1929.

Present: Dalton and Drieberg JJ.

SINNIAH CHETTY *v.* SILVA *et al.*

57—D. C. (Inty.) Colombo, 27,859.

Agency—Authority to sign cheques—Termination of authority—Burden of proof—Evidence Ordinance, s. 69.

The plaintiff sued the first defendant on cheques drawn by a person who was alleged to be defendant's agent. In obtaining leave to defend the action, the defendant filed an affidavit in which he admitted that the drawer of the cheques was his agent some time previous to the date at which the cheques were issued.

Held, that the burden of proving that the authority of the agent had terminated was upon the defendant.

PLAINTIFF sued the defendants on three cheques drawn on the Mercantile Bank of India, Kandy, for the sums of Rs. 1,500, Rs. 1,000, and Rs. 2,500, dated January 18, January 25, and January 27, 1928, respectively, and signed " V. Silva & Co., D. A. Ameresekere, Manager." First defendant asked for leave to defend the action and filed an affidavit in support of the application. There he denied that he made or signed the cheques, but admitted that he carried on business under the name of V. Silva & Co., and that at one time he had a business at Nawalapitiya under the management of one D. A. Ameresekere, in connection with which he opened an account in the Mercantile Bank, Kandy. The branch, however, was closed in October, 1926. Leave to defend was granted and at the trial the first issue framed was "Did D. A. Ameresekere sign the cheques sued on ?" After argument the learned District Judge held that the burden of proving the agency of Ameresekere to sign cheques for the firm was on the plaintiff.

Keuneman (with *Canekeratne*), for plaintiff, appellant.

H. V. Perera (with *Croos da Brera*), for defendants, respondent.

June 20, 1929. DALTON J.—

The sole question that arises on this appeal is as to where the burden of proof lay.

Plaintiffs sued the defendants on three cheques alleged to have been made by first defendant and endorsed by the second defendant. The cheques were drawn on the Mercantile Bank of India,

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Kandy, for the sums of Rs. 1,500, Rs. 1,000, and Rs. 2,500, and dated January 18, 25, and 27, 1928, respectively, and are signed " V. Silva & Co., D. A. Ameresekere, Manager. "

Defendant asked for leave to defend the action, and filed an affidavit in support of his application. Therein he denied that he made or signed the cheques. He admitted, however, that he carried on business under the name of V. Silva & Co., and that " at one time " he did have a branch business at Nawalapitiya under the management of one D. A. Ameresekere, in connection with which branch he opened an account in the Mercantile Bank, Kandy. D. A. Ameresekere as manager was authorized to operate on that account by signing and issuing cheques in the form in which the cheques sued on purported to be signed for the purpose of making payments in the ordinary course of business of the branch. The branch was, however, he sets out, closed and that authority came to an end in October, 1926.

Leave to defend was thereon granted and answer was filed. Numerous issues were framed, the first issue being " Did D. A. Ameresekere sign the cheques sued on ?"

Thereupon argument proceeded as to where the burden of proof lay in respect of the alleged agency of Ameresekere to sign cheques for the firm. Counsel for plaintiff urged that what he had to do, at any rate at the commencement, was to satisfy the Court on the first issue, apparently relying upon the admissions in the affidavit upon which leave to defend was granted. The trial Judge held that his contention that the burden of proving that Ameresekere had no authority to issue the cheques in question was on the first defendant was wrong. He adds that where the agent has been dismissed and a considerable period of time has elapsed he was of opinion that the burden of proving " that plaintiff dealt with Ameresekere as agent and has had reasonable ground for treating him as agent is on the plaintiff. "

It has been suggested in the argument before us that the trial Judge can in fact look at no admissions in defendant's affidavit until it has been properly proved. But that affidavit sets out facts upon which leave to defend was granted and has to all intents and purposes been incorporated in the answer, further defences being also added. I must admit I am unable to understand this suggestion as being a serious one.

On the question of burden of proof I am unable to agree with the trial Judge. The authority of D. A. Ameresekere to sign cheques as manager up to October, 1926, is admitted. It seems to me on the law that plaintiff's Counsel's contention that the burden of proving that that authority had terminated was on the first defendant was correct. By section 109 of the Evidence Ordinance when the question is whether persons are principal and agent, and it has been

shown that they have been acting as such the burden of proving they *do not* stand or have ceased to stand to each other in that relationship is on the person who affirms it. The terms of this section are explicit. It is admitted this relationship existed here up to October, 1926, but it is alleged by defendant that it then ceased to exist. In Woodroffe and Ameer Ali's *Law of Evidence, 8th ed., p. 744*, there is a commentary on this section and two cases are referred to (*Smout v. Ilbery* [1] and *Clark v. Alexander* [2]), neither of which, having regard to the facts, give assistance on the question now under consideration. In *Smout v. Ilbery* (*supra*) the wife, the agent, had full authority to contract, and continued to do so after the death of her husband but before information had been received of his death on the way to China. As his estate was insolvent Smout sought to make her personally liable, but it was held that he could not do so under the circumstances, the continuance of the life of the principal being equally within the knowledge of both parties. The decision in *Brown v. Wren Bros.*[3] cited in the course of the argument supports appellant's contention. It is a case of partnership in which it was sought to charge W. Wren as having been a partner in the firm at the date when the goods were supplied. The only evidence that W. Wren was ever a member of the firm was a letter written by him saying "I have not banked any money this last eight months, as I have dissolved partnership with my brother last April." On appeal from the County Court, the Divisional Court held that the letter clearly contains an admission that W. Wren was a partner in Wren Bros. in April, 1892, and it must be presumed that the state of things so admitted to have existed at that date continued to exist unless the contrary be proved. The case of *Dodwell & Co., Ltd. v. John et al.*[4] does not help on the point now under consideration. I have come to the conclusion for the above reasons that the learned Judge was wrong on the question of burden of proof in respect of agency. It seems to me clear, however, that plaintiff could not properly confine the evidence to be led by him at the outset to the first issue. Taking the admission that Ameresekere was the manager and agent of first defendant up to October, 1926, and so continued until the contrary be proved, plaintiff could not expect to succeed if he confined his proof to evidence only of the signing of the cheques by Ameresekere. He has to show the connection between the acts alleged in his claim and the relationship presumed from the admission.

I would allow the appeal, setting aside the Judge's order on the question of burden of proof of authority. The costs of appeal will follow the event in the Court below.

[1] *10 M. & W. 1.*
[2] *13 L. J. C. P. 133.*
[3] *(1895) 1 Q. B. 390.*
[4] *20 N. L. R. 206.*

DRIEBERG J.—

The question before us has been rendered difficult by the issues framed in the case, but it appears from the judgment of the learned District Judge that what Counsel for the appellant contended was that in view of the admission of the respondent that Ameresekere was prior to October, 1926, his agent with authority to sign cheques on account of his buisness, the burden of proving that Ameresekere's authority was determined before these cheques were issued was on the respondent and that the appellant should have the right of leading evidence in rebuttal. This contention is based on section 109 of the Evidence Ordinance.

The learned District Judge was of opinion that the presumption of continuing agency could not be drawn in view of the long period which had elapsed, by which, I take it, he meant the period between October, 1926, when the respondent says he terminated the agency, and January, 1928, when the cheques sued on were issued.

I agree, however, that the burden of proving that Ameresekere's agency was determined before these cheques were issued is on the respondent. There is no authority, as far as I know, for excluding the presumption under section 109 where such a period has elapsed as in this case. The appellant is also entitled to use the statement of the respondent in his affidavit regarding the previous agency in the same way as if that statement appeared in his answer.

I agree with the order made by my brother Dalton.

Appeal allowed.