APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

1904. September 14. October 25.

SUBBA NARAYANA VATHIYAR (PLAINTIFF), PETITIONER,

v.

RAMASWAMI AYYAR (DEFENDANT), RESPONDENT *

Negotiable Instruments Act XXVI of 1881—*Promissory note—Suit by payee—Defence by maker—Payee not true owner of note—Parol evidence to support plea—Admissibility.*

In a suit to recover the amount due on a promissory note by the payee named in the note the defendant pleaded that the consideration for the note was not advanced by the plaintiff, but by a third party on whose account the note was taken; and that as the amount had already been repaid to the party entitled the suit was fraudulent and unsustainable:

Held, per SUBRAHMANIA AYYAR, J., that the plea was sustainable. Parol evidence is admissible in a suit on a promissory note to show that the plaintiff is not the true owner of the note, if such proof would enable the defendant to establish a defence, valid as against the true owner.

Per DAVIES, J., diss. that the defendant was precluded from pleading the "jus tertii" of a person who is not even a party to the record.

SUIT on a promissory note made payable to the plaintiff or his order by the defendant. The note was not negotiated and the defendant's plea was that the consideration for the note was advanced not by the plaintiff, but by a third party on whose account the note was taken in the name of the plaintiff as payee, and that the amount having been duly repaid to the party entitled to it, the present suit was fraudulent and unsustainable. The District Judge dismissed the suit. The plaintiff filed this Civil Revision Petition.

T. Subrahmania Ayyar for petitioner.

C. Venkatasubarama Ayyar for respondent.

SUBRAHMANIA AYYAR, J.—The plaintiff in this case sued the defendant for Rs. 299-1-3 being the amount of the promissory note made payable to the plaintiff or his order by the defendant. The note was not negotiated and the defendant's plea was that the consideration for the note was advanced not by the plaintiff, but by one Krishna Vathiyar on whose account the note was taken

* Civil Revision Petition No. 401 of 1903, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of L. C. Miller, Esq., District Judge of Salem, in Small Cause Suit No. 10 of 1902.

with the name of the plaintiff as payee, and that the amount having been duly repaid to the party entitled to it, the present suit was fraudulent and unsustainable. The District Judge who tried the suit received oral evidence in support of this plea and being of opinion that the evidence was trustworthy, dismissed the suit.

Of course the rule that oral evidence is inadmissible to vary a written contract is applicable to negotiable instruments as well, but it is equally settled that even as to such instruments the rule mentioned is subject to certain exceptions; as for instance—parol evidence is admissible to show fraud, illegality, want or failure of consideration, the delivery of the paper on condition and non-fulfilment thereof, the true relation of the parties as between themselves when it is necessary to a correct determination of the right or liability of either of them thereon and so forth. The real question in the present case is whether parol evidence was admissible to prove that the plaintiff was not the true owner of the note in order to enable the defendant to substantiate a good defence as against such owner.

In the argument before us our attention was not drawn to any authority clearly bearing on it. On principle it would seem to be obvious that the evidence was, in the circumstances of the case, perfectly admissible. Now it is indisputable that "if one person is the agent of another the latter, as to all matters falling within the scope of the agency, is entitled to the benefits and subject to the burdens of acts done and contracts made by his agent. The fact of the existence of an agency may not be disclosed to the other contracting party. The contract may be in writing and may appear to be executed by him in favour of the agent without disclosing his agency and may upon its face be a contract apparently enforceable by or against him only. His principal though undisclosed is nevertheless entitled to its benefit, and the general principle that a contract in writing may not be varied by parol is subject to the exception that if it be made by one of the parties as the agent of another person, the latter may treat it as his own contract and may maintain an action in his own name thereon and prove by parol evidence that he is entitled to do so though there is nothing in the face of the writing indicating that he has any right thereon." These propositions, it has sometimes been assumed both in England and in the United States, do

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not extend to negotiable instruments and that in their case only the person named therein as the payee can maintain an action thereon. In stating the rule to be to that effect in Dicey on 'Parties to Actions', the learned author refers at p. 135 to Leake on 'Contracts' and in the part of the latter work referred to *Beckham* v. *Drake*(1), *Emly* v. *Lye*(2) and *Miles Claim*(3) are cited as the authorities in support of that proposition. But Sir Frederick Pollock in his work on 'Contracts', while referring to the technical rule that those persons only can sue or be sued upon an instrument under seal who are named or described therein as parties, points out that though a similar rule has been "supposed" to exist as to negotiable instruments, "modern decisions seem to show that when an agent is in a position to accept bills so as to bind his principal, the principal is liable though the agent signs not in the principal's name but in his own, or, it would appear, in any other name. It is the same as if the principal had signed a wrong name with his own hand" (at page 100, Pollock on 'Contracts', 7th edition), and the cases of *Lindus* v. *Bradwell*(4) and *Edmunds* v. *Bushell*(5) cited by the author clearly sustain this statement. If the view of the law adopted by Sir F. Pollock and the authorities cited by him with reference to the *liability* of a principal in respect of a negotiable instrument is correct, it is impossible to doubt that such a principal is entitled to *enforce his rights* under such instruments in his own name in spite of the supposed rule.

Turning to the decisions in the United States, it will be seen from Story on 'Promissory Notes', 7th edition, note to section 67, that there also a diversity of opinion on the point exists. As the different views are well presented in certain of them, I take the liberty of referring to them as helpful to a clear understanding of the matter. The most pronounced statement in favour of the view that a principal for whose benefit an agent obtains a negotiable instrument cannot sue, will be found in the judgment of Justice Prentiss of the United States Circuit Court for Vermont in *Bank of United States* v. *Lyman*(6) and the gist of his conclusion was thus expressed by the learned Judge:—

"Upon the whole it appears to me that the true rule of law, as deducible from the adjudged cases American as well as English,

(1) 9 M. & W., 79 at p. 96.
(2) 15 East, 7.
(3) L.R., 9 Ch., ap. 635.
(4) (1848) 5 C.B., 583.
(5) (1865) L.R., 1 Q.B., 97.
(6) 20 Vt. (U.S.C.C), 666.

is that no person, although in fact a principal or partner, can sue or be sued upon a bill or negotiable note, unless he appear upon its face to be a party to it. A promissory note, according to the expression of very great Judges, partakes in some measure of the nature of a specialty, importing a consideration and creating a debt or duty by its own proper force. Being assignable, and passing by mere endorsement, it is necessary that the parties to it should appear and be known by bare inspection of the writing; for it is on the credit of the names appearing upon it that it obtains circulation. It is for these qualities, and on these considerations, that it is distinguished from written simple contracts in general and made subject to a different rule" (cited 12 Amer. Dec. 711). Positive as this expression of opinion is, it has not been generally accepted in that country as a correct statement of the law on the point, and according to Mr. Daniell, the author of a work of repute on negotiable instruments, the preponderance of authority is greatly the other way (sections 1187 and 1188); the author's own opinion is expressed thus (section 1187):—

"Upon the theory that the party entitled to sue is the one in whom the instrument shows the legal title to exist, it has been held that when the bill or note is payable to a certain person by name but describing him as agent of another person also named, as for instance, A. B. agent for C. D., the suit must be brought in the name of the agent and cannot be brought in the name of the principal, and that *a fortiori* must the suit be so brought when the instrument is simply payable to 'A B agent', no principal being named. But in either case, the better doctrine, as it seems to us, is that either the agent or the principal might sue. If suit were brought by the agent, the possession conforming to the express indication of the paper would clearly sustain the action. If suit were brought by the principal whose name is expressed in the instrument, possession by him would be evidence that he had received from his agent the instrument of which he was entitled to the beneficial interest; and there could be no good reason why it should be necessary for the principal to continue to use his agent's name when it is clear from the face of the paper that if so used, it would be as the representative of his own. And where the principal is undisclosed on the face of the paper he might also sue in his own name; but in such case mere possession of the paper

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would not be sufficient evidence that he was the principal intended and it would be necessary for him to supply that element in his title to recover by parol proof" (cited 2 Amer. Dec., p. 713).

Of the decisions adopting this view of the law, it is sufficient to cite *Baldwin* v. *Bank of Newbury*(1), the judgment in which delivered by Justice Clifford on behalf of the Supreme Court of the United States contains a lucid exposition of the reasons for such view. He said :—

"The promise as appears by the terms of the note was to 'O. C. Hale, Cashier,' and the question is whether parol evidence is admissible to show that he was the cashier of the plaintiff Bank, and that in taking the note he acted as the cashier and agent of the corporation. The contract of the parties shows that he was cashier, and that the promise was to him in that character. Banking corporations necessarily act by some agent, and it is a matter of common knowledge that such institutions usually have an officer known as their cashier. In general he is the officer who superintends the books and transactions of the Bank under the orders of the Directors. His acts within the sphere of his duty are in behalf of the Bank, and to that extent he is the agent of the corporation. Viewed in the light of these well-known facts, it is clear that evidence may be received to show that a note given to the cashier of a Bank was intended as a promise to the corporation, and that such evidence has no tendency whatever to contradict the terms of the instrument. Where a cheque was drawn by a person who was a cashier of an incorporated Bank and it appeared doubtful upon the face of the instrument whether it was an official or a private act, this Court held in the case of *Mechanics' Bank* v. *Bank of Columbia*(2), that parol evidence was admissible to show that it was an official act. The signature of the promisor in that case had nothing appended to it to show that he had acted in an official character, and yet it was unhesitatingly held that parol evidence was admissible to show the real character of the transaction. The opinion in that case was given by Mr. Justice Johnson and in disposing of the case he said that it is by no means true, as was contended in argument, that the acts of agents derive their validity from professing on the face of them to have been done in the exercise of their agency.

(1) 1 Wallace, 234. (2) 5 Wheat, 326.

Rules of form, in certain cases, have been prescribed by law, and where that is so, those rules must in general be followed, but in the diversified duties of a general agent the liability of the principal depends upon the fact that the act was done in the exercise and within the limits of the powers delegated, and those powers, says the learned Judge, are necessarily enquirable into by the Court and jury. The maker of the note in that case had signed his name without any addition to indicate his agency, which makes the case a stronger one than the one under consideration.

"The same rule as applied to ordinary simple contracts has since that time been fully adopted by this Court. Examples of this kind are to be found in the case of the *New Jersey Steam Navigation Co.* v. *Merchant's Bank*(1), and in the more recent case of *Ford* v. *Williams*(2), where the opinion was given by Mr. Justice Grier. In the latter case it is said that the contract of the agent is the contract of the principal and he may sue or be sued thereon, though not named therein. Parol proof may be admitted to show the real nature of the transaction; and it is there held that the admission of such proof does not contradict the instrument but only explains the transaction. Such evidence, says *Baron Parke in Higgins* v. *Senior*(3), does not deny that the contract binds those whom on its face it purports to bind; but shows that it also binds another, by reason that the act of the agent is the act of the principal. The argument for the defendant is, that the doctrine of those cases can have no application to the present case because the suit is founded upon a promissory note, but the distinctions taken we think cannot be sustained under the state of facts disclosed in the agreed statement. Mr. Parsons says if a bill or note is made payable to AB without any other designation there is authority for saying that an action may be maintained upon it, either by the person therein named as payee or by the Bank of which he is cashier, if the paper was actually made and received on account of the Bank, and the authorities cited by the author fully sustain the position (*Fairfield* v. *Adams*(4), *Shaw* v. *Stone*(5), *Barnaby* v. *Newcombe*(6) and *Wright* v. *Boyd*(7)). Among the cases cited by that author to show that the suit may be maintained

(1) 6 Howard, 381.
(2) 21 Howard, 289
(3) 8 M. and W., 844.
(4) 16 Pick., 381.
(5) 1 Cush., 254.
(6) 9 Cush., 46.
(7) 3 Barb., 523.

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by the Bank is that of the *Bank* v. *White*(1), which deserves to be specially considered. The note in that case was indorsed to 'R. Olcott, Esquire, cashier or order' and the suit was brought in the name of the plaintiff Bank of which the indorsee was cashier. Objection was made that the suit could not be maintained in the name of the Bank, but it appearing that the indorsement was really made for the benefit of the corporation, the Court overruled the objection and gave judgment for the plaintiff (*Bailey* v. *Onandaga Ins. Co.*(2)). Suggestion was made at the argument that the rule was different in Massachussetts, but we think not. On the contrary, the same rule is established there by repeated decisions which have been followed in other States (*Eastern R. R. Co.* v. *Benedict*(3), *Folger* v. *Chase*(4), *Hartford Bank* v. *Barry*(5), *Long* v. *Colburn*(6), *Swan* v. *Park*(7) and *Rutland, etc., R. R. Co.* v. *Cole*(8)). Doubt cannot arise in this case that the person named in the note was in fact the Cashier of the plaintiff Bank, because the fact is admitted, and it is also admitted that the plaintiff can prove that in taking the note he acted as the cashier and agent of the corporation, provided the evidence is legally admissible. Our conclusion is that the evidence is admissible and that the suit was properly brought in the name of the Bank."

From the *ratio decidendi* of the above and similar cases, it follows that it is equally competent to a defendant to adduce oral evidence that the plaintiff in the action is not the true owner if such proof would enable the defendant to establish consistently with other rules governing the case of negotiable instruments, a defence valid against the true owner. This was accordingly held in *Newton* v. *Turner*(9). There the plaintiffs were indorsees of a promissory note given by the defendants to the plaintiff's indorser Campbell. In answer to their claim for the amount of the note, the defendant denied that the plaintiffs were the owners of the note and averred that the property therein was still in Campbell and set up certain defences available as against him. In holding that the defendants were entitled to adduce evidence in support of

(1) 1 Denio, 608.
(2) 6 Hill, 476.
(3) 5 Gray, 561.
(4) 18 Pick., 63.
(5) 17 Mass., 94.
(6) 11 Mass., 97; 6 Amer. Dec., 160.
(7) 1 Fairf., 441.
(8) 24 Vt., 33.
(9) 25 Amer. Dec., 173.

their averment that the true owner was Campbell and not the indorsees, the Supreme Court of Louisiana laid down the law as follows:—

"The doctrine contended for by the plaintiffs, which has been sanctioned by several decisions of this Court, we believe correct. The maker of the note when sued has not the right to inquire whether the plaintiff, in whom the legal title to the instrument is vested, be the agent or the owner of it. Because, whether he be the one or the other is immaterial to the defendant for a judgment in favour of the party who *ex facie* has the title to the note will protect him against a demand against any other person. But this rule has its exceptions as we stated in the case of *Banks* v. *Eastin*(1) and one of these is where the defendant has substantial grounds of defence against the payee, of which he apprehends an attempt is made to deprive him by a fictitious assignment. In this case the answer sets up what would be a good defence against the payee and it charges the assignment to be false and fraudulent. It, therefore, comes clearly within the exception just stated, unless a distinction taken by the counsel for the plaintiffs should be found correct.

"It is contended that as the debts now pleaded in compensation were not acquired until after the indorsement of the note, the assignment could not have been made to deprive the defendants of any just defence to the instrument sued on; and consequently they have no right to put the interrogatories. The position assumes that the authority of the defendants to go into the enquiry as to the real ownership of the note depends on their having a defence against the payee, at the time of the transfer, and that this transfer was made to deprive them of the defence. We are not aware of any authority or sound reason on which the right can be so limited. As strong an inducement for such fictitious transfers may exist in the apprehension the debtor will acquire obligations of the plaintiffs as he will set off those already acquired. The fictitious assignment cannot deprive the defendants of rights which they would have had, had that assignment not been made; if the plaintiffs are but the agents of the payee, the case must be open to every defence against them as it would be against him."

(1) 3 N.S., 291, 392.

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Passing now to the consideration of the question with reference to the law of this country, both from the passage quoted from the judgment of Justice Prentiss and from the statement in Pollock on 'Contracts' adverted to above, it will be seen that the supposed rule that none but a person *eo nomine* a party to a negotiable instrument can sue or be sued thereon, rests on the supposition that negotiable instruments present greater analogy to deeds and indentures than to simple written contracts. This analogy can hardly lend any weight in countries to whose common law deeds and indentures are unknown. Whether the decision in *Lindus* v. *Bradwell* (1) which Sir F. Pollock apparently treats still as good law, is consistent with sections 17 and 23 of the English Bills of Exchange Act, is a point on which Mr. Chalmers seems to entertain some doubt (Chalmer's 'Bills of Exchange,' 6th edition, pp. 42 and 43). Be this as it may, it is to be observed that the Indian Negotiable Instruments Act does not contain any section similar to the two just referred to of the English statute. And commenting on section 28 of the Indian Negotiable Instruments Act Mr. Chalmers observes:—"It seems uncertain whether the English rule as to the non-liability of an undisclosed principal on a bill applies to India. Neither sections 233, 234 of the Indian Contract Act nor this Act excepts parties to negotiable instruments from the general rule that where an agent is personally liable, a person dealing with him may hold either him or his principal or both of them liable." (Chalmers' 'Negotiable Instruments Act.')

But even supposing it were otherwise as to the *liability* of an undisclosed principal according to the law of this country that cannot affect the question as to the *right* of such a principal to sue in respect of the benefit accruing to him under a negotiable instrument taken by the agent in his own name. For in the absence of any express provision to the contrary in the Negotiable Instruments Act the general rules as to principal and agent will be applicable and according to them the right of the principal to sue cannot be denied. To avoid misconceptions on points like the present, it is necessary to keep steadily in view the bearing, on transactions effected by negotiable instruments, of rules and principles other than those embodied in the Negotiable Instruments Act, and of which the following may serve as instances. The case

(1) (1848) 5 C.B., 583.

in *Muhammad Khumarali* v. *Ranga Rao*(1) is an instance where the ordinary rule as to the assignability of a chose in action was held applicable to negotiable instruments, title thereto otherwise than by endorsement being recognized. The case of the right to negotiable instruments devolving by operation of law on the assignees of a bankrupt is another example of title to such instruments accruing otherwise than in accordance with the special provisions of the law merchant to be found in the Negotiable Instruments Act. In *Krishna Ayyar* v. *Krishnasami Ayyar* (2) a person not a party to a promissory note was made liable in respect of the debt created thereby on the ground that under the personal law to which he was subject the obligation was one he was bound to discharge. The present is an instance where the question has to be decided not with reference to any rule of the Mercantile Law peculiar to negotiable instruments but with reference to the general rules of the law of evidence as to admissibility or otherwise of parol proof to vary a written instrument, negotiable or not negotiable which are unaffected by the provisions relating to rules of evidence in Chapter XIII of the Indian Negotiable Instruments Act.

The judgment of Kernan, J., in *Bommee Chetti Ramiah Chetty* v. *Visvanatha Pillay*(3) goes far to support my view.

As to the case in *Ramanuja Ayyangar* v. *Sadagopa Ayyangar*(4) it seems to lay down that one who takes a promissory note in his own name *benami* for another is the only party entitled to sue thereon and that the true owner is precluded from maintaining an action in his own name for the amount thereof. This decision is directly in conflict with the unquestionable rule that a principal disclosed or undisclosed is entitled to enforce his rights under a contract entered into on his behalf by his agent, recognised alike by the common law and by section 230 of the Indian Contract Act which is not in any way qualified or restricted by anything contained in the Negotiable Instruments Act. The true rule in such cases is, as stated in the passage from Daniell on 'Negotiable Instruments' quoted above, that either the principal or the agent may sue, the former, when suing, being subject to all equities properly arising in the case. Whilst following this rule it is now unnecessary to decide whether a suit by an

(1) I.L.R., 24 Mad., 654.
(2) I.L.R., 23 Mad., 597.
(3) 6 Mad. Jurist, 305.
(4) I.L.R, 28 Mad., 205.

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undisclosed principal, say on a negotiable promissory note made payable to his agent, may not on the analogy of the principle on which the decision of the Court of appeal in *Beck* v. *Pierce*(1) followed by the Full Bench in *Periasami Mudaliar* v. *Seetharama Chettiar*(2) be correctly held to be subject in the matter of limitation to the same rules as those which would govern the suit had it been brought by the agent himself. I will therefore dismiss the petition with costs.

DAVIES, J.—The simple case before us is whether the defendant, the maker of a promissory note which was negotiable, can set up the plea that the payee thereof (the plaintiff) is not the person entitled to recover the money on the ground that the plaintiff is only the ostensible payee and that the real payee is some third person. It seems to me that the decision of the case is governed entirely by the provisions of the Negotiable Instruments Act XXVI of 1881 and that under the provisions of that Act, the defendant is estopped from setting up that plea.

The "payee" of a promissory note is defined in section 7 of the Act to be "the person named in the instrument to whom or to whose order the money is by the instrument directed to be paid." In the promissory note now in suit, the plaintiff is undoubtedly that person. As he has not negotiated the note he is the "holder" thereof according to section 8 of the Act as he is the "person entitled in his own name to the possession thereof and to receive or recover the amount due thereon." Section 78 lays down that payment of the amount due on a promissory note must "in order to discharge the maker" be made to the holder of the instrument.

Further, the special rules of evidence in regard to negotiable instruments provide that the holder of a negotiable instrument shall be presumed to be a holder in due course [section 118, clause (*g*)] and that no maker of a promissory note "shall in a suit thereon by a holder in due course be permitted to deny the validity of the instrument as originally made." (Section 120.)

In the face of these plain provisions of the law, I am clearly of opinion that the defendant in this case is precluded from pleading the *jus tertii* of a person who is not even a party on the record. Under section 120, the defendant cannot deny that the plaintiff, the holder of the promissory note, is entitled to

(1) L.R., 23 Q.B.D., 316. (2) I.L.R., 27 Mad., 243 at pp. 246 and 253.

recover the money and under section 78 he can only be discharged from his liability to pay it by payment to the holder.

Whether a person not named as the payee or indorsee of a promissory note can sue upon it as being the beneficial owner is, in my opinion, a question that does not arise in this case and I therefore refrain from discussing it here. I should however state that I have lately decided the question in the negative in *Sadagopa Ayyangar* v. *Ramanuja Ayyangar*(1) which decision has been confirmed by a Bench of two Judges in *Ramanuja Ayyangar* v. *Sadagopa Ayyangar*(2). The matter therefore seems to be finally settled so far as this Court is concerned.

Holding that the defendant had no good defence to the action, I would reverse the decree of the District Judge, and give the plaintiff a decree for the amount sued for with costs throughout.

In the result, the petition is dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Sankaran Nair.

MAHOMED ABDUL MENNAN (ACCUSED), PETITIONER,

v.

PANDURANGA ROW (COMPLAINANT), RESPONDENT. *

1904. October 12, 13.

Criminal Procedure Code—Act V of 1898, *ss.* 203, 435, 439—*Complaint—Complaint dismissal of—Revival of Proceedings—Illegality.*

When an original complaint is dismissed under section 203 of the Code of Criminal Procedure no fresh complaint on the same facts can be entertained so long as the order of dismissal is not set aside by a competent authority.

Mir Ahwad Hossein v. *Mahomed Askari*, (I.L.R., 29 Calc., 728), differed from.

THIS was a petition to revise the order of the Stationary Sub-Magistrate of Tenali passed in the following circumstances:—

The petitioner was charged with receiving and retaining property in respect of which criminal breach of trust had been committed. After the case for the prosecution had been closed, the petitioner filed a petition stating that a charge, based upon

(1) C.R.P. No. 12 of 1904 (unreported). (2) I.L.R., 28 Mad, 205.

* Criminal Revision Case No. 232 of 1904, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of M.R.Ry. T. Sitaramiah, Stationary Sub-Magistrate of Tenali, in Calendar Case No. 126 of 1904.