**1966** *Present :* **L. B. de Silva, J., and G. P. A. Silva, J.**

CEYLON ESTATE AGENCY AND WAREHOUSING CO., LTD., Appellant, *and* N. ST. C. H. DE ALVIS and another, Respondents

*S. C. 515/1962—D. C. Colombo, 20896/S*

(i) *Contracts—Contract of guarantee—Elements necessary—Interpretation—Separate documents relating to same obligation—Effect on issue relating to misjoinder of parties and causes of action—" Cause of action "—Civil Procedure Code, s. 5.*

(ii) *Bills of Exchange Ordinance—Section 89 (1)—Promissory note payable " at Colombo "—Requirement of presentment for payment—Effect of failure to present for payment when such presentment is necessary.*

(i) Plaintiff lent and advanced to the 1st defendant on 10th August 1956 a sum of Rs. 40,000 on a promissory note of which the 1st defendant was maker, the 2nd defendant was payee and the plaintiff was indorsee. A few days later, on 13th August 1956, the 1st defendant mortgaged to the plaintiff, as security, the crops of Oakfield Estate. On the same day, the 2nd defendant guaranteed to the plaintiff in writing P5 the repayment by the 1st defendant of the said sum of Rs. 40,000 and interest, renouncing all benefits of suretyship and making himself jointly and severally liable with the 1st defendant. This agreement, although it was described in the deed P5 as a guarantee and referred to the rights and benefits to which sureties were entitled, was in reality a contract under which the 2nd defendant became a principal debtor.

In the present action the plaintiff sued the 1st and 2nd defendants for the recovery of a restricted claim of Rs. 25,000. He based his claim against both of them on the promissory note as the first cause of action and, alternatively, on the crop bond and P5 as the second cause of action. It was contended on behalf of the defendants that, in regard to the 2nd cause of action, there was a misjoinder of parties and causes of action inasmuch as the writing P5 given by the 2nd defendant was not a guarantee but was a separate and principal obligation undertaken by the 2nd defendant to pay the debt due from the 1st defendant to the plaintiff upon the crop bond.

*Held*, (*a*) that a contract cannot be regarded as a contract of guarantee if it is such a contract only by description but is not so in reality. The mere use of a descriptive term cannot affect the reality of a transaction. Deed P5, when read as a whole, was not a guarantee of the 1st defendant's debt to the plaintiff but was, in reality, a contract whereby the 2nd defendant became a principal debtor of the plaintiff for consideration.

(*b*) that the term " cause of action " has been given a broad meaning in section 5 of the Civil Procedure Code. The obligation sought to be enforced from the 1st defendant on the crop bond and from the 2nd defendant on the writing P5 was one and the same. Though there were two separate documents, they were in fact one and referred to the same obligation. The promissory note, the crop bond and the writing P5 were entered into by all the parties as parts of a single transaction and with the consensus of all. In the circumstances, although P5 was not a contract of guarantee, there was no misjoinder of parties and causes of action in regard to the alternative second cause of action.

(ii) As for the first cause of action, the promissory note was drawn by the 1st defendant in favour of the 2nd defendant, who indorsed it to the plaintiff. In the body of the note it was made payable " at Colombo " to the 2nd defendant or his order. The 1st defendant lived at Hendala and the 2nd defendant at Pamunuwa. The 2nd defendant was only an accommodating party who immediately indorsed it and gave it over to the plaintiff, who then paid Rs. 25,000 out of the consideration to the 1st defendant. It was only the plaintiff who had a place of business in Colombo. It was thus clearly understood by all parties to the promissory note that payment was to be made to the plaintiff.

*Held*, that the court can look into the surrounding circumstances to ascertain if the place of payment designated in a promissory note is a " particular place " within the meaning of section 89 (1) of the Bills of Exchange Ordinance. In the present case a particular place of payment was mentioned in the body of the promissory note and, therefore, presentment for payment was necessary before the plaintiff could sue the defendants on the promissory note. In an action on a promissory note where presentment for payment is necessary, it is necessary to aver in the plaint filed against the maker and the indorsers that the note was duly presented for payment and was dishonoured. If there was any excuse for not presenting the promissory note for payment, such excuse should be pleaded. As against the indorsers, the plaint must further aver that notice of dishonour was given to them, unless there was an excuse for not giving such notice, when such excuse should be pleaded. Even if the court is to take a liberal view of the pleadings, the defect should at least be cured by raising the appropriate issues on these matters unless these facts are admitted by the defendants. As the plaintiff in the present case failed to make these necessary averments in the plaint and also failed to cure the defect in the plaint by raising the relevant issues at the trial, the plaint failed to disclose a cause of action against the defendants on the 1st cause of action.

APPEAL from a judgment of the District Court, Colombo.

*D. R. P. Goonetilleke*, with *D. S. Wijewardene*, for the plaintiff-appellant.

*H. W. Jayawardene, Q.C.*, with *N. S. A. Goonetilleke* and *C. A. Amarasinghe*, for the 1st defendant-respondent.

*N. S. A. Goonetilleke*, for the 2nd defendant-respondent.

*Cur. adv. vult.*

March 30, 1966. L. B. DE SILVA, J.—

The Ceylon Estate Agency and Warehousing Company, Ltd. (hereinafter called the plaintiff) sued Norvin St. Clair Hilarion de Alvis and Gamamedaliyanage John Paris Perera (hereinafter called the 1st and 2nd defendants respectively) for the recovery of the restricted claim of Rs. 25,000 on two alternate causes of action. The 1st cause of action is on a promissory note marked A and P2 dated 10.8.1956, executed by the 1st defendant in favour of the 2nd defendant and endorsed by him to the plaintiff, for Rs. 40,000.

On the 2nd cause of action, the plaintiff alleged that on or about 13th August, 1956 he lent and advanced to the 1st defendant a sum of Rs. 40,000 and as security for the repayment of the said sum and interest at 7% per annum the 1st defendant, by deed No. 943 (1D2) dated 13th August, 1956, mortgaged and hypothecated with the plaintiff the crops of Oakfield Estate.

The 2nd defendant by a writing (P5) dated 13th August, 1956 guaranteed the repayment by the 1st defendant of the said sum of Rs. 40,000 and interest, renouncing all the benefits of the suretyship and making himself jointly and severally liable with the 1st defendant.

The defendants denied the plaintiff's claim. The 1st defendant claimed from the plaintiff in reconvention Rs. 88,000 on grounds of misappropriation of funds due to the estate and management of Oakfield Estate, the management of which was entrusted to the plaintiff under the Agreement No. 944 dated 13th August, 1956. (1D1).

The 1st defendant had purchased Oakfield Estate for Rs. 500,000 in November, 1954. It was 1,074 acres in extent, comprising of 714 acres in rubber, 159 acres interplanted in tea and rubber, 32 acres in cocoa and rubber, 16 acres in paddy and 153 acres in jungle. He had taken a loan of Rs. 60,000 from C. W. Mackie & Company for this purpose.

The estate was managed for the 1st defendant by de Soysa & Co. from 1.12.1954 till September, 1955. During this period, a sum of Rs. 45,000 had been paid to Mackie & Co. in reduction of their loan. The average profit during this period was said to have been Rs. 3,000 a month.

From September, 1955 till 14th August, 1956, Vedamanicam, the chief clerk of the estate, managed the estate. In June, 1956, Mackie & Co. had filed action in the District Court of Colombo against the 1st defendant to recover the balance sum of Rs. 15,156·48 due to them. The 1st defendant, who was a renter, was in urgent need of Rs. 25,000 at this time, to deposit towards his toddy rents.

The 1st and 2nd defendants entered into the present transaction with the plaintiff, to enable the 1st defendant to obtain the necessary financial accommodation. The 2nd defendant was merely an accommodating party to enable the 1st defendant to raise the necessary funds. The parties are agreed that the promissory note sued upon, the crop bond and the writing by the 2nd defendant were all executed for this purpose and formed part of a single transaction.

At the execution of the promissory note, the plaintiff paid the 1st defendant Rs. 25,000 by cheque. He also undertook to settle the claim of Rs. 15,000 odd of C. W. Mackie & Co., which was then in suit. The plaintiff had thereafter settled the claim of Mackie & Co. by an arrangement with them to pay that sum by instalments. That was a private

transaction between them. Mackie & Co. thereupon moved that their action against the 1st defendant be dismissed stating that their claim and costs had been settled. The action was accordingly dismissed without costs. (Vide 1 D 3 (*b*). Marginal page 1173.)

It is quite clear that the 1st defendant obtained the full consideration of Rs. 40,000 on the promissory note in suit. The fact that the plaintiff had made a separate arrangement with Mackie & Co. to pay the amount due from 1st defendant to them by instalments, does not mean that the plaintiff had failed to settle in full the liability of 1st defendant to Mackie & Co. Once the action of Mackie & Co. against the 1st defendant was dismissed on the ground that their claim and costs had been settled, the liability of 1st defendant to Mackie and Co. was fully extinguished. The submission made on behalf of 1st defendant in this appeal, that the promissory note is fictitious on the ground that the plaintiff did not pay the money due to Mackie & Co. is without any substance.

The plaintiff's action was dismissed with costs by the learned District Judge on certain legal objections and judgment was given in favour of 1st defendant on his claim in reconvention in a sum of Rs. 5,000. The plaintiff has appealed from that decision and the 1st defendant has filed cross objections against the amount awarded to him in reconvention.

For the purposes of this appeal, we propose to consider first the objection raised by the defendants that the plaint discloses a misjoinder of parties and causes of action. They conceded that there was no misjoinder so far as the 1st cause of action on the promissory note was concerned. With regard to the alternate cause of action, they conceded that if the writing given by the 2nd defendant was a guarantee of the amount due from the 1st defendant to the plaintiff on the crop bond, there was no misjoinder of parties and causes of action and the action was duly constituted. They argued, however, that the writing given by the 2nd defendant was not a guarantee but was a separate and principal obligation undertaken by the 2nd defendant, to pay the debt due from the 1st defendant to the plaintiff upon the crop bond.

The learned District Judge upheld this contention and we are in entire agreement with his finding on this question. In construing a deed very similar in terms with P5, the Privy Council held in *Wijewardena v. Jayawardena* [1] —

"..... the question to be decided is whether on a proper construction of the deed, the defendant has bound himself to the plaintiff as principal debtor or has made himself liable only as a surety. This question must be answered by consideration of the deed as a whole."

[1] *(1924) 26 N. L. R. 193 at p. 197.*

They also stated, " It was, however, alleged that the statement in clause 3 ' that this guarantee shall be a continuing guarantee ' changed the character of the obligation created by paragraph 1 into one of suretyship only. Their Lordships cannot agree with this contention and do not think that such a description of the document can alter the real nature of the contract as appearing in the express terms in paragraph 1. It is settled law that the mere use of a descriptive term cannot affect the reality of a transaction. "

The contract of guarantee is defined in the " South African Law of Obligations " by Lee & Honore, page 138, section 541, as follows.....

" The contract of Suretyship or Guarantee is a contract whereby one person (surety or guarantor) promises another person (creditor) to be answerable in the event of a third party (the principal debtor) making default in the performance of a duty owed by such third party to the creditor. "

The deed P5 (marginal page 116) has the heading " Guarantee ". The 1st paragraph of P5 is as follows. " In consideration of the Ceylon Estate Agency & Warehousing Co., Ltd., at my request agreeing not to require immediate payment of the sum of rupees forty thousand (Rs. 40,000) lent and advanced by the Company to Mr. Norvin St. Clair Hilarion de Alvis, I, the undersigned G. John Paris Perera....do hereby agree to pay to the Company in Colombo the said sum of Rs. 40,000 with interest thereon at 7% per annum from 10th August, 1956. "

Paragraph 2 states, "This guarantee shall not be considered as satisfied by any intermediate payment or satisfaction of the whole or any part of the moneys herein mentioned but shall be a continuing security...."

Paragraph 8 states, "I agree that the Company shall be at liberty either in one action to sue the debtor and me jointly and severally or to proceed in the first instance against me." The next portion of this paragraph in not intelligible. There is a reference in it to, "and all other rights and benefits to which sureties are or may be by law entitled." It further states, " it being agreed that I am liable in all respects hereunder as principal debtor jointly and severally to the extent aforesaid including the liability to be sued before recourse is had against the debtor ".

Though this contract is referred to in the deed as a guarantee and the deed refers to the rights and benefits to which sureties are entitled to and provision is made in the deed that the contracting party (i. e., the 2nd defendant) may be sued before recourse to the debtor (i. e. the 1st, defendant), we are satisfied on reading the deed as a whole, that this deed P5 is not a guarantee of the 1st defendant's debt to the plaintiff but that the 2nd defendant has become a principal debtor of the plaintiff for the consideration set out in paragraph 1 of the deed. The concluding portion of paragraph 8 also confirms that view.

We shall now consider if there is a misjoinder of parties and causes of action on the plaintiff's alternate cause of action. Section 5 of the Civil Procedure Code defines the expression "Cause of action" as a wrong for the prevention or redress of which an action may be brought. It includes a refusal to fulfil an obligation. In *Croos v. Gunewardena Hamine* [1] and *Arulananthan v. The Attorney General.* [2] the expression, "Cause of action" has been given a broad meaning. In the earlier case, Wendt J. said, "I think that the word 'obligation' in this definition is to be understood not in the narrow sense in which a parol promise to pay, a promissory note and a mortgage, although given for the same debt, may be described as three different obligations, but in the more generally understood sense of a liability to pay that sum of money. Reading the definition in this case the cause of action was the same in both cases, namely the failure to pay one and the same debt."

That decision was approved and followed by Dias S.P.J. and Gunasekara J. in *Arulanantham v. the Attorney-General.* In that case, there were two separate agreements. In one, the 1st defendant alone was liable for all damages and in the other the 2nd and 3rd defendants were only liable to pay up to Rs. 2,000 of the damages. It was submitted that these were contracts of suretyship. But the principle of law enunciated in both these cases is that the expression "cause of action" must be given a broad and liberal meaning.

Applying that principle to the present case, we are satisfied that the obligation sought to be enforced on the crop bond from the 1st defendant, and the writing (P5) from the 2nd defendant is one and the same, that is the obligation to repay the loan of Rs. 40,000 given to the 1st defendant by the plaintiff or the balance outstanding on that account. Though there were two separate documents, they were in fact one and referred to the same obligation. It may be noted that in P5, the 2nd defendant agreed that the plaintiff may sue him and the 1st defendant in one action jointly and severally. The fact that 1st defendant was no party to that agreement is immaterial as the loan was only given to him. The fact that the 2nd defendant undertook to be jointly and severally liable with 1st defendant for that debt, did not, in any sense, increase 1st defendant's liability. It only relieved him of his liability to some extent. The promissory note, the crop bond and the writing (P5) were entered into by all the parties as parts of a single transaction and with the consensus of all.

We hold there is no misjoinder of parties and causes of action in this case.

The plaintiff's action on the first cause of action on the promissory note was dismissed by the learned District Judge on the ground that he

[1] *(1902) 5 N. L. R. 259.* [2] *(1950) 53 N. L. R. 364.*

failed to aver in the plaint that the promissory note was duly presented for payment but it was dishonoured by the 1st defendant and that notice of dishonour was given to the 2nd defendant.

The plaintiff failed to make such averments in his plaint and he also failed to raise any issues on these points and offer any evidence in proof thereof. It is necessary to consider if the plaintiff was required by law to present this promissory note for payment. Section 89 of the Bills of Exchange Act (Chapter 82, Legislative Enactments of Ceylon, Revised Edition) provides as follows.....

" Section 89 (1). Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable. "

" Section 89 (2). Presentment for payment is necessary in order to render the indorser of the note liable. "

The promissory note P2 is in favour of the 2nd defendant and is made payable at Colombo to him or his order. The 1st defendant lives at Hendala and the 2nd defendant at Pamunuwa. The 2nd defendant was only an accommodating party and the promissory note was immediately endorsed by 2nd defendant and given over to the plaintiff. Rs. 25,000 out of the consideration was paid by the plaintiff direct to the 1st defendant. It was thus clearly understood by all parties to the promissory note that payment was to be made to the plaintiff.

The question arises for decision if Colombo, which is the place of payment designated in the promissory note, is a particular place of payment within the meaning of section 89 (1) of the Bills of Exchange Act. Two local cases have considered the question whether a note payable at a particular town, was a note payable at a particular place.

In *Storer v. Sinthamany Chettiar* [1] the promissory note was made payable at Negombo. The maker was resident at Chilaw and had no business or interests in Negombo. Maartensz J. held in that case, " Thus, if a note payable at Negombo is made by a person who lives or has a place of business in Negombo or it can be gathered from the course of business carried on by the maker and the payee, where presentment for payment should be made, Negombo would, in my opinion, be a sufficiently specific description of the place where the note is payable, to render presentment for payment imperative. It was held in that case that a particular place of payment was not mentioned in the note and presentment for payment was not necessary to render the maker liable.

[1] *(1938) 40 N. L. R. 109.*

In *de Silva v. Gunawardena* [1] the promissory note was made payable at Talawakele. The maker and payee were both residents of Talawakele and had their places of business there. Keuneman J. stated in that case that as both the maker and the payee had their places of business at Talawakele, " This may at first sight appear to create an ambiguity as to which place at Talawakele is to be the place of presentment but I think on consideration, that as we are dealing with presentment for payment, it may *prima facie* be taken that presentment should be made at the address of the maker of the note, who is responsible for the payment." It was held in that case that a particular place of payment was designated in the promissory note.

Keuneman J. further stated, " It is, I think, clear from the English cases cited to us, that where a note has to be presented for payment at a particular place, an allegation to that effect that presentment has been made at that place, is a necessary ingredient in the plaint and that plaintiff's cause of action is not complete without such an allegation."

These cases indicate that the court can look into the surrounding circumstances to ascertain if the place of payment designated in the promissory note is a particular place of payment or not. In the present case, it is only the plaintiff who has a place of business in Colombo. Both the defendants have their residences outside the town of Colombo and have no places of business in Colombo.

In the crop bond No. 943 (1D2), the 1st defendant engaged and bound himself to pay the sum of Rs. 40,000 and interest or the balance outstanding to the said obligee in Colombo on demand. By the Writing P5, (page 116), the 2nd defendant too promised to pay the said sum of Rs. 40,000 lent and advanced to the 1st defendant, and interest to the plaintiff in Colombo.

As the deed (1D2), the writing P5 and the promissory note P2 were documents executed in connection with this loan of Rs. 40,000 to the 1st defendant by the plaintiff, it is clear that the parties agreed that the balance outstanding on this loan should be paid to the plaintiff in Colombo, meaning thereby at plaintiff's place of business in Colombo. We, therefore, hold that a particular place of payment was mentioned in the body of the promissory note and that presentation for payment was necessary before the plaintiff could sue the defendants on the promissory note.

In the case of *de Silva v. Gunawardena* cited earlier, Keuneman J. held that the plaintiff pleaded in the plaint that the promissory note was marked for non-payment clearly meaning thereby that it was noted for non-payment. He said, " I am inclined to think that the allegation with regard to the noting, carries with it the implied allegation that the note was duly presented for payment. "

[1] *(1941) 42 N. L. R. 433*

We hold that in an action on a promissory note where presentment for payment is necessary, to make the maker and indorsers liable, it is a necessary averment in the plaint that the promissory note was duly presented for payment and was dishonoured. If there was any excuse for not presenting the promissory note for payment, such excuse should be pleaded. As against the indorsers, the plaint must further aver that notice of dishonour was given to them, unless there was an excuse for not giving such notice, when such excuse should be pleaded. Even if the court is to take a liberal view of the pleadings, the defect should at least be cured by raising the appropriate issues on these matters unless these facts are admitted by the defendants.

As the plaintiff has failed to make these necessary averments in the plaint and has also failed to cure the defect in the plaint by raising the relevant issues at the trial, we hold that the plaint in this case fails to disclose a cause of action against the defendants on the 1st cause of action on the promissory note (P2). The learned District Judge has rightly dismissed the plaintiff's 1st cause of action on this ground.

With regard to the 2nd cause of action, the estate in question was subject to several mortgages executed prior to the crop bond (1D2). A mortgage action D. C. Colombo No. 5332/M.B. (1D195–page 1397) was filed on tertiary mortgage bond No. 74 dated 3rd June, 1955 by the mortgagees, against the mortgagors, one of whom was the present 1st defendant. The plaintiff was made the 5th defendant in that case as a puisne encumbrancer, for the purpose of obtaining a mortgage decree binding on his interests. Order was made to enter judgment in that case against 1 to 3 defendants. (See 1D196–page 1412.)

It has been argued in this case that the decree in the mortgage action has wiped out the rights of the plaintiff as against the 1st defendant as the plaintiff did not assert his rights against him. The relevant issues on this question are issues 20 to 22 (*b*). A short answer to this question is that no decree has been entered nor has any order been made to enter a decree against the 5th defendant in that case, (i.e., against the present plaintiff). The plea of Res Judicata must, for this reason alone, fail.

As this point has been overlooked in the argument of the case both in the trial court and in appeal, we shall refer to another point raised in the case before both the courts. Does the crop bond 1D2 affect any interest in land ? The relevant portion of this bond mortgages and hypothecates as a first and primary mortgage free from any encumbrances " all the crops and produce described in the 1st schedule hereto (hereinafter called ' mortgaged property ') of the estate plantations and premises called and known as Oakfield Estate in the 2nd and 3rd schedules hereto more particularly described and all the right, title interest property claim and demand whatsoever of the obligor in to out of or upon the same. "

The 1st schedule reads as follows . . . .

" All and singular the crops and produce consisting of latex, all rubber manufactures or otherwise including rubber sheet smoked or otherwise and crepe rubber of all grades scrap crepe, Teas including green leaf and tea manufactured or in process of manufacture and all other crops or produce harvested or manufactured or otherwise of every sort and description now lying and which may hereafter at any time and from time to time and at all times be harvested, manufactured, brought in or lie upon the premises in the 2nd and 3rd schedules hereto or any factory or building thereon and in or upon any factories or godowns, stores, buildings, warehouses and premises at which the said crops and produce now are and may at any time hereafter and from time to time and at all times be stored and kept. "

We have no doubt at all that this mortgage refers only to the severed crops of the estate and has no reference whatsoever to the standing crops of the estate. As such this is not a mortgage that affects any land. The fact that this bond has been registered in the Land Registry, does not affect the interpretation of this bond.

The learned District Judge has erred in holding that this crop bond (1D2) affects immovable property. He has also erred in holding that the decree in the mortgage action D. C. Colombo No. 5332/M.B. is a bar to the plaintiff filing this action.

It is not necessary in this case to express our views on this plea of Res Judicata assuming that the bond (1D2) referred to immovable property and a proper decree had been entered in the mortgage action, binding on the plaintiff's interests in this land, as they would be obiter.

The balance due to the plaintiff from the 1st defendant on this loan has to be ascertained after taking into account the income from and expenditure on Oakfield Estate, which was managed by the plaintiff for the 1st defendant. A monthly statement of the detailed expenditure of the estate as per documents P43 to P51 and a monthly statement of the account between the plaintiff and the 1st defendant as per documents 1D7, 1D11 to 1D18 were sent to the 1st defendant.

In this connection, the correspondence between the plaintiff and the 1st defendant during March, 1957 shortly before the Agency Agreement was terminated is revealing. By P6 dated 8th March, 1957, 1st defendant informed the plaintiff that he had made arrangements to sell the estate and hoped to finalise the transaction on or before 30th April, 1957. He said that the intending purchaser had applied to C. W. Mackie & Co., Ltd. requesting them to take over the 1st defendant's liability to the plaintiff. He also stated that his debt to the plaintiff has been decreased by about Rs. 10,000 during the past two months.

The plaintiff promptly replied by letter P7 dated 8th March, 1957, that they could not understand his statement that the debt was decreased by Rs. 10,000. Plaintiff pointed out that the original loan was Rs. 40,000 and that it now stands at Rs. 43,473.84 and Rs. 1,211.93 on account of the Superintendent remain unpaid.

The 1st defendant replied to this letter by his letter P8 of 9th March, 1957, stating that he is making every endeavour to discharge his obligations to the plaintiff. He did not challenge the correctness of his liability to the plaintiff as stated in P7.

In challenging the claim of the plaintiff in this action, the 1st defendant alleged that he had been debited twice over with the estate expenses for August and September 1956. According to the Ledger 1DB, page 345, the 1st defendant's account with the plaintiff appears under the name Oakfield Estate. On 29.9.56 the 1st defendant is debited with Rs. 14,270·60 being the amount transferred from the account of the Superintendent of this estate, at pages 193, 196 and 84 in this ledger. A corresponding credit item is entered in the Superintendent's account at page 194. This sum represents the balance due to the plaintiff from the Superintendent of this estate on 29th September, 1956. On 30th October, 1956 the 1st defendant is debited with the following items :—

| | *Rs.* | *c.* |
|---|---|---|
| Estate Expenditure for August .. .. | 5,631 | 45 |
| Estate Expenditure for September .. | 11,170 | 68 |
| Total .. | 16,802 | 13 |

At a superficial examination, it would appear that the 1st defendant has been double debited with the item of Rs. 14,270·60. The actual state expenditure for these two months were Rs. 5,631·45 and Rs. 11,170·68 as shown in the detailed monthly statements P43 and P44. The actual estate expenditure incurred by the Superintendent for a particular month is generally more than the amount sent to him by the plaintiff during that month. According to 1D8, in August 1956, the balance due from the Superintendent was only Rs. 2,812·98, but the actual estate expenditure incurred by the Superintendent for that month was Rs. 5,631·45.

The 1st defendant's account in the ledger 1D8 at page 245 shows that he was credited with " The Superintendent's A/C October Credit balance transferred " Rs. 3,068·77. Thereafter the 1st defendant was debited with the actual estate expenditure for the preceding month and was credited with the credit balance transferred from the Superintendent's account.

On 29th November, 1956, the 1st defendant was debited with the estate expenditure for October Rs. 14,143·74 and was credited on 30.10.56 with a sum of Rs. 1,880·33 being transfer of balance from Oakfield Estate A/C. (This should be from Oakfield Estate Superintendent's A/C.) The corresponding entries appear in the Superintendent's A/C.

Sometimes there is no such credit balance transferred, as the amount sent to the Superintendent during that month is more than what was spent by him that month. In that event, a debit balance will be debited to the 1st defendant's A/C as in December, 1956. On 20.12.56 plaintiff was debited with the Oakfield Estate expenditure A/C November Rs. 13,778·72 and again on 31.12.56 he was debited with Balance transferred from Oakfield Superintendent Rs. 749·87.

In the statement of A/Cs for the months of April and May, 1957 sent to the plaintiff (1D18. page 1, 190), he is credited on 30.4.57

| | *Rs.* | *c.* |
|---|---|---|
| " By balance A/C Superintendent, Oakfield Estate, transferred..... .. .. | 10,981 | 16 |

and on 31.5.57

| | | |
|---|---|---|
| " By Superintendent, Oakfield, balance transferred .. | 1,168 | 19 |

We are satisfied that the 1st defendant has not been debited twice over with the sum of Rs. 14,270·60 nor has he been over-charged on that account. The 1st defendant is a toddy and arrack renter. He received monthly statements of the estate expenditure and his account with the plaintiff. If there was such a large over-charge or double debit, he could not have failed to detect it. It was suggested in the course of this appeal that the plaintiff restricted his claim of Rs. 41,620·32 to Rs. 25,000 because there was a large overcharge in the account. We are unable to speculate on the reason for which the plaintiff restricted his claim.

It was also urged in this appeal that the plaintiff paid C. W. Mackie & Co. the sum of Rs. 15,000 odd by instalments from the proceeds of sale of the produce of 1st defendant's estate. There is nothing in the accounts to bear out this suggestion. There are certain payments to Mackie & Co. charged to the 1st defendant's A/C. These will be dealt with later.

We shall now deal with 1st defendant's claim in reconvention. The learned District Judge has awarded Rs. 5,000 as damages against the plaintiff for mismanagement of the estate. Under the Agreement No. 944 dated 13th August, 1956 the 1st defendant appointed the plaintiff to manage and control Oakfield Estate for remuneration.

Under paragraph 3, the management was to be under the unfettered control of the plaintiff, subject to the general policy as may be agreed to between the parties.

Under paragraph 4, the plaintiff undertook to manage and work the estate to the best interest of the owner and to maintain it in a good and proper state of management and cultivation. The plaintiff also undertook to exercise and perform all such powers, duties, functions and responsibilities as are commonly undertaken by estate agents and secretaries.

The 1st defendant was entitled to appoint a visiting agent for the estate and the agricultural policy shall be agreed on by the owner, the visiting agent and the plaintiff. The 1st defendant did not appoint a visiting agent but he himself visited the estate fairly regularly and over-looked the estate, though he had no special knowledge or experience as a planter.

It is clear on the evidence that this estate was in a rather neglected condition and the rubber including the budded rubber had been slaughter-tapped for some years prior to the Agreement. It is common knowledge in estate circles that old rubber is slaughter-tapped for a short period before the rubber is felled for replanting. Sometimes when the old rubber is uneconomic for ordinary tapping, it is slaughter-tapped for a short period before it is abandoned. But it is unheard of to slaughter-tap budded rubber trees under proper agricultural supervision of an estate.

As the plaintiff had allowed this pernicious practice to continue after the plaintiff took over the management of the estate, without an express directive from the owner to do so, the plaintiff has undoubtedly committed a breach of the agreement. The 1st defendant was fully aware of the prevailing practice and condoned it. Even a tyro would have been aware that this practice will be very harmful to the budded rubber trees and will greatly diminish the value of the estate, though he would temporarily get a higher yield from the rubber.

The least that the plaintiff could have done in these circumstances, was to have warned the owner of the ill-effects of continuing this bad practice. There is no evidence of the extent in budded rubber in this estate. The amount awarded by the learned District Judge as damages included the damages for the bad manufacture of rubber. The evidence shows that the smoked sheet rubber manufactured in this estate was of a very poor quality.

Mr. Warusavitarne, a Visiting Agent and an experienced planter, who visited the estate, has given evidence, which has been accepted by both parties. He has stated that about 90 to 95% of the out-turn of sheet rubber should be of grade 1, in a normal estate. Only about 40% of sheet rubber in this estate came up to grade 1. There was a difference of 3 to 4 cents in the prices of grades 1 and 2 of sheet rubber.

It is not necessary to go into any detail about the loss caused to this estate by the bad manufacture of rubber. The damages for mismanagement have been claimed by the 1st defendant in his 2nd claim in reconvention, in a sum of Rs. 50,000.

But this claim is limited to the reduction in the value of the estate. The value of the estate has not been diminished by the bad manufacture of rubber. The 1st defendant would have had a separate cause of action for the loss caused by such bad manufacture. As he has made no such claim, it is not necessary to consider this claim any further.

This estate had been abandoned shortly after the plaintiff's management was terminated. About 1½ years later, this estate which had been purchased by the Agricultural and Industrial Credit Corporation under a primary mortgage, was sold to Mr. D. L. W. Rajapakse for Rs. 75,000. This estate has been valued by Mr. Warusavitarne in June, 1956 at Rs. 456,000. (See Valuation Report P88.)

We are unable to take into consideration the low price of this sale, in considering the damage caused to the estate by the plaintiff's mismanagement. Several other factors have contributed to the low price realised. Even as an abandoned estate, the price realised is ridiculously low.

Considering all the circumstances, we award the 1st defendant Rs. 5,000 as damages on his 2nd claim in reconvention. The learned District Judge has awarded the same sum but for both mismanagement and bad manufacture of rubber.

On the 1st claim in reconvention, the 1st defendant claimed Rs. 38,000 for alleged misappropriation of income, on the grounds of double debits and improper accounting. On this claim, the learned District Judge has awarded Rs. 5,682·57. We have already dealt with the alleged double debits. This item has been disallowed by the learned District Judge and we, too, have come to the same conclusion.

The learned District Judge allowed the 1st defendant three payments made to Mackie & Co. :—

(*a*) Rs. 2,890 paid by him in terms of an abortive settlement. (See P17 dated 7. 8. 57 and P18 dated 10. 8. 57.)

(*b*) Rs. 74·82 as a liability undertaken by plaintiff.

(*c*) Rs. 1,500 another payment to Mackie & Co. which should have been paid by plaintiff.

He also allowed the 1st defendant Rs. 334·93 being a sum paid by him to plaintiff under the abortive settlement.

On these items, the 1st defendant would be entitled to Rs. 4,799·75.

He has disallowed the plaintiff the sum of Rs. 882·72 charged as interest on Rs. 15,000. The plaintiff has settled the liability of 1st defendant to Mackie & Co. and there is no reason why the plaintiff is not entitled to charge the interest on the full Rs. 40,000.

The 1st defendant also claimed Rs. 15,156·48. This was the sum for which Mackie & Co. sued the 1st defendant. The plaintiff settled that claim with Mackie & Co. and the action was accordingly dismissed. This sum and the Rs. 25,000 paid direct to 1st defendant by the plaintiff were duly charged to 1st defendant's A/C. There was no double charge of the item of Rs. 15,156·48.

The learned District Judge excluded this item because the plaintiff had restricted his claim to Rs. 25.000. We see no valid ground on which the 1st defendant can claim this sum. We disallow this claim of Rs. 15,156·48.

We find that the 1st defendant has been wrongly charged with the four items referred to earlier, totalling Rs. 4,799·75. This sum must be set off from the amount due to the plaintiff on the Crop Bond (1D2). Even after giving credit to 1st defendant for these items, there is a sum in excess of Rs. 25,000 due to the plaintiff on his alternate cause of action.

The 1st defendant cannot claim this sum of Rs. 4,799·75 as money misappropriated by the plaintiff, as these items must be and have been taken in account, in considering the liability of 1st defendant on the plaintiff's alternate cause of action. For these reasons, we dismiss defendant's first claim in reconvention.

We set aside the judgment and decree of the learned District Judge and direct that judgment and decree be entered for plaintiff for Rs. 25,000 as prayed for with costs on his alternate cause of action. The plaintiff's 1st cause of action is dismissed without costs.

The 1st defendant's 1st claim in reconvention is dismissed without costs. We direct that judgment and decree be entered on 1st defendant's 2nd claim in reconvention for Rs. 5,000 with costs in that class.

Subject to the above directions, the plaintiff's appeal is allowed and the cross objections of the defendants are dismissed. The plaintiff is allowed his costs of appeal.

G. P. A. SILVA, J.—I agree.

*Appeal allowed.*