by way of fixed deposit for opening overdraft accounts—Nature of transaction—Fixed deposits if entitled to priority on winding up of bank.

THIS was an application by the Nayar Modern Bank, Ltd., for payment of a sum of Rs. 23,950-3-4 in full and in preference to the ordinary creditors of the Travancore National and Quilon Bank, Ltd. It was alleged that under agreements with the Travancore National and Quilon Bank, Ltd., the Nayar Modern Bank, Ltd., made fixed deposits at the various branches of the Travancore National and Quilon Bank, Ltd., at different times for the purpose of enabling the Nayar Modern Bank, Ltd., to open overdraft accounts on the security of such fixed deposits, that there were five such fixed deposits on the date when the Travancore National and Quilon Bank, Ltd., suspended payment and that after giving credit to the amounts drawn by it on overdraft account there remained a balance of Rs. 23,950-3-4 which was now claimed.

The ground on which the claim for preferential payment was made was that the fixed deposits were made and the overdraft accounts were opened at the same time and the deposits were made only for the specific purpose of obtaining accommodation by opening overdraft accounts.

The Official Liquidators contended that the several deposits were made by the Nayar Modern Bank, Ltd., in the ordinary course of business, that an overdraft account was opened as per the terms of an agreement dated 11th November 1937, and that the amounts deposited by the applicant bank were to be a security for the due payment of the amounts that were from time to time paid to the applicant bank in the overdraft account and that, that was nothing more than a usual and ordinary banking transaction of loan.

The question therefore was, what was the nature of the transaction between the Nayar Modern Bank, Ltd., and the Travancore National and Quilon Bank, Ltd. ? His Lordship after referring in detail to the terms of the agreement for overdraft and the relevant correspondence

between the parties at the inception of the dealings between them stated : " The transactions therefore between the Nayar Modern Bank, Ltd., and the Travancore National and Quilon Bank, Ltd., did not constitute anything more than a relation of debtor and creditor. In the case of fixed deposit account the Travancore National and Quilon Bank, Ltd., is the debtor and the Nayar Bank is the creditor ; while in the case of the overdraft account the position is reversed, the Nayar Modern Bank, Ltd., being the debtor and the Travancore National and Quilon Bank, Ltd., being the creditor. I am therefore unable to see how any question of trust arises in the case ; nor can it be pretended that the amount which was paid by the Nayar Modern Bank, Ltd., to the Travancore National and Quilon Bank, Ltd., by way of fixed deposit is money placed with the latter bank for any specific purpose so as to clothe it with the relationship of a trustee. It will be seen that what was given as security is not the specific amount that was deposited but the debt as evidenced by the deposit receipt issued by the Travancore National and Quilon Bank, Ltd."

For the above reasons His Lordship disallowed the claim of the Nayar Modern Bank, Ltd., to preferential payment of the fixed deposits and dismissed the application with costs.

Note.—A fixed deposit by a customer with a bank as security for overdraft account creates only the ordinary relationship of debtor and creditor between the parties.

In the matter of the Travancore National and Quilon Bank, Ltd.
(In Liquidation.)

SIR T. DESIKACHARI AND ANOTHER, TRUSTEES, EAST TANJORE ELECTRIC SUPPLY CORPORATION, LTD., EMPLOYEES' PROVIDENT FUND INSTITUTION, TRICHINOPOLY ... ... *Applicants*

versus

JAMES VOCE PIRRIE AND CYRIL GILL (OFFICIAL LIQUIDATORS) ... ... *Respondents*

(Venkatramana Rao *J.*)

A.I.R. 1940 Madras 184 : 1939 Madras Weekly Notes 1068.

Banker and customer—Deposit of provident fund moneys of employees of a company—Effect of Section 282B, Indian Companies Act, 1913.

THIS was an application on behalf of East Tanjore Electric Supply Corporation Ltd. Employees' Provident Fund Institution, Trichinopoly, for the payment of a sum of Rs. 500 in preference to the ordinary creditors of the Travancore National and Quilon Bank Ltd. It was argued on behalf of the applicants that the said sum in the savings account of the bank was the provident fund moneys of the employees of the Corporation and therefore trust moneys under Section 282B of the Indian Companies Act, 1913, which stated that all moneys contributed to the provident fund should be invested only in securities mentioned in Clauses (*a*) to (*e*) of Section 20 of the Indian Trusts Act, 1882, and all moneys belonging to such fund at the commencement of the Indian Companies Amendment Act, 1936, which were not so invested should be invested in such securities by annual instalments not exceeding ten in number and not less in amount in any year than one-tenth of the whole amount of such moneys. It was contended on behalf of the applicants that the sum of Rs. 500 was trust property which came into the hands of the Travancore National and Quilon Bank, Ltd., with notice of the trust and inconsistently with the trust and the bank having received the money wrongfully and in breach of trust was itself a trustee for the amount and the amount continued to be trust money in its hands. The Official Liquidator stated that the bank did not receive the sum of Rs. 500 wrongfully or knowingly in breach of any trust and that under Section 282B (*2*) of the Indian Companies Act, 1913, the trustees were entitled to deposit the trust

funds in the bank to accumulate the same for the purpose of investing such accumulations annually in the securities referred to in Section 20 of the Indian Trusts Act, 1882. He therefore contended that the transaction was only an ordinary banking transaction which created the relationship of debtor and creditor between the parties and that the applicants were not entitled to any priority.

His Lordship stated that the deposit of trust moneys with a banker did not make him a trustee thereof. His duty in such a case was not to participate in a breach of trust. However, in this case the bank was a party to a partial breach of trust by the trustees in as much as the bank received the provident fund of the employees and did not see to it that one-tenth of the deposit was invested annually in trust securities in terms of Section 282B (*2*) of the Indian Companies Act, 1913.

Held that the applicants were entitled to preferential payment in respect of the sum which ought to have been so invested and for the balance they could prove only as ordinary creditors in the winding up.

Note.—As observed by Vice-Chancellor Malins in Gray *vs.* Lewis (1869), 8 Eq. 526 : " All persons who obtain possession of trust funds with a knowledge that their title is derived from a breach of trust will be compelled to restore such trust funds."

In re TRAVANCORE NATIONAL AND QUILON BANK LTD. IN LIQUIDATION

NAYAR MODERN BANK, LTD., PALGHAT ... ... *Applicant*

versus

JAMES VOCE PIRRIE, CYRIL GILL AND JOHN STANLEY GOODWIN (OFFICIAL LIQUIDATORS) ... ... *Respondents*

(Venkatramana Rao *J.*)

A.I.R. 1940 Madras 178 : 1939 Madras Weekly Notes 1066.

Banker and customer—Deposit of trust money in bank—Effect.

THIS was an application by the Nayar Modern Bank, Ltd., for payment of a sum of Rs. 6,500 that stood to its credit with the Travancore National and Quilon Bank, Ltd., under three fixed deposits for Rs. 1,000, Rs. 5,000 and Rs. 500 respectively in preference to the ordinary creditors of the bank. Under Section 282B, Indian Companies Act, 1913, the Nayar Modern Bank, Ltd., deposited with the Travancore National and Quilon Bank, Ltd., these deposits in a separate account earmarked as " Employees' cash security." The Nayar Modern Bank, Ltd., contended that as the amount representing the employees' cash security was held by the Nayar Modern Bank, Ltd., as trustees in trust for its employees and the said money having been received by the Travancore National and Quilon Bank, Ltd., with notice of the said trust the latter bank must be held to be trustees for the employees of the Nayar Modern Bank, Ltd.

The Official Liquidators contended that the amount of Rs. 6,500 was received as deposit in the ordinary course of banking business, the earmarking of the deposit as " Employees' Cash Security " was merely to distinguish it from the other several deposits or loans made by the same bank against which the depositor arranged to obtain overdrafts and that the Travancore National and Quilon Bank, Ltd., did not accept the sum of Rs. 6,500 as a trustee and the transaction was not impressed with any trust.

His Lordship negatived the contention of the applicant and stated : " The fact that the depositor is a trustee and that the money deposited is trust money does not affect the relation which the law creates between a bank and an ordinary customer, namely, the relation of a debtor and creditor. The legal effect of a notice to the bank that the money deposited is trust money is only to cast a duty on the bank not to participate in a breach of trust by the trustee." His Lordship

cited the passage from Hart's Law of Banking which stated : " A banker who received into his possession moneys of which his customer has, to his knowledge become the owner in a fiduciary character contracts the duty not to part with them even at the mandate of his customer for purposes which he knows are inconsistent with the customer's fiduciary character and duty." His Lordship further added : " The banker must not be a party to an appropriation of these funds which is inconsistent with the character in which the customer holds them ; for example, he must not allow those moneys to be applied in payment of his own overdrawn private accounts."

Held that the deposits in a scheduled bank under Section 282B of the Indian Companies Act, 1913, did not constitute the scheduled bank a trustee and the only duty imposed on the Travancore National and Quilon Bank, Ltd., in the circumstances of the case was not to be a party to any dealing by the Nayar Modern Bank, Ltd., with those moneys in violation of the duty which the statute imposed. The Travancore National and Quilon Bank, Ltd., had not been a party to any such misapplication and the applicant was not entitled to any preferential payment.

The application was dismissed with costs.

IMPERIAL BANK OF INDIA, MADRAS ... ... { *Defendant* / *Appellant*

versus

S. KRISHNAMURTHI AND ANOTHER ... ... { *Plaintiffs* / *Respondents*

(Beaseley, *C.J.* and Bardswell *J.*)

A.I.R. 1933 Madras 628 : 65 Madras Law Journal 471.

Banker and customer—Duties of banker—Customer a trustee—Duty of banker not to pay money for purposes inconsistent with trust.

THIS was an appeal by the Imperial Bank of India, defendant 2 in the suit. The facts were as follows :—The plaintiff was the son of one Sanjeevi Rangaiah Naidu who on 14th December 1913 made a will bequeathing to the plaintiff, his younger son the sum of Rs. 3,121-10-3 which had been deposited by him with the appellant in fixed deposit dated 24th July 1913. In his will the testator appointed Chellammal, his sister and R. Lakshmiah Naidu his brother-in-law and the plaintiffs' maternal uncle, the guardians of the plaintiffs. It was further provided that these two guardians were to receive the accrued interest earned by the sum of money in fixed deposit already referred to once a year for the maintenance and education of the plaintiff until he attained majority when he would be entitled to receive the whole amount on fixed deposit from the Bank. The plaintiff's father died on 20th January 1914 and the two guardians applied to the High Court at Madras for the grant to them of letters of administration with the will annexed. The grant was ordered on 10th February 1916 on the necessary security being furnished.

The plaintiff was supported by Chellammal during her life time but she died in 1924 and thereafter the other guardian Lakshmiah Naidu would have nothing to do with the plaintiff or his support. The plaintiff attained majority in April 1928 and discovered in 1929 that the sum of money in fixed deposit at the Imperial Bank had been withdrawn by Lakshmiah Naidu on 18th March 1916 together with one year's interest from the date of the deposit by the testator of this money and that Lakshmiah Naidu had drawn it out on the pretext of investing it on more advantageous terms as to interest in house property or some other form of investment.

The circumstances under which the money was withdrawn from the Imperial Bank of India were these. On 17th January 1914 three

days before the death of the testator the two guardians wrote through a lawyer to the bank calling the bank's attention to the amount in fixed deposit standing in the name of the testator and stating that the testator had executed a will directing that the amount standing in fixed deposit should be renewed and should be paid to the minor on his attaining majority and that in the meanwhile the interest alone was to be drawn by the executors. It was also stated that the testator's eldest son was attempting to draw out this money without any authority and the bank was warned that the money was not to be transferred or otherwise dealt with till the guardians produced the probate of the will. Afterwards there was further correspondence between the guardians and the bank in which the former indicated that after they obtained the probate they would like to withdraw the fixed deposit from the bank so as to purchase a house or deposit the amount elsewhere where they would get a higher rate of interest for the benefit of the minor.

On 18th March 1916, the guardians produced before the bank the letters of administration with the will annexed which they had obtained and requested permission to withdraw the money from the fixed deposit together with the accrued interest for the use and benefit of the minor plaintiff. After some dispute regarding the amount of accrued interest, the bank paid the guardians the amount due under the fixed deposit with interest up to the date of maturity. The bank also made it clear that they paid the amount since Lakshmiah Naidu stated that he wished to invest the amount in house property. In fact there was no such investment by the guardians and Lakshmiah Naidu died in September 1929. On 1st February 1930 the security bond having been assigned over to the plaintiff by the Registrar of the High Court, he filed this suit against the widow of one of the sureties and in consequence of her written statement he made the appellants also defendants.

The point was whether under the circumstances the bank could be held liable to the plaintiff. The appellants pleaded that they were not liable because they were protected by Section 273, Succession Act, 1925, which gave a full indemnity to all debtors paying their debts and all persons delivering up property to the person to whom probate or letters of administration have been granted. The learned trial Judge, Stone, *J.* however negatived that plea holding that as the bank had knowledge of the fiduciary capacity of the administrators and of the trust in favour of the plaintiff created by the will and that the administrators were dealing with the trust money in a manner in consistent with that trust they were not entitled to the protection given by Section 273, Indian Succession Act, 1925.

Their Lordships in appeal concurred with this view and stated that it was clear that the appellants knew of the trust created by the will. They had the letters of administration with the will annexed before them. The remarks column of the schedule in the letters of administration clearly stated : " The guardians have right to receive only the interest accrued on the sum once in a year for the support of the minor until the minority expires."

Their Lordships after referring to the provisions of Sections 40 and 20 of the Indian Trusts Act 1882 stated that the purchase of a house was not an authorised investment under Section 20 of the Act. There was a specific direction as regards investment of the money in the testator's will and the administrators were not entitled to invest the money otherwise than as directed by the testator without the sanction of the Court.

Their Lordships also referred to Hart's *Law of Banking* (Third Edition) at page 189 where it is stated as a general proposition " that a banker must not knowingly be a party to the application of trust moneys to any purposes inconsistent with the trusts affecting them," and later on under " notice of trust " it is stated : " A banker who receives into his possession moneys of which his customer has to his knowledge, become the owner in a fiduciary character, contracts the duty not to part with them even at the mandate of his customer for purposes which he knows are inconsistent with the customer's fiduciary character and duty."

" If indeed, the banker has knowledge of the misapplication of the trust money received by his customer and paid to him he is just as much liable for the amount as if he had himself been nominated a trustee of the money and it had come into his hands as such."

Their Lordships held for the above reasons that the appellants were not protected by Section 273, Indian Succession Act, 1925, and that they were liable and dismissed the appeal with costs.

Note.—A banker who knows the fiduciary character of his customer should not pay him money for purposes inconsistent with his fiduciary character and duty. Any such payment is not protected by the provisions of Section 278 of the Indian Succession Act, 1925.

JOGENDRA NATH CHAKRAVARTI ... ... *Plaintiff*

versus

NEW BENGAL BANK, LTD. ... ... *Defendant*

(McNair *J.*)

A.I.R. 1939 Calcutta 63 : 180 Indian Cases 660.

Banker and customer—Failure to honour customer's cheque—Measure of damages.

THIS was a suit for damages by the plaintiff against the defendant bank for failure to honour four cheques drawn by him upon the bank although his account was in funds. The defendant bank repudiated liability alleging an arrangement between the bank and the plaintiff amongst other creditors that they would not draw cheques other than of an urgent and personal nature during the period of financial stress which the bank was experiencing. The cheques dishonoured were alleged to have been drawn in breach of the agreement. The plaintiff assessed his damages in the plaint at Rs. 8,000. The only particulars he gave were Rs. 5,000 general damages and Rs. 3,000 special damages.

His Lordship after analysing the evidence in the case stated that there was no agreement as alleged by the bank when these cheques were dishonoured. Regarding the measure of damages that the plaintiff was entitled to, his Lordship referred to the passage in Hart's *Law of Banking* (Fourth Edition, Volume I, page 443), which read : " Where the banker being bound to honour his customer's cheque has failed to do so he will be liable in damages. If special damage naturally ensuing from the dishonour is proved, it will be properly taken into account in assessing the amount of the damages. If the customer be a trader the jury may properly award substantial damages, in the absence of proof of special damage. In other cases, the customer will be entitled to such damages as will reasonably compensate him for the injury which from the nature of the case, he has sustained. All loss flowing naturally from the dishonour of a cheque may be taken into account in estimating the damages." His Lordship after dealing with the evidence in the case stated that the plaintiff was not a trader and in the circumstances of the case, the amount of damages claimed by him were excessive. The plaintiff had also not proved that he had suffered any special damage. His Lordship considered that the plaintiff's credit and reputation were damaged by the dishonour of his cheques and decreed the plaintiff's claim for Rs. 500 with costs.

PUNJAB NATIONAL BANK LTD., DELHI ... ... { *Defendant* / *Appellant*

versus

NANNEH MAL JANKI DAS AND ANOTHER ... ... { *Plaintiffs* / *Respondents*

(Tek Chand and Coldstream *JJ.*)

A.I.R. 1933 Lahore 742 : 148 Indian Cases 11.

Banker and customer—Fixed deposit for a term—No interest unless renewed—Deposit not renewed—Repayment of the deposit made impossible by depositor himself—Banker not liable for interest after expiry of the term.

THE material facts of the case were as follows :—On the 17th April 1926, Banarsi Das acting as manager of the joint family firm, Nanneh Mal Janki Das of Delhi placed a lakh of rupees in fixed deposit with the Punjab National Bank Ltd. at Delhi. The deposit was for six months and to carry interest at 6 per cent. and was subject to six months' notice of withdrawal. Such notice was given at the time of the deposit and it was repayable on the 17th October 1926. The deposit ceased to carry interest unless renewed. A memorandum printed on the fixed deposit receipt stated that the receipt must be presented, endorsed by the depositor before any payment could be made thereon and receipt intended to be renewed should be sent in on the due date to prevent loss of interest.

Before the period of deposit expired dispute arose between the partners of the firm and one partner Rai Sahib Lala Nanak Chand served a notice on the Bank not to pay, transfer or otherwise deal with the money deposited in the Bank by the firm which money belonged to Rai Sahib Nanak Chand jointly with the other proprietors of the firm. On the 9th October 1926, the bank gave notice on the usual form to the firm intimating that the deposit would fall due for repayment on the 17th October 1926 and asking to be informed whether the firm wished to withdraw the money or continue to keep it in fixed deposit for 3, 6, 9, 12, or 18 months. The notice requested that in any case the receipt should be endorsed and returned and pointed out that interest would cease from the date on which the deposit became repayable. No reply was sent to this notice. The dispute among the members of the firm was referred to arbitration which proved infructuous. So far as the Bank was concerned it was prohibited from dealing with the firm's deposit without Rai Sahib's consent. The

Bank received a letter dated 16th March 1927 from Banarsi Das's lawyer asking it to pay the money to Banarsi Das as managing partner of the firm. The Bank declined to do so without authority given by all the partners of the firm.

Having failed to recover the deposit, Banarsi Das filed an action against the Bank in the Court of the Senior Sub-Judge, Delhi to recover Rs. 1,16,875 being the lakh deposited with interest. He also asked for future interest. The Bank contended that (i) the dissensions between the members of the firm justified their refusal to pay the deposited money to Banarsi Das, (ii) there was no tender of the deposit receipt duly endorsed and (iii) Rai Sahib Nanak Chand one of the partners of the firm had prohibited the Bank from repaying the amount to Banarsi Das. The Bank was prepared to repay the deposit with interest up to the 16th October 1926 provided a valid discharge was given. The fixed deposit receipt was signed by Banarsi Das and Rai Sahib Nanak Chand and the Bank deposited the principal amount and interest to the due date in the Chartered Bank.

The learned Senior Subordinate Judge held : –

(i) Although there had been disruption of the joint family firm the change of relationship of its members *inter se* did not affect the relations of the firm with the world outside.

(ii) As Banarsi Das had been carrying on the business as Manager, the Bank ought to have acted on his instructions notwithstanding Nanak Chand's prohibition, and

(iii) In view, however, of Banarsi Das's omission to demand repayment on the due date and his delay in asking for a renewal of the deposit, the Bank should be given some latitude.

Accordingly after deducting interest for two months, the claim was decreed against the Bank for Rs. 1,15,875, that is to say, Rs. 12,875 more than the sum which the Bank had been ready to pay.

The Bank preferred an appeal to the High Court at Lahore against the decree. Their Lorships of the High Court held :

(i) The lower Court's judgment in so far as it laid down that the Bank was bound to renew the deposit because Banarsi Das could have given a valid release on behalf of firm was wrong in law and could not be supported. His Lordship Coldstream, *J.*, stated : "The authorities for the proposition that each partner in a business has implied authority to act for the others in the management of that business do not justify the conclusion that after disruption one of them who acted previously as Manager can appropriate part of the firm's property for

himself or deal with it in a manner contrary to the wishes of the others."

(ii) The Bank was not a trustee and did not occupy any fiduciary position in respect of the firm's deposit and the Bank was not bound to deal with it to the best advantage of the firm either by renewing the deposit or placing the money in current account bearing interest. Under the terms of the contract made between the firm and the Bank, the deposit was to cease to bear interest on the 17th October 1926 and that no repayment or re-deposit was to be made unless the receipt was presented on the due date " to prevent loss of interest." Obviously the Bank was bound to hold the money at call after the due date and repay it on presentation of the receipt so endorsed as to bind all the old partners or their representatives and was not at liberty to deal with it as it chose best and thus lay itself open to possible claims for damages because it had dealt with the deposit in a manner which one of the partners considered disadvantageous to himself.

(iii) In the present case there was no wrongful or unjust retention of the money or fraud and interest could not be claimed on equitable grounds.

(iv) In conclusion as there was no stipulation for interest after the due date in the contract between the parties, as the Bank was always ready to return the firm's deposit and as there was no breach of contract by the Bank, it was not liable to pay interest after the due date when the fixed deposit became repayable.

Held that for the above reasons the Bank was entitled to succeed and the appeal was allowed with costs.

STATE-AIDED BANK OF TRAVANCORE, LTD. ... { *Defendants* / *Appellants*

versus

DHRIT RAM ... ... { *Plaintiff* / *Respondent*

(Lord Atkin.)

I.L.R. 1942 Bombay 318 : A.I.R. 1942 Privy Council 6.

Banker and customer—Fixed deposit in bank—Contract—Offer and acceptance—Construction—Place of payment—Law governing contract.

THE plaintiff was a permanent resident of Bombay. The defendants (the bank) were a company incorporated according to the laws of the State of Travancore and apart from a branch office in the State of Cochin, had their head and only office at Alleppey in Travancore State. In September 1936, the plaintiff wrote to the bank at Alleppey asking for the rate of interest allowed on fixed deposit. On the 5th September 1936, the bank wrote back stating their present rates of interest for deposits and that "remittance may be made towards credit of our account with the National City Bank of New York, Bombay, and the same will be accepted by us at par and interest allowed from the date on which credit will be accorded to our account at that end. Enclosed please find the necessary opening forms for fixed deposit account which please return duly completed and signed on the remittance being made." On 1st October 1936, the plaintiff paid a sum of Rs. 11,000 to the account of the bank in the National City Bank of New York, Bombay, filled up the bank's opening form and wrote to the bank at Alleppey enclosing the executed form and also the specimen signature card and requested the bank to issue a fixed deposit receipt for two years in his name. The receipt after stating the terms of the deposit mentioned that interest would cease at the expiration of two years when the receipt should be sent in for payment or renewal endorsed by the depositor. Interest was paid by the bank to the depositor on four occasions under the fixed terms by sending him a cheque on a bank in Bombay, only in one case on the National City Bank of New York. Subsequently, the Travancore bank fell into difficulties and proceedings for winding-up the bank were taken in the Travancore Court and a scheme of arrangement approved by the Court was arrived at. By virtue of the order of the Court, the scheme became binding on the bank and all the creditors.

The plaintiff filed an action in the High Court at Bombay for the recovery of the amount of the deposit and contended that the contract was made and was to be performed at Bombay and that the proceedings and scheme of arrangement in the Travancore Court were not binding on him.

There was a difference of opinion in the Bombay High Court as to the documents constituting the contract of deposit. The trial Judge held that the bank's letter of 5th September 1936 was an offer accepted by the plaintiff by paying the money to the National City Bank of New York and sending the opening form. The Chief Justice thought that the letter of the 5th September 1936 was merely a quotation of business terms and that the contract was made by the offer by the plaintiff in the opening form accepted by the bank by the issue of the deposit receipt and, therefore, that the contract of deposit was made at Alleppey in Travancore. Lord Atkin, delivering the judgment of the Board of the Privy Council, agreed with the opinion of the Chief Justice on this point.

The other question was whether the contract between the parties was governed by Travancore Law. Lord Atkin stated: "The law which governs a contract depends upon the intention of the parties, express or implied. There is no intention expressed in these documents and the Courts are left to infer the intention by reference to considerations where the contract was made and how and where it was to be performed. The learned Chief Justice, though he came to the conclusion that the contract was made at Travancore, was of opinion that it was to be performed, i.e., discharged, at Bombay. Their Lordships cannot agree. With the greatest respect to the Chief Justice he does not appear to have given sufficient weight to the fact that this is a banking transaction entered into at the only office of the bank where in ordinary matters banking business of this kind can be completed."

His Lordship, after referring to certain English decisions and relevant facts in this case, concluded that not only the place where the contract was made but also the place where the contract was to be performed was Travancore and that the law of that State governed the transaction. His Lordship held that the defendants (the bank) were protected by the terms of the scheme of arrangement and dismissed the plaintiff's suit with costs.

ALLAHABAD BANK, LTD., LAHORE ... ... *Plaintiff / Appellant*

versus

RATTAN CHAND CHAWALA AND OTHERS ... ... *Defendants / Respondents*

(Addison and Agha Haidar *JJ.*)

I.L.R. 8 Lahore 702 : A.I.R. 1927 Lahore 577.

Banker and customer—Hundis endorsed in favour of banker for collection—Banker crediting the customer's account with the amount and permitting him to draw the money before collection from his overdrawn account—Hundis dishonoured by drawer—Held that the customer and drawer were liable to the banker in respect of the dishonoured hundis.

THE material facts of the case were as follows :—Mr. Rattan Chand Chawala the first defendant had a current account with the plaintiff bank. On the 21st June 1922, the first defendant endorsed in favour of the bank two hundis drawn in his favour by the second defendant on a Bombay firm. The current account of the first defendant with the bank at that time was overdrawn and when the hundis were endorsed in favour of the bank, it immediately gave him credit for their full amount, thereby changing the debit balance to a credit balance of Rs. 4,594-15-7. The same day the first defendant was allowed to draw out on his own behalf Rs. 4,550 thus reducing the credit balance to Rs. 44-15-7. The hundis were not honoured by the drawer when presented for payment and their amounts were debited by the bank on the 18th July 1922 in the pass book of the first defendant. At that time his account was already overdrawn.

The plaintiff bank filed this suit for recovery of Rs. 6,677-9-3 principal and interest payable in respect of the hundis against the first defendant and the second defendant who was the drawer of the hundis. The suit was contested only by the first defendant, his principal pleas being that

(1) the hundis were given for collection only and that though credit was at once given for them in the current account of the first defendant with the bank, they had in fact nothing to do with that account ;

(2) the bank later agreed to adjust them in the current account, this being done on the 18th July 1922, and that in this way they had merged in the current account which was an overdraft account by agreement ; and

(3) the hundis were discharged by the amount due on them being debited in the current account and pass book of the first defendant.

It was urged that for these reasons there was no cause of action on the hundis though there was against the first defendant alone on the overdrawn current account.

The trial Court for reasons which need not be detailed agreed with the last of the above contentions but without completely dismissing the suit gave a decree in favour of the plaintiff for the small sum of Rs. 36-3-0 with future interest against the defendants. The bank preferred an appeal to the High Court.

Their Lordships of the High Court after referring to the facts of the case and leading authorities on the subject stated as follows :—

(i) It was clear from the course of the transactions that the hundis were given for collection. The amount of the hundis was credited at once to the first defendant who by means of this credit was able to draw out Rs. 4,550 cash. The bank was thus a holder in due course of the hundis.

(ii) The question of merger was one of fact and on the evidence in the case it was impossible to hold that there was a discharge by merger in the present case. The bank never agreed to give up its rights in the hundis and in fact gave notice of suit on the two hundis to both defendants on the 18th July, i.e., on the same day as it debited their amounts in the pass book of the first defendant.

Held for the above reasons that both defendants were liable to the bank in respect of the money due on the hundis.

The appeal was allowed with costs.

Note.—It is decided in this case that the mere fact that a banker credits the account of his customer in respect of a bill indorsed in favour of the banker for collection does not deprive the banker of his rights under the bill in case it is dishonoured.

In the matter of Travancore National and Quilon Bank, Ltd.

A.S.S.R. ST. VEERAPPA CHETTIAR ... ... *Applicant*

versus

J. V. PIRRIE AND OTHERS (OFFICIAL LIQUIDATORS)... *Respondents*

(Venkatramana Rao *J.*)

A.I.R. 1940 Madras 436 : (1940) 1 Madras Law Journal 115.

Banker and customer—Individual and joint account—Set-off.

THIS was an application by one Veerappa Chettiar claiming a set-off of the amounts due and payable by the bank in respect of fixed deposit of Rs. 7,500 dated 6th March 1938 in the branch office of the bank at Karaikudi in the name of himself and his mother Visalakshi Achi payable to either or survivor against a sum of Rs. 10,087-15-9 owing by him to the bank on overdraft account.

The applicant stated that the fixed deposit solely belonged to him and his mother Visalakshi Achi had no interest therein and that her name was included at the time of the original deposit in 1937, as the applicant was then in failing health.

The Official Liquidators opposed the claim on the ground that from the terms of the fixed deposit receipt it was a joint debt payable by the bank and there was nothing to indicate that Visalakshi was only a name lender and therefore there could not be a set-off of a joint debt against a separate debt.

His Lordship stated : " It is no doubt true that where there is an amount payable by *A* in his individual account and an amount payable to *A* and *B* in their joint account, the two accounts cannot be set-off, but if it could be shown that, though the account is in the name of *A* and *B*, *A* is solely entitled to the amount, a set-off has always been allowed. As Cotton, *L.J.*, puts it in *ex parte* Morier ; *In re* Willis Percival & Co. (1880), 12 Ch. D. 491, at page 502, the question is whether ' it can be said that the money so absolutely belongs to that one of the two persons in whose joint names the account stands, who has another account of his own that we must treat it as his sole property, and require the balance to be struck between the two accounts.' " His Lordship also referred to the passage contained in Hart's *Law of Banking*, Volume I, at pages 309 and 310, thus : " Where a person has an account in his own name and

has another in the joint names of himself and a second person with the same banker, upon the bankruptcy of the latter the one account cannot be set-off against the other unless the person having the sole account is solely interested in the balance of the joint account, so that equity would have compelled the other person without imposing any terms or directing any enquiry to transfer the account into his name alone."

His Lordship after examining the evidence in the case in detail found that the fixed deposit of Rs. 7,500 was the sole property of the applicant.

Held that the applicant was entitled to a set-off as claimed by him.

BATAKRISHNA PRAMANIK ... ... *Defendant Appellant*

versus

BHAWANIPUR BANKING CORPORATION, LTD. ... ... *Plaintiffs Respondents*

(Mukherji and Guha *JJ.*)

I.L.R. 59 Calcutta 662 : A.I.R. 1932 Calcutta 521.

Banker and customer—Interest on overdraft—Rate of—Knowledge and ratification of.

THIS was an appeal by the defendant from a judgment of the Additional Subordinate Judge at Alipur decreeing the plaintiffs' suit for recovery of money due on an overdraft account. The plaintiffs were a banking corporation and the defendant was a customer of theirs who had had transactions with them ever since 1914.

There was no controversy between the parties as regards the advances which were made. The plaintiffs' claim as regards interest rested upon first an agreement to pay compound interest on overdrafts with monthly rests at 1 per cent. above the Bengal Bank rate subject to an enhancement of 2 per cent. on resolution being passed by the plaintiffs to that effect and with a minimum of 7 per cent. per annum ; and second, on a resolution passed by the plaintiffs in December 1920 enhancing the said rate of interest to that effect to take effect from 1st January 1921.

The defendant disputed the plaintiffs' claim on several grounds but the most important of which was that there was no such agreement as regards interest as alleged by the plaintiffs.

There was no contract in writing with regard to this overdraft. Their Lordships after referring to the oral evidence which was not satisfactory, stated that there were other circumstances in the case which made the defendant liable. The defendant in his written statement beyond professing to deny the agreement as alleged on behalf of the plaintiff bank had not set out what the terms were on which he took the advances. There was evidence of acknowledgment of liability by the defendant as calculated on the basis of the agreement alleged on behalf of the plaintiffs. The rate of interest was not mentioned in the admission but the amount that he had admitted as due from him could only be arrived at on such a basis. Moreover, it would appear from the pass books which the defendant from time to

time produced before the plaintiff bank to get his accounts entered therein that interest on overdraft advances was charged monthly at the end of every month and the total thus made up was carried on to the next month and treated as the total advance on which interest was thenceforward to run. Their Lordships stated : " The abstract question whether the return of the pass book without comment constitutes a stated and settled account and operates as an estoppel precluding the customer from disputing the entries therein to the prejudice of the bank on which there is a conflict of judicial authority, need not be considered in the present case. The defendant is a man of business and appears upon the evidence to be well conversant with dealings of banks and bank rates of interest. Here there is clear evidence that the defendant used to intelligently examine the entries in his pass book and to dispute or call for explanations as regards entries which to him seemed open to exception. It is quite true that the rates of interest charged were not stated in the entries but the entries would at once show that compound interest at monthly rests was being charged and debited—a fact which goes a long way to support the plaintiffs' case as to the agreement and completely demolishes the case of the defendant on that point. From circumstances such as these it would not be unreasonable to contend that means of knowledge was equivalent to knowledge or reasonable grounds of belief so as to fix the defendant with adoption or ratification of the rate of interest that was being charged. And from continued and persistent acquiescence of this character the existence of an agreement may be presumed."

Their Lordships referred to the leading English cases in support of the above opinion and held that the agreement set up on behalf of the plaintiff bank must have been in existence and dismissed the defendant's appeal with costs.

Note.—A banker's right to compound interest in respect of an overdraft account is generally by virtue of an agreement with the customer. It was held in this case that such an agreement may be implied by the acquiscence and course of conduct of the borrower.

S. K. PANIKAR ... ... *Applicant*

versus

TRAVANCORE NATIONAL AND QUILON BANK, LTD., BY ITS OFFICIAL LIQUIDATORS ... ... *Respondent*

(Venkatramana Rao *J.*)

A.I.R. 1942 Madras 351 : (1942) 1 Madras Law Journal 161.

Banker and customer—Joint account by a Hindu husband and wife amount being payable to either—Loan to husband—Liquidation of the bank—Held the bank was entitled to set-off the credit in the joint account against the loan due by the husband.

AN account was opened by a Hindu husband in the joint names of himself and his wife, the amount being payable to either or survivor. The account was credited with the husband's salary every month by an arrangement with his employers and the amount at credit, a sum of Rs. 1,100, represented the balance of his salary left after his withdrawals. On the material date the husband was indebted to the bank to the extent of Rs. 2,000. The bank went into liquidation. The husband claimed to set-off the amount standing to the credit of himself and his wife against the amount due by himself alone to the bank.

Held that the husband was entitled to such set-off. Under the law prevailing in India a deposit by a Hindu husband in the name of himself and his wife payable to either or survivor must, in the absence of evidence to the contrary, be presumed to belong to the husband. In this case there was the undisputed fact that the amount at credit of the account represented the accumulation of salary of the husband.

His Lordship stated: "Under the law of set-off which is applicable in the winding-up of a company which is the law prevailing in the bankruptcy of a debtor where there are two accounts, one in the account of *A* and the other in the account of *A* and *B*, if it is shown that the latter account though standing in the name of *A* and *B* was really in trust for *A*, the amount due under one account can be set-off against the amount due under another account."

S. PAKRASHI AND ANOTHER ... ... *Appellants*

versus

EMPEROR ... ... *Respondent*

(Derbyshire *C.J.* and Bartley *J.*)

A.I.R. 1941 Calcutta 713 : 45 Calcutta Weekly Notes 1071.

Banker and customer—Money deposited in current account—Legal relationship between banker and customer—Dishonour of cheque by banker—Liability of banker for misappropriation under Criminal Law—Held not liable.

THE material facts of the case were as follows :—The Ruby Bank Limited was ostensibly carrying on banking business until about the middle of 1940 in Calcutta. The two appellants (accused in the Court of the Magistrate) in this case were the Managing Director and Manager of the Ruby Bank Limited. The complainant was a customer of the bank who opened a current account in April 1940, and deposited various sums of money with the bank amounting in all to Rs. 660. The customer had withdrawn by cheques on various occasions sums amounting to Rs. 434-8 and on 8th May 1940, there was a balance of Rs. 225-8 to his credit at the bank. The customer drew a cheque for Rs. 197-14-6 in favour of one Jaharmall Mathurdas who deposited it with the Imperial Bank of India for collection. The Imperial Bank presented the cheque to the Ruby Bank Ltd. for payment on 8th May 1940. It was not paid but was returned with a slip attached stating " Returned unpaid for reason 18 " which was " Please receive payment on Friday 17th May 1940," signed by the Manager of the branch concerned. The cheque was represented to the Ruby Bank Ltd. on three subsequent occasions. It was not represented on 17th May 1940, as required in the slip returning the cheque. On 13th May 1940, the customer filed a criminal complaint against both the accused under Sections 409 and 114 of the Indian Penal Code, 1860, charging them with offences of criminal breach of trust and abetment. The learned Presidency Magistrate who tried the accused in the first instance, convicted them and sentenced each of the accused to rigorous imprisonment for six months and a fine of Rs. 300 in default three months' further rigorous imprisonment. It was also ordered that out of the fine, if paid, Rs. 197-14-6 be paid to the complainant.

The two accused appealed to the High Court, Calcutta, against their convictions and sentences. The appeal came before their

Lordships Derbyshire, *C.J.* and Bartley, *J.*, and their Lordships allowed the appeals, quashed the convictions and sentences passed by the Magistrate as being unsustainable in law.

The Chief Justice delivered the judgment of the Court. It contains an interesting analysis of the legal relationship between banker and customer. His Lordship relied on the following passage contained in Halsbury's Laws of England, Volume I (Second Edition), page 796, paragraph 1305 :—

" *Receipt of Money on Current Account.*—Save as regards the following of trust funds into his hands, the receipt of money by a banker from or on account of his customer constitutes him merely the debtor of the customer although the obligation to repay only arises upon demand and repayment need only be made at the branch at which the account is kept. He is not a trustee for the customer, and the latter has no right to inquire into or question the use made of the money by the banker."

His Lordship also quoted with approval the English decision, Foley *vs.* Hill, reported in 11 H.L.C. 28 at 35 where Lord Cottenham exhaustively dealt with the legal relationship of banker and customer. Lord Cottenham, then Lord Chancellor, stated :

" Money when paid into a bank ceases altogether to be the money of the principal (*see* Parker *vs.* Marchant, 1 Phillips, 360) ; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the bankers is money known by the principal to be placed there for the purpose of being under the control of the banker ; it is then the banker's money ; he is known to deal with it as his own ; he makes what profit of it he can, which profit he retains to himself, paying back only the principal according to the custom of bankers in some places or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker to do with it as he pleases ; he is guilty of no breach of trust in employing it ; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation ; he is not bound to keep it or deal with it as the property of his principal but he is of course answerable for the amount because he has contracted, having received that money, to repay to the principal when demanded a sum equivalent to that paid into his hands. That has been the subject of discussion in various cases and that has been established to be the relative situation of banker and customer. That being established to be the relative situation of banker and customer, the banker is not an agent or factor but he is a debtor."

His Lordship Derbyshire, *C.J.*, following the above English authorities which lay down that the relationship between banker and customer in the case of current account is merely that of debtor and creditor, came to the conclusion that in the case before him the money deposited by the customer in his current account did not come within the meaning of the term " entrusted " in the sense in which it is used in Sections 405 and 409 of the Indian Penal Code, 1860, and therefore the complaint of the customer disclosed no criminal offence. It is important to note that in this case there was no evidence before the Court that the Ruby Bank Ltd. had dishonestly used or disposed of that property—entirely negativing *mens rea*, an important element to constitute a criminal offence.

Held for the above reasons that the convictions against the appellants could not stand, the appeal was allowed and the appellants were acquitted.

Note.—The gist of the decision is that the mere inability of a banker to honour the cheque of his customer does not involve the banker in any criminal liability. The remedy of the aggrieved creditor in such a case is to sue the bank in a Court of Law or to take steps to wind up the bank under the provisions of the Indian Companies Act, 1913.

In the matter of Travancore National and Quilon Bank, Ltd.

NEW FIELD AND CO. BY PROPRIETOR K. L. KHULLER... *Applicant*

versus

MESSRS. JAMES VOCE PIRRIE, CYRIL GILL AND STANLEY GOODWIN (OFFICIAL LIQUIDATORS) ... ... *Respondents*

(Venkatramana Rao *J.*)

A.I.R. 1940 Madras 139 : 51 Madras Law Weekly 107.

Banker and customer—Money paid by customer for transmission—Failure of bank—Right to preferential payment.

THIS was an application for payment of a sum of Rs. 534-5-0 to the applicant in preference to the ordinary creditors of the Travancore National and Quilon Bank, Ltd. The applicant paid to the bank on 20th June 1938, the day on which the bank suspended payment, a sum of Rs. 533-1-0 for being remitted by telegraphic transfer to the Great Indian Trading Co. at Bombay. The applicant had a current account with the bank but the bank did not credit the said sum in his account, but a sum of Rs. 1-4-0 being the charges for the intended transfer was debited. The money was never transferred because on that very day the bank suspended payment.

His Lordship stated : " On the facts of this case, it seems to me that the money was held apart by the bank as the property of the applicant. I am also inclined to the view that the money was received by the bank in the capacity of a mere agent."

The applicant's claim was allowed with costs.

Note.—Money held apart by a banker as the property of his customer does not form part of the banker's assets on liquidation.

OFFICIAL ASSIGNEE OF MADRAS REPRESENTING THE ESTATE OF S. N. FIRM ... ... *Defendants Appellants*

versus

NATESAM PILLAI ... ... *Plaintiff Respondent*

(Venkatramana Rao and Kunhi Raman *JJ.*)

A.I.R. 1940 Madras 441 : (1940) 1 Madras Law Journal 254.

Banker and customer—Moneys paid by customer for the purpose of effecting a specific transaction and credited in anamath or suspense account—Failure of bank—Right to preferential payment.

THE Official Assignee of Madras, representing the estate of defendants 1—7 who were adjudicated insolvents, was the appellant. The defendants 1—7 were members of a joint Hindu family which was carrying on banking business under the name and style of the S. N. Firm which suspended business on 30th April 1935. The plaintiff had arranged to purchase certain lands in a village near Tuticorin and the third defendant, a partner of the firm, suggested that the transaction could be arranged through the defendants' branch at Tuticorin. Between 25th March 1935 and 17th April 1935, the plaintiff-respondent had paid this firm a total sum of Rs. 6,950 at Trichinopoly on the above account. After the defendants were adjudicated insolvents, the plaintiff, sued to recover the moneys paid by him to the firm in full alleging that he paid the amounts under an arrangement that the defendants should keep the money in trust for him until he decided how they should be disposed of. The plaintiff stated that the amounts were not deposited by him with the firm and that when he made the payment no relationship of banker and customer arose between him and the firm. On the other hand the defendants' firm received the amounts in a fiduciary capacity and the plaintiff claimed priority on the insolvency of the firm.

The claim was resisted in the Court below on the ground that the plaintiff was not entitled to any preferential treatment in respect of the total amounts paid by him because they were paid by him as a deposit which was to carry interest at 5 annas per cent. per month in the ordinary course of the banking business of the firm. This contention of the defendants was negatived by the trial Court which found on the evidence that the amounts were paid by the plaintiff on anamath account on the understanding that the total amount should

be paid back to him when he went to Tuticorin or that a draft should be given to him for the total amount to be paid at Tuticorin by the defendants' branch there. The defendants suspended payment before the plaintiff had made up his mind as to what course he should adopt. If the plaintiff had taken a draft on the defendants' branch at Tuticorin the position taken up by the plaintiff at the trial might have been untenable.

In appeal, it was contended on behalf of the appellant that the money was paid to the bank to be held at " call " to be paid back to the plaintiff whenever he demanded payment. In fact it was paid into a current account to the credit of the plaintiff and that therefore the plaintiff must be regarded as an ordinary customer of the bank and not as a person who had entrusted money to the bank to be held in a fiduciary capacity.

The plaintiff stressed the fact that he did not at any time have a banking account with the firm. The amount was paid by the plaintiff at the invitation of defendant 3. No cheque book or pass book was given to the plaintiff by the firm. No entry was made of the payment in the current account or fixed deposit register of the firm. The plaintiff therefore contended that the payment was made to the firm as bailee or agent and that he was entitled to priority on the insolvency of the firm.

His Lordship after examining the evidence in the case and referring to the leading authorities on the point stated : " The account books of the parties in the present case show that the amounts were credited in anamath or suspense account to await the instructions of the plaintiff as regards their disposal. The defendants' oral evidence shows that when amounts were paid to the firm in current account or fixed deposit generally pass books and cheque books used to be given and usually agreements used to be entered into regarding the interest payable on the deposits. This procedure was not followed when the plaintiff's moneys were received."

Held on the authorities that the amounts were received by the firm in a fiduciary capacity and not as between a bank and its customer.

The appeal was dismissed with costs.

Note.—A banker is in a fiduciary position in respect of moneys received by him for a specific purpose and credited in anamath or suspense account. In such a case the relationship between the parties is not that of a creditor and debtor but that of an agent and principal.

BENARES BANK LTD. ... ... { *Plaintiff* / *Appellant*

versus

MASUDAN LAL ... ... { *Defendant* / *Respondent*

(Dhavle and Agarwala *JJ.*)

A.I.R. 1936 Patna 444 : 162 Indian Cases 178.

Banker and customer—Overdraft account—Letter of guarantee by surety—Construction.

THE material facts of the case were as follows :—The plaintiff bank granted overdraft facilities to a customer on the execution of an agreement of guarantee by the defendant Masudan Lal. The agreement was dated the 27th February 1925 and read as follows :—" In consideration of your allowing from time to time an overdraft in current account up to a maximum of Rs. 1,000 only to Babu Jugal Kishore and Babu Nawal Kishore, Proprietors of the firm of Messrs. Agarwala Brothers of Nayabazar, Bhagalpur, (i) I hereby agree to hold myself, my executors and administrators responsible for the due repayment of the same or any unpaid portion thereof together with interest at the rate of 12 per cent. per annum, and I undertake to pay you the amount which may become due to you under this guarantee upon your demand, and (ii) I further undertake to pay on demand any money for which he may become liable alone or jointly with any other person or persons to you on any account whatsoever and for interest, commission or other Bank's charges to the extent mentioned above exclusive of interest."

In June 1926, the overdraft amounted to Rs. 1,000. The suit was instituted on the 24th July 1930. It appeared that with the exception of Rs. 100 which the bank advanced to the principal debtors on the 27th July 1927, none of the advances were within 3 years (period of limitation) of the institution of the suit. The bank sent statements of account to the principal debtors on the 30th January 1929 and on the 20th January 1930 which they returned to the Bank duly signed. Copies of the statements of account were also sent to the surety who however declined to sign them.

The principal debtors did not contest the claim. The surety denied his liability on the ground that the plaintiff's claim was barred by limitation. The trial Court held that the claim against the surety

was barred except to the extent of Rs. 100 and passed a decree accordingly. On appeal by the paintiff to the Additional Subordinate Judge of Bhagalpur, the decree against the surety for Rs. 100 was set aside.

The plaintiff preferred this second appeal to the High Court contending that the surety was liable to the extent of Rs. 1,000 and interest on that sum. Agarwala *J.* delivering the judgment in the appeal stated that apart from the question whether the surety could be held liable by the acknowledgments made by the principal debtors extending the period of limitation in respect of their liability, the surety on the face of the letter of guarantee itself undertook not only to guarantee the overdraft to the extent of Rs. 1,000 but by paragraph 2 he agreed to hold himself liable for the dues of the principal debtors " on any account whatsoever " to the extent of Rs. 1,000 and interest thereon, etc. It was clear that there was an account stated as between the plaintiff and the principal debtors which implied a liability on the part of the latter to pay the plaintiff the amount ascertained to be due to them. The second part of the letter of guarantee covered this liability and the surety was therefore liable to the plaintiff to the extent of Rs. 1,000 so ascertained together with interest. The starting point of limitation for a suit to enforce this liability was not earlier than the date on which the account was stated under Article 64 of the Indian Limitation Act 1908, which provided for a period of three years from the date when the accounts were stated.

Held that the suit was in time and the plaintiff was entitled to a decree against the surety also for Rs. 1,000 with interest from the date of the account stated.

The appeal was allowed with costs.

Note.—The letter of guarantee in question was widely worded so as to cover the liability of the principal debtors " on any account whatsoever " to the extent of Rs. 1,000 with interest and this liability being within the period of limitation, the High Court held that the surety was liable to the bank.

O.A.P.R.M.A.R. ADAIKAPPA CHETTIAR ... ... *Plaintiff / Appellant*

versus

THOMAS COOK & SONS (BANKERS) LTD. ... ... *Defendants / Respondents*

(Lord Atkin.)

A.I.R. 1933 Privy Council 78 : 64 Madras Law Journal 184.

Banker and customer—Power of attorney to manager—Construction—Power to "endorse" and power to pay do not authorise person so empowered to "back" bills or "promise to pay."

THIS was an appeal from the Supreme Court at Colombo in an action in which the plaintiff sought to recover from the defendants the sum of Rs. 1,70,000 on four cheques or alternatively as money had and received. The action was tried in the District Court of Colombo where the plaintiff receovered judgment. On appeal to the Supreme Court the judgment of the District Judge was reversed and the action dismissed with costs. The plaintiff preferred this appeal to the Privy Council.

The plaintiff was a money-lender carrying on business at Colombo and the dispute arose out of a series of transactions in which the plaintiff, one M. S. Peiris since deceased carrying on business as Don Philip and Company and as was alleged the defendants acting through John Davis their acting manager were engaged. In 1925 Mr. Davis was given a power of attorney by the company's general representative in the East Mr. S. E. Humphreys. One of the questions in dispute was whether the terms of the power of attorney authorised Mr. Davis to bind the bank to perform the obligations which the plaintiff sought to enforce. Mr. Peiris, as Don Philip and Company had dealings with the defendant bank before Mr. Davis came on the scene. Mr. Peiris appeared to be doing active business as a produce broker and Mr. Davis allowed him a small overdraft.

"In June 1925 Davis made Peiris an advance against shipping documents of tea. The consignees refused to take up the documents ; and the result of the transaction was that Peiris' account was overdrawn to the extent of over Rs. 16,000. Mr. Smith who was the general manager of Thomas Cook & Son, Ltd. disapproved of these advances to Peiris and he instructed Davis to take steps to have the overdraft paid off. In October Peiris borrowed the money from one

Ramachandra who was only willing to advance on the terms that the bank guaranteed payment. On 17th October 1925, Peiris drew a cheque on the defendant bank for Rs. 17,000 in favour of Ramachandra, and Davis wrote on the back of the cheque " Good for payment on 17th December 1925 " or words to that effect, and signed *per pro* Thomas Cook and Sons (Bankers) Ltd., John Davis. In exchange for this document Ramachandra made the agreed advance of Rs. 16,500 by his cheque of 17th October 1925. On 17th December 1925 Peiris' account was only in credit Rs. 4. Davis could not ordinarily allow the cheque to be paid without debiting Peiris' account and thus re-establishing the overdraft which he had been directed to end. Accordingly, when the cheque was met, Davis directed a transfer to Peiris' account of a credit entry " cash *ex* selves 17,000 " and made a fictitious entry in the Bank's Till Book " Safe 17,000 " which served to avoid discovery of what had taken place.

" This was obviously but a temporary device and measures had to be taken to give a better appearance of regularity to the transaction. On 29th December 1925, Peiris entered into the first of a series of transactions with the appellant which culminated in January 1928 in the negotiation of the documents in suit. Peiris asked the appellant to cash a cheque of Don Philip and Company drawn on the bank; the appellant refused, but on being told on a later occasion that the bank would agree to pay the cheque on a future date he agreed. Accordingly Peiris gave the appellant a cheque dated 29th December 1925 for Rs. 20,000 drawn in the name of Don Philip and Company on the bank endorsed: " Good for payment on 12th January 1926 per Thomas Cook & Son (Bankers) Ltd., John Davis." In return the appellant gave to Peiris a cheque of even date in favour of Don Philip and Company which was cleared through the bank. Davis gave to the appellant at the same time a memorandum " Received for credit of Don Philip and Company cheque on National Bank of India for Rs. 20,000," with the same signature as to the endorsement. Rupees 3,000 was placed to the credit of Don Philip; the balance was used to put the bank books in order by cancelling the fictitious entry of " 17,000 in safe." On 12th January the Don Philip account was not in sufficient credit to meet the guaranteed cheque. Another fictitious entry had to be made, until 21st January 1926 when another similar cheque transaction was entered into for Rs. 37,500 with a bank guarantee for payment on 4th February. This was further met by a third cheque transaction on 4th February for Rs. 18,000 payable on 5th March 1926.

" So the transactions went on month by month sometimes the cheques being plainly renewals in whole or in part, sometimes constituting fresh advances; in all cases where there was not immediate

renewal the account of Don Philip was kept in credit by a fictitious entry until the necessary cheque arrived of the appellant. Between 29th December 1925 and 3rd January 1928, 75 cheques had been exchanged varying in amount from Rs. 5,000 to Rs. 75,000. In May 1927, the appellant changed the system and thenceforth drew his cheques in favour of Thomas Cook & Son crossing them " account payee only". . . . In September 1927 Peiris came to the appellant with a request that he would not present the cheques indorsed by Davis but would take in substitution a cheque drawn by Don Philip bearing the due date and on payment of such cheque would return the endorsed cheque. The story told by Peiris was that in this manner he would escape paying commission to the bank. Davis on being applied to, confirmed this remarkable explanation and the appellant acceded to the request.

" On 3rd January 1928, there were outstanding in the appellant's possession three cheques of Don Philip indorsed by the bank for payment on various days, (1) 17th December 1927 for Rs. 35,000 payable by the Bank on the 16th January 1928, (2) 23rd December 1927, for Rs. 50,000 payable by the bank on 7th January 1928, (3) 23rd December 1927, for Rs. 50,000 payable by the bank on 21st January 1928. But Davis had ceased to enjoy the bank's confidence. Some inquiry into the alleged practice of giving guarantee on behalf of the bank had been made in October though nothing had been done. But on 29th December 1927 Mr. Humphreys learned that Davis had written a letter to another bank guaranteeing the production of certain shipping documents (apparently a completely genuine transaction). He suspended Davis and there and then revoked his power of attorney marking it as cancelled.

" On 3rd January the balance of Don Philip's account was only Rs. 652. The outstanding cheques would have to be met. The appellant was willing to renew and even to make a fresh advance on receiving the usual bank guarantee. 3rd January 1928 was a bank holiday. The appellant's manager Somasundaram met Peiris and Davis at Peiris' warehouse. Somasundaram received four cheques drawn by Don Philip in favour of the appellant and dated 3rd January 1928, for Rs. 35,000, Rs. 50,000, Rs. 35,000 and Rs. 50,000 each endorsed respectively " payment of this cheque on 5th (6th, 7th and 8th) March 1928 guaranteed *per pro* Thomas Cook & Son (Bankers) Ltd., John Davis."

" In return Somasundaram gave to Davis or Peiris cheques dated 3rd January 1928 for Rs. 35,000, Rs. 50,000, Rs. 50,000 and Rs. 20,000 drawn in favour of Thomas Cook & Son (Bankers) Ltd., or order crossed " not negotiable, payee's account only " and a fifth cheque

drawn as open cheque to Don Philip and Company for Rs. 15,000 as Peiris said he desired that amount of cash. In respect of the cheque for Rs. 20,000 and the open cheque for Rs. 15,000 Davis at Somasundaram's request gave a receipt : " Received to our credit the sum of Rs. 35,000 as per reverse *per pro* Thomas Cook & Son (Bankers) Ltd., John Davis," and on the reverse " Rs. 15,000 cash Rs. 20,000 cheque balance, Total Rs. 35,000."

" On 4th January 1928, Peiris or someone on his behalf paid into Don Philip's account with the bank the four cheques making Rs. 1,55,000. No one seems to have thought it unusual that he should be paying in cheques drawn to the order of the bank. The cheques were stamped on the face with Thomas Cook's stamp apparently at the Clearing House or for Clearing House purposes and were credited to Don Philip's account and served to meet the outstanding cheques falling due in January, for which as before the unendorsed cheques of Don Philip were substituted. In March the cheques for Rs. 1,55,000 were presented but were returned " accounts closed." On 27th January 1928 the bank had closed Don Philip's account and had paid over the then credit balance of Rs. 825. On proceeding to discuss the liability of the bank, it has to be remembered that the Courts have negatived any lack of good faith on the part of the appellants and that Davis was not cross-examined to suggest that he derived any personal advantage from his proceedings. A specific issue as to whether the plaintiff or his agents had knowledge of a conspiracy by Davis and Peiris to defraud the bank was negatived by the trial Judge.

" The case against the bank was made under two heads :—

(1) The bank were liable on the contract contained in the cheques because Davis had actual authority to make such a contract. (2) If no such contract was in fact made, then the bank were liable in the amount of the cheques for money had and received either as money paid for no consideration or on a consideration which had wholly failed or for money paid under a mistake of fact."

" The first question to determine is what was the contract made between the parties. The plaintiff alleged that he lent the money to the bank. In support of this view he relied on the fact that his later cheques including those that he gave on the transaction in question were drawn in favour of the bank marked " Not negotiable " and " Payee's account only." Their Lordships however are clearly of opinion that the money throughout was lent to Peiris. He drew the cheque in repayment and he paid the interest. The plain business was that the money was lent to Peiris and purported to be guaranteed by the bank. Had then Davis actual authority to guarantee payment of these loans by Peiris ? This depends primarily upon the con-

struction of the power of attorney, though it is also possible that beyond the express powers of attorney there might be actual implied authority necessarily arising from the service of Davis as acting manager of the bank. The plaintiff faintly suggested such an authority, but mainly relied on the express words of the power-of-attorney. Oddly enough both parties contended that the words on the cheque were an acceptance of the cheque. The plaintiffs sought to read the word " accept " into Clause 4 of the power-of-attorney, suggesting that it had been omitted by a copyist's error in copying the Clause from the power-of-attorney given to Mr. Humphreys on 1st August 1924. Though this construction found favour with the District Judge, it appears to their Lordships quite inadmissible."

Their Lordships stated that there was no principle of construction that permitted a document contrary to its actual wording to be read as though it followed a proposed precedent unless between the parties it had been rectified or at least was such as would by the Court be rectified and that in the present case there was little doubt that the omission was intentional. Their Lordships after examining the contention of the defendants that the promise by Davis on behalf of the bank was an acceptance as defined in the Bills of Exchange Act and was therefore outside the authority given by the document stated : " It is unnecessary to decide whether this was an acceptance or not for whatever it be called it appears to them not to be within any of the express powers given by the power-of-attorney. It was said to be an exercise of the power to ' endorse.' In their Lordships' view this power of attorney should not be construed as giving Davis the power to sign otherwise than as drawer or acceptor or holder so as to cause the bank to ' incur the liabilities of an endorser ' under Section 56, Bills of Exchange Act.

" It was never intended that the bank servants should ' back ' bills on behalf of the bank. Equally unwarranted is the suggestion that the power to ' pay ' cheques, etc., involves the power to promise to pay. The general words in Clauses 9 and 10 must be read with the special powers given in the earlier Clauses and cannot be construed so as to enlarge the restricted powers there mentioned. It follows that Davis had no actual authority given him by the power of attorney to guarantee payment of these loans by Peiris. Their Lordships are also quite satisfied that his position in the bank was not such as to make it necessary to imply the power to enter into these transactions on the part of the bank. They appear on the evidence and according to ordinary banking usage to be quite outside a manager's general authority. This last consideration would dispose of any question of ostensible authority ; but as the plaintiff twice examined the power-of-attorney and plainly relied on the evidence of actual authority, as

reliance on ostensible authority was properly negatived in the Courts below and was not pressed before their Lordships.

" It remains therefore to consider the question of the plaintiff's rights, if any, on the footing that no contract was in fact made between him and the bank. If, as the plaintiff contended, the apparent contract was that the money had been lent to the bank, or that the bank otherwise was to have the disposition of the money, there could be no doubt as to the plaintiff's right. He would have performed his part of the contract, relying upon a supposed effective promise of the bank to repay. On proof that such promise was not made he could recover the money as having been paid without consideration.

" Whether he could recover it as money paid under a mistake of fact is not so clear. It is necessary to establish this cause of action that the mistake should be as to some fact causing a liability to pay. Cash handed over under a voluntary contract hardly comes within that description. It was ingeniously contended by counsel for the plaintiff that while plaintiff's cheque may not have been handed over under any mistaken belief that he was bound to part with it, payment of his cheque was made under the mistaken belief that he was bound to honour it under a binding contract with the bank. It seems unnecessary to discuss this refinement, for if the bank received the money at their own disposal under a mistake by the plaintiff as to the supposed agent's authority, they would have to return it. But, in fact, the bank received the money on the terms that it should be placed to Peiris' credit. The transaction was one by which the supposed contract as between the three parties required that the money represented by the cheque drawn in favour of the bank should be made available to Peiris in his account kept with the bank. In no other way in the circumstances could Peiris fairly become indebted to the plaintiff so as to be liable on the cheque which Peiris drew and the bank guaranteed, or become liable to pay interest, as in fact he did. In no other way could the cheques of the plaintiff serve to effect a renewal (as undoubtedly was intended) of the outstanding cheques for Rs. 1,35,000 replaced in accordance with the practice of the parties by the cheques of Peiris alone.

" The bank dealt with the plaintiff's cheques precisely as they were intended to deal with them under the supposed contract. They collected them for Peiris' account, placed the entire proceeds to Peiris' credit, and out of the proceeds the outstanding cheques in favour of the plaintiff were met. The bank are in the position of a mandatory who has fully performed his mandate, before any mistake has been discovered. In these circumstances the bank are not liable to repay money to the plaintiff which they have disposed of according to the plaintiff's wishes in accordance with the supposed contract.

" As a final bit of salvage, counsel for the plaintiff contended that at any rate as the result of the series of transactions the bank received from the plaintiff's money payment of the original Rs. 17,000 which in December 1925, they had paid to Ramachandra. The answer to this is that advance had long before been repaid to the bank by Peiris by the numerous credit payments which he had made since that date in accordance with the ordinary principles applicable to appropriation of payments. The simple result is that the plaintiff is found to have advanced money to Peiris on an invalid security, and that he and not the bank must bear the loss."

The appeal was dismissed with costs.

Note.—This decision explains the principles of construction of a power-of-attorney granted to a bank manager. It is held that "power to endorse" and "power to pay" do not empower an agent to "back" bills or "promise to pay." It is further held that in this case the position of the manager in the bank was not such as to clothe him with the implied authority on behalf of the bank to guarantee or certify a cheque as good for payment on a date subsequent to the date of the cheque.

HONGKONG AND SHANGHAI BANKING CORPORATION ... *Appellants*

versus

LO LEE SHI ... ... *Respondent*

(Lord Buckmaster.)

A.I.R. 1928 Privy Council 116 : 55 Madras Law Journal 627.

Banker and customer—Promissory note in the form of bank note issued by bank—Note mutilated by accident—Note identifiable but its number missing—Liability of the bank.

THE appellants were the Hongkong and Shanghai Banking Corporation who carried on the business of banking in Hongkong. In the course of their business they issued bank notes for various sums ; such notes were not legal currency, but owing to the high credit of the appellants they were used as if they were. The notes they issued were in the ordinary form of a bank note.

The respondent was given by her husband two of such notes, each for five hundred dollars. " She placed them in the pocket of some garment, and then, having forgotten their hiding place, she washed, dried, and starched the garment and was proceeding to iron it when she found a wad of paper in the pocket, this upon extraction proved to be the remains of the two bank notes which together with the coat had been subjected to all the above processes. Considerable effort was made with the help of the bank to restore these agglutinated fragments to their original shape and as to one note this met with complete success and the note was accordingly paid. The full restoration of the other was more difficult with the utmost skill the number could not be recovered. Apart from this a very considerable portion of the note was replaced and its most critical characteristics were made plain : the name of the bank, the amount of the note, the definite promise to pay the " bearer " on demand at the appellants' office, and the signatures by the Chief Accountant and the Chief Manager were all clearly and definitely evidenced. The bank, however, refused payment mainly upon the ground that the number was missing and the respondent accordingly brought an action against them upon the note."

The trial Judge found in favour of the respondent. On appeal to the full Court, the Judges were divided, the Chief Justice being in favour of the defence and the trial Judge who formed the other member of the Court affirmed his own judgment. The bank anxious to know

their true legal position with regard to a note whose number was defaced preferred this appeal to the Privy Council.

The real point in the case was in the circumstances above stated were the appellants liable on a note whose number had been accidentally defaced ? His Lordship after discussing the law on the subject held that when once honest accident was accepted as the cause of damage, the only remaining question was whether the extent of the damage was such as to prevent the note being sued upon and also whether the missing material parts could be supplied by verbal or other evidence. His Lordship stated that it was not denied that the pieces of the document were pieces of one of the appellants' notes nor was it or could it be suggested that the missing particles could be used in building up another note. It was the absence of the number on which the appellants relied and this was no part of the operative portion of a bill of exchange or promissory note although its alteration was held to be material in the case of a Bank of England note owing to its special features, Suffell *vs.* The Bank of England (1882) 9 Q.B.D. 555. There was in the present case no alteration of the note within the meaning of Section 64 of the Hongkong Bills of Exchange Ordinance. It was difficult to see what had destroyed the liability of the bank upon a document admitted to be one of their notes. Lord Buckmaster stated : " In their Lordships' opinion the contract here has never been altered and is sufficiently evidenced by the mutilated document and the verbal testimony. Their Lordships do not think that beyond their decision as to the meaning of the Ordinance it is possible in this case to lay down any general principles of law ; they desire their judgment to be limited to this point, that in the special circumstances of this case it is possible, by means of the fragments of the document assisted by verbal evidence, to establish a claim against the bank for the 500 dollars due upon the note."

His Lordship dismissed the appeal.

Note.—The principle of this decision may be applicable to mutilated negotiable instruments though their Lordships expressly state that they lay down no general principles of law. The mode of recovery of money in the case of mutilated currency notes and bank notes which are legal tender in British India is governed by the provisions of Section 28 of the Reserve Bank of India Act, 1934 and Note Refund Rules made thereunder.

In re Travancore National and Quilon Bank, Ltd. (In Liquidation).

SECRETARY, ALL-INDIA SPINNERS' ASSOCIATION, TAMIL NAD BRANCH ... ... *Applicants*

versus

JAMES VOCE PIRRIE, CYRIL GILL, AND JOHN STANLEY GOODWIN (OFFICIAL LIQUIDATORS) ... ... *Respondents*

(Venkatramana Rao *J.*)

A.I.R. 1940 Madras 101 : 51 Madras Law Weekly 111.

Banker and customer—Purchase of draft—Cheques for collection—Bank going into liquidation—Priority.

THIS was an application by the Secretary of the All-India Spinners' Association, Tamil Nad Branch, for payment to him of a sum of Rs. 9,200 in preference to the ordinary creditors of the Travancore National and Quilon Bank, Ltd. (in liquidation). The claim for the said amount was put under two heads: (1) a sum of Rs. 5,000 being the amount paid into the Tiruppur branch of the bank for getting a draft in exchange drawn by the bank on its Rajapalayam branch in favour of one Sankararaja, and (2) Rs. 4,200 being the proceeds of three cheques delivered to the Tiruppur branch of the bank for collection from other banks in different places. The receipt of the cash of Rs. 5,000 and the three cheques is admitted by the Official Liquidators. The claim in respect of Rs. 5,000 was made on the basis that the amount was specifically entrusted to the bank for the specific purpose of being transmitted to Sankararaja through the bank's branch at Rajapalayam.

His Lordship negatived this contention and held that where a person paid a certain amount into a bank for getting a draft in exchange drawn by the bank on its branch, the transaction was nothing more than a purchase of the draft. It could not be said to be entrusted to the bank for any specific purpose and the bank did not receive the money in the capacity of an agent for applying the said moneys for a specific purpose. On liquidation of the bank the person was not entitled to preferential payment in regard to the amount.

Held that the claim in respect of the proceeds of the three cheques stood on a different footing. The receipts given by the bank unmistakably showed that the cheques were received for collection

only. Further the amounts were realised by the bank only after it suspended payment. His Lordship following the English case *In re* Farrow's Bank, Ltd. (1923), 1 Ch. 41, held that the applicants were entitled to the sum of Rs. 4,200 being the proceeds of the said three cheques realised by the bank after suspension.

Note.—The purchase of a draft from a banker is an ordinary banking transaction and there is no entrustment of money for any specific purpose. But where the banker is merely to collect the cheques, they do not form part of the assets of the banker on liquidation unless the cheques are realised and credited to the account of the customer before failure of the banker.

DAW HNIT ... ... *Appellant*

versus

C.T.A.R.A. ANAMALAI CHETTYAR ... ... *Respondent*

(Mosely and Dunkley *JJ.*)

1938 Rangoon Law Reporter 468 : A.I.R. 1938 Rangoon 335.

Banker and customer—Relationship—Native bankers receiving deposits on current account on large scale—Held money was payable on demand—Period of limitation.

THE appellant, Daw Hnit, sued the respondent, C.T.A.R.A. Anamalai Chettyar, a banker who carried on banking business in Mandalay and Monywa and elsewhere in Burma, for a sum of about Rs. 7,000, the balance on 1st January 1932 of a deposit made on current account with him. The demand for payment was made on 17th August 1936 and the suit was filed shortly thereafter. The main defence made was that the relationship between the plaintiff and the defendant was that of lender and borrower and that the claim was barred by limitation.

The respondent was adjudicated insolvent in June 1927 and Daw Hnit filed a proof of debt for her claim which was then Rs. 11,586 on 23rd September 1927. The first dividend was paid on 17th December 1927. The adjudication was annulled on 11th February 1930 for failure of the respondent to apply for his discharge. Even after this, the Official Receiver continued to act under an order of the Court under Section 37 (*1*), Provincial Insolvency Act, 1920. He distributed second and third dividends and the balance due to Daw Hnit after giving credit to these dividends was Rs. 7,097. It was later decided in these very proceedings by a Full Bench of the Rangoon High Court that the appointee under Section 37 (*1*), Provincial Insolvency Act, 1920, had no power to distribute dividends unless directed by Court and that the property of the debtor was merely vested in him for the purpose of making the property available to the creditors if they wished to file regular suits for the satisfaction of their claims, or the balance of their claims.

The appellant filed the present suit after the assets of the debtor were returned to him. If the relationship between the parties was that of lender and borrower the article of the Limitation Act, 1908, applicable would be Article 57 which gave a period (for money payable for money lent) of three years from the date when the loan was made.

The appellant's contention on the other hand was that Article 60 applied which read : " 60. For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable, the limitation is three years from the date when the demand is made."

The trial Judge held that Article 57 applied to the case and dismissed the plaintiff's suit.

Their Lordships in appeal after referring to the leading authorities on the point and in particular to Joachimson's Case (1921), 3 K.B. 110, held that it was impossible to hold that there was not an implied agreement in this, as in all such cases of deposits on current account with native bankers who do a large business that the money was to be payable on demand. Their Lordships also held that the respondent's tendering proof of her debt and making claim in insolvency did not constitute "a demand" within the meaning of the Limitation Act, 1908.

Held that Article 60, Indian Limitation Act, 1908, applied to the facts of this case, the plaintiff's claim was not barred by limitation and she was entitled to succeed.

The appeal was allowed with costs.

Note.—In Joachimson *vs.* Swiss Bank Corporation (1921), 3 K.B. 110, it was held that the banker's debt in respect of a customer's credit on current account was not repayable without previous demand. Their Lordships applying the above principle to the facts of this case have held that Chettiar bankers who accept deposits on current account on a very extensive scale from their customers and conduct nearly every branch of ordinary banking business are bankers within the meaning of Article 60, Indian Limitation Act, 1908, and there is an implied agreement that the deposits with them on current account are repayable on demand.

CHAMPION AUTOMOBILES, LTD., MADRAS ... ... *Appellants*

versus

TRAVANCORE NATIONAL BANK, LTD. ... ... *Respondents*

(Leach *C.J.* and Varadachariar *J.*)

A.I.R. 1938 Madras 77 : (1937) 2 Madras Law Journal 817.

Banker and customer—Rule reserving right to close account without reference to customer—Held valid.

THE appellants were the plaintiffs in a suit filed against the Travancore National Bank, Ltd., for the recovery of damages for the dishonouring of a cheque. In September 1932 the appellants opened an account with the Mount Road branch of the bank at Madras. The bank had rules regarding the keeping of accounts and one of the rules read as follows : " The Bank reserves to itself the right to close any account without reference to the depositor if in the opinion of the Bank it is not desirable to keep such account for any reason whatsoever." There was also another rule to the effect that a depositor should always have a minimum credit balance of Rs. 100. These were some of the conditions on which the plaintiffs' account was opened and it formed part of the contract between them and the bank.

On 1st August 1934, the appellants' account was standing in credit to the extent of Rs. 15-4-7 and the appellants drew a cheque in favour of one C. R. Parthasarathi Mudaliar for Rs. 12 but the bank closed the account that day and wrote to the plaintiffs informing them of the fact and sent them pay warrants for Rs. 15-4-7 and Rs. 3-11-1 the latter sum representing interest which the bank admitted had accrued due to the plaintiffs in respect of their account. This letter was received by the plaintiffs on 3rd August 1934 and on that date the plaintiffs wrote to the bank stating that they had drawn a cheque for Rs. 12 on 1st August 1934 and accordingly returned to the bank the warrant for Rs. 15-4-7 to meet the cheque. The cheque was presented for payment on 3rd August 1934 and the bank refused payment on the ground that the account had been closed since the cheque had been drawn, the cheque being returned with an endorsement on a separate slip bearing the words " account since closed." In the circumstances the plaintiff filed this suit against the bank for damages for dishonouring the cheque.

The learned trial Judge found that there was no cause of action against the bank and in disposing of the claim observed : " It is argued

that such a rule (that is the rule giving the bank the right to close an account without reference to the depositor) is invalid because it is opposed to the ordinary code of banking business. But so long as it is not in violation of a statutory obligation, I do not see why parties should not contract themselves in the manner they have chosen to do. The rule is in the nature of a contract entered into between the parties. It cannot be said that there is a statutory prohibition. Neither can it be said that it is immoral or that it is opposed to public policy. Under the circumstances I am of opinion that plaintiffs were not entitled to be given notice before the account was closed."

Their Lordships in appeal agreed with the above observations and stated that the rule gave the bank the right to close the account at any time, without giving the plaintiffs notice of the fact and the bank had been careful to point out that the account had been closed after the drawing of the cheque and there was no reflection on the plaintiffs.

The appeal was dismissed with costs.

Note.—" A banker will not be justified in closing an account and dishonouring cheques drawn against it without reasonable notice. The notice must be sufficient to enable the customer, having regard to outstanding cheques or bills to make such arrangements as will obviate injury to his credit." (Hart's Law of Banking, 3rd Edition, page 237.) In this case their Lordships have held that the rule of the bank regarding the keeping of accounts providing that the bank reserved to itself the right to close any account without reference to the depositor was valid and binding on the customer as it was in the nature of a contract between the parties.

BANK OF DECCA LTD. ... ... { *Decree-holder* / *Appellant*

versus

GOUR GOPAL SAHA ... ... { *Judgment-debtor* / *Respondent*

(Guha and Bartley *JJ.*)

A.I.R. 1936 Calcutta 409 : 166 Indian Cases 855.

Banker and customer—Securities deposited for overdraft account—Pledge—Customer's liability for unpaid shares in liquidation—Sale of securities—Held that the customer was entitled to the balance of money after his liabilities to the bank were satisfied.

THE material facts of the case were as follows :—The respondent Gour Gopal Saha was a shareholder in the appellant bank. On liquidation of the bank, orders were passed against the respondent for recovery of money in respect of unpaid calls for shares allotted to him. The respondent had an account with the bank and as security against overdraft had deposited Government promissory notes. These notes were deposited by the Bank of Decca with the Bengal National Bank and were sold by the Receiver appointed by the Court for the Bengal National Bank and the sale proceeds after certain deductions made therefrom on account of dues of the Bank of Decca to the Bengal National Bank were sent to the Liquidator of the Bank of Decca. The amount received by the Liquidator exceeded the sum realisable from the appellant under the balance order put into execution. The respondent contended that the Liquidator of the Bank of Decca should meet the amount due in respect of unpaid calls out of the amount recovered from the Receiver of the Bengal National Bank which was his property being trust money which could not be applied for any purpose other than that for which the Government promissory notes were deposited, and that the money in the hand of the Liquidator would fully satisfy the respondent's liability under the balance order.

The Liquidator of the Bank of Decca asserted that the respondent was only a creditor of the bank and his objection by way of set-off was not maintainable.

The trial Court and the first appellate Court held that on the facts and in the circumstances of the case, the Bank of Decca was a trustee in respect of the Government promissory notes deposited by way of security for advances that the debt of the bank could be squared without

taking the matter into Court at all, and that the case was not one of set-off or of a contributory claiming a deduction before a share out among the creditors. The respondent was not in the position of a creditor but was entitled to enforce his ownership of the Government promissory notes deposited with the bank.

In appeal their Lordships after referring to the various legal relationships that may exist between a banker and its customer stated : " In the circumstances of the case before us where securities were deposited as cover for advances and for the purpose of securing overdrafts or advances the transaction was strictly of the nature of a pledge. The bank had converted the Government promissory notes to its own use and was liable for the value of them including interest on them. The customer was of course bound to pay the loans for which the Government promissory notes were security."

Their Lordships agreeing with the lower Courts held that there was no question of set-off in this case and the customer was entitled to enforce his ownership to the amount in the hands of the banker after the sale of the Government promissory notes deposited in the bank as security to cover overdrafts or advances after payment of the loans from the bank for which they were security.

The appeal was dismissed with costs.

Note.—A contributory of a limited company in liquidation is not entitled to set-off his liability for unpaid calls against any debt due to him from the company. In this case their Lordships have held that the transaction in question was in the nature of a pledge and the customer was entitled to assert his ownership to the balance of the sale proceeds of the securities after satisfying the overdraft amounts due to the bank and there was no relationship of debtor and creditor in respect of this amount. The contributory was held entitled to claim this amount in full and adjust it in reduction of his liability for calls.

ALLAHABAD BANK, LTD. ... ... *Defendant Appellant*

versus

GULLI LAL AND OTHERS ... ... *Plaintiffs Respondents*

(Bennet and Verma *JJ.*)

I.L.R. 1940 Allahabad 207 : A.I.R. 1940 Allahabad 243.

Banker and customer—Suit by fixed depositor for repayment—Place of suit.

THE plaintiffs were the children of one Nand Lal Gupta who held a fixed deposit of Rs. 3,000 with the defendant bank at its Agra branch. Nand Lal Gupta died on 25th February 1934 and on his death the plaintiffs as heirs demanded of the bank the renewal of the deposit in their names or repayment. The bank required the plaintiffs to establish their legal title to the money and also to produce some other documents. The plaintiffs did not comply with these requirements and filed the suit in the Court at Farrukhabad alleging that they were permanent residents of Farrukhabad, the cause of action accrued at Farrukhabad on 25th February 1934 on the death of Nand Lal Gupta and on 15th October 1935, the date of the refusal of the defendant bank to renew the deposit or make the payment till the establishment of legal title.

The defendant bank contested the claim on various grounds and for our purpose the important point raised by the bank was that the contract of fixed deposit was made at Agra and the amount was repayable only at Agra and the Court at Farrukhabad had no jurisdiction to try the suit. The bank did not even have a branch at Farrukhabad.

The trial Judge found that there was no jurisdiction in the Court at Farrukhabad. The plaintiffs appealed and the District Judge held that the Farrukhabad Court had jurisdiction. The bank preferred this appeal to the High Court at Allahabad.

Their Lordships held that in the case of a fixed deposit the fixed deposit receipt generally contained the terms of the contract. The plaintiffs had not produced the receipt and proved the terms of the written contract to show what were the provisions in the written contract in regard to the place of repayment. Their Lordships

negatived the contention that a fixed depositor could bring a suit in any place where he happened to reside.

The appeal was allowed with costs.

Note.—" Deposit Account :—Where money is placed on deposit account and a receipt is given indicating the particular office at which the money has been paid in, the money is primarily repayable only at that office. If, however, that particular office should have been closed or payment should be refused there, the banking company or firm would, of course, be liable for the amount as the principal debtor in the transaction." (Hart's *Law of Banking*, 3rd Edition, page 93).

V. S. VENKATRANGAM ... ... *Plaintiff*

versus

OFFICIAL LIQUIDATORS, TRAVANCORE NATIONAL AND QUILON BANK, LTD. (IN LIQUIDATION) ... ... *Defendants*

(Venkatramana Rao *J.*)

A.I.R. 1939 Madras 352 : 1938 Madras Weekly Notes 1332.

Banker and employees—Provident fund established by bank—Amount standing to the credit of the employees—Liquidation of bank—Priority.

THE Travancore National and Quilon Bank Ltd., had constituted a provident fund for its staff and the question arose whether the members of the provident fund were entitled to preferential payment under Section 230, Indian Companies Act, 1913 of the amount standing to the credit of the employees in this fund and due and payable to them. Section 230 (*1*) (*e*), Indian Companies Act, 1913, as amended in 1936 is a new section making such sums preferential debts and that, under Section 282-B (*2*), Indian Companies Act, 1913, as amended in 1936, all moneys contributed to a provident fund constituted by a company should in accordance with the provisions of the said section after 15th January 1937 be invested only in trust securities under Section 20, Indian Trusts Act, 1882. There were no similar provisions in the Travancore Companies Regulation and neither the fund itself nor any part of it was invested in any trustee securities though the bank was a scheduled bank. The plaintiff V. S. Venkatrangam claimed the amount of provident fund standing to his credit in the books of the bank as a preferential creditor. The Official Liquidators applied to the Court for directions as to payment of the amount standing to the credit of the employees of the bank in the provident fund constituted by the bank.

It was contended on behalf of the plaintiff that under Section 230 (*1*) (*e*), Indian Companies Act, 1913, his claim would be a preferential payment, that even otherwise the provident fund would be trust money and by the combined operation of Section 229, Indian Companies Act, 1913 and Section 52, Presidency Towns Insolvency Act, 1909, the creditors of the bank would have no right thereto.

On behalf of the creditors of the bank in liquidation, it was contended that having regard to the rules and regulations of the bank which govern the provident fund, they would not be considered to be trust moneys but form part of the assets of the bank divisible among

its creditors. As regards the application of Section 230 (*1*) (*e*), Indian Companies Act, 1913, it was contended that it would not apply to the bank in question, at any rate to employees who entered service of the bank before 1st January 1937.

His Lordship after referring to relevant sections in the Indian Companies Act, 1913, stated that the Travancore National and Quilon Bank, Ltd., had to be treated as an unregistered company within the meaning of the Indian Companies Act, 1913, and Section 271 (*1*) would apply to the bank and once the order for winding up was made, the company would be deemed to be a company under the Act. His Lordship added that "in a case where a foreign company was wound up in more jurisdictions than one the law is that of the Court of each jurisdiction will be governed by the forensic rules which govern the conduct of its own liquidation. Section 230 (*1*) (*e*) is a forensic rule. I have therefore no hesitation in holding that Section 230 (*1*) (*e*) is one of the provisions which ought to be applied in the matter of the winding up of this company and it would apply to the case of a sum due to any employee from the provident fund account maintained by the bank." His Lordship negatived the contention on behalf of the creditors that if Section 230 (*1*) (*e*) applied it would apply only to the employees who had entered service after the coming into force of the amendment on 15th January 1937. His Lordship stated that Section 230 (*1*) (*e*) drew no such distinction and the plain meaning of the rule was that if there was a sum due to any employee on the date of the winding up he was entitled to the benefit of this provision.

His Lordship also held that on a construction of the rules and regulations of the fund and on the authorities, the provident fund moneys were trust moneys and the bank held them in a fiduciary capacity.

The plaintiff's claim was allowed with costs.

Note.—Section 230 (*1*) (*e*) of the Indian Companies Act, 1913, provides that in a winding up there shall be paid in priority to all other debts all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company.

In the matter of Travancore National and Quilon Bank, Ltd.

OFFICIAL LIQUIDATORS AND ANOTHER ... ... *Applicants*

(Venkatramana Rao *J.*)

A.I.R. 1939 Madras 337 : (1939) 1 Madras Law Journal 209.

Banker and employees—Security for good conduct—Deposit carning interest—Liquidation of bank—Held that employees were entitled to preferential claim in respect of such deposits.

THE material facts of the case were as follows :—One A. M. Gopala Krishnan, an employee of the Travancore National and Quilon Bank, Ltd., prayed for an order that directions should be issued to the Official Liquidators to pay him the sum of Rs. 10,000 furnished by him to the above bank as security for his post as the chief cashier in the Anderson Hall branch, Madras, in full and in priority to the claim of any creditor. He stated that he was employed on 9th March 1938 and that his services were terminated due to the fact of the bank being wound up. He submitted that the security amount was deposited for a specific purpose agreed upon between him and the bank and that in the event of any loss caused to the bank by his misconduct the bank might recoup themselves from out of the sum only such loss and nothing more, and that on the termination of his services, the amount should be returned to him. The employee contended that the bank was trustee to him in respect of the said sum and that the said sum was trust money in the hands of the bank entrusted for a specific purpose. There were similar applications by other employees. The Official Liquidators also made an application asking for directions in regard to payment of the amount of security furnished by the employees for the due performance of their duties.

The rules of service of the bank required all the employees of the bank to furnish cash security, the amounts differing with each class of employees. In the receipt it was stated that it was " Staff Security Deposit Receipt " and that the deposit would bear interest and it further stated that the staff security deposit was subject to the rules and regulations of the bank for the time being in force. But in fact no rules and regulations were framed by the bank as the bank went into liquidation. The receipt was also not transferable. A separate account was kept for staff security deposits although the deposits were not invested in specific securities.

On the above facts, His Lordship after dealing elaborately with the authorities on the point held that where moneys were placed in or remitted to a bank to apply them for a specific purpose, the bank must be deemed to hold such moneys in a fiduciary capacity and the depositors were entitled to priority on liquidation. The security deposit was given to the bank for a specific purpose, i.e., it should be held by the bank in trust for the employee until the termination of his service as a security for his good behaviour so that, in case he is found guilty of any act or mission in the discharge of his duties and loss should result therefrom, the bank might recoup such loss and pay the balance. The words 'security deposit' indicated that the money did not belong to the banker as in the case of an ordinary deposit, but was money belonging to the depositor. The fact that there was provision for payment of interest in the receipt given by the bank did not alter the relationship to one of debtor and creditor and convert the money which was advanced for a specific purpose into a mere loan. His Lordship further added: "If the matter was governed by the provisions of the Companies Act as amended by Act 22 of 1936, there can be no doubt about the answer to this case. The answer is that the moneys held in security deposit were held in trust by the bank. Section 282-B (*1*), Companies Act is decisive of the matter. There is a statutory prohibition against the utilisation of any portion of the moneys except for purposes agreed to in the contract of service. In my opinion the section only declares the correct legal position of the bank in regard to those moneys, namely, that they cannot be considered as mere deposits with a banker and do not form part of the assets of the bank. But the provisions of the section cannot apply to the present case because so far as this matter is concerned, the bank is governed by the provisions of the Travancore Regulations where there is no provision corresponding to Section 282B."

Held that the employees were entitled to rank as preferential creditors in respect of their security deposits.

Note.—Security deposits of the employees of a company do not form part of the assets of the company on its liquidation. Section 282B of the Indian Companies Act, 1913, provides that such moneys shall be kept or deposited by the company in a scheduled bank and no portion thereof shall be utilised by the company except for the purposes agreed to in the contract of service.

PUNJAB NATIONAL BANK LTD., LYALLPUR ... ...{*Defendant* / *Appellant*

versus

DIWAN CHAND AND OTHERS ... ...{*Plaintiffs* / *Respondents*

(Broadway and Johnstone *JJ.*)

A.I.R. 1931 Lahore 302 : 134 Indian Cases 577.

Banker as agent—Failure to carry out instructions of customer—Liability for damages.

THIS was an appeal by the Punjab National Bank Ltd., Lyallpur against a decree for damages for Rs. 47,474-13-0 passed in favour of the plaintiffs in an action brought by them against the bank claiming a sum of Rs. 52,000 as damages for the negligence of the bank in connection with the renewal of a fire insurance policy. The material facts of the case were as follows :—In respect of a cash credit loan upto Rs. 60,000 allowed by the bank to the plaintiffs who formed members of a joint Hindu family, the bank took from them an equitable mortgage of the buildings and machinery of their mills. The plaintiffs under the agreement undertook to insure the properties mortgaged for a sum of Rs. 40,000 and to assign and deposit the policy of insurance with the bank should they require them to do so. The plaintiffs effected a fire insurance policy through the bank with the South British Insurance Company, Limited with effect from the 1st May 1919. The total amount for which the policy was taken out for one year was one lakh, the charge on the buildings was Rs. 10,000, on the machinery Rs. 40,000 and on the stock of wheat and wheat products in the premises Rs. 50,000. It should be noted that the policy was made so as to make the bank the " assured " according to its terms. The policy was renewed from time to time through the bank. In 1921 the plaintiffs leased their mills to third parties and the wheat and wheat products on the premises ceased to belong to the joint family. When the policy came to be renewed in 1921 Lala Diwan Chand, as head of the family, through his clerk, addressed two letters, one to the bank and one to the company. To the latter he stated that he wished to renew the policy for one lakh but as the wheat no longer belonged to him he wanted the whole of the amount of one lakh to be a charge on the buildings and the machinery and that he had instructed the bank accordingly. He wrote in similar terms to the bank. The bank informed Lala Diwan Chand that the policy on the mills had been renewed as instructed by him. The policy was however retained by the bank and was not forwarded to Lala Diwan Chand or anybody on his behalf for scrutiny.

On the night of the 5th August 1922 the mills caught fire and the buildings and machinery were burnt and the loss was estimated at over two lakhs. When the claim was made to the Insurance Company, it was discovered that the policy had been renewed on the old terms that is to say, that the machinery and buildings were insured for Rs. 50,000 and the wheat and wheat products for another Rs. 50,000. The Insurance Company thereupon confined their payment to the loss incurred by the burning of the buildings and the machinery and paid Rs. 46,985 in respect of such loss to the bank as being the "assured."

Lala Diwan Chand, as head of the joint family, filed the present action for damages. The main contention of the bank was that they did not act as the agents of the plaintiffs in the matter of taking out the insurance policy but had insured the property as mortgagees for their own benefit and that of the plaintiffs' and that they were accountable to the plaintiffs only for such sum as they received from the Insurance Company. In the alternative they urged that if they were held to be agents they were gratuitous agents and as such only liable for gross negligence and that they were not guilty of any negligence at all.

The trial Court held that the bank had acted as the plaintiffs' agent in taking out the insurance policy and that they had been guilty of such negligence as resulted in damage and loss to the plaintiffs and decreed the suit for Rs. 47,474-13-0 with proportionate costs.

In appeal their Lordships after carefully analysing the evidence in the case agreed with the learned trial Judge and held that the bank acted in the matter relating to the taking out of the insurance policy not as a mortgagee but as the agent of the plaintiffs.

Held also that as the bank had failed to carry out the clear instructions of the plaintiffs they must be regarded as guilty of gross negligence and were responsible to the plaintiffs for the loss occasioned by their negligence. It was immaterial whether they were acting as gratuitous agents or agents for reward.

The appeal was dismissed with costs.

Note.—An agent is bound to carry out the directions of his principal and conduct the business of agency with such skill as is generally possessed by persons engaged in similar business; unless the principal has notice of his want of skill. He is bound to make compensation to his principal in respect of any loss incurred by his failure to carry out the directions of his principal or by his negligence in the conduct of his business of agency. (*See* Sections 211 and 212 of the Indian Contract Act, 1872). There is no distinction in Indian Law in this respect between the degrees of deligence and skill expected of gratuitous agents and agents for reward.

FATIMA BEE BEE AND OTHERS ... ... *Appellants*

versus

OFFICIAL TRUSTEE ... ... *Respondents*

(Ba U and Shaw *JJ.*)

A.I.R. 1941 Rangoon 344.

Bankers' Book Evidence Act (1891), Section 2 (8)*—Extracts signed by Sub-Accountant for Manager—Held not sufficient.*

THE material portion of the judgment on the point is as follows :— "Section 4, Banker's Books Evidence Act, 1891, provides no more than that subject to the provisions of the Act a certified copy of any entry in a banker's book shall, in all legal proceedings, be received as *prima facie* evidence of the existence of such entry and shall be admitted as evidence of the matters, transactions and accounts therein recorded, in every case where, and to the same extent as the original entry itself is now by law admissible, but not further or otherwise. Exhibit S was wrongly admitted in evidence. Its defects were immediately pointed out by the learned advocate for the defendants. Nevertheless P. David was examined with reference to the document with a view to supply the omissions from it. He stated it was certified by a Mr. Meyer, sub-accountant of the bank, who signed for the manager. That he may have had authority to sign for the manager is beside the point. He was neither the principal accountant nor the manager of the bank who alone could certify the document. The certificate reads : "We certify that this is a true extract from the books of the bank."

"That is not a certificate which is prescribed as requisite in Section 2 (*8*), Bankers' Books Evidence Act, 1891. P. David also stated that the extract was prepared by him from the books of the bank and that the books of the bank were kept in the ordinary course of business and that the books from which the extracts were taken were still in the bank. In cross-examination, however, he stated that the extracts were taken from the ledger books and that there were "daily cash book, ledger and balance books" in all of which a customer's accounts will appear as did M.O.A. Gany's account. He further stated that in the ledger there were the following columns : date, particulars, cheque number, debit column, credit side and balance. These have not been reproduced in Exhibit S. He said he picked out and chose such columns as were thought necessary. There

is no column " Nominee " in the ledger. He put in that column which was not in the ledger. It is therefore perfectly clear that Exhibit S is not a true copy of the ledger entries. It follows that Exhibit S is not a certified copy of entries in a banker's book as defined in the Bankers' Books Evidence Act, 1891."

Note.—The provisions of Section 2(*8*), Bankers' Evidence Act, 1891, should be strictly complied with in order to get the benefit of the Act. The certificate should be signed by the principal accountant or the manager. This decision holds that a certificate signed by a sub-accountant for the manager is not sufficient compliance with the requirements of the Act. The copy of any entry should be full and exact. The omission of any particulars contained in the entry will not make it a true copy.

A. F. G. PRICE ... ... *Petitioner*

versus

EMPEROR ... ... *Opposite Party*

(Skemp *J.*)

I.L.R. 17 Lahore 593 : A.I.R. 1937 Lahore 160.

Bankers' Books Evidence Act (1891), Section 2 (4) and 5—Police Officer investigating criminal case against customer—Held entitled to inspect the account of the customer.

THIS was a criminal revision petition to the High Court at Lahore by the petitioner against the judgments of the City Magistrate and the Sessions Judge, Lahore, convicting him under Section 175, Indian Penal Code though action was taken in his favour under Section 562 (*1-A*) Criminal Procedure Code and punishment was remitted. The facts of the case were as follows :—A police Officer investing a charge under Section 420, Indian Penal Code against a customer of the Imperial Bank of India, Lahore Branch, approached Mr. Price, Accountant of that Bank and asked his permission to inspect the accounts of the Bank so far as they concerned that customer. Mr. Price refused to show the accounts relying on Section 5, Banker's Books Evidence Act, 1891, which states that no officer of a bank shall in any legal proceeding to which the bank is not a party be compellable to produce any banker's book the contents of which can be proved under this Section, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the Court or a Judge made for special cause. There was some correspondence between the Police and Mr. Price who asked for the order of a Court or a Judge. Ultimately the Police Officer in question the officer-in-charge of the Police Lines, Lahore, served a formal order under Section 94, Criminal Procedure Code on Mr. Price to produce the books at the Civil Lines police station. The order was not complied with. Mr. Price was prosecuted and convicted with the above result.

His Lordship after discussing the legal position stated : " I am of the opinion that ' evidence ' in the Bankers' Books Evidence Act, 1891, has the same meaning as in the Indian Evidence Act, 1872, and that as evidence is not given before a police officer, proceedings before him are not a ' legal proceeding ' as defined in that Act . . . . (1) It was said that the Bank owes a fiduciary duty to its customers not to disclose their affairs or accounts. No doubt this is so, but this duty

is no answer to an express provision of a statute. (2) It was also said that it would be a matter of great inconvenience to take the books of the Bank to a police station. This is true, but inconvenience also is no answer to an express provision of a statute. Further in this case all that the police officer originally wished to do was to see the books of the Bank at the Bank and this would be the normal and proper procedure unless the books themselves were required for special reasons."

His Lordship dismissed the revision petition.

Note.—A police officer under Section 94 of the Criminal Procedure Code, 1898, is entitled to inspect the accounts of the customer of a bank and the provisions of Section 5, Banker's Books Evidence Act, 1891, do not affect this right of a police officer.

CENTRAL BANK OF INDIA LTD. ... ... *Applicant*

versus

P. D. SHAMDASANI ... ... *Complainant*

(Beaumont *CJ.* Rangnekar and Norman *JJ.*)

A.I.R. 1938 Bombay 33 : 39 Bombay Law Reporter 1187.

Bankers' Books Evidence Act (1891) S. 6—Bankers' Books—Production and inspection—Principles governing.

THE facts of the case are not material but the legal position is stated in the following extracts from the judgment of his Lordship the Chief Justice, " I would say that in my view there is no justification whatever for the suggestion that when a Magistrate makes an order for production under Section 94 Criminal Procedure Code which he can do whenever he thinks such an order necessary or desirable for the purposes of the proceedings before him, he thereby commits himself to the proposition that inspection of all the documents production of which is ordered must necessarily follow . . . Usually inspection should only be given of particular documents shown to be relevant and not of documents in bulk."

" The Bankers' Books Evidence Act is a special Act dealing with the subject matter of bankers' books and being a special Act, the provisions of the Criminal Procedure Code do not in any way conflict. Section 4 Bankers' Books Evidence Act, deals with the mode of proof of entries in bankers' books and Section 5 deals with the obligation of the bank to produce their books, and directs that in any legal proceedings to which a bank is not a party, no officer of a bank shall be compelled to produce any banker's book the contents of which can be proved under this Act, that is by certified copies unless by order of the court or a Judge made for a special cause. . . . Section 6 provides : " On the application of any party to a legal proceeding, the court or a Judge may order that such party be at liberty to inspect and take copies of any entries in bankers' book for any of the purposes of such proceeding " and sub-section (*3*) of Section 6 directs that : " The bank may at any time before the time limited for obedience to any such order as aforesaid either offer to produce their books at the trial or give notice of their intention to show cause against such order, and thereupon the same shall not be enforced without further order." So that the bank have a statutory right to object to any order directing inspection to be given of their books."

" The Legislature has endowed the Courts with wide power for ordering production of documents necessary for the determination of matters before the Court, and for directing inspection of those documents, but it must always be borne in mind that an order directing a person to produce or give inspection of his books in a dispute to which he is not a party involves a serious inroad upon his normal rights as a citizen, and the Courts have always set their faces against giving anything in the nature of a roving or fishing commission to inspect documents. The Court does not allow a man to say " I make such and such a charge against my opponent, and now if you will let me look into his books I will see whether I can find some evidence to support it." If the Courts were to make orders for inspection of books merely on an allegation that certain facts are true, the practice would be open to very serious abuse, and the Court might easily become something of a menace to a mercantile community.

" In my opinion, it is not the practice of the Court to allow inspection of bankers' books under the Bankers' Books Evidence Act unless a *prima facie* case is made out for thinking that there is some matter on which the books of the bank are bound to be relevant."

Note.—This decision is of considerable importance to bankers as it lays down the principles under which a court may order inspection of bankers' books. An order for production of bankers' books under Section 94 of the Criminal Procedure Code, 1898 by a court does not carry with it the right to inspection as a matter of course. The banker may for proper reasons object under Section 6, Bankers' Books Evidence Act, 1891, to the inspection of the books so produced.

In the Matter of Benares Bank Ltd., Benares.

(Allsop *J.*)

A.I.R. 1939 Allahabad 726 : 1939 Allahabad Law Journal 1009.

Banking company—Difficulty in meeting obligations—Moratorium or stay of proceedings under Section 277N Indian Companies Act, 1913—When granted by Court.

THIS was an application on behalf of the Benares Bank Ltd. under Section 277N of the Indian Companies Act, 1913, for an order staying the commencement or continuance of all actions and proceedings against the applicants for a period of one year with liberty to apply for an extension of time. A conditional interim order for stay of proceedings against the bank had been passed by the vacation Judge and the application came for final hearing. The question was whether the order staying proceedings under Section 277N of the Indian Companies Act, 1913, should be withdrawn or whether it should be confirmed under the same conditions or under different conditions. The bank in order to be entitled to an order for stay of proceedings under this section must establish that it was temporarily unable to meet its obligations. The report of the Registrar of Joint-stock Companies made by him as required under sub-section (2) of Section 277N was against the bank as it showed that the bank was unable to meet its obligations and its assets were less than its liabilities. His Lordship after referring to the suggested scheme of composition with the creditors and other facts in the case stated : " It may be that the directors and the present chairman are actuated by the best of motives and that they think and hope that their arrangements are those best suited to meet the liabilities of the company, but although that may be so, that is no ground in law for passing an order under Section 227N of the Indian Companies Act, unless the Court really is satisfied that the position of the company is embarrassed only temporarily. . . . It was never the intention, I am sure, of the Legislature in enacting Section 277N Indian Companies Act, that a company in an insolvent position should be allowed to continue its operations under the protection of the Court and that those who had dealings with the company should be prevented under the orders of the Court from seeking legal remedies to which they would otherwise have been entitled."

Held that the Benares Bank Ltd. was not entitled to stay of

proceedings under Section 277N of the Indian Companies Act, 1913, and the application was dismissed.

Note.—The object of Section 277N of the Indian Companies Act, 1913, is to grant something in the nature of a moratorium to a banking company in temporary difficulties. This decision points out that a banking company in order to be entitled to an order for stay of proceedings under Section 277N must establish that its difficulties are only temporary and it is otherwise solvent.

M. S. PALANIAPPA MUDALIAR ... ... *Appellant*

versus

OFFICIAL LIQUIDATOR, PASUPATHI BANK, LIMITED, COIMBATORE ... ... *Respondent*

(Mockett and Kunhi Raman *JJ.*)

I.L.R. 1942 Madras 875 : A.I.R. 1942 Madras 470.

Banking company—Shares issued in the name of a minor—Liquidation of bank—Effect of.

THIS was an appeal preferred by the appellant against the order of the District Judge, Coimbatore, placing him in the list of contributories under the provisions of the Indian Companies Act, 1913, on the liquidation of the Pasupathi Bank Limited.

The material facts of the case were as follows :—An application was made by M. S. Palaniappa Mudaliar as guardian of his minor daughter Meenakshi for shares and the Company issued shares to and registered shares in the name of Meenakshi describing her as a minor. The Company evidently did not know that the transaction was void. On the liquidation of the Company, the Official Liquidator claimed against the minor for contribution. The minor through her father Palaniappa Mudaliar filed an affidavit setting up her minority and disclaiming any personal responsibility. The Official Liquidator contended that if the minor was not liable, the father of the minor who signed the application must be deemed to have contracted for the shares and should be placed on the list of contributories. The learned District Judge accepted this contention and included the name of the father of the minor in the list of contributories.

On appeal His Lordship Mockett, *J.*, after referring to the authorities on the point stated : " This transaction was void on the face of it. An application for shares cannot be a necessity for a minor. There is no suggestion that the Pasupathi Bank Ltd. were unaware of the contributory's minority ; they knew they were being invited to contract with a minor and they thought fit to contract with the minor. The application by Palaniappa Mudaliar was made on behalf of his minor daughter. There is nothing on the record to show that he had at any time intended to become a subscriber of the Company. . . . It seems to be clear that the contract was made by both sides

under complete misapprehension as to the law but no misapprehension whatever as to the facts. Under the law it was void."

The appeal was allowed with costs.

Note.—A minor has no legal capacity to contract and any contract entered into by or on behalf of a minor will be void as against the minor. It is on this ground that articles of association of a company generally provide that a minor cannot be a shareholder of the company.

MALIK BARKAT ALI ... ... { *Plaintiff* / *Appellant*

versus

IMPERIAL BANK OF INDIA AND ANOTHER ... ... { *Defendants* / *Respondents*

(Beckett and Marten *JJ.*)

A.I.R. 1945 Lahore 213 : (1945) 15 Company Cases 108.

Banker's draft—Countermand of payment—Presentment of draft by payee duly endorsed—Payment by banker—Held that the payment was in due course and the banker was protected.

THE material facts of the case were as follows :—The Crown Brand Tea Company at Dacca had advertised in a newspaper that they wanted to engage provincial managers who would be required to offer Rs. 5,000 as security against the stocks of tea with which they would be provided. The appellant Malik Barkat Ali was anxious to find employment for his son Malik Nawazish Ali and advised the latter to answer the advertisement which was done. Malik Nawazish Ali was selected and was required to deposit the security money by means of a draft on the Imperial Bank of India on its Dacca branch. Malik Barkat Ali accordingly instructed the Imperial Bank of India to send a draft for Rs. 5,000 to the Crown Brand Tea Company, the cost of which was to be debited to his current account. This was done on the 19th December 1940. Malik Nawazish Ali reported for duty at Dacca on the afternoon of the 22nd December 1940. As soon as he reached the offices of the Company, he formed the impression that the Company was a bogus concern and he sent a telegram to his father the same evening asking him to have the payment of the draft stopped anyhow. Malik Barkat Ali himself telegraphed to the Dacca branch of the Imperial Bank of India asking them to stop payment of the draft in question. This telegram reached Dacca on the morning of the 23rd December 1940. On the same morning Malik Barkat Ali went to the Imperial Bank of India, Lahore and requested the Manager to arrange for the branch at Dacca to stop payment of the draft explaining his reasons for doing so. As the reasons advanced by Malik Barkat Ali would not ordinarily constitute a sufficient ground for stopping payment of the draft, the Manager at Lahore at first refused to comply with the request, but did so later in the day after good deal of argument. As already stated Malik Barkat Ali's telegram to Dacca reached there on the morning of the 23rd December 1940. The telegram from the

Imperial Bank of India, Lahore did not arrive until late in the afternoon. In the meantime, the draft had been duly endorsed in favour of one bank and then in favour of the Comilla Banking Corporation Ltd. by which it had been cleared in the course of the afternoon. The Imperial Bank of India, Dacca had made careful enquiries about the nature of the endorsements and there was no doubt that the draft was properly presented for payment by the Comilla Banking Corporation Ltd. on behalf of the company in whose favour the draft had been issued. The Imperial Bank of India at Dacca did not consider that the telegram received from Malik Barkat Ali would justify them in stopping payment, and as the endorsement had been properly guaranteed, payment of the draft was made by them after the position had been carefully examined. By the time that the telegram from the Imperial Bank of India, Lahore, came in, it was too late to stop payment.

No tea was received by Malik Nawazish Ali and eventually criminal proceedings were instituted during the course of which the accused absconded. Malik Barkat Ali sued the Imperial Bank of India, Lahore, on the ground that they acted negligently in refusing to stop the payment of the draft immediately on being asked to do so for the reasons given at the time. The trial Court dismissed the suit against the bank mainly on the ground that the agency of the bank was terminated as soon as it had complied with the original request made by the plaintiff and had sent off the draft to the company.

On appeal His Lordship Beckett, *J.* stated : " I do not think that the case is really covered by the law of agency. There were actually two transactions involved. One was the preparation of the draft and the other was the sending of the draft to the company. The latter was a matter of agency, but this was completed when the draft was sent off. The issue of the draft is regarded in banking practice as a matter of purchase, the person at whose instance the draft is issued, being regarded as the purchaser. The question that falls to be decided is what are the conditions in which a bank can stop payment of a draft after it has reached the hands of the person in whose favour it is drawn, and whether it can do so at the instance of the purchaser. No decision on exactly similar facts has been laid before us, but the general principles seem fairly clear. Ordinarily, a bank cannot stop payment of a draft unless there is some doubt as to the identity of the person presenting it as being or properly representing the person in whose favour it is drawn. This appears from Sheldon's *Practice and Law of Banking*, 1931, p. 155. The position of a bank in regard to its own drafts is not quite the same as its position in regard to cheques drawn on it, since it has taken on commitments of its own in favour of a third person at the instance of the purchaser. This seems to be in accordance with the provisions of the Negotiable Instruments Act,

Section 85A lays down that the bank is discharged as regards drafts by payment in due course, which is defined as follows in Section 10 :—

> " ' Payment in due course ' means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned."

This section would seem to indicate that the question with regard to which a bank has to satisfy itself is that of the title of the person presenting the draft. If a draft is lost, for example, a risk may arise that it will be presented by some one who is not entitled to be the holder and there may be a forged endorsement. In such cases, the purchaser may reasonably ask the bank to be on its guard against presentation by the wrong person ; and, if the bank does not exercise the necessary precautions, the purchaser may sue the bank for negligence. It is with cases of this kind that the reported decisions are mostly concerned. On the other hand, it does not appear that the purchaser is entitled to ask the issuing bank to stop payment on other grounds, such as matters relating to the consideration in respect of which the draft has been issued at his instance, for this would often put the bank in an impossible position, as when the purchaser of the draft is dissatisfied with some bargain which he has made with the person in whose favour the draft has been issued."

The appeal was dismissed with costs.

Note.—It is held in this case that when a draft has already been issued and presented for payment by the payee duly endorsed the banker will be discharged by payment in due course. The purchaser of a draft has no authority to countermand payment of the draft after it has been delivered to the payee and the banker would be justified in refusing to comply with the instructions countermanding payment. If there is any dispute as to the payment of the money covered by the draft between the purchaser and the payee, it would have to be settled between them.

BANK OF BIHAR LTD. ... ... { *Plaintiff* / *Appellant*

versus

OMITAVE CHATTARJI AND ANOTHER ... ... { *Defendants* / *Respondents*

(Harries *C.J.* and Dhavle *J.*)

A.I.R. 1940 Patna 283 : 21 Patna Law Times 262.

Bank manager executing security deed transferring house to bank for proper discharge of his duties—Construction of the deed—Held charge created.

THIS was an appeal by the plaintiff to the High Court from concurrent decrees of the Courts below dismissing the plaintiff's suit for enforcement of a certain charge. The material facts were these. The plaintiff bank appointed one Ashutosh Chattarji, the father of the contesting defendant, as manager of their Gaya branch. Ashutosh Chattarji, before he took up his duties, executed on the 19th July 1928 a deed the material portion of which read : " In consideration of the said post of manager, . . . the said Babu Ashutosh Chattarji doth hereby grant, convey and transfer unto the said Bank of Bihar Ltd., or its successor-in-office his house named " Kirk View " valued at Rs. 4,000 and all the estate, right, title and interest of the said Babu Ashutosh Chattarji in the said house and every part thereof. To have and to hold as security for the said post of manager, . . . provided always that in the event of the removal of the said Babu Ashutosh Chattarji from the post of manager, Bank of Bihar Ltd., Gaya, by resignation, dismissal, death or otherwise, the said Bank of Bihar Ltd., or its successors-in-office shall reconvey the aforesaid house unto and to the use and possession of the said Babu Ashutosh Chattarji." The deed was registered and Ashutosh Chattarji took up the post of manager. On the 15th May 1924, Ashutosh Chattarji was discharged. In 1926, the plaintiff bank brought a suit against him for accounts and for amounts due in respect of losses suffered by the plaintiff bank through the conduct of Ashutosh Chattarji. The litigation was protracted but eventually the matter was referred to an arbitrator who on the 23rd February 1930 made an award in favour of the bank for Rs. 4,500 with future interest at 6 per cent. per annum. Later on the award was filed in Court and a decree passed in its terms. The plaintiff bank realised various sums from Ashutosh Chattarji, in respect of the decree from time to time. In 1934 Ashutosh Chattarji died,

The present suit was filed on the 25th February 1936 against the defendants who were the sons of Ashutosh Chattarji for a sum of Rs. 4,864-6-6 being the balance due on the decretal amount and the plaintiff claimed that the amount should be realised out of the house which it was said was charged by the deed dated the 19th July 1918.

The defendants resisted the suit on a number of grounds, the important of them were as follows :—It was said that the document created neither a mortgage nor a charge and further that the suit was barred by reason of the provisions of Order 2, Rule 2, Civil Procedure Code. Both the lower Courts came to the conclusion that the document did not create a simple mortgage ; but neither Court considered whether the document created a charge. It was argued for the appellant that the house belonging to Ashutosh Chattarji was by the deed made security for the payment of any sum which might become due from Ashutosh Chattarji to the bank by reason of his failure to discharge his duties in a due and proper manner. On the other hand it was argued for the respondents that the deed did not create a charge, because the property was not made security for the payment of money to the bank. His Lordship Harries, *C.J.*, said that the document was not happily drafted and after referring to the recitals in the deed stated : " If this document is read literally, the moment dismissal occurred as a result of dishonesty, the bank were bound to surrender their security to the dismissed servant. In my view such a meaning cannot be given to this provision and it must be read in the light of the earlier provisions. In my view what the document as a whole means is that the house was to be held by the bank as security for any sum which might become due from the manager to the bank as the result of misconduct, neglect or such like. If on the other hand no sum was due from the manager to the bank, the former would be entitled to the return of his security the moment he left their employ. The document cannot mean that the manager would be entitled to the return of the security when he had been dismissed for dishonesty or such like. Both the Courts below were also of opinion that the suit was barred by reason of the provisions of Order 2, Rule 2 of the Civil Procedure Code, 1908. The Courts came to the conclusion that assuming the document created a security, the plaintiff should have sought to enforce the security when it instituted proceedings in the first place. The Courts came to the conclusion that as the plaintiff had failed to ask for the enforcement of its security in the proceedings which culminated in the money decree, he could not bring subsequent proceedings for such enforcement. If however, this document created a charge Order 2, Rule 2, could not in my view, bar the suit. It is expressly provided by Order 34, Rule 14, that : ' Where a mortgagee has obtained a decree for the payment of money in satisfaction of a

claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage and he may institute such suit notwithstanding anything contained in Order 2, Rule 2.' Order 34, Rule 15, provides that all provisions contained in Order 34 which apply to a simple mortgage shall, so far as may be, apply to a charge within the meaning of Section 100, Transfer of Property Act, 1882."

Held on the authorities and relevant provisions of law that there was a charge in this case to secure moneys due from Ashutosh Chattarji to the plaintiff bank, the bank could in the first place, sue to recover those moneys and on failure to obtain satisfaction, could bring a subsequent suit to enforce their charge. A preliminary charge decree for Rs. 4,000 which was the limit stated in the deed of security was passed in favour of the plaintiff bank.

The appeal was allowed with costs.

Note.—The points of law raised in the case were : (i) whether the deed of security in question created either a mortgage or a charge, and (ii) whether the plaintiffs' suit was barred by the provisions of Order 2, Rule 2 of the Civil Procedure Code, 1908. The appellate Court has held on a construction of the deed that there was a charge created in favour of the bank. The material portion of Order 2, Rule 2, read : " (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action . . . (3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs ; but if he omits except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted." It was contended on behalf of the defendants that since the plaintiff bank had obtained a money decree against Ashutosh Chattarji in the first instance, a subsequent suit to enforce the charge was barred under the above provisions. His Lordship Harries, *C.J.*, negatived this contention and stated : " A chargee may bring a suit to recover the money charged on immoveable property and may subsequently bring a suit to bring that immoveable property to sale in satisfaction of his decree. Neither a mortgagee nor a chargee can, on obtaining a money decree execute that decree against the mortgaged or charged property. They must, by a subsequent suit, bring the mortgaged or the charged property to sale. Order 34, Rules 14 and 15, are an exception to the general rule laid down in Order 2, Rule 2."

CANARA INDUSTRIAL AND BANKING SYNDICATE CO., LTD. ... ... *Plaintiffs*

versus

NARAYAN VENKATESH SHENOY AND ANOTHER ... *Defendants*

(Kania *J.*)

I.L.R. 1942 Bombay 101 : A.I.R. 1942 Bombay 15.

Bills of exchange drawn in Bombay and accepted by drawee in Calicut—Jurisdiction—Place of suit.

THIS was a suit by the plaintiffs Canara Industrial and Banking Syndicate, Ltd., to recover from the defendants Rs. 4,625 and interest. The material facts were that some bills of exchange drawn by defendant 1 in favour of the plaintiffs were accepted by defendant 2 at Calicut. On the due date, however, he dishonoured the same by non-payment. The suit was filed in the Bombay High Court as a summary suit after obtaining leave under Clause 12, Letters Patent. Defendant 1 remained *ex parte*. The defendant 2 obtained leave to defend and filed his written statement.

The main contention for our purpose that the defendant 2 raised was that the Bombay Court had no jurisdiction to try the suit. He contended that because he had accepted the bills at Calicut no part of the cause of action arose in Bombay and the leave obtained under Clause 12, Letters Patent, was irregular.

His Lordship after referring to relevant authorities on the point held that the drawing of the bills of exchange was a material fact which had to be proved by the plaintiffs to prove their claim and as that fact took place in Bombay with leave under Clause 12, Letters Patent, the Court at Bombay had jurisdiction. His Lordship stated : " The starting point for the liability is the drawing of the bills of exchange on him and the concluding point is when he accepts the liability by putting his signature on the bills as acceptor. The acceptance is, therefore, the culminating point fixing the liability on him and not the starting point as contended by defendant 2."

Note.—The point in this case is that the drawing of a bill of exchange is a material part of the cause of action and a suit can be filed in the place where it is drawn. Clause 12, Letters Patent (Bombay), requires leave of court being first obtained in cases where only part of the cause of action has arisen within the jurisdiction of the court.

FIRM MALABAR STEAMSHIP CO. ... ... *Appellants*

versus

CENTRAL BANK OF INDIA, LTD., AND OTHERS ... *Respondents*

(Davis *J.C.*, and Tyabji *J.*)

I.L.R. 1939 Karachi 439 : A.I.R. 1939 Sind 225.

Bills of lading issued for goods not on board—Pledge of the bills of lading by endorsement in favour of a banker—Effect of.

THE material facts of the case were as follows :—One Maganlal purchased some bags of foodstuffs such as atta, rice, etc., and after lodging the shipping bills with the Customs authorities on the 16th January 1931, he obtained the necessary permission to export and the goods were put in lighter for transhipment to the S.S. *Janaki* which was expected to arrive in Karachi on the 17th January, but she did not arrive as expected, and in anticipation of her arrival Mr. Maganlal obtained from the Manager of the Shipping Company bills of lading duly filled in which he pledged with the Central Bank of India, Ltd., the same day and obtained from the Bank about Rs. 5,038-6-0. On the 18th January 1931, one of the sellers of foodstuffs made a complaint to the police of an offence of cheating against Mr. Maganlal with respect to the atta sold to him and the police after obtaining from the City Magistrate the necessary orders seized all the goods that were in the lighter with the result that on the 19th January the S.S. *Janaki* sailed without the consignment which was never put on board.

The Central Bank of India, Ltd., as endorsees of the bills of lading filed an action against the Shipping Company, the shipper and the vendors of the goods for recovery of the sum of money the Bank had advanced on the security of goods stated in the bills of lading. The trial Judge decreed the Bank's claim against the Shipping Company for Rs. 4,095-13-0 being the value of the goods with insurance and Port Trust charges with interest at 6 per cent. and costs.

The Shipping Company preferred an appeal. Their Lordships after referring to the authorities on the subject stated : " We do not think, therefore, that it can be said that the Shipping Company did not owe a duty to the Bank, the indorsee of the bill of lading, and, we think, the case of the Bank against the Shipping Company can be dealt with simply on the principle of estoppel. The Company are bound by their own statements in the bill of lading that the goods were received on board in apparent good order and condition. They

were however not received on board at all. The Bank in consequence acted to their detriment in advancing money to the shipper, and we think there can be no doubt that the Shipping Company must compensate the Bank for loss suffered by their action." Their Lordships further stated : " It appears to us essential for the purpose of commerce that a necessary condition of the operation of a bill of lading as a document of title is the receipt on board the ship of the goods which the bills of lading cover and which it is so declared in the bill itself." As in the present case the goods were not on board at all, the Bank had no valid pledge of the goods covered by the " false " bills of lading and the vendors of the food-stuffs could not be held liable.

In the result the Bank succeeded in its claim against the Shipping Company and the shipper. The appeal preferred by the Shipping Company was dismissed with costs.

Note.—A bill of lading is a document of title to goods signed by a ship owner or by the master or other agent of the ship owner which states that certain specified goods have been shipped upon a particular ship and which purports to set out the terms on which such goods have been delivered to and received by the ship. On a transfer of a bill of lading by way of sale, mortgage or pledge the property in the goods passes either absolutely or otherwise according to the intention of the parties provided that the transferor was competent to dispose of the goods. But these attributes attach only to a true bill of lading and not to a false bill of lading, to goods shipped and not to goods intended to be shipped. In the present case the Shipping Company issued the three bills of lading in the form " received on board in apparent good order and condition " before the goods were received at all on board the ship. The Central Bank of India Ltd. relying on the statement contained in the bills of lading advanced money to the shipper on the pledge of the bills of lading. As it turned out that the goods were not received on board and the Bank had no valid pledge of the goods, the Shipping Company were held liable to compensate the Bank for their loss on the ground of estoppel.

BANK OF BARODA LTD. ... ... { *Defendant* / *Appellant*

versus

PUNJAB NATIONAL BANK LTD. (PLAINTIFF) AND OTHERS *Respondents*

(Lord Wright.)

A.I.R. 1944 Privy Council 58 : 48 Calcutta Weekly Notes 810.

Cheque—Certification or marking of a post-dated cheque as good for payment by manager of a bank—Position of endorsee of such a cheque—Dishonour on presentment on the due date by the drawee banker on the ground "not arranged for"—Held that (i) the marking was not an acceptance of the cheque and there was no custom amongst bankers in India to that effect, (ii) the endorsee of such a cheque had no remedy in law against the drawee banker, and (iii) the manager had no ostensible or real authority to certify post-dated cheques as good for payment.

THE material facts of the case were as follows :—In May 1939 one Ghose (Respondent 3) opened an account with the Bank of Baroda Ltd. at Calcutta on the understanding that he should be allowed "temporary accommodation from time to time" and one Mitter purported to guarantee that account. Mr. M. P. Amin was the Manager of the Calcutta branch of the Bank of Baroda Ltd. and Mr. Bhagwan Das was the Manager of the Calcutta branch of the Punjab National Bank Ltd. where Mr. Mitter had an account. On the 13th June 1939, Ghose's account with the appellant bank showed a debit balance of Rs. 89,274. On the same date, Mitter's account with the respondent bank was overdrawn to the extent of about Rs. 35,000. "On that day, Mr. Mitter brought to the respondent bank two cheques drawn by Ghose on the appellant bank both in favour of Mitter and both dated 13th June 1939 ; both cheques were marked on their face with the words 'Marked good for payment up to 20th June 1939,' and signed by Amin on behalf of the appellant bank. One cheque was for Rs. 1,40,000 and the other for Rs. 1,35,000. Mitter informed Mr. Bhagwan Das that the cheques would not be paid until 20th June 1939, and asked to be allowed to draw Rs. 2,40,000 against them. Bhagwan Das said he wanted a cheque the date of which was the same as that on which payment was to be made. Mitter then took away the cheques and returned a little later on the same day with one cheque dated 20th June 1939, drawn by Ghose on the appellant bank in favour of Mitter or order, for Rs. 2,75,000. The cheque was crossed '& Co.'

and on the face of it were written crosswise the words ' Marked good for payment on 20-6-39. For the Bank of Baroda Ltd. M. P. Amin, Manager.' It has not been questioned that the signature was that of Amin. Mitter endorsed the cheque generally and handed it to Bhagwan Das, with two letters, in which he asked the respondent bank to credit Rs. 2,75,000 to his account ' on realisation on due date,' and also requested an overdraft of Rs. 2,40,000 besides the previous balance, which he promised to adjust on 20th June 1939." The Punjab National Bank Ltd. on the same day gave Mr. Mitter its cheque for Rs. 2,40,000 on the Imperial Bank of India at Calcutta which Mr. Mitter duly cashed.

Meantime the head management of the Bank of Baroda Ltd. suspecting Mr. Amin of irregularities suspended him on the 19th June 1939 and early next day a notice was sent to the respondent and other banks that Mr. Amin's power-of-attorney had been cancelled and another branch manager appointed. On the 20th June 1939, the respondent bank, who, though they had not yet received the notice had become apprehensive, sent their cashier and their accountant to the appellant bank, as soon as it opened for business that morning to present the cheque marked as above which Mr. Bhagwan Das had endorsed generally for Rs. 2,75,000 over the counter for payment. Ghose's account was then in credit to the extent of annas seven and pies three only. The appellant bank refused payment and returned the cheque with a memorandum attached ' not arranged for.'

After some correspondence the Punjab National Bank Ltd. sued the Bank of Baroda Ltd. together with Mr. Ghose as drawer and Mr. Mitter as endorser of the cheque. As against the appellant bank the Punjab National Bank Ltd. stated in their plaint after setting out the above facts that they advanced the sum of Rs. 2,40,000 to Mr. Mitter on the security of a cheque certified by the Bank of Baroda Ltd. that the cheque would be honoured in terms of the certificate and that Mr. Amin certified the cheque on behalf of the appellant bank acting in the course of his employment and within the scope of his authority. The plaint further stated that the certification was in accordance with the custom and/or usage prevailing amongst banks in Calcutta and that the effect of such certification was to show that the cheque was drawn in good faith and on funds sufficient to meet its payment and to add to the credit of the drawer that of the defendant bank. Neither Mr. Mitter nor Mr. Ghose appeared in the suit. In the written statement of the Bank of Baroda Ltd. the authority of Mr. Amin to mark or certify the cheque was denied and it was further denied that they made the representation alleged and that the respondent bank in making payment to Mr. Mitter acted on the alleged representation. The custom of bankers in Calcutta to mark or certify cheques pleaded

in the plaint was denied. The Bank of Baroda Ltd. contended that in law the certification or the marking of the cheque in question by Mr. Amin did not impose on them any liability.

" At the trial before Panckridge, *J.* the evidence called included some Calcutta bankers, who deposed on the question of there being a practice in Calcutta to mark or certify cheques, but it is clear that on any view there was no satisfactory evidence that it was usual to certify post-dated cheques. Panckridge, *J.* held the appellant bank liable on the cheque on the ground that they were acceptors because in his judgment the certification constituted an acceptance within the meaning of the Negotiable Instruments Act, though he went on to hold as a further ground that the evidence showed that bankers at Calcutta are by usage liable on cheques certified by them when presented by parties entitled thereto. He did not deal specifically with the case that the cheques were post-dated.

" On appeal the judgment of the trial Judge was affirmed. The Chief Justice who delivered the judgment of the Court decided the case on the ground that the marking or acceptance of the cheque was in law an acceptance by the appellant bank, and accordingly the question of usage did not arise. He said however that the evidence was insufficient to enable him to hold that the custom alleged was established. He was prepared to consider the evidence as showing that banks in Calcutta which mark cheques regard the certification as an acceptance which makes them legally liable to pay and that they honour their obligation. The Chief Justice did not deal at length with the objections to certifying post-dated cheques, though in the memorandum of appeal it was expressly urged that to certify a post-dated cheque was outside the manager's authority and was outside any custom or usage."

The appellant preferred this appeal to the Privy Council. Their Lordships after referring elaborately to the authorities on the subject and evidence in the case stated as follows :—

(1) A cheque though a bill of exchange is of a special type. In the ordinary course it is never accepted. A cheque is presented for payment, whereas a bill in the first instance is presented for acceptance unless it is a bill on demand. A bill is dishonoured by non-acceptance ; this is not so in the case of a cheque, because the holder of a cheque as between himself and the drawer has no right to require acceptance. These essential differences are sufficient to explain why in practice *cheques are not accepted.* Acceptance is not necessary to create a liability to pay as between the drawer and the drawee bank. The liability depends on the contractual

relationship between the bank and the drawer, its customer. It is different in the case of an ordinary bill ; the drawee is under no liability on the instrument until he accepts, his liability on the bill depends on his acceptance of it. As between the drawer and his bank, acceptance of a cheque is superfluous. The customer's right to draw a cheque depends on his having satisfied the contractual conditions which require the bank to honour his mandate to pay the cheque. But if the bank (at least at the drawer's request) accepts the cheque he should be entitled to protect himself as against his customer by setting aside the appropriate funds standing to the customer's credit.

(2) Both Chalmers in his Bills of Exchange Act and Paget on Banking are of opinion that marking or certification is neither in form nor in effect an acceptance of which the holder or payee can avail himself.

(3) A custom has grown up among bankers themselves of marking cheques as good for payment for the purpose of clearance by which they become bound to each other. This practice prevailed in Calcutta also subject to the regulations of the Calcutta Clearing Banks' Association. The practice seems to be simply that after clearing hours a cheque presented for clearing may be marked and will then be paid on the next day when clearing business is resumed. It is true that in such a case the marking bank is by the judicially established custom bound to pay it to the other bank. This certification or marking cannot however be identified with an acceptance, the effect of which is to create a negotiable liability.

(4) In England and India the marking of a cheque has so far been only judicially recognised to import a promise or undertaking to pay as between banker and banker for the purpose of clearance.

(5) Their Lordships were of opinion that the certification which was relied on as constituting acceptance of the cheque was not an acceptance within the meaning of the English or Indian Act or the common law.

(6) There was no sufficient evidence in the case to justify the finding of a custom to identify certification with acceptance. However there was evidence to the effect that it was *unusual* to certify post-dated cheques and indeed that it was almost unknown.

(7) The point whether the certification imported a promise by the certifying bank to pay the amount of the cheque whether

or not there were funds to meet it depended on the existence of a contract between the respondent bank and the appellant bank. There was privity of contract only as between the appellant bank and either Mr. Ghose or Mr. Mitter or perhaps both. As the certification on the cheque was not negotiable as an acceptance in the proper sense, the respondent bank could not be considered as a holder in due course of the certified cheque. There was neither privity of contract nor any consideration passed between the appellant and the respondent in respect of the certification on the cheque.

(8) The certification might be construed as words of representation, as to the genuineness of the cheque and of the signature. If the cheque had not been post-dated, the certification might also be held to include a representation as to the then sufficiency of the drawer's account. But as the cheque was not due for payment until seven days later, a representation as to then position would not go very far. If it was to be construed as a representation that on the due date there would be funds available, it necessarily amounted to a promise and the want of consideration would be fatal to its enforceability. The promise, if any, was a non-negotiable gratuitous promise given either to Mr. Ghose or Mr. Mitter or to both to lend the money when the 20th June 1939 came. The promise could have been revoked or disowned. It was not binding there was no appropriation of funds or declaration of trust involved in the certification, because there were in fact no funds available on the 13th or indeed the 20th June 1939. Nor could the certification be construed as an estoppel on which the respondent could claim because that doctrine applied only to a representation as to an existing fact, whereas in this case, not only were no funds available but what is called the representation related to the future.

(9) The ostensible authority of the manager did not extend to cover the certification of post-dated cheques and that in the present case he had no actual authority to do so.

(10) Their Lordships were not unconscious that bankers regard their word as their bond and honour their signature even though they might have an answer in law. This was especially true as between banker and banker. But a court of law has to decide a case according to law and not on grounds of banking ethics or etiquette or good banking policy as a matter of business. From the point of view of a court of law, a gentleman's agreement or honourable obligation however important in business has no validity.

Held for the above reasons that the certification or marking on the cheque in question was not binding on the appellant bank and the appeal was allowed with costs in the courts below and of the appeal.

Note.—This decision is of some importance to bankers though the practice of marking or certifying of cheques as good for payment is not generally prevalent in this country. Though in this case the Privy Council has dealt with the effect of marking on a post-dated cheque, the legal position of the endorsee of a marked cheque is not free from difficulty in view of the fact that there is no privity of contract between him and the drawee banker. The practice of marking cheques is not looked upon with favour by bankers and the effect of the Privy Council's decision would be to tend to put an end to this practice by all bankers except for clearing house purposes.

J. P. RAJARAM ... ... *Applicant*

versus

MANAGER, RESERVE BANK OF INDIA ... ... *Respondent*

(Mya BU, *J.*)

1941 Rangoon Law Reporter 759 : A.I.R. 1942 Rangoon 59.

Cheque in favour of judgment-debtor—Whether can be attached as debt—Procedure.

THE material facts of the case were as follows :—The plaintiff J. P. Rajaram in execution proceedings against his judgment-debtor one Ranganayakulu obtained a prohibitory order on the Manager, Reserve Bank of India, Rangoon, directing him to withhold payment of the judgment-debt and costs of the two cheques drawn by the Superintendent, Central Telegraph Office, Rangoon, in favour of Ranganayakulu. This prohibitory order was issued under Order 21, Rule 52, Civil Procedure Code, which stated : " Where the property to be attached is in the custody of any court or public officer, the attachment shall be made by a notice to such court or officer requesting that such property and any interest or dividend being payable thereon may be held subject to further orders of the court from which the notice is issued." The order of the court on the bank was the following : " The plaintiff having applied under Rule 52 of Order 21, Civil Procedure Code, for an attachment of certain money in your hands, namely, the sum of . . . out of the amount of the cheque Nos. 7797 and 7798 of book No. 78 (that is Rs. . . . each) issued to the defendant above-named from the Central Telegraph Office, Rangoon, it is requested that he will hold the said money subject to the further order of this court."

One of the cheques was cashed before the order was served on the bank. When the other cheque was presented, the bank in view of the prohibitory order returned the cheque to the person presenting the same without making any payment.

The plaintiff sought to make the bank liable for their failure to withhold part of the amount due under the cheque as directed in the prohibitory order.

The point in the case was whether a cheque in favour of a judgment-debtor could be attached under Order 21, Rule 52, by means of a prohibitory order. Section 60 (*1*), Civil Procedure Code,

enumerates property liable to attachment in execution of a decree by setting out " lands, houses or other buildings, goods, money, bank notes, cheques, bills of exchange, hundies, promissory notes, etc., belonging to the judgment debtor or over which or the profits of which he has a disposing power which he may exercise for his own benefit whether the same be held in the name of the judgment debtor or by another person in trust for him or on his behalf."

His Lordship held that in order that the amount or part of the amount of the cheque might be available, it must have been money belonging to the judgment debtor lying in the bank or a debt due to him by the bank. " A cheque being a negotiable instrument unless and until the money is paid to the payee, the amount of the cheque cannot be considered to be his property. A drawer of the cheque has the right to stop payment at any time before the money is actually paid out. The payee may endorse the cheque in favour of some one else and thereby negotiate the same in which case he parts with the property in the cheque itself but even in such an event the amount of the cheque before it was withdrawn from the bank is still not the property of the endorsee. Therefore the amount of the cheques not being money belonging to the judgment debtor does not fall within the category of property declared to be liable to attachment in execution of a decree under Section 60 (*1*), Civil Procedure Code."

His Lordship stated that the proper procedure for attachment in this case would have been by actual seizure of the cheques while they were the property of the judgment debtor before the judgment debtor negotiated or parted with the property in the cheques. In the circumstances his Lordship held that the attachment was invalid and inoperative and the plaintiff's suit against the bank was dismissed.

Note.—The point in this case is that the amount due under a cheque is not the property of the payee of the cheque unless and until the money is paid to the payee. It is not property belonging to the payee liable to attachment under Section 60 (*1*), Civil Procedure Code. The proper procedure is to attach the cheque by actual seizure while it remained the property of the judgment debtor.

MADRAS PROVINCIAL CO-OPERATIVE BANK, LTD.
MADRAS ... ... *Appellant*

versus

SOUTH INDIAN MATCH FACTORY LTD. (IN LIQUIDATION) *Respondent*

(Leach *C.J.* and Shahabuddin *J.*)

A.I.R. 1945 Madras 30 : (1944) 2 Madras Law Journal 295.

Cheque in favour of Official Liquidator—Bank paying the cheque personally to him—Whether payment in due course—Section 244A, Indian Companies Act, 1913, and Rule 66, Madras High Court Rules under Companies Act—Held that the payment was not a payment in due course under Section 85, Negotiable Instruments Act.

ONE M. Ramachandra Rao, an Advocate of the Madras High Court was appointed Official Liquidator in the winding up of the South Indian Match Factory, Ltd. (in liquidation). The main assets of the Company consisted of the factory building and machinery. The Court directed the sale of these properties and the Official Liquidator entered into negotiations with one Shamasuddin Rowther. The sale price was fixed at Rs. 5,750 and Rs. 200 was paid as earnest money. This payment was made by means of a crossed cheque in favour of the Official Liquidator on the Madras Provincial Co-operative Bank, Ltd. But the Official Liquidator induced the bank to cash the cheque over the counter. Under Section 244A, Indian Companies Act, 1913, the Official Liquidator was required to open an account with a bank and pay therein the moneys received by him in the course of the liquidation. Rule 66 of the Madras High Court Rules framed under the Companies Act required that all bills and other securities payable to the Company or to the Official Liquidator be deposited by him in the bank for the purpose of being presented for acceptance and payment or payment only as the case might be. The Official Liquidator here failed to open an account with a bank. After the sale was confirmed by Court, Shamsuddin Rowther on the 9th May 1940 handed over a cheque for Rs. 5,550 to the Official Liquidator in discharge of the balance of purchase consideration. It was an open cheque and was in favour of "M. Ramachandra Rao, Official Liquidator in Original Petition No. 5 of 1939 or order." The same day the Official Liquidator presented the cheque for payment to the Madras Provincial Co-operative Bank, Ltd., and payment was made. Before paying M. Ramachandra Rao Rs. 5,550, the Bank called for his order of appointment. The Official

Liquidator misappropriated the proceeds, for which he was prosecuted, convicted and sentenced. He was also removed from the office of the Official Liquidator and the Official Receiver of Madras was appointed to act as the Official Liquidator of the Company. The new Official Liquidator filed a suit against the bank alleging that it had acted negligently in paying the cheque and that it was also liable for conversion. The trial Judge Bell, *J.* passed a decree against the bank for Rs. 5,550 with interest. The bank preferred this appeal.

On appeal His Lordship Leach, *C.J.* after referring to the facts in the case stated : " If the payee had been a private individual, the action of the bank in paying the amount of the cheque could not have been called in question. The cheque in question was made out to " M. Ramachandra Rao, Official Liquidator in Original Petition No. 5 of 1939, or order." From the cheque itself the bank had notice that it was made out to him as Official Liquidator and that it realised this in full is shown by the fact that it called for the order of appointment. The contention of the plaintiff that the bank acting through its officers must be deemed to know the law cannot be contradicted, and this case must proceed on the basis that the bank knew that the Official Liquidator ought to have a bank account and that he could collect the amount of this cheque only through his bank. Section 244A, Companies Act, and Rule 66 of the rules framed by this High Court under the Companies Act make this perfectly clear."

" We will now turn to Section 85, Negotiable Instruments Act. Section 85 says that where a cheque payable to order purports to be endorsed by or on behalf of the payee, the drawee is discharged by payment " in due course." Section 10 defines what is payment " in due course " and it says it means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned. Therefore Section 85 only protected the bank if it made payment in accordance with the tenor of the instrument, in good faith and without negligence. Was this payment made to M. Ramachandra Rao by the bank on 9th May 1940 a payment made in good faith and without negligence ? We have no doubt that the officers of the bank did not realise, as they should have done, that the bank was doing something improper, but in the circumstances there was negligence. They knew or must be deemed to have known that this money could only be collected by the payee through his own bank and therefore it was most improper on his part to ask for payment over the drawee's counter. In our judgment there was here a clear breach of a statutory duty placed upon the bank and the learned Judge was right in holding the bank

liable. The payment of the cash to M. Ramachandra Rao facilitated his misappropriation of the money. As payment was not made in due course, Section 85 does not help the bank and it must take the consequence of its negligence."

The appeal was dismissed with costs.

Note.—It has been held in this case that mere verification of the appointment order of the Official Liquidator by the bank was not sufficient. The bank ought to have been aware of the statutory provisions relating to the keeping of accounts by an Official Liquidator. As the bank failed to observe the law in this respect, it was held to be negligent and liable to compensate the true owner for the loss.

J. G. ROBINSON ... ... { *Plaintiff* / *Appellant*

versus

CENTRAL BANK OF INDIA LTD. ... ... { *Defendants* / *Respondents*

(Page *C.J.* and Sen *J.*)

I.L.R. 9 Rangoon 585 : A.I.R. 1932 Rangoon 6.

Collecting banker—Negligence in receiving payment of a crossed cheque for a customer—Held that the banker was liable to the true owner of the cheque.

THE material facts of the case were as follows :—On the 12th October 1929, a cheque for Rs. 2,361-12-0 in favour of the Corporation of Rangoon or order was drawn on behalf of the plaintiff J. G. Robinson by his duly constituted attorney Dantra in payment of municipal taxes due from the plaintiff to the Corporation. Mr. Dantra handed the cheque to his clerk one M. S. Shah with a direction that he should pay it to the Corporation. Mr. Shah failed to deliver the cheque to the Corporation as instructed but forged what purported to be an endorsement on behalf of the Corporation, proceeded to the respondent bank and tendered the cheque for collection. There was also a further endorsement on the cheque to the effect " Pay signature guarantee for Savitabai Manilal Shivchand Shah." At the same time Mr. Shah instructed the bank to credit the proceeds of the cheque to savings bank account which he had opened with the respondent bank on the 8th October 1929 in favour of an infant girl Savitabai of whom he asserted that he was the guardian. The clerk to whom the cheque was tendered for collection, accepted the cheque, endorsed it with a rubber stamp to the effect " payee's endorsement guaranteed. For the Central Bank of India Ltd., Agent " and took the cheque to one Mr. Tracy who was at that time acting as the Chief Accountant of the Bank. Mr. Tracy passed on the cheque for collection without signing the guarantee as he knew Mr. M. S. Shah was not a person whose endorsement he could guarantee. The cheque was cleared the same day and the proceeds of the cheque credited to savings bank account of the infant of whom Mr. Shah had stated that he was the guardian. On the 10th December 1929 Mr. Shah drew out Rs. 2,360 leaving a balance of Rs. 6-12-0 in the account and then absconded. When the Corporation of Rangoon served upon the plaintiff a further demand for payment of the taxes, the fraud was discovered.

The plaintiff as the drawer of the crossed cheque brought this suit against the respondent bank to recover damages for conversion or in the alternative for the value of the cheque as money had and received by the respondent bank to the plaintiff's use. The plaintiff claimed that in the circumstances of the case the respondent bank in receiving payment of the cheque and crediting the proceeds to the savings bank account of the infant Savitabai was guilty of negligence and the bank was not entitled to the protection of Section 131 of the Negotiable Instruments Act, 1881.

On behalf of the respondent bank it was contended that in connection with the presentation of a crossed cheque for collection, the collecting bank was under no obligation to make any inquiry for the purpose of ascertaining whether the cheque was a genuine cheque or whether the endorsements upon the cheque were genuine or forged endorsements. It was urged that the sole obligation of a collecting bank, if it suspected or was put on inquiry as to the genuineness of a crossed cheque or the endorsements thereon was to refrain from signing the guarantee of the collecting bank that the endorsements were genuine, and that if it forwarded the cheque to the paying bank in that condition, it was absolved from further responsibility in the matter. It was contended that in such circumstances, according to the usage of bankers obtaining in Rangoon, the paying bank must elect to pay or not to pay the cheque on its own responsibility and if it paid the cheque the collecting bank was at liberty, however extravagant the endorsements on the cheque might be, to credit the proceeds to the account of the customer who had tendered it for collection.

The trial Judge accepted the contention of the respondent bank and dismissed the suit. The plaintiff preferred this appeal.

His Lordship Page, *C.J.*, after referring to the evidence in the case and authorities on the point stated as follows :—

(i) The evidence adduced in the case did not prove any custom or usage in Rangoon as contended for by the respondent bank.

(ii) The most casual perusal of the cheque ought to have aroused suspicion and put the respondent bank on inquiry as to the genuineness of the endorsement on behalf of the Corporation of Rangoon, for it was a crossed cheque drawn in favour of a public body for Rs. 2,361-12-0 and tendered by a mere clerk for collection and payment into a small savings bank account opened by the clerk in favour of an infant of whom he was the guardian.

(iii) " If banks for fear of offending their customers will not make inquiries into unusual circumstances, they must take with the benefit of not annoying their customer the risk of liability

because they do not inquire" per Scrutton, ***L.J.*** in A. L. Underwood Limited *vs.* Bank of Liverpool and Martins (1924), I.K.B. 775.

Held for the above reasons that the respondent bank was guilty of negligence in receiving payment of the cheque for Savitabai and the plaintiff's claim was decreed with costs in both the Courts.

Note.—Section 131 of the Negotiable Instruments Act, 1881, provides that a banker who has in good faith and without negligence received payment for a customer of a crossed cheque shall not, in case the title to the cheque proves defective incur any liability to the true owner of the cheque by reason only of having received such payment. In this case it was held on the evidence that the bank was negligent in receiving payment of the cheque and therefore was not entitled to the protection of Section 131, Negotiable Instruments Act, 1881.

BAPULAL PREMCHAND ... ... *Plaintiff*

versus

NATH BANK LTD. ... ... *Defendants*

(Chagla *J.*)

A.I.R. 1946 Bombay 482 : 48 Bombay Law Reporter 393.

Collecting banker—Protection in case of collection of cheque for a customer having no title to the cheque—" Without negligence " meaning of—Section 131 Negotiable Instruments Act, 1881.

THE material facts of the case were as follows :—On the 5th February 1945, Messrs. Ramchandra Ramgopal, a firm of merchants at Akola, drew a cheque upon the Laxmi Bank Ltd., Bombay, for the sum of Rs. 4,000 payable to Bapulal Premchand (the plaintiff in this case) or bearer. The cheque was crossed generally by Messrs. Ramchandra Ramgopal before delivery to the plaintiff. On the same day, the plaintiff despatched the cheque by post from Akola to his commission agents Messrs. Chimanlal Mohanlal Suratwala, Bombay for presentment and collection. This cheque never reached Messrs. Chimanlal Mohanlal Suratwala and apparently it was stolen during transit. It turned out that the cheque had been collected through the defendant bank for one of their customers Mr. N. A. Gandi who evidently had no title to the cheque. The plaintiff as the true owner of the cheque filed this suit against the defendant bank for conversion of the said cheque and claimed Rs. 4,000.

The facts in the case relating to the customer Mr. N. A. Gandi of the defendant bank were as follows :—On the 25th January 1945, the defendant bank opened a branch in Bombay, and on the 26th January 1945, one Mr. Nemchand Amichand Gandhi opened an account by paying to the credit of that account Rs. 300 in cash. Although the name of the depositor was Gandhi, he signed his application form as " N. A. Gandi." On the 30th January 1945, Mr. Gandhi withdrew from his account by a cheque written in Gujarati the sum of Rs. 225. On the 7th February 1945, Mr. Gandhi drew a further sum of Rs. 50 by drawing another cheque this time in English. Therefore the position was that on the 7th February 1945, there was only a sum of Rs. 25 to the credit of Mr. Gandhi's account. On the 7th February 1945, Mr. Gandhi paid in into his account the cheque for Rs. 4,000 which had been drawn in favour of the plaintiff and of which the plaintiff claimed to be the true owner. The cheque was collected by

the defendant bank and the amount credited to Mr. Gandhi's account. On the 8th February 1945, Mr. Gandhi drew a cheque for Rs. 3,800 on his account. The cheque was drawn in favour of Kantilal Maganlal Shah or bearer and was endorsed by R. H. Desai. The evidence in the case clearly established that the plaintiff was the true owner of the cheque and that Mr. Gandhi who paid in this cheque to the credit of his account had no title to the cheque.

It was, therefore, clear that as against the true owner the defendant bank was guilty of conversion. Under the ordinary law the bank had no answer to the plaintiff's claim. But Section 131, Negotiable Instruments Act, 1881, afforded the defendant bank a statutory protection against the true owner in cases of conversion provided certain conditions mentioned in that section had been complied with. His Lordship stated : " If a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself he shall not, in case the title to the cheque proves defective incur any liability to the true owner of the cheque by reason only of having received such payment. In order, therefore, to escape the liability which the general law imposes upon a person or a party who converts the goods belonging to the true owner thereof, the banker must discharge the burden of establishing that he received payment on behalf of a customer of his of a cheque not belonging to the customer but to someone else in good faith and without negligence."

In the present case, it was not suggested that the bank had acted without good faith, but the plaintiff's allegation was that the bank had acted with negligence in collecting the cheque and thereby had lost the protection afforded to a bank by Section 131, Negotiable Instruments Act, 1881. The point to be determined in the case was whether on the facts established the defendants had discharged their burden of proving that they acted without negligence. His Lordship stated : " Negligence is essentially a question of fact and it must depend on the circumstances of each case whether negligence has been proved or not. It is difficult to define negligence but an attempt was made by Scrutton, *L.J.*, in Savory & Co. *vs.* Lloyds Bank Ltd. (1932) 2 K.B. 122. . . . Scrutton, *L.J.* says (page 13). " A question at once arises, as there is no ' negligence ' without a legal duty, what was the exact duty imposed on the bank, and to whom ? Before the Act (Bills of Exchange Act) the bank, of course, owed a duty to every owner of property not to convert it but that duty was absolute, and independent of reasonable case. In my view, Section 82, Bills of Exchange Act, 1882, lessened the duty of the bank by limiting it to an obligation only to use reasonable care in dealing with the cheque, or by providing that if the bank proved that it had used reasonable care in discharging its obligation to the true owner not to convert his property, it was

discharged from liability though it had converted that property." Then Scrutton, *L.J.* cites with approval the observations of Kennedy, *J.* in Hannan's Lake View Central Ltd. *vs.* Armstrong & Co. (1900) 5 Com. Cas. 188 (page 191): "The only question is, did they act without negligence? What does "without negligence" mean? It means, I take it, without want of reasonable care in reference to the interests of the true owner, the principal of whose authority the customer purports to have."

"Therefore what I have to determine in this case is whether in collecting the cheque belonging to customer Mr. Gandhi the bank acted without reasonable care in reference to the interest of the plaintiff, the true owner of the cheque."

The first contention of the plaintiff was that no customer of the bank by the name of Mr. Gandhi in fact existed and that the identity of Mr. Gandhi had not been established by evidence in the case. His Lordship referred in detail to the evidence of Mr. Modi and Mr. Gupte, Cashier and Accountant respectively of the bank. Mr. Modi had a casual acquaintance with Mr. Gandhi and had known him as a broker. Mr. Gupte in his evidence stated that when the cheque for Rs. 225 came to him in the ordinary course, he noticed that although the name of the drawer was Gandhi, he was signing as "Gandi" and he therefore sent for Mr. Gandhi and inquired of him about the discrepancy in the name. Mr. Gandhi told the accountant Mr. Gupte that he signed as "Gandi" because his signature should not be forged. In the circumstances, His Lordship stated that the bank could not be imputed with negligence in this respect.

It was next urged by the plaintiff that the bank was negligent in accepting Mr. Gandhi as a customer. On this point the practice as to accepting customers was deposed to by Mr. Gangooli, the manager of the defendant bank. He said that the bank opened accounts only of such persons as were known to any member of its staff or to any outsider who was known to the bank. Mr. Gangooli further said that when a customer was introduced by a person other than a member of the staff, the bank made no reference to him about the customer either in writing or orally; but when a customer was introduced by the members of the staff, he always sent for that member of the staff and questioned him about the credentials of the customer. Mr. Gangooli also pointed out that one of the rules of the bank was that the proposed customer should be properly introduced and his interpretation of the word "properly" was that it must be by one whom he could trust, and in the ordinary course he would trust every officer and servant in the bank if he introduced a customer. Mr. Gangooli further stated that when he saw the application form for opening the account of Mr. Gandhi and he saw that Mr. Gandhi was introduced by Mr. Modi,

he sent for Mr. Modi and asked him about Mr. Gandhi. Mr. Modi told Mr. Gangooli that he knew Mr. Gandhi well, that he was a broker. The manager stated that after he had this discussion with Mr. Modi he passed the account opening form of Mr. Gandhi. His Lordship believed the evidence of Mr. Gangooli in this respect.

It was further contended that there were suspicious circumstances attendant upon the opening of the account by Mr. Gandhi. In the first place, it was pointed out that whereas the name of the customer was Mr. Gandhi, he signed his application form and his specimen signature card as " Gandi." Mr. Gangooli, the manager of the bank however stated that it was not uncommon for a man to give his specimen signature which was differently spelt from his own name ; and as both Mr. Gupte and Mr. Modi stated that in answer to inquiries by them Mr. Gandhi told them that he signed his name differently from the way in which it was spelt in order that his signature should not be copied. Then it was pointed out that it was very unusual for Mr. Modi the cashier of the bank, to have filled in on behalf of Mr. Gandhi the paying in slip in respect of the deposit of Rs. 300 and also the application form for opening an account with the bank. The manager stated that it was not customary for the cashier to do these things ; but Mr. Modi stated in evidence in the case that he did this because Mr. Gandhi did not know English and he did it as a friendly act. Mr. Modi also said that he filled in the application forms of other customers besides Mr. Gandhi whom he had introduced. His Lordship stated : " The important fact to remember in connection with the opening of Mr. Gandhi's account is that the account was opened with cash and not with any cheque paid in by Mr. Gandhi. When a customer opens an account with a cheque, certain inquiries may become necessary as to the cheque ; but when an account is opened with cash, obviously the position is very different."

It was further urged that the bank's suspicions should have been roused before they collected the cheque from Mr. Gandhi by the manner in which Mr. Gandhi's account was operated. A great deal of emphasis was placed on the fact that by the 7th February 1945, the credit to Mr. Gandhi's account only stood at Rs. 25 and that on that very day a cheque for Rs. 4,000 was paid in. The rules relating to current accounts of the bank provided that accounts should be opened with a minimum of Rs. 500; but as far as the Bombay branch was concerned, the evidence was borne out by the subsequent amendment of the rule itself that the managing director had given his sanction to opening accounts in Bombay with a minimum sum of Rs. 300 and in Bombay the minimum balance required to be maintained was Rs. 50. If the balance of Rs. 50 was not maintained a fee of Re. 1 was charged to the customer. The manager stated that it was not unusual for a customer to deposit the

minimum amount necessary and then to withdraw within four or five days the maximum amount permissible and leave just the balance required. His Lordship stated : " It is difficult to see why a customer who opens an account with the minimum permissible, namely, Rs. 300 should not operate upon it so as to reduce it to an amount less than required under the rules to maintain the account and when he finds that he has gone below the minimum necessary, pay in a sum of Rs. 4,000 so that the balance goes up to a much larger sum than required. It cannot be suggested that the payment of a cheque for Rs. 4,000 was for such a large sum or such a disproportionate sum that it should have aroused the suspicion of the bank."

A further point was sought to be made that cheques were drawn by Mr. Gandhi in Gujarati and in English. But Mr. Gupte, the accountant, of the bank produced two cheques of another customer, one written in Gujarati and the other in English. Thus there was nothing in this fact by itself which was sufficient to put the bank on enquiry with regard to its customers.

It was further urged that it was the duty of a bank to notice the account of a customer from time to time and in failing to notice the account the bank was guilty of negligence, His Lordship stated : " It is true that in the case before me the account was opened with a very small sum and had been brought down practically to nothing. But I have not the case whereafter that large sums had been brought in by cheques in quick succession. All that happened was that when the account was reduced to Rs. 25, a cheque for Rs. 4,000 was paid in. In my opinion that was not sufficient to put the bank on inquiry and the bank was not negligent in not having made any inquiries when they discovered the state of the account on the 7th February 1945."

His Lordship Mr. Justice Chagla after considering the various contentions of the plaintiff and reviewing the evidence and the authorities in the case held as follows :—

(i) " Primarily, inquiry as to negligence must be directed in order to find out whether there is negligence in collecting the cheque and not in opening the account. If there was anything suspicious about the cheque of Rs. 4,000 which Mr. Gandhi paid in to the credit of his account, there can be no doubt that it would have been the duty of the bank to make the necessary inquiries before they cashed the cheque. If there had been any note of warning or alarm on the cheque itself, then if the bank had collected it disregarding the note of warning or alarm it would have done so at its own peril. But in this case the cheque is a perfectly inocuous document. . . . There is nothing on the face of the cheque which should put the

bank on inquiry. Therefore, *prima facie*, the bank was not negligent in collecting this cheque which on the face of it did not in any way arouse its suspicion."

(ii) " But it is not sufficient that the cheque itself should not arouse the suspicion of the bank. If there is any antecedent or present circumstance . . . which aroused the suspicion of the bank, then it would be the duty of the bank before it collected the cheque to make the necessary inquiry and undoubtedly one of the antecedent circumstances would be the opening of the account. Now it is important to bear in mind that there is no connection whatever in this case between the opening of the account and the stealing of the cheque. The cheque did not come into existence till the 5th February 1945 and the account was opened on the 26th January 1945. It is impossible to believe that Mr. Gandhi or whoever opened the account on the 26th January 1945 had the remotest idea that on the 5th February 1945 Messrs. Ramchandra Ramgopal would make out a cheque in favour of the plaintiff on the 5th February and that the plaintiff would post it to his commission agent Suratwala and he would get an opportunity to steal the cheque and get his bank to collect it."

(iii) " But apart from there being no connection whatever between the stealing of the cheque and the opening of the account, was there any suspicious circumstances at all about the opening of the account ? As I have pointed out, the account was opened with cash. There was a reference by the cashier and that reference was sufficient according to the practice followed by the bank. The manager made the necessary inquiries and the account was opened . . . If a customer opens an account with cash and there is nothing suspicious about the manner in which the account is opened, the fact that the bank made no inquiries about the customer would not disentitle the bank to the protection given to it by Section 131, Negotiable Instruments Act. Of course, on the facts before me there was actually a reference given by Mr. Modi to Mr. Gandhi and I have also held that the manager of the defendant bank did make inquiries about the position and status of Mr. Gandhi."

(iv) A bank may be negligent in not making inquiries as to a customer on opening an account. However, it is not obligatory upon a bank to make inquiries as to the respectability of a customer in order that it should avail itself of the protection given to it under Section 131, Negotiable

Instruments Act. It would depend on the facts of each case and the circumstances attendant upon the opening of the account whether an inquiry as to a customer was necessary and called for or not.

(v) " In my opinion there is no absolute and unqualified obligation on a bank to make inquiries about a proposed customer. I agree that modern banking practice requires that a customer should be properly introduced or, in other words, that the bank should act on the reference of some one whom it could trust. Therefore, perhaps in most cases it would be wiser and more prudent for a bank not to accept a customer without some reference. But I am not prepared to go so far as to suggest that after a bank has been given a proper reference with regard to a proposed customer and although there are no sufficient circumstances attendant upon the opening of the account, it is still incumbent upon the bank to make further inquiries with regard to the customer. In this case, of course, as I have already pointed out, the manager of the defendant bank accepted the reference of the cashier Mr. Modi and also in fact made certain inquiries of Mr. Modi as to the position and status of Mr. Gandhi. In my opinion, it was not obligatory upon the defendant bank to make any further inquiries about this customer, and in having failed to make any such further inquiries, in my judgment they are not guilty of negligence."

(vi) " Under all the circumstances of the case, the bank has established that there was no negligence on its part in collecting the cheque of Mr. Gandhi and crediting it to his account and, therefore, the bank is protected by Section 131, Negotiable Instruments Act, and is not liable to the plaintiff for conversion."

The plaintiff's suit against the bank was dismissed with costs.

Note.—A collecting banker is entitled to the protection under Section 131, Negotiable Instruments Act, 1881, only when he acts in good faith and without negligence and it is for the banker to establish that he received payment on behalf of a customer of his of a cheque not belonging to the customer but someone else in good faith and without negligence. This decision is of considerable importance to bankers as it deals with in detail as to the meaning of the words " without negligence " and when a banker can be said to have acted without negligence.

MATURI C. SANYASILINGAM ... ... *Plaintiff*

versus

THE EXCHANGE BANK OF INDIA AND AFRICA LTD. ... *Defendants*

(1946. Coyajee *J.* Bombay High Court.)

Journal of the Indian Institute of Bankers (Vol. XVII, No. 4 page 31).

Collecting banker and bank draft drawn by one office of a bank upon another office of the same bank—Whether the banker entitled to the protection under Section 131, Negotiable Instruments Act, 1881.

THE material facts of the case were as follows :—The plaintiff, a resident of Vizianagram, purchased on the 10th March 1944 a draft for Rs. 4,400 from the Imperial Bank of India, Vizianagram, payable by the Imperial Bank of India, Bombay. The draft was drawn in favour of one Shantilal Lalchand Shah or order and it was sent by the plaintiff to Mr. Shah at Bombay by ordinary post. The draft was not received by Mr. Shah and when inquiries were made it appeared that the draft had been stolen. On the 14th March 1944 the draft was delivered to the defendants for collection by one of their customers, Nagindas Premji Shah, who had a current account with the defendants' branch office at Jhaveri Bazar in Bombay. The said branch realized the draft from the Imperial Bank of India, Bombay, and credited the amount on the 16th March 1944 to the account of Nagindas Premji Shah who withdrew the amount and subsequently absconded.

The plaintiff filed the present action against the Exchange Bank of India and Africa Ltd. for conversion. His Lordship Mr. Justice Coyajee of the Bombay High Court decided that on the evidence in the case the defendants were negligent in the collection of the draft in question and therefore they were not entitled to the protection of the provisions of Section 131 of the Negotiable Instruments Act, 1881, which provided that a banker who in good faith and without negligence received payment for a customer of a crossed cheque shall not, in case the title to the cheque proved defective incur any liability to the true owner of the cheque by reason only of having received such payment. According to His Lordship the acts of negligence in the case were the following :—

(i) The defendant bank permitted Nagindas Premji Shah to open a current account with them without proper introduction or inquiry made as to his respectability. This was contrary to the rules of the bank which stated that a current account

will be opened for approved parties only. Nagindas Premji Shah opened his current account with the bank on the day the Jhaveri Bazar branch was opened without being called upon to follow the usual formalities.

(ii) The nature of the current account maintained by Nagindas Premji Shah with the bank was also of a peculiar nature. The account was opened with a cash of Rs. 300 a part of which amount was withdrawn leaving a balance of Rs. 6-8-0 after which there was only one deposit of a sum of Rs. 100 and after that a large cheque for Rs. 4,400 was paid into the account on the 14th March 1946 together with another sum of Rs. 1,000 and within two days thereafter Rs. 5,300 were withdrawn. Although opening and operating an account in the above manner *per se* did not amount to negligence, it was an antecedent circumstance which put the bank upon an inquiry when large amounts were paid and withdrawn immediately.

(iii) The draft was drawn in favour of one Shantilal Lalchand Shah. It purported to be endorsed by Shantilal Lalchand Shah in favour of Nagindas Premchand Shaha. The customer of the defendant bank thus failed to notice the clear difference between Nagindas Premji Shah and Nagindas Premchand Shaha of which the latter was the endorsement on the draft.

In view of the cumulative effect of all the above acts of the bank his Lordship held that the bank had failed to satisfy the Court that they were not guilty of any negligence, they were therefore liable to the plaintiff and the suit was decreed with costs.

Although the case was decided on a question of fact, in the course of the judgment, His Lordship Mr. Justice Coyajee stated his view on the point of law as to whether a banker who collected a bank draft drawn by one office a bank upon another office of the same bank would be entitled to the benefit of the provisions of Section 131 of the Negotiable Instruments Act, 1881. His Lordship was of the opinion that such a bank draft was not a cheque within the meaning of Section 6 of the Act and therefore a banker who collected such a draft would not be entitled to protection under Section 131. Mr. Justice Coyajee concedes that a draft drawn by one bank upon another bank is a bill of exchange or cheque and the banker who collects such a draft will be entitled to protection under Section 131 of the Act. According to His Lordship if a draft drawn by one office of a bank upon another office of the same bank was a cheque under Sections 5 and 6 of the Act, there was no necessity to amend the Negotiable Instruments Act, 1881, by the insertion of Section 85A as it was done by the Amending

Act, XXV of 1930. His Lordship, therefore, was of the opinion that a bank draft would not be a bill of exchange or cheque if the draft was drawn by one office of a bank upon another office of the same bank. His Lordship relied in support of his view on the judgment of the House of Lords in Capital and Counties Bank *vs.* Gordon (1903) A.C. 240 and stated that a bank which was both drawer and drawee of an instrument was not entitled to treat the instrument as a bill of exchange as in such a case the drawer could not bring an action on the instrument against the drawee. His Lordship was also of the view that the " certain person " contained in Section 5 of the Negotiable Instruments Act, 1881, referred to a third person. His Lordship pointed out that in the United Kingdom the law was specifically amended by the Bills of Exchange Amendment Act, 1932, in order to make the provisions relating to crossed cheques applicable to a banker's draft drawn by one office of a bank upon another office of the same bank as if the draft were a cheque. His Lordship suggested that the Indian Legislature will have to amend Section 131 of the Negotiable Instruments Act, 1881, suitably in order that the protection given under that section shall extend to drafts drawn by one office of a bank upon another office of the same bank.

Apart from the above view of His Lordship it may be stated that according to banking practice in India a banker's draft, even though it is drawn by one office of a bank upon another office of the same bank, has always been treated as a bill of exchange or cheque and the bankers in India are under the impression that they are entitled to the protection of the provisions of Section 131 of the Negotiable Instruments Act as long as they act in good faith and without negligence. In view of the definition of " a bill of exchange " under Section 5 of the Negotiable Instruments Act, 1881, as an order directing a " certain person "—unlike the English Law which required that the bill should be addressed by one person to another—it is considered that in India a draft issued by one office of a bank upon another office of the same bank is a bill of exchange. This view is also the view of some Indian text book writers on the law relating to Banking and Negotiable Instruments (*see* Bhashyam and Adiga, Negotiable Instruments Act, 8th Edition, page 43 ; Tannan's *Banking Law and Practice*, 5th Edition, page 108 and Agarwal's Negotiable Instruments Act, page 31). Section 85A of the Negotiable Instruments Act, 1881, appears to have been inserted in 1930 as a matter of abundant caution and as stated by Tannan even before 1930 drafts drawn by one office of a bank upon another office of the same bank were treated in India as cheque if they satisfied other requirements of the law.

However in view of the definite opinion expressed by his Lordship Mr. Justice Coyajee which is contrary to the banking practice in India

in this respect, it would be desirable that the Negotiable Instruments Act, 1881, should be suitably amended so that Section 131 of the Act will also apply to a draft drawn by one office of a bank upon another office of the same bank. As in the case of the Bills of Exchange Amendment Act, 1932, in the United Kingdom, the provisions of Sections 123 to 131 of the Negotiable Instruments Act, 1881, relating to crossed cheques might be made applicable to a banker's draft drawn by one office of a bank upon another office of the same bank as if it were a cheque. It appears to be necessary to have an amendment of the law on these lines as soon as possible in order to allay the apprehension of bankers in India in this respect.

Note.—The Government of India have since introduced a bill in the Legislature for amending the Negotiable Instruments Act, 1881, on above lines so that Section 131 as well as the provisions of Sections 123 to 131 relating to crossed cheques will be applicable to a banker's draft drawn by one office of a bank upon another office of the same bank, as if it were a cheque. It seeks to add to Chapter XIV of the Negotiable Instruments Act, 1881, a new Section which runs as follows :—

" 131A. The provisions of this chapter shall apply to any draft, as defined in Section 85A, as if the draft were a cheque."

V.E.R.M.N.R.M. KASIVISWANATHAN CHETTYAR ... *Applicant*

versus

INDO-BURMA PETROLEUM CO., LTD. ... ... *Opposite Party*

(Braund *J.*)

A.I.R. 1936 Rangoon 52 : 162 Indian Cases 127.

Company—Articles of Association recognising only executors or administrators of a deceased shareholder—Claim of Hindu heir by survivorship —Articles whether binding on him.

THE material facts were as follows :—The applicant's father was a shareholder in the respondent company in respect of 24 ordinary shares. The father died intestate and there were no letters of administration granted in respect of his estate. The applicant stated that the deceased and himself formed a joint Hindu family governed by the Mitakshara Law, that the shares in question formed part of their undivided joint family property and on the death of the father he became by right of survivorship the owner of the shares. The applicant filed the present petition under Section 38 of the Indian Companies Act, 1913, for the rectification of the register of the Indo-Burma Petroleum Co., Ltd. by having his name entered therein in the place of that of his deceased father. The company, however, stated that under the articles of association they were bound to recognise only the executors or administrators of the deceased shareholder and in the absence of legal representation to the deceased, they could not recognise the claim of the applicant to be entered in the register of shareholders.

His Lordship stated : " The right of transfer and the phenomenon of transmission of share are (subject to the articles and in the case of a private company to certain statutory provisions) inherent. But by the contract of membership restrictions and conditions are insisted upon by the company, I do not think that the company can in insisting upon them be held to act ' without sufficient cause ' within the meaning of Section 38 of the Indian Companies Act."

Held that the articles constituted a contract between the member and the company and the person claiming through a member was bound by it. The application was dismissed.

HAR GOPAL AND ANOTHER ... ... { *Plaintiffs* / *Appellants*

versus

PEOPLES' BANK OF NORTHERN INDIA, LTD., LAHORE { *Defendant* / *Respondent*

(Coldstream and Jailal *JJ.*)

A.I.R. 1935 Lahore 691.

Company—Conditional application for shares—Allotment—Waiver of condition—Validity of allotment.

HAR GOPAL, one of the appellants applied to the Peoples' Bank of Northern India, Ltd., on 3rd June 1926 asking for an allotment of 150 shares in the bank worth Rs. 100 each. The application was on a printed form, but he added to the printed words the following sentence in his manuscript : " This purchase of shares is subject to the condition that I will be appointed a permanent local director. I will pay the allotment amount after the branch is opened here." Subsequently Har Gopal paid up 50 per cent. of the face value of the shares. He was appointed local director of the Gujarat branch. When the time came round for directors to be elected, he was successful. In the second election however, which was in May 1931, he was not recommended for election and was not elected. On the 3rd August 1931 Har Gopal instituted a suit against the Gujarat branch of the bank in Wazirabad, to recover dividends which the bank refused to pay him. His position as a shareholder was admitted by the bank who contested the suit on the ground that the bank had a lien on his property. Har Gopal obtained a decree for Rs. 450 on 18th January 1932. Meanwhile, on 29th September 1931, the bank had suspended payment. On 14th July 1932, Har Gopal instituted the suit from which this appeal arose for a declaration that he was not a shareholder in the bank. His case was that his application for share was conditional on an undertaking by the bank that he would be appointed a permanent director of the local branch, Gujarat, that the bank had, however allotted him shares (as he had subsequently discovered) regardless of this condition and that therefore the allotment proceedings were void, as if they had never taken place. The bank contended that the condition had been withdrawn by Har Gopal before the shares were allotted and that in any case the plaintiff's conduct barred him from maintaining the suit.

The trial Judge found upon the evidence that Har Gopal had purchased the shares on the understanding that the allotment would be conditional, but had accepted them subsequently as free from this condition. The trial Judge therefore held that as Har Gopal had acted as a shareholder, had pledged his shares and not only accepted a dividend but enforced his right to receive it, he was not competent afterwards to rely upon the non-performance of the condition precedent and dismissed the plaintiff's suit.

Their Lordships in appeal agreed with the views of the trial Judge and dismissed the appeal with costs.

Note.—In the case of a conditional application for shares, the condition should be performed before the applicant can be treated as a member even if his name is conditionally registered. But an allottee may be estopped from contending that the allotment is void on the ground of non-fulfilment of the condition when by his conduct by accepting the position as a shareholder, by accepting dividend, by filing suit for it, and by pledging shares, he has waived the condition.

PEOPLES BANK OF NORTHERN INDIA, LTD., LAHORE ... *Appellant*

versus

LUCKNOW SUGAR WORKS LTD. (IN LIQUIDATION) ... *Respondent*

(King *C.J.* and Thomas *J.*)

I.L.R. 12 Lucknow 283 : A.I.R. 1936 Oudh 338.

Company—Debenture account with bank on the security of block and machinery—Liquidation of company—Lease of security by liquidator—Held that the bank was not entitled to claim usufruct as part of the security.

THE facts of the case were that the Lucknow Sugar Works Ltd., before it went into liquidation had dealings with the Peoples Bank of Northern India Ltd., under the heads of (1) debenture account on the security of block and machinery and (2) cash credit account on the security of goods, stores and machinery. The Lucknow Sugar Works Co., Ltd., went into liquidation and under order of Court the Liquidator was directed to lease out the mills. The Liquidator had in his custody the rents realised from the lease of the mills made from year to year. The appellants claimed that the amounts so realised formed part of their security of the debenture account and that as soon as the order of liquidation was made, the securities were crystallised and the rent realised must enure for the benefit of the creditor. Their Lordships negatived this contention and stated : " The security of the appellants as debenture-holder is limited to block and machinery and whether it is a floating security or fixed security it creates no new rights in the debenture holders. The old security remains which in their case is block and machinery and because the security has crystallised it does not mean that the appellants are entitled to the usufruct of the property. Take the case of a simple mortgage of a house. The mortgagor has a right to rent it but the mortgagee who is not in possession, cannot claim the rent. We have no doubt that the appellant's security as debenture-holder is limited to block and machinery and it cannot extend to the money realised from the leases."

The appeal was dismissed with costs.

IMPERIAL BANK OF INDIA ... ... *Appellants*

versus

BENGAL NATIONAL BANK LTD. (IN LIQUIDATION) ... *Respondents*

(Lord Atkin.)

A.I.R. 1931 Privy Council 245 : 61 Madras Law Journal 589.

Company—Debenture creating floating charge—Secured debts—Transfer of debts without security—Validity.

THIS was an appeal from an order of the High Court of Judicature at Calcutta affirming an order of the Court made in its original civil jurisdiction on an application for directions made by the Liquidators of the Bengal National Bank Ltd., the respondents in this appeal. On or before the 4th May 1923, the respondent bank had borrowed from the Imperial Bank of India, a sum of Rupees ten lacs with interest and on the 4th May 1923 executed and delivered to the Imperial Bank of India a debenture creating a floating charge on the whole undertaking, properties, assets and interests present and future of the respondent bank as security for the loan. On the 1st August 1923, a similar debenture was executed and delivered to the Imperial Bank of India creating a similar floating charge as security for a further loan of Rupees 10 lacs with interest. Both the documents were duly registered pursuant to Section 109 of the Indian Companies Act, 1913. Neither document was registered under Indian Registration Act, 1908. In both the documents the charge was to become fixed, amongst other events, on the respondent bank suspending payment. On the 28th April 1927 that event happened.

On the same date the Imperial Bank of India exercising the power given them by the debenture of the 1st August 1923, appointed three gentlemen as receivers under the debenture. On the 20th May 1927, a petition was presented for winding up the respondent bank and on the 2nd August 1927 the Court made a winding up order. On the 26th May 1927, the Imperial Bank of India commenced a debenture holders' action and on the 1st June 1927, the three receivers appointed by them were appointed receivers by the Court. On the 9th August 1927, two of the receivers together with a third gentleman were appointed Official Liquidators and they asked for directions of the Court on various matters. It appeared that the respondent bank in the ordinary course of its business lent money to customers on overdraft account on the security of title-deeds deposited by the customers in

respect of which loans at the date of the suspension of payment sums remained due to the bank who continued to hold the security. The question was whether the two debentures held by the Imperial Bank of India gave them any and what interest in the amounts due to the respondent bank from such customers and in the property comprised in the title-deeds. The Imperial Bank set up express charge over the whole of the assets of the respondent bank. The Liquidators contended that the debentures were not effective so far as they sought to charge the debts secured on deposit of title-deeds which came within Section 17 of the Indian Registration Act, 1908, which require the registration of all non-testamentary instruments which " purport or operate to create, declare, assign, limit, or extinguish, whether in the present or in the future, any right, title or interest whether vested or contingent of the value of Rs. 100 and upwards to or in any immoveable property." Section 49 of the Indian Registration Act, 1908, provided that no documents required by Section 17 to be registered and in fact unregistered shall affect any immoveable property comprised therein or be received as evidence of any transaction affecting such property. The High Court upheld this contention of the Liquidators and the Imperial Bank of India appealed against this decision to the Privy Council.

In the course of the proceedings of the debenture-holders' action the Imperial Bank of India, by its advocate admitted that by reason of the fact that the two debentures in this suit had not been registered in accordance with the provisions of the Registration Act, 1908, such debentures did not operate to affect any immoveable property of the defendant bank and the Court declared that the said debentures constituted a charge upon all the undertaking, property and assets (including uncalled capital) of the defendant bank other than the immoveable property of the defendant bank. There was no appeal from this decree and it operated in the opinion of their Lordships to restrict considerably the points that remained open for argument by the Imperial Bank of India. The counsel for the Imperial Bank of India desired to address to the Board arguments to the effect that the Indian Registration Act, 1908, did not apply to a floating charge for various reasons as, for example, that it was impossible to comply with the provisions requiring particulars of the specific property : they also were prepared to contend that the provisions in the Companies Act, 1913, for the registration of charges took the place of the provisions in the Registration Act so far as they affected dispositions by companies. Their Lordships could not allow any such arguments to be raised as being inconsistent with the decree which had become final.

As a result the Imperial Bank of India acquired no right, title or interest in the immoveable property comprised in the title deeds.

The title deeds were not available to them as security for any of the debts which the deeds were deposited to secure. They could not therefore control such securities or the disposition of them or take steps to enforce them either in their own name or in the name of the respondent bank.

The question was, were they however left without any right or interest in the debts which the title-deeds secured ? Their Lordships stated : " The High Court on appeal has answered this question in the affirmative. Their Lordships are of opinion that this decision does not give effect to the rights of the parties and cannot be supported. The debentures were intended to create a charge over the whole assets of the respondent bank ; a floating charge until the occurrence of the stipulated events ; a fixed charge when any of these events occur . . . It is sufficient in this case to say that the validity of the floating charge over assets other than immoveable property is not disputed and has been expressly established by the decree in the debenture-holders' action referred to above. Inquiry therefore has to be made as to what were the assets of the respondent bank other than immoveable property at the time when the charge became fixed. It seems to their Lordships obvious and beyond question that the principal assets of this bank, as of any bank, are the debts due to the bank from customers either for advances, whether on overdraft or loan account, or for any other consideration, such as guarantees, etc. The debts may be secured either on immoveable property or on merchandise : they may be wholly secured or partly secured : the securities may have been given when the debts were created or later : but in any case, the debts exist as moveable property : and do not if secured become identified with the security or transformed into land in the one case or merchandise in the other. The separation between debt and security is well established ; the creditor is entitled to take a judgment for the debts without having recourse to his security. There would therefore appear to be no reason in principle why a creditor should not be able to charge his moveable assets, the debts due to him, even if he be unsuccessful by reason of statutory restrictions in transferring the security." After referring to the definition of actionable claim and other relevant provisions of the Transfer of Property Act, 1882, their Lordships added : " There appears to be no difficulty in a transfer of a debt without the security : the original debtor can always redeem : the relations between him and his original creditor are not altered : indeed, in the present case it would appear that the Imperial Bank can only enforce the debt in the name of the respondent bank which, no doubt, the latter bank must permit. The transferee takes no further interest than the transferor was able to give him. The rights of the parties are further declared by the amended Section 134,

Transfer of Property Act, 1882, which would appear to apply to their case. The result is that while the Imperial Bank have no right or interest in the immoveable property of the respondent bank including the immoveable property over which the respondent bank hold security, the Imperial Bank have a charge over the debts due to the respondent bank, whether secured or not, and are entitled to the benefit of all sums received in reduction of the debt, whether from the realisation of securities or otherwise."

Held that the Imperial Bank of India was entitled to all sums received subsequent to the 28th April 1927 (date of suspension of payment by the bank when the charge under the debentures became fixed) by the receivers or the Liquidators of the Bengal National Bank Limited, in or towards satisfaction of debts owing to the bank upon the security of property, moveable or immovable, and any interest on such debts, whether such sums were received by way of repayment by the customer or payment by a guarantor or out of proceeds of sale of the security or otherwise : and, subject thereto.

Their Lordships allowed the appeal with costs.

PRAYAN PRASAD AND OTHERS ... ... *Appellants*

versus

GAYA BANK AND TRADES ASSOCIATION LTD. ... *Respondent*

(Ross and Scroope *JJ.*)

I.L.R. 10 Patna 249 : A.I.R. 1931 Patna 44.

Company-- Forefiture of shares.

THE appellants appealed against an order passed by the District Judge of Gaya disallowing the objections of the appellants to their inclusion in the list of contributories in the winding up of the Gaya Bank and Trades Association Company Ltd. The main point in the appeal was that the shares of the appellants having been forfeited more than a year before the commencement of the winding up they were not liable to contribute under Section 156 of the Indian Companies Act, 1913. The shares in question were shares of Rs. 100 each payable in four instalments of Rs. 25 each. The first two instalments were already paid. On the 9th September 1922 a notice was issued for payment of the third call which stated that " in case of failure in payment the directors will be obliged to take other steps for its realisation by forfeiture or otherwise as the case may be." On the 1st September 1922 there was a reminder notice to the appellants to pay up the third call which ran as follows : " Dear Sir, Please take notice that as per resolution of the directors of the bank passed at a meeting held on 21st February 1923 (which was confirmed at the annual general meeting of the shareholders of this bank held on 14th March 1923) those shareholders who have not yet paid up the third call with interest due against them are requested to pay up the same within six weeks from the date of service of this notice failing which the shares held by them will be forfeited as provided by the Companies Act 7 of 1913. You are therefore requested to pay up Rs. 50 third call for two shares Nos. 13 to 14 held by you in this company together with Rs. 7-7-5 interest upto 31st March 1923 besides current year's interest till date of payment at 5 per cent. per annum. Herein fail not." It was contended on behalf of the appellants that on their failure to comply with this notice their shares were forfeited six weeks after the date of service thereof. The company had no separate set of articles and by virtue of Section 18 of the Indian Companies Act, 1913, the regulations of Table A applied. Regulation 26 provided " if the requirements of any such notice as aforesaid are not complied with

any share in respect of which the notice has been given may at any time thereafter before the payment required by the notice has been made be forfeited by a resolution of the directors to that effect." It was clear therefore that the notice had not by its own force the effect of forfeiting the shares. Something more was necessary, viz., a subsequent resolution of the directors. The minute book of the company showed that at the annual general meeting on the 14th March 1923 the following resolution was passed : " Considered the resolution of the directors made at the meeting held on 21st February 1923 as regards realisation of the third call on shares by forfeiture or otherwise. Resolved that notice of six weeks be issued to the shareholders asking them to pay up the third call with interest and in case of failure in payment their shares may be forfeited by a resolution of the directors to be passed hereafter." The minute-book further showed that no such resolution by the directors was ever passed. Thus neither the terms of the notice nor the resolutions of the directors and of the shareholders seemed to support the argument that the shares had been forfeited. There was no other evidence of forfeiture.

It was contended on behalf of the appellants on the authority of certain English cases that the notice in itself by reason of its terms had the effect of forfeiting the shares and that no subsequent resolution of the directors was necessary for this purpose.

Their Lordships after reviewing the authorities in detail stated that the present case was not covered by those authorities and Regulation 26 Table A of the Indian Companies Act, 1913, governed the case. As there was no compliance of the terms of the regulation the shares of the appellants were not forfeited and they were liable as contributories.

The appeal was dismissed with costs.

Note.—Forfeiture of shares of a company to be valid and effective, the terms of the regulations of the company in that respect should be strictly observed.

SARDAR GULAB SINGH ... ... *Plaintiff / Appellant*

versus

PUNJAB ZAMINDARA BANK LTD., LYALLPUR THROUGH SARDAR DESA SINGH, MANAGER AND OTHERS ... *Defendants / Respondents*

(Young *C.J.* and Sale *J.*)

A.I.R. 1942 Lahore 47 : 199 Indian Cases 667.

Company—Managing Director—Appointment under articles and acting as such—Implied contract of service—Position of—Wrongful removal—Remedy—Damages.

THESE were cross appeals from the decision of Bhide, *J.* The plaintiff, Sardar Gulab Singh, brought an action against the Punjab Zamindara Bank Ltd., Lyallpur, for a declaration that he was the Managing Director of the bank. He also prayed for an injunction restraining the bank from preventing him from acting as such. The trial Court decreed both the declaration and the injunction prayed for. On appeal the Subordinate Judge dismissed the suit. On second appeal to the High Court Bhide, *J.* allowed the appeal as regards the declaration but dismissed it with regard to injunction. Both the parties appealed : the plaintiff against the decision disallowing him an injunction and the defendants against the decision granting the plaintiff a declaration.

The plaintiff was the promoter of the company. Article 101 of the articles of association of the company provided as follows : " The remuneration of the Managing Director may be by way of salary, commission, participation in profits or by any or all of these modes at the discretion of the board and they may enter into agreement with such Managing Director as to term of office subject to such conditions as they may deem necessary. But Sardar Gulab Singh, Honorary Magistrate, will be the first Managing Director to the Company and his remuneration shall be 25 per cent. of the net profits. He will remain Managing Director for the time he holds shares at least of Rs. 20,000." In pursuance of the terms of this article, the plaintiff held shares for Rs. 20,000 and he acted as Managing Director for 11 years and received 25 per cent. of the net profits. The shareholders of the company evidently did not approve of the Managing Director receiving such a large proportion of the profits and in the month of November 1931, some of the shareholders requisitioned a meeting of the company. On the agenda for the meeting two of the items were

a " vote of no confidence in the Managing Director " and " the Managing Director was not entitled to 25 per cent. of the profits." No notice was given to the shareholders that the company intended to amend Article 101. At the meeting Article 101 was amended and the resolution amending Article 101 was duly confirmed at a subsequent meeting. The Court held that the procedure adopted for amending Article 101 was improper and the amendment was invalid for lack of notice under Section 81 of the Indian Companies Act, 1913.

In appeal it was argued on behalf of the company that the memorandum and articles of association did not constitute a contract between the company and the plaintiff and the latter could not rely on Article 101 in support of his claim. Their Lordships after referring to authorities on the point held that even if Section 21 of the Indian Companies Act, 1913, did not constitute a legal and binding contract between the parties, there was in this case by the acts of the parties an implied contract between the company and the plaintiff in terms of Article 101. Sardar Gulab Singh applied for and obtained Rs. 20,000 worth of shares, which were allotted by the Board. He was the Managing Director for 11 years and he was remunerated in accordance with the terms set out in Article 101. Therefore an implied contract on the terms of Article 101 was held to be proved.

With regard to the second point, whether the plaintiff was entitled to an injunction, their Lordships stated: " We do not consider that in this case, it would be proper to issue an injunction. The learned Judge (Bhide, *J.*) held that the position of the company and that of Sardar Gulab Singh as Managing Director was that of master and servant. With great respect we do not think that this is correct. A director or a managing director is in no way a servant of the company: he is the agent of the company for carrying on its business. But we agree that the same principles which have been held to apply to the issue of an injunction at the instance of a dismissed servant ought also to apply in the case of a dismissed agent. It would be contrary to public policy to impose upon an unwilling principal an agent whom he does not wish to employ, especially as there is nothing to prevent an agent whose contract of agency has been wrongfully broken from bringing an action for damages. Section 21, Specific Relief Act 1877 enacts that certain contracts cannot be specifically enforced, e.g., if a contract depends on the personal qualifications or volition of the parties, or otherwise from its nature is such that the Court cannot enforce specific performance of its material terms; or a contract which is in its nature revocable, or a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date, such contracts cannot be specifically enforced. It appears to us that the contract

in this case contains terms to which some of these provisions are applicable. The company could, if a majority of the shareholders in a general meeting properly convened, so wish, amend the articles of association though this action might give cause for an action for damages for breach of contract. The contract clearly extends over a longer period than three years from its date and it also depends on the volition of the parties. It has been invariably held that an injunction will not issue in the case of contracts which cannot be specifically enforced, and the Courts have always held that where breach of the contract can be adequately compensated in damages an injunction will not issue (*see* also Section 54 (*c*), Specific Relief Act, 1877)."

Both the appeals were dismissed.

Note.—A company cannot break its contracts by altering its articles. It is held in this case that where a person is appointed as a managing director in pursuance of the terms of the articles of association of the company and he acts as such there is an implied contract of service on those terms and the company cannot alter its articles affecting the rights of the managing director without committing a breach of contract. The proper remedy of the managing director in such a case is an action for damages against the company for breach of contract of service.

DEHRA DUN MUSSORIE ELECTRIC TRAMWAY LTD. AND ANOTHER ... ... *Defendants Appellants*

versus

JAGAMANDAR DAS AND OTHERS ... ... *Plaintiffs Respondents*

(Banerji and King *JJ.*)

I.L.R. 53 Allahabad 1009 : A.I.R. 1932 Allahabad 141.

Company—Powers of Managing Director—Mortgage—Validity.

THIS was an appeal arising out of a suit for sale upon the basis of a mortgage. The defendant was the Dehra Dun Mussorie Electric Tramway Co., Ltd. (in liquidation). The plaintiffs were the proprietors of a bank at Dehra Dun and the company had an account with that bank. On the 19th January 1923 the plaintiffs allowed the company, at the request of their managing agent Mr. Beltie Shah Gilani an overdraft of Rs. 25,000. The mortgage deed in suit was executed on the 19th June 1923 by Mr. Beltie Shah on behalf of the company in favour of the plaintiffs to secure the overdraft. The defendants admitted the receipt of the consideration by the company. The overdraft of Rs. 25,000 was undoubtedly utilised for the necessary purposes of the company. The defendants had no objection to treating the plaintiffs as unsecured creditors but pleaded that the company was not bound by the mortgage deed for various reasons detailed below. The trial Court held that the mortgage was valid and binding upon the company. The defendants appealed against the decision.

The first question in appeal was whether Mr. Beltie Shah had authority to borrow Rs. 25,000 from the plaintiffs on behalf of the company. The Board of Directors undoubtedly had power under the articles of association to borrow money for the purposes of the company and to secure the loan by a mortgage. Article 104 of the articles of association of the company laid down : " The Board may delegate any of their powers other than powers to borrow and make calls, to committees consisting of such member or members of their body as *they think fit.*" *The Board were thus expressly* prohibited from delegating their power to borrow money. Under Article 120 the managing agent was given very extensive powers to conduct and manage the business and affairs of the company and he was given power " to enter into all contracts and to do all other things, usual,

necessary or desirable in the management of the affairs of the company." The respondents contended that the power of entering into contracts would include the power of contracting loans. Their Lordships opined that this contention could not be accepted. The articles must be read as a whole and as Article 104 restricted the Board from delegating its powers of borrowing, Article 120 could not be interpreted so as to give the managing agent unrestricted powers of borrowing money on behalf of the company. Their Lordships stated: "It is open to question however whether under the ordinary rules of law relating to agency the managing agent should not be held to have been authorised to obtain the overdraft in the circumstances of this case. The loan was urgently required for the purpose of the company. Machinery and stores had been ordered and had arrived from England, and had to be paid for without delay. Under Sections 188 and 189 of the Indian Contract Act, 1872, an agent has very extensive powers in an emergency to do such acts as are necessary for the purpose of protecting his principal from loss and for carrying on the business. Under Article 120 of the articles of association also the managing agent was given extensive powers to do anything necessary in the management of the affairs of the company. In the circumstances of this case the managing agent might well be regarded as being faced with an emergency and thus authorised under the ordinary rules of agency to obtain temporary accommodation from the bank for the purpose of protecting the interests of the company. It is not denied that the loan was necessary and that the money was at once utilised for the purposes of the company. We think that although the managing agent had no general power to borrow money on behalf of the company he was nevertheless authorised to incur a temporary loan in the interests of the company in an emergency such as arose in the present case. Article 104 prohibits the delegation of a general power of borrowing but we think, it does not prohibit the managing agent from incurring a temporary loan in an emergency for protecting the interests of the company." Their Lordships added that "even if Mr. Beltie Shah acted *ultra vires* in obtaining this loan it appears that his action was clearly ratified by the Board of Directors. . . . The Directors' report to the shareholders for the period ending the 31st March 1923 submitting the audited accounts for that period, shows the item of Rs. 24,454-3-8 as due to Bhagwan Das & Co. (the plaintiffs) as an unsecured loan. This report purports to be signed by four of the directors of the company at a meeting dated the 17th September 1923 and it has not been argued that this meeting was not properly convened. We take it therefore, that the Board of Directors clearly ratified the loan to the plaintiffs in their report dated the 17th September 1923." Held that the

company could not escape liability on the ground that their managing agent had no authority to raise the loan.

The second question in the appeal was whether the mortgage deed was executed in such a manner as to bind the company under the provisions of the company law. The mortgage deed was signed by Mr. Beltie Shah in his capacity as managing agent of the company and it bore the common seal of the company. The appellants argued that the execution of the mortgage deed was invalid because under Article 98 (*t*) of the articles of association of the company a document to which the common seal was affixed must also be signed by at least one director and countersigned by the agent or other officer appointed by the Board for that purpose. Mr. Beltie Shah was an *ex-officio* director as well as the managing agent, but it was clear that, even if he be considered to have signed the document in his capacity as director, Article 98 (*t*) required the countersignature by the agent or some other officer duly appointed and the document in question bore no countersignature. The respondents contended that there was no necessity for affixing the common seal to the mortgage deed and the presence of the seal might be ignored. Their Lordships stated : " In our opinion the affixation of the seal was not required by company law. Under Section 88, Indian Companies Act, the mortgage could be validly executed by any person acting under the authority of the company. No rule of law applicable to companies in general or to this company in particular has been shown to us requiring a deed of mortgage to be executed on behalf of a company by affixation of the common seal. If a document under seal is not necessary then a mere defect in the manner of affixing the seal will not render the document invalid."

The next question was whether Mr. Beltie Shah was authorised to execute the mortgage on behalf of the company. The minute book of the company set forth a resolution which purported to have been passed by the directors of the company in a meeting held on the 2nd June 1923 which ran in these terms : " Resolved that the Board of Directors of the Dehra Dun Mussorie Electric Tramway Co., Ltd. approve of the proposal of the managing agents to the effect that in order to secure the overdraft of Rs. 25,000 obtained by the company from Messrs. Bhagwan Das & Co., bankers at Dehra Dun, the company's land known as the Khazanchi Bagh near the Dehra Dun Railway Station, be legally assigned to the said Messrs. Bhagwan Das & Co., on such terms and conditions as may be settled beween the managing agents and Messrs. Bhagwan Das & Co. The Board of Directors authorise Mr. Beltie Shah to enter into the agreement and give the necessary deed to Messrs. Bhagwan Das & Co., and to sign and seal and deliver the deed on behalf of the Board." The resolution purported to be signed by three directors including Mr. Beltie Shah. It was

strenuously contended for the appellants that this was a mere bogus resolution as no meeting of directors was in fact held on the 2nd June 1923 and even if some directors did meet together it was not a properly convened meeting in accordance with the procedure laid down in the articles of association. It was further argued for the appellants that the directors were not authorised under the articles of association to empower Mr. Beltie Shah to execute the mortgage. The argument was that as the directors could not delegate their power to borrow they could not leave the details of the mortgage transaction to be settled by the managing agent. But the loan had already been incurred and there was no question of delegating the power of borrowing any further sums. The only question for the directors was whether they should give the plaintiffs a security for the loan which they had already advanced. Their Lordships after discussing the evidence in detail held that under Article 104 the Board of Directors could legally authorise Mr. Beltie Shah to execute the mortgage on behalf of the company by a resolution passed at a properly convened meeting. As a matter of fact, we hold that there was no properly convened meeting which passed the resolution dated the 2nd June 1923, but the plaintiff had no reason to suppose that the resolution had not been properly passed and was not binding upon the company. On these facts we consider that the plaintiff is protected in spite of the defect in passing the resolution, and the company is bound by the mortgage as far as company law is concerned. The law on this point is laid down in Halsbury's *Laws of England*, Volume 5, page 302 as follows: "The persons contracting with a company and dealing in good faith may assume that acts within the powers of the company have been properly and duly performed and are not bound to enquire whether acts of internal management have been regular." The case of the Royal British Bank *vs.* Turquand, 24 L.J.Q.B. 327 is one of the most important cases on this point. In that case the directors of the company were authorised in certain circumstances to give bonds but the company sought to escape liability on the ground that there had been no resolution authorising the making of the bond in suit. It was held that the plaintiff was entitled to judgment having a right to presume that there had been a resolution at a general meeting authorising the borrowing of money on the bond."

Held on the authorities that the company was bound by the mortgage so far as company law was concerned.

Their Lordships however allowed the appeal on another ground, namely, that the mortgage was void as having been executed in contravention of Clause 37 of the Dehra Dun-Mussorie Tramway Order 1921 without the previous sanction of the Local Government. The plaintiffs were held entitled to rank only as unsecured creditors for the

amount due by the company to be realised by them in due course of liquidation.

Note.—A banker lending to a company has to satisfy himself that (i) the person with whom he contracts has authority to bind the company and (ii) the regulations of the company and statutes if any relating to such borrowing are strictly complied with.

SRIMATI PREMILA DEVI AND OTHERS ... ... *Appellants*

versus

PEOPLES BANK OF NORTHERN INDIA LTD. (IN LIQUIDATION) ... ... *Respondents*

(Lord Romer.)

I.L.R. (1939) Lahore 1 : A.I.R. 1938 Privy Council 284.

Companies Act (1913) Section 153—Scheme of arrangement confirmed by Court—Variation of—Forfeiture of shares—Procedure.

THE material facts of the case were as follows :—The peoples Bank of Northern India Ltd., suspended payment on the 29th September 1931. A scheme of arrangement between the Bank, its creditors and shareholders was duly sanctioned by Court under Section 153 of Indian Companies Act 1913. Clause 6 of the scheme read : " That for the purpose of the revival of the Bank it be distinctly laid down that further calls on capital of " A " and " B " class shares of which Rs. 50 and Rs. 25 lakhs have been respectively subscribed will not exceed 25 per cent., 20 per cent. having been already called, thus leaving only a further call of 5 per cent. to be made. This 25 per cent. call will be redistributed into 5 calls of 5 per cent. each payable every half year starting from 1st July 1932." The directors did not follow strictly the dates indicated in the scheme for calling up the unpaid capital and fixed dates for payment of calls different from the scheme and purported to forfeit the shares of the appellants for their failure to pay on the dates called for by the directors. The directors removed appellants' names from the register of members in respect of those shares. The bank ultimately went into liquidation. The Official Liquidator however inserted the names of all the appellants in the list of contributories contending that their shares had not been validly forfeited and that their names had been improperly removed from the register. The High Court at Lahore accepted the contention of the Official Liquidator and ordered the rectification of the register of members so as to include the names of the appellants and others in the like position and settled their names upon the list of contributories.

The appellants appealed to the Privy Council. Lord Romer who delivered the judgment of the Board after referring to the facts of the case in detail agreed with the judgment of the High Court and held that the forfeiture of the shares of the appellants by the directors was not valid and the appellants continued to be members of the bank.

His Lordship stated : " Upon confirmation by the court of the amended scheme of arrangement that scheme became by virtue of Section 153 Indian Companies Act, binding upon the creditors, the shareholders and the bank alike. Its terms could thereafter only be varied by order of the court after the variation had been approved at meetings of the creditors and shareholders and the Bank alike. It was not therefore possible for the bank or its directors or shareholders whether by resolution or ratification or otherwise to alter the dates fixed by Clause 6 of the scheme for payment of the 20 per cent. called up on March 1932 or the 5 per cent. called up on 18th January 1933. It necessarily follows that the resolution of the directors on the latter date requiring the whole 25 per cent. to be paid with interest on or before 26th February 1933 was an attempt on their part to do something that was *ultra vires* the bank." His Lordship further added : " In the matter of the forfeiture of shares, technicalities must be strictly observed. And it is not, as is sometimes apt to be forgotten merely the person whose shares are being forfeited who is entitled to insist upon the strict fulfilment of the conditions prescribed for forfeiture. For, the forfeiture of shares may result in a permanent reduction of the capital of a company. . . . The creditors are therefore entitled to see that the power of forfeiting shares is exercised strictly."

Held that no variation of or departure from the scheme could be validated by the mere acquiescence of the shareholders and creditors. Even if it be assumed that the forfeitures could be made valid by ratification there was no evidence in the case which would justify the conclusion that such ratification was in fact given.

The appeal was dismissed with costs.

Note.—A scheme of arrangement duly sanctioned by Court cannot be varied or altered except with the sanction of the Court and same procedure should be adopted for variation of the scheme as for sanction of the original scheme. No variation or departure from that scheme can be validated by the mere acquiescence of the shareholders and creditors of a company.

In re TRAVANCORE NATIONAL AND QUILON BANK LTD.. *Petitioners*

K. ANANTARAMAN—DEBTOR ... ... *Applicant*

versus

JAMES VOCE PIRRIE AND CYRIL GILL (OFFICIAL LIQUIDATORS) ... ... *Respondents*

(Gentle *J.*)

A.I.R. 1940 Madras 157 : 1939 Madras Weekly Notes 1096.

Company in liquidation—Assignment of fixed deposit—Procedure—Set-off.

THIS was an application for set-off in the liquidation of the Travancore National and Quilon Bank Ltd. The applicant was a debtor of the bank in liquidation. On the 17th February 1938, he borrowed from the Travancore National and Quilon Bank Ltd., a sum of Rs. 1,000 and as security for his loan he deposited 450 shares of two other companies. On the 30th May 1938, the repayment of this loan was demanded by the bank. The applicant wrote a letter to the agent of the company on the 4th June 1938 to the effect that he was the holder in due course of a fixed deposit receipt with the bank for a sum of Rs. 1,000 standing in the name of Sri Bageerathi Ammal maturing on 28th July 1939, and he requested an adjustment of this debt from the company against the amount due from the applicant. There was an interview in this connection between the applicant and the agent. At this interview the applicant informed the agent that the depositor of Rs. 1,000, the subject of the fixed deposit receipt, had attempted to obtain payment from the bank for the amount covered by the receipt but was unsuccessful, and the applicant requested that he should be allowed to set-off against his debt to the bank, the debt which was maturing in favour of the depositor. The applicant was told by the bank that an adjustment could not be allowed against his debt before the date of maturity of the fixed deposit receipt but that it was being held as collateral security for the loan. The applicant's reply in his letter of 18th June 1938 was that he had paid the depositor the purchase consideration and he requested that the fixed deposit should be transferred to his name if it were not possible for the bank to reconsider his original request to be allowed to set-off. He also asked for the return of the share certificates deposited as security. His Lordship stated : " It is quite clear that, whatever may have been stated, he (the applicant) accepted the position that on that day there was no set-off and the debt due from him was still outstanding to the bank."

It was urged on behalf of the applicant that no matter what transpired in June 1938, he was on liquidation of the bank entitled to set-off against moneys due from him, the moneys which ordinarily would have become due on the maturity of the fixed deposit receipt. It was conceded on behalf of the respondents that a debt, although not presently payable could be set-off against moneys owing to a company in liquidation. The main point on which the application of the applicant was opposed was that there was no valid assignment. The only documents supporting an assignment were (*a*) the deposit receipt which on the back bore the signature of the depositor which signature was merely one evidencing discharge of the moneys due from the bank; (*b*) a letter dated the 16th June 1938 signed by the depositor and addressed to the bank in which it was stated that the depositor had assigned her rights in the fixed deposit receipt to the applicant and authorised the bank to apply the amount towards the applicant's loan account. In the affidavit supporting the application, the applicant contended himself with saying that he was the holder of the fixed deposit receipt in due course. The Official Liquidators in their counter affidavit did not admit and put the applicant to strict proof that he was a *bona fide* assignee for value of the amount covered by the fixed deposit. In his reply the applicant merely stated that he was a *bona fide* assignee of the deposit receipt. He did not even set out the consideration which he paid. His Lordship after referring to Section 30, Sub-section (i), Transfer of Property Act, 1882, which provides that a transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, stated that there was no such document although the counsel for the applicant informed the Court that the assignment was effected by means of a written document. The letter written by the depositor dated 16th June 1938 to the bank was not an assignment. It was merely a notice to the bank that an assignment had been made. The fixed deposit receipt was not a negotiable instrument and an endorsement on the back did not have the same effect as an endorsement of a bill of exchange on promissory note. It was argued on behalf of the applicant that the bank before the winding up, accepted him as the assignee inasmuch as, having been given the fixed deposit receipt with the signature of the depositor upon the back it retained this document as a collateral security. His Lordship stated that one could not infer from this that an assignment had been recognised. It was not infrequent that third parties' property or documents were held as security against a loan. His Lordship after referring in detail to other relevant facts in the case stated that there was no assignment in writing as required by Section 130, Transfer of Property Act, 1882, and quite apart from

that the applicant was put to strict proof and it was insufficient for him to say " I am a *bona fide* assignee " and nothing more.

Held that the applicant was not an assignee of the fixed deposit and he was not entitled to any set-off.

The application was dismissed with costs.

Note.—A fixed deposit receipt is not a negotiable instrument and an endorsement on the back of the receipt does not have the same effect as an endorsement of a bill of exchange or promissory note. An assignment or transfer of a fixed deposit in a bank may be effected by the execution of an instrument in writing duly stamped and signed by the transferor under Section 130 of the Transfer of Property Act, 1882.

In the matter of Travancore National and Quilon Bank Ltd. (In Liquidation).

I. S. AND C. MACHADO, FIRM ... ... *Applicants*

versus

CYRIL GILL, STANLEY GOODWIN AND SYDNEY ALBERT BINDON, OFFICIAL LIQUIDATORS AND ANOTHER ... *Respondents*

(Venkatramana Rao *J.*)

A.I.R. 1941 Madras 654 : 1941 Madras Weekly Notes 358.

Company in liquidation—Bank debtor to A—A and B jointly and severally liable to bank—Set-off.

THIS was an application for set-off in the liquidation of the Travancore National and Quilon Bank Ltd. The material facts were as follows :— I. S. and C. Machado was a partnership firm which carried on business in Tuticorin. They had dealings with the Travancore National and Quilon Bank Ltd. and on the 20th June 1938 when the bank suspended payment there was a sum of Rs. 8,636-3-6 to their credit in the books of the bank. There was another firm called the Machado Cloth Shop which was started in 1933 and dissolved on the 31st May 1938. The cloth shop was started by I. S. and C. Machado in partnership with one Germain Machado. On the 20th June 1938, the Machado Cloth Shop was indebted to the Travancore National and Quilon Bank Ltd. in the sum of Rs. 10,179-6-2 in respect of advances made to them, secured by a promissory note executed by the partners of the cloth shop. The partnership with Germain Machado was dissolved on the 31st May 1938 and he ceased to have any interest in the cloth shop from that date. The concern was subsequently solely run by the firm of I. S. and C. Machado. On a demand made by the Liquidators against the Machado cloth shop, the firm of I. S. and C. Machado claimed to set-off the amount due to them by the bank, i.e., the sum of Rs. 8,636-3-6 against the amount due by the Machado cloth shop, namely, Rs. 10,179-6-2. The question was whether the set-off was permissible.

His Lordship after referring to the relevant provisions of the law and discussing English and Indian decisions on the point stated : " It is clear that before a set-off can be claimed there must be a mutuality of debts or dealings, i.e., the set-off is available only between the same parties and in the same right as the claim. Applying this principle a

joint debt is not allowed to be set-off against a separate debt nor a separate debt against a joint debt and the principle is thus stated in Halsbury's *Laws of England* :

" A joint debt and a several debt cannot be set-off against each other. Thus in an action for a debt due from the defendant to the plaintiff separately the defendant cannot set-off a debt due from the plaintiff jointly with others who are not co-plaintiffs in the action ; but he may set-off a debt due from the plaintiff severally as well as jointly with others. (Volume 29, page 490)."

His Lordship dealing with the Indian Law on the point referred to Section 43 of the Indian Contract Act, 1872, which read : " When two or more persons make a joint promise the promisee may in the absence of express agreement to the contrary compel any (one or more) of such joint promisors to perform the whole of the promise." His Lordship added : " Thus the liability is joint and several and if a debt is incurred by the members of a partnership they will be jointly and severally liable : *vide* Section 25, Indian Partnership Act, 1932. This is a distinct departure from the English Law, though it must be observed that so far as amounts due to members of a firm are concerned, the claim will be a joint claim, both in Indian and English Law, because Section 45 of the Indian Contract Act, 1872, provides : " When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract the right to claim performance rests, as between him and them, with them during their joint lives, and after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and after the death of the last survivor with the representatives of all jointly" . . . If the liability of a partner is joint and several the principle of the English Law must also be applied here and so far as the present claim to a set-off is concerned, it must be allowed, because the liability of I. S. and C. Machado and Germain Machado is joint and several, and in a claim to enforce the joint and several liability, it is open to I. S. and C. Machado to set-off the debt due to them on the principle stated by Jessel M. R. in Middleton *vs.* Pollock (1875) 20 Eq. 515 : " There was a several demand on the one side and on the other."

Held that the applicants were entitled to set-off as claimed.

Note.—There is some conflict of judicial opinion on the point dealt with in this case. His Lordship Venkatramana Rao, *J.* has held on the basis of English authorities that where a debt is joint and several a set-off could be allowed.

In the matter of Travancore National and Quilon Bank Limited. (In Liquidation).

G. SAMUEL ... ... *Applicant*

versus

CYRIL GILL AND JOHN STANLEY GOODWIN (OFFICIAL LIQUIDATORS) ... ... *Respondents*

(Venkatramana Rao *J.*)

A.I.R. 1941 Madras 622 : 1941 Madras Weekly Notes 363.

Company in liquidation—Bank lending to G on the security of the fixed deposit of S—Liquidation of bank—Set-off.

THIS was an application for set-off in the liquidation of the Travancore National and Quilon Bank Ltd. The material facts of the case were as follows :—The bank advanced a loan of Rs. 2,000 to one G. Samuel on a promissory note dated the 7th October 1936 on the security of a fixed deposit of Rs. 4,300 held in the bank by his mother-in-law Mrs. Srinivasan. The terms on which she gave the said security were reduced to writing and read as follows : " I beg to hand you herewith fixed deposit amount receipt, No. 116 for Rs. 4,300 dated the 7th October 1936 as security for the promissory note loan of Rs. 2,000 you have granted to Mr. G. Samuel. I hereby authorise you to set-off at any time the whole or any portion of the said deposit and interest accrued thereon towards the said loan whenever you deem it necessary." Along with this letter duly receipted fixed deposit receipt in blank was also lodged with the bank. The fixed deposit was for a period of two years and on the date when the bank went into liquidation it had not matured. Mr. Samuel did not pay anything towards the promissory note, but he claimed that he was entitled to have the amount due by the bank to Mrs. Srinivasan set-off against the amount due by him. Mrs. Srinivasan was willing to have the amount so set-off. The question was whether a set-off could be allowed in law.

His Lordship held that there were no mutual dealings in the case which would entitle the applicant to claim a set-off under Section 229 of the Indian Companies Act, 1913. His Lordship after elaborately discussing the law on the subject stated : " The security in this case takes the form of a debt due by the bank. If that debt was owing to the debtor, it will be a case of cross demand and a case for a set-off. But the security in this case was given by a third party and by reason

of the liquidation the owner of the security cannot have any cause of action against the bank for wrongful conversion. Under the law he cannot say that the value of his debt is impaired ; he is only entitled to receive the dividend and cannot claim the full amount and there can be no cause of action against the bank for any diminution in the value of the security, it is not possible to understand how the applicant can claim the full value of the security."

His Lordship also negatived the contention put forward on behalf of the applicant that on the facts there was in this case an agreement to set-off the amount of fixed deposit against the debt due by the applicant. The terms of the letter given by Mrs. Srinivasan were relied on. His Lordship stated : " From the terms of the letter it appears to me that the fixed deposit amount is given as security with the intention that the amount when realised may be appropriated by the bank towards the debt if they chose to do so. It is one thing to say that the bank has got a right to set-off, but another thing to say that the applicant has got a right to set-off and there was an agreement to set-off. It is open to the bank to give up the security if they like. I am therefore of the opinion that no set-off can be allowed in this case but the equity of the case demands that the bank should adjust the dividend payable under the deposit towards the amount due and recover only the balance."

Note.—When a banker lends money to a person on the security of the fixed deposit of a third person the debtor is not entitled on liquidation of the bank to set-off the fixed deposit in full against his liability for the loan since the transactions are not mutual dealings and in the same right between the parties.

R. C. BHIDE ... ... *Appellant*

versus

TRAVANCORE NATIONAL AND QUILON BANK LTD. (IN LIQUIDATION) ... ... *Respondents*

(Leach *C.J.* and Horwill *J.*)

A.I.R. 1941 Madras 18 : (1940) 2 Madras Law Journal 697.

Company in liquidation—Breach of contract for overdraft—Claim for damages—Enforcement—Procedure.

THE appellant claimed to be a creditor of the Travancore National and Quilon Bank Ltd., in liquidation. In February 1938, the appellant entered into an agreement with the bank under which the bank was to allow him on certain conditions to overdraw his account upto the sum of Rs. 75,000, for the purpose of financing a contract which he had entered into with the Travancore Government. The bank suspended payment on the 20th June 1938 and subsequently was wound up compulsorily by order of Court. On the date of suspension of payment by the bank, the appellant had overdrawn his overdraft account to the extent of Rs. 56,000, and on suspension he could not draw further and consequently the appellant complained that the bank had committed a breach of contract and also stated that the contract was a continuing one. On this basis, he filed an application under Section 230A (*5*) of the Indian Companies Act, 1913, for an order rescinding the contract and awarding him damages. Other reliefs were also asked for by the appellant but the learned trial Judge refused to consider the application and directed the appellant to file a regular suit.

In appeal it was contended on behalf of the appellant that the learned trial Judge had no power to relegate him to a regular suit and he should have heard the application and passed such order thereon as the circumstances demanded. The Liquidators contended that the contract had been terminated by calling in the amount due on the overdraft which was repayable on demand and the present application did not lie.

His Lordship Leach *C.J.* who delivered the judgment of the appellate court after referring to the relevant provisions of law stated : " The appellant was entitled to have his application heard. If the Court then came to the conclusion that the contract had already been rescinded it would have no power to pass an order on the application

and the appellant would have to be relegated to the ordinary procedure provided by the Act for proving any debt in the winding up." Under Section 229 of the Indian Companies Act, 1913, the general law of insolvency applied to the winding up of an insolvent company and a creditor claiming against the company must file a proof of his claim. A claim for damages including unliquidated damages for breach of a contract was a provable debt and the creditor should not have been in the circumstances relegated to a regular suit.

The appeal was allowed and the application was remanded to the learned trial Judge to be disposed of according to law.

Note.—A person claiming to be a creditor of an insolvent company in respect of damages, including unliquidated damages for breach of a contract by the company may either apply under Section 230A (*5*) of the Indian Companies Act, 1913, or prove his claim as a debt in the winding up.

In the matter of Peoples Bank of Northern India Ltd., Lahore. (In Liquidation).

(Young *C.J.*)

I.L.R. 1939 Lahore 324 : A.I.R. 1939 Lahore 497.

Company in liquidation—Compromise of debt—Powers of Liquidator.

THIS was a petition by a debtor praying that the Court should make an order reducing the amount payable by him to the Liquidator of the Peoples Bank of Northern India Ltd. The Court had already on the report of the Official Liquidator made some reductions in the interest payable by the debtor. The debtor after making some part payment of the amount due made the present application for a further reduction in his favour. The Liquidator opposed the application.

Rule 68 of the Lahore High Court's Rules and Orders, Volume II, Chapter 1 read: "Every application for the sanction of the Judge to a compromise with any contributory or other person indebted to the company shall be supported by the affidavit of the Official Liquidator, stating that he has investigated the affairs of such contributory or person and believes that the proposed compromise will be beneficial to the company and giving his reasons for such belief." His Lordship stated : "It is clear from this rule that the Liquidator cannot consider a mere matter of pity or mercy. He must make out a case that the compromise will be beneficial to the company ; for example, that there is a contested claim, and if the compromise is entered into, the payment would be made very much sooner than if the claim was contested ; or on similar grounds. It would be difficult, if the Liquidator is satisfied that the whole amount can easily be paid by the debtor, for him to file an affidavit as contemplated by Rule 68. Further Section 234 of the Indian Companies Act, 1913, is as follows :—

"The Liquidator may, with the sanction of the Court when the company is being wound up by the Court, . . . do the following things or any of them : . . . (iii) compromise debts and liabilities and all claims. . . . This section is the equivalent of Section 160, English Companies Act, 1862. The English section has had the consideration of the Courts in England. *In re* East of England Banking Company (Pearson's case), (1872) 7 Ch. A 309, it was held that the Court had no jurisdiction to order the Liquidator in a winding up to consent to a compromise with a contributory. In that case the company Judge had taken a strong view that the contributory was in a very poverty

stricken condition and that the Liquidator ought to accept a compromise which had been offered. The Court of Appeal set aside the order of the Company Judge and held that the Court had no more power to compel the Liquidator to accept a compromise than to compel an ordinary suitor to take less than is due to him. I am of opinion that the only power is in the Liquidator with the sanction of the Court; and that there is no power in the Court to order a compromise whether the Liquidator recommends it or not."

Held on the authorities that the Court had no jurisdiction to compel an unwilling Liquidator to compromise a debt due to the company in liquidation.

The petition was dismissed.

Note.—A Liquidator may with the sanction of the Court compromise a debt with a contributory or creditor if it is in the interests of the company to do so. He cannot be compelled to agree to a compromise of a debt even by the Court.

In the matter of the Travancore National Bank Subsidiary Co. Ltd.

D. SUNDARAVARADAN ... ... *Petitioner*

versus

M. K. MANI IYER ... ... *Applicant*

(Gentle *J.*)

A.I.R. 1939 Madras 195 : (1939) 2 Madras Law Journal 325.

Company in liquidation—Equitable rule regarding secured debts—Applicability.

THE material facts of the case were as follows :—" The applicant was the subscriber for one ticket in a chit fund conducted by the company of the nominal value of Rs. 1,000. Having been a successful bidder for the prize at the sum of Rs. 940, he withdrew the prize. Thereafter his liability to pay his subscriptions from month to month continued. He withdrew the prize money upon supplying to the company security for the amount the security being the moneys to which his two brothers would each be entitled in respect of their respective subscriptions to other chit funds conducted by the company, the two brothers being sureties. . . . Under the rules of the fund, failure by the applicant to pay any one instalment rendered the total amount outstanding immediately payable to the company."

The company went into liquidation and the Official Liquidator called upon the applicant to pay the moneys due from him. It was contended on behalf of the applicant that since the company had gone into liquidation and therefore had reached a position in which the securities which had been taken in respect of moneys due from the applicant could not be returned to him, the Official Liquidator was not entitled to recover from the applicant any moneys due from him. The observations of Lord Cave *L.C.* in Ellis & Co.'s Trustees *vs.* Dixon Johnson (1925) A.C. 489, which stated that " if a creditor holding a security sues for his debt, he is under an obligation on payment of the debt to hand over the security," were relied on by the applicant in support of his contention.

His Lordship after referring to the facts of Ellis & Co.'s case and another Indian decision on the point stated that in the present case " the security was not furnished by the applicant who was the debtor; it was furnished by two others. The principle in equity that creditor

is not entitled to recover the amount of his debt for which security has been given when he is not in a position to return the security applies in my view when the debtor and the person giving the security are the same person."

Held that the applicant's contention failed and the application was dismissed.

SANKAMMA HENGSU ... ... *Petitioner*

versus

H. ANANTHA KAMATH AND OTHERS ... ... *Respondents*

(Pandurang Row *J.*)

A.I.R. 1940 Madras 882 : (1940) 2 Madras Law Journal 309.

Company in liquidation—Indorsement of promissory notes by Liquidator's agent—Validity.

THESE were two civil revision petitions to the High Court which arose out of two connected Small Cause Suits by two persons claiming to be assignees or indorsees of two different promissory notes under indorsements purporting to have been made by the power-of-attorney agents of the Liquidators of the National Live-Stock Registration Bank Ltd., Madras. The trial Court dismissed the suits mainly on the ground that the endorsements were not valid and conveyed no interest to the assignees. In one of these revision petitions, the only question that arose was whether the endorsement by the agents of the Liquidators was valid in law. His Lordship stated : " This very point arose in connection with a similar case in Civil Revision Petition No. 22 of 1934, in which it was held by Sir Owen Beasley *C.J.* that the Liquidators had no power whatever to delegate their powers to anyone else. The power of the Liquidators themselves is derived from Section 179 of the Indian Companies Act, 1913, and so far as indorsements of promissory notes are concerned from Clause (*f*) of that section. In other words, the power given to the Liquidator to indorse promissory notes is a power given by the statue, and it is a well established principle that a statutory power cannot be delegated in the absence of a statutory provision for such delegation. It is not pretended that there is any such statutory provision for delegation in a case of this kind, and it is clear as was held in Civil Revision Petition No. 22 of 1934, that the indorsement by the agents appointed by the Liquidators conveys no title in law to the assignees."

In the other petition, it was said that all the previous indorsements made by the power of attorney agents were ratified by the Liquidator. His Lordship after discussing the case cited in support of the petitioner stated : " It does not in any way take away the force of the general rule which is embodied in Article 25 in Bowstead on Agency at page 47, 8th Edition ; to the effect that it is only an act which is capable of being done by means of an agent that can be ratified by the person in

whose name or on whose behalf it was done. In other words, if, as in this case, the Liquidator could not validly in law appoint an agent to assign promissory notes by means of a general authority no subsequent ratification of what was *ab initio* void could make that act valid."

His Lordship added : " It has been argued that a distinction must be drawn between this case and a case where the principal himself has decided the matter or in other words, decided to make the particular assignment or indorsement, and merely leaves it to his power-of-attorney holder to sign the indorsement on his behalf. But in this case there is nothing to show that at the very inception that the Liquidator had decided to assign the promissory note in question and merely employed his power of attorney agents to sign on his behalf. If that was the case, there would have been no necessity to plead ratification at all because the original act itself would have been valid ; the mere affixing of signature on behalf of the principal being a mere ministerial act the validity of which does not rest on any statutory provision. No such case was set forth by the petitioner in the lower court, and there is certainly no material available which would justify a finding to the effect that before the assignment by the agents the Liquidators themselves had applied their minds to the question and had decided to make the assignment."

Both the revision petitions were dismissed with costs.

Note.—It is held in this case that the indorsement of promissory notes by an Official Liquidator's agent is not valid and conveys no title to the assignee on the ground that the Liquidator cannot delegate such authority to the agent. The power-of-attorney in this case seems to have been one of general authority to the agent. However it appears from the later portion of the judgment that an Official Liquidator who has decided to assign promissory notes, can authorise his power-of-attorney agent to sign the endorsement on his behalf. Promissory notes, bills of exchange, etc., of a company in liquidation should be endorsed by the Official Liquidator himself unless the agent appointed by him is specifically authorised to endorse the negotiable instruments on behalf of the Liquidator.

In the matter of the Peoples Bank of Northern India Ltd., Lahore.

(Tek Chand and Jai Lal *JJ.*)

A.I.R. 1933 Lahore 51 : 33 Punjab Law Reporter 979.

Company in liquidation—Scheme of arrangement—Principles governing sanction by Court.

THIS was an application under Section 153 of the Indian Companies Act, 1913, by the Peoples Bank of Northern India Ltd., for sanctioning an arrangement for the resuscitation of the bank. The Peoples Bank of Northern India Ltd., was a joint stock company incorporated under the Indian Companies Act, 1913, and had its head office at Lahore and 72 branches in several places in Northern India. The bank was registered in April 1925 and its authorised capital was one crore of rupees of which Rs. 95,92,800 was subscribed and Rs. 39,12,809-6-3 paid up. On the 29th September 1931, the bank suspended payment. On that date, it had over Rs. 2,25,00,000 in deposit with it.

On the 26th October 1931 a petition under Section 153 of the Indian Companies Act, 1913, was presented in Court by the bank stating that the business had to be suspended owing to stringency of the money market, fall in the price of Government Securities, and an unprecedented demand for liquid cash, that a large number of depositors and shareholders had expressed a desire that the bank might be resuscitated, that in the opinion of the directors the assets of the bank were more than sufficient to pay off all its creditors in full within a reasonable time and that the Board of Directors had drawn up a scheme of resuscitation the terms of which were given in detail in an annexure to the petition. The bank prayed for orders of Court authorising the managing director to convene meetings of creditors and shareholders of the bank to consider and approve the scheme, to appoint a chairman to preside in the meetings, to authorise the Board of Directors to obtain the consent of secured creditors to the above scheme. The petition was granted and a scheme duly approved by the requisite majority of the creditors and shareholders was submitted to the Court for sanction.

Their Lordships stated : " The principles which should guide us in exercising jurisdiction under Section 153 are well settled. The first thing that the Court has to see is whether the provisions of the Statute have been complied with. Now there can be no doubt that this has been done in the case before us. The meetings were properly advertised and held, and were attended by a very large number of creditors and shareholders, who unanimously approved of the scheme

subject to provision being made for certain " safeguards." Secondly, we have to see that the persons present at the meetings have acted *bona fide* and that they have done nothing which, in the circumstances, is injurious to the interests of the classes whom they represented. On this point also, I am satisfied on an examination of the names and qualifications of the persons present, the record of the proceedings and the resolutions passed, that there is nothing to impugn the good faith of those who voted in support of the scheme. But this is not enough. The Court does not sit merely to register the decree of the majority of the creditors or shareholders present at the meetings. It has to look at the arrangement and see that it is such that a man of business would reasonably approve and further that it is fair and reasonable as regards the interest of all concerned : per Lindley, *L.J.*, in *In re* Alabma, New Orleans, Texas and Pacific Junction Railway Co. (1891) 1 Ch. 213. The Court has a wide discretion in the matter, though as observed by the same Lord Justice in *In re* English, Scottish, and Australian Chartered Bank (1893) 3 Ch. 385, it will reject the scheme only where it is shown that there has been something wrong, but where the creditors, acting in good faith and on sufficient information, and with time to consider what they are about have pronounced that a particular scheme is to their commercial advantage the court will be slow to differ from them. See also to the same effect the recent decision in *In re* Anglo-Continental Supply Co., Ltd. (1922) 2 Ch. 723."

The scheme with some additional conditions to be carried out by the directors was sanctioned by the Court.

Note.—In the present case though the scheme was sanctioned by Court it was not put through by the bank and the Peoples Bank of Northern India Ltd., was ultimately wound up by Court.

In re BENARES BANK LTD.

SRI NATH SHAH ... ... *Applicant*

versus

OFFICIAL LIQUIDATOR ... ... *Opposite Party*

(Full Bench. Thom *C.J.* Ganga Nath and Braund *JJ.*)

A.I.R. 1940 Allahabad 544 : 1940 Allahabad Law Journal 826.

Company in liquidation—Set-off—Claim by contributory—Section 186 Indian Companies Act, 1913.

THIS was an application in the matter of the Benares Bank Ltd. in liquidation and raised a question of some importance relating to claim of set-off by a contributory. The facts were that the applicant Shri Nath Shah was a contributory of the bank in respect of shares on which there was an uncalled liability. He was also at the date of the winding up order a depositor in the Bank to the extent of Rs. 5,000. He had an overdraft account which was in debit to the extent of Rs. 3,822-9-9. The applicant was thus a contributory of the bank in liquidation, a creditor of the bank, and a debtor to it in respect of the overdraft account. The Official Liquidator settled the list of contributories including the applicant as a contributory and called upon him to pay a sum of Rs. 3,822-9-9 due on his overdraft account. The applicant contended that he was entitled to satisfy it by setting it off against Rs. 5,000 due from the bank to him on his deposit account, with the result that the bank would remain his debtor on this deposit account to the extent of a little more than a thousand rupees. The Official Liquidator stated that under Section 229 of the Indian Companies Act, 1913, the applicant was entitled to no such set-off, inasmuch as he was a contributory and relied on the provisions of Section 186 of the Indian Companies Act, 1913. There was some conflict of judicial opinion on the point whether in the circumstances of a case like that of the applicant the Court should pass an order for payment under Section 186 of the Indian Companies Act, 1913, which would deprive the contributory of a legal right of set-off which he would have if an action had been filed for the same by the Liquidator. His Lordship Mr. Justice Braund before whom the application came in the first instance referred the case to His Lordship the Chief Justice for being heard by a Full Bench of the Court : " Whether, having regard to the observations made by Their Lordships of the Privy Council in Hansraj

Gupta *vs.* Official Liquidators, Dehra Dun-Mussorie Electric Tramway Co., Ltd. (A.I.R. 1933 Privy Council 63) and in a case in which the contributory of a company in compulsory or voluntary liquidation, would, or might but for the liquidation have an accrued legal right to set-off a debt due to him from the company against a debt due by him to the company (other than in respect of calls on shares), the Court exercising jurisdiction in the winding up ought to refuse an application by the Official Liquidators or Liquidator as the case may be under Section 186 of the Indian Companies Act and leave the Official Liquidators or Liquidator to sue the contributory in the ordinary course."

Their Lordships of the Full Bench after referring to the facts of the case and statutory provisions on the point stated: "There is nothing in Section 186 of the Indian Companies Act, in our view which can reasonably be construed as a general deprivation of the contributories to companies in liquidation of the right of set-off. That is our view upon a consideration of the general principles of set-off and of the statutory provisions to which we have referred. The matter in our opinion however is put beyond doubt by a dictum in the judgment of the Privy Council in Hansraj Gupta *vs.* Official Liquidators, Dehra Dun-Mussorie Electric Tramway Co., Ltd. (A.I.R. 1933 Privy Council 63). In that case the Board had under consideration the provisions of Section 186. In the course of the judgment of the Board, Lord Russell of the Killowen observed: "The power of the court to order payment is discretionary. It may refuse to act under the section leaving the Liquidator to sue in the name of the company, and it will readily take the course in any case in which it is made apparent that the respondent under this procedure, if continued would be deprived of some defence or answer open to him in a suit for the same moneys."

Held by the Full Bench that it was open to the Court exercising jurisdiction in the winding up of a company in its discretion to grant or to reject an application under Section 186 of the Indian Companies Act, 1913.

Note.—A contributory is not entitled to set-off the debt due to him from the company against his liability for calls. But where there have been mutual dealings between the contributory and the company independent of being a member of the company, there can be a set-off in respect of such dealings. This decision holds that in such cases the Court may not pass an order for payment under Section 186 of the Indian Companies Act, 1913, which will deprive the contributory of his right of set-off.

In re TRAVANCORE NATIONAL BANK SUBSIDIARY CO., LTD. (IN LIQUIDATION).

D. SUNDARAVARADAN ... ... *Applicant*

versus

R. NARASIMHACHARI (OFFICIAL LIQUIDATOR) ... ... *Respondent*

(Gentle *J.*)

A.I.R. 1940 Madras 266 : 1939 Madras Weekly Notes 1231.

Company in liquidation—Set-off—Principal and surety—Debtors.

THE material facts of the case were as follows :—The company was conducting chit fund transactions and according to the rules of the fund, a successful bidder in an auction before he received the prize money was required to execute a security bond with one or two sureties for payment of future subscriptions. The company went into liquidation and the Official Liquidator applied to the Court for directions on two points : (i) whether a debtor in respect of whose debt there was a surety was entitled to set-off in respect of his obligation to the company moneys owing to him from the company and (ii) whether the surety was entitled to set-off in respect of his obligation to the company moneys owing to him from the company.

It was contended on behalf of the Liquidator that the obligation itself in regard both to the debtor and the surety first arose upon the execution of the security bond. It was argued on behalf of the debtor, that the original contract between the debtor and the company subsisted throughout and continued after the execution of the security bond. Whatever the position might be, it was common ground that the obligations of the debtor and the surety were joint and several.

His Lordship after dealing with the law relating to set-off in the winding up of an insolvent company referred to the passage in 2 Halsbury (Hailsham Edition) 285, para 377, which read as follows : " In the absence of agreement, express or implied, there is no set-off between joint and separate debts ; but if one joint debtor is a surety for the other the principal debtor may set-off against the joint debt a debt due to himself." His Lordship also referred to the passage in Rowlatt on Principal and Surety, Edition 3, page 140 which stated : " If a surety, being severally liable, has money in the hands of the creditor, who becomes bankrupt he is entitled before the trustee sues the principal

to apply it in satisfaction of the debt." After discussing the relevant Indian and English cases on the point His Lordship stated : " Firstly I will consider the position of the debtor who wishes to set-off. Is it to be said that a debtor who has a cross-claim which he can set-off against the company loses that right because the company had obtained a safeguard by a surety assuring to the company the amount of debt of the debtor to the company ? That is the position which must arise if the contention on behalf of the Official Liquidator is sound. In my view that cannot be. There being moneys which can be set-off, this right is not lost when a surety is obtained in respect of the debtor's debt to the company. The other position is that of the surety himself whose obligation is to pay to the company the debts of another person, the surety himself having money owing to him by the company in a separate dealing or transaction. In my view the moneys due to the surety on the one hand and from him to the company on the other are mutual dealings and he has the right to set-off against his indebtedness to the company the moneys due to him when the obligation to the company by the debtor and surety is one which is joint and several as admittedly it is in the present case. Both the debtor and the surety who are under an obligation to pay moneys to the company but who themselves are creditors of the other and the balance remaining due should be paid to or by the company as the case may be. I give directions to this effect in the application by the Official Liquidator."

In the matter of Muslim Bank of India Ltd. (In Liquidation) Lahore.

(Young *C.J.* and Munroe *J.*)

I.L.R. 1939 Lahore 299 : A.I.R. 1939 Lahore 515.

Company in liquidation—Shares purchased by father on behalf of minor sons—Effect of—Father held liable as contributory.

THESE were applications by certain persons for the removal of their names from the list of contributories of the Muslim Bank of India, Ltd., in liquidation. The Official Liquidator also applied to place upon the list of contributories the respective fathers of these persons. The ground of the application was, that they were minors at the time of the transactions which resulted in their names being put upon the list of contributories. In one case the father signed the application form for shares " on behalf of " his sons, opened savings bank accounts in their names in the Muslim Bank Ltd. and paid the purchase money by his own cheque out of these accounts. Dividends were credited to these accounts and the balance in these accounts was drawn out by the minors when they became of age. It was argued by the Official Liquidator that in the circumstances the father was liable to be placed upon the list of contributories on the ground that when he signed the applications on behalf of his minor sons, he must be taken to know that the sons were incapable of acting or contracting being minors and that therefore he must be treated as the owner of the shares.

In the other case the facts were that the father signed an application for shares for his minor son and paid 50 per cent. of the value of the shares by his own personal cheque. The father attended a shareholders' meeting and signed the proceedings on behalf of his minor son. Dividends were credited in the father's account and money was used by him. There was also another transaction entered into by the father on behalf of his minor son. He purchased by transfer 12 shares signing the minor's name on the transfer form as transferee through himself. Dividends on these shares were paid to the father and the money was drawn by him.

Held on the authorities that the minors were incapable of contracting the transactions in question and the respective fathers should be treated as the shareholders and placed on the list of contributories on the winding up of the bank.

The applications were allowed.

Note.—It is held in this case that where shares are purchased on behalf of a minor, the person so purchasing the shares is to be treated as the owner and he is liable as a contributory on the liquidation of the company. The correctness of this decision is not free from doubt. It is not clear from the facts of the case, whether the Bank knew at the time of allotment of the shares that the applications were made on behalf of minors. In a similar case Palaniappa Mudaliar *vs.* Official Liquidator Pasupati Bank Ltd. (A.I.R. 1942 Madras 470) the Madras High Court decided that the guardians of the minors could not be held liable as contributories.

ESMAIL ESOOF MOOLA AND OTHERS ... ... *Appellants*

versus

CHARTERED BANK OF INDIA, AUSTRALIA & CHINA ... *Respondents*

(Page *C.J.* and Maung Ba *J.*)

I.L.R. 9. Rangoon 318 : A.I.R. 1931 Rangoon 334.

Company in liquidation—Solvent company—Interest after winding up.

THIS was an appeal from an order arising out of a petition by certain shareholders in M. E. Moola Co., Ltd., which was wound up compulsorily. The question was whether the creditors who had been paid interest on the debts due to them from the company at an agreed rate up to the date of winding up, but who had been paid the debts after that date, were entitled, upon the footing that the company was solvent, to receive interest on such debts out of the surplus assets at the agreed rate or at 6 per cent. per annum as in the insolvency law.

The trial Judge held that the creditors were entitled to receive interest between the date of the winding up of the company and the payment of the principal sums due at the rate agreed between the creditors and the company.

The appellants contended that the case was governed by Section 229 of the Indian Companies Act, 1913, and Sections 49 (*5*), (*6*) and Section 76 of the Presidency Towns Insolvency Act, 1909, which read as follows :—

" Section 229, Indian Companies Act : In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled by virtue of this Section.

Presidency Towns Insolvency Act, 1909, Section 49 (*5*) : Subject to the provisions of this Act, all debts proved in insolvency shall be paid rateably according to the amounts of such debts respectively and without any preference.

Section 49 (*6*) : Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of 6 per centum per annum on all debts proved in the insolvency.

Section 76 : The insolvent shall be entitled to any surplus remaining after payment in full of his creditors, with interest as provided by this Act and of the expenses of the proceedings taken thereunder."

It was argued for the appellants that in terms of the above provisions in the Presidency Towns Insolvency Act, 1909, the interest payable for the period in question was at the rate of 6 per cent. per annum only.

His Lordship Page, *C.J.* stated : " Whether interest is payable at 6 per cent. per annum or at the contract rate depends upon : (1) whether in the case of a company which in the event is found to be solvent Section 229 of the Indian Companies Act, applies ; and (2) if it does apply, whether the interest claimed is a " debt provable " within the meaning of that Section. Now " debt provable " are set out in Section 228 of the Indian Companies Act, 1913, and I am disposed to think that interest payable after the date of the winding up is not a " debt provable " within Section 229. Section 229 is only applicable to an insolvent company and in the winding up of an insolvent company interest accruing after the commencement of the liquidation is not a provable debt. It would seem to follow therefore that such interest is not within the ambit of Section 229 of the Indian Companies Act, 1913. Secondly, assuming that interest accruing after the date of the winding up is a " debt provable " in the liquidation, Section 229 applies only to the winding up of a company which in fact is insolvent.... Now, *prima facie*, a company in liquidation is an insolvent company but if a company is in a position to pay such liabilities in full and after paying outstanding liabilities there remain surplus assets, I am of opinion that in such circumstances Section 229 of the Indian Companies Act has no application to the company."

Held on the authorities that where a company in liquidation turned out to be solvent the creditors whose debts carried interest by agreement or otherwise were entitled out of the surplus assets to payment of interest after the winding up until payment was made of the principal debts at the rate at which by agreement or otherwise interest on such debts was payable.

Note.—In the case of solvent companies the creditors are entitled to payment of interest out of the surplus assets at the agreed rate after the winding up until the date of payment.

BUTA SINGH AND SONS LIMITED ... ... *Petitioners*

versus

PEOPLES BANK OF INDIA LTD., CREDITORS ... ... *Respondents*

(Tek Chand *J.*)

A.I.R. 1931 Lahore 589 : 131 Indian Cases 379.

Company in voluntary liquidation –Stay of execution proceedings.

THIS was an application under Section 216 of the Indian Companies Act, 1913, filed by the Liquidators of a limited company called R. B. Buta Singh and Sons Ltd., praying that proceedings in execution of a decree, which was obtained by the respondent, the Peoples Bank of Northern India Ltd., Lahore, against the company be stayed in the Court of the Subordinate Judge at Rawalpindi. The relevant facts were that on the 25th November 1929, a simple money decree for Rs. 5,100 was obtained by the respondent bank against the company. The bank took out execution proceedings in June 1930 for attachment and sale of a house belonging to the judgment debtors at Rawalpindi. Attachment was effected on the 25th August 1930 and proceedings to bring the property to sale were taken and the Court directed the bank on the 2nd January 1931 to file a corrected plan of the house on the 13th January 1931. In the meantime, on the 6th December, 1930, the company passed a resolution to go into voluntary liquidation. On the 9th January 1931 the Liquidators applied to the Court for stay of execution of the decree of the respondent so as to enable a rateable distribution of the assets of the company being made *pari passu* between the creditors. The respondents opposed the application on the ground that attachment of the property had been effected several months before the company went into liquidation and that proclamation for sale of the house was about to issue when the company went into liquidation.

His Lordship stated : " It is settled law that a purely voluntary winding up does not by itself prevent a person who holds a money decree against it from taking or continuing execution proceedings against it, but under Section 215 (present Section 216) this Court has the power to do so if it is satisfied that the exercise of such power will be " just and beneficial." The Court has a wide discretion in the matter, but the discretion must be exercised according to sound judicial principles. It has been recently laid down by the Court of Appeal in Anglo-Baltic and Mediterranean Bank *vs.* Barbar and Company, (1924) 2 K.B. 410

that where a judgment is recovered against a company which is in voluntary liquidation the invariable practice of the Court is to stay execution of the judgment unless there are very exceptional reasons for exercising its discretion otherwise. The reason for this rule is described by Lord Atkin at page 418 of the report, that " the execution if followed would necessarily interfere with the distribution of the assets *pari passu.*"

Under Section 211 of the Indian Companies Act, 1913, one of the consequences which ensued in the voluntary winding up of a company is that its assets have to be applied in satisfaction of its liabilities *pari passu* and unless the articles of association otherwise provide the assets are to be distributed among the members according to their rights and interests in the company. In this case was it " just and beneficial " to place the respondent in a better position over other creditors ? His Lordship added : " It is urged that before the company went into liquidation the property had been attached in execution of the respondents' decree. But it is admitted that under the Code of Civil Procedure attachment creates no charge or lien upon the attached property in favour of the attaching creditor. It does not make him a secured creditor nor does it confer any title on him. Until the property is actually sold the position of the attaching creditor is not higher than that of one, who has a mere money claim against the judgment debtor. At the crucial date therefore the respondent bank had no preferential right in law or in equity to realise his decretal money from the attached house, and it seems to me that it would be going against the statutory provisions of Section 207 (present Section 211) of the Indian Companies Act, 1913, to allow the execution to proceed."

The application for stay of the execution of the decree of the respondent bank was granted.

Note.—In a winding up by Court, leave of the Court under Sections 171 and 232 of the Indian Companies Act, 1913, is necessary before legal proceedings against the company in liquidation can be proceeded with or any of its property sold in execution. In the case of voluntary winding up of a company there is no automatic stay of proceedings against the company but it may apply for stay of proceedings under Section 216 of the Indian Companies Act, 1913. Courts generally grant stay of execution in such cases as a matter of course in order to prevent any particular creditor from getting an advantage over others by reason of his execution proceedings.

ROYAL BANK OF CANADA ... ... *Appellant*

versus

JOSEPH SALVATORI ... ... *Respondent*

(Lord Atkinson.)

A.I.R. 1927 Privy Council 272 : 47 Calcutta Law Journal 300.

Contract of guarantee—"Agreeing or continuing to deal with the customer."—Meaning of.

THIS was an appeal from the Supreme Court of Trinidad and Tobago dismissing with costs an action brought by the appellants against the respondent upon a guarantee signed by the latter and dated the 23rd March 1921 to recover the sum of $5,000. The facts of the case were as follows:—The appellants were registered as a banking corporation in Canada with a branch at Port of Spain, Trinidad. The respondent was a merchant carrying on business at Port of Spain. Antoni Brothers were a partnership firm carrying on business as cocoa merchants at Port of Spain. In 1920, this firm had obtained from their bankers, the appellants, large advances of cash on credit to enable them to purchase quantities of cocoa to carry on their trade or business of dealers in that commodity. In March 1921 Antoni Brothers were heavily indebted to their bankers.

"In the winter of 1920-21 the market for cocoa in Trinidad simply collapsed entailing upon the firm so heavy losses as to threaten bankruptcy. To add to their misfortune, the appellants near the end of the year 1920, ceased to make advances to the firm as they had theretofore done, to enable them to carry on their trade, with the result that the firm had no capital to carry on their business and were practically insolvent. . . . The firm, from about the end of the year 1920 had owing to their complete lack of capital and their insolvent condition, practically ceased to attempt to carry on their business of cocoa dealers, so that it had become quite obvious that unless they could obtain financial assistance in the shape of advances they would never be able to regain to any extent their former commercial position and would be forced to summon a meeting of their creditors."

It was in these circumstances that the respondent undertook to guarantee the account of Antoni Brothers and the material clause of the contract of guarantee read as follows:—

"To the Royal Bank of Canada,

In consideration of the Royal Bank of Canada agreeing or

continuing to deal with Antoni Brothers, herein referred to as " the customer " in the way of its business as a bank, the undersigned hereby jointly and severally guarantee payment to the Bank of the liabilities which the customer has incurred or is under or may incur or be under to the bank, whether arising from dealing between the bank and the customer or from other dealings by which the bank may become in any manner whatsoever a creditor of the Customer; including in such liabilities all interest, computed with quarterly or other rests according to the bank's usual custom, charges for commission and other expenses, and all costs, charges and expenses which the bank may incur in enforcing or obtaining payment of any such liabilities (the joint and several liability of the undersigned hereunder being limited to the sum of forty thousand dollars without interest).

And the undersigned agree that the bank may refuse credit, grant extensions, take and give up securities, accept compositions, grant releases and discharges and otherwise deal with the customer and with other parties and securities as the bank may see fit, and may apply all moneys received from the customer or others, or from any securities upon such part of the customer's indebtedness as it may think best, without prejudice to or in any way limiting or lessening the liability of the undersigned under this guarantee effect.

And the undersigned specially waive and renounce any benefits of discussion and division.

And it is further agreed and it is a part of the guarantee herein contained that we undertake that the amount of $5,000 (five thousand dollars) will be paid yearly commencing on the 1st March 1922 on the debt of Antoni Brothers herein guaranteed, and we make ourselves responsible to the bank for the said yearly payments up to the amount of our guarantee of $40,000 (forty thousand dollars) without interest. It is understood that as long as the terms of this guarantee are fulfilled, and as long as no action is taken by the firm of Antoni Brothers, or any of the partners which would be prejudicial to the interest of the bank in connexion with the advances which they have received from the bank, and as long as no legal action is taken against them by any of the other creditors, that no legal action will be taken against the firm of Antoni Brothers by the bank, but nothing herein contained shall prejudice the bank in regard to any claim they may have against the firm of Antoni Brothers in respect of any interest or any other moneys owing to them by the said firm over and above the said sum of $40,000 (forty thousand dollars).

Sealed and dated Port of Spain, Trinidad, the 23rd March 1921, A.D."

The bank made no further advance to the firm and there was no fresh transaction. The appellants, however, filed this action for the first instalment of $5,000 being the amount payable on the 1st March 1922 in terms of the guarantee. It was stated on behalf of the bank that the firm should get no help from the bank beyond leaving their account open merely continuing to carry the liability. This contention was negatived and His Lordship Adrian Clerk, *J.* stated : " continuing to deal with Antoni Brothers in the way of its business as a bank must involve some *bona fide* fresh transaction between the parties."

Their Lordships concur with him in this view. They think it is impossible to confine these words to merely keeping the account of this firm open, that is, merely receiving payment from anyone who chooses to pay in money to the bank to the firm's credit. The deed really contains two covenants or contracts, one being the consideration for the other, the first covenant being that if the bank continue to deal with the firm as their customer in the way of its business as a bank, the guarantor will pay to the bank the $40,000 at the time and in the manner specified and do the other things he had undertaken to do. The bank have failed to perform their covenant, they have not continued to deal with the firm as their customer in the way of their business as a bank. The guarantor has not received the consideration, i.e., the whole of the consideration upon which his covenant was based. He is therefore not bound to perform that covenant by reason of this failure."

The appeal was dismissed with costs.

Note.—A contract has to be construed so as to carry out the intention of the parties and in arriving at the intention of the parties regard may be had to the circumstances under which the contract was entered into and the words used in the contract. It is held in this case, that where a guarantee covers existing liability and also future advances, the guarantor is not liable for the existing liability unless further advances are made. A contract of guarantee like any other contract requires consideration for its validity and there is no consideration when no advances are made after the guarantee.

T. H. HANCOCK ... ... *Appellant*

versus

IMPERIAL BANK OF CANADA ... ... *Respondents*

(Viscount Dunedin.)

A.I.R. 1930 Privy Council 272 : 32 Madras Law Weekly 582.

Contract of guarantee—Advances made by bank in terms of guarantee—Liability of surety.

THE action was for recovery of money by the bank against the appellant on the basis of a letter of guarantee signed by him in favour of the bank for advances made to the business of one Mr. Garlock. It could not be disputed that the advances were made by the bank in terms of the letter of guarantee. The appellant however raised several contentions denying his liability but the most important for our purpose was that he was relieved of his liability because of an alteration made behind his back in the form of the contract. The appellant was not satisfied that he was in a position of complete safety as regards his relations with the debtor and desired to limit his liability. A letter to that effect drafted by the solicitors of the debtor and signed by him was sent to the appellant. The letter included a paragraph in which it was said : " Further, the guarantee which we have signed with the Imperial Bank is given for the purpose of discount only." The bank was not a party to this arrangement and in terms of the guarantee had made discount advances against paper and also on pure accommodation. The appellant contended that this constituted a variation of the contract of guarantee and that he was not liable under the contract. The only reason suggested by him for the arrangement to be binding on the bank was that the solicitors who drafted the letter happened to be the solicitors for the bank also. This contention was negatived and his Lordship stated : " The solicitors were not acting on the bank's instructions and it is not to be supposed that they would have had authority to alter the contracts of the bank ; but it is sufficient to say that they were not acting on the bank's instructions at all. It is impossible to suppose that an arrangement between the principal debtor and the surety behind the back of the bank, without the bank knowing anything about it, could possibly affect the bank's right."

The action was decreed in favour of the bank and the appeal was dismissed with costs.

Note.—Section 133 of the Indian Contract Act, 1872, states that any variance made without the surety's consent in the terms of the contract between the principal debtor and the creditor discharges the surety as to transactions subsequent to this variance. In this case there was no variation of the contract between the principal debtor and the creditor. A surety is liable to the creditor in terms of the contract of guarantee and any agreement between the debtor and the surety varying its terms without the knowledge or consent of the creditor is not binding on him and will not relieve the surety of his liability under the guarantee.

NEDUNGADI BANK LTD. ... ... *Appellant*

versus

DORAIKANNU AMMAL ... ... *Respondent*

(Leach *C.J.* and Horwill *JJ.*)

I.L.R. 1941 Madras 313 : A.I.R. 1941 Madras 282.

Contract of guarantee—Construction—Held continuing guarantee.

THE point in the appeal was whether the respondent gave a continuing guarantee to the appellant bank. The material facts of the case were as follows :—The respondent was the wife of one A. Murugesa Mudaliar, an army contractor and merchant who carried on business in Madras. On the 5th May 1926, for the purpose of this business Mr. Murugesa Mudaliar opened a current account with the appellant bank and it was arranged that he should be allowed to overdraw it at any one time to the extent of Rs. 18,000 provided that the respondent deposited with the appellant the title deeds of a house belonging to her in Madras as security for the overdraft. The respondent deposited the title deeds with the bank on this footing. Her husband was operating on this account but he did not exceed the limit of Rs. 18,000. Mr. Mudaliar wanted further finance and the appellant agreed to allow him to overdraw to the extent of Rs. 25,000, provided that his wife executed a legal mortgage in respect of the house. The respondent was agreeable to this course and on the 17th February 1927 she executed a legal mortgage in favour of the appellant for Rs. 25,000. The material portion of the mortgage deed read : " This indenture witnesseth that in consideration of the consolidated sum of Rs. 25,000 which the mortgagor doth hereby acknowledge her liability to pay to the mortgagee, the mortgagor doth hereby covenant with the mortgagee to pay back to the mortgagee on demand being made the whole of the said sum of Rs. 25,000 with interest at $9\frac{3}{4}$ per cent. per annum, or any amount for the time being owing and due to the mortgagee from the mortgagor on the footing of these presents with interest thereon at $9\frac{3}{4}$ per cent. per annum without claiming any deduction or abatement whatsoever for any reason as aforesaid." Mr. Mudaliar operated on this account. There were drawings and payments in which had the effect of reducing the overdraft. The state of account though fluctuated was always in debit and on the 26th February 1936, when the appellant filed the suit for recovery of money against the husband and wife the amount then due was Rs. 15,259-6-11. The suit was defended and the

pleas raised were that the defendants had not been given credit for certain sum of money to which they were entitled, that the suit was bad for misjoinder of parties and cause of action and that it was barred by the law of limitation. The respondent did not plead in her written statement that her guarantee was not a continuing one and that the rule in Clayton's case, 35 E.R. 767 applied. The contention was, however, raised during the hearing of the case, and was accepted by the learned trial Judge as freeing the respondent from all liability. Consequently a decree against the husband alone was passed and the suit against the wife was dismissed with her costs. In holding that the respondent was not liable, the learned Judge had regard merely to the wording of the deed of mortgage. He considered that there was no evidence of any intention that the respondent's guarantee should be a continuing one and that in these circumstances he was bound to give effect to the rule in Clayton's case. It appeared that if the rule in Clayton's case applied the mortgage debt was discharged by the 31st March 1927.

The bank appealed. His Lordship Leach, *C.J.* delivering the judgment of the Court stated : " With great respect for the opinion of the learned Judge, we are unable to agree that there is no evidence on the record from which it can be concluded that there was here a continuing guarantee. The authorities indicate that in deciding such a question the whole of the surrounding circumstances must be taken into consideration unless the wording of the guarantee is such that the court is precluded from taking anything else into consideration." His Lordship referred to the decision in Heffield *vs.* Meadows (1869) L.R. 4 C.P. 595 where the Court of Common Pleas had to consider whether there was a continuing guarantee where a document read : " I, John Meadows, of Barwick, in the County of Northampton, will be answerable for 501 sterling that William York, of Stamford, butcher, may buy of Mr. John Haffield of Dornington." It was held that the guarantee was a continuing one. Willis, *J.* said : " It is obvious that we cannot decide that question upon the mere construction of the document itself, without looking at the surrounding circumstances to see what was the subject matter which the parties had in their contemplation when the guarantee was given. It is proper to ascertain that for the purpose of seeing what the parties were dealing about, not for the purpose of altering the terms of the guarantee by words of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guarantee." There were also other similar decisions on the point. His Lordship on the evidence in the case held that the mortgage executed by the respondent was a continuing guarantee and that there was nothing in the terms of the mortgage precluding the Court from so holding.

Held that the bank was entitled to a decree against the respondent also under the guarantee.

The appeal was allowed with costs.

Note.—In considering whether a contract of guarantee constitutes a continuing guarantee, the whole of the surrounding circumstances of the contract must be taken into consideration unless the wording of the guarantee precludes it. The rule in Clayton's case is explained as follows : " In the case of a running or current account, provided that there has been no specific appropriation by the debtor or the creditor, then the law appropriates the payment, and according to the law it is the first item on the debit side that is discharged or reduced by the first item on the credit side. In other words it is the sum first paid in that is first paid out (Sir W. Grant, M. R., in Clayton's case, 1816). This is known as the Rule in Clayton's case—a rule which vitally affects all current accounts, whether in credit or in debit, though the banker is naturally more concerned with the effect of the Rule on overdrawn accounts." (Sheldon's *Practice and Law of Banking*, 5th Edition, pages 196-197). In the case of a continuing guarantee the rule has no material effect on the security.

IMPERIAL BANK OF INDIA ... ... { *Plaintiff* / *Appellant*

versus

V. P. AVANASI CHETTIAR ... ... { *Defendant* / *Respondent*

(Kumaraswami Sastri and Walsh *JJ.*)

A.I.R. 1930 Madras 874 : 59 Madras Law Journal 513.

Contract of guarantee—Guarantee of overdraft account of customer—No duty of banker to disclose past indebtedness of customer in the absence of enquiry from surety.

THE appeal arose out of an action filed by the plaintiff to recover moneys due in respect of a guarantee by the defendant guaranteeing payment of the sums that might be due to the bank by a firm which carried on business in the name of N. Nanchappa Chettiar. The material clause in the letter of guarantee by the defendant Avanasi Chettiar read as follows : " In consideration of an overdraft for a sum of not exceeding Rs. 10,000 only to be opened by the Imperial Bank of India in favour of N. Nanchappa Chettiar Krishnappa Chettiar I have made and delivered to N. Nanchappa Chettiar Krishnappa Chettiar one on demand promissory note, dated 15th March 1923, for a similar sum of Rs. 10,000 which promissory note the said Nanchappa Chettiar Krishnappa Chettiar has endorsed and delivered to you to be held by you as security for the repayment to you by N. Nanchappa Chettiar Krishnappa Chettiar of the amount of any advance of money which you have made or may make to N. Nanchappa Chettiar Krishnappa Chettiar or any balance of account which may now or hereafter be due by N. Nanchappa Chettiar Krishnappa Chettiar to you not exceeding the sum of Rs. 10,000. And I declare that it is intended that these presents shall be a continuing security and guarantee by me for such advances or balances not exceeding the said sum of Rs. 10,000, as may at any time be owing by N. Nanchappa Chettiar Krishnappa Chettiar to you unless and until the security and guarantee be revoked by me in writing but any such revocation shall not affect any liability already incurred by me hereunder at the date of such revocation."

The defendant denied his liability under the guarantee on several grounds. The important ground for our purpose was that at the date of the guarantee a sum of Rs. 5,000 was already due by the firm to the bank and that fact was not disclosed to the surety. The respondent

contended that on account of that non-disclosure the contract of guarantee was not enforceable and he relied on Section 143 of the Indian Contract Act, 1872, which read : " Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid." In this case the terms contained in the letter of guarantee clearly covered past indebtedness also. Apart from that, the question was whether there was in law a duty cast on a banker to disclose to a surety at the time of the guarantee the past indebtedness of the customer whose overdraft the surety guaranteed.

Their Lordships after referring to the facts in the case stated : " The balance of authority is that there is a difference between fiduciary guarantees and guarantees by persons in favour of banks and that though in the former case there may be a duty to disclose all material facts there is no such duty in the case of a bank which takes a guarantee from a person to disclose the indebtedness of the person guaranteed at the date of the guarantee. In Hamilton *vs.* Watson, 12 Cl. and F. 109, it was held by the House of Lords that a surety is not of necessity entitled to receive without enquiry from the party to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the principal and the party and that if he wants to know any particular matter he must make it the subject of a distinct enquiry." Their Lordships also referred to the following passage in Rowlatt on Principal and Surety which read : " A guarantee will fail if the creditor misrepresents to the surety the state of accounts between the principal and himself. But a surety proposing to guarantee a banking account should enquire whether there is any adverse balance already existing ; he is not entitled to assume there is not." So far as the Indian cases are concerned it was held in Balakrishna V. N. Kirtikar *vs.* The Bank of Bengal (1891), 15 Bombay 585, that the expression " keeping silence in Section 143 of the Indian Contract Act clearly implies intentional concealment as distinguished from mere non-disclosure and the withholding must be fraudulent as necessarily is the case when a material circumstance is intentionally concealed." This decision appeared to be good law and was on a line with the English authorities referred to above. Their Lordships held : " We think that the balance of authority is clearly in favour of the view that where a person stands surety for another as regards an advance to be made by a bank, the bank is under no obligation to disclose any past indebtedness existing at the date of the contract of suretyship and that is a matter on which the person standing as surety has to inform himself. If, of course, he wanted information and the bank gave wrong information it might vitiate the contract of suretyship."

The plaintiff's claim was decreed and the appeal allowed with costs.

JEAN MACKENZIE ... ... { *Plaintiff* / *Appellant*

versus

ROYAL BANK OF CANADA ... ... { *Defendants* / *Respondents*

(Lord Atkin.)

A.I.R. 1934 Privy Council 210 : 1934 Allahabad Law Journal 763.

Contract of guarantee—Guarantee procured by undue influence or misrepresentation—Not binding on surety.

THIS was an appeal in an action brought by the plaintiff to recover 187 shares in a company which she had deposited with the defendant bank as security for advances made and to be made to the Mackenzie Manufacturing Co., Ltd., in which her husband was the principal shareholder. The material facts of the case were as follows :—The plaintiff was the owner of 187 shares in Ottawa Dairy Co., Ltd., which she had inherited from her father. Her husband was formerly carrying on business under the name of Mackenzie Ltd. and on his request she executed on the 31st December 1920 a general hypothecation letter in favour of the bank making her 187 shares " general and continuing collateral security for payment of the present and future indebtedness and liability of Mackenzie Ltd." Unfortunately the Mackenzie Ltd. was declared bankrupt—Companies in Canada being subject to the ordinary bankruptcy law. The bank, however, held security over the stock-in-trade and book-debts of the company and the assets were more than sufficient to cover the debts. The bank filed their proof of debts and under the bankruptcy law on the failure of the trustee to redeem the securities, the debts of the bank became discharged and paid by the acceptance by the bank of the company's property in exchange for the debts. Thereafter there was no indebtedness or liability of the company to which the hypothecation by the plaintiff of the 31st December 1920 could attach.

There were certain proposals between the plaintiff's husband Mr. Mackenzie and the bank for reconstruction of the company whereby the business could be carried on by a new company. These were completed by November 1921. " A new company, Mackenzie Manufacturing Co., Ltd., was formed. The bank sold to Mr. Mackenzie the assets of the old company for $1,25,000, Mackenzie sold them to the new company for the same price, the bank advanced the price to the company and took the assets as security for the loan. In the

result the bank were in much the same position in relation to the new company as they had been before the bankruptcy to the old. But the bank and Mr. Mackenzie required the plaintiff to enter into a guarantee of the indebtedness of the new company and a new hypothecation and on the 21st November 1921, at the bank's office, she signed the ordinary form of bank guarantee with a limit of $2,00,000 and an hypothecation form securing the indebtedness of the new company."

The plaintiff in the present action attached this guarantee as being not binding on her on the ground that it was procured by undue influence and misrepresentation and sought to recover the shares from the bank. It appeared in evidence that at the time when the guarantee was executed the plaintiff was assured by her husband and the bank manager that her shares were still bound to the bank under the old guarantee, dated the 31st December 1920, that the shares were gone any way and that she had a chance of getting them back if she signed the new guarantee. After her execution of the guarantee she was given a form to be taken to a lawyer and signed by him intimating that he had given her independent advice, and that she fully understood the transaction and a form to be signed by herself to the same effect. These forms were completed and a lawyer signed the paper as a matter of form seeing that she had already signed the guarantee but gave her no advice as he knew nothing about the new company. The documents were then returned to the bank.

The trial Judge decreed in the plaintiff's favour but this judgment was reversed by the appellate division of the Supreme Court of Ontario and the plaintiff preferred the present appeal to the Privy Council.

Their Lordships stated : " If it had been incumbent upon the bank to prove that the lady had had independent advice, their Lordships would have had the greatest difficulty in coming to the conclusion that the bank had discharged the onus. Independent advice to be of any value must be given before the transaction, for the question is as to the will of the party at the time of entering into the disputed transaction. Advice given after the event when the supposed contracting party is already bound is given under entirely different circumstances. with a different position presented to the minds both of the adviser and his client. It is unnecessary, however, to emphasise this point for their Lordships are not able to take the view that the transaction was one in respect of which there was an onus upon the bank to prove that the plaintiff had independent advice."

Held on the evidence that there was no undue influence by her husband on the plaintiff in respect of the transaction in question.

Regarding the point of misrepresentation their Lordships stated : " We have come to the conclusion that the contract cannot be allowed

for another reason. A contract of guarantee like any other contract, is liable to be avoided if induced by material misrepresentation of an existing fact, even if made innocently . . . The evidence conclusively establishes a misrepresentation by the bank that the plaintiff's shares were still bound to the bank with the necessary inference, whether expressed or not, and their Lordships accept the plaintiff's evidence that it was expressed, that the shares were already lost, and that the guarantee of the new company offered the only means of solving them. It does not seem to admit of doubt that such a representation made as to the plaintiff's private rights and depending upon the transactions in bankruptcy, of the full nature of which she had not been informed was a misrepresentation of fact. That it was material is beyond discussion. It consequently follows that the plaintiff was at all times, on ascertaining the true position entitled to avoid the contract and recover her securities."

The appeal was allowed with costs.

SREE MEENAKSHI MILLS, LTD., AND ANOTHER... { *Defendants 2 and 3* / *Appellants*

versus

RATELAL TRIBHUVANDAS THAKAR ... ... { *Plaintiff* / *Respondent*

(Beaumont *C.J.* and Kania *J.*)

I.L.R. 1941 Bombay 273 : A.I.R. 1941 Bombay 108.

Contract of guarantee—Proof of debt against guarantor.

THE facts of the case are not material to bankers but the point of law raised in the case is of some importance. The question was whether a guarantor who had merely guaranteed the payment of the principal debtor's debt, was entitled to require the debt to be proved against him in spite of admission of liability by the principal debtor.

Held on the authorities that it was well established that a guarantor was *prima facie* entitled to have the debt proved as against him. In the absence of a special agreement, the fact that the principal debtor had admitted the debt, or that a judgment or award had been given against him for the debt, did not bind the guarantor unless he was a party to the proceedings in which the judgment or award was given or was a party to the admission by the principal debtor. If the guarantor had merely guaranteed payment of the debt of the principal debtor, then he was entitled to require the debt to be proved as against him. If on the other hand, the principal debtor had agreed that as against him the debt shall be proved in a particular way and the guarantor had guaranteed the debt so to be proved, then the guarantor would be bound by the particular method of proof agreed to by the principal debtor and himself.

A. R. KRISHNASAMI AYYAR AND ANOTHER ... ... *Defendants Appellants*

versus

TRAVANCORE NATIONAL BANK, LTD., REPRESENTED BY MESSRS. J. V. PIRRIE AND C. GILL, PROVINCIAL OFFICIAL LIQUIDATORS, AND ANOTHER ... ... *Plaintiffs Respondents*

(Burn and Mockett *JJ.*)

I.L.R. 1940 Madras 757 : A.I.R. 1940 Madras 437.

Contract of guarantee—Surety contracting liability even after discharge of principal debtor—Surety liable.

THIS was an appeal by the defendants in an action brought by the plaintiffs, the Travancore National Bank, Ltd., on the basis of a surety bond executed by the defendants by which they made themselves liable to pay to the plaintiffs, the amount due from one K. E. Sodawalla. The contract of guarantee contained a clause which read: "It is further agreed that any co. ract between the borrower and the lender by which the lender makes a composition with or promises to give time or not to sue the borrower will not discharge the surety or sureties." Mr. K. E. Sodawalla became insolvent and his creditors including the Travancore National Bank, Ltd., accepted a sum of four annas in the rupee in full satisfaction of their claims. There was thus a composition as envisaged in the clause in the contract of guarantee.

The trial Court decreed the plaintiffs' claim for the amount due under the bond less the amount received by the bank under the composition.

In appeal it was argued on behalf of the defendants that as the composition deed extinguished the debt of the principal debtor, there was no debt for which the sureties could be made liable. Their Lordships held on the authorities that the composition deed was within the terms of the contract of guarantee, that the sureties had expressly contracted to remain liable notwithstanding the discharge of the principal debtor and that it could not now be contended that the discharge of the principal debtor was an implied discharge of the sureties.

Another point urged in appeal was that there was a duty on the bank to disclose Mr. Sodawalla's overdraft liability at the time when the contract of guarantee was entered into by the sureties. It was also alleged by the witnesses for the defendants that in answer to questions by the sureties as to the financial position of Mr. Sodawalla,

the representative of the bank Mr. Kuruvilla assured the defendants that Mr. Sodawalla's financial position was beyond reproach. It was alleged by the defendants that Mr. Kuruvilla stated : " Mr. Sodawalla's account is one of the best. You need not be anxious. Only the rules require two signatures." Their Lordships held on the evidence that there was no such fraudulent misrepresentation by the bank to induce the sureties to enter into the contract of guarantee.

Held on the authorities that there was no legal obligation on the part of a banker to volunteer to a surety particulars of the customer's indebtedness in the absence of an enquiry from the surety and the contract of guarantee in this case was binding on the sureties as there was no intentional concealment or fraud.

The appeal was dismissed with costs.

Note.—A surety is liable in terms of the contract of guarantee and where there is an express clause in the guarantee by which the surety contracts to remain liable notwithstanding the discharge of the principal debtor he cannot plead the discharge of the principal debtor as a ground for the discharge of his liability.

SYED MOHOMMED YAQUB ... ... *Plaintiff*

versus

IMPERIAL BANK OF INDIA ... ... *Defendant*

(Lort Williams *J.*)

I.L.R. (1940) 2 Calcutta 578 : A.I.R. 1941 Calcutta 110.

Countermand of cheque—Payment by banker by mistake—Held not a payment in due course and the banker was liable.

THE material facts of the case were as follows :—The plaintiff had a current account with the defendant bank. In the first week of February 1937 he drew a cheque No. A14766 on the bank for Rs. 6,250 in favour of one B. S. Makani post dated the 20th March 1937. On the 14th February 1937, he wrote to the bank countermanding that order for payment which was acknowledged by the bank on the 20th March 1937. Nevertheless and contrary to these instructions on the 10th June 1937 the bank cashed the cheque, made payment to Mr. Makani and debited the plaintiff's account with the amount.

The plaintiff filed this action for recovery of the amount so debited alleging that (i) the defendant bank had no authority to pay the cheque after it had been countermanded and (ii) it had been negligent in so doing and therefore it was liable. The bank denied any negligence on its part and also relied on Clause 5 of its Current Account Rules, knowledge of which was admitted by the plaintiff and which read as follows : " The bank will register instructions from the drawer regarding cheques lost, stolen, etc., but cannot guarantee constituents against loss in such cases in event of a cheque being paid."

His Lordship held on the evidence in the case that the bank was guilty of negligence in paying the stopped cheque by mistake or oversight. His Lordship added, " In my opinion the rule relied on by the bank is irrelevant. The cheque was not lost or stolen and ' etc.' must be read *ejusdem generis*. The rule is intended to apply to events happening prior to the time when a cheque reaches the Bank and is presented for payment. Not to negligence committed by the Bank after presentation."

Held on the authorities that upon a cheque being stopped the position was the same as if it had never been given. A bank paying a cheque in due course is protected under Section 85 (*1*) of the Negotiable Instruments Act, 1881. Section 10 of the Act defines " payment in

due course " as meaning payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount that is mentioned. But as already held by his Lordship the payment in this case was not made " without negligence " and was not therefore a payment made in due course so as to discharge the bank. The result was that the bank was not entitled to debit the plaintiff's account and was still indebted to him in the sum of Rs. 6,250. As the bank did not pay interest on current accounts, the plaintiff had not suffered any damage on that score and no other damage had been proved.

Held that the plaintiff was entitled to judgment for Rs. 6,250 only with interest and costs.

Note.—A cheque is a mandate of the customer on his banker to pay the holder of the cheque provided the banker has sufficient assets of the customer available for that purpose. Where a mandate is given but subsequently withdrawn the position is as if no mandate were given at all. In such a case, the banker has no authority to debit the customer's account and should not pay the cheque. If he does so by mistake or by negligence, the banker will have to bear the loss.

S. MARUTHAMUTHU NAICKER ... ... *Plaintiff*

versus

P. KADIR BADSHA ROWTHER AND OTHERS ... ... *Defendants*

(Full Bench—Leach *C.J.*, Varadachariar and Mockett *JJ.*)

I.L.R. 1938 Madras 568 : A.I.R. 1938 Madras 377.

Endorsee of a promissory note executed by manager of a joint Hindu family—Non-executant members of the family ordinarily not liable.

THIS was a reference to the High Court at Madras on a point of law by the Subordinate Judge of Tanjore in a suit on a promissory note. The material facts of the case were as follows :—The note was executed by defendants 1 and 2 (a Hindu father), in favour of one Ponnuswami Naicker who endorsed it to the plaintiff. The two sons of defendant 2 who constituted with him an undivided family were made defendants as it was sought to make them liable on the ground that the debt was incurred for family purposes by defendant 2 in his capacity as managing member. The sons raised the plea that the plaintiff as the endorsee of the promissory note was not entitled to sue them. The Subordinate Judge referred the following question to the High Court for their opinion : " Whether an endorsee of a promissory note executed by the managing member is entitled to recover the debt from the property of the non-executant coparceners on the ground of their liability under the Hindu Law or whether he is limited to the remedy available on the note."

His Lordship Leach *C.J.* after referring to the authorities on the point stated that (i) it was a fundamental principle of the law relating to negotiable instruments that no one whose name did not appear on the instrument could be held liable thereon and (ii) there was no privity of contract between an endorsee and the maker or acceptor.

Held that " the endorsee of a promissory note executed by the managing member of a Hindu family is limited to his remedy on the note, unless the endorsement is so worded as to transfer the debt as well and the stamp law is complied with, and therefore in the case of an ordinary endorsement, the endorsee cannot sue the non-executant coparceners on the ground of their liability under the Hindu Law." A valid assignment of the debt represented by the promissory note was necessary to make the non-executant members of the family liable.

AHMED ANGULIA ... ... *Appellant*

versus

ESTATE AND TRUST AGENCIES (1927), LTD., AND OTHERS ... ... *Respondents*

(Lord Romer.)

A.I.R. 1938 Privy Council 205 : 1938 Madras Weekly Notes 774.

Executor—Binding contract of deceased—Duty.

THE appeal raised an interesting question as to the duties of an executor in relation to the testator's contracts remaining incompleted at his death. The material facts were that one Kavena Hadjee Mohamed Yoosuf of Singapore had entered into a contract with a building contractor for the erection of shops on his lands. The work was completed about three-quarters of it when Mr. Yoosuf died. After his death a document which purported to be his will was admitted to probate, probate being granted to the appellant who had been thereby appointed the sole executor. The appellant proceeded to administer the estate and in his capacity as executor paid $17,276 to the building contractor who had in the meantime completed the contract. In order to provide this sum the appellant as executor mortgaged some property forming part of the estate and in respect of such mortgage a sum of $3,702.96 was paid by the appellant by way of interest. Subsequently the probate of the alleged will under which the appellant had been appointed executor was revoked by order of the Court on the ground that the same had not been properly executed, and the respondents Estate and Trust Agencies (1927), Limited, were appointed administrator of the intestate's estate. When the appellant's accounts of his administration came for passing before the Registrar, the administrator and the next of kin of the deceased objected to the payments of the above two sums by the appellant as being not properly payable out of the estate, on the ground that the appellant should have treated the contract as at an end on the death of the intestate. It was, however, not disputed the amounts paid by the appellant became properly payable on completion of the contract. The objection was referred to the Judge for determination and he directed the Registrar to disallow in the appellant's account $17,276 except so much of it as the Registrar should consider would have been fair to pay to the building contractor as compensation for breach of the contract to build the shops if the contract had been broken at the death of the

intestate and also to disallow so much of $3,702.96 as represented interest upon such part of $17,276 as was directed to be disallowed. His Lordship took this view on the ground that the performance of the contract of the deceased by the appellant was not for the benefit of the estate. An appeal from this judgment to the Court of Appeal at Singapore was dismissed and the appellant appealed to the Privy Council.

Lord Romer delivering the judgment of the Privy Council, referred to leading English cases on the point and stated: "*Prima facie*, it is the duty of a legal personal representative to perform all contracts of his testator, or intestate as the case may be, that can be enforced against him, whether by way of specific performance or otherwise. If the contract be one that cannot be enforced against him for any reason such as the Statute of Frauds and is one that it would be disadvantageous to the estate to perform, it is a different matter: See *In re* Rownson (1885), 29 Ch. D. 358, though it seems to be settled that he is not bound to plead the Statute of Limitations and may pay a statute barred debt unless it has been judicially declared to be so: see Midgley *vs.* Midgley (1893), 3 Ch. 282. Nor in the case of an enforceable onerous contract ought he to neglect any opportunity that may present itself of coming to terms with the other contracting party that may benefit the estate. But the breaking of an enforceable contract is an unlawful act and in their Lordships' judgment it can never be the duty of an executor or an administrator to commit such an act. . . . In their Lordships' judgment it was the duty of the appellant as the apparent legal personal representative of the intestate to honour the intestate's obligations under the contract in question unless an opportunity presented itself of coming to some arrangement with the builder that would be of advantage to the estate that he was administering. There is no evidence that any such opportunity did in fact present itself and the onus of proving the existence of such an opportunity lay in their Lordships' opinion upon the respondents."

Held that the estate was liable to be debited with the sums paid by the appellant for the completion of the contract.

The appeal was allowed with costs.

Note.—It is held that *prima facie* it is the duty of an executor to complete the contracts of the deceased which are binding on him. In the case of onerous contracts, he should not neglect any opportunity that may present itself of coming to terms with the other contracting party that may benefit the estate. There is no duty cast on an executor to break a binding contract of the deceased on the ground that it may possibly benefit the estate.

RAM KRISHNA MURAJI ... ... *Appellant*

versus

RATAN CHAND AND ANOTHER ... ... *Respondents*

(Sir Lancelot Sanderson.)

A.I.R. 1931 Privy Council 136 : 1931 Allahabad Law Journal 458.

Hindu law—Borrowing powers of manager of joint Hindu family—Duty of lender.

THE facts of the case are not material to bankers. The point of law stated in the decision is of importance to bankers who have dealings with managers of joint Hindu families. The question often arises as to whether a debt contracted by the manager of a joint Hindu family is binding on the other members of the family to the extent of their interests in the joint family property and what are the duties which a lender must observe in order to make the joint family estate liable for the debt. The rule of law on this point was laid down in Hunooman Persaud Pandy *vs.* Mt. Babooee Munraj Koonweree (1854), 6 M.I.A. 393, and followed in the present case which read : " Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so enquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that therefore the mere creation of a charge securing a proper debt cannot be viewed as improvident management ; the purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived."

Note.—Property belonging to a joint Hindu family is ordinarily managed by the father or other senior member for the time being of the family who is called the " karta " or the manager. He represents

the family in transactions with outsiders. Where the manager has contracted debts for a proper joint family purpose the coparcery property is liable. The principle laid down in Hunooman Persaud's case related to a mortgage created by mother as manager of her minor son's estate, but the same principles apply to any other loan by the manager. The test of liability of the joint family is that the loan must have been incurred by the manager for legal necessity or benefit of the estate and it is the duty of the lender to satisfy himself about the same, though he is not bound to see to the actual application of the money.

THE BENARES BANK LTD. ... ... *Appellants*

versus

HARI NARAIN AND OTHERS ... ... *Respondents*

(Sir Dinshah Mulla.)

A.I.R. 1932 Privy Council 182 : 1932 Allahabad Law Journal 714.

Hindu law—Debt contracted for new business by manager of joint Hindu family—Not binding on minor members.

THE material facts of the case were as follows :—The father of the respondents had executed a mortgage in favour of the Benares Bank Ltd., for Rs. 28,000. The respondents who were minors at the time of the execution of the mortgage deed questioned the binding nature of the mortgage on their interests in the joint family property and stated that there was no consideration for the mortgage and no necessity for the loan. The important question that was raised in the case was whether the interests of the minor members of a joint Hindu family could be made liable for a debt contracted by the manager for starting a new business. It appeared that a sum of Rs. 3,658 out of the mortgage amount represented the debt incurred by the father of the respondents in starting a Theka business which was not a joint family business.

Held by the Privy Council that a business started by the manager or father as manager, could not be regarded as ancestral business so as to render the minors' interests in the joint family liable for the debt.

Held on authority that the manager of a joint Hindu family had no power to impose upon the minor members of the family the risk and liability of a new business started by him. The law was the same in this respect both under the Mitakshara and Dayabagha Law.

Held that the debt of Rs. 3,658 incurred for the Theka business by the father of the respondents was not binding on the interests of the minor coparceners in the joint family property.

Note.—In Hindu Law the manager of a joint Hindu family has implied authority to contract debts and pledge the credit and property of the family including the interests of the minor coparceners for ordinary purposes of family business. It is to be noted that the business must be an ancestral or joint family business and not a new one started by the manager. It is held in this case that (i) the business started by the father as manager is not an ancestral business, (ii) the manager

of a joint Hindu family has no power to impose upon a minor member of the family the risk and liability of a new business started by him. A banker in order to make the whole of the joint Hindu family property including the interests of the minor coparceners liable in respect of a loan granted to the manager for his business, will have to satisfy himself that the business is a joint family business and not a new one started by the manager. As regards adult members, the manager cannot impose even upon them the risk and liability of a new business unless the business is started or carried on with their consent express or implied.

JULIO MASCARENHAS AND OTHERS ... ... *Appellants*

versus

MERCANTILE BANK OF INDIA LTD. ... ... *Respondents*

(Sir George Lowndes.)

I.L.R. 56 Bombay 1 : A.I.R. 1932 Privy Council 22.

Holder in due course—Endorsements on securities forged—"Renewal" of the securities—Bona fide holder of the renewed securities—Held protected.

THE material facts of the case were as follows :—In 1914, the appellants who were residents of Goa, entrusted one Fernandes with certain securities for collecting on their behalf the interest as it fell due. The securities consisted of debentures issued by the trustees for the Improvement of the City of Bombay and Bombay Municipal debentures. These securities were transferable by endorsement. Mr. Fernandes remitted the interest regularly for sometime and then he defaulted. It was then discovered that he had in 1918, by means of forged endorsements in his own favour, pledged all the debentures in question with the Alliance Bank of Simla, endorsing them over to that Bank to secure his own indebtedness. In 1921, the Alliance Bank of Simla surrendered the securities to the trustees who exchanged them for new debentures the face value of which differed in many cases from those of the originals, though the totals were the same. All these new instruments were issued directly to and in the name of the Alliance Bank of Simla clear of all previous endorsements. The original securities were cancelled by the trustees and retained by them. Thereafter in 1921, Mr. Fernandes transferred his loan account to the Mercantile Bank of India Ltd., the respondents and on his instructions the Alliance Bank of Simla endorsed the new instruments over to the respondents. The forgery committed by Mr. Fernandes was discovered by the appellants in 1923, when he failed to remit the interest. The appellants filed this action against Mr. Fernandes and the Alliance Bank of Simla for money had and received in respect of the securities and against the respondents for the delivery and transfer to them of the new securities in their possession. The action was defended by the respondents only.

The appellants succeeded in the trial Court, but failed to hold their decree on appeal and they preferred the present appeal to the Privy Council.

Their Lordships of the Privy Council after referring to the facts of the case and authorities on the subject stated :—

(i) The "renewals" of the original securities on which the endorsements were forged constituted a new contract between the trustees of the debentures and the Alliance Bank of Simla and were transferable by endorsement.

(ii) There was no irregularity in the transfer of the "renewed" securities to the respondents which could have led the respondents to believe that there was any defect in the title of the Alliance Bank of Simla. It was not suggested that there was anything else in the transaction to put them on enquiry.

(iii) The respondents were in the position of holders in due course under Section 9 of the Negotiable Instruments Act and therefore protected.

Held for the above reasons that the appellants had no valid claim against the "renewed" securities in their possession and the appeal was dismissed with costs.

Note.—The point in this was that the respondents were holders in due course of the "renewed" securities which constituted a new contract with the trustees of the debentures. There was no forgery in respect of these securities and the respondents' title to them was not affected. The rule that forgery conveys no title was not applicable to the facts of the case.

PUNJAB CO-OPERATIVE BANK LTD., AMRITSAR ... *Appellant*

versus

COMMISSIONER OF INCOME-TAX, LAHORE ... ... *Respondent*

(Viscount Maugham.)

I.L.R. 1940 Lahore 685 : A.I.R. 1940 Privy Council 230.

Income-tax—Bank selling Government securities and shares held by them to meet withdrawals by depositors—Profits from such sales are profits or gains of the business and assessable to income-tax under Section 10 of the Indian Income-tax Act, 1922.

THIS was an appeal from a judgment of the High Court of Judicature at Lahore delivered on a reference under Section 66 (*2*) of the Indian Income-tax Act, 1922, by the Commissioner of Income-tax, Punjab.

The material facts of the case were as follows :—The appellant, the Punjab Co-operative Bank, Ltd., was a joint stock company carrying on the business of banking. It appeared that on the 31st December 1934, the value of the investments of the Bank amounted to Rs. 50,88,550 mainly held in Government securities. During the year 1935 some 10 lacs of these Government securities and some shares were sold and the profit made taking the difference between the cost price of the investments and the prices at which they were sold was Rs. 1,42,588.

The question was whether the profits could be assessed to income-tax as profits or gains of the business of the Bank during the assessment year 1936-37. It was contended on behalf of the Bank that

(i) the Bank had treated the investments in Government securities and shares as a reserve for emergencies and had resorted to their sale in 1935 because they had in that year to meet heavy withdrawals of deposits and to deposit Rs. 2,66,000 with the Reserve Bank of India as a scheduled bank under Section 42 (*1*) of the Reserve Bank of India Act, 1934, and

(ii) the Bank claimed also that they did not " deal in shares and securities " and that therefore the profit made by the sale of shares and securities was not taxable.

The High Court at Lahore held that the profits were liable to income-tax. On appeal by the Bank to the Privy Council, Viscount Maugham delivering the judgment of the Privy Council stated on the authorities :—

(i) The realisation of securities by the Bank in order to meet withdrawals by depositors was a normal step in carrying on the banking business.

(ii) It was not necessary to prove that the Bank carried on a separate or severable business of buying and selling investments with a view to profit in order to establish that profits made on the sale of investments were taxable. It was well established " that enhanced values obtained from realisation or conversion of securities may be so assessable where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on or carrying out, of a business."

Held for the above reasons that the profits of the Bank was assessable to income-tax.

The appeal was dismissed with costs.

OUDH COMMERCIAL BANK LTD., FYZABAD ... ... *Appellant*

versus

PANDIT BISHAMBAR NATH BAJPAI ... ... *Respondent*

(Lord Wright.)

I.L.R. 1938 Allahabad Law Reporter 750 : A.I.R. 1938 Privy Council 250.

Instalment payments—"On default of three consecutive instalments"—Meaning of.

THE point raised in this appeal was about the construction of a clause in a compromise decree which read : "If the applicant judgment-debtor does not pay three consecutive instalments (Rs. 200 each), the decree-holder shall have power to take out execution in respect of the remaining entire amount due. In no other case the decree-holder shall have power to execute the decree against the applicant." The appellant was the decree-holder and the respondent the judgment-debtor. It appeared that the respondent failed to pay the first and the second instalments on the due dates. But he paid the third instalment in time. Again he did not pay the fourth and the fifth instalments but paid the sixth instalment. On these facts it was contended on behalf of the respondent that there was no failure on his part to pay three consecutive instalments in terms of the compromise decree and no execution could lie against him.

This contention was negatived and his Lordship stated : "In Their Lordships' judgment the respondent is in the position in fact that he has not paid three consecutive instalments and therefore he is in default under the compromise agreement, and the appellant, as decree-holder, has accordingly power to take out execution in respect of the remaining entire amount due. In their Lordships' opinion the matter may be tested by taking a simple concrete case. Let it be assumed that there are instalments due in January, February and March and that when March comes the respondent not having paid the January or February instalment, pays Rs. 200. He pays no more in respect of that quarter. Then April comes and he pays nothing ; then May comes and he pays nothing ; June comes and then he pays Rs. 200. In their Lordships' opinion of those facts, the payment which is made in March is in law a payment not of the March instalment, but of the January instalment. That is the position as the evidence stands. It is perfectly true that the respondent might

have paid the instalment which he did tender in March but on the express terms that it was a payment of the March instalment and not of the January or February instalment. The question would then arise whether the appellant was bound to accept a tender made in that way. That question does not arise and in their Lordships' opinion when the instalment was paid in March, it was in fact and in law a payment of the January instalment. It follows from that, that when April came and no payment was made, there were three consecutive instalments unpaid, that is to say the February instalment, the March instalment and the April instalment and so on. In these circumstances, in their Lordships' opinion the case ought to be decided on the footing that there has been default by the respondent in carrying out the compromise agreement and that the remaining entire amount due is claimable."

Note.—The point decided in this case though simple is of some importance to bankers. It is held that in the facts of the case, the words "default of three consecutive instalments" mean default of three instalments on the whole.

PEOPLES BANK OF NORTHERN INDIA LTD. (IN LIQUIDATION) AND ANOTHER ... ... *Petitioners*

versus

LALA HARKISHEN LAL ... ... *Opposite Party*

(Young *C.J.* and Monroe *J.*)

A.I.R. 1936 Lahore 408 : 163 Indian Cases 378.

Loan to Chairman of a banking company—Formalities as to sanction of loan not observed—Chairman purchasing property with the money in his personal name—Liquidation of bank—Held that the liquidator was entitled to take possession of the property as it was bought from the funds of the bank obtained in an unauthorised way by the Chairman.

THE material facts of the case were as follows :—Lala Harkishen Lal who was the Chairman of Board of Directors of the Peoples Bank of Northern India Ltd. obtained from the Manager of the Bank a sum of Rs. 2,40,000 on the 9th December 1930. The money was used by Lala Harkishen Lal to purchase Amber Nath Mills situated near Bombay. On the 19th December 1930, the Manager of the Bank sent a note to the Chairman asking him to which of his accounts this sum was to be debited. The reply from Lala Harkishen Lal was " Place before the Board, meanwhile take a promissory note." The promissory note executed on the 19th December was antedated back to the 9th December 1930. Although the matter was placed before the Board of Directors of the Bank, discussion on this transaction was adjourned from time to time and up to the date of suspension of the Bank in September 1931, no action was taken by the Board of Directors at all. The Directors apparently did not like the transaction but had not the courage to oppose Lala Harkishen Lal.

On the liquidation of the Bank, the Liquidator claimed that as the Mill was bought by Lala Harkishen Lal in his own name out of the funds of the Bank which he had obtained by an illegal and unauthorised way, the Bank was entitled to the same and the Liquidator should be given possession of the Mill under the provisions of Section 185 of the Indian Companies Act, 1913. It was contended on behalf of Lala Harkishen Lal that the amount received by him should be looked upon as a loan from the Bank to Lala Harkishen Lal and that therefore the property in the Mill bought with his own money was his.

Their Lordships after referring to the evidence in the case stated : " It is clear that there never was a loan by the Bank to the Chairman. Certain formalities had to be carried out before a loan could be advanced to any customer. The Board itself had to authorise any loan. This transaction amounts to the Chairman himself, without any authority and wholly illegally taking the funds of the Bank and converting them to his own use. Lala Harkishen Lal as Chairman is a trustee of all the moneys of the Bank. Apart from any criminal responsibility he clearly has committed a breach of his duties as a trustee."

Held that the Liquidator was entitled *prima facie* to the property.

BENARES BANK LTD. ... ... { *Plaintiff* / *Appellant*

versus

DIP CHAND AND ANOTHER ... ... { *Defendants* / *Respondents*

(Thom and Bajpai *JJ.*)

A.I.R. 1936 Allahabad 172 : 1936 Allahabad Law Journal 155.

Minor—Guardian obtaining loan on promissory note for the benefit of minor's estate with sanction of Court—Estate of minor held liable.

THIS was an appeal in an action brought by the Benares Bank Ltd. for the recovery of a sum of Rs. 6,268-4-0 due as principal and interest on a promissory note, dated the 28th April 1927, executed by one Kirat Chand as guardian of Dip Chand who was then a minor. The trial Court decreed the plaintiff's claim against Kirat Chand but dismissed the suit against Dip Chand. It was contended in appeal that the suit should have been decreed against Dip Chand as well limited to his estate.

The material facts were as follows :—Kirat Chand was appointed a guardian to the person and property of minor Dip Chand. While Kirat Chand was the guardian of the minor he borrowed a sum of Rs. 5,000 with the sanction of the Court from the Benares Bank Ltd., executing a promissory note, dated the 28th April 1927, signing himself as guardian of Dip Chand, minor. Kirat Chand also executed a receipt on the same day and there also he styled himself as guardian of the minor. There was a letter of guarantee of the same date by the guardian in his personal capacity to the bank by which he made himself responsible for the due repayment of the loan of Rs. 5,000 advanced to the estate of Dip Chand minor. The amount due under the promissory note was not paid and the bank filed the present action against Kirat Chand and Dip Chand's estate. Kirat Chand was absent, but the suit was contested on behalf of Dip Chand on the ground that the income of the property of the minor was quite sufficient and Kirat Chand had no right to borrow the money for the minor, nor was any money borrowed from the bank spent for the benefit of the minor. It was said that the sanction of the Court was obtained by misrepresentating facts.

Their Lordships after referring to the facts in the case held that the loan was borrowed for legal necessaries of the minor and for the

benefit of the estate. On the question of law their Lordships stated: "It has been held by their Lordships of the Privy Council in Ganga Pershad Sahu *vs.* Maharani Bibi (1885), 11 Calcutta 379, that when an order of the Court has been made authorising the guardian of an infant to raise a loan on the security of the infant's estate the lender of the money is entitled to trust to that order, and that he is not bound to enquire as to the expediency or necessity of the loan for the benefit of the infant's estate. If any fraud or underhand dealing is brought home to him, that would be a different matter; but apart from any charge of that kind, he is entitled to rest upon the order. Is there any reason why the same principle should not apply when the guardian instead of raising a loan on the security of the minor's property obtains money on a simple bond? We can think of no ground on which to draw a distinction between the two cases; indeed under certain circumstances, it might be more desirable to obtain money on a simple bond than on a hypothecation bond and in certain circumstances it might be impossible to avert the danger after undergoing the formalities of a regular deed of transfer . . . In this case the utmost that has been even alleged by the respondent is that the guardian made false representations to the Court. It is not suggested that the bank was a party to the fraud, if any, practised by the guardian. We have, however, in an earlier portion of our judgment said that we are not satisfied that any fraudulent representations were made by the guardian."

Held that the bank was entitled to a decree against both the defendants with costs. But so far as the minor Dip Chand was concerned the decree was limited to his estate and he was not personally liable.

Note.—A minor's estate is liable for legal necessaries supplied to the minor. (See Section 68, Indian Contract Act, 1872.) When a loan is applied for by a guardian on behalf of the minor the lender should satisfy himself by reasonable enquiries that the loan is required for the legal necessaries of the minor. It is held in this case that where a guardian has obtained sanction of Court for the loan the lender is entitled to trust to that order and he is not bound to enquire as to the expediency or necessity of the loan for the benefit of the minor's estate. The lender is also not bound to see that the money so borrowed is actually applied for the necessities of the minor.

P. C. BHANDARI ... ... *Plaintiff / Appellant*

versus

PUNJAB NATIONAL BANK LTD. AND OTHERS ... *Defendants / Respondents*

(Addison and Abdul Rashid *JJ.*)

A.I.R. 1938 Lahore 520 : 40 Punjab Law Reporter 863.

Payment in due course—Joint payees of a draft—Negligence in payment to one of the payees—Held that the bank was liable.

THE material facts of the case were as follows :—On the 26th May 1932 P. C. Bhandari paid Rs. 1,000 to the Punjab National Bank Ltd. at Rawalpindi and the bank issued a draft drawn on their branch at Quetta for payment of Rs. 1,000 to Lt. Halsey and Lt. P. Greig or order. The amount was remitted by P. C. Bhandari as loan to the payees. The draft was sent by Bhandari to Lt. Halsey who presented it at the Quetta Branch on the 4th June 1932 for payment. The draft purported to be endorsed in blank on the reverse by both Lt. Halsey and Lt. Greig. The Manager of the Punjab National Bank at Quetta refused to pay Rs. 1,000 to Lt. Halsey as he did not know him. Subsequently, however, it was arranged that one Lalwani, the proprietor of the Quetta Branch of the Standard Bookstall who was known to the bank and had a current account should verify the endorsement of Lt. Halsey that the draft should be endorsed in his favour by Lt. Halsey and paid into the account of the Standard Bookstall. This was done and the draft was credited to the account of the Standard Bookstall. Lalwani paid Rs. 1,000 to Lt. Halsey from his account. Shortly afterwards it appeared that the signature of Lt. Greig on the draft was forged. The plaintiff accordingly instituted the present suit for recovery of the amount against Lt. Halsey, the Punjab National Bank Ltd. and the Standard Bookstall.

The point in the case was whether the payment of the draft of Rs. 1,000 was made by the Bank in due course within the meaning of Section 85A and Section 10 of the Negotiable Instruments Act so that the Bank could not be held liable for the amount. There was conflict of opinion on this point and the matter went up to a Bench of the Lahore High Court under Clause 10 of the Letters Patent.

His Lordship Abdul Rashid *J.* referred to the evidence of Lalwani who stated that according to him, the Manager of the Punjab National

Bank Ltd. at Quetta had the following conversation with him : " The Bank Manager said as you do not know Greig personally, if Mr. Halsey guarantees his signature and you identify Halsey, the draft could be cashed. Therefore ask Halsey to guarantee the signature of Greig . . . I asked Lt. Halsey if he would guarantee the signature of Greig as suggested by the Bank Manager and Lt. Halsey did it." His Lordship added : " The learned counsel contended that as the draft purported to be endorsed by both Lt. Halsey and Lt. Greig the Bank was discharged. The question for consideration, however, is whether the payment by the Bank can be said to be a payment in due course within purview of Section 10, Negotiable Instruments Act : ' Payment in due course ' means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned."

" In the present case Lt. Halsey and Lt. Greig were jointly entitled to the payment. The Manager of the Bank asked Lalwani merely to identify Lt. Halsey and so far as the signatures of Lt. Greig are concerned he merely wanted Lt. Halsey to guarantee his signature ; in other words, the Manager of the Bank did not want Mr. Lalwani to give any guarantee regarding the signatures of Lt. Greig. As mentioned already, the facts that Lt. Halsey came alone to Bank and had long conversations with the Manager, who had refused to pay the amount of the draft to him, and that Lt. Halsey gave no reasonable explanation of the absence of Lt. Greig, should have raised the suspicions of the Manager so far as Lt. Greig's signatures on the draft are concerned. In order to safeguard himself he ought not to have relied merely on the endorsement made by Lt. Halsey on the back of the draft that the draft had been signed by Lt. P. Greig. Under these circumstances, the payment of the draft cannot be said to have been made in good faith and without negligence. A scrutiny of the various endorsements at the back of the draft would have convinced the Manager that the words ' P. Greig ' in the blank endorsement were in the handwriting of Lt. Halsey. It appears from the evidence of Mr. Lalwani, whom we see no reason to disbelieve, that it was the Manager himself who had suggested the means whereby Lt. Halsey could obtain payment of the draft. If the Manager was inclined to suggest ways and means to Mr. Lalwani whereby the draft could be cashed, it was incumbent on him to tell him that he should guarantee the signatures of both Lt. Halsey and Lt. Greig. The identification by Mr. Lalwani of Halsey alone ought to have been considered insufficient by the Manager of the Bank so far as the question of the genuineness of Lt. Greig's signatures was involved. We therefore hold that Section 85A read

with Section 10, Negotiable Instruments Act, does not absolve the Bank from liability in the present case."

Note.—The decision is based on the particular facts of the case and illustrates what may constitute negligence within the meaning of Section 10, Negotiable Instruments Act, 1881.

POONA BANK LTD. ... ... { *Defendant 3* *Appellant*

versus

KACHHI DASA OSWAL JAIN TEMPLE ... ... { *Plaintiff* *Respondent*

(Patkar and Broomfield *JJ.*)

A.I.R. 1932 Bombay 31 : 33 Bombay Law Reporter 848.

Pledge of goods obtained from owner by means of an offence or fraud—Validity.

THE facts of the case were as follows :—" At the material time one Mudwedkar was the Manager of the Hubli Branch of the Poona Bank Ltd. One Trikamji Mulji was a cotton broker of Hubli who had considerable dealings with the bank. Mudwedkar for his own purposes took certain ornaments belonging to the bank which had been pledged with the bank by some of its constituents, and handed these ornaments over or caused them to be handed over to Trikamji who pawned them with the plaintiff, a certain temple institution of Hubli, whose vahivatdars carry on money-lending business. The plaintiff advanced Rs. 6,000 on the pledge of the ornaments and Trikamji handed this money over to Mudwedkar. Trikamji, Mudwedkar and the Assistant Manager of the bank were prosecuted for criminal breach of trust in respect of the ornaments. In the trial Court Mudwedkar and the Assistant Manager were convicted, Trikamji being acquitted. On appeal the Assistant Manager was acquitted, but the conviction of Mudwedkar was confirmed. The criminal Court ordered that the ornaments should be restored to the possession of the Poona Bank. Subsequently the plaintiff brought the suit from which this appeal arises against Trikamji, defendant 1 Mudwedkar, defendant 2, and the Poona Bank Ltd., defendant 3, praying that the ornaments should be sold in order to realize the money advanced upon them by the plaintiff and that a decree should be given for the deficit, if any, against defendants 1 and 2."

It was alleged in the plaint that the ornaments belonged to defendant 1, and in the alternative, if it were held that they did not belong to defendant 1 that the plaintiff *bona fide* believed that they were the property of defendant 1. The trial Court negatived the contention of the plaintiff that the ornaments belonged to the defendant 1. But the learned Judge allowed the plaintiff's claim on the ground that defendant 1 Trikamji was entrusted with the ornaments

as an agent for pledge by defendant 2 and the plaintiff being a lawful pawnee and having acted in good faith was entitled to the protection afforded by Section 178 of the Indian Contract Act, 1872, as it stood before it was amended in 1930 and passed a decree in favour of the plaintiff for recovery of the amount due by sale of the ornaments in possession of the bank and the deficit from defendants 1 and 2 personally.

The bank appealed and their Lordships on the authorities and relevant provisions of law held that as the ornaments were obtained by defendant 2 by means of an offence from the owner, the bank, the pledge by the agent however innocent he was, could not confer on the pledgee any title to the ornaments and the pledge was invalid.

Held that the plaintiff was entitled to a decree against defendants 1 and 2 only and the suit against the bank was dismissed.

The appeal was allowed with costs.

Note.—A person making a pledge of goods obtained from the real owner by means of an offence or fraud does not confer on the pledgee any title to the goods. The possession of the goods under Section 178 of the Indian Contract Act, 1872, means lawful or juridical possession from the owner and for the validity of the pledge by an agent, the goods must have been obtained from the owner by lawful means so as to make him an agent or factor for sale or pledge on behalf of the owner.

BENARES BANK LTD. ... ... *Plaintiff / Appellant*

versus

PREM & CO. AND OTHERS ... ... *Defendants / Respondents*

(Harries *J.*)

A.I.R. 1937 Allahabad 255 : 1937 Allahabad Law Journal 150.

Pledge of shares—Wife entrusting shares with husband for safe custody—Husband pledging the same with bank—Pledge invalid and not binding on wife.

THE material facts of the case were as follows :—One Mr. Prem Nath Bhargava had a current account with the Benares Bank Ltd., at Agra. This account was later on transferred to the name of Messrs. Prem & Co. Prem Nath Bhargava represented to the bank that he and his wife Mt. Sheelwanti were the proprietors of this firm and he requested the bank to allow him to overdraw to the extent of Rs. 5,000. By way of security Prem Nath Bhargava deposited with the bank a number of shares including 50 shares of the Central Bank of India Ltd. The share certificates had attached to them a transfer signed in blank by Mt. Sheelwanti.

The plaintiff bank brought the present action against Messrs. Prem & Co., Prem Nath Bhargava and against Mt. Sheelwanti for the recovery of a sum of Rs. 2,745-6-3 due on the overdraft and also to enforce their charge on the shares. The trial Court as well as the lower appellate Court decreed the plaintiff's claim against defendants 1 and 2 with costs ; but dismissed the claim as against Mt. Sheelwanti, defendant 3, with costs holding that the pledge of her shares was not valid and that she was not liable in respect of the overdraft. The plaintiff bank applied in second appeal to the High Court against that decision in so far as it concerned Mt. Sheelwanti.

Several arguments were raised on behalf of the plaintiff bank to prove that the pledge of the shares was valid. It was contended that Mt. Sheelwanti was a partner or one of the proprietors of the firm Prem & Co., that the shares were actually transferred by Mt. Sheelwanti to her husband or in any event that they were deposited by Prem Nath Bhargava with the consent of his wife and therefore that these shares could be sold to discharge the debt due by Prem Nath Bhargava. On the evidence these contentions were negatived by the

courts below and his Lordship agreed with their judgments. It was also held on the evidence of Mt. Sheelwanti that the shares had been handed over to her husband merely for safe custody and that he had no authority of any kind to pledge them, or deposit them, or deal with them in any way.

In appeal the plaintiff bank relied upon Section 237 of the Indian Contract Act, 1872, which read: "When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority." Illustration (*b*) to this section read: "*A* entrusts *B* with negotiable instruments endorsed in blank. *B* sells them to *C* in violation of the private orders from *A*. The sale is good." His Lordship stated: "It is contended that the present case falls entirely within illustration (*b*) to Section 237 of the Indian Contract Act, 1872. But in my view this section has no application unless the person handing over the negotiable instruments is a principal and the person who receives them is an agent. The section in terms speaks of the person dealing with third persons as the agent of the principal sought to be made liable. There was no relationship of principal and agent existing between the husband and Mt. Sheelwanti. A custodian of goods for safe custody is a bailee of the goods and is not an agent of the principal for the purposes of dealing with the goods. In the present case upon the facts found Prem Nath Bhargava was in no sense an agent of his wife and therefore Section 237 of the Indian Contract Act cannot assist the plaintiff bank."

Held that as there was no relationship of principal and agent between Prem Nath Bhargava and Mt. Sheelwanti the husband had no right whatsoever to deal with the shares and the bank could obtain no title to them.

The appeal was dismissed with costs.

Note.—A banker who advances money on the security of shares should satisfy himself that the person who pledges the shares has the right to do so. In this case though the share certificates had attached to them blank transfers signed by Mt. Sheelwanti the Court has held that her husband had no right in the circumstances of the case, to pledge the shares to the bank and the pledge was invalid.

KUNHUNNI ELAYA NAYAR ... ... { *Plaintiff* / *Appellant*

versus

KRISHNA PATTAR AND OTHERS ... ... { *Defendants* / *Respondents*

(Leach *C.J.* and Happell *J.*)

A.I.R. 1943 Madras 74 : 1942 (2) Madras Law Journal 120.

Pledge of share certificate—Effect of—Valid pledge of shares.

THE question raised in this appeal was whether there could be a valid pledge of shares by the deposit of the share certificate when it was not accompanied by an instrument of transfer. The material facts of the case were as follows :—One Subrahmania Pattar was indebted to Ramakrishna Pattar on a promissory note dated the 22nd March 1931. This promissory note was subsequently endorsed to the plaintiff Kunhunni Elaya Nayar. The case of the plaintiff was that when he demanded the amount due under the promissory note, Subrahmania Pattar deposited with him a share certificate in respect of shares in the Parli Tile Works, Ltd., as and by way of pledge. He therefore filed the suit for the recovery of the debt by sale of the said shares. The main contesting defendant in the case was Krishna Pattar, defendant 4, who on a date subsequent to the deposit of the share certificate with the plaintiff purchased the shares in Court auction in execution of the decree obtained by defendant 3 against the said Subrahmania Pattar. Defendant 4 denied the validity of the pledge of the plaintiff and maintained that he himself had obtained title to the shares by reason of his purchase in Court sale.

There were conflicting decisions as to the validity of the pledge in the lower Courts, and the matter came up in appeal to a Bench of the High Court under Clause 15, Letters Patent.

Their Lordships (Leach *C.J.* and Happell *J.*) after referring to various authorities on the point, held that shares were goods and pledgeable by the deposit of the share certificate. They stated : " We think that when a person delivers a share certificate to another to be held by him as security, there is under the law of India a pledge which he can enforce and unless the pledgee at the time of the deposit secures a deed of transfer which he can use in case of necessity or obtains one from his debtor at a later stage, he must have recourse to the Court when he wishes to enforce his security. There is nothing to prevent

a pledgee suing on the debt and asking the Court to sell the goods for him. If the goods happen to be shares, the Court can confer a full title on the buyer by following the procedure laid down in Order 21, Rule 80, Civil Procedure Code."

Note.—There is conflict of judicial opinion on the point as to whether the deposit of a share certificate as security unaccompanied by a transfer form constitutes a pledge of the shares. This decision lays down that a valid pledge of the shares is created in such a case and indicates the procedure for enforcing the security.

LAL BEHARI LAL ... ... *Defendant Appellant*

versus

ALLAHABAD BANK LTD., CAWNPORE AND ANOTHER *Plaintiff and Defendant Respondents*

(Niamatullah and Bennett *JJ.*)

A.I.R. 1929 Allahabad 664 : 1929 Allahabad Law Journal 1137.

Promissory note—Joint executants—Plea by one that he was a surety—Not sustainable—Executants liable.

THIS was an appeal by one of the defendants, Lal Behari Lal against the decree passed by the learned Subordinate Judge of Cawnpore awarding to the plaintiff, the Allahabad Bank Ltd. the balance due on a promissory note for Rs. 25,000 dated the 5th February 1923 executed both by the appellant and the other defendant Jagan Nath. On the 2nd August 1923 Jagan Nath paid the bank a sum of Rs. 5,000 and later on he became insolvent. The appellant also made some payments and the present action by the bank was only for the balance due in respect of the promissory note. The Subordinate Judge decreed the plaintiff's claim.

The main contention of the appellant was that his liability was only that of a surety and not of a principal debtor. It appeared that Jagan Nath had written a letter to the bank stating that Rs. 5,000 would be repaid within six months and the balance within one year. The bank decided that the period of loan should not be more than one year. It was urged on behalf of the appellant that he was not aware of the period fixed for the repayment of the loan, that he intended the loan to be payable on demand and as the bank had given time to Jagan Nath without the consent of the appellant, he was discharged from liability.

Their Lordships after referring to the facts in the case stated that though the promissory note was payable on demand it was contemplated between the parties to the knowledge of the appellant that the loan was repayable after sometime as the promissory note stated that interest was to be at 9 per cent. per annum on half-yearly rests. Section 135 of the Indian Contract Act, 1872, read that "a contract between the creditor and the principal debtor by which the creditor... promises to give time to or not to sue the principal debtor discharges

the surety unless the surety assents to such contract." Their Lordships stated: "The defence of the appellant based on Section 135 of the Indian Contract Act, contemplates a subsequent contract between the creditor and the principal debtor, whereby the time originally fixed is subsequently extended. In the present case there was no subsequent contract between the creditor and defendant 2 by which the period was extended and therefore Section 135 of the Indian Contract Act has no application. We next examine the question as to whether under the circumstances of the present case, the appellant can be held to be a surety only. . . . Under Section 4, Negotiable Instruments Act, 1881, a promissory note is an instrument in writing containing an unconditional undertaking signed by the maker to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument. The chief point about this definition is that the undertaking to pay must be unconditional. On the other hand, the definition of surety in Sections 124 and 126 of the Indian Contract Act, 1872, is that the surety is a person who undertakes a liability which is conditional on the failure of another person to discharge his liability. There is, therefore, an essential antithesis between the legal position of a surety and that of the executant of a promissory note. We consider, therefore, that as the appellant executed this promissory note, he cannot be held in law to have the position of a surety. In this connection we would also refer to Section 132 of the Indian Contract Act, and to the illustration attached to it. That illustration is similar to the present case and it is laid down that, where two persons jointly execute a promissory note, they are jointly liable on that promissory note in spite of the fact that they may have made a contract between themselves by which one of them only would be liable on default of the other."

The appeal was dismissed with costs.

Note.—The executants of a promissory note are primarily liable to the promissee in respect of the amount due under the note. It is not open to one of the executants of a promissory note to prove that as between the promissee and him, he is only a surety.

U Po Gyi and Others ... ... *Appellants*

versus

Latchumanan Chettyar and Others ... ... *Respondents*

(Full Bench. Roberts *C.J.* Leach and Dunkley *JJ.*)

1937 Rangoon Law Reporter 1 : A.I.R. 1937 Rangoon 227.

Promissory Note—Joint Payees—Payment to one of the payees—No discharge of maker as against the other payees.

The facts of the case are not material. The question raised was whether in the case of a promissory note made payable to two or more persons jointly, payment made by the maker to one of the joint payees, would be a valid discharge of the maker in respect of his liability under the note so as to bar a claim against the maker by the other joint payees.

Their Lordships after referring to the rulings of the various High Courts on the point held that where a promissory note was payable to two or more persons jointly they should be regarded as being entitled to the debt in equal shares as tenants in common with the consequence that the discharge by one payee could not be set up as a defence against the other payees suing for their share of the debt. The maker should obtain a discharge from all the joint payees.

ROWLAND ADY AND OTHERS ... ... *Defendants / Appellants*

versus

ADMINISTRATOR-GENERAL OF BURMA, ADMINISTRATOR TO THE ESTATE OF HOSAIN HAMADANEE ... ... *Plaintiff / Respondent*

(Lord Wright.)

1938 Rangoon Law Reporter 417 : A.I.R. 1938 Privy Council 198.

Promissory note payable on demand—Condition precedent to liability between immediate parties to the note—Held valid.

THE question in the appeal related to the liability of the appellants in respect of a promissory note for Rs. 13,608-6-9 which they had executed in favour of the respondent. The action was brought by the respondent on the renewal of the promissory note. Under the terms of the promissory note the amount due under the note was payable on demand. The material facts of the case were that the appellants and one Hamadanee were interested in a company called Ashe's Minerals Ltd. On Hamadanee's death the respondent was appointed administrator of the estate of the deceased and the suit promissory note represented the amount due from the appellants to the estate. It appeared from a statement signed by the appellant in the accounts, that the promissory note was executed in favour of the respondent on the condition precedent that no liability was to attach thereto until the appellants received the next distribution of the assets from Ashe's Minerals Ltd., and until certain adjustments of account in the appellants' favour were made.

The plaintiff's suit on the promissory note was decreed by the trial Court and affirmed by the High Court on appeal. The appellants preferred this appeal to the Privy Council.

Lord Wright after referring to the facts in the case stated that the plaintiff was not entitled to demand payment of the promissory note until the next distribution from Ashe's Minerals, Ltd., and as that had not yet taken place the action based on the promissory note was premature. It was contended on behalf of the respondent that the evidence of collateral agreement contradicting the terms of the promissory note was not admissible under Section 92 of the Indian Evidence Act, 1872. His Lordship stated : " We are of opinion that the accompanying or collateral agreement which was the condition of the execution of the promissory note was a written agreement and

therefore outside Section 92 of the Indian Evidence Act, 1872. But even if the collateral agreement was an oral agreement so as to come within Section 92, their Lordships are of opinion that it would fall within Proviso 3 of the section. . . . It is necessary to distinguish a collateral agreement which alters the legal effect of the instrument from an agreement that the instrument should not be an effective instrument until some condition is fulfilled, or to put it in another form, it is necessary to distinguish an agreement in defeasance of the contract from an agreement suspending the coming into force of the contract contained in the promissory note. . . . The promissory note is, by its express terms, payable on demand, that is at once. The obligation under the note attaches immediately. But the agreement not to make a demand until the specified condition is fulfilled has the intention and effect of suspending the coming into force of that obligation which is the contract contained in the promissory note. Thus the oral agreement constitutes a condition precedent to the attaching of the obligation and is within the terms of Proviso 3 of Section 92."

His Lordship held that the present case fell to be decided on documentary evidence on record and no question of admissibility of evidence under Section 92 of the Indian Evidence Act, 1872 arose and that on the evidence the appellants were entitled to succeed and that they were not liable on the promissory note.

The appeal was allowed with costs.

Note.—Sections 91 and 92 of the Indian Evidence Act, 1872, state that no oral evidence is admissible for the purpose of contradicting, varying or adding to the terms of a written contract. In the case of a promissory note payable on demand, no oral evidence is admissible to prove that the amount due under the note is payable otherwise than on demand or contradict the terms contained in the note. It is held in this case (i) that there was documentary evidence to the effect that the promissory note was not enforceable until certain conditions were fulfilled and (ii) that even if the evidence was treated as oral agreement, it fell within the Proviso 3 to Section 92 of the Indian Evidence Act, 1872, which read : " The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant, or disposition of property, may be proved."

M. V. MAHALINGA AIYAR ... ... *Defendant Appellant*

versus

UNION BANK LTD., KUMBAKONAM ... ... *Plaintiff Respondent*

(King and Kunhi Raman *JJ.*)

A.I.R. 1943 Madras 216 : 207 Indian Cases 191.

Promissory Note with Joint and Several Liability as Security for Overdraft—Liability of Executants.

THIS was a judgment in appeal in an action brought by the Union Bank Ltd., Kumbakonam, in respect of a promissory note dated the 21st August 1935 executed by two persons, one V. R. Srinivasan and V. M. Mahalinga Aiyar, the defendant 1 in the suit. The promissory note was for Rs. 8,500 and both the executants bound themselves jointly and severally to pay the bank that sum with interest. The words " security for overdraft " were found printed on the top of the promissory note. It was the case of the bank that V. R. Srinivasan had an overdraft account and it was necessary for all persons having overdraft account to have a co-obligant and that defendant 1 was a co-obligant in respect of the suit promissory note. V. R. Srinivasan fell upon evils days and on 7th February 1937, executed a trust deed putting all his property into the hands of trustees for the purpose of satisfying his creditors. As V. R. Srinivasan thus failed, the bank proceeded against defendant 1 in this suit.

The defendant 1 raised several defences to the suit and for our purpose the important defences were (1) that as the bank had assented to the trust deed executed by V. R. Srinivasan and was prepared to take whatever dividend might be available, this constituted a discharge of defendant 1 under Section 135, Indian Contract Act, 1872, which says that a contract between the creditor and the principal debtor by which the creditor makes a composition with or promises to give time to, or not to sue the principal debtor discharges the surety unless the surety assents to such contract and (2) that the promissory note ceased to be a promissory note because the words " security for overdraft " were found printed on it.

Their Lordships negatived the contentions and stated : " Now it is argued that the real contract here was well known, that no one expected defendant 1 to borrow any money from the bank and that

every one understood that his sole liability was to guarantee the borrowing by Srinivasan. That does not, however, affect the fact that the contract between defendant 1 and the bank is expressed in a promissory note, and according to the provisions of Section 132, whatever the contract may have been between defendant 1 and Srinivasan and whatever the knowledge of the bank may have been of that contract, the liability of both of them under the promissory note is quite unaffected by that fact."

Held that the defendant 1 was liable under the promissory note and the suit was decreed with costs.

Note.—This decision applies to the facts of the case the illustration to Section 132, Indian Contract Act, 1872, which reads: "*A* and *B* make a joint and several promissory note to *C*. *A* makes it in fact as surety for *B*, and *C* knows this at the time when the note is made. The fact that *A* to the knowledge of *C* made the note as surety for *B* is no answer to a suit by *C* against *A* upon the note."

MERCANTILE BANK OF INDIA LTD. ... ... { *Defendants* / *Appellants*

versus

CENTRAL BANK OF INDIA LTD. ... ... { *Plaintiffs* / *Respondents*

(Lord Wright.)

I.L.R. 1938 Madras 360 : A.I.R. 1938 Privy Council **52.**

Railway Receipt—Pledge of Railway Receipt is pledge of goods—Doctrine of estoppel—Applicability.

THE appellants and the respondents carried on the business of bankers in Madras. The appeal was against the judgment of the Appellate Court of Madras High Court which held that the appellants were liable to the respondents for conversion of their property. The question arose out of a series of frauds committed by a firm of merchants named C. K. Narayana Iyer & Sons who, until the frauds became disclosed, had enjoyed the highest standing and repute in Madras where they carried on business as buyers and exporters of groundnuts. " Their practice was to purchase the groundnuts from the up-country growers and have them despatched by railway to Madras. The Railway companies and the Madras Port Trust which had its own railway system within the Port had a working arrangement between them under which the Port Trust took over the consignment of nuts on their arrival at the port and lodged them in the first instance in their godowns. The groundnuts were covered in respect of each consignment or wagon load by a document called a railway receipt " which contained particulars of the goods and the names of the consignor and the consignee. In all the consignments in question in these proceedings the merchants were entitled to obtain delivery of the goods under the railway receipts either because they were named as the consignees or because, if they were not so named, the documents had been endorsed by the named consignee. The railway receipts contained conditions to the effect that the railway receipt must be given up at destination by the consignee, failing which the railway might refuse to deliver and that the signature of the consignee or his agent in the delivery book at destination should be evidence of complete delivery. They also provided that if the consignee did not attend to take delivery, he must endorse on the receipt a request for delivery to the person to whom he wished it to be made.

" Both the appellants and the respondents had been in the habit of making loans to the merchants on the security of the goods covered by the several railway receipts ; the practice was that the merchants should deliver to the bank the relevant railway receipts by way of pledge giving at the same time to the bank a promissory note for the amount advanced and a letter of lien. The bank would then pass the railway receipts on to their godown keeper so as to enable him to obtain possession of the goods. What was in practice then done was for the bank's godown keeper, in order to avail himself of the merchants' services, to hand the railway receipts back to the merchants but only for the specific purpose of clearing the goods from the Port Trust and storing them in the bank's godown. The character and effect of this course of business was discussed by the Board in Official Assignee of Madras *vs.* Mercantile Bank of India, 58, Madras 181. It was there held that the railway receipt was a document of title within the meaning of Section 178, Contract Act, 1872 and that a pledge of the railway receipt under that section which was in force at material times but has since been repealed, as a pledge of the goods, though by the general law a pledge of documents is not *prima facie* deemed to be a pledge of the goods. It was also held by the Board in that case that the pledgee did not lose his right of property as pledgee by parting with the custody of the railway receipts or by entrusting them to the merchants or their agents or mandatories for the special purpose of convenient dealing with the goods by collecting them from the Port Trust or putting them into Bank's godown. It was said by the Board that such a procedure was in the usual course of business and was obviously either necessary or at least convenient for the conduct of the business."

" The railway receipts concerned in this case were 85 in number. The merchants in accordance with the practice and for the purpose described above were given by the respondents the receipts and they fraudulently obtained a second advance from the appellants. It was found that in January and February 1929 the merchants followed a systematic course of fraud in their dealings with both the appellants and the respondents. After having obtained railway receipts from either the appellants or the respondents as the case might be, they repledged them with the other bank—and obtained advances on them as if they had not been already pledged. . . . There was however one difference between the two banks in that the practice of the appellants was to place their stamp on the railway receipt when they took it by way of pledge. That practice was not adopted by the respondents until about the end of the period covered by the fraudulent operations. The addition of the stamp had no effect in law and was not it seems generally adopted by the banks, but it would naturally according to

the evidence put the other bank on enquiry. The merchants however were not unequal to dealing with this complication. They followed the simple process of obtaining delivery of the goods if the railway receipts bore the bank's stamp and thereupon pledging the goods themselves with the other bank."

In due course the frauds became known and the merchants were declared insolvent. The respondents brought against the appellants an action for conversion out of which the present appeal arose. The trial Judge held that the respondents having obtained a valid pledge of the goods from the merchants by the pledge of the receipts did not lose their rights as pledgees by what the merchants then did when they purported to pledge the goods with the appellants. Lord Wright after referring to the provisions of Section 178, Indian Contract Act, 1872, as it stood before the amendment in 1930 stated that the Courts below had found that the merchants obtained the documents or goods by means of an offence or fraud within the meaning of the old Section 178, Contract Act, and that the appellants were liable. The appellants however contended that the plaintiff bank having placed C. K. N. and Sons in possession of the railway receipts without anything therein to indicate that the plaintiff bank had any interest therein or that C. K. N. and Sons were not the owners thereof, enabled C. K. N. and Sons to hold themselves out as the owners thereof and thereby to pledge the said railway receipts for value with the defendant bank, who acted in good faith and the plaintiff bank was therefore estopped from setting up its title against that of the defendant bank to the relative goods or their value. His Lordship after referring to the evidence in the case stated that it was impossible to say that the respondents made any representation to the appellants that the merchants had authority or were entitled to obtain an advance on the goods for themselves. The respondents did not commit any breach of duty owing either to the appellants or to any one else. His Lordship also referred to the leading decisions on the point which held that unless there was a breach of duty, there could be no estoppel.

For the above reasons the appeal was dismissed with costs.

Note.—The points of law decided in this case are : (i) A pledge of goods or documents of title to goods made by a person by means of an offence or fraud does not confer any title to the goods in the pledgee. (ii) The plea of estoppel depends on the existence of some duty owed by one party to the other and unless there is a breach of that duty by the party sought to be estopped, there can be no estoppel.

DULI CHAND ... ... *Defendant Appellant*

versus

JWALA PRASAD AND SONS ... ... *Plaintiffs Respondents*

(Bennet *J.*)

1934 Allahabad Law Reporter 449 : A.I.R. 1934 Allahabad 568.

Railway receipts as security for overdraft—Whether bailment of goods.

THIS was an application in revision by the defendant against a decree passed by the Small Cause Court of Agra in favour of the plaintiffs who were bankers. The plaintiffs lent money to the defendant on an overdraft on the security of railway receipts which they had received from the defendant for collection of money from the consignees. The defendant had also written a letter dated the 18th May 1931 to the plaintiffs the second paragraph of which read : " In case the R/Rs. are returned unpaid I will settle your account and will take delivery of the R/Rs. immediately I hear from you, failing which authorise you to clear and store the goods, etc." The bankers endeavoured several times to collect the money from the consignees but they refused to accept the consignment. The bank did not clear and store the goods but filed the present action against the defendant on the loan. It was contended on behalf of the defendant that there was a bailment of the goods under Section 151 of the Indian Contract Act, 1872, which read : " In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed " and that the plaintiffs had failed to take the necessary care of the goods and that defendant was entitled to set-off for loss that occurred to him.

His Lordship referred to the letter of the defendant dated the 19th May 1931 and stated that there was no duty on the part of the plaintiffs to clear and store the goods though they could have done so if they desired. It was an essential element of bailment that there must be the putting into the possession of the bailee or of his agent of the goods in question. His Lordship held : " In the present case in my opinion the goods were not put into the possession of the bank at all. All that was done was that the bank received a document of title to the goods and the bank received that document in order that the document might be handed to the consignee by the bank and the

consignee would pay a sum of money to the bank. By such a transaction the goods would never come into the possession of the bank. During this period the goods would remain in the possession of the railway company as common carriers and it would be the railway company who would be the bailee and not the bank. . . . What the bank received as security was not the goods, but the possession of a document of title to the goods. In some cases no doubt a bank does take actual possession of goods and place them in godowns under its charge and in that case the bank no doubt becomes a bailee of the goods, but where a bank merely takes possession of a document of title the responsibility of the bank under Section 151 of the Indian Contract Act, 1872 is for the safe custody of the document of title and not for the safe custody of the goods."

The revision application was dismissed.

Note.—A banker who advances money on the security of railway receipts sent to him for collection of money from the consignee does not become a bailee of the goods thereby, having the duty to take care of the goods unless he takes possession of the goods under the railway receipts.

OFFICIAL ASSIGNEE OF MADRAS ... ...*Appellant*

versus

MERCANTILE BANK OF INDIA LIMITED... ... ... *Respondent*

(Lord Wright.)

I.L.R. 58 Madras 181 : A.I.R. 1934 Privy Council 246.

Railway receipt is a document of title to goods—Effect of pledge of railway receipt—Whether pledge of goods.

THE appellant was the Official Assignee of Madras representing the estate of C. K. Narayan Ayyar & Sons, a firm of groundnut merchants who were adjudicated insolvents. The question in the appeal was whether the appellant or the respondents were entitled to the proceeds of certain consignments of groundnuts ; the primary issue being whether the respondents who had advanced money on the security of the railway receipts in respect of the groundnuts obtained a valid pledge of the goods.

The material facts of the case were as follows :—C. K. Narayan Ayyar & Sons before their insolvency, carried on a large business at Madras in groundnuts which they purchased from up-country growers who despatched them by rail to Madras. C. K. Narayan Ayyar & Sons received railway receipts in respect of the consignments of groundnuts either as consignees or endorsees of the receipts. In order to finance their purchases C. K. Narayan Ayyar & Sons borrowed from the respondents on the security of the railway receipts. Before such a loan was granted, the bank required the borrowers (i) to endorse and assign the railway receipts ; (ii) to sign and give a letter of lien and (iii) execute and deliver a promissory note. The letter of lien was a document whereby the borrowers acknowledged to have deposited with the bank the property thereunder mentioned as collateral security for the due payment of the promissory note. When the goods arrived in Madras the practice of the respondents was to hand over the railway receipts to the representatives of the insolvents who paid freight and unloaded the goods from the wagons into their godown in Port Trust premises which had on it a sign board bearing the name of the respondent bank. When C. K. Narayan Ayyar & Sons were ajudicated insolvents there were 7,993 bags of groundnuts either in transit on the railway or in the transit sheds or godowns of the Port Trust represented by 46 railway receipts all duly pledged with the respondents. The Official Assignee representing the estate of C. K. Narayan Ayyar & Sons claimed

the goods as belonging to them. In view of this claim which culminated in the present suit the Port Trust authorities refused to deliver the goods to the respondents when they presented the railway receipts and all the goods were eventually sold under orders of the Court the proceeds being held by the respondents to abide the result of the proceedings.

The Official Assignee contended that the goods were the property of the insolvents and the mere pledge of the railway receipts did not constitute a pledge of the goods. The respondents contended that the railway receipts were documents of title to the goods and a pledge of them even by the owner constituted a pledge of the goods.

The trial Court held in favour of the appellant but on appeal it was reversed and the Official Assignee preferred this appeal to the Privy Council.

His Lordship after referring to the wording of Section 178 of the Indian Contract Act, 1872, as it then stood before its amendment in 1930, and the English Law on the subject held that a railway receipt was a document of title to goods and a pledge of the receipt even by the owner constituted a pledge of the goods. His Lordship stated that on the facts of the case the letter of lien executed by the insolvents at the time of the taking of the loans from the respondents constituted a good equitable charge of the goods in their favour.

Held that the respondents were entitled to the sale proceeds of the goods and the appeal was dismissed with costs.

RAGHUNATH RITHKARAN ... ... *Plaintiffs / Appellants*

versus

IMPERIAL BANK OF INDIA ... ... *Defendants / Respondents*

(Macleod *C.J.* and Coyajee *J.*)

I.L.R. 40 Bombay 49 : A.I.R. 1926 Bombay 66.

Recovery of money paid under a mistake of fact—Notice of claim given after unreasonable delay—Held that the claimants were not entitled to recover.

THE material facts of the case were as follows :—On the 22nd December 1921 the Imperial Bank of India presented to the plaintiffs for payment four hundis for sums aggregating Rs. 7,000. They were all written by the same person, Dhanraj Suganchand. Out of the four hundis one hundi for Rs. 1,000 was, as a matter of fact, not drawn on the plaintiffs. But by the carelessness of the plaintiffs this hundi was treated as having been drawn on them and so it was honoured. The plaintiffs on the same day made entries in their hundi accounts of the four hundis which were debited to the account of Dhanraj Suganchand, but did not notice that one of the hundis was not drawn on them. No Memorandum of account was sent to Dhanraj Suganchand until November 1922. In his reply dated the 10th November, 1922, he complained that he had been debited with Rs. 1,000 in excess of the true amount. On the 9th August 1924 the plaintiffs gave notice to the Imperial Bank of India demanding refund of the money paid in respect of the hundi in question on the ground that it was paid under a mistake of fact and filed an action in the Small Cause Court to recover the money from the Imperial Bank of India. The Chief Judge of the Small Cause Court stated : " It is the essence of all negotiable instruments that in the case of any mistake whatsoever, notice without any delay has to be given to the party from whom the amount is sought to be recovered the reason being obvious, as in the meantime the position of the party may have been prejudiced. This has not been done in this case and on this ground, if not on any other ground, plaintiffs' suit must fail. ' The Chief Judge also found, on the facts of the case, that the plaintiffs had been negligent in paying the hundi without even reading the address of the drawee and dismissed the plaintiffs' suit.

The plaintiffs preferred an appeal to the High Court. But their Lordships agreed with the decision of the Chief Judge, Small Cause Court and dismissed the appeal with costs.

Note.—When money is paid under a mistake or ignorance of fact it is generally recoverable and the person to whom it has been paid must repay it. In this case their Lordships have held that the plaintiffs have by their negligence and unreasonable delay in giving the notice claiming refund have made it impossible to restore the parties to their original position and therefore disentitled to recover the amount.

SECRETARY OF STATE ... ... *Appellant*

versus

BANK OF INDIA LTD. ... ... *Respondents*

(Lord Wright.)

65 Indian Appeals 286 : A.I.R. 1938 Privy Council 191.

Renewal of Government security under forged endorsement—Effect of—Right of Government to indemnity from the person in whose favour the security was renewed.

THIS was an appeal from a judgment of the High Court in appeal at Bombay, which affirmed a judgment of Wadia, *J.*, as trial Judge. These judgments rejected the claim of the appellant to be indemnified by the respondents against a liability which he had incurred and been compelled to satisfy under the circumstances of the case which were shortly as follows :—" A lady named Gangabai was the indorsee and holder of a Government promissory note for Rs. 5,000. A broker named Acharya, having possession of the note on the lady's behalf, forged her indorsement to it in his favour and indorsed it for value to the respondents. The respondents acting in good faith applied to the Public Debt Office under the Indian Securities Act, 1920, to have a renewed promissory note payable to them issued in exchange for the note which the respondents gave up in exchange. The lady, on becoming aware of the fraud practised by Acharya and the dealing with her note on the part of the respondents and the appellant, which constituted a conversion of her property by either or both as well as Acharya, sued the appellant in conversion and recovered the appropriate damages. The appellant then brought the present action against the respondents claiming to be indemnified against the loss thus sustained by him on the principle that the Public Debt office had issued the renewed note at the request of the respondents and was accordingly entitled to be indemnified against the damage resulting from the fact that what had been done involved an injury to a third party's rights. So far as the renewed note was concerned, it was rightly accepted on both sides before their Lordships that it constituted a new contract between the Government and the respondents, which was not affected by the circumstances under which it was issued...."

The principal ground on the basis of which the lower Courts decided against the appellant was that the Indian Securities Act, 1920, contained provisions which enabled the Public Debt Office to insist on a bond of indemnity before Government promissory notes were

renewed and as they failed to do so, Government should bear the loss and the doctrine of implied indemnity under the common law did not apply to the present case as Government promissory notes were governed by a special statute.

Their Lordships of the Privy Council after referring to the authorities on the point stated as follows :—

(i) The fact that under the provisions of the Indian Securities Act, 1920, the Public Debt Office could insist upon an indemnity before renewing a Government promissory note did not mean that they should do so in every case and their omission to do so in a particular case did not deprive Government of the indemnity implied under the common law from the person at whose request a Government promissory note was renewed. In the present case as the renewed note was issued at the request of the respondent Bank in respect of a note on which the signature of the holder had been forged and Government was held liable to the true owner, the Bank was bound to indemnify Government under the common law.

(ii) The provisions of the Indian Securities Act, 1920, conferred on the Public Debt Office an added statutory right to demand an indemnity before renewing a Government promissory note whenever they thought fit to do so and the existence of such provisions in the statute did not exclude the common law right of implied indemnity.

(iii) Even if the matter were to be decided on the basis of the equities between the parties, the loss should more properly be borne by the respondent Bank who had thought fit in the course of their business which they carried on for profit to purchase the note from Mr. Acharya on the forged endorsement and had assumed the responsibility of putting forward the note as their own property whereas the officer in charge of the Public Debt Office had merely performed his statutory duty in a ministerial capacity at the request for renewal made by the respondent Bank.

For the above reasons the appeal was allowed with costs.

Note.—The points decided in the case are :—

(1) Forgery conveys no title and a person who obtains renewal of a Government promissory note to which he has no title is bound to indemnify Government as against the claim of the true owner on the original note.

(2) A renewed note constitutes a new contract with Government and a person deriving valid title to a renewed note is not affected by any forged endorsement on the original note.

In re., LLOYDS BANK LTD.

(Broomfield and Divatia *JJ.*)

I.L.R. 58 Bombay 152 : A.I.R. 1934 Bombay 74.

Search warrant against money in the hands of banker—Validity.

THIS was an application in revision against an order for search warrant issued by the Presidency Magistrate, Bombay, against the Lloyds Bank Ltd., for the production and seizure of a sum of Rs. 4,000 standing to the credit of a customer who was an accused in the proceedings before the learned Magistrate. The material facts of the case were as follows :—It appeared that the customer had obtained a sum of Rs. 6,000 by committing theft and forgery of the signature of the constituent of another bank. He opened a savings bank account in Lloyd's Bank Ltd., Bombay with a cash of Rs. 5,000 of this money. Subsequently he withdrew Rs. 1,000 leaving a balance to his credit of Rs. 4,000. On the complaint of the person whose signature the customer had forged, he was being prosecuted for the offences of theft and forgery. In these proceedings the Magistrate issued a letter of request to the Manager of the bank asking him to depute a clerk to attend the Court, and give evidence in the case on behalf of the prosecution and to produce Rs. 4,000 the balance to the credit of the accused. The bank objected that there was no property of the accused capable of production, but only a credit entry. The learned Magistrate overruled the objection of the bank and issued a search warrant authorising the police to search for " the amount of Rs. 4,000 in Lloyds Bank Ltd., and to produce the same forthwith before the Court." The police-officer went to the bank and he was paid Rs. 4,000 which was brought into Court. The bank preferred the revision application to the High Court against the order of the learned Magistrate.

The relevant provisions of law under which the Magistrate issued the order are contained in Sections 94 and 96 of the Criminal Procedure Code, 1898, which read :—

" Section 94 (i). Whenever any Court, . . . considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry or trial, or other proceeding under this code by or before such court . . . such court may issue a summons . . . to the person in whose possession or power such document or thing if believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order."

" Section 96 (i). Where any court has reason to believe that a person to whom a summons or order under Section 94 . . . has been or might be addressed will not or would not produce the document or thing as required by such summons or requisition . . . or where the court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection, it may issue a search warrant. . . . "

It was contended on behalf of the bank that it could not be said that any notes amounting to Rs. 4,000, not being the particular notes received by the alleged forger, could be necessary or desirable for the purposes of the investigation of the charges of theft, forgery and cheating. The notes produced from the bank could afford no assistance to the Court whatever. " Moreover there was no money in the possession of the bank which could be claimed as the property of the depositor, i.e., the accused, or the complainant or could be claimed as in any way connected with the case before the Court. On deposit of the money the bank became the owner of it. The relationship between the bank and its client is that of a debtor and creditor."

It was also contended on behalf of the bank that the " thing " referred to in Section 94 of the Criminal Procedure Code must be some specific thing which might be evidence of the offence to be inquired into, or at any rate, was in some way connected with the offence.

His Lordship Mr. Justice Broomfield after referring to the provisions of Section 94 of the Criminal Procedure Code which was very wide stated that courts should exercise judicial discretion in ordering production under the section. Anything which might reasonably be regarded as forming part of the evidence in the case might be ordered to be produced. His Lordship added : " But what is the position in this case ? Neither the accused nor the complainant through the accused can possibly have any right to any particular sum of money lying in Lloyd's Bank. The accused has a credit for Rs. 4,000 an actionable claim for that amount. That claim can be proved—it has been proved by the production of the accounts—but it cannot be produced in Court. What has been ordered to be produced and has been seized is a part of the assets of the bank. It has no value as evidence. It is not evidence of any fact except that the bank possesses Rs. 4,000 which is irrelevant and anyhow may be taken for granted. The order in this case can only have been made with an eye to a subsequent order disposing of the money produced. But this money is obviously not part of the proceeds of the alleged offence. It has no real connection with the subject matter at all. Whether the accused be convicted or whether he be acquitted, it cannot legally be disposed of except by ordering it to be returned to the owner, i.e., the bank

which produced it. . . . The learned Magistrate goes on to say : " The large amount deposited with Lloyds Bank by the accused and the close proximity of the dates of commission of the alleged offence and the deposit of the moneys raised a very reasonable connection between the commission of the alleged offence and the deposit of the moneys, that these are the very moneys or the proceeds thereof which were obtained from the Chartered Bank as the result of a criminal offence." Now that in my opinion is obviously not so. No doubt it may be said that there is a connection between the offence and the deposit, but there is no connection whatever between the offence and these particular moneys which were attached from the bank. . . . The primary object of criminal proceedings is the punishment of the offender. Restitution to the injured party is also no doubt a desirable thing, but the criminal Courts are not always in a position to deal with that. Rights of third parties may be involved. One point that the learned Magistrate does not appear to have considered is this. In spite of the attachment of this money the accused might still draw on his account, and it is, to say the least, doubtful whether the fact that the Court had seized the money would afford any legal justification to the bank for refusing to honour his cheque. . . . Lastly, the relief which the complainant seeks to obtain by this procedure could certainly be obtained by civil process."

Held that the order for search warrant issued by the Magistrate for the production of money standing to the credit of the accused customer in the hands of his banker was not valid. The order was set aside and the money produced was directed to be returned to the Lloyds Bank Ltd.

Note.—It is held in this case that where a customer has stolen money and deposited it with his banker, the money in the hands of the banker cannot be attached by the issue of a search warrant under Sections 94 and 96 of the Criminal Procedure Code, 1898. Money on being deposited by a customer with his banker becomes the property of the banker and there is only the relationship of creditor and debtor between them. The real owner of the money should establish his title as against the customer in a civil Court.

In the matter of Bengal Zemindary and Banking Co., Ltd.

(Lort-Williams *J.*)

I.L.R. (1937) 2 Calcutta 305 : A.I.R. 1937 Calcutta 221.

Security deposit furnished by an employee of bank—Specific agreement that the position of the bank in respect of the security was to be that of trustee—Security deposit carrying interest—Held that the bank was in a fiduciary position in respect of the security deposit.

THIS was an application by an employee of the Bengal Zemindary and Banking Co., Ltd. that he might be treated as a preferential creditor in the liquidation of the company. The facts of the case were as follows :—" The applicant was appointed cashier of the Calcutta branch of the company on a monthly salary of Rs. 60 on condition that he furnished security to the extent of Rs. 2,500 in cash. It was agreed that the Bank should pay him interest on the money at the rate of 5 per cent. per annum. It was further agreed that the money should be held by the Bank distinct and separate from other deposits and that the position of the Bank in respect of the security was to be that of a trustee and not that of debtor and creditor.

His Lordship after referring to the authorities on the point held that as there was a specific contract between the employee and the Bank that the position of the Bank was to be that of a trustee in respect of the security deposit, on the liquidation of the Bank, the employee was entitled to be treated as a preferential creditor in respect of the amount.

The application was allowed with costs.

Note.—Under sub-section (i) of Section 282B of the Indian Companies Act, 1913, as amended in 1936 all moneys or securities deposited with a company by its employees in pursuance of their contracts of service with the company shall be kept or deposited by the company in a special account to be opened by the company for the purpose in a scheduled bank as defined in the Reserve Bank of India Act, 1934, and no portion thereof shall be utilised by the company except for the purposes agreed to in the contract of service.

NEW CITIZEN BANK OF INDIA, LTD. ... ... { *Appellants* / *Respondents*

versus

ASIAN ASSURANCE COMPANY, LTD. ... ... { *Respondents* / *Petitioners*

(Stone *C.J.* and Kania *J.*)

A.I.R. 1945 Bombay 149 : (1945) 15 Company Cases 53.

Transfer of shares—Instrument not duly stamped— Held the Bank were justified in refusing to register the transfer.

THE material facts of the case were as follows : The Asian Assurance Company, Ltd. were the transferees of 300 shares of the New Citizen Bank of India Ltd. The Asian Assurance Co., Ltd. presented the share certificates together with the transfer deed to the Bank for registration of their name as a shareholder. The Bank refused to act upon the transfer deed and contended that (i) the directors of the Bank had absolute power to refuse a transfer and they did so in this case (ii) the New Citizen Bank of India Ltd. had a lien on the shares held in the name of the registered holder and therefore the Bank was not bound to transfer the shares in favour of the Asian Assurance Co., Ltd. as required and (iii) no proper instrument of transfer was presented in that the document presented was not duly stamped. The Asian Assurance Co., Ltd. filed an application under Section 38 of the Indian Companies Act, 1913, for rectification of the register of members of the Bank and for inclusion of the Asian Assurance Co., Ltd. as a shareholder of the Bank in respect of the shares in question. The trial Judge negatived the contentions of the Bank and held that the Asian Assurance Co., Ltd. were entitled to have the share register of the Bank rectified by having the 300 shares transferred to their name. The New Citizen Bank of India Ltd. preferred this appeal.

Their Lordships after referring to the points in dispute and authorities in the case stated that as the Asian Assurance Co., Ltd. had not submitted to the Bank a duly stamped transfer deed in respect of the shares in question the Court could not pass an order for rectification of the share register of the Bank for inclusion of the Assurance Company as a shareholder. The relevant provisions of Section 34 (3) of the Indian Companies Act, 1913, which read " it shall not be lawful for the company to register a transfer of shares in or debentures of the company unless the proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to

the company along with the scrip " are mandatory in terms and as in this case the Asian Assurance Co., Ltd. did not comply with the said provisions by delivering to the Bank a proper instrument of transfer duly stamped the Assurance Company were not entitled to an order for rectification in their favour. Their Lordships also negatived the contention, subsequently put forward on behalf of the Assurance Company, that the Bank had sufficient funds of the company deposited with the Bank and by reason of the fact, that in respect of the previous transfers the Bank had affixed the stamp, there were implied instructions to the Bank to do so in this case. If the Asian Assurance Co., Ltd. had any such agreement with the Bank and there was a breach of the agreement by the Bank, there might be remedy by way of damages against the Bank but the remedy did not lie in an order for rectification of the share register of the Bank.

The appeal was allowed with proportionate costs.

Note.—It is a condition that before a shareholder can claim any relief by way of rectification of register of members of a company under Section 38 of the Indian Companies Act, 1913, he should submit to the company a properly executed and duly stamped transfer deed in his favour in respect of the share.

SUBJECT INDEX