1941 *Present :* **Moseley S.P.J. and Wijeyewardene J.**

INDIAN BANK LTD. *v.* CHARTERED BANK *et al.*

*11 & 12—D.C. Colombo, 10,413.*

***Bill of sale—Pledge of movable property—Custody and possession of property—Non-compliance with the provisions of Registration of Documents Ordinance (Cap. 101), s. 18—Roman-Dutch law.***

**Section 18 of the Registration of Documents Ordinance invalidates a pledge of movable property, whether executed in writing or not, which does not comply with the provisions of the section.**

***Held, further,* that the phrase "ostensibly and *bona fide* in such custody" means that the possession of the person possessing should be not only *bona fide* but should be of such a nature as to make it apparent to others that such person was in possession.**

THIS action was concerned with the conflicting claims of the plaintiff and the first defendant to certain bags of flour which belonged to Mr. J. P. Kapadia who died in insolvent circumstances and whose estate was being administered by the second and third defendants as executors of his last will.

It was contended on behalf of the plaintiff that he held a valid pledge in respect of the bags of flour and that they had been actually delivered over to the custody and possession of the plaintiff as pledgee as required by section 18 (*a*) of the Registration of Documents Ordinance. Even if the plaintiff had not the custody and possession as contemplated by the Ordinance, he was entitled to make his claim as a pledge under the Roman-Dutch law. The first defendant claimed the bags in question as pledgee in possession and in the alternative by virtue of a document (1 D 1) a right to retain possession of the bags and to sell them and apply the proceeds in satisfaction of his debt.

The learned District Judge rejected both claims and directed the proceeds to be paid to the second and third defendants.

*L. M. de Silva, K.C.* (with him *N. Nadarajah, M. Tiruchelvam* and *J. A. T. Perera*), for the plaintiff, appellant.—The plaintiff held a valid pledge over the bags of flour and has, therefore, a preferential right to the money in Court. The plaintiff's claim may be based on three grounds :—(1) There was a good pledge under the common law; (2) even under section 18 (*a*) of the Registration of Documents Ordinance, No. 23 of 1927 (Cap. 101) the plaintiff was in ostensible possession of the bags of flour; (3) document P 34 confers an authority coupled with an interest.

As regards ground (1), where the passing of property, special or general, is effected by actual delivery of possession any accompanying document does not have the effect of any such instrument as is described by section 18 of the Registration Ordinance. There was a good pledge notwithstanding the non-registration of P 34. Our present Ordinance follows the English law and strikes only at documents. See *Wrightson v. McArthur* [1], *Ex parte Hubbard* [2], and *Halsbury's Laws of England (2nd ed.), vol. 3, p. 6.* The pledge contemplated in the Ordinance is a written

[1] *(1921) 2 K. B. 807.* [2] *(1886) 17 Q. B. D. 690.*

pledge. A "bill of sale" under sections 17 and 18 must necessarily refer to, and connote, a document. We have, by the present Ordinance, brought ourselves into line with the English law. 41 & 42 Vict. c. 31 runs on exact parallel with our Ordinance.

[WIJEYEWARDENE J.—Does a "bill of sale" always connote a document? See clause (*b*) of section 18.]

As against that there is section 23, and the word "executed" in section 18.

In regard to ground (2), it is clear, on the evidence, that we remained ostensibly in possession, within the meaning of the word "ostensible" in section 18. The question in this case must be decided in precisely the same way as if the debtor, whose transactions have given rise to the controversy had been himself bringing this action. It would be startling if there was anything in the state of the law which compelled us to say that under the circumstances which occurred in this case he could successfully maintain such an action—*Charlesworth v. Mills.*[1] "Ostensibly" means something less than real. Before 1871, according to the common law, we had to have legal delivery and continued legal possession in order to prove a valid pledge. The word "ostensible" relaxed the requirements of the common law. One must have regard to the commercial necessities of the situation. The object of the Ordinance was to mitigate the ill effects of secrecy and secret documents. If anybody made reasonable inquiries he would have found that we were in possession of the bags of flour. Ostensible possession is unrelated to legal possession. A man may be ostensibly in possession of a thing without being really in possession, and, *vice versa,* one may be really in possession without being ostensibly in possession.

Thirdly, document P 34 confers an authority to sell coupled with an interest—*Charlesworth v. Mills* (*supra*). Such authority is not revoked by death—*Bowstead on Agency* (*9th ed.*) *p. 332; Carter v. White.*[2]

*Babcock et al. v. Lawson et al.*[3] which the District Judge purported to follow is really in my favour. *Whales' Trustee v. Early*[4] too has no application. See also *17 Cape S. C. 73.* The meaning of the word "assurance" appearing in section 17 (1) of Cap. 101 is dealt with in *Gunatileke v. Ramasamy Pulle.*[5] *Great Eastern Rly. Co. v. Lord's Trustee*[6] is directly in point to show that the transaction between the plaintiff and Kapadia cannot be regarded as a bill of sale and to establish that my possession is entitled to protection. The fraud committed by Kapadia cannot prejudice my claim—*Farquharson Bros. & Co. v. King & Co.*[7].

*H. V. Perera, K.C.* (with him *E. F. N. Gratiaen* and *Walter Jayawardene*), for the first defendent, respondent, was called upon to address on grounds (1) and (3) only.—The Roman-Dutch law regarding pledges appears in *Maasdorp's Institutes, vol. 2* (*5th ed.*) *p. 259.* According to the Ordinance of 1871 a "bill of sale" had to be in writing and, as regards pledges, the Roman-Dutch law was codified, and open and actual delivery of possession was made necessary. The term "bill of sale" in section 17

[1] (*1892*) *A. C. 231 at 240.*
[2] *50 Law Times 670.*
[3] *48 L. J. Q. B. 524.*
[4] *3 Buchanan's Rep. 474.*
[5] (*1919*) *6 C. W. R. 125.*
[6] *L. R. 1909 A. C. 109.*
[7] (*1902*) *A. C. 325.*

of the present Ordinance, on the other hand, catches up every form of pledge, documentary and non-documentary. A word can be given any meaning by the Legislature. The word "includes" in section 17 is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statue—*Dilworth et al. v. Commissioner of Stamps.*[1] There is an expression of opinion by Dalton J. in *Appuhamy v. Appuhamy*[2] that the term "bill of sale" refers not only to documents but also to transactions such as pledges.

No right of sale was conferred by P 34. One cannot extract from a bad pledge some other contract. In Roman-Dutch law a lien gives no cause of action. A right of sale of property, unless coupled with an interest, is revoked by death. For meaning of "coupled with an interest" see *vol. 3 Maasdorp's Institutes (1924) p. 337.* But this point need not be dealt with further in view of the fact that it was agreed in the District Court that the plaintiff's claim should be rejected if the pledge was held to be bad.

On the facts it cannot be said that the plaintiff had a mortgage over any particular bags of flour at the time he came to Court.

*N. K. Choksy* (with him *S. J. Kadirgamer*), for the second and third defendants, respondents.

*L. M. de Silva, K.C.*, in reply—The rule of interpretation stated by the Privy Council in *Cadija Umma et al. v. Don Manis Appu et al.*[3] is helpful to interpret "bill of sale" in section 17. It is not possible to interpret that term without limiting it to writing. In every kind of business the word "bill" occurs as representing any writing—*The Bank of England v. Anderson.*[4] The dictum of Dalton J. in *Appuhamy v. Appuhamy* (*supra*) was merely obiter.

The Roman-Dutch law relating to mortgage of movables has not been entirely swept away by legislation (*Ramen Chetty v. Campbell.*[5])

*Cur. adv. vult.*

November 7, 1941. WIJEYEWARDENE J.—

This action is concerned with the conflicting claims of the plaintiff and the first defendant to certain bags flour which belonged admittedly to Mr. J. P. Kapadia, who died in insolvent circumstances on June 9, 1939, and whose estate is now administered by the second and third defendants as executors of his last will.

Kapadia who was carrying on a large business in wheat flour had a store at Prince Street, Pettah, which it is now admitted, could not have held more than 4,000 bags of flour at a time.

Kapadia used to borrow large sums of money from the plaintiff bank and the first defendant bank, representing to them that they had sufficient security in the bags of flour kept at his stores. This representation was untrue as the sums borrowed by him were far in excess of the value of the maximum number of bags that could have been kept there. At the time of his death Kapadia owed Rs. 50,747.13 to the plaintiff and

[1] *L. R. (1899) A. C. 99 at 105.*
[2] *(1933) 35 N. L. R. 329 at 330.*
[3] *(1938) 40 N. L. R. 392 at 396.*
[4] *3 Bingham's New Cases 589 at 601.*
[5] *(1896) 2 N. L. R. 94.*

Rs. 346,434.28 to the first defendant. During the lifetime of Kapadia, each bank was ignorant of the transactions of Kapadia with the other bank.

For the purposes of this case, it is not necessary to consider the transactions between the plaintiff and Kapadia earlier than October 17, 1938. Shortly before that date, Kapadia asked Mr. Rau, the agent of the plaintiff bank, for a loan of Rs. 150,000 on the security of 15,000 bags of flour, some of which were said to be already in the store, and the balance, at the Customs, pending their removal to the store. Rau acceded to Kapadia's request and lent him Rs. 150,000 on October 17, 1938, and there was no other debt due at the time by Kapadia to the plaintiff on the security of the bags kept at the Prince street store. According to its practice, the bank obtained from him three documents—a promissory note P 21, a letter P 22 and a letter of hypothecation P 23. Both the letters P 22 and P 23 referred to the security as 15,000 bags "stored and to be stored" at the store, in view of the fact that Kapadia himself informed Rau that some of the 15,000 bags were awaiting transporation to the store. Kapadia purported to give the bank possession of the hypothecated goods by handing to Rau some seven or eight keys and padlocks of the store. In order to secure the possession so obtained, the plaintiff bank placed an additional padlock on the door of the store and employed a man called Krishnan as a watcher at the store from 8 A.M. to 6 P.M. In terms of the arrangement reached between Kapadia and the plaintiff bank, the watcher was further directed not to permit any bags to be removed from the store except on a delivery order issued by the plaintiff bank but to keep the store open for the admission of any bags. The plaintiff bank stated that it was in possession of the bags in the store in that manner up to the death of Kapadia. During that period the plaintiff bank lent to Kapadia—

(*a*) On December 22, 1938, Rs. 75,000 on documents P 26, P 27 and P 28 on the security of 9,000 bags.

(b) On March 6, 1939, Rs. 55,000 on documents P 29, P 30 and P 31 on the security of 5,000 bags.

(c) On March 31, 1939, Rs. 55,000 on documents P 32, P 33, and P 34 on the security of 5,000 bags.

There was however a difference between these three loans and the first loan. Each of these loans was given on the security of bags represented by Kapadia to be actually in the store at the time and not covered by any previous letter of hypothecation. The plaintiff bank was satisfied with the assurance of Kapadia with regard to each of these loans that there was in the store, as security for each loan, the number of bags mentioned in the relative documents. The documents themselves referred to the bags as "stored" in the Prince street store and not as bags "stored and to be stored" as in P 23. None of these documents P 22, P 23, P 27, P 28, P 30, P 31, P 33 and P 34 were registered under the provisions of section 18 (*b*) of the Registration of Documents Ordinance.

The bank kept separate accounts for each loan, crediting against each loan any payment made by Kapadia in respect of that loan. Whenever Kapadia made such a payment, the plaintiff bank issued to him a

delivery order authorising him to remove a number of bags the value of which priced at Rs. 10 per bag was equivalent to the amount paid. On the presentation of a delivery order by Kapadia, Krishnan would permit him to remove the number of bags mentioned in the order. When he had removed that number of bags or made a pretence of having removed that number, Kapadia would hand over to Krishnan the delivery order endorsed by him to be returned to the plaintiff bank. I use the words, "made a pretence of", because, very often, the delivery order was for a number of bags far in excess of the number which the store could have possibly held, and it was, therefore, not possible to remove on any such delivery order all the bags mentioned in it. But Kapadia had to make the pretence that he removed all the bags so mentioned in order to prevent the plaintiff bank from having any doubts as to the representations made to it from time to time by Kapadia regarding the number of bags kept by him in the store. The issue of a delivery order released automatically the bags mentioned in it from the charge imposed on those bags by the relative letter of hypothecation.

On March 31, 1939, the indebtedness of Kapadia to the plaintiff bank was Rs. 137,683.15, and the plaintiff bank believed that it had the requisite number of bags in the stores as security for the balance due under the relative letters of hypothecation. On that day Kapadia got a further loan of Rs. 55,000 on the security of 5,000 fresh bags which he alleged he had placed in the store. In respect of that loan Kapadia gave the plaintiff bank the promissory note P 32, the letter P 33 and the letter of hypothecation P 34. By P 34 Kapadia purported to give the bank 5,000 bags of flour kept in the store as security for that loan.

The first loan of Rs. 150,000 was settled on March 30, 1939, the second loan of Rs. 75,000 on May 4, 1939, and the third loan of Rs. 65,000 on May 30, 1939. On June 7, 1939, the fourth loan alone remained unsettled and the balance due on that loan was Rs. 50,747.13.

The number of bags found in the store on June 9, 1939, was 2,504. Those bags were sold under the orders of Court and the proceeds of sale amounting to Rs. 24,979 were deposited in Court. The claims in this action were, thereupon, confined to the fund in Court.

The first defendant bank claimed the bags in question as a pledgee in possession and, in the alternative, claimed by virtue of 1 D 1 a right to retain possession of the bags, sell them and apply the proceeds of sale in satisfaction of the debt due to it.

The District Judge rejected the claims of the plaintiff and the first defendant to any preferential right in the sum of Rs. 24,979 and directed that the money should be paid to the second and third defendants.

Both the plaintiff and the first defendant have appealed from the decree of the District Court, appeal No. 11 being by the plaintiff and appeal No. 12 by the first defendant.

At the argument before us the plaintiff-appellant's Counsel contended—

(*a*) that the plaintiff was entitled to a preferential right to the fund in Court as the holder of a vaild pledge of the bags of flour ;

(*b*) that the plaintiff was authorised as an agent by Kapadia to sell the bags and appropriate the proceeds in satisfaction of the debt

due to the plaintiff and that the plaintiff therefore, could exercise the right so given, even if he did not hold a valid pledge of the bags.

The first defendant's Counsel pointed out that it was not open to the plaintiff to put forward his claim before us on ground (b) as it was specifically agreed in the District Court—as recorded by the District Judge—that the plaintiff's claim to a preferential right should be rejected in the event of his being held not to have a valid mortgage over the bags. In these circumstances we decided to confine ourselves to a consideration of the first ground alone in adjudicating on the rights of the plaintiff.

In support of his argument that the plaintiff held a valid pledge in respect of the bags of flour, the plaintiff's Counsel argued—

(1) that the bags had "been actually delivered over into the custody and possession of the plaintiff as pledgee and they continued and remained ostensibly and *bona fide* in such custody and possession" until he made his claim as required by section 18 (*a*) of the Registration of Documents Ordinance.

(2) that even if the plaintiff had not the custody and possession contemplated by section 18 (*a*) of the Registration of Documents Ordinance, he was entitled to make his claim as a pledgee under the Roman-Dutch law.

In dealing with the first point it is sufficient, for the purpose of this appeal, to consider the question whether the bags were "ostensibly" in the custody and possession of the plaintiff. It was contended on behalf of the plaintiff that the "ostensible" possession contemplated by section 18 (*a*) was something less than "actual" possession and that "ostensibly" was used in that section as opposed to "actually". I am unable to accept that contention as the word "ostensibly" occurs in the phrase "ostensibly and *bona fide* in such custody". I think the phrase means that the possession of the person possessing should be not only *bona fide* but should be of such a nature as to make it apparent to others that such person was in possession. Giving the word "ostensibly" that meaning I shall consider, now, the evidence to determine whether the bags were "ostensibly" in the custody or possession of the plaintiff.

The bags were kept in a store which was well-known as the store of Kapadia. The rent for the store was paid by Kapadia. Though the plaintiff bank kept its own servant, Krishnan, as the day watcher, Mr. Rau, the agent of the plaintiff bank states that "one of the terms of our agreement (with Kapadia) was that the deceased (Kapadia) had to keep a night watcher". According to the same witness—

(*a*) "Krishnan's instructions were to keep the store open during the day if deceased (Kapadia) wanted it".

(*b*) "His (Krishnan's instructions were to have the place locked and if deceased wanted to put flour into the warehouse Krishnan was to open the doors and allow him to do so. Deceased may want to enter the warehouse apart from taking goods in. He may come there to look at his stock or to take samples to show prospective purchasers. In fact he could do anything except taking stock out.

(c) "Kapadia generally had free access to the stores with any prospective purchaser".

Krishnan wore no distinctive badge to show that he was employed by the bank. No arrangement was made for Krishnan to stop near the store when the store was closed. In reply to the question, "if the door was locked where was Krishnan to remain?" Mr. Rau did not hesitate to reply, "He could have stayed in the shop opposite or somewhere there, I was not concerned where Krishnan stood". Rau has further stated that the plaintiff "put up no notices anywhere saying that the stock inside the store was mortgaged (to the Bank). There were no such notices either inside or outside".

It is admitted by the plaintiff that on three occasions, at least, Kapadia removed the keys from Krishnan and kept them with him for a day or two. When Krishnan reported to Rau on the first two occasions that Kapadia removed the keys from him, Rau did not question Kapadia about the matter. Speaking of this, Rau stated, "on the previous occasions when Krishnan reported the incident of the keys what could I do? I condoned the irregularity. I did tell Krishnan he should not do a thing like that again. But I did not speak to the deceased".

The accountant of the Chartered Bank describing his visit to the store in April, 1939, stated:—"On my visit to the Prince street store I was accompanied by the deceased who called for me by appointment at the Bank. It was some time before noon . . . . I know the gate which has been described as the wicket gate. When I arrived there it was shut. The deceased opened the lock with the key which he had in his possession. He had the keys in his pocket. The main door was locked. It had a number of padlocks. Deceased opened these padlocks too with the keys which were in his possession. There was nobody present who indicated that a third party had any claim or right with regard to the contents of the store".

Once a delivery order issued by the plaintiff bank was shown to Krishnan, the store was kept open for Neina Cassim, the cart contractor employed by Kapadia, to go in and out of the store for the removal of the bags. As Krishnan himself did not keep an account of the bags removed, he was unable to control Neina Cassim's movements. The door would be kept open a number of days until the deceased told Krishnan that he had removed all the bags mentioned in the delivery order. During that period, Neina Cassim and his coolies "used to come and remove bags from the store on cart chits issued by the deceased".

Both Mr. Mehta, a clerk employed by the deceased, and Mr. Homji, the manager of the deceased, were not aware that the goods of the deceasd had been pledged with the plaintiff bank though their office was only a few minutes' walk from the Prince street store. I do not think it necessary to refer in greater detail to the evidence. I am satisfied that the bags were not ostensibly in the custody and possession of the plaintiff.

The second point was put forward on the basis that the Registration of Documents Ordinance, 1927, struck at documents and not at transactions. It was argued as a necessary consequence that though P 34 might be invalid for non-compliance with the provisions of section 18, the validity of the transaction would still remain to be considered, in the circumstances

of this case, according to the principles of the Roman-Dutch law. Our attention was drawn, in this connection to a number of cases (*Ex parte Hubbard (1886) 17 Queen's Bench Division 690, Charlesworth v. Mills*[1] and some others) where the English Courts have held that, in certain circumstances, though the documents themselves were invalid under the Bills of Sale Acts of 1878 and 1882, the transactions referred to in these documents would not be questioned, if valid under the common law.

It was argued on behalf of the plaintiff that the term "bill of sale" in section 17 of the Ordinance connoted a writing and that therefore when a "bill of sale" was defined as including a pledge it had the effect of restricting the "pledges" referred to in the Ordinance to written pledges. It was sought to strengthen this argument by referring to the word "executed" in section 18 which it was said, connoted a writing.

Now sections 17, 18 and some of the following sections have been enacted in place of Ordinance No. 8 of 1871 and No. 21 of 1871 which were repealed by section 50 of the Registration of Documents Ordinance. Ordinance No. 8 of 1871 itself was passed in order to remedy the evil pointed out in *(1858) 3 Lorenz 49* that according to the then existing law, it was possible for a person holding a written mortgage of movables unaccompanied by possession to claim a preferential right as against other creditors who had given credit to the mortgagor in ignorance of the existence of the special mortgage. Ordinance No. 8 of 1871 rendered invalid certain transactions in respect of movables, if there was no compliance with the provisions of section 2 of that Ordinance. That section enacted that "no pledge or conventional hypothecation or bill of sale of any movable property" shall be valid—

(*a*) "unless the said property shall have been actually delivered ——— and shall continue and remain ostensibly and *bona fide* in such custody and possession ———",

(*b*) "unless such pledge, hypothecation or bill of sale shall have been created by writing ——— and unless such writing shall have been duly registered ———".

Section 3 of that Ordinance corresponding to section 19 of the present Ordinance provided that "no transfer or assignment . . . . of any pledge, conventional hypothecation, or bill of sale of any movable property shall be valid and effectual" . . . . unless such transfer or assignment was in writing and registered.

Section 6 of that Ordinance defined the words "bill of sale" and according to that definition a bill of sale did not include a pledge or conventional hypothecation. The effect of this was that the draftsman had to use the expression "pledge, conventional hypothecation or bill of sale", in sections 2, 3 and 4 of that Ordinance in order to make these sections applicable to pledges and conventional hypothecations in addition to "bill of sale". A comparative study of the provisions of Ordinance No. 8 of 1871, Ordinance No. 21 of 1871, and sections 18 to 24 of the Registration of Documents Ordinance leads me to the opinion that, by making a "bill of sale" to include a pledge and a conventional hypothecation in section 17 of the new Ordinance, the Legislature merely carried out into effect its intention to substitute for the words "pledge conventional hypothecation or bill of sale" occurring in the old Ordinance the shorter

[1] *(1892) A. C. 231.*

expression " bill of sale ". In other words, the Legislature grouped together the various transactions referred to in the definition of " bill of sale " in section 6 of the old Ordinance and added to that group the two transaction of pledge and conventional hypothecation and indicated by that section that the enlarged group would henceforward be known by the term " bill of sale ". It thus obviated the necessity for the use of the cumbrous expression " pledge, conventional hypothecation or bill of sale" favoured in the old Ordinance. Nor do I think that the word " executed " in section 18 of the present Ordinance conveys the idea that the " bill of sale " referred to is a written " bill of sale ". I do not see any reason why the word " executed " should not be given its ordinary meaning " carried into complete effect ". Moreover the words in clause (*b*) of section 18 of the present Ordinance, " unless such bill of sale shall have been created by writing ", suggest that the Legislature contemplated also a class of " bills of sale " other than " bills of sale " created by writing. In the absence of a cogent reason I am not prepared to hold that the " bill of sale " in section 17 of the Registration of Documents Ordinance is a written instrument and thus bring into existence even greater evils than those which were condemned in *3 Lorenz 49*. I do not think that the Legislature intended to, or did in fact, effect a drastic change in our law as suggested by the plaintiff's Counsel when it enacted sections 17 and 18 of the Registration of Documents Ordinance in place of sections 6 and 2 of Ordinance No. 8 of 1871. I am of opinion that section 18 of the present Ordinance refers to documents and transactions, and hold therefore, against the plaintiff on the second point raised by him.

There remains to be considered the argument of the Counsel for the first defendant, that, in any event, the plaintiff has failed to prove that he had any interest under P 34 in the 2,504 bags that were in the store on June 9, 1939. According to Kapadia's books there were in the store 3,936 bags on March 31, 1939. It could not have held more than 4,000 bags. At that time the indebtedness of Kapadia to the bank on the previous loans was Rs. 137,683.15. These bags should be regarded, in the absence of any evidence to the contrary, as some of the bags that were effected by the previous letter of hypothecation. This would mean that, at the time Kapadia gave letter P 34 hypothecating 5,000 bags in the store, there were, in fact, no bags in the store available for such hypothecation, as the agreement was that the bags to be hypothecated should not be bags covered by a previous letter of hypothecation. The view most favourable to the plaintiff, that could be taken, is that the 3,936 bags in the store on March 31, 1939, were available for hypothecation under P 34 and were, in fact, so hypothecated. Even if it be possible to consider the position in that light, it would not help the plaintiff very much, in view of the removals and additions made between March 31, 1939, and June 9, 1939. According to Kapadia's books, only 3,860 bags were brought to the store during that period. On June 9, 1939, there were left only 2,504 bags. The number of bags that must have been removed, therefore, during that period would be 5,292. According to Kapadia's books the number removed during that period was 5,223 while according to the delivery orders returned by Kapadia endorsed by him he had authority to remove 7,500 bags. In view of the fact that it

was not the practice of Kapadia to remove always the total number of bags mentioned in the delivery orders, this disparity between the number removed and the number authorised to be removed is not strange. Taking the figures most favourable to the plaintiff, I shall take the number removed from March 31, 1939, to June 9, 1939, as 5,223 bags. There is nothing in the evidence to show that the 5,223 bags which were removed did not include the entire stock of 3,936 bags which were in the store on March 31, 1939. The figures themselves show conclusively that at least 1,432 bags out of that stock had been removed. The resulting position then is that it is not possible to say the 2,504 bags that were ultimately found in the store were a portion of the bags hypothecated under P 34. The same result is reached even if one goes through the more detailed process of considering each addition and each removal during the period. The form employed by the plaintiff for letters of hypothecation enabled the plaintiff to describe with reference to distinctive marks the bags mentioned in each letter of hypothecation. The plaintiff neglected to get a specific description of the goods in the letter of hypothecation and the consequence is that it is not possible to say that the bags ultimately found in the store were the bags hypothecated under P 34, in view of the additions and removals effected after March 31, 1939.

I hold, for the reasons given by me, that the plaintiff's appeal must fail.

As regards appeal No. 121 the Counsel for the first defendant did not press the appeal against that part of the decree of the District Court dismissing his claim to a preferential right in the bags. He contended, however, that the first defendant should not have been ordered to pay the second and third defendants the costs of the action. I think that, in the circumstances of this case, the first defendant has a just grievance and I direct that the part of the decree dealing with the payment of costs by the first defendant to second and third defendants be deleted.

Mr. Choksy who appeared for the second and third defendants asked that an order be made by us enabling the second and third defendants to charge the estate of Kapadia with the costs incurred by them. On the evidence before me, I am inclined to the view that the second and third defendants should be allowed to debit the estate of Kapadia with the costs here and in the District Court, but I do not think it proper to make such an order in this action. The second and third defendants should make an application for this purpose in the testamentary case in which the estate of Kapadia is administered and the Judge dealing with the matter will, no doubt, make an appropriate order, after such inquiry as may appear necessary to him.

I direct decree to be entered affirming the judgment of the District Court subject to the modification made by me regarding the costs of the second and third defendants. There will be no order as to the costs of these appeals.

*Appeals dismissed.*

MOSELEY S.P.J.—I agree.