1879

DIWAN MARWAR ALI v. ANNODAPERSAD RAI.

The appellant will also be entitled to the costs of this appeal.

Agents for the appellant: Messrs. *Bailey, Shaw,* and *Gillett.*

Agent for the respondent: Mr. *T. L. Wilson.*

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

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Feby. 3.

THE BANK OF BENGAL (PLAINTIFFS) *v.* MENDES (DEFENDANT).

Theft of Negotiable Instrument—Title—Purchaser of stolen Security.

In the month of October 1878, a Government promissory note for Rs. 10,000 was sent from the *A* treasury to the Public Debt Office for enfacement. The note was duly received at the office, and its receipt was entered in the proper book. The business of the Public Debt Office is carried on by certain officers of the *B* Bank. The note was stolen from the office, and endorsed over by the thief to a person, who sold it to *C* for full value. The note bore two blank endorsements prior to that of the thief. In the same month *C* applied to the *B* Bank for a loan, which the Bank agreed to make upon the security of *C's* promissory note, and the deposit of Government notes. The form of application for the loan specified by their numbers the notes which were to be deposited. One of these was the stolen note. Before finally agreeing to the advance, the officers of the Bank in charge of the Loan Department sent the application, showing the numbers of the notes to the Public Debt Office, and received it back with a memorandum upon it to the effect that the notes were not stopped. On the 23rd October the loan was made, and the securities were given. Shortly afterwards the theft was discovered, and the note was stopped. In November the Bank, at the request of *C*, sent the note to the Public Debt Office for payment of interest, and the note was detained by the superintendent. The Bank then required *C* to repay the amount of his loan. This he refused to do unless all his securities were handed over to him. In a suit by the Bank against *C* upon his promissory note:

Held, that he was not entitled to refuse payment until the stolen note was given up to him.

Per GARTH, C. J.—The Public Debt Branch of the *B* Bank is as much a Government office as if it were carried on separately under the management of Government officers. The note was, therefore, stolen whilst virtually in the hands of the Government, and was, when detained

by the superintendent of the Public Debt Office, held by him as the agent of the Government on behalf of the true owner at the time when it was stolen, and the Bank had no right or power to take it in their private capacity out of the hands of the Public Debt Office.

When an instrument, such as the note in question, has been stolen, the person from whom it was stolen has a good title to it, not only as against the thief, but as against any person who subsequently becomes the holder, unless such person can prove that the instrument had become negotiable at the time it was stolen, and that he had obtained it *bonâ fide* for value without notice of the theft. In this case the note was stolen whilst in the custody of the Public Debt Office before *C* had any title to it. The Bank, therefore, as agents for the Government, on behalf of the true owner, from whom and on whose behalf they received it, had *primâ facie* a better title than the thief or any one claiming through him, and *C*, in order to rebut that *primâ facie* case, would have to show that he was a *bonâ fide* holder for value. In order to do so he would have to prove that the note at the time when it was stolen was a negotiable instrument, and this he had failed to do, as he had not proved that the endorsements prior to that of the thief were genuine.

THIS was a suit brought by the Bank of Bengal on a promissory note for Rs. 14,700, payable on demand, given under the following circumstances to the Bank:—

In October 1878, the defendant applied to the Bank for an advance, which the Bank agreed to make upon the security of the defendant's promissory note, and the deposit of Government securities. The defendant deposited Government paper as security to the amount required, and the Bank, after satisfying themselves through the Public Debt Office, that the notes were not stopped, made the advance at a later date. The Bank sent the Government paper deposited with them as security for the advance to the Public Debt Office for payment of interest. There one of the Government promissory notes was recognized as a stolen note, and detained. It appeared that the note in question had been originally sent from the Backergunge treasury to the Public Debt Office for enfacement, but that, whilst at the Public Debt Office, it was stolen by one Grish Chunder Banerjee, a clerk employed in the office. The Backergunge treasury not receiving the note back made enquiries, which ultimately led to the Public Debt Office detaining the note as above stated when sent to them for payment of interest. There were two blank endorsements upon the note prior to that of Grish Chunder Banerjee, but

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no evidence was given as to whether they were genuine or not. The plaintiffs, on receiving notice from the Public Debt Office of the detainer placed upon the note in question, demanded from the defendant payment of his promissory note. The defendant was willing to pay on all the securities being given up to him. The Bank refused to deliver to him the note said to have been stolen, and as the defendant refused payment except on this condition, the Bank brought the suit to recover the money due on the promissory note.

Mr. *Phillips* and Mr. *Trevelyan* for the plaintiffs.

Mr. *Jackson* and Mr. *Stokoe* for the defendant.

The judgment of the lower Court was delivered by

WILSON, J.—About the facts of this case there is no doubt. The plaintiffs, the Bank of Bengal, not only carry on the ordinary business of bankers; they also, under arrangement with the Government, have the management of the public debt of this country, and certain of their officers are specially employed in this branch of their business, known as the Public Debt Office. In October 1878, a Government note for Rs. 10,000 was transmitted from the treasury at Backergunge to the Public Debt Office for enfacement,—that is to say, for marking in the way necessary to obtain payment of interest at Backergunge. It is not shown to whom the note belonged, from whom the treasury received it, or on whose behalf they sent it for enfacement. The note was duly received at the Public Debt Office, and its receipt entered in the proper book. It then disappeared. It has never been enfaced, nor entered in the enfacement book, and when it next appeared, it bore the endorsement of Grish Chunder Banerjee, a clerk in the Public Debt Office, employed in the enfacement of notes, and who immediately after the loss left the service of the Bank. There can be no doubt, I think, that Grish Chunder stole the note. He sold it to Prosad Dass Boral, and the latter sold it to the defendant, in each case for full value.

In October 1878 the defendant applied to the Bank for an advance of Rs. 14,700, which the Bank agreed to make upon the security of the defendant's own promissory note and the deposit

of Government notes. The form of application for the loan specified by their numbers the notes which were to be deposited. One of these was the stolen note. Before finally agreeing to the advance, the officers of the Bank, in charge of the Loan Department, sent the application, showing the numbers of the notes, over to the Public Debt Office, and received it back with a written memorandum upon it to the effect that the notes were not stopped; and, thereupon, on the 23rd of October, the loan was made, and the agreed securities given. Very shortly afterwards a letter from the Backergunge treasury called the attention of the Bank in its Public Debt Department, to the fact that the note in question had not been returned enfaced. Inquiries were thereupon made, the loss was discovered, and a notice inserted in the *Gazette* that the note was stopped. Some time after this, the note was sent from the Loan Department of the Bank to the Public Debt Office for payment of interest. In the latter Department it was recognized as the stolen note, and detained. Correspondence then ensued between the Bank and the defendant. It is not, I think, necessary to examine the various letters in detail. The upshot was, that the Bank claimed repayment of the loan. The defendant refused to pay unless the Bank would give back the note they had stopped.

The Bank thereupon brought the present suit upon the defendant's promissory note. The defendant resists the claim upon the ground he has throughout insisted upon.

It was contended, in the first place, for the plaintiffs, that even if the defendant be entitled to have the note given up, still their refusal to do so was not a defence to this suit. I cannot assent to this view. I think where money is lent upon security, if the lender claims to be repaid, he must be prepared to give up the security, unless he can show sufficient excuse for not doing so. It is not necessary to enquire how such a defence could be raised, or whether it could be raised at all elsewhere, and under other systems of procedure. I do not see any difficulty under the procedure here in force.

Another point was raised, and raised on behalf of the defendant, which it is well to notice before dealing with the main questions in the case. It was said that, whatever the rights of

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the parties might otherwise be, the memorandum "not stopped," written at the Public Debt Office, on the loan application, estopped the Bank from saying that the note had at that time been stolen. I think that is not so. The enquiry was made by the Bank for its own protection, not by the defendant. The statement was addressed to the Bank, not to the defendant. Moreover, the statement was true. The necessary elements to give rise to an estoppel, are, therefore, wanting.

Have the Bank then shown any sufficient excuse for refusing to give up the note? As to this reference was made to s. 117 of the Evidence Act, which it was argued precluded the Bank from disputing the defendant's title to the note. That section says:—"Nor shall any bailee be permitted to deny that his bailor had, at the time when the bailment commenced, authority to make such bailment." Explanation (2) runs:—"If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor." It is plain, I think, that there has been nothing which can be called a delivery of the note, actual or constructive, by the Bank to any third person. It has in fact remained in their hands throughout. They do not show that they have acknowledged the title of any third person, or that they are retaining the note on behalf or in right of any third person. On the contrary, the evidence is clear, that they stopped the note in their own interest, and for their own protection.

The terms of Expl. (2), therefore, do not apply. The case (assuming for this purpose the question of title in favor of the Bank) is the simple one of a person advancing money on pledge of what turn out to be his own goods. At first sight the words of the Evidence Act seem conclusively to prevent the bailee's setting up his own right as against the bailor. But there are weighty considerations on the other side. The estoppel can, I think, be only co-extensive with the bailment. If then the pledgee were, by reason of the bailment, compelled to give up his own goods to the pledgor, the estoppel would then be at an end, and there would be nothing that I can see to preclude his at once recovering them back again on the strength of his own better title. Again, by s. 164 of the Contract Act,

the bailor warrants his title. "The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment." If then, by virtue of the bailment, the pledgee were obliged to part with his own goods, this section seems to give him the right to recover their value as damages from the pledgor.

Upon the principle of avoiding circuity of action, lest that should be recovered in one suit which could be recovered back in another, I think that a person who has inadvertently taken his own goods in pledge, may set up his own title against a claim of the pledgor.

It remains only to consider, whether the Bank have shown a better title than the defendant. As to this it must be observed, that even apart from s. 117 of the Evidence Act, the burden of proof lies upon the Bank. They are seeking to excuse the non-fulfilment of their contract.

Now the Bank have begun the history of the note at the time when it reached their own hands, and went on to the possession of Grish Chunder Banerjee. But when the note is looked at, it appears that there are two blank endorsements upon the note above that of Grish Chunder Banerjee, one of Issur Chunder Bose, the other of Sarat Chunder Mookerjee. In the absence of any evidence to the contrary, I think those endorsements must be taken to be genuine, and to have been upon the note, before it was stolen. It follows that the note, when stolen, was payable to bearer, and as the plaintiff is a holder for value, he has a title good against the Bank.

I am, therefore, of opinion that the Bank are bound to give up the note in question as well as the others deposited as security.

The decree will be, that the defendant pay the Bank the sum of Rs. 14,700 upon their delivering up to him the securities.

As the Bank are, in my opinion, wrong upon the point in controversy in the suit, they must pay costs on scale No. 2.

Against this judgment the plaintiffs appealed.

The *Advocate-General* (Mr. *Paul*) and Mr. *Phillips* for the appellants.

Mr. *Branson* and Mr. *Stokoe* for the respondent.

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The *Advocate-General*.—The defence set up is bad, for although defendant says he was ready and willing to pay, he has not done so; nor has he paid the money into Court. The Judge deals with the matter in his judgment as if it were a bailment, but it is a question of mortgage. Under the Contract Act, with one exception, the word "goods" does not include negotiable instruments, but the bailment sections, at all events, do not do so. If a note is stolen, the property does not pass to the holder unless he can show that he is a *bonâ fide* purchaser for value; the note was not detained by us, but by the Public Debt Office. [PONTIFEX, J.—The Public Debt Office had only a right to refuse to pay interest, but not to detain the note. The defendant has a right of suit against the Bank. Supposing it to have been the Agra Bank, which sent up the note for enfacement to the Public Debt Office, would the latter have had the right to withhold it from the Agra Bank?] I am now prepared, to show, that one of the signatures, blank endorsed on the note, was a forgery. In the Court below I took up a legal position, and said I am entitled to judgment; but the Judge has said "you are entitled to a contingent judgment," and it is that which I appeal against. In England an equitable plea such as is used in the defendant's written statement under the circumstances would be bad. [GARTH, C. J.—I think not, the Court of Chancery, for the sake of doing equity, would be bound to make some order on the subject.] The Courts would not interfere to prevent the suit proceeding. [GARTH, C. J.—That is one question, then there remains the question, supposing such a defence is set up, ought not you to be in a position to show that you could not give the security up? PONTIFEX, J.—If you brought your suit in England on the promissory note, you would be entitled to judgment, and the defendant would have to bring a redemption suit for the recovery of his property. Then comes the question, does not the defendant's written statement in this suit answer the purpose of a cross-suit?] No, because the circumstances are not sufficiently set out.

Mr. *Phillips*, on the same side.—I contend, (i) the plea set up is no defence to the action; (ii) if it is a defence, we have

sufficiently met it; (iii) if it is a defence, we have shown that the note was stolen, and that the endorsement was a forgery. Taking the man in possession of the note to have given full value for it, he is not a holder as he has not shown that the endorsements were good at the time it was stolen; it was not a negotiable instrument. With regard to the question whether the defence set up is a defence in strict right, a Court of Equity might say, your conduct is so inequitable that we will stay your suit. There are no cases, however, which show that where there has been a dispute as to the title, that the Court would interfere. We are acting *bonâ fide* for our own protection, and are not holders perversely, and the Court of Equity would not stop our suit.

Mr. *Branson*.—Is the Bank entitled to sue, having refused to deliver over the securities? I rely on s. 110 of the Evidence Act. We were in possession of Government paper through the Bank, and the person holding, when the suit was brought, was Mendes. Until our possession be determined, the burden of proving that the note did not belong to us, is on the Bank. They are not entitled to set up a *jus tertii* without first determining our title: *Biddel* v. *Bond* (1). After the note was endorsed in blank, its negotiability could not be restrained by a special indorsement: *Walker* v. *Macdonald* (2). [PONTIFEX, J.—The money ought to have been paid into Court as in *Schoole* v. *Sall* (3).]

The judgments of the Court were as follows:—

GARTH, C. J.—This suit is brought by the Bank of Bengal to recover from the defendant the sum of Rs. 14,700 and interest upon his promissory note.

The defendant's answer is, that the note was given to secure to the Bank the repayment of a loan, which they made to him in October 1878; that, as part of the same transaction, he deposited with the Bank, by way of further security, certain Government notes, one of which was for Rs. 10,000; and that

(1) 6 B. and S., 225, 227. (2) 2 Exch., 527.
(3) 1 Sch. and Lef., 176.

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he is not bound to pay them their money, unless they are prepared to give him back these notes.

The Bank are ready to give up all the securities, except the note for Rs. 10,000, which they say that they are unable to return for the following reason:

In one branch of their establishment they carry on the ordinary business of bankers; in another, which is called the Public Debt Office, they have the management of the public debt on behalf of the Government, both branches being under the charge of officers who are employed and paid by the Bank of Bengal.

Before the loan in question was effected, the Government note for Rs. 10,000 had been sent from the treasury at Backergunge to the Public Debt Office for "enfacement,"—that is to say, for the purpose of being marked, so that interest might be obtained upon it at the Backergunge treasury. It does not appear on whose behalf this note was sent from Backergunge, or who was the actual holder of it at that time. The learned Judge finds upon the evidence, and in this I quite agree with him, that the note was stolen whilst in the Public Debt Office, by an officer employed there, called Grish Chunder Banerjee (in fact we now learn that this man has been subsequently convicted of stealing it), but the theft had not been discovered at the time when the defendant's loan was effected; and consequently when the Bank sent at that time to enquire at the Public Debt Office, whether the note had been stopped, the answer was, that it had *not*.

The theft, however, having been afterwards discovered, a notice in the usual course was inserted in the *Calcutta Gazette*, that, in consequence of the note having been stolen, the payment of the note and of interest upon it was stopped.

On the 20th of November the note was, at the request of the defendant, sent by the Bank to the Public Debt Office, in order that interest might be obtained upon it, and it was then and there stopped by Mr. Biss, who was the officiating Superintendent in that office.

A letter of the 6th of October 1878 was then sent by the Bank to the defendant, requesting him at once to repay the

loan, and informing him that the Rs. 10,000 note had been stopped.

Upon this a correspondence ensued, the effect of which was, that the defendant refused to pay the money, until the Rs. 10,000 note was returned; and the Bank, on the other hand, insisted that they could not, and were not bound to return it, because it was stopped in the Public Debt Office.

In this state of facts the learned Judge in the Court below has decided, that the plaintiffs have shown no sufficient reason for refusing to return the note to the defendant. He considers that they are in a position to return it, and that until they do so, the defendant is not bound to repay the money. And he seems to say further, that, assuming the plaintiffs to have the right to hold the note against the defendant, if they could show that they had a better title to it than he has, they have not shown such a title.

I am unable to take this view of the plaintiffs' rights or position. I quite agree, that if it were in the plaintiffs' power, consistently with their relations to the Government, to return the note to the defendant, they must be ready *to do so before* they could ask for repayment of the loan.

But it appears to me in the first place, that it is no longer optional with the plaintiffs to return the note to the defendant. It has been stopped in that branch of their establishment where they are acting, not in their capacity of private bankers, but as the agents of the Government. The Public Debt Branch of the establishment seems to me, for the purposes of this question, to be as much a Government office as if it were carried on separately under the management of officers in direct Government employ.

That being so, this note was stolen whilst it was virtually in the hands of the Government. It was in the custody of the Government on behalf of the person to whom it belonged at the time when it was stolen from the Public Debt Office.

It then came into the possession of the plaintiffs, when the defendant's loan was effected in their private capacity of bankers, and at the defendant's own request it was sent to the Public Debt Office to obtain the interest payable upon it. It

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was then and there detained by the Superintendent of the Public Debt Office; and I consider that, as he held it as the agent of the Government on behalf of the true owner at the time when it was stolen, he was not only at liberty but bound to detain it on behalf of that person, when it thus came back into his possession.

It was contended on the part of the defendant that the Public Debt Office had no right to detain the note; and that, at the utmost, they could only have given notice to the person for whom they originally received it, to enable him to contest the defendant's title; and if he did not contest it within a certain time, they were bound to return it to the defendant. But I think, as at present advised, that this was not the position of the Public Debt Office. It might have been their position, no doubt, if they had received a notice in the nature of a stop-order from some third person, who had lost it, or from whom it had been stolen. But as they were themselves the custodians of it when it was stolen from them, I think that they were justified in detaining it, as such custodians, until the defendant could make out a better title to it than the person for whom they received it.

But however this may be, the Bank had no right or power in my opinion to take it, in their private capacity, out of the hands of the Public Debt Office.

If the Bank of Bengal and the Public Debt Office had been two separate establishments, the one under the charge of the Bank officers, and the other under the charge of the Government, I take it there would have been no doubt that the Bank, under the circumstances, would have had no power of returning it to the defendant; and it seems to me that the fact of the Public Debt Office being managed by the Bank, instead of by the Government, makes no difference in this respect.

I cannot accept the view, which appears to have been acted upon in the Court below, that the Bank are detaining the note "for their own protection and in their own interest." This is not, I think, what the Bank's witnesses say or mean; and it is not the Bank's true legal position. In my opinion the Bank, in

its private capacity, has no more right or power to take the note out of the hands of the Public Debt Office, after it has been detained there, and to hand it over to the defendant, than it would have had, if the Public Debt Office had been a separate Government establishment.

If this were not so, and if the rights of holders of Government paper were to be less secure in consequence of both establishments being under the control of the Bank officers, I think it would clearly not be right, in the interest of persons dealing with the Government, to allow the public debt to be any longer managed by the Bank of Bengal.

But there is another view of this case which has been dealt with by the Court below, and which also appears to me to afford a complete answer to the defendant's contention.

Assuming the Bank to be now bailees of the note, and to have no right to detain it as against the defendant, unless they can show that they hold it by a better title, the question then arises, whether they have not in fact proved that they hold it by a better title?

Now I quite agree with the Court below that, in determining this question, the *onus probandi* in the first instance lies upon the Bank. They are bound to show that they hold the note by a title superior to the defendant; and even if they prove such a title *primâ facie*, the defendant is at liberty to rebut it by proving a better one.

Then how stands the evidence in this respect?

The defendant does not pretend to say that he was the owner of the note when it was sent to the Public Debt Office from Backergunge, or that he derives title from the person who owned it at that time. His title, such as it is, is derived from Grish Chunder Banerjee who stole it.

Now I take it to be clear law, that when an instrument, such as the note in question, has been stolen, the person from whom it was stolen has a good title to it, not only as against the thief, but as against any person who subsequently becomes the holder, unless such person can prove that the instrument had become negotiable at the time it was stolen, and that he obtained it *bonâ fide* for value without notice of the theft

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See *Raphael* v. *The Bank of England* (1), *Miller* v. *Race* and authorities there cited.

Now here I am satisfied that the note was stolen whilst was in the custody of the Public Debt Office, and bef the defendant had any title to it. The Bank, therefore, agents for the Government, on behalf of the true owner fi whom and for whom they received it, have *primâ facie* a bet title to the note than the thief, or any one claiming it from through the thief. They have shown, therefore, *primâ facie*, it seems to me, that they hold the note by a title superior to tl of the defendant.

But then has the defendant rebutted that *primâ fa* by showing that he is a *bonâ fide* holder of the note for I think he has not.

The first thing which he was bound to prove for this pu was, that the note at the time it was stolen was a negotiab strument; that it had become so by being endorsed in Of this he has given no evidence. He has not shown that of the endorsements prior to that of Grish Chunder Ba were genuine, or that they were upon the note at all bef was stolen.

The learned Judge in the Court below has relieved t fendant from this difficulty, by presuming, in the absence of evidence to the contrary, that the apparent endorsements prior to that of Grish Chunder were genuine. But in this I cannot agree with him. I think that we have no right to make any presumptions in favor of the holder of a stolen note. On the contrary, we are bound to see, for the protection of the party who has been robbed, that every link of the holder's title is strictly proved. If Grish Chunder Banerjee was rogue enough to steal the note, he might well have been also rogue enough to forge endorsements for the purpose of giving it an appearance of negotiability.

I do not enter into the further question, which will probably have to be decided in another suit, whether, assuming the negotiability of the note, the defendant has sufficiently shown that he is a *bonâ fide* holder for value.

(1) 17 C. B., 161. (2) 1 Smith's L. C., 7th Ed., 516.

its there is nothing in our present judgment to prevent him from out ging a suit against the Government, or against the Bank of de gal as agents of the Government, or both, to establish his wc to the note as against the party who was robbed. All that Go have to decide here is, whether the plaintiffs are entitled in l suit to recover from the defendant the amount due for pa cipal and interest upon the note made by himself; and for me reasons which I have already given, I consider that they are wc entitled.

wi think, therefore, that the judgment of the lower Court mould be reversed, and that the plaintiffs' claim should be

Bud, with interest at the current rate charged by the Bank with gal, from the 23rd October 1878 to the date of this decree, afford ereafter on the aggregate amount of principal and interest

As rate of 6 per cent., with costs in both Courts on scale 2.

have NTIFEX, J.—In this case the defendant, having taken a loan can the Bank of Bengal, deposited with them as security for s three Government loan notes, one for Rs. 10,000, one for Rs. 5,000, and one for Rs. 1,000, and by way of collateral ecurity gave the Bank a promissory note.

The Bank of Bengal, in strict performance of their duty to the defendant for the purpose of drawing interest on his behalf, and at his request, presented the loan note for Rs. 10,000 at the Public Debt Office, the conduct of which, as it happens, has been confided to the Bank by the Government, and the business of which is carried on in their premises but in separate rooms, through separate officers, and by separate books.

The Public Debt Office, rightly or wrongly (as to which I decline to give any opinion in this suit), detained the note, insisting that it had been stolen from their previous custody, and they decline to give it up without suit. The Advocate-General, representing the plaintiff Bank, has formally denied on behalf of his client that the Bank *qua* Bank detains the notes.

Under these circumstances the Bank having been deprived, at least for the time, of the main portion of their security, and being under reasonable apprehension that it may ultimately prove valueless, sue the defendant on his promissory note. The defendant resists the suit on the ground that he is not bound

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to pay until his securities are returned to him, and a dec (2) has been made in the lower Court upon that footing. It se to me that, even if the Bank had by carelessness lost or misla it the security, or if it was responsible for the detention of t re loan note, the proper decree would have been for payment in as Court by the defendant of the amount due by him, as ... *Schoole* v. *Sall* (1); see also *Bentinck* v. *Willink* (2). ...er

But as I view the evidence, and having regard to the c or claimer by the Advocate-General of any detainer by the Bank as *qua* Bank—the case presents itself to my mind under the f at lowing aspect:—A mortgagor gives a mortgagee what is eith a bad security, or what can only prove to be a good securi ase after the delay and cost of legal proceedings. due?

In the first case, the mortgagor has certainly no case for ing payment; and in the latter case, I cannot see that I irpose any equity to force his mortgagee, who has no knowledge le in- manner in which the defendant became possessed of the ank. to take proceedings for his benefit which must take time a may be inoperative, and meanwhile to keep his mortgagee out of his money. At the most, what he seems to me entitled to ask is liberty, if necessary, to take proceedings in his mortgagee's name upon an undertaking to indemnify the mortgagee against costs. Either with or without that liberty I think he is bound to pay the debt.

The case has been argued as if it were a case of bailor and bailee, and s. 160 of the Contract Act has been relied on. But that section is not even included among the sections which relate to bailment of goods as security for payment of debts (see s. 172 to s. 179). In my opinion neither s. 160 of the Contract Act, nor s. 117 of the Evidence Act, affects the present suit.

I think, therefore, the decree below must be reversed with costs on scale 2, and the defendant, having such liberty as I have mentioned, must be directed to pay to the plaintiff Bank the principal and interest secured by the promissory note up to the date of our decree, with subsequent interest at the rate of six per cent. on the aggregate amount of principal, interest, and

(1) Sch. Lef., 176. (2) 2 Hare, 1.

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std up to the date of payment, upon the return by the Bank brit ne loan notes for Rs. 1,000 and Rs. 5,000 respectively.

GARTH, C. J.—With regard to what has just been said by my wa ied colleague, I quite agree that the defendant should be th Cberty to use the Bank's name, if he pleases, upon giving pre th an indemnity, and also that when he pays the sum due, the entitled to a return of the securities other than the so 0.000 note.

Appeal allowed.

Sh ttorneys for the appellants: Messrs. *Roberts, Morgan, & Co.*

ttorney for the respondent: Mr. *Hart.*

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at the *Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.*

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PONTANGES MANUFACTURING CO. (DEFENDANTS) *v.* SOURUJ-MULL AND OTHERS (PLAINTIFFS).

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it, *dor and Vendee—Unpaid Vendor—Appropriation of particular goods* r *to Original Vendee—Estoppel by assent to delivery, order—Evidence Act (I of 1872), Chap. VIII.*

A contracted to buy from *B & Co.* 180,000 gunny bags for cash on delivery. Subsequently *C* agreed with *A* to advance Rs. 15,000 against 87,500 bags. *B & Co.* gave delivery orders to *A*, although the goods remained unpaid for. *A* then endorsed certain of the delivery orders over to *C*. On these orders the agents of *B & Co.*, at the request of *A*, wrote the following words,—"the bearer of this will personally take delivery of each lot as required."

C took delivery of 50,000 bags, but *B & Co.* refused to deliver to him the remainder, on the ground that *A* had not paid them according to the terms of his contract.

Held that, although there had been no actual appropriation of any goods to *A*, yet as *B & Co.*, by their agents, had consented to the transfer, and had thereby induced *C* to advance Rs. 15,000 on the delivery orders being endorsed and made over to him, it was not now open to them to repudiate the transfer, which they had, through their agent, been the means of confirming.

Estoppels in the sense in which that term is used in English legal phraseology are matters of infinite variety, and are by no means confined to the subjects which are dealt with in Chap. VIII of the Evidence Act.

A man may be estopped not only from giving particular evidence, but from doing any act or relying upon any particular argument or contention, which the rules of equity and good conscience prevent him from using as against his opponent.