APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

ARDESHIR SORABSHA MOOS (ORIGINAL PLAINTIFF), APPELLANT, *v.* KHUSHALDAS GOKULDAS TRADING AS CHUNILAL KHUSHALDAS AND CO. (ORIGINAL DEFENDANT), RESPONDENT.*

1907. *December* 11.

Negotiable Instruments Act (XXVI of 1881), sections 7, 32, 53, 64, 115, 134—Bills of exchange drawn on defendant and endorsed over to plaintiff by the Banks in whose favour they were drawn—Failure of defendant to pay—Suits to recover on the bills—Plaintiff's capacity—Holder deriving title from holder in due course—Bills accepted need not be dishonoured and protested—Acceptor liable at maturity—Assent not signed on the bills but on copies—Assent not valid.

The plaintiff sued to recover on certain bills drawn on the defendant and endorsed over to the plaintiff by the Banks in whose favour they were drawn. The suits were dismissed on the grounds that (1) the suits were defective in form inasmuch as the plaintiff was suing as agent without disclosing his principals and (2) the suits were not competent as the bills had never been dishonoured and protested.

Held (1) that the bills were endorsed over to the plaintiff by the Banks in whose favour they were drawn, so that he was a holder deriving title from holders in due course, and as such he was competent to sue under section 53 of the Negotiable Instruments Act (XXVI of 1881)

Held further (2) that the bills were made payable at Bombay. Therefore under sections 134 and 32 of the Act the acceptor became liable at the maturity of the bills and the suits were not bad because the bills had not been dishonoured and protested. Section 115 of the Act merely enacts that a bill is not dishonoured until it has been dishonoured by the drawee in case of need where such drawee is named in the bill. Presentment is not necessary to charge the acceptor. The acceptor is the principal debtor and his liability is independent of the presentment.

The acceptance having been signed on the copies of the bills and not upon the bills or upon one of their parts in accordance with section 7 of the Act,

Held that a material requirement of law had been omitted with the result that there was no valid acceptance.

SECOND appeals from the decrees of R. Knight, District Judge of Ahmedabad, confirming the decrees of Vadilal T. Parikh, Joint

* Second appeals Nos. 15, 177, 178 and 179 of 1907.

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Subordinate Judge, in original suits Nos. 387, 389 and 390, and reversing that in suit No. 388 of 1903.

The facts of the case were as follows :—

One Khushaldas Gokuldas, a shroff in a Branch of the Bank of Bombay at Ahmedabad, and one Ardeshir Sorabsha Moos, a merchant at Bombay, occupying among other positions that of agent to Fracis, Times and Co., a London Firm of Cigarette-dealers, were personal friends. In November 1898 Ardeshir persuaded Khushaldas to give his principals an order for large consignments of cigarettes which were to be disposed of at Bombay and Ahmedabad. Ardeshir was to look after the sales at Bombay and Khushaldas after those in Ahmedabad. Khushaldas, therefore, signed an indent ordering sixty cases, each of 50,000 cigarettes to be shipped in twelve lots of five cases each, one lot per month. He signed the indent not in his own name, but in that of Chunilal Khushaldas and Co., Chunilal being his son. The payment was to be made by means of drafts on Chunilal Khushaldas and Co., drawn against each consignment. The cigarettes began to arrive in 1900. Khushaldas accepted the drafts forwarded to him by Ardeshir as agent of Fracis, Times and Co., and the cigarettes were cleared. One case was sent to Ahmedabad and the others were kept for disposal in Bombay. Khushaldas tried to place the cigarettes on the market at Ahmedabad but found that they were not up to the sample submitted to him by Ardeshir at the inception of the agreement and that people would not buy them. This gave rise to a long correspondence between the two and it gradually grew more acrimonious as fresh consignments arrived; and Khushaldas, who had paid the first three drafts, finally declined to meet the others which he had accepted. Fracis, Times and Co., consented to cancel about one-third of the contract and subsequently litigation arose between Khushaldas and Ardeshir in reference to the drafts.

Khushaldas instituted a suit, No. 70 of 1903, against Ardeshir in the Court of the Joint Subordinate Judge of Ahmedabad, for an account alleging that Ardeshir was a partner in the transaction. Ardeshir denied the allegation and contended that he

was acting merely as the agent of Khushaldas. The Subordinate Judge found that Ardeshir was not the partner of plaintiff Khushaldas and he dismissed the suit. His decree was confirmed on appeal by the District Court.

Ardeshir also brought four suits, Nos. 387, 388, 389 and 390 of 1903, against Khushaldas in the Court of the Joint Subordinate Judge of Ahmedabad on drafts which the latter had accepted but failed to meet. In suit No. 388 of 1903 the acceptance was endorsed on the original draft and in the other three suits it was endorsed on copies.

In three out of the said four suits the drafts were drawn to the order of the Chartered Bank and in the fourth the draft was drawn to the order of the Agra Bank, and the latter subsequently endorsed it to the former. On all the drafts Ardeshir was entered as the drawee in case of need.

When Khushaldas declined to meet the bills, the Chartered Bank made a reference to the London Firm of Fracis, Times and Co., and they replied as follows :—

Bills on C. Khushaldas and Co.

Dear Sirs,

With reference to bills drawn upon this indentor in case of need, Mr. A. F. Moos, writes us that in order to enforce payment it will be necessary for him to take legal action against the indentor, and for this purpose—so we are informed—it will be necessary for the Bank to endorse at least some of the bills "payable to his order." So will you please instruct your Bombay branch accordingly, and request them to afford him any facilities that they possibly can with a view to the clearance of these bills.

We understand that the same facility has been granted him with reference to a bill on Mr. Moosabhoy for Rs. 300 and it is with only a view to getting these bills paid that we ask for this concession.

We are, &c.,
Fracis, Times and Co.

The Chartered Bank acted on the suggestion and formally endorsed the bills to Ardeshir which were the basis of his four suits mentioned above. The Subordinate Judge rejected his claims in suits Nos. 387, 389 and 390 of 1903 which were based on acceptances made on copies of the drafts and awarded the

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claim in suit No. 388 of 1903, in which the acceptance was made on the original draft.

Both the parties having appealed, the District Judge confirmed the decrees in the suits in which the claims were dismissed and reversed the decree and dismissed the suit in which the claim was awarded. The District Judge held that the plaintiff Ardeshir sued in his capacity as agent for Fracis, Times and Co., without disclosing his principals, the suits were, therefore, defective in form. He further held that the suits were not competent as the bills had never been dishonoured and protested and that the acceptances on the copies of the bills were not valid. His reasons were as follows :—

I find that Moos is suing in his capacity as Agent for Fracis, Times and Co. It must follow, I think, that his suits are fatally defective. His plaints represent him as suing in his own interest and do not disclose his principals: so that Khushaldas was unable to raise the defence on the merits that he would certainly have raised if the principals had appeared upon the record.

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Passing to the next issue, whether a suit can lie upon a bill that has never been formally dishonoured and protested, I state my conclusion with diffidence. I think that the issue must be found in the negative. It is admitted that in this case the formal procedure contemplated by the Negotiable Instruments Act for protesting the bills has not been followed. Section 115 renders it incumbent on the holder of a bill to refer to the drawee in case of need, if such be named upon it, when the drawee has refused to accept to pay the bills; and Chapters VIII and IX prescribe the procedure to be followed thereafter in order to obtain the certificate called a protest. Moos' name appears upon all the bills as the case of need, but no reference was made to him in that capacity, and it is admitted that the bills were never dishonoured with in the meaning of the Act. Do they then afford a cause of action? I think not. Such cause can only arise, or to speak more accurately, is only complete, when default is made in payment. Section 92 defines that a bill of exchange is said to be dishonoured by non-payment when the acceptor makes default in payment on being duly required to pay the same; and section 115, as I have pointed out, supplements this by providing that the bill is not dishonoured until the case of need, if there be one, has made similar default. Thus it cannot be said that default has been made in payment until both the drawee and the case of need have failed to pay: and if no such default has been made, where is the cause of action? The learned counsel for Mr. Moos endeavoured to meet this by referring to section 32, arguing that the acceptor of a bill is absolutely and finally bound by his acceptance, and that this by itself affords a cause of action under the gene-

ral law of contract; but I cannot find a sufficient answer here. The cause of action is certainly not complete until payment has been demanded and has been refused. Nor is it easy to fathom the object of the legislature in prescribing a process of some length and circuity before a bill can be protested, if it is open to any one to disregard all the precautions provided and hurry into law Courts the moment the drawee disappoints him. I therefore find this issue in the negative.

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Lastly, as to whether the acceptance upon the copies is not a valid acceptance, I must certainly follow the opinion expressed by the learned Subordinate Judge that it is not. The Negotiable Instruments Act is one which "reproduces in a statutory form the English Law of Negotiable Instruments with scarcely any modification" (Introduction to Chalmers' Edition). One year after it was passed, the English Law on the subject was codified by 45 and 46 Vict. c. 61, wherein it is expressly enacted that the acceptance must be in writing upon the bill. There can be no doubt that the meaning of section 7 of the Indian Act is the same. As for the evidence furnished by some commercial gentlemen of Bombay, that it is the practice there, when the drawee lives upcountry, to substitute acceptance upon a copy for acceptance upon the original, I can only regard it as irrelevant. The practice, if such there be, is not one which the law countenances, and the sooner it is abandoned the better.

The plaintiff preferred second appeals.

Raikes with *K. N. Koyaji* appeared for the appellant (plaintiff):—One of the grounds on which the plaintiff's suits were dismissed was that as the plaintiff was an agent of Fracis, Times and Co., and as this fact was not disclosed in the plaints, the defendant was prejudiced in his defence and the suits were held to be "fatally defective." But, in the first place, the principal being a resident abroad, the suits could be brought without disclosing the principal. Secondly, as the bills were endorsed to the plaintiff, he could sue in his own independent right as an indorsee, section 32 of the Negotiable Instruments Act. He was a holder under section 6 and under section 53 he stepped into the shoes of the Bank which was a "holder in due course" under section 9. Thirdly, the defendant was all along aware of the agency and could have raised any defence he liked with regard to such agency. Fourthly, he himself never raised the plea of want of knowledge of the principal.

The second ground on which the suits were dismissed by both the lower Courts was that as the plaintiff, who was a

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referee in case of need, was not asked to pay, the defendant was not liable under section 115 of the Negotiable Instruments Act. But section 115 has no application here. It only states what "dishonour" is in cases where there is a drawee in case of need. An acceptor is liable as a principal under section 32 of the Act and no notice of dishonour to him is necessary. He knows very well that he has committed default. It is only where a drawer or other parties are sought to be held liable that notice of dishonour is necessary to be given under section 30 of the Act.

The third ground on which three of the suits were dismissed by the lower Courts was that the acceptance was signed on copies of the bills and so did not constitute a legal and valid acceptance. The defendant signed the exact copies of the bills and sent them on for the purpose of being attached to the originals. We submit that such an acceptance is valid. The words of section 7 of the Negotiable Instruments Act need not be taken too literally. Supposing a man writes his signature on a piece of paper and then glues that piece on to the bill, it would be sufficient signing upon the bill. Similarly, a signature forwarded to be attached to a bill would, we submit, constitute a signing upon the bill. There is, besides, evidence of a custom that banks are in the habit of forwarding copies of bills, instead of the bills themselves, to people in the mofussil for being signed by them for acceptance. Such a custom ought to be given effect to.

Strangman with *Hiralal and Co.* appeared for the respondent (defendant):—The bills were not presented to the acceptor, therefore, under section 64 of the Negotiable Instruments Act the acceptor is not liable.

As to the custom alluded to, the Subordinate Judge holds it is not proved.

Raikes in reply:—Section 64 of the Act makes presentment necessary where other parties are sought to be made liable. Here the acceptor is the principal debtor and he is liable without any presentment.

Whatever the Subordinate Judge may have held with respect to the custom, the District Judge in appeal has not found whether it is proved or not, thinking it unnecessary to do so. We submit that we are entitled to have a finding on the question.

BATCHELOR, J.:—The appellant in these appeals was the original plaintiff. He sued to recover on certain bills drawn on the defendant and endorsed over to the plaintiff, the defendant having failed to pay the bills. In the first Court three of the suits were dismissed on the ground that the defendant was not an "acceptor" within the meaning of the Negotiable Instruments Act inasmuch as he had not signed his assent upon the bills. In the fourth suit, there being no room for this objection, a decree was made in the plaintiff's favour. On appeal to the District Judge all four suits were dismissed on the grounds (i) that the plaintiff was suing as agent for the London firm Messrs. Fracis, Times and Co., without disclosing his principals so that the suits were defective in form, and (ii) that the suits were not competent as the bills had never been dishonoured and protested. Against these decrees the plaintiff has preferred the present appeals, and the first point taken before us is as to his capacity to sue. This point must, we think, be decided in his favour. The bills were endorsed over to him by the Banks in whose favour they were drawn, so that he was a holder deriving title from the holder in due course; and as such he is competent to sue under section 53 of the Negotiable Instruments Act.

Then it was urged that the learned District Judge was wrong in holding that the suits were bad because the bills had not been dishonoured and protested; and here again we think that the plaintiff's view must be sustained. The bills were made payable in Bombay, and consequently under sections 134 and 32 of the Act the acceptor became liable at the maturity of the bills. Section 115 has no bearing upon this point, but merely enacts that a bill is not dishonoured until it has been dishonoured by the drawee in case of need where such a drawee is named in the bill. It was suggested that presentment would be necessary to charge the acceptor, but that is clearly not so, and section 64 provides only that the *other parties—i. e.* the maker and the

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drawee—are not liable to the holder unless the bill has been presented to the acceptor. The acceptor is the principal debtor, and his liability is independent of presentment.

No other objection being suggested, it follows that in Appeal No. 177, where the plaintiff's acceptance was written on the *original bill*, the decree of the lower appellate Court must be reversed, and the suit decreed with costs throughout.

In the remaining appeals the acceptance was written on copies of the bills, and that we think, is fatal to the plaintiff's cause. Some attempt to escape this result was made by Mr. Raikes but the language of the Act is too plain to be mistaken. It is enough to say that whereas section 7 of the Act lays down that the acceptance shall be signed either upon the bill or upon one of its parts, the plaintiff's assent was signed only upon copies of the bills; and thus a material requirement of the law was omitted with the result that there was no valid acceptance.

Finally it was urged on behalf of the plaintiff that there is evidence to indicate that some Banks are in the habit of forwarding for acceptance copies of bills instead of the bills themselves. That perhaps is so; but certainly there are not before us any materials on which we could accept as proved any such custom as the law would recognise, and this suffices to dispose of the contention as it arises in these appeals. That being so, the further question which would arise upon due proof of a custom fulfilling legal requirements in respect of universality, constancy and so forth—the question namely, whether such custom could override the provisions of the Act—is a point upon which, since it cannot now arise, we must rigidly abstain from giving any opinion.

The Appeals Nos. 15, 178 and 179 must be dismissed, and the appellant must pay the costs of them.

One appeal allowed and three dismissed.

G. B. R.