

(1870) 06 CAL CK 0011
In the Calcutta High Court

Fleming and Others

APPELLANT

Vs

Shearman

RESPONDENT

Date of Decision : 01-06-1870

Acts Referred:

Citation : (1870) 06 CAL CK 0011

Judgement

Sir Richard Couch, Kt., C.J.—We are of opinion that there was sufficient evidence of the payment of the bills by the plaintiffs. There is no question that the bills were drawn against the consignments, and the defendant in his evidence said, "I got the proceeds of the bills drawn against the shipments, which bills I sold to banks; no demand has been made on me as the drawer of those bills; I have received no notice of the dishonor of those bills." If the bills had been refused acceptance, and the plaintiffs after signing their names as acceptors had cancelled the signatures and kept the bills in their possession, as it has been suggested by the defendant's counsel might have been done, the defendant must in the ordinary course of things have received notice of the dishonor, or some demand would have been made upon him by the banks. If the goods had been sold by or on account of the holders of the bills in consequence of the non-acceptance of them, the defendant must have had some notice of it. The correspondence shows, and the fact cannot be doubted, that the goods were sold by the plaintiffs, which they could not have done if they had not accepted the bills. The fair inference from the facts proved, and the production of the bills by the plaintiffs at the hearing is, that the bills were accepted and returned to the indorses, and were afterwards paid by the plaintiffs. We also think that the plaintiffs were right in their contention, that, in determining whether they were entitled to treat the goods as a consignment, each invoice was to be taken separately.

2. (His Lordship here read some portions of the correspondence to show this was the intention of the parties in the arrangement. He referred to the plaintiffs' letters of March 19th, and April 3rd, 1866, remarking of the latter: "There was here a clear intention that each invoice would be taken separately, and there is

no remark or remonstrance from the defendant that this was not what he intended." He referred also to the defendant's letter of March 8th, the defendant's letter of January 26th, 1866, the plaintiffs' of April 26th, and continued.) In the case of the Elphinstone cuttings, the plaintiffs made a concession to which the defendant was not entitled, and it does not show what was the general agreement. The case now put forward by the defendant is at variance with the letters which passed between the parties at the time of the transactions, and it is from these letters that we can most safely collect what was the understanding between them. The next matter we have to consider is the shipments by the Ganges and Belle Isle, and the question between the parties as to these is disposed of by a reference to the correspondence. In his letter of 23rd September 1865, the defendant advises the shipment of 668 bales of jute cuttings which was made on his own account. On the 3d of November, the plaintiffs wrote to the defendant asking whether they might take the shipment by the Ganges on their own account, which was assented to by a letter of 22d December. On the 18th December, the plaintiffs wrote to the defendant: "With the cuttings per Belle Isle we have not yet done anything, there not having been much demand for such goods of late. We think it may perhaps be best to let them arrive, as cuttings ought to be favorably affected by the high prices for jute; but we shall be guided as to this by the course of events, and in any case you may depend upon our doing for the best according to our judgment." This letter, which must have been received after the defendant had assented to the plaintiffs taking the shipment by the Ganges on their own account, tells him they do not intend to do so with the shipment by the Belle Isle, and the defendant made no reply claiming that they should do so. His assent with regard to the Ganges shipment had no such qualification annexed to it as he now sets up. Even if we thought it fair that the plaintiffs should take on their own account the shipment by the Belle Isle, we are not at liberty to make an agreement for them, and we are of opinion that the plaintiffs were not bound to treat Messrs. Stevens and Foggo as their principals. The defendant himself drew for the whole amount of the invoice, making no distinction between his own goods and theirs, and the plaintiffs having paid the bill are entitled to sue him for the deficiency.

3. We also think the account sales are *prima facie* evidence, and that the plaintiffs are entitled to recover what upon the footing of them is the balance due in respect of their advances; for assuming that the plaintiffs received instructions from the defendant relative to holding the goods which they were bound to follow (with regard to which we give no opinion), there is no evidence that if the sales had been made at later dates than they were, better prices would have been realized.

4. It only remains to consider the question of the law of limitation. In order to take the item of ?188-5-6 out of the operation of that law, the plaintiffs rely upon the postscript in a letter of the 22d December 1865--"Enclosed a remittance of ? 40 to old account." The terms of section 4 of Act XIV of 1859 require that the person shall have admitted that the debt is due by an acknowledgment in writing

signed by him. Although the amount need not be stated, and evidence may be given to identify the debt referred to, the writing must contain an admission that a debt is due. The words "remittance of ₹40 to old account" are ambiguous, and do not necessarily import that a further sum is admitted to be due. And even if we look at the surrounding circumstances, which are that there was an account between the parties upon which a larger balance than ₹40 was due, we think we are not justified in holding that the words were intended as an admission that more was due. The words must be regarded rather as a mere direction accompanying the remittance than as an acknowledgment in writing of a debt, and we are of opinion that they are not sufficient to give a new period of limitation. The decree must therefore be modified, by deducting from the sum thereby ordered to be paid, equivalent of the sum of ₹188-5-6, at the exchange of 1s. 11 7/15d., and each party must bear his own costs of this appeal.

1 Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Macpherson.

Umesh Chandra Mookerjee (Defendant) v. E. Sageman (Plaintiff).

13th April 1869.

This was an appeal from a decision of Mr. Justice Phear. The suit was brought on a promissory note, dated 1st April 1865, by which the defendant promised to pay the sum of rupees 1,000 to the plaintiff, with interest at the rate of 12 per cent. per annum for value received. The defendant on 18th of July 1866 wrote a letter to the plaintiff, which contained the following words:--"I further hold myself responsible to you for the two sums of rupees 1,000 and rupees 900, respectively; the latter sum bearing interest at the rate of 24 per cent. per annum. Both these sums of rupees 1,000 and rupees 900 I engage to pay to you, with interest on the latter as soon as practicable."

At the original hearing, the defendant raised the defence that the suit was barred by the Law of Limitation, but Phear, J., held that the letter of 18th July 1866 was an admission of the debt, and the defendant failing on the merits, a decree was given for the plaintiff for rupees 1,000, with interest as in the promissory note.

The defendant appealed from this decision.

Mr. Branson for the appellant.

Mr. Kennedy and Mr. Evans for the respondent.

Peacock, C.J. (after shortly stating the facts), continued:--It appears to me that this decree ought to be affirmed. The letter is addressed to Mrs. White, but parol evidence was admissible to shew that Mrs. Sageman was known as Mrs. White, and that this letter was given to her. There is an acknowledgment of two dates. It is almost impossible for an acknowledgment in writing so to identify a debt, as that no parol evidence is required for the purpose of completing the identification.

In a case under the Statute of Frauds, it was held that, if a letter properly signed does not contain the whole agreement, yet if it actually refers to a writing that

does, it will be sufficient, though the latter writing is not signed; and parol evidence is admissible to identify the writing referred to--*Allan v. Bennet* 3 Taunt, 169, *Roscoe's Nisi Prius Evidence*, 11th Ed., 152.

Now, if parol evidence is admissible in such a case to identify the writing referred to, it appears to me to follow that parol evidence is admissible in this case to identify the debt referred to. Suppose the defendant had said in the letter, "I acknowledge that I owe you ?1,000, for which I have given a promissory note," that of itself would not identify the promissory note referred to. Even if he said, "I have given you a promissory note of the 1st February 1865," that would not of itself identify the note; but some evidence would be required to shew that this particular note was the note to which the acknowledgment referred. Parol evidence is admissible for the purpose of showing parcel or no parcel. Thus, where a testator devised all his farm, called "Trogues Farm," it was held that it might be shown of what parcels the farm consisted, to show what were the particular lands to which the writing referred as "Trogues Farm;" see *Goodtitle v. Southern* 1 M. & S., 299, *Roscoe's Nisi Prius Evidence*, 10th Ed., 25. It appears to me therefore that parol evidence was admissible for the purpose of showing what debt was referred to in the acknowledgment; and the plaintiff proves that the debt of rupees 1,000 is the debt referred to. It is then said that the plaintiff on cross-examination admitted that there were three debts, and that the acknowledgment might as well have referred to the third debt, as to the other two debts of which she speaks. No doubt, an ambiguity was created, as the defendant promised to pay only two debts, and there were three debts spoken to by the plaintiff. The question then arose as to which two of the three the acknowledgment related to. But how was that ambiguity created? Not by the writing, but by the parol evidence of the plaintiff obtained from her on cross-examination. It is a clear rule of law that parol evidence is admissible to explain a latent ambiguity, that is, an ambiguity raised by evidence. No ambiguity arose upon the face of the acknowledgment, until the parol evidence showed that there were three debts. "When an ambiguity not "apparent on the face of a written instrument is raised by the introduction of parol evidence, the same description of evidence is admitted to explain it; for example, where a testator devised his estate called Blackacre, and had two estates called Blackacre, evidence was admitted to show which of the Blackacres was meant. So, when a man devises an estate to his son, John Thomas, and he has two sons of the name of John Thomas, evidence may be admitted to show which the testator intended"--*Roscoe's Nisi Prius Evidence*, 10th Ed., 23. It therefore appears to me that the evidence was admissible for the purpose of showing that the acknowledgment related to the promissory note upon which the action was brought, and to prove that Mrs. Sageman was the person alluded to under the name of Mrs. White, and that she was the person to whom the note was given.

I might further illustrate the case thus. Suppose there were two notes of ?1,000 each, one of April 1st, 1865, and one of April 2nd, 1865, and that the one of April 1st had a surety to it; and suppose the defendant said in his letter, "I

acknowledge I owe you ?1,000 on my note of April last." I apprehend it is clear that the plaintiff could show, by parol evidence, that the acknowledgment referred to the note to which there was no surety. It is further said that there was no acknowledgment to pay interest, and that the Judge has given too much interest. If the defendant acknowledged that he owed money on the note, the interest would run from that date at the latest. It may be that the Judge has given interest from the date of the note, and that he has given a little too much. But there is no appeal on that point; and as no substantial in-justice has been caused to the defendant, I should be reluctant to reverse the decision as to the excess. Under these circumstances the decree is affirmed with costs.

Macpherson, J.--I also think that the decree should be affirmed with costs. There was a direct acknowledgment of a debt; and parol evidence was admissible for the purpose of identification.

2 See Broughton's Civil Procedure Code, 3rd Edition, Appendix, 222.