MUTTIAH *v.* RAMASAMY.

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D. C., Kandy, 15,115.

Promissory note—Debts of husband's coolies working on tea estate—Promissory note of kankani to head kankani—Security for coolies' debts—Evidence necessary to support action on promissory note—Defence of conditional delivery—Bills of Exchange Act, 1882, s. 21.

When a kangani, employed on a tea estate in Ceylon, obtained advance through the head kankani and brought to the estate a number of coolies and, on the order of the superintendent, gave the head kankani a promissory note for the amount of the debt of himself and his gang of coolies to the estate—

Held, in an action brought by the head kankani against the kankani, on his promissory note, that it was a good plea that the note was given under a special agreement as a security only for a debt which was to be liquidated by stoppages from the wages of the defendant and his coolies, and that as the defendant was performing his part of the contract it was not open to the plaintiff to demand immediate payment of the balance due on the note.

In the case of such agreement the promissory note is delivered conditionally, and the fact of such delivery may be proved between the immediate parties to the note, under the Bills of Exchange Act, 1882, section 21.

LAYARD, C.J.—It may be that the plaintiff has a right of action to recover from the defendant the amount due in respect of some one or more of the coolies who have failed to pay his or her debts to the estate and to carry out the terms of that agreement, but he has certainly no right to recover on the note the whole amount due, unless he establishes that all the principal debtors have failed to carry out the terms of the agreement in respect of which the note was made.

THE plaintiff in this case was the head kankani of Watagoda estate. He sued the defendant, who was a sub-kankani on the same estate, upon a promissory note ftor Rs. 901.13 made on the 26th October, 1901, by the defendant in favour of the plaintiff for the recovery of a balance sum of Rs. 501.91.

The note ran as follows:—

"Watagoda estate, 26th October, 1901.

"On demand, I, the undersigned, Ramasamy Kankani of the above estate, do hereby promise to pay to Mr. Muttiah, head kankani, or order, the sum of Rs. 901.13 only for value received.

"(Signed) RAMASAMY KANKANI."

The plaint also contained a count for money lent to the defentdant.

The defendant admitted that he received the sum of Rs. 901.13 from the plaintiff, but he contended that it merely passed through his hands to certain coolies whose services the defendant procured for Watagoda estate; that the document sued upon, through having

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the form of a promisory note, was signed by the defendant only as a security for the debts of the defendant's coolies, in conformity with an established custom obtaining in tea estates; that defendant had a gang of forty coolies on the said estate, of whom sixteen men deserted service; that neither the plaintiff nor the superintendent of the estate, although requested by the defendant, took measures to have them apprehended; that three of the coolies died; that plaintiff, as head kankani, had removed from defendant's gang five more of the coolies; that the remaining sixteen of the defendant's coolies were still on the estate working, liquidating the debt to the plaintiff from wages earned; that defendant was not liable to be sued on the note until recourse was had to the principal debtors; and that so long as his coolies worked on the estate the liability of the defendant as kankani did not arise.

The District Judge gave judgment for plaintiff for Rs. 501.91, holding that the allegations as regards the desertion and death of the coolies were not proved; that the note was given for the money admittedly received by the defendant and distributed by him, at his own discretion in proportions unknown to any one else, among the labourers he secured by such advances; that he was the principal debtor; and that documents having the form of promissory notes should not be allowed to veil a quite different form of contract.

The defendant appealed. The case was argued on 5th June, 1903.

Samarawikrama, for appellant.

Van Langenberg, for respondent.

19th June, 1903. LAYARD, C.J.—

I would set aside the decree and dismiss the plaintiff's action. The evidence for the defendant shows that the promissory note was given merely by way of security for the amount of debts due by him and his coolies to the estate. This evidence is uncontradicted. The plaintiff to succeed in this action must prove that the defendant and his coolies have failed to carry out the terms of the agreement in respect of which the note was given. He has failed to do so. It may be that the plaintiff has a right of action to recover from the defendant the amount due in respect of some one or more of the coolies who have failed to pay his or her debts to the estate and to carry out the terms of that agreement, but he has certainly no right to recover on the note the whole amount due, unless he establishes that all the principal debtors have failed to carry out the terms of the agreement in respect of which the note was made.

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This is an action to recover a balance of Rs. 501.91 on a promissory note for Rs. 901.13, dated 26th October, 1901, made by defendant in favour of plaintiff, and payable on demand. The action was brought on 21st January, 1902. At the dates material to the action the plaintiff was the head kankani of the Watagoda tea estate, and the defendant was a sub-kankani under the plaintiff, and had a gang of coolies under him working on the estate. The defence is "that the promissory note was signed by the defendant for the debts of defendant's coolies or labourers by way of security only, in conformity with an established custom obtaining in tea estates, for the debts of his coolies to the plaintiff, the head kankani." The answer goes on to say that of defendant's gang of forty men, sixteen deserted, three died, and plaintiff removed five from defendant's gang, and that the remaining sixteen are still working on the estate paying off from time to time by wages earned the said debt to plaintiff; "that defendant is not liable to be sued on the note until recourse be had to the principal debtors, and so long as his coolies work on the said estate the liability of the defendant as kankani does not arise." Defendant also said that the debt on the note had been reduced by deductions made from time to time from the wages of his coolies.

It will be observed that defendant pleads an alleged custom. In the Court below great reliance was placed on his behalf on the case of *Imray v. Palawasen Kankani* (*1 Browne, 88; 4 N. L. R. 113*), but the custom there recognized by this Court had nothing to do with promissory notes made by a sub-kankani in favour of his head kankani. It related to notes made by a kankani in favour of the superintendent, or, in other words, by the person who has the supervision of a labour force which he has collected and brought to the estates in favour of the person who, in the eye of the law, is the employer of the labourers, with power to continue employing them or to dismiss them, power to pay their wages, or stop them wholly or in part. The debt is the debt of the coolies to the state, *i.e.*, to the proprietor, and with their consent deductions are from time to time made by the superintendent from their wages, which are applied in reduction of the debt, and the custom is stated by Bonser, C.J., in these words: "It was stated in the evidence in this case, and in my opinion proved, that these promissory notes are given by the kankanies as security that the coolies would pay the amount by working it off. If the coolies run away or die, then the employer can sue the kankani, but the custom

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is that so long as the coolies work on that estate the liability of a kankani on that promissory note does not arise." See the remarks on this case of Layard, C. J. and Moncreiff, J., in *Whitham v. Pitche Muttu*, decided in appeal on December 9, 1902, *6 N. L. R. 290*. The question as to when precisely the superintendent would be entitled to sue on the note, whether he could do so when a large gang of coolies was substantially reduced by desertions, or whether he was precluded from coming into Court so long as a single cooly remained earning wages which could go in reduction of the debt, did not arise in the case referred to, and was therefore not decided. In the present case the payee is not the person who employed the coolies and paid them their wages, and therefore, in the ordinary course of things, he could not make deductions towards liquidation of the debt, and the defendant admits that the debt was due to the plaintiff, not to the estate.

But, although the custom established in *Imray v. Palawasen* does not help defendant, he is entitled to prove, if he can, the custom he pleads, or, failing that, to prove that there was a special agreement between him and plaintiff, which controlled the plaintiff's right to sue him on the note. The only witness called at the trial was the defendant himself, and his evidence falls very far short of what is necessary to establish a custom which the Court could recognize. Has he then proved such a special agreement? I may say here that I do not appreciate the District Judge's objections to the admission of extrinsic evidence of such an agreement. If the agreement between you and me is that I should give you a promissory note to secure my servant's debt, or to be held by you as a floating security for my own indebtedness, which may vary from time to time, our agreement may either be in writing or may be by word of mouth. In the former case, doubtless, it would have to be stamped with an *ad valorem* stamp in addition to any stamp required by the promissory note when made, but in the latter case it cannot be, and is not required by the law to be stamped. In the case of such an agreement the promissory note is delivered conditionally, and this may be proved between immediate parties. See *The Bills of Exchange Act, 1882, section 21 (2) (b)* and illustrations 4 and 8. Certainly, if the payee indorsed the note to a holder in due course, the latter could immediately recover on the note from the maker in spite of the agreement between maker and payee. The parties must be taken to have reckoned with the possibility of such negotiation. If they intended to exclude that possibility, nothing was easier than to make the promissory note payable to the payee only, and so to prevent its negotiation.

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Turning to the evidence, defendant deposes that in 1897 he took a gang of eight or nine coolies to the estate where they were taken into service, the defendant becoming a sub-kankani under Muttu Carpen Kankani. From time to time the defendant added to the gang, obtaining advances from Muttu Carpen for that purpose. He gave Muttu Carpen a promissory note for what the gang owed him. Muttu Carpen died, and was succeeded by plaintiff as head kankani about October, 1901, and defendant, on the orders of the superintendent, gave plaintiff the note in question for the amount of the debt of himself and his gang to the estate. In January, 1902, plaintiff took over eleven of defendant's coolies, by which I understand defendant to mean that plaintiff placed them under some other sub-kankani and reduced his claim against plaintiff on the note by the amount of the debt due by the eleven men. This was apparently done after action brought, as it is not mentioned in plaintiff's account particulars. The defendant admitted that he had received the Rs. 901.13, the amount of the note, in cash into his own hands and had disbursed it as advances to the coolies whom he brought to the estate. He kept an account with each one, and whenever wages were withheld by the superintendent he was informed of it, and in turn told each cooly of the amount credited to him against his debt. At the date of action, defendant and the remainder of his coolies (either sixteen men or ten men, it is not clear which) were working on the estate and were willing to continue working, but after action, namely, on 27th February, the superintendent gave defendant himself notice to quit, and he left on 27th March.

That the note was not given for a fixed and certain debt, but was a sort of floating security, is proved by plaintiff's account particulars, in which defendant is debited with three sums of Re. 1.50, Rs. 10 (cash), and Rs. 27 (cash); and defendant's story that the note was to be worked off in wages is borne out by plaintiff's giving him credit on October 28 for the wages of three men named, Rs. 9.30; for contract pay, Rs. 6.10; and on 11th January for "October and November pay taken in for advance," Rs. 155.50 (this seemingly represents the wages of coolies); and " contract pay for October and November taken in for advance, Rs. 21.70. " These deductions show that the superintendent was cognizant of the arrangement between plaintiff and defendant and gave plaintiff the sums he deducted from the coolies' wages, and defendant says that the note itself was given to the plaintiff at the instance of the superintendent. Defendant's evidence is entirely uncontradicted. Under these circumstances, I think the defendant has shown that the note was given as a security only for a debt

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which was to be liquidated by stoppages from the defendant's and his coolies' wages, and as at the date of the action the defendant was abiding by and performing his part of the contract it was not open to plaintiff to demand immediate payment of the balance due on the note. I therefore think the decree appealed against should be reversed and the action dismissed with costs.