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SUPPRAMANIAN CHETTY *v.* WHITE.

D. C., Kandy, 8,517.

Payment for supplies to tea estate—Arrangement between creditor and superintendent—"Delegation" and "Novation"—Application of payments on monthly accounts.

In accounts between defendant, the proprietor of a tea estate, and plaintiff, a trader who had supplied goods to the estate, there appeared an unpaid balance in favour of plaintiff. A, who was superintendent of the estate when this debt was contracted, requested plaintiff to keep the existence of this unpaid balance secret from his successor in the superintendentship and gave plaintiff his own promissory note for the whole amount of the balance—*Held*, that the grant of the promissory note by A did not constitute a valid delegation, inasmuch as defendant, the original debtor, was no party to the arrangement. Defendant still remained liable, and plaintiff having, by arrangement with A, cancelled the arrangement between them and returned the note, was entitled to recover from the defendant the original debt.

Payments made to plaintiff, after A had left the estate, by his successor could not, in the circumstances, be attributed to this old debt, but had to be applied in reduction of the monthly accounts rendered to the latter.

IN this case plaintiff sued defendant for the recovery of Rs. 24,111.99 for goods sold and delivered and for money lent by plaintiff to defendant. It appeared that the defendant, being an absentee proprietor of a tea estate in Ceylon called the Daragala estate, carried on its cultivation by a superintendent, and that one Mr. Cantlay, appointed by the defendant as superintendent, received supplies of money, rice, poonac, &c., from the plaintiff for the use of the estate. At the end of 1889 Mr. Cantlay went away on leave, and Mr. Evans succeeded him as superintendent. At that time there was a balance due to the plaintiff, but what that balance was did not appear. During the eight months in which Mr. Evans was in charge, the payments made by him from month to month satisfied the current expenditure, so that, when Mr. Evans left, there was nothing due for the period of time during which Mr. Evans acted. No account was sent in to Mr. Evans showing that there was any previous existing debt.

On Mr. Cantlay's return, the plaintiff continued to do business with him on behalf of the estate, and Mr. Cantlay made payments from time to time. The plaintiff did not appropriate those payments, month by month, to the current expenditure, but appropriated them to the payment of the pre-existing debt, with

the result that, when Mr. Cantlay ceased to be superintendent at the end of 1893, plaintiff came into Court and sued the proprietor of the estate, claiming a sum of Rs. 24,111.99 as due by the defendant.

The defendant denied the claim, and pleaded that the superintendents of the said estate were not authorized by him to purchase goods or borrow money for the use of the said estate on his credit, and as an alternative plea the defendant averred that for goods sold and money borrowed in March, 1890, the defendant paid plaintiff the sum of Rs. 2,103.43, and for goods sold and money lent in April, 1890, the defendant paid plaintiff the sum of Rs. 3,444.19, and that the defendant accepted the said sums in satisfaction of the amounts due for the said two months, and thereafter the defendant purchased goods and borrowed money from plaintiff, and his liability in respect of the said transactions since April, 1890, amounts to Rs. 169,853.86, and since June, 1890, in respect of the said transactions the defendant paid plaintiff the sum of Rs. 117,479.73, and that by such payment the defendant's liability has been satisfied.

Counsel being unable to agree upon the issues, the District Judge (Mr. J. H. de Saram) framed the following issues:—

(1) Whether the transactions between the plaintiff and defendant were satisfied by payment of Rs. 4,931.59.

(2) Whether the defendant is indebted to the plaintiff in Rs. 24,111.99.

After hearing evidence, the District Judge found in favour of the plaintiff on the first issue; and as regards the second issue, he held as follows:—

" The difference of Rs. 1,001.42½ in the accounts has been proved to be in plaintiff's favour, and has also been admitted to be correct.

" It was contended the defendant's superintendents were not authorized by him to purchase goods and to borrow money for the use of his estate on his credit, or that they had the right to pledge his credit. As to this question, there is the fact that the superintendent was in charge of the estate, which required to be cultivated, and the benefit of which cultivation accrued to the defendant. It is not denied that the money, rice, &c., was obtained by the superintendent for the upkeep and cultivation of the estate, and it is not suggested that the superintendent was kept supplied with funds by defendant to render it unnecessary for him either to borrow money or purchase rice, &c., on credit, in order to keep the estate in proper cultivation, or that he was placed in funds to pay the amount of this claim.

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"I therefore hold that the defendant is liable to the plaintiff in Rs. 24,111.99, and give him judgment with interest thereon at 9 per cent. per annum from the 16th August, 1894, up to the date of payment and costs."

Defendant appealed. The Supreme Court, by its judgment of 20th November, 1896, set aside the judgment of the Court below, and remitted the case in order that an account might be taken from the beginning of all dealings and transactions between the plaintiff and the defendant which resulted in the alleged debt of Rs. 24,111.99. In remitting the case, Chief Justice Bonser observed: "In a case like this, where the defendant is an absent "tea proprietor, he should have the accounts properly proved before "he is made liable. Questions may arise as to the appropriation of "the various payments made. In deciding them the District "Judge will be guided by the principles laid down in *Ephraims* "*v. Jansz* (C. R., Galle, 3,407)."

On the case going back to the Court below, the accounts in question were taken and referred to an accountant for audit, and his report being duly submitted to the Court, the District Judge found as follows:—

"The accountant has examined the plaintiff's accounts from January, 1881, to January, 1894, and finds that the balance due to the plaintiff is Rs. 24,606.41, which is Rs. 554.42 in excess of the amount claimed by the plaintiff up to July, 1888. Payments were regularly made, and all debits closed up to March, 1888. Charles Cantlay, who was the superintendent at the time, was remiss in his payments thereafter. At the end of October, 1889, the account shows that plaintiff had advanced money and sold and delivered goods to the value of Rs. 224,419.26, and had been paid on account Rs. 203,748.32, leaving a balance of Rs. 20,670.94. On the 5th December, 1889, he took a promissory note for Rs. 20,416.89 from Charles Cantlay, payable seven months after date for the balance due at the end of October, 1889. According to the account the note should have been for Rs. 20,670.94. The note was taken by the plaintiff as security for the repayment of the amount. Charles Cantlay left the estate in November, 1889, and returned in June, 1890, shortly before the note fell due. During his absence Evans was defendant's superintendent. When Evans took charge, he was not informed of the balance outstanding at that date. Cantlay had expressly asked the plaintiff not to inform Evans of that balance. For that reason none of the accounts rendered to Evans showed any balance due by his predecessor. Accounts were rendered to him and were settled by him. When he left, and Cantlay resumed

charge of the estate, there was due to plaintiff, on account of Evans' transactions for May and June, 1890, Rs. 4,595.93. On the 6th July, 1890, Cantlay paid plaintiff Rs. 6,000. The promissory note had then fallen due. Then, in August, 1890, Cantlay paid Rs. 7,016.78, when there was due only Rs. 2,420.85 for July, 1890. Going a little further into the account, I find that, while the supplies from May to August, 1890, totalled Rs. 10,499.38, Cantlay paid plaintiff in July, August, and September, 1890, Rs. 17,233.67, or Rs. 6,734.29 in excess of what was due. This large excess would not have been paid by Cantlay, but for there being the previous existing debt of Rs. 20,416.89, which he knew, and for which he gave a promissory note. Mr. Beven made a great deal of the fact that Evans had not been informed of the large amount outstanding, and that he had never been asked to pay it, but, as I have already observed, Cantlay expressly asked the plaintiff, for reasons, I conclude, best known to himself, not to inform Evans of it. It appears to me that, as the account taken under the directions of the Supreme Court shows, not only that the balance alleged to be due when Evans took charge was then due, but also that a larger balance is now due to the plaintiff than the amount claimed by him, he is entitled to judgment. The question as to the appropriation of payments does not arise.

"Mr. Beven contended that the evidence in the case established that the plaintiff allowed Cantlay to use the money paid to him by the defendant for purposes of his own instead of meeting the current expenditure on account of the estate, and that plaintiff accepted a promissory note from Cantlay for the amount. If Cantlay was placed in funds by the defendant, that is a fact capable of being proved either by the examination of the defendant's attorney in the Island or by the issue of a commission for the examination of the defendant in England, but there is no proof of this.

"It was next contended that the granting and acceptance of the promissory note was a novation of the debt as a personal debt of Cantlay. The express and declared will of the creditor to make a novation is requisite in order to constitute novation (*Vanderlinden, 269*). There is no proof of this. On the contrary, the evidence is that the note was taken as security. This stands uncontradicted. The evidence is all one way, and the only possible conclusion is that the plaintiff is entitled to judgment."

The District Judge entered a decree in plaintiff's favour for Rs. 22,744.25, with interest thereon at 9 per cent. per annum from the 16th August, 1894, to the date of payment.

The defendant appealed.

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Layard, A.-G. (and *H. Loos*), for defendant, appellant.—Cantlay borrowed the money claimed by the plaintiff ostensibly for the estate on behalf of the defendant, but when Cantlay proposed to go on leave he asked the plaintiff to keep the amount covered by the promissory note secret. Plaintiff agreed to do so. This was a novation of the debt. From that moment plaintiff must be taken to have known that that debt was personal to Cantlay. Plaintiff's taking the promissory note discharged the defendant. If plaintiff had sued Cantlay on the note, he would have got judgment. The defendant could not also be made liable for that debt. Apart from novation, the act of the plaintiff in concealing the existence of this debt from Cantlay's employer, estops the plaintiff from making any claim now. Having represented to the defendant that there was no such debt as was said to be on the promissory note, plaintiff cannot now go back and say "You now owe me that amount." Plaintiff's representation led to these consequences. Defendant retained Cantlay in his service; and if defendant had acknowledged Cantlay's debt as his debt, the defendant would have sued Cantlay for the recovery of it. By plaintiff's conduct. defendant could not exact securities from Cantlay.

Wendt, for plaintiff, respondent.—The plea of novation cannot be supported. Granting for the moment that the Chetty discharged the defendant and accepted Cantlay as his debtor when he took the promissory note, it would be the debtor who was changed and not the nature or character of the debt. But novation can only arise where there is a change in the nature of the obligation by the same debtor. In novation it is the obligation which changes, and the debtor remains the same. Where the obligation remains unchanged, but a new debtor steps into the shoes of the old one, that is called delegation (*3 Burge, 781, et seq.*). Here the defendant knew nothing of the promissory note at the time it was made. He was not cognizant of this attempt to shift debtors. In delegation all the three parties must concur. Defendant's concurrence not being proved. being in fact contrary to all the evidence, the attempt to argue any delegation or novation fails. But neither the plaintiff nor Cantlay meant to shift the burden of the defendant from defendant's shoulder. The promissory note was a mere formal security, which the plaintiff took to satisfy himself that he would get his money back. It was a collateral security, by which Cantlay succeeded in winning the plaintiff over to secrecy. Defendant could not be discharged without knowing that he was discharged. The rule is this. The acceptance of a negotiable security from an agent discharges the

principal only, if by reason of the acceptance of such security the principal has been induced to settle with the agent, but if the position of the principal has not been changed, the dishonour of the bill or negotiable security or its withdrawal leaves the principal still liable. Consequently, there was no change in the debtor nor in the nature of his liability. There was no novation (*Vanderlinden, 269; 4 N. L. R. 165*). As to estoppel—Is it now in the mouth of the defendant to raise this plea? Estoppel is essentially a matter for the pleadings at the earliest opportunity. Here the defendant knew all the facts at the first trial, but to the very last he only insisted on novation. The plea or estoppel does not appear even in the petition of appeal.

The evidence leaves no room for any argument as to misrepresentation or estoppel. Whatever wrong Cantlay may have done defendant, defendant as principal is liable to plaintiff. His liability cannot be avoided in any way (*1 S. C. C. 34; 4 S. C. C. 40; 5 S. C. C. 34; 6 S. C. C. 45, 116, and 159*).

Layard, A.-G., replied.

15th July, 1900. LAWRIE, A.C.J.—

In the end of 1899 there was an unpaid balance due by the defendant to the plaintiff. The superintendent, to whom monthly accounts had been regularly rendered, was about to leave the Island for a time. He asked the plaintiff to keep the existence of this unpaid balance secret from his successor in the superintendentship, and at the same time he gave the plaintiff his own promissory note for the whole amount, payable in seven months, which was the time he excepted to be absent from the Island. It was argued that this was a novation by which the defendant (the debtor) was released and a new debtor, the superintendent, was substituted in his place.

It certainly is not the novation of the Civil Law, which is the substitution of a new engagement or obligation by the same debtor to the effect of extinguishing the original debt. The substitution of a new debtor for the old with the consent of the creditor was delegation. The person substituted was called expromissor. The distinction between novation and delegation is clearly stated by Burge (*vol. 3, p. 782*): "In the Civil Law and the jurisprudence of Holland, Spain, France, and Scotland, and the State of Louisiana, the new or second engagement by which the former is extinguished, if it be a change of the nature of the obligation without any change of the debtor, is called novation. If the original obligation still subsist, but the debtor is changed,

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that is, if the person change himself with the original obligation instead of the former debtor, or enter into a new obligation, it is called delegation." Later, at p. 788, Burge says: "Delegation is novation effected by the intervention of another person, whom the debtor, in order to be liberated from his creditor, gives to such creditor............and such person so given becomes obliged to the creditor in the place of the original debtor. *Delegare est vice sua alium reum dare creditori vel cui jusserit* ". And later, at p. 790: "It is necessary that there should be the concurrence of the person delegating, that is, the original debtor, and of the person delegated, with the person whom he appoints. The intention of the creditor to discharge the first debtor and to accept the second in his place must, in order to give effect to the delegation, be perfectly evident.

Addison, on Contracts, ch. 19, setion 2, says: "But there must be a mutual agreement between all the three parties, the creditor, his immediate debtor, and the intended new debtor, for the substitution of the new debt in the place and stead of the original debt; for if that continue to subsist, there is no consideration for the new contract and no valid substitution takes place, and the case, as regards the intended new debtor, is no more than if I promise a stranger, to whom I do not owe anything, that if he will accept me to be his debtor for £60, I will pay it to him, yet this is but a *nudum pactum*, because I was not indebted to him before, and my promise to pay, if the other will receive it, is nothing but a mere voluntary promise, which does not bind me at all (*Forth v. Stanton, 5 Taunt. 450*)."

Without going so far as to say that the superintendent was not bound by his undertaking to pay, as evidenced by his granting the promissory note, the transaction between the plaintiff and the superintendent was (in my opinion) a matter which did not affect the debtor, he was no party to it; and later, when the agreement between the other two was cancelled by mutual consent, by the promissory note being returned, I think the debt between the plaintiff and the defendant remained in the same position as if the promissory note had never been given. I would repel the plea of novation or delegation.

During the course of the argument in appeal it was suggested that the plaintiff was estopped from asserting that the debt remained due because by his conduct from 1889 to 1893 he, by his omission to render accounts to the defendant bringing out this balance, intentionally caused or permitted the defendant to believe it to be true that there was no balance outstanding, and to act on that belief, and therefore that he may not in this

subsequent suit between himself and the debtor deny the truth that there was then no balance due. I am of the opinion that the plaintiff did voluntarily cause the defendant to believe that no balance was due; I am not sure that there is evidence that the defendant acted on that belief. It may be that if the defendant had known that the superintendent had, for reasons of his own, asked that the debt be kept secret, the defendant would have dismissed the superintendent from his service; that would have left the plaintiff and the defendant in the same position as before, and doubtless the defendant would have promptly paid the debt.

The next question is, Had the plaintiff right to attribute to the old debt the payments made by Mr. Evans after Mr. Cantlay left the estate? I am of the opinion that he had no right to attribute this to any but to payment of the monthly accounts rendered to Mr. Evans and paid regularly by him. Then, as regards payments made by Mr. Cantlay after his return to the Island, these, I think, were also attributable to the monthly accounts rendered. It is plain that all concerned, the plaintiff, the superintendent, the visiting agent representing the defendant regarded the moneys as paid in reduction and satisfaction of the current account; these payments could not be attributed without the latter's consent to the payment of an old debt, of the existence of which the plaintiff kept the defendant in ignorance. But it is said that the defendant's agent, the superintendent, knew of the old debt, and that his knowledge was the defendant's knowledge. I think it was not the defendant's knowledge; the transactions between the plaintiff and the superintendent were separate from and somewhat antagonistic to the relations of either with the defendant. With regard to third parties, Mr. Cantlay was the defendant's agent; regarding them, anything he knew material to his principal's interests must be presumed to have been communicated; but here the plaintiff knew that the agent had not communicated to his principal the existence of the debt.

I am of the opinion that the payments made since 1889 cannot be attributed to the old debt. The debt for which the plaintiff now sues has been paid, and the action for the goods supplied since May, 1893, must be dismissed with costs.

MONCREIFF, J.—

I have come to the same conclusion. I agree that there was no novation. I believe that neither the agent of the plaintiff nor Cantlay meant to release the defendant; they meant to make him pay, and Cantlay's promissory note was taken as a collateral

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security in consideration of the connivance at the deception he was practising on his employer. I agree that the payments made by the defendants since 1889 cannot be attributed to the old debts, and that therefore this action must fail.

As for estoppel, it seems to me that the view of the Chief Justice as to the appropriation of payments comes very near to holding that the plaintiff, having represented to the defendant for a considerable period of time that he, the defendant, was paying his expenses from month to month, cannot now turn round and say that the payments were made in respect of old debts.

I should be disposed to think that the estoppel has an even broader basis. The plaintiff's representation was to this effect: " Our accounts are squared; you owe me nothing. You are simply " paying for what I am supplying from month to month." In order to estop the plaintiff from contradicting this representation, it is not necessary to show that the defendant sustained damage by acting upon it. It is enough to show that he acted upon it. The defendant was a man of substance, little likely to leave his superintendent short of funds, and if he had known that Cantlay had allowed the estate to fall into debt to the plaintiff to the extent of more than Rs. 20,000, I can scarcely think that he would have retained Cantlay in his employment. It appears to me that in consequence of the plaintiff's conduct the defendant continued to deal with the plaintiff without dismissing Cantlay, and that he retained him as superintendent without exacting the securities for his good conduct, which he would certainly have required if he had known the truth.

BROWNE, A.P.J.—

I apprehend that the previous judgments and proceedings of this Court have in effect opened the issue between the parties to be whether in honour or honesty defendant (or his legal representatives) now are indebted in aught to the plaintiff.

Defendant was the proprietor resident in England. A. Cantlay holds his power of attorney, and was his visiting agent. His brother, C. Cantlay, was superintendent of the tea garden in question. We must not exaggerate his position or powers. His duties would ordinarily be to have control of the cultivation, the labour force, and (subject always to the visiting agent's control) to receive moneys necessary to defray expenses and make such payments. Is there anything proved to show that he had authority to novate debts or bind the proprietor by estoppel, unless the

proprietor was directly and personally affected with notice or knowledge thereof? The entries in the plaintiff's accounts of the parties, when C. Cantlay first took charge and of Evans' interregnum, show that in ordinary course of business, the proprietor (or his attorney or financial agents in Ceylon) would place the superintendent in funds so promptly that any creditor, like plaintiff, supplying goods could be paid by the superintendent for them within two months. C. Cantlay so paid plaintiff's accounts within two months, down to 30th September, 1882, and 20th November. Then he drifted into three months' arrears, the account to 31st August, 1884, being paid 3rd November following; then into four months, the account to 30th September, 1886, not being paid till 22nd January, 1887, and that to 30th September, 1888, not till 30th January, 1889; then he drifted into six months arrears, the account to 30th June, 1889, not being paid till 31st January, 1890, and that to 31st July, 1890, not till 31st January, 1891. The average monthly supplies by plaintiff were about Rs. 3,900, and so C. Cantlay's promissory note of 5th December, 1889, to plaintiff for Rs. 20,416.89 was for five to six months' expenditure.

Now, if this action were being fought under the provisions of section 18 of the Civil Procedure Code as a triangular duel between plaintiff, defendant, and C. Cantlay, we should have the old question raised against plaintiff in this broad honour and honesty inquiry: "To whom was credit given?" which formally came for consideration in *Ramanathan's Reports (1886), pages 178-197; 4 S. C. C. 40; 5 S. C. C. 33; 6 S. C. C. 52, 115, and 159, &c.*, and I consider that in this case the incident of the promissory note of 5th December, 1889, and the suspension for seven months of any demand of the balance debt which C. Cantlay requested and plaintiff gave, following the manner in which plaintiff had extended credit for two to six months without any apparent cause therefor on defendant's part, though very possibly to oblige C. Cantlay, are all sufficient to show that he (plaintiff) waited upon his pleasure and dealt with him as his principal debtor, and that he should be by us remitted now to his claim against his true debtor. We all know by experience how in the competition of trade a native trader will be kindly and obliging to a superintendent at times so as to gain the business of the estate at first by this favour, and then by the fetter of the arrears—debt. It can be no hardship to him to bid him have resort to his true debtor, while there can be no legal claim against the proprietor, who has in all *bona fides* kept the superintendent always in funds to make payment in the necessary or customary period of two months. I would dismiss plaintiff's action with costs.