JONMENJOY COONDOO (DEFENDANT) *v.* GEORGE ALDER WATSON (PLAINTIFF).

P. C.* 1884 *February 6, 7, March 1.*

[On appeal from the High Court at Fort William in Bengal.]

Construction of power-of-attorney—Power to "negotiate" Government notes.

An agent, with whom were deposited Government notes for safe custody, was authorized by power-of-attorney to negotiate, make sale, dispose of, assign, and transfer, or cause to be assigned, and transferred, at his discretion, all or any of them, and on the principal's behalf from time to time, at his discretion, to contract for, and purchase, Government notes, and accept the transfer thereof, into the principal's name; "and for the purposes aforesaid to sign for him in his name, and in his behalf, any and every contract, agreement, acceptance, or other document."

The agent, purporting to act as attorney, indorsed one of the notes, and borrowed money thereon for himself, and in fraud of his principal.

Held that, with regard to the general objects of the power, the agent had under it no authority to pledge, and that the lender of the money acquired no title to the note as against the principal.

The power-of-attorney was not in the same form as that in the *Bank of Bengal* v. *Macleod* (1), and the *Bank of Bengal* v. *Fagan* (2), not containing, in express words, power to indorse. Had it done so, the question would have been whether there was anything to prevent it from being a power, in the discretion of the donee of it, to indorse the note, and convert it into one payable to bearer, whenever he thought fit to do so, for any purpose.

It was not laid down in the judgment on those cases that the words used in a power-of-attorney, to express its objects, are always to be construed disjunctively, though they may be so construed; and there is no reason why a rule of construction, intended to aid in arriving at the meaning of the parties, should not be applied in construing a power-of-attorney as much as any other document.

APPEAL from a decree (3) of a Divisional Bench of the High Court (4th May 1882), reversing a decree of the same Court in its Original Civil Jurisdiction (22nd December 1881.)

The question raised on this appeal related to the authority of an agent, who, having received a power-of-attorney in reference

* *Present:* LORD BLACKBURN, SIR B. PEACOCK, SIR R. COLLIER, SIR R. COUCH and SIR A. HOBHOUSE.

(1) 5 Moo. I. A., 1.

(2) 5 Moo. I. A., 27.

(3) I. L. R., 8 Calc., 934.

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to Government notes deposited with him, had pledged one of them, having endorsed it in the name of his principal.

The respondent deposited, with other Government notes, one note for Rs. 20,000, in the custody of his agents, Messrs. Nicholls and Co. (W. Nicholls and G. A. Thompson), to whom he executed the power-of-attorney, which is set forth in their Lordships' judgment. This note (1) was afterwards pledged by Thompson in fraud of his principal, having been endorsed by Thompson, and delivered to the appellant, with whom it remained as security for a loan of Rs. 19,000 made by him to Thompson as agent, nominally, for the respondent. Nicholls and Co. became insolvent.

On the 25th February 1881, Watson, through his solicitors,

(1) The following was the form of the note :—

Promissory Note for Government Rupees 20,000 bearing interest, payable half-yearly at the rate of Four-and-a-half Rupees per centum per annum :

The Governor-General of India in Council does hereby acknowledge to have received from Surgeon-Major Geo. A. Watson, the sum of Government Rupees Twenty thousand as a loan to the Secretary of State in Council for India ; and does hereby promise, for and on behalf of the said Secretary of State in Council, on demand, three months after notice of repayment, published by order of the Governor-General of India in Council in the *Gazette of India*, to repay the said loan of Rupees Twenty thousand to the said Geo. A. Watson, his executors, administrators or assigns, or his or their order, in Calcutta, with interest from the 15th day of March 1879 (seventy-nine), to the date appointed for discharge, at the rate of Four-and-a-half per centum per annum, and such notice as aforesaid shall be equivalent to a tender of repayment at the period therein appointed for the discharge of this Note. And the Governor-General in Council hereby promises, on and after each succeeding fifteenth day of the months of September and March until the expiration of three months after notice of repayment as aforesaid (when all further interest will cease) on demand, to pay to the said Geo. A. Watson, his executors, administrators or assigns, or his or their order, in Calcutta, interest on the said sum of Government Rupees Twenty thousand for half-a-year at the rate of Four-and-a-half per centum per annum. The Governor-General in Council hereby further engages that notice of repayment as aforesaid shall not be given before the fifteenth day of June 1893, and that this Note shall not be discharged before the 15th day of September 1893.

Rs. 20,000 dated the 15th day of March 1879. No. 016588.

demanded the note, stating that it had been fraudulently pledged, without his authority. The appellant, refusing to give up the note, called upon the respondent to redeem it.

The suit which resulted was dismissed by the Court of original jurisdiction, on the ground that the property in the note had passed to the defendant by indorsement, authorized by the power-of-attorney, the defendant, also, being the *bonâ fide* holder of the note for value.

This decree, on appeal, was reversed by a Divisional Bench of the High Court (GARTH, C.J., and WHITE, J.) and the plaintiff was held entitled to recover the note. The ground of this judgment, briefly stated, was that the pledge was not authorized by the terms of the power-of-attorney. The Court was also of opinion that, the borrowing having been unauthorized by the principal and a fraud upon him, the lender could not, in equity, be held entitled to retain the note as security for a loan, as against the principal, who had neither authorized the borrowing nor received the money.

The judgments, having been printed in the report of the appeal to the High Court in I. L. R. 8 Calc. 934, are here omitted.

On this appeal,—

Mr. *J. Rigby, Q.C.*, and Mr. *E. Rolland* appeared for the appellant.

Mr. *A. Cohen, Q.C.*, and Mr. *J. T. Woodroffe* appeared for the respondent.

For the appellant it was argued that the decree of the Court of first instance was correct, because (*a*) the indorsement and transfer of the Government note was within the authority conferred by the power-of-attorney; and (*b*) because the appellant, having had no notice of fraud, and having acted *bonâ fide*, took a title to the note not affected by the conduct of the agent. If the power-of-attorney, in effect, contained the power to indorse, this appeal must succeed. On this point reference was made to the principles of construction recognized in the *Bank of Bengal* v. *Macleod* (1), and the *Bank of Bengal* v. *Fagan* (2). The words

(1) 5 Moo. I. A., 1. (2) 5 Moo. I. A., 27.

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of the power-of-attorney, on which reliance was placed, were "to negotiate" and "to dispose of"; these being words, it was contended, of signification no less comprehensive than "to indorse" and "to assign"; the latter words having been held sufficient to authorize a transfer of Government paper by the agent, in the above cases. Power to negotiate included the power to indorse, and when the latter power was established, the absence of intention on the part of the principal to transfer the security, in the way in which it had been transferred, was immaterial. Reference was made to part of the judgment of Lord Brougham on the above cases (1), *viz.*, "though the indorsee's title must depend upon the authority of the indorser, it cannot be made to depend upon the purposes for which the indorser performs his act, under the power." This disposed of the argument, whereon the judgment of the Court below, to a great extent, proceeded, *viz.*, that the fraud, on the part of the agent, prevented the appellant from making a title to the note. That argument left out of account the nature of the powers given by the written authority, and that of the property pledged. Mere negligence on the part of the holder of the note, unless it was so great as to negative his being the *bonâ fide* holder of it, could not deprive him of his title. If then the power to indorse was established, the converse of the case which occurred in *De Bouchout* v. *Goldsmid* (2) presented itself here. One of the objects of the power, which in construing it should be considered, might be that the principal, or agent, should be put in funds with a view to the purchase of other notes. And if the parties to this power had wished to include the raising money, as an act authorized, they might have used such words as had been used. The accumulated expressions should receive effect; and such an instrument should be read *fortius contra proferentem* with due regard to the language used in mercantile parlance in such matters. Storey on Agency, chap. VI, was referred to. *Wookey* v. *Pole* (3).

For the respondent it was argued: *First*, that the pledge of the Government note, an act distinct from "to negotiate," or

(1) 5 Moo. I. A., at p. 40. (2) 5 Ves. Jun. 211.
(3) 4 B. & A., 1.

"to dispose of," was not authorized by the power-of-attorney. In a decision upon the Factors' Act, 6 Geo. IV, c. 94, *Taylor* v. *Kymer* (1), it had been held that powers of sale and disposition did not include the power to pledge. The latter power was neither given in terms, nor was there any contemplation of the borrowing money as part of the means whereby the agency was to be carried on. Reference was made to Storey on Agency, paragraphs 68, 69, 74, and 77. The absence of written authority to indorse the note was what distinguished this case from that of *The Bank of Bengal* v. *Macleod* (2) and *The Bank of Bengal* v. *Fagan* (3). In those cases the agent having indorsed the note, having authority expressed in his power-of-attorney to indorse, the question was as to the effect of his indorsement, and delivery to the holder. But here the decision must rest on the agent's want of authority to indorse. In *Attwood* v. *Munnings* (4), the power-of-attorney not authorizing acceptance of a will by an agent, who nevertheless did accept "per proc," it was held that the holder could not treat it as an acceptance by the principal.

Secondly, it was argued that the Government note was not negotiable, and had not acquired the incidents of the class of instruments known to the law-merchant as negotiable. From this it resulted that the appellant did not acquire from the agent, by reason of the nature of what was pledged, a better or higher title than the agent himself had. The exception from the general rule as to transfers, other than those in market overt, where the title in the person transferring was defective, established in the case of negotiable instruments, did not apply to an instrument of the class now in question. Setting aside statutory enactment, an instrument payable to order could not be made negotiable, save by established custom. No doubt certain written promises to pay a sum to the holder, proved to be usually passed in the English market by delivery, *Goodwin* v. *Roberts* (5), had been held by the Courts to be legally dealt with as negotiable instruments. The paper of certain Governments, as regards transfer,

(1) 3 B. & Ad., 320.
(2) 5 Moo. I. A., 1.
(3) 5 Moo. I. A., 27.
(4) 7 B. & C., 278.
(5) L. R., 1 App. Cas., 476.

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see *Gorgier* v. *Mieville* (1), *Attorney-General* v. *Bouwens* (2), *Glyn* v. *Baker* (3), had been placed on the same footing with bills or notes payable to bearer or indorsed in blank or with Exchequer bills, *Wookey* v. *Pole* (4). But no customary recognition of the notes of the Government of India loan, 1879, as negotiable instruments, having been proved, it could not be held that by them was given a floating right of suit to any holder into whose hands they might come. See the judgment in *Dixon* v. *Bovill* (5). They rather fell within the principle of the decision in *Crouch* v. *The Credit Foncier* (6). Another obstacle to the notes being dealt with as a negotiable instrument (if this question should arise) would be found in the position of the Government as a State acting in sovereign rights. On this was cited *Nobinchunder Dey* v. *The Secretary of State for India* (7); *The Bank of Bengal* v. *The United Company* (8), *The Peninsular and Oriental Company* v. *The Secretary of State for India* (9). Another, in the relation of the indorser to the holder, on which reference was made to "The Indian Securities Act" III of 1881, s. 5.

Mr. *J. Rigby* replied, contending that the power-of-attorney sufficiently authorized indorsement by the agent, and that the title to the note had passed to the appellant.

On a subsequent day, 1st March, their Lordships' judgment was delivered by

SIR R. COUCH.—The respondent in this appeal, George Alder Watson, is a Surgeon-Major in Her Majesty's Indian Army, and the appellant is a merchant at Calcutta. On or about the 18th of October 1878 the respondent deposited with Messrs. Nicholls & Co. described in the plaint as a firm carrying on business as bankers and financial agents in Calcutta, promissory notes of the Government of India amounting to Rs. 37,500, for which a receipt was given to him by Nicholls & Co., headed "Safe custody receipt."

(1) 3 B. & C., 45.
(2) 4 M. & W., 171.
(3) 13 East, 509.
(4) 4 B. & A., 1.
(5) 3 Mac. H. L. Cas., 1.
(6) L. R., 8 Q. B. 374.
(7) I. L. R., 1 Calc., 11.
(8) Bignall's Reports, Supreme Court, Calcutta, 1830-31, p. 87.
(9) Bourke Pt. VII, 166, at pp. 188, 189.

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One of those notes was for Rs. 20,000. This note was payable to Watson, his executors, administrators, or assigns, or his or their order, and was subsequently exchanged by Nicholls & Co. for a similar note, apparently that the interest might be received at Calcutta instead of Peshawur, where the interest on the former note was payable; but no question arises upon this.

On the 18th of October 1878 Watson executed and gave to Nicholls & Co. a power-of-attorney, in the following terms:—

"Know all men by these presents, that I, George Alder Watson, Surgeon-Major, 19th Regiment Bengal Lancers, do make, constitute, and appoint William Nicholls and George Augustus Thompson, of Messrs. Nicholls & Co., financial agents, Calcutta, jointly and severally to be my true and lawful attorneys and attorney, for me and in my name, and on my behalf, from time to time to negotiate, make sale, dispose of, assign and transfer, or cause to be procured and assigned and transferred, at their or his discretion, all or any of the Government promissory notes, or other Government paper, bank shares, or shares in any public Company, and other stocks, funds, and securities of any description whatsoever, now or hereafter standing in my name, or belonging to me, or any part or parts thereof respectively. And also for me, and in my name, and on my behalf, from time to time, at their or his discretion, to contract for, purchase, and accept the transfer into my name or name of any Government promissory notes or other Government paper, bank shares, or shares in any public Company, and other stocks, funds, and securities of any description whatsoever, now or hereafter standing in the names of, or belonging to, any other person or persons. And also to receive all interest and dividends due, or to accrue due, on all or any of such stocks, funds, and securities. And for the purposes aforesaid, or any of them, to sign for me and in my name, and in my behalf, any and every contract or agreement, acceptance, or other document. And to sign, seal and deliver for me, and as my act and deed, any and every deed which they or he may think expedient."

This power-of-attorney, when produced in evidence, had on the back of it a seal of the Public Debt Office, Bank of Bengal, showing that it had been registered there, and the new note had on the back two like seals, with the same register number, showing that a power-of-attorney had been registered for the receipt of interest and for sale. Watson never gave to Nicholls & Co. any authority to deal with the notes except the power-of-attorney. The note when produced bore two indorsements, "G. A. Watson, by his attorney G. Aug. Thompson," "G. A. Watson, by his attorney G. Aug. Thompson." The former of these indorse-

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ments appeared to apply to a receipt for a half year's interest, which was indorsed on the note.

In December 1880 a broker named Goberdhone, employed by Nicholls & Co., applied to the gomastah of the appellant for a loan to Watson of Rs. 19,000, on the pledge of a Government Security for Rs. 20,000, and subsequently bought the note for Rs. 20,000. Being asked by the gomastah under what authority the name of Watson was signed by Thompson, he said there were two seals on the paper, and from the two seals it appeared that Mr. Thompson had authority to draw interest and sell the paper, so he had full authority. The gomastah then sent the money by one Koylash Chunder Roy to the office of Nicholls & Co., telling him to inquire whether the paper was actually signed by Thompson. What then took place is stated by Koylash Chunder Roy thus:—"In the office the broker took the paper from Ameer Singh's durwan, and gave it to Mr. Thompson. Mr. Thompson gave that paper to me, and said he wanted money on that paper. I asked him if the signature on the paper was his signature, and if he had pledged the paper with Ameer Singh Shumar Mull. He said, 'Yes.' I told him 'The paper stands in the name of Mr. Watson, why do you want money on this paper, and what authority have you to sign for Mr. Watson?' Mr. Thompson said 'I have got a power-of-attorney. 'If you wish to see the power-of-attorney I can show it to you.' He said he had a power-of-attorney from Watson to manage all his business, and he had authority to receive money on that paper. Then he executed a promissory note, in which he signed for Mr. Watson, gave the promissory note to me with the Government promissory note, and took the money from me." In the account books of the appellant the transaction was entered as a payment of Rs. 19,000, on account of pledge of Company's paper. Nicholls & Co. having failed, the respondent brought a suit in the High Court at Calcutta, praying that the appellant might be decreed to endorse and deliver up the promissory note for Rs. 20,000 to him, and to pay him all such interest as the appellant might have received thereon, and that the appellant might, if necessary, be restrained from parting with it.

The Judge before whom the case came on for disposal dismissed

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the suit with costs. On appeal to the High Court in its Appellate Jurisdiction this decision was reversed, and a decree was made in the respondent's favour, from which there is this appeal to Her Majesty in Council.

It was properly admitted by the learned counsel for the appellant in the argument before their Lordships that the appellant, having notice that the indorsement was under a power-of-attorney, was in the same position as if the power-of-attorney had been perused, and if that power did not authorize the indorsement he must fail. But counsel contended that it gave an authority to pledge the Government note, and relied upon the case of the *Bank of Bengal* v. *Macleod* (1). It is necessary to look at the facts, and argument, and judgment in this case somewhat minutely.

The action was one of detinue and debt brought by James William Macleod against the Bank of Bengal. In 1841 the plaintiff sent from England a power-of-attorney, constituting and appointing Alexander Donald Macleod (his brother), and Christopher Fagan, carrying on business in Calcutta as agents under the firm of Macleod, Fagan & Co., his attorneys, jointly and separately in their individual names, or the name of the firm, and on his behalf, "to sell, endorse, and assign, or to receive payment of the principal, according to the course of the treasury, of all or any of the securities of the East India Company for shares in their public loans," to which he was entitled. A. D. Macleod applied to the Bank of Bengal for a loan upon his own account, and offered as a security Company's paper, No. 13397, for Rs. 5,000. This note bore the following endorsement:—"Pay to G. J. Gordon, Esq., Secretary, Union Bank, or order, J. W. Macleod, by his attorney, A. D. Macleod." "Pay to A. D. Macleod, attorney to J. W. Macleod, or order, G. J. Gordon, Secretary, Union Bank. J. W. Macleod, by his attorney, A. D. Macleod." The Secretary of the Bank, upon inspection of the note and the last endorsement, requested to see the power-of-attorney, which was shown to him. The Bank then took a further endorsement on the note from A. D. Macleod in these words: "Pay to the Bank of Bengal,

(1) 5 Moo. I. A., 1; 7 Moo., P. C., 36.

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or order A. D. Macleod," and the required loan was then made by the Bank in the ordinary course of business. Two days afterwards a further loan of Rs. 17,100 was made by the Bank to A. D. Macleod, upon his depositing two other notes and endorsing them, and his statement that they were his own property.

A verdict was found for the plaintiff, and a rule, which was granted to show cause why that should not be set aside and a nonsuit entered, or why a verdict should not be entered for the defendants, or new trial granted, having been discharged, the defendants appealed to Her Majesty in Council. The difference between this case and that before their Lordships may be here noticed. The power-of-attorney contained the word "endorse." The loan was made to A. D. Macleod on his own account, and the Bank took an endorsement on the note from him on his own account, and not as attorney for J. W. Macleod. In this case, and in the similar case of *The Bank of Bengal* v. *Fagan* (the judgment being given in both cases) it was argued for the appellants that A. D. Macleod had power to endorse the notes; that "sell, endorse, and assign" might be read either distributively or conjunctively, and the power to endorse was not auxiliary only, but was the real object of the power. For the respondent it was argued that the endorsement mentioned in the power-of-attorney was for the purpose of authorizing A. D. Macleod as agent for the purposes of a sale, and a power to sell did not give a power to pledge, that the word endorse was controlled by the context, and the words must be taken collectively. The following passages from the judgment delivered by Lord Broughman show the ground of the decision:—

"Thus, the main and fundamental question is, had Macleod & Co. authority to endorse under the power-of-attorney, which is in the same words in both cases. It is to 'sell, endorse, and assign, or to receive payment of the principal according to the course of the treasury, and to receive the consideration money and give a receipt for the same.' It is contended for the respondent that the words 'sell, endorse, and assign' used conjunctively cannot be used in the disjunctive, but that the only power given to endorse is one ancillary to sale, and that we are to read it as if it were power to sell, and for the purposes of selling to endorse. This construction is endeavoured to be supported by referring to the variation

of 'or' for 'and' immediately following 'or to receive the money at the treasury.' We are unable to go along with this view of the instrument. The variation is clearly owing to a new subject-matter being introduced. . . . . Shall we then say that a power to 'sell, endorse, and assign' does not mean a power to sell, a power to endorse and a power to assign, and would not such a negative or exclusion be doing violence to the plain sense of the words? If we adopt this exclusive construction we must hold that these words not only give no powers to endorse without selling, but also that they give a power to sell without endorsing, and we must suppose an agent acting under such a power to be entirely crippled. . . . . It appears to us that the rational and the natural construction is the one which represents a power to 'sell, endorse, and assign' as a power to sell, a power to endorse, and a power to assign—so that these acts may be done apart or together, and that the powers are conveyed conjointly and severally."

It seems to have been thought by two of the learned Judges of the High Court that it was laid down in this case, as a rule of construction, that words used in a power-of-attorney to express the objects of the power are always to be construed disjunctively. Their Lordships cannot agree in this view of the case. The words there may have been used disjunctively, but they do not see any reason why the rule laid down by Lord Bacon, *Copulatio verborum indicat acceptationem in eodem sensu,* which is intended to aid in arriving at the meaning of the parties, should not be used in construing a power-of-attorney as much as any other instrument.

The power-of-attorney in the present case is not in the same form as that in *The Bank of Bengal* v. *Macleod.* It does not contain in express words a power to "endorse." If it had, the question would have been whether there was anything to prevent it from being a power in the discretion of the donee of it to endorse the note, and so convert it into one payable to bearer whenever he thought fit to do so for any purpose. But in this power the endorsement is not authorized in express words, but is authorized if it comes within the meaning of the words, "And for the purposes aforesaid to sign for me, and in my name and on my behalf, any and every contract or agreement, acceptance, or other document." The "purposes aforesaid" are these,—

"From time to time to negotiate, make sale, dispose of, assign and transfer, or cause to be procured and assigned and transferred [there seems to be mistake in words here, but it does not make any difference in the meaning], at their or his discretion, all or any of the Government

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promissory notes or other Government paper, &c., and also for me, and in my name and on my behalf, from time to time, at their or his discretion, to contract for, purchase, and accept the transfer into my name of any Government promissory notes or other Government paper, &c."

The appellant's counsel relied mainly upon the word negotiate, and also upon "dispose of." In order to see what was intended by these words, they must be looked at in connection with the context, as well as with the general object of the power. This appears to their Lordships to have been to sell or purchase for Watson Government promissory notes and other securities, not to borrow or lend money upon them. If the word "negotiate" had stood alone, its meaning might have been doubtful, though, when applied to a bill of exchange or ordinary promissory note, it would probably be generally understood to mean to sell or discount, and not to pledge it. Here it does not stand alone, and, looking at the words with which it is coupled, their Lordships are of opinion that it cannot have the effect which the appellant gives to it, and, for the same reason, "dispose of" cannot have that effect.

It did not appear when the endorsement by Thompson as Watson's attorney was made, but Nicholls & Co. did not deal with the note as having themselves become the holders of it by endorsement, as was the case in *The Bank of Bengal* v. *Macleod*. They borrowed the money on behalf of Watson, giving a promissory note for it signed by Thompson as his attorney, and pledged the Government promissory note as Watson's. As they had not authority to do this, the authority to sell not giving an authority to pledge, the appellant acquired no title to the note by its delivery to him, and the High Court has properly made a decree in the plaintiff's favour.

Their Lordships will humbly advise Her Majesty to affirm that decree and to dismiss this appeal, and the costs of it will be paid by the appellant.

Solicitors for the appellant. Messrs. *Watkins & Lattey*.

Solicitors for the respondent: Messrs. *Vallance & Vallance*.