PRIVY COUNCIL.

H. PESTONJI AND COMPANY AND OTHERS (DEFENDANTS) *v.* COX AND COMPANY (PLAINTIFFS).

J. C.*
1928
June 14

[On Appeal from the High Court at Bombay]

Bill of Exchange—Alteration—Stamp—Note of due date written on bill—Extension of date—Alteration of note on bill—Validity of bill—Negotiable Instruments Act (XXVI of 1881), section 87—Indian Stamp Act (II of 1899), sections 14, 35.

Bills of exchange, payable some 60, some 90, and some 120 days after sight, drawn on the appellants were indorsed for value to the respondents, who duly stamped them, and after acceptance noted in the corner of each bill the date for presentation. The parties to the bills having mutually agreed that the dates of payment should be postponed, the respondents altered the dates so noted, but without making any alteration in the bills as originally drawn. On presentation for payment at the extended dates the bills were dishonoured by the appellants.

Held, that there had been no discharge of the bills by material alteration, nor was a new stamping necessary under the Indian Stamp Act, 1899, sections 14, 35; and accordingly that the appellants remained liable.

International Banking Corporation v. *H. Pestonji & Co.*,[1] disapproved.

APPEAL (No. 116 of 1926) from a decree of the High Court in its Appellate Jurisdiction (January 25, 1926) reversing a decree of the Court in its Original Jurisdiction.

The respondents, as holders in due course of 48 bills of exchange, sued the appellants, as acceptors, to recover thereunder.

The facts appear from the judgment of the Judicial Committee.

The trial Judge (Shah, J.) dismissed the suit, on the ground that 37 of the bills were not admissible in evidence having regard to the Indian Stamp Act, 1899, sections 14, 35, and on the ground that all the bills were to be regarded as discharged in the circumstances which had happened.

**Present:* Viscount Sumner, Sir John Wallis and Sir Lancelot Sanderson.

[1] (1924) 49 Bom. 351.

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The appellate Court (Macleod, C.J., and Coyajee, J.) reversed the above decision and made a decree for the plaintiffs. The appeal is reported at 50 Bom. 656.

Upjohn K. C. and *Chappell*, for the appellants, referred to *Hill* v. *Patten*,[1] *French* v. *Patton*,[2] *Reed* v. *Deere*[3] and *Fitch* v. *Jones*.[4]

Jowitt K. C. and *Horace Douglas*, for the respondents, were not called upon.

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The judgment of their Lordships was delivered by VISCOUNT SUMNER :—In 1920 the appellants, merchants in Bombay, imported goods from three Manchester firms, Messrs. Royle & Binns, Davies Black & Co., and Wilkinson & Warburton, Ltd. In ordinary course, these sellers drew drafts on the appellants, with shipping documents attached and discounted them with the respondents' bank in London. The respondents then sent the drafts to their Bombay branch to be presented to the appellants for acceptance and for subsequent collection. The drafts fell due generally 60 or 90, though sometimes 120, days after sight, and on presentation they were accepted. On arrival at Bombay the goods were cleared by the appellants and warehoused in the bank's name and under its control.

Of these drafts there are in all 48, to which this appeal refers, 25 drawn by the first-named firm, 20 by the second and 3 by the third. Their aggregate amount was £24,118 10s. The amount of those drawn against goods shipped to Bombay was £19,753 19s. 4d. The rest were drawn against Karachi goods and are not now in question.

The Bombay drafts were not presented for payment on their due dates for reasons to be presently mentioned. When ultimately presented at later dates, they were

(1) (1807) 8 East. 373.
(2) (1808) 9 East. 351.
(3) (1827) 7 B. & C. 261.
(4) (1855) 5 E. & B. 238 at p. 245.

dishonoured, except to the extent of £274 12s. 10d. and thereupon the respondents, as holders, sued the acceptors on the dishonoured bills. At the trial, Shah, J., decided in favour of the acceptors and dismissed the suit. On appeal, the Appellate Division of the High Court of Bombay reversed his decree, but gave the acceptors leave to bring the present appeal.

On July 26, 1920, when most, but not all, of the drafts had been already accepted, Messrs. Royle & Binns wrote to the respondents' London office, quoting a cablegram from the appellants to themselves stating in effect that one-third of the piece goods market at Bombay had been destroyed by fire, and requesting accordingly that the best arrangement possible should be made with the bank to " extend duration " of all their drafts for two or three months. Messrs. Royle & Binns added that they supposed Messrs. Pestonji & Co. wished for this indulgence because the fire would cause a dislocation of business. No doubt, importers, anticipating that the goods they had bought would not readily be disposed of during the period of usance of the bills, wished to have it extended so as to avoid being out of pocket to an unforeseen extent. Messrs. Royle & Binns added " we are quite willing to comply with their request," subject, of course, to the respondents' consent, but they made two stipulations, first, that interest accruing for any extension of time beyond the date of maturity of the drafts should be chargeable to Messrs. Pestonji & Co., and, second, that this arrangement should not apply to goods for Karachi, where there had been no fire.

The London office, having assented to the suggestion made by Messrs. Royle & Binns, instructed their Bombay branch accordingly to " extend all outstanding bills " for periods which varied and ultimately were

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followed by further extensions, the details of which are not now material. A closely similar course was followed between the bank and Messrs. Davies Black & Co. and Messrs. Wilkinson & Warburton, Ltd. For what it may be worth, slightly different expressions were used by the bank's Bombay branch in advising the appellants of the instructions they had received from London and of the course they had taken. They spoke of "extending the usance," "extending the due dates," "extending the dates of payment" and "extending the dates of maturity," but in all cases they referred, generally by date or other particulars, to the bills originally drawn. Messrs. Pestonji were seemingly content with all these expressions alike, for after all they had got what they had asked for. Their Lordships think that these variations, both in the language of the communications and in the length and number of the extensions, are of no importance for present purposes.

In ordinary course, the clerk at the respondents' Bombay branch affixed the necessary revenue stamps to drafts before presenting them for acceptance and also, as a general rule, though not invariably, stamped the word "Due" on the top right-hand corner of the draft and after acceptance added to it the date for presenting the bill for payment according to its usance with the days of grace added. When the duration of a bill was extended, they usually struck through this marginal date and substituted the extended date, and repeated this process twice or three times, according to the number of extensions arranged, but in a number of cases no date was put in the margin of the acceptance, even though its duration was extended.

The Indian Stamp Act provides by section 14 that "no second instrument chargeable with duty shall be written upon a piece of stamped paper, upon which an

instrument chargeable with duty has already been written," and by section 35, " no instrument chargeable with duty shall be admitted in evidence for any purpose . . . unless such instrument is duly stamped." The respondent bank, having in every case affixed the necessary revenue stamp to the bill, when it was accepted, did not in any case affix another.

Accordingly, at the trial, the present appellants contended that the arrangements, made in London and detailed above, constituted in each case a discharge of the bill sued on ; that any alteration of the memorandum as to the due date made on the top right-hand corner of any bill constituted a material alteration of the bill, which in law avoided it, or which, in the alternative, produced the result, that there was thereafter a second instrument, chargeable with duty, written on the original piece of stamped paper, which, however, not being further stamped, was wholly inadmissible in evidence. Accepting these submissions, Shah, J., held that, by the arrangements made by the parties dehors the bills, they were discharged, although this defence had not been included among the appellants' voluminous pleas, and that, by noting in the margin the changes in the duration resulting from their arrangements, the respondents' clerk had written in each case on a piece of stamped paper, already bearing a bill of exchange, a second instrument, which was chargeable with duty. It followed that, not being restamped, each such bill was inadmissible and was rejected, and the learned Judge made a decree in favour of the present appellants. On appeal, this view was rejected by the High Court, who held that there was neither a discharge nor a material or any alteration in the bills, and that no new chargeable instrument came into existence on paper already stamped, so as to require a further stamp.

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The appellants' case at their Lordships' bar was, in the first place, one of discharge by mutual consent of the drawers, endorsers, and acceptors of the bills of exchange. As a matter of business, this would be a remarkable, not to say a unique, bargain. The bankers, having the goods against which the bills of exchange were drawn already warehoused in their names, were in a position to realise them on the dishonour of the bills, as ultimately they did, but, by assenting to the postponement, they suspended their right to realise forthwith, and eventually the goods proved to be insufficient to cover the bills. Considering that they were to get nothing in return for this, it might have been expected that, between business men, enough had been conceded.

The result, however, of an agreement to discharge the bills would be this. Instead of having in their hands negotiable instruments, capable of being endorsed away or of being summarily sued upon, they would now be bankers, who had made advances by discounting bills, and yet had no bills to deal with; bankers, who had given up a right of recourse against the drawers, though getting nothing in return; bankers, looking only to import merchants, who had not even given a written undertaking to pay, and to Manchester piece goods imported into Bombay on an embarrassed market. Every word in the written or cabled communications negatived any such intention. An extension of time with a continuing liability on the old bills was spoken of; interest payable by the acceptors was mentioned, on the footing that the amounts of the old bills would be due, and long overdue, before payment could be obtained, and, instead of the holders being left with three inconvenient remedies—an action in Bombay against the acceptors, another in Manchester against the drawers,

and a series of selling operations in the Indian piece goods market—it was plain that the respondents were supposed to be still in their old position, subject only to giving time with the assent of all other parties to the bills, who, at the time, were concerned. The appellants' proposition only needed to be stated, and its impossibility became apparent. No such agreement arose.

As to the material alteration, the answer is that the bill itself was not altered at all. Of course, if the due date on the face of the bill had been altered, the alteration would have been material, but what was done did not, in fact, affect the bill, nor was it done with any such intention. The date formed no part of the bill, nor did its alteration affect the contract. It was a mere docket for office purposes. If a slip of paper, with the date on it, had been pinned on to the bill, the two holes made by the pin in the paper would have been no less liable to be called an alteration. Reference may be made to the decisions in *Brill* v. *Crick*[1]; *Fanshawe* v. *Peet*[2]; *Suffell* v. *Bank of England*[3] and *Garrard* v. *Lewis*.[4]

The appellants relied on *International Banking Corporation* v. *H. Pestonji & Co.*[5] in which, on closely similar facts, Kajiji, J., held that after the marginal note of the due date had been altered a new instrument was brought into existence which required a new stamp. The learned Judge says (p. 355) :—

" It is urged that on the face of it there is no alteration, that is to say, that the words ' ninety days after sight ' are not struck out and there is no alteration on the face of it, and the due date in red ink which is put on the top of the bill on the right-hand side is made by the bank in Bombay simply for their own convenience, and it is a mere memorandum, and, therefore, that does not amount to an alteration on the face of it. I see no force in

[1] (1836) 1 M. & W. 232.
[2] (1857) 26 L. J. Ex. 314.
[3] (1882) 9 Q. B. D. 555 at p. 567.
[4] (1882) 10 Q. B. D. 30.
[5] (1924) 49 Bom. 351.

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this argument. In my opinion it amounts to an alteration. . . . Everybody knew that the date of payment of these bills of exchange was extended by four months from the first due date. It must be held, under these circumstances, that the original bill was extinguished and a new bill was substituted in its place which was re-accepted and the due date of it was four months after the first due date."

With the proposition quoted above, their Lordships are unable to agree and, unless the fact of re-acceptance with the circumstances under which it took place in that case, which are not fully stated, introduce a sufficient distinction, they are obliged to say that in their opinion the case was wrongly decided.

As to the stamp objection, no second instrument, that is, no bill of exchange, was written on the old stamped paper at all. The old instrument remained unaffected, and nothing was added to or taken from it. The clerks had no intention of destroying their employers' remedies on the bills, nor had they any authority to do anything, except make an office docket in the corner, and from the two other essential parties to this supposed second instrument, the drawers and the acceptors, they had no authority at all. How far their docket might have affected a new endorsee with notice of some collateral agreement between prior parties need not be considered, for there was no new endorsee, but it must not be taken that there was any new and binding agreement or any new promise or any consideration for one.

In their Lordships' opinion the decision of the High Court of Bombay in appeal was right and should be affirmed, and this appeal should be dismissed with costs, and so they will humbly advise His Majesty.

Solicitors for appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for respondents: Messrs. *Fludgate & Co.*

A. M. T.