stand, appear to me to be clear. I agree with the Chief Justice that they have been made clearer by the amendment of the section by section 52 of Act VIII of 1890.

We answer the question in the affirmative. Costs costs in the case. This will leave the Small Cause Court the power to deal with them in its discretion.

Attorneys for the defendant :—Messrs. *Daftary and Fereira.*

ORIGINAL CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Strachey.

VELJI HIRJI AND CO., CLAIMANTS, *v.* BHA'RMAL SHRIPA'L AND CO., ATTACHING CREDITORS.*

1896. *August* 7.

Consignor and consignee—Goods consigned to agent for sale on commission—Hundis drawn against goods and paid by agent—Railway receipts sent to agent—Equitable assignment of goods by consignor—Goods attached by judgment-creditor of consignor—Claim by agent—Priority—Civil Procedure Code (Act XIV of 1882), Sec. 280.

One Ukerda Punja at Viramgám consigned certain bags of seed to Velji Hirji and Co. at Bombay for sale on commission, and drew *hundis* against the goods for Rs. 3,200, which at his request Velji Hirji and Co. accepted and paid on receiving the railway receipts by post. The goods were to be sold on arrival on Ukerda Punja's account and the proceeds credited to him as against the advances made by the payment of the *hundis*. On the arrival of the goods at Bombay they were attached by Bhármal Shripál and Co., who had obtained decrees against Ukerda Punja.

Held, that Velji Hirji and Co. were entitled to the goods. They had made specific advances against the goods. Bhármal Shripál and Co. as attaching creditors occupied the same position as Ukerda Punja himself and had no better claim to the goods than he had, and if he had attempted to prevent the goods reaching the hands of Velji Hirji and Co., who at his request had made specific advances against them, he would have been restrained by injunction.

Held, also, that at the date of attachment the goods were in possession of Ukerda Punja by the railway company "on account of or in trust for" Velji Hirji and Co., in the sense in which that expression is used in section 280 of the Civil Procedure Code (Act XIV of 1882).

THIS was a case stated for the opinion of the High Court under section 69 of the Presidency Small Cause Court Act by

* Small Cause Court Suits Nos. 4713, 4714 and 4712 of 1896.

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Mr. Rustomji Merwánji Patell, Acting Chief Judge, in the following terms:—

"These were three claimants' notices issued under section 278 of the Civil Procedure Code, calling upon the attaching creditors to show cause why the attachment levied against 562 bags of castor seed, in the possession of the B. B. and C. I. Railway, should not be removed; and why the said goods should not be handed over to the claimants, who were the consignees under the railway receipts and had advanced Rs. 3,200 on the security of the said receipts.

"One Ukerda Punja had consigned the goods from Viramgám for sale on commission in Bombay by the claimants, and drawn four *hundis* against the same for Rs. 3,200. At the consignor's request, the claimants had accepted and paid the *hundis* on receiving the railway receipts by post. The goods represented by the receipt were then in transit and had not arrived in Bombay. The sale of the goods on arrival was to be made on account and at the risk of the consignor, and the proceeds thereof credited to him as against the advance to his debit.

"On the evidence I was of opinion that the claimants had made an advance by the payment of the *hundi* of Rs. 2,200 against the railway receipts for 387 bags and of Rs. 1,000 against the receipts for 175 bags.

"The railway receipts were in the usual form adopted by the B. B. and C. I. and the Rájputána-Málwa Railways, and were headed 'Goods receipt note.' The material portion was as follows:—

"Received from Punja the undermentioned goods for conveyance by goods train consigned to Velji at Carnac Bridge Station. The railway company reserves to itself the right of refusing to deliver the goods without the production of the receipt or until the person entitled, in its opinion, to receive them has given an indemnity to the satisfaction of the railway. If the consignee does not himself attend, he must endorse a request for delivery to the person to whom he wishes it made."

"The goods arrived in Bombay on or about the 22nd August 1895, and were immediately after attached by the firm of Bhármal Shripál, who had obtained three decrees against the consignor, Ukerda Punja. The claimants then applied for the removal

of the attachment, and based their claim (1) on being holders of the railway receipts representing the said goods (2); on having advanced moneys on the security of the same; and (3) on having the property in the goods transferred to them by the delivery of the railway receipts. Their counsel contended that the railway receipts were 'documents of title, or documents showing title to goods,' and relied on section 108 of the Contract Act (IX of 1872).

"No evidence was laid before me to prove any custom or mercantile usage to show that merchants in Bombay had, in making advances on the security of railway receipts, invariably recognised these receipts as 'documents of title.'

"I was of opinion that the circumstances of the present case of an advance made by an agent for his principal on the faith of the railway receipts did not fall within the purview of either section 108 or 178 of the Contract Act; and that these sections did not apply. In the absence of any specific provision of the Contract Act, I applied the principles of common law as they stood before the passing of that Act; and I was of opinion that the railway receipts were not 'documents of title' or 'documents showing title of goods.' I also held that by the mere delivery of the receipts to the claimants, and the subsequent advance made on them, the consignor did not transfer any possession to the consignees. I held that the claimants had neither actual nor constructive possession by attachment of the goods; the possession of the carrier was the possession of the consignor, and not of the consignee, the goods having been carried at the risk and on account of the consignor, and not at the orders of the consignee.

"I was of opinion that such railway receipts could not be placed on a higher footing than the delivery orders issued after the arrival of the goods at the railway station which in the case of *Coventry* v. *G. E. Railway Company*[1] Brett, M.R., held to be non-negotiable instruments that did not pass the property to the pledgee. The wording of the delivery orders in that suit was certainly much stronger than that of the railway receipts

(1) 11 Q. B. D., 776.

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in question. I, therefore, held that railway receipts could be regarded only as tokens of authority to receive possession, and that they did not operate to transfer possession, and relied on *Farina* v. *Home*[1] and *McEwan* v. *Smith*[2]. They could not be likened to bills of lading and could only be treated as delivery orders or dock warrants at common law, which, as Parke, B., said in the former case, were no more than an engagement by the wharfinger to deliver to the consignee or any one he may appoint. I also relied on the *G. I. P. Railway Company* v. *Hanmandas*[3], though it was restricted to the construction of section 103 of the Contract Act as regards an unpaid vendor's right of stoppage *in transitu*, as the reasoning of Sir Charles Sargent seemed equally applicable to the circumstances of the present case.

"I held, therefore, that the claimants had no lien against the 562 bags they claimed, and that they failed to establish any right to the possession of them as against the attaching creditor of the consignor; and under section 281 of the Code I disallowed the claim.

"At the request of the counsel for the claimants, my judgment was delivered contingent on the opinion of the High Court. I beg to invite the opinion of their Lordships on the following questions submitted on behalf of the claimants:—

"1. Whether the possession of the railway receipts, coupled with the fact of the claimants having made advances on the same, did not, in law, give the claimants the right to claim the goods represented or covered by such receipts wholly or to the extent of their advances.

"2. Whether the possession of the railway company was not the possession of the claimants after the consignor parted with the railway receipts and obtained advances on the same.

"3. Whether railway receipts in the hands of a commission agent, who had made specific advances against them, are not documents of title, entitling the agent to claim the goods covered by the receipts against a judgment-creditor of such goods.

(1) 16 M. & W., 119. (2) 2 H. L. C., 309.

(3) I. L. R., 14 Bom., 57.

"4. Whether the claimants obtained any lien over or property in the goods represented by the railway receipts on the security of which the claimants made specific advances.

"5. Whether, on the facts found, the Court was not in error in disallowing the claim."

Lang (Advocate General) and *Macpherson* for the claimants:—The lower Court has failed to see the real point in the case. There is a good equitable assignment of the goods to us. The consignor having induced us to pay the bills could not have stopped the goods. The attaching creditors can stand in no better position than the debtor, the consignor—*Megji Hansráj* v. *Rámji Joita*(1); *Whitworth* v. *Gaugain*(2); *Lutscher* v. *Comptoir D'Escompte*(3). There can be no doubt that the arrangement was that on paying the *hundis* we were to get the goods—*Ranken* v. *Alfaro*(4).

Scott for the attaching creditors:—The advance in this case was not against the goods but against the railway receipts. This distinguishes the case from *Megji Hansráj* v. *Rámji Joita*. So again *Lutscher* v. *Comptoir D'Escompte* (3) is distinguishable, as the advance there was against the bill of lading which is the symbol of the goods at common law, whereas railway receipts are, under the decisions of this Court, not documents of title. *Ranken* v. *Alfaro* is in my favour, as it shows possession is a condition precedent to a lien. The claimant has advanced his money against documents which are worthless.

Lang in reply:—The Judge has held that by the agreement the payments were made for the goods. This is a specific appropriation in our favour—*Ex parte Banner*; *In re Tappenbeck*(5).

FARRAN, C. J.:—The exact legal relations between the parties in this case do not seem to have been borne in mind with sufficient distinctness by the counsel or pleader who, on behalf of the claimants, presented the points for his consideration to the learned Chief Judge of the Small Cause Court.

It appears from the case as stated that one Ukerda Punja consigned the goods in question from Viramgám to the claim-

(1) 8 Bom. H. C. Rep. (o. c. J.), 169.
(2) 3 Hare, 416.
(3) 1 Q. B. D., 709.
(4) 5 Ch. D., 786.
(5) 2 Ch. D., 278, at p. 287.

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ants, Velji Hirji and Co., Bombay, for sale on commission by the latter, and drew four *hundis* against the same, *i.e.* against the goods, which *hundis* the claimants' firm accepted and paid on receiving the railway receipts by post. On the arrival of the goods in Bombay Bhármal Shripál and Co., who were judgment-creditors of Ukerda Punja, attached the same as the property of their judgment-debtor. The contest, therefore, lies between the judgment-creditors of Ukerda Punja on the one hand, who have attached the goods, and the claimants' firm of Velji Hirji and Co., who have made specific advances against the goods, on the other hand. The claimants' firm have neither sold the goods to a purchaser nor pledged them to a third party; so neither section 108 nor section 178 of the Contract Act has any bearing upon the case. On the other hand, the firm of Bhármal Shripál and Co. are not either unpaid vendors of the goods seeking to stop them in *transitu* under section 103 of the Contract Act, nor are they purchasers nor pledgees of the goods. They simply occupy the position of attaching creditors. What that position is, has been pointed with great clearness by Westropp, C. J., in the case of *Megji Hansraj* v. *Rámji Joita*[1]. They occupy exactly the same position as their judgment-debtor Ukerda Punja himself. They stand in his shoes and are in no better and no worse situation with reference to the goods in question than he would have been in had he sought to prevent the goods reaching the hands of Velji Hirji and Co. It is to our minds clear that Ukerda Punja, had he attempted to prevent the goods reaching the hands of the claimants, who had made specific advances against them at his request, would have been promptly restrained in the attempt by an injunction. The case of *Lutscher* v. *Comptoir D'Escompte de Paris*[2], cited by the Advocate General, is, in our opinion, exactly in point. There the equitable agreement was to place the bill of lading in the hands of the firm who had made advances against it. Here it is to place the goods in the hands of the advancing firm. Mr. Scott, with extreme ingenuity, contended that the claimants' firm made the advances, not on the goods, but on the railway receipts, and, therefore, advanced their moneys on worthless documents which are not, like

(1) 8 Bom. H. C. Rep., 169. (2) 1 Q. B. D., 709.

a bill of lading, symbols of the goods at all. We do not so read the case. Its third paragraph states that Ukerda Punja drew against the goods, though the time when Velji Hirji and Co. were to accept and pay the *hundis* so drawn was on the receipt of the railway receipts. The rest of the paragraph (3) makes this still more clear. The sale of the goods on arrival was to be made on account of the consignor, and the proceeds thereof credited to him against the advances. The Judge no doubt goes on to say: "On this evidence I was of opinion that the claimants had made an advance by the payment of the *hundis* of Rs. 2,200 against the railway receipts for 387 bags, and of Rs. 1,000 against the receipt for 175 bags;" but what Ukerda Punja drew against were the goods, and the claimants were to be paid their advances out of the proceeds of the goods. The learned Judge cannot, we think, be taken to mean that he was of opinion that the claimants had made the advances against the railway receipts, but that the particular advances which he refers to were made against the goods specified in the particular railway receipts which he mentions.

It comes to this that by agreement between Ukerda Punja and the claimants the latter were to make advances against the goods specified in the railway receipts when they received such receipts, and were to pay themselves their advances out of the proceeds of such goods when they received and sold them. We cannot doubt but that that agreement constituted a good equitable charge upon the goods as between Ukerda Punja and claimants' firm when the rights of third parties did not intervene. We have already stated that the attaching creditors are but the *alter ego* for this purpose of Ukerda Punja. No argument was addressed to us by Mr. Scott, based upon the wording of section 280 of the Civil Procedure Code. We do not, however, think that it offers any difficulty, as in the view which we take of the case we find no difficulty in holding that, at the date of the attachment, the goods were in possession of Ukerda Punja by the railway company "on account of or in trust for" the claimants in the comprehensive sense in which that expression is used in the section. We notice the point lest it might be thought that we had overlooked it. The only doubt which we have felt in the matter is whether, as the

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aspect of the case, which we have been above considering, was not presented to the acting learned Chief Judge, and was probably not present to his mind when he was stating the case and framing the questions to be submitted to the Court for opinion, we ought to give our opinion upon it. But we think that, as the question (5) " whether on the facts found the Court was not in error in dismissing the claim " is in the widest possible terms, we are at liberty to determine it; and as the facts are all before us, that we ought not to make shipwreck of a good cause upon the rock of overfine technicality by refusing to entertain it. We answer the fifth question in the affirmative, but do not consider it necessary to answer the other questions submitted for our opinion, as our answer to the fifth question is sufficient to dispose of the case. Costs of the reference will be costs in the case.

Attorneys for the claimants:—Messrs. *Maganlál and Rustomji.*

Attorneys for the attaching creditors:—Messrs. *Chitnis, Motilál and Málvi.*

ORIGINAL CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Strachey.

1896. *September 25.*

IMPERIAL BANK OF PERSIA, PLAINTIFF, *v.* FATTECHAND KHUBCHAND, DEFENDANT.*

Hundi—Bill of exchange—Suit by holder and indorsee against payee and indorser—Presentment to acceptor—Local usage as to presentment—Usage of presentment at Bushire—Negotiable Instruments Act (XXVI of 1881), Secs. 70, 71.

The plaintiff as holder and indorsee of a *hundi* drawn on one Háji Mirza sued defendant as payee and indorser to recover Rs. 1,193-4-0 on a *hundi* which had been dishonoured by the acceptor.

It was found by the Court (1) that the local usage at Bushire was to present the *hundi* for payment at the bank and for the acceptor to call at the bank at due date and effect settlement; (2) that the *hundi* in question was presented for payment to the authorized agent of the acceptor at the bank on the due date; (3) that the said agent refused payment and informed the bank that the acceptor would not pay the *hundi*. It was argued that presentment at the bank was not good presentment, having regard to sections 70, 71 and 137 of the Negotiable Instruments Act (XXVI of 1881).

Held, that the local usage made the presentment a good presentment.

* Small Cause Court Suit No. $\frac{105}{5514}$ of 1896.