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APPELLATE CIVIL.

31 C. 249.

"Undoubtedly, a banker, who pays a forged cheque is in general bound to pay the amount again to his customer, because in the first instance he pays without authority. On this principle the two cases which have been cited were decided, because it is the duty of the banker to be acquainted with his customer's handwriting, and the banker, not the customer, must suffer if a payment be made without authority. But though that rule be perfectly well established, yet if it be the fault of the customer that the banker pays more than he ought, he cannot be called on to pay again."

That shows that it was on the principle of negligence imputable to the customer that a banker can make the customer liable if payment had been made on a forged cheque; and in this case nothing having been said as to defendant No. 1 being negligent in any way,—no foundation having been laid for a case of negligence, we do not think that the principle of *Young* v. *Grote* (1) can be applied to it at all.

Then, as to the second point, we are of opinion that it is concluded by the finding of fact arrived at by the Court of Appeal below. That finding is perhaps not so categorically and expressly stated as it might have been. But reading the last two paragraphs of the judgment, we must say that there can be no doubt that the lower Appellate Court has found that, as a matter of fact, the defendant No. 2 is not shown to have been the agent of **[253]** defendant No. 1 upon the whole evidence. The learned Judge in the Court of Appeal below states in his judgment: "Was Ramsukh the appellant's agent at all? Did the appellant by any act of his give the plaintiffs to understand that Ramsukh was his agent?" And after having stated the question he arrived at his conclusion, which could have been arrived at only upon a complete negative answer to those questions being returned.

The contentions urged before us therefore fail, and this appeal must be dismissed with costs.

Appeal dismissed.

31 C. 253=(7. C. W. N. 135)

[253] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Geidt.

DEBENDRA NATH BISWAS v. HEM CHANDRA ROY.*

[14th August, 1903.]

Executor, debt contracted by—Co-executor, liability of—Liability of estate for debt incurred by Executor.

The estate of a testator is not liable for debts, contracted by one of the several executors, for goods apparently supplied to the estate. The executor who contracted the debt is personally liable for it.

Farhall v. *Farhall* (2) and *Labouchere* v. *Tupper* (3), referred to.

[Ref. 31 P. R. 1906=133 P. L. R. 1906.]

SECOND APPEAL by the defendants Nos. 2 and 3, Debendra Nath Biswas and another.

* Appeal from Appellate Decree, No. 1841 of 1900, against the decree of W. Teunon, District Judge of Murshidabad, dated June 30, 1900, affirming the decree of Mohendra Nath Mitter, Subordinate Judge of that District, dated August 17, 1899.

(1) (1827) 4 Bing. 253.
(2) (1871) L. R. 7 Ch. 123.
(3) (1857) 11 Moo. P. C. C. 198.

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APPELLATE CIVIL.

31 C. 253=7 C. W.N. 135.

This appeal arose out of an action brought by the plaintiffs, Hem Chandra Roy and another, for the recovery of a certain sum of money due on a promissory note.

[254] The plaintiffs alleged that the said promissory note was executed, on the 7th Joisto 1303 B.S. (19th of May 1896), by Bipin Behary Chowdhry (defendant No. 1), one of the four executors appointed by the will of one Kali Prosanna Biswas deceased, and that the consideration for it was paddy, paddy golas a *catcheri* house, and other things taken over from the plaintiffs for the benefit of the estate. They further alleged that the note was given by Bipin Behary in the discharge of his functions as one of the executors, and the estate was therefore liable for the debt.

Bipin Behari Chowdhry did not enter appearance.

The defence of the other executors mainly was that inasmuch as the promissory note was given by Bipin Behary alone in his personal capacity, and not by the majority of the executors, the estate was not liable.

In the will it was provided that the executors were to do everything in consultation and agreement with the testator's eldest son, Debendra, and that when, they, the executors, differed in opinion, the opinion of the majority was to prevail.

The Court of first instance found that the executors joined in acquiring the properties which formed the consideration for the promissory note; that the transaction was one entered into for the benefit of the estate; that the promissory note was executed because the estate had no cash in hand to pay for the properties acquired; and that Bipin Behary alone signed the note because it so happened that the other two male executors were at the time absent from illness; and the fourth was a *purdanashin* lady; and it accordingly passed a decree against the defendants, and directed that the decretal amount should be recovered from the estate of the testator, Kali Prosanna Biswas.

On appeal by the defendants Nos. 2 and 3, the District Judge of Murhidabad affirmed the decision of the first Court, observing that it could not be said on the facts found, that Bipin Behary had acted contrary to the wishes of his co-executors or otherwise than with their assent.

Babu *Lal Mohan Das* (Babu *Harendra Nath Mookerjee* with him) for the appellants. The debt due on the promissory note executed by only one of the executors after the death of the [255] testator, though apparently for the benefit of the estate, the estate is not liable for it: *Farhall* v. *Farhall* (1) and *Labouchere* v. *Tupper* (2). The estate might be liable to the executor who raised the money for the purposes of the estate, if he could show that there were no moneys of the estate in his hands. But the creditor could not sue the estate.

Babu *Saroda Prosanna Roy* (Dr. *Ashutosh Mookerjee* with him) for the respondents. The debt having been contracted for the benefit of the estate, the estate is liable. Moreover, the promissory note was executed with the acquiescence of the other surviving executors.

MACLEAN, C. J. This is a suit by certain creditors against the executors of a deceased gentleman, and the object of the suit is to have his estate rendered liable for a debt which was contracted by one of the executors alone. There were four executors, and the suit is brought on

(1) (1871) L. R., 7 Ch., 123. (2) (1857) 11 Moo. P. C. C., 198.

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APPELLATE CIVIL.

31 C. 253=7 C. W. N. 135.

Sahai (1) a promissory note given by one of them alone for goods apparently supplied to the estate. The question is whether the estate can be made liable. I do not think it can. I refer only to two cases, the case of *Farhall* v. *Farhall* (1) where Sir George Mellish says :—" It appears to me to be settled law that, upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally, and cannot be sued as executor so as to get execution against the assets of the testator"; and the same principle was laid down in the case before the Privy Council of *Labouchere* v. *Tupper* (2).

The appeal must be allowed in favour of the present appellants, but the decree of the lower Court will stand as against the executor who gave the promissory note—the defendant No. 1, Bipin Behary Chowdhry.

This case was before the Court a short time back, and it stood over in order that the defendant No. 1 might be served with notice of the appeal. It has been served, but he does not appear. The appellants are entitled to costs in all the Courts.

GEIDT, J. I concur.

Appeal allowed.

31 C. 256 (=31 I. A. 52=8 C. W. N. 649.)

[256] PRIVY COUNCIL.

BAGESWARI PROSAD SINGH *v.* MAHOMED GOWHAR ALI KHAN.

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

[12th November, 1903.]

Sale for arrears of Revenue—Act (XI of 1859,) *ss.* 5, 31, 33—*Bengal Act (VII of* 1868,) *s. 1—"Malikana"—" Land Revenue "—Sale for arrears accruing subsequently to notification of sale—Point not taken in Court below, or before Commissioner.*

Malikana comes under the definition of " Land Revenue "given in s. 2 of Act XI of 1859 and s. 1 of Bengal Act VII of 1868. The Revenue authorities are entitled to calculate them together ; and where part of the arrears for which a sale takes place under Act XI of 1859 is malikana, no separate notice under s. 5 of the Act in respect of such portion is necessary.

A sale for arrears of revenue is not necessarily bad because it was held not only for arrears specified in the notice under s. 5 of Act XI of of 1859, but also for arrears that accrued subsequently. Where it appeared that the Collector had acted under s. 31 of the Act, and that the objection to the sale had not been taken either in the Court below or before the Commissioner, and therefore could not, under s. 33, be taken on appeal the objection was not sustained.

Under the circumstances the High Court held that there had been no irregularity in the sale, and the judgment of the High Court was upheld by the Judicial Committee.

[**Foll.** 10 C. W. N. 137=2 C. L. J. 325 ; **Ref.** 11 C. W. N. 1107=6 C. L. J. 99 ; 19 C. W. N. 1129.]

APPEAL from a judgment and decree (11th July, 1899) of the High Court at Calcutta, reversing a decree (22nd March, 1897) of the Subordinate Judge of Monghyr and dismissing the appellants' suit with costs.

The plaintiffs appealed to His Majesty in Council.

The suit was brought on 11th September, 1895 by the three sons of the late Maharaj Kumar Babu Har Pershad Singh against 17 defendants, of whom the 1st, Khaja Mahomed Gowhar Ali Khan, was the

* *Present* : Lord Macnaghten, Lord Lindley, Sir Andrew Scoble and Sir Arthur Wilson.

(1) (1871) L. R. 7 Ch. 123. (2) (1857) 11 Moo. P. C. C. 198.