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FERNANDO *v.* SILVA.

C. R., Colombo, 15,590.

1902.
September 22. and 24.

Promissory note payable on demand—Action by endorsee against maker—Agreement between maker and payee as to suspending payment in the event of a contingency—Knowledge of such agreement on the part of endorsee—Evidence Ordinance, s 92—Conditional delivery.

Section 92 of the Evidence Ordinance, which deals with the exclusion of evidence of oral agreements, allows by proviso 3 that the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

This principle applies to negotiable instruments also.

Oral evidence is admissible in the case of such instruments to show not only that the consideration for the contract has failed, but also that what purports to be a complete contract has never come into operative existence.

Where A made a promissory note in favour of B for a certain sum of money payable on demand, on account of the price of a land which B had sold to A, on the agreement that, if B did not turn out C who was in occupation of it, the amount of the note was not to become payable.

Held, in an action raised against A by D, the endorsee of B, that as D had notice of this oral agreement it was open to the defendant to plead or prove such agreement in bar of plaintiff's claim.

THE plaintiff sued the defendants Silva and his wife and one Cecilia de Silva for the recovery of a sum of Rs. 250 and interest due to him as endorsee of a promissory note dated 29th December, 1898, made by the defendants jointly and severally in favour of one Marsiano Fernando, and by him endorsed to the plaintiff on 13th May, 1900. The defendants admitted the making

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of the note, but pleaded that it was given on account of the price of a land sold to them by the payee, on the agreement that the defendants should pay the amount of the note only in the event of one Nonchihamy, who was then residing in a house on the land, being ejected by the payee. The defendant pleaded that the plaintiff had knowledge of this agreement with the payee, and that Nonchihamy had not been ejected. The Commissioner, after hearing evidence, believed the case for the defence and dismissed the plaintiff's action.

The plaintiff appealed. The case was argued on September 22, 1902.

Bawa, for the appellant.—The plaintiff's title to the land was good. He passed his title to the defendants, handed them the title deeds, and put them in possession. Nonchihamy occupied a part of the land. She has no title to it, but claims to be a caretaker of it. The evidence shows that she was let in by Marsiano Fernando. The defendants took no steps to put her out. The plaintiff, having conveyed the land to the defendants, is not now in a position to sue Nonchihamy in ejectment. The defendants must do so. But the agreement which the defendants have pleaded in their answer as to the right of the defendants to suspend the payment of the note till Marsiano turns out Nonchihamy contradicts the terms of the promissory note that it was payable on demand. Oral evidence regarding the former agreement has been improperly admitted. Evidence Ordinance, section 92. In *Appuhamy v. Ran Menika* (*3 S.C.C. 61*) it was held that the title to immovable property was complete when the deed of transfer was executed and delivered, as that was *vera traditio* of the land. The plaintiff is entitled to judgment on the promissory note.

Van Langenberg (with him *Samarawikrama*), for the defendants, respondents.—The defendants were not bound to eject Nonchihamy. They had the power to sue her in ejectment, but they were not bound in law to do so. It is open to the respondents to say that, in consequence of the agreement between the defendants and Marsiano Fernando as to the ejectment of Nonchihamy, the plaintiff who represents Marsiano Fernando did not become a holder of the promissory note in due course. He took it in May, 1900, with knowledge of this agreement, kept quiet for a long time, did not ask for interest, and came into Court on 8th March, 1901. Being a creature of the payee, his title to the bill is bad, and his action against the maker is not maintainable.

Cur. adv. vult.

24th September, 1902. MONCRIEFF, J.—

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On the 29th December, 1898, the defendants, who are husband and wife, bought from one Marsiano Fernando a property called Hunukotuwewatta for Rs. 2,000. At the same time they mortgaged the property for Rs. 1,000, and a promissory note was executed by the wife in favour of Marsiano. The note was for Rs. 250, it was payable on demand, but the interest at 9 per cent. was not to begin to run until the 29th January, 1899. It appears that of the purchase money the defendants paid Rs. 1,750, while the balance of Rs. 250, the amount of the note, remained unpaid. On the 13th May, 1900, Marsiano endorsed the note to the plaintiff, and on the 8th March, 1901, the plaintiff put the note in suit. The defendant's story is that the note was given subject to an agreement or condition which had reference to the fact that a woman named Nonchihamy, who had been the vendor's caretaker, remained in possession of a house on the property. The defendants took delivery of the whole of the land with the exception of Nonchihamy's house. There was obviously some agreement respecting this note. That is clear from the fact that Marsiano and the plaintiff, as endorsee, between them held the note for more than two years, and although it was payable on demand and no interest was paid on it, it was not put in suit until the 8th March, 1901. There is some vagueness as to what the agreement was. The first defendant says that Marsiano was to eject Nonchihamy within one month from the date of the note, and is corroborated by the fact that interest was to be payable on the note from the 29th January, 1899—a month after the making of the note. If that was the case of the defendants, there was a complete breach of the agreement at the end of January, 1899. I think, however, that that is not the case of the defendants. I understand them to mean that the obligation they undertook on giving the note was subject to a suspensive condition, *i.e.*, that their obligation on the note was suspended until the happening of a certain event, viz., the ejectment of Nonchihamy. Nonchihamy has never been ejected and the defendants say that their liability on the note has never become definitive. That is the case set up in the answer, and the case suggested by the first isue.

It is argued, however, that, even if there was a parol agreement of this kind, it cannot be used to vary or detract from the obligation on the note. It is said, and I agree, that there was no want or complete failure of consideration, which the law, as expressel in the Evidence Ordinance, section 92, proviso 1, would permit the defendants to prove. There may have been partial failure of consideration. The case, however, is not that there was a failure

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of consideration, but that the obligation on the note was not to arise until Nonehihamy was ejected. The question then is, whether the law permits proof of that condition.

Section 92 of the Evidence Ordinance, which deals with the exclusion of evidence of oral agreements, allows by proviso 3 that "the existence of any separate oral agreement, consituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved." That principle, so long as its operation is not excluded by law in relation to negotiable instruments, would, in my opinion, apply to this case. The principle has been admitted in English Law with some reluctance. Common Law Judges were apparently very averse to the admission of oral evidence with regard to obligations incurred on negotiable instruments. But I find this in Mr. Chalmers' book, Art. 55. He speaks of a note, delivered as this note was delivered, as an "escrow," and then he says that the payee of the note may be treated as a sort of bailee, and finally, by reference to certain authorities, he lays down that oral evidence is admissible to show, among other things, in reference to negotiable instruments, both that the consideration for the contract has failed, and that what purports to be a complete contract has never come into operative existence. That is the defendants' case. In support of that proposition Mr. Chalmers cites some authorities, one of which I have not been able to consult, *Salmon v. Webb* (*3 H. L. 510*). In *Bell v. Lord Ingestre* (*12 Q. B. 317*) we find that the defendant's acceptance of two bills was obtained and transmitted to the Company with his name endorsed upon it for the purpose of retiring some overdue bills, but on the express condition that the last-mentioned bills should be returned to him by next post which condition had never been complied with. Lord Denman, Chief Justice, said the bills were a sort of escrow, and regarded the case as something very novel, because the bills were delivered to parties who were to benefit by them. Still he thinks they were delivered to them as mere trustees, and the other Judges took the same view more or less. In the third case (*Castrique v. Battigieg, 10 Moore, P. C. 108*) the Court apparently considered that the intention with which delivery of the bill or note was made and accepted, as evinced by the words, either spoken or written, of the parties, and the circumstances under which the delivery took place, were all matters which should be taken into consideration in determining the exact position brought about by the making of the note.

These cases appear to me to apply in this instance, if it is held that the agreement was entered into as alleged between

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Marsiano and the defendants, and the plaintiff (the endorsee) had full knowledge of what had taken place. The defendants assert that the plaintiff carried this transaction through, and that he was in the employment of Marsiano. The Commissioner has held that he was privy to these proceedings, and is bound by what Marsiano did. I think the Commissioner was right in his finding on the facts, and in holding that the agreement or condition set up by the defendants was made, and that the plaintiff is bound by it, inasmuch as the event upon the occurrence of which the defendants' liability was to become positive has never taken place. In my opinion the defendants are not liable upon this note.