APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1901. October 17, 18. November 29. December 3.

DARGAVARAPU SARRAPU (DEFENDANT NO. 3), APPELLANT,

v.

RAMPRATAPU AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

Sale of goods—Promissory note accepted by vendor for their value—Suit for the price of goods sold and delivered and not on the notes—Maintainability—Partnership—Promissory note signed by one of two partners for the price of goods purchased—Suit by vendor against both partners based on the original contract—Liability of both partners.

Plaintiffs had sold and delivered opium to defendants on different occasions, taking a promissory note at each sale for the value of the parcel sold. These promissory notes had been signed by one of two partners, they were made payable on demand to plaintiffs or their order and they had not been negotiated. Plaintiffs now sued all the partners for the amount due, framing the suit as one for the price of goods sold and delivered and not basing it on the notes. The partner who had not signed the notes contended that the suit did not lie as framed, and that it should have been brought on the notes and not for the goods sold and delivered:

Held, that plaintiffs were entitled to sue for the price of the goods sold and delivered, and that both of the partners were liable.

SUIT for the value of goods sold and delivered. Plaintiffs alleged that defendants Nos. 1 and 2 were undivided brothers, and that they had traded in opium jointly with an elder brother Veerabhadrudu, since deceased,—the latter having been managing member trading jointly with his brothers for the benefit of the family. Defendant No. 3 was alleged to have been a partner in the business. Defendants had purchased opium from plaintiffs from time to time from 15th June 1896 forward, and plaintiffs said that when a purchase was made, a promissory note was always executed by whichever of the defendants happened to be present, sums being subsequently paid on account from time to time. Defendants Nos. 1 and 2 pleaded that the suit would not lie as framed, inasmuch as promissory notes had been executed for each parcel of opium which defendants had purchased. They contended that plaintiffs should have

* Appeal No. 106 of 1900 against the decree of J. H. Munro, Acting District Judge of Godavari, in Original Suit No. 8 of 1899.

based their suit upon the notes and not upon the sales. They denied that Veerabhadrudu had been managing member of their family or that he had traded with them for the benefit of the family, and alleged that he was divided from them and had traded separately. They also denied that they had ever taken opium from plaintiffs or executed promissory notes for its value, or made payments on account of such purchases. Defendant No. 3 denied having been a partner with Veerabhadrudu at any time, and said no contract had ever been entered into between him and plaintiffs. He admitted having executed a promissory note on 15th June 1896 jointly with Veerabhadrudu, in plaintiff's favour, but said that he had done so merely to enable Veerabhadrudu to give security to plaintiffs, and that the said promissory note had been duly met by Veerabhadrudu. Plaintiffs had not, he said, delivered opium subsequently to 15th June 1896 either to him or to any one else at his request or on his responsibility. He also set up the defence that inasmuch as a promissory note had been given at each purchase, plaintiffs could only sue on the notes and not for the value of the goods sold and delivered. Of the notes, one filed as exhibit C, dated 15th June 1896, was signed by both Veerabhadrudu and third defendant in respect of the price of the first supply of opium. Other notes, filed as exhibit D series, were executed at later dates by Veerabhadrudu alone, who did not purport to sign on behalf of, or as agent for, defendant No. 3, nor was it suggested that the name Veerabhadrudu was the name of the partnership. Though these notes (exhibits D, D1, D2) bore the signature of Veerabhadrudu alone, they stood in the names of both Veerabhadrudu and defendant No. 3. It was admitted that the promissory notes had been made and given by the purchasers for the value of opium; that they were payable to the plaintiffs, the vendors, or their order; and that they had not been negotiated by plaintiffs, and had been produced by them in the suit.

The District Judge held that it had not been proved that Veerabhadrudu was divided from defendants Nos. 1 and 2; that the business had been carried on by Veerabhadrudu on behalf of the family; that defendant No. 3 had been a partner of Veerabhadrudu and was liable to plaintiffs' claim; and that the suit was maintainable as framed. He passed a decree against all the defendants for the amount claimed.

Defendant No. 3 preferred this appeal.

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Seshagiri Ayyar, for appellant, argued (*a*) that the opium had been supplied to Veerabhadrudu alone, and that appellant was not a partner with him in the purchase of opium from the plaintiff, and (*b*) that even if appellant should be held to be a partner, plaintiff could not sue for the opium sold and delivered but could only sue upon the promissory notes which had been given to him in payment of the price of the opium as and when it had been supplied. On the question whether the suit was maintainable as framed, he contended that it should have been brought on the promissory notes, even though they had not been negotiated. He referred to section 50 of the Contract Act. The notes had been given in consideration of the opium and for no other consideration. He cited *Camidge* v. *Allenby*(1) where the taking of notes as money for the price of goods was held to be a payment, and the debt was held to be discharged; also to *Peacock* v. *Russell*(2) where it was held that default in presentation of a bill taken as collateral security for a debt prevents the creditor from afterwards suing his debtor either on the bill or on the original consideration; also to Lindley on 'Partnership,' pages 180 and 187, and Leake on 'Contract,' page 768.

K. Ramachandra Aiyar, for respondents.

[On questions of fact their Lordships concurred in the findings of the District Judge that defendant No. 3 was a partner with Veerabhadrudu, and that plaintiff had sold the opium to both jointly. The judgment then proceeded as follows:]

JUDGMENT.— . . . . The second contention raised on behalf of the appellant that the plaintiff cannot sue for the balance of the price of opium sold and delivered between the 15th June 1896 and 12th September 1896, and that his cause of action, if any, is only upon the promissory notes which he obtained for the value of the opium, is clearly untenable upon the admitted facts, viz., that the promissory notes were made and given, for the value of opium, by the vendees themselves, payable on demand to the plaintiff—the vendor or order—and the notes have not been negotiated by the plaintiff and have been produced by him in the suit. When a bill or note is given for the price of goods sold and delivered, the presumption is that it is only a conditional payment

(1) 6 B. & C., 373; 30 R.R., 358. (2) 32 L.J.C.P., 266.

with a recourse to the original debt (*Goldshede* v. *Cottrell*(1), *Maillard* v. *Argyll*(2), and *Bottomley* v. *Nuttall*(3)). So far as exhibit C is concerned, it is a promissory note made and given by both Veerabhadrudu and the third defendant in respect of the price of the first supply of opium. The subsequent promissory notes D, D 1 and D 2 were signed by Veerabhadrudu alone; he did not purport to sign on behalf of, or as agent for, the third defendant also; and it is not alleged that the name Veerabhadrudu is the name of the partnership. The promissory notes are all payable on demand to plaintiff or order. Though D, D 1 and D 2 purport to be executed by both, yet as the promise to pay is only by Veerabhadrudu, who alone signed them, the third defendant cannot be sued upon these promissory notes as such. If two partners are indebted on the partnership account and one of them alone gives a promissory note for the debt and it is not alleged or shown that the creditor intended to substitute the liability of the one giving the promissory note for the joint liability of the two (*Evans* v. *Drummond*(4) and *Reed* v. *White*(5)), the partner who has not joined in the promissory note will continue liable only on the original cause of action and he cannot be sued upon the promissory note. In respect, therefore, of the prices of the supplies of opium covered by exhibits D, D1 and D2, the third defendant, as one of two partners, can be liable only on the original cause of action, *i.e.*, the price of the opium supplied on those occasions, and the promissory notes given therefor by the other partner Veerabhadrudu will in no way affect such liability; and the very fact that the promissory notes were intended to be promissory notes given by both clearly establishes that the creditor did not intend to substitute the liability of one partner for the joint liability of the two.

So far as exhibit C is concerned—and the same would hold good in respect of D, D1 and D2 also even if the third defendant were liable to be sued thereon—the third defendant as one of the two joint-makers of the promissory note is primarily liable, and it therefore lies upon him, when resisting a claim for the original debt (the price of opium, covered by exhibit C), to allege and prove

(1) 2 M. & W., 20.
(2) 6 M. & G., 40.
(3) 5 C.B.N.S., 134; 28 L.J.C.P., 110.
(4) 4 Esp., 89.
(5) 5 Esp., 122.

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that the note is still running or that the plaintiff has endorsed it over in favour of a third person and that it is not in his hands (*Price* v. *Price*(1) and *National Savings Bank Association, Ld.* v. *Tranah*(2)). It is only when the debtor is but secondarily liable as drawer or endorser that the delivery of the bill or note is sufficient *primâ facie* answer to the claim founded upon the original cause of action and that it lies upon the creditor to account for the non-payment of the bill or note in a way to revive the liability of the debtor; for, as holder of the bill or note, he is bound to take all steps necessary to obtain payment and to preserve the rights of his debtor upon it, *i.e.*, such steps as due presentment for payment, and notice of dishonour, in default of which (where it is necessary) the debtor is discharged not only from his liability upon the bill or note, but also from the original debt (*per curo Price* v. *Price*(3), *Bridges* v. *Berry*(4), *Soward* v. *Palmer*(5), and *Plimley* v. *Westley*(6)).

The case of *Camidge* v. *Allenby*(7) and *Peacock* v. *Russell*(8) cited on behalf of the appellant fall under the latter class of cases above and are entirely inapplicable to the present case. In the former case the vendor of goods, who accepted from the purchaser in payment of the price certain promissory notes payable to bearer on demand, made and issued by a bank, was guilty of laches in not circulating the same or presenting them to the banker (who became insolvent) for payment, and it was held that the vendor had thereby made the notes his own and consequently that they operated as a satisfaction of the debt. In the latter case, the creditor took a bill of exchange from his debtor as collateral security for the payment of his debt, and when the time for payment came the bill was not paid by the acceptor, but the creditor nevertheless gave no notice of dishonour and the bill consequently became worthless, and it was held that he could not afterwards sue his debtor either on the bill or on the original consideration.

The appeal therefore fails and is dismissed with costs.

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(1) 16 M. & W.P., 232, at p. 241.
(2) L.R., 2 C.P., 556.
(3) 16 M. & W., 232, at p. 241.
(4) 3 Taunt, 130.
(5) 8 Taunt, 277.
(6) 2 Bing. N.C., 249.
( ) 6 . & C., 373; 30 R.R., 358.
(8) 32 L.J. (n-s) C.P., 266.