convincingly in the following passage by ANANTAKRISHNA AYYAR J.

"The circumstance that the mortgagee filed a suit against a wrong person does not affect the rights of the real owners of the equity of redemption. If it does not affect them at all, one fails to see how they could be heard to say that by virtue of the prior suit, which admittedly does not affect them, a (second) suit against them is not maintainable." (Page 326.)

For these reasons I agree with my Lord that this appeal should be dismissed with costs of the second respondent.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Burn.

MALLAVARAPU NARASAMMA (PLAINTIFF), APPELLANT,

v.

BOGGAVARAPU BULLI VEERRAJU (DEFENDANT), RESPONDENT.*

1934, October 18.

Negotiable Instruments Act (XXVI of 1881), sec. 118—Expectant heir—Promissory note by—Suit to enforce—Amount advanced under note—Proof of—Onus on plaintiff—Presumption as to quantum *of consideration, if arises under sec.* 118 *of Negotiable Instruments Act or sec.* 114 *of Indian Evidence Act (I of* 1872*)—Effect of explanation to ill. (c) of sec.* 114 *of Evidence Act—Onus of Proof—Question as to—Materiality of—Evidence let in by both sides and finding based on whole evidence.*

In suits instituted by different plaintiffs against the same defendant for sums of money claimed to be due under promissory notes executed by the defendant, it appeared from the defence evidence that the defendant was a junior member of a rich family but not in possession or management of its properties, that he had got into bad ways and had begun to borrow

* Appeals Nos. 250 and 321 of 1930 and 16 and 17 of 1931.

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recklessly, under the influence of bad companions, when he was aged only nineteen years and a few months, that the suit notes had been executed by him during that period and that the plaintiffs, to whom the elder members of the defendant's family were well known, had dealt with him without making any enquiries of those elder members and with knowledge of the kind of life that the defendant was leading and the purposes for which he required moneys.

Held that though, under section 118 of the Negotiable Instruments Act, there was a presumption that the suit notes were for consideration, there was no presumption as to the quantum of consideration for the notes and that, in the circumstances of the case, the onus was on the plaintiffs to prove the amounts actually advanced by them under the suit notes.

The principle underlying the decisions in *Moti Gulabchand* v. *Mahomed Mehdi Tharia Topan*, (1895) I.L.R. 20 Bom. 367, *Sundarammal* alias *Sowbhagiammal* v. *Subramania Chettiar*, (1914) 29 M.L.J. 236, and *Sami Sah* v. *Parthasarathy Chetty*, (1915) 31 I.C. 739, approved.

Scope and applicability of section 118 of the Negotiable Instruments Act and section 114, illustration (*c*), of the Indian Evidence Act, explained.

Effect of the explanation to illustration (*c*) of section 114 of the Evidence Act stated.

The question of onus of proof is of subordinate importance in appeal, when both sides have let in evidence and the appellate Court has to come to a conclusion on the whole evidence.

APPEALS against the decrees of the Court of the Subordinate Judge of Cocanada in Original Suits Nos. 42, 49 and 51 of 1927 and 9 of 1928 respectively.

B. Satyanarayana, *K. Rajagopala Ayyar*, *K. Bhimasankaran*, *K. Rajah Ayyar* and *V. Satyanarayana* for appellant.

S. Srinivasa Ayyangar for *C. Rama Row* for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—These appeals arise out of suits instituted by different plaintiffs against the same defendant, for varying sums of money claimed to be due under promissory notes executed by the defendant. As the defence was to a certain extent common to all the suits, they were tried together and the whole evidence for the defendant was recorded in Original Suit No. 42 of 1927 (Appeal Suit No. 250 of 1930). In two of the suits, the defendant admitted receipt of small sums and to that extent those suits were decreed ; the other two suits were dismissed.

The defendant is the youngest son of a rich Vysia family of Cocanada. Born in July 1907, he was married in 1921 into a rich family of Akkiveedu and his wife joined him early in 1925. Nevertheless, in the course of 1926, he seems to have taken to bad ways, with the help and under the evil influence of two of his father's dismissed clerks—Bhaskara Row and Majeti Venkatramana —and one Immidi Sooryam, the husband of a deceased sister. The transactions which led to these suits took place between September 1926 and May 1927, and, as the lower Court points out, the defendant must, according to the tenor of these promissory notes, have borrowed more than Rupees Twenty-three thousand in the course of about eight months. The father and the brothers of the defendant had been doing their best to wean him from his bad ways and the defence to the present suits is admittedly conducted by them.

The issues as originally framed threw the burden of proof on the defendant, as his plea

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amounted to a denial of consideration; but, at a later stage, an additional issue was framed in the following terms:

"Whether there are circumstances in the case which in law would shift the burden of proving consideration for the pro-notes, on the plaintiffs."

There was some further discussion before the trial commenced, and the learned Judge ruled that

"the defendant should adduce evidence on the whole case and then the plaintiff will be allowed to adduce his evidence. The defendant will not be allowed to adduce further evidence after the plaintiff closes his case . . . (but he may) ask the Court that from the circumstances that may be proved in the case, the plaintiffs should bear the burden of establishing the consideration for the suit notes."

An issue of "fraud and undue influence" was also raised but, at an early stage of the case, Counsel for the defendant seems to have intimated that he relied on fraud and undue influence only as reasons for executing the suit promissory notes and that his main plea was that the defendant received little or no consideration for the promissory notes.

A mass of evidence, oral and documentary, has been produced, on behalf of the defendant, to prove the course of life led by him during these eight months and the attempts of the elder members of the family to get at him and save him. Though some remarks have been made before us against the genuineness or reliability of portions of this documentary evidence, nothing seems to have been said against them in the Court below and such portions of the correspondence as consist of post cards are absolutely above criticism. It does not seem to us necessary to examine this part of the evidence in detail, as we find no

difficulty in accepting the summary of its result, as set out in paragraph twenty-one of the lower Court's judgment in Original Suit No. 42 of 1927. We therefore proceed to deal with the case on the footing that the defendant, who was a junior member of a rich family but not in possession or management of its properties, got into bad ways and began to borrow recklessly, under the influence of bad companions, when he was aged only nineteen years and a few months. During portions of this period of eight months, he was away from his house and people, on at least three occasions—(i) between 16th February 1927 and 7th March 1927, at Madras, Tirupati, etc., (ii) between 7th March 1927 and 22nd March 1927 at Calcutta, Bombay, Hyderabad and (iii) between 30th March 1927 and 30th April 1927 at Calcutta, Benares, etc. During the first two of these trips, the members of the defendant's family were unable, in spite of their best efforts, to get at him, but on the third trip they managed to keep one of their men with him and were gradually able to re-assert their influence over him. There can be little doubt that it was under the advice of his father and brothers that the defendant (while still in Calcutta) declined to receive the notice of demand sent on 30th March 1927 by the Vakil for the plaintiff in Original Suit No. 42. That suit was filed on 30th April 1927 (i.e., immediately after the defendant's return to Cocanada). The defendant's father, now that he regained control over his son, got notices issued on 8th May 1927 to the plaintiffs in the other three suits, repudiating defendant's liability to them on grounds similar to those raised in the present written statement.

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As regards the alleged associates of the defendant, we see no reason to differ from the conclusion of the learned Subordinate Judge that they were bad people, that Bhaskara Row and Majeti Venkatramana were possessed of no property, that Imidi Sooryam was addicted to drink and had lost all his property by leading an extravagant and immoral life and that the defendant was under their influence and control during 1926 and up to 30th March 1927.

[His Lordship referred to the case of the appellants as to the necessity for the loans taken by the defendant and to the evidence bearing on the same and proceeded :—]

But he (the trial Judge) held that all the transactions had been entered into under very suspicious circumstances and without making any enquiries of the elder members of the defendant's family, though they were well known to the lenders, that they could not have been *bona fide* loans as the lenders were or must have been aware of the kind of life that defendant was leading and the purposes for which he required moneys, that in the circumstances they were not likely to have advanced the full amounts shown in the various promissory notes, that the facts proved by the defendant sufficed to throw on the plaintiffs the burden of proving the amounts actually advanced by them and this onus they had not discharged by the production of reliable evidence. On the question of burden of proof, he relied on *Moti Gulabchand* v. *Mahomed Mehdi Tharia Topan*(1), *Sundarammal* alias *Sowbhagiammal* v. *Subramania Chettiar*(2) and *Sami Sah*

(1) (1895) I.L.R. 20 Bom. 367. (2) (1914) 29 M.L.J. 236.

v. *Parthasarathy Chetty*(1), which undoubtedly support his view. The correctness of these decisions has been questioned before us as also their applicability to the circumstances proved in the present suits. It has also been contended that the lenders were not dealing with a "limited owner" or pardanashin lady and were under no obligation to satisfy themselves as to the propriety of the purposes for which the loans were taken or to communicate with the defendant's father or his brothers.

The last argument may be briefly disposed of. The learned Judge does not rely on these considerations as part of a precaution which the lenders were bound under law to take but only as throwing light on the circumstances under which the defendant incurred these debts and the probability or otherwise of the plaintiffs having lent such large sums to one circumstanced like the defendant in the manner in which they say they have done. We do not think the learned Judge has fallen into any error in taking such considerations into account, though opinions may differ as to the weight to be given to them.

On the question of burden of proof, reliance has been mainly placed by the appellants on section 118 of the Negotiable Instruments Act and it has been argued that the decision in *Moti Gulabchand* v. *Mahomed Mehdi Tharia Topan*(2), which has been followed in *Sundarammal* alias *Sowbhagiammal* v. *Subramania Chettiar*(3) and *Sami Sah* v. *Parthasarathy Chetty*(1), practically ignores the marked difference in language between

(1) (1915) 31 I.C. 739.
(2) (1895) I.L.R. 20 Bom. 367. (3) (1914) 29 M.L.J. 236.

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that section and section 114 of the Indian Evidence Act and illustration (*c*) thereto. Whatever comment may be made upon the way in which the learned Judges have expressed themselves in these cases, the principle underlying these decisions seems to us unexceptionable ; and in dealing with rebuttable presumptions, it is common knowledge that the Court is often obliged to rely more upon circumstances than upon direct or definite evidence negativing the fact presumed [cf. *Singar Kunwar* v. *Basdeo*(1) and *T. M. Ramaswamy Iyer* v. *Ganapathia Pillai*(2) ; see also *Tatam* v. *Haslar*(3).].

The appellant's arguments seem to us to read a great deal into section 118 of the Negotiable Instruments Act ; that section must be understood in the light of the reason of the rule and the history of the law as to the presumption in favour of negotiable instruments. From the definitions and from the illustrations in the Act, it will be seen that it is not required or even expected that the "consideration" should be stated in the instrument itself. So, no presumption can ordinarily arise in such cases of "recitals" in the document. At one time, it was a matter of doubt in England whether a statement, in the bill, of the transaction which gave rise to the bill, might not detract from its character as an "unconditional" order or promise to pay and clause 3 of section 3 of the Bills of Exchange Act was put in to remove this apprehension. Having regard to mercantile usage and the interests of business, it had been developed as a rule of practice and pleading in

(1) A.I.R. 1930 All. 568. (2) (1913) 24 I.C. 709.
(3) (1889) 23 Q.B.D. 345.

the English law that in the case of bills and notes there need be no reference either in the document itself or in the plaintiff's pleading to "value received" or to payment of consideration; see *Hatch* v *Trayes*(1) and *Foster* v. *Dawber*(2). In later cases, this idea came to be embodied in the rule that a bill or note *prima facie* imports consideration or value [*Southall* v. *Rigg*(3) and *Jones* v. *Gordon*(4)] and the same is reproduced in section 30 of the Bills of Exchange Act in the words:

> "Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value."

There is no reason to think that section 118 of the Indian Act lays down anything more than this. Neither the earlier case-law nor the language of the section justifies any presumption being made as to the *quantum* of consideration. The English Act merely states that any consideration sufficient to support a simple contract may constitute "valuable consideration" for a bill or note (see section 27). Though there is no corresponding provision in the Indian Act, the principle must be the same here [see *Samuel* v. *Ananthanatha*(5)]. In clause (*a*) of section 118, the same language covers cases both of "making or drawing" and of "negotiation" and, in the latter case, the presumption can only be of a transfer *for value* and not in favour of any *particular amount* as "consideration" for the transfer. It may also be noticed in passing that in illustration (*c*) to section 114 of the Evidence Act the presumption is only stated to be

(1) (1840) 11 AD. & E. 702; 113 E.R. 581.
(2) (1851) 6 Ex. 839, 853; 155 E.R. 785, 791.
(3) (1851) 11 C.B. 481, 492; 138 E.R. 560, 565.
(4) (1877) 2 App. Cas. 616, 627. (5) (1883) I.L.R. 6 Mad. 351, 353.

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that the bill was accepted or endorsed "for good consideration".

As a corollary to the above rule of pleading, it was recognised in England that it is

> "not enough in a plea of want of consideration merely to say that the defendant never had any value or consideration —the plea must go on to aver the circumstances which show that there was no consideration"; *Southall* v. *Rigg*(1).

In Byles on Bills (at page 125), the rule is stated in the following terms :

> "Consideration is presumed until the contrary appears or *at least appears probable.*" (the italics are ours).

The expression "until the contrary is proved" in section 118 of the Indian Negotiable Instruments Act must also be read in this expanded sense, having regard to the definitions of the word "disproved" and of the expression "shall presume" in sections 3 and 4 of the Evidence Act. The difference between section 114 of the Evidence Act and section 118 of the Negotiable Instruments Act consists only in this, that, under the first, the Court has a discretion to make the presumption or not, whereas, under the second, the Court is bound to start with the presumption ; but once the presumption is made, there is no difference between the two cases, in the manner of displacing the presumption or disproving the "presumed" fact.

Any presumption as to *quantum* of consideration, as distinguished from the mere existence of consideration, has accordingly to be drawn, not by virtue of section 118 of the Negotiable Instruments Act or even under section 114 of the Evidence Act, but only from the recitals, if any, that the instrument may contain. As to such

(1) (1851) 11 C.B. 481, 492; 138 E.R. 560, 565.

recitals, it has long been established that being *prima facie* evidence against the parties to the instrument, they may operate to shift on to the party pleading the contrary the burden of rebutting the inference raised by them ; see *Zamindar S.G.R.V. Bomaya Nayik* v. *Virappa Chetti*(1). But the *weight* due to recitals may vary according to circumstances and, in particular circumstances, the burden of rebutting them may become very light, especially when the Court is not satisfied that the transaction was honest and *bona fide* ; see *Brajeshware Peshakar* v. *Budhanuddi*(2) ; see also *Zohra Jan* v. *Rajan Bibi*(3).

In applying the principles above adverted to, Courts have in course of time come to regard certain types of cases as specially calling for scrutiny from the debtor's point of view. It is immaterial whether or not "fraud" in the sense of "deceit" or "undue influence" as defined in section 16 of the Indian Contract Act is made out ; the grounds in favour of a wide exercise of equitable jurisdiction in certain types of cases were explained by Lord HARDWICKE in *Chesterfield (Earl of)* v. *Janssen*(4). (See also Story's Equity Jurisprudence, section 348). One of these well-known types is represented by the category of transactions between money-lenders and expectant heirs. As early as in *Freeman* v. *Bishop*(5), the reason of the rule governing such cases was stated to be the "necessity" that young heirs are in, for the most part, which naturally lays them open to imposition ; and in *O' Rorke* v. *Bolingbroke*(6) it was

(1) (1864) 2 M.H.C.R. 174. (2) (1880) I.L.R. 6 Calc. 268, 277, 278.
(3) (1915) 28 I.C. 402.
(4) (1750) 2 Ves. Sen. 125, 155; 28 E.R. 82, 99.
(5) (1740) 2 Atk. 39; 26 E.R. 420. (6) (1877) 2 App. Cas. 814.

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pointed out that in such cases the parties do not really meet on equal terms and the opportunity for the one party to take advantage of the weakness or necessity of the other raises a presumption of "fraud" in the sense of improper use of the power arising out of the circumstances. In *Smith* v. *Kay*(1) Lord CRANWORTH strongly condemned the practice of getting hold of a young man of fortune, supplying him with means and pandering to his extravagance. The young man who has gone through a course of wilful and culpable folly and extravagance is, in such cases, relieved from its consequences, not because he has any "merits of his own to plead" but that "there is a principle of public policy in restraining" such conduct on the part of lenders, that "this system of undermining and blasting, as it were, in the bud, the fortunes of families is a public as well as a private mischief."; *per* Lord SELBORNE in *Earl of Aylesford* v. *Morris*(2). It must not be forgotten that in such cases the prodigal is by the very circumstances of the situation drawn away from the help and advice of his natural guardians and protectors and delivered into the hands of persons interested in taking advantage of his weakness (*ibid*). In *Croft* v. *Graham*(3) KNIGHT BRUCE L.J. used very strong language, observing that "it would be a disgrace to the Court" if securities given in such circumstances were allowed to stand for more than the moneys really advanced and a reasonable rate of interest. In the application of these principles, the mere form of the

(1) (1859) 7 H.L.C. 750, 771. (2) (1873) L.R. 8 Ch. 484.
(3) (1863) 2 DeG.J. & S. 155, 160; 46 E.R. 334, 336.

transaction cannot defeat the power of the Court and promissory notes form no exception to the rule ; cf. *Nevill* v. *Snelling*(1).

Considerations like those adverted to above have led the Indian Legislature to add to illustration (*c*) of section 114 of the Evidence Act an explanation stating that, in deciding whether the presumption in favour of consideration is to be drawn or not, the Court shall have regard to the fact that the drawer of the bill of exchange was a man of business and the acceptor a young and ignorant person under his influence. The explanation only indicates the principle and is not meant to be exhaustive of its application. Its operation is not necessarily limited to cases where the creditor is a professional money-lender or excluded in cases where the borrower has a vested right in property as distinguished from a mere *spes*. The presumed or proved necessity of the borrower and the inequality of position between the lender and the borrower constitute the reason of the rule. If such considerations can justify the Court in *refusing to draw the presumption*, they must equally operate to help to *rebut* the presumption drawn under section 118 of the Negotiable Instruments Act.

It is well established in England that, in cases where the Court examines a transaction in the light of the foregoing principles, the creditor is only entitled to get what he can prove to have lent, " by affirmative evidence, beyond the production of the note itself " ; *per* ALDERSON B. in *Jones* v. *Thomas*(2). See also *Bill* v. *Price*(3). It

(1) (1880) 15 Ch. D. 679. (2) (1837) 2 Y. & C. Ex. 498
(3) (1687) 1 Vern. 467 ; 23 E. R. 592

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is in accordance with this principle that in *Moti Gulabchand* v. *Mahomed Mehdi Tharia Topan*(1), *Sundarammal* alias *Sowbhagiammal* v. *Subramania Chettiar*(2) and *Sami Sah* v. *Parthasarathy Chetty*(3) the Court refused to give a decree to the plaintiff for more than what he proved to have lent, even when it strongly suspected that the defendant must have received more than he admitted; see also *Barkat Ullah* v. *Muhammad Hayat Ali Khan*(4); cf. *Kishen Ballabh* v. *Ghure Mal*(5).

Reference was made, in passing, to the decision in Appeal Suit No. 26 of 1927, apparently with a view to suggest that even on receipt of a smaller amount there might be a valid promise to repay a larger amount. But that is not the plaintiffs' case here—and for obvious reasons too; for, in the circumstances, any serious disparity between the amount received and the amount promised to be repaid may go to support the defendant's plea of "undue influence". The plaintiffs have insisted that they have advanced the full amount shown in the promissory notes and, if the evidence establishes payment only of smaller amounts, the case will be clearly governed by section 44 of the Negotiable Instruments Act.

It only remains to add that the question of onus is of subordinate importance at this stage, when both sides have let in evidence and the appellate Court has to come to a conclusion on the whole evidence; see *Sime, Darby and Company, Limited* v. *The Official Assignee of the Estate of Lee*

(1) (1895) I.L.R. 20 Bom. 367.
(2) (1914) 29 M.L.J. 236.
(3) (1915) 31 I.C. 739.
(4) (1922) 84 I.C. 866.
(5) (1915) 13 A.L.J.R. 322.

Pang Seng(1) following *Robins* v. *National Trust Co.*(2). The decision of the Allahabad High Court in *Ram Nath* v. *Ram Chandra Mal*(3) must be understood to relate to a case where, in the words of Lord DUNEDIN, the evidence *pro* and *con* was so evenly balanced that the onus had to determine the conclusion of the Court. Even in suits on negotiable instruments, it has been recognised that the debtor can press into his service facts and circumstances disclosed by the plaintiff's evidence as well; *Bishambar Das* v. *Ismail*(4) and *Muhammad Shafi Khan* v. *Muhammad Moazzam Ali Khan*(5); cf. *Makund* v. *Bahori Lal*(6) and *Raghavalu Chetty* v. *Sabapathy Chetty*(7).

With these general observations, we proceed to consider the evidence in each of the suits.

* * * *

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(1) (1927) 54 M.L.J. 339 (P.C.). (2) [1927] A.C. 515.
(3) A.L.R. 1934 All. 350; A.I.R. 1935 All. 154.
(4) A.I.R. 1933 Lah. 1029. (5) (1922) 67 I.C. 684.
(6) (1881) I.L.R. 3 All. 824. (7) (1911) 21 M.L.J. 1013.