1897.
January 13 and February 3.

MOHAMADU CADER *v.* LOURENSZ.

D. C., Chilaw, 1,374.

Receipt of payment—Primâ facie *evidence and not conclusive*—*Evidence Act, ss. 91 and 92.*

A written receipt acknowledging the payment of a sum of money, and adding that it is in full discharge of the debt, is not conclusive evidence of the discharge of the whole debt. Such a receipt affords only *primâ facie* proof which may be rebutted by other evidence.

THE facts appear in the judgments:—

Chitty, for appellant.

3rd February, 1897. LAWRIE, J.—

The judgment-creditor in this action holding a decere for Rs. 1,114·50 with interest and costs, before the costs were taxed, received payment from the judgment-debtor of Rs. 1,200 and granted the following receipt and discharge :—

" Received from Seyanna Ana Seyna Mohammedu Cader the " sum of rupees one thousand principal and rupees two hundred " and sixty as interest and costs due to me in case No. 1,374, D. C., " Chilaw, and have granted this receipt in full discharge thereof. " —J. B. Lourensz " (witnessed by two witnesses).

This receipt was granted on the 3rd February, 1896. On the 24th September, 1896, the proctor for the judgment-creditor certified payment of Rs. 1,000 by the debtor in part payment of the decree, and on his motion a writ was re-issued to enforce payment of the balance Rs. 157, with interest from 3rd March, 1896, and also taxed costs Rs. 155·75. The writ went out and property was seized, when the judgment-debtor moved that the writ be stayed and that the decree-holder be ruled to show cause why he should not certify to the Court full satisfaction of the judgment. On the day fixed for hearing this rule, the plaintiff's proctor admitted the receipt produced by the defendant, but urged that Rs. 1,200 was a less sum than the judgment, and that no consideration had been shown for waiving the extra amount due.

The judgment-creditor was then examined on oath ; no issue was framed ; it does not appear what he was permitted to go into the witness box to prove, for he had admitted he had granted a receipt and discharge in full.

The material parts of the evidence given by the judgment-creditor were : " On 2nd March last I had to pay Rs. 1,000. The " defendant offered me Rs. 1,000 and a promissory note for the

" balance. I could not compute the balance, as the costs in the " case were not taxed. I did not offer to take a promissory note " for Rs. 260 in satisfaction of the balance. The Fiscal's marshal " made a rough calculation of the costs, and estimated them at " Rs. 100 ; we agreed that if the amount were more he should pay " me, and if less I would refund the difference."

The defendant paid Rs. 1,000 and gave a promissory note for Rs. 260, but the sufficiency of the stamp on the note was challenged —it was a postage stamp, not a revenue stamp ; the debtor afterwards offered to give a note with a revenue stamp for the same amount, Rs. 260, but the plaintiff refused to accept it.

In cross-examination the plaintiff said : " I never offered to waive " anything. At the time he paid me I thought the whole matter " settled and gave the receipt in full discharge." Then in answer to the Court he said, " Defendant said if I did not give him a receipt " in full discharge of the claim he would not pay me the money. " The money and promissory note were accepted by me with a " promise on either side that any difference would be made good."

It does not appear whether the defendant was in Court when this evidence was given by the plaintiff : no evidence was given to contradict it. The District Judge held that the debtor was bound to pay the balance of the taxed costs, which amounted to Rs. 55·75, in addition to the Rs. 1,260 paid by the defendant.

The defendant appealed, urging that the writing of the 3rd February, 1896, was a full discharge of his liability.

The learned District Judge has not stated what his reasons were for holding the plaintiff entitled to get more than the sum accepted by him on 3rd February. I gather that his reason was that Rs. 55 has by taxation since been ascertained to have been due, but that is not a good reason for disregarding a discharge in full.

Here the only deficiency in payment was as to costs ; these then were unliquidated and uncertain. It is quite fixed law that such an illiquid demand may be discharged by the payment of an agreed sum. The question here is, Was the sum of Rs. 1,260 agreed on by the parties ? If it was, the plaintiff is bound by that agreement ; if it was not agreed, he is not bound. The receipt and discharge signed by him are *primâ facie* evidence of a complete binding agreement. The plaintiff however says that there was no final agreement, that the agreement was that if on taxation (Rs. 100) was found to be more than the amount due, then he should repay ; if the amount was more, the defendant was to pay the additional balance.

The evidence of this agreement is (to me) by no means satisfactory. I would prefer to hold the plaintiff to the terms of his

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written discharge; but as my brother Withers is of a different opinion, and as the defendant has not contradicted the somewhat meagre and varying statements of the plaintiff, I am content (though with hesitation) to agree to affirm.

WITHERS, J.—

The question we have to consider is whether a writing granted by a judgment-creditor to his debtor acknowledging the receipt of a certain sum of money, and adding that it is in full discharge of his money judgment and costs, is conclusive evidence that the judgment is in fact thereby wholly discharged.

It is, I take it, no doubt *primâ facie* evidence, but I cannot think it is conclusive. What the terms of the writing are the writing of course alone can prove.

The 91st and 92nd sections of our Ceylon Evidence Ordinance 1895, seem to govern a case of this kind. The 91st section enacts that when the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, &c., except the document itself.....92 enacts that when such contract, &c., has been "reduced to the form of a document" and proved, "no "evidence of any oral agreement or statement shall be admitted as "between the parties to any such instrument.....for the "purpose of contradicting, varying, adding to, or subtracting from "its terms." Now, this is a pure and simple receipt, and contains no sort of contract. I understand it as: "I am receiving the full amount of my judgment." Hence it is unaffected by the section referred to. Indeed the last illustration to section 92 shows this: "A give B a receipt for money paid by B; oral evidence is offered "of the payment. The evidence is admissible." Such a receipt as the present is evidence only of a fact and not of a contract or right, and the rule that parol evidence is inadmissible to vary its terms does not apply.

The creditor was examined on oath and said in effect: "It is true "I granted this receipt, but as the amount representing costs was an "estimate of the sheriff's officer, it was agreed between me and my "debtor that if the costs when taxed by the officer of the Court were "found to be more or less than the sum named in the receipt, he was "to pay or I to repay the difference, according to the result."

This was admissible evidence, it was believed, and it was not contradicted. The creditor is entitled to the balance of his taxed costs; such is the judgment, which should be affirmed.

1897.
March 10 and 12.

GURUSIN APPU *v.* CARLINA HAMINE *et al.*

D. C., Matara, 1,402.

Principal and surety—Execution against surety—Right of discussion of principal's property.

Where judgment has been entered against a principal and his surety, writ of execution may issue against the property of the surety before writ of execution is issued against the property of the principal; but the surety may protect himself by pointing out the property of the principal for seizure and sale first.

THE facts are set forth in the judgment.

Wendt, for appellant.

Cur. adv. vult.

12th March, 1897. LAWRIE, J.—

The law of Scotland on the law of the liability of a surety or cautioner, before the law was altered by the Mercantile Law Amendment Act of 1856, was, so far I believe, the same as the civil law, on which the Dutch Law of Ceylon is founded (Bell's Commentaries, 1, 8, 4). "Discussion is a corollary to the accessory nature of the "engagement. It is a right by which the cautioner is entitled to "insist that the creditor shall first call upon and (in law language) "discuss the principal debtor if the cautioner has not expressly or "virtually dispensed with this right, and that the creditor shall give "the cautioner all the benefit and relief derived from the principal "debtor. Discussion imports not merely a demand of payment "but enforcement of it (by execution). But there is a tendency to "relax this rule, and it is a sufficient answer to a demand for dis-"cussion that the principal debtor is out of the kingdom, and has "no estate or effects in it, or that he is bankrupt and his estate "sequestered," &c.

In a short chapter on Principal and Surety Sir Charles Marshall lays down the same law: "For as the very essence of a surety's "engagement is that he will be answerable in the event of the "principal failing to perform his engagement he has a right to expect "due diligence on the part of the creditor in compelling fulfilment "by the principal."

As early as 1837 it seems to have been the practice to enter judgment against the principal and surety in the same decree, and to issue writs against both at the same time. The surety could move to have the writ against him recalled if the creditor had discharged the principal from jail without the surety's consent. (*Morg. Dig. p. 193.*)

In a Batticaloa case reported in *3 Lor. p. 254*, where judgment was entered against both principal and surety and writ issued

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against both, the surety insisted on property of the principal debtor being first discussed. The next case I find reported is one from Kandy, 40,670, in 1869, reported by Vanderstraaten, p. 8.

These writs went against both principal and surety, but the surety was allowed to protect his own property by pointing out the principal's property.

The procedure in that case seems a little less favourable to the surety than the law formerly laid down. In my opinion that procedure should be followed, and I would affirm the order for re-issue of the writ; if the surety's property be seized he can protect himself by pointing out the property of the principal to be seized and sold before his (surety's) property be sold.

WITHERS, J.—

This is an action against a principal and surety, and a sum has been adjudged to be due of the principal to the creditor. Judgment however went against the two defendants, and a decree was passed in conformity with that judgment. The surety did not promptly ask the Court to re-form the judgment (I will not decide whether the Court could or could not have done so), nor did he appeal. The decree was passed on 29th October, 1895. On the 15th October, 1896, the surety did ask the Court to re-form the judgment and decree, and to recall the writ issued against his property. No order was made on this application till the 19th January, 1897. The District Judge refused to amend the decree. I think under the circumstances he was quite right to refuse. On the 23rd January the plaintiff's proctor moved to re-issue writ against the surety's property, and that was allowed on the 30th January. The surety appealed. No local authorities were produced as to the privilege of a surety, who had not renounced any of his privileges in the case of a judgment recovered against both principal and surety for a sum of money. My brother Lawrie has carefully gone into the local authorities, and the last case he has discovered is that reported at page 8 of Vanderstraaten's Reports.

This was a case which I brought to the attention of appellant's counsel during argument. I agree with my brother that in the circumstances of this case I think we ought to follow the decision in Vanderstraaten. If the appellant wishes to protect his own property from seizure he must point out property of his principal and take on himself the expense and risk of the seizure of such property. I may here observe that I see no reason in law why property of the principal, who is a woman and who is said to have been married when she incurred this debt, should not be seized and sold to satisfy the judgment against her.

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I wish to reserve for future consideration what would be the effect of some such defence as this put in by a surety, who is joined with his principal in an action by the creditor : " I submit to the judgment " of the creditor, and am prepared to pay what is found to be due by " the principal and what cannot be recovered against the principal " in the execution of a judgment, but I pray that his property may " be discussed before mine in the event of the creditor recovering " judgment against the principal."

The appeal fails.