1931

Present: **Lyall Grant J. and Maartensz A.J.**

MOHAMAD *v.* EASTERN BANK.

20—(Inty.) D. C. Colombo, 39,112.

Bill of sale—Pledge of rubber—Security against overdraft—Trust receipt—Delivery of possession—Registration—Ordinance No. 23 of 1927, ss. 17 and 18.

The plaintiff caused the Court to sequester, before judgment, certain rubber as the property of the defendant. The Eastern Bank, Limited, claimed the rubber as pledgee or owner by virtue of a document C 3, called a trust receipt, and delivery of possession. C 3 was in the following terms:—

"In consideration of your allowing us to overdraw our current account from time to time, the total overdraft not to exceed fifteen lacs of rupees, we hereby agree that all cheques drawn on our current account shall be applied by us solely in the purchase of produce and in the event of an overdraft being created by reason of your honouring such cheque, then until such overdraft has been repaid to you, either by proceeds of bills of exchange or cash, all such produce as shall be purchased by us by means of such cheques and overdraft shall be kept apart by us from all other goods and produce in our godowns and shall be held by us as agent and in trust for you . . . ."

The intention of this agreement is that you are to be entitled to such produce as security for an overdraft for the time being, we holding such produce as agent and trustee for you, and in the event of our failing to repay to you the amount of our overdraft, when called upon to do so, we hereby undertake to deliver to you at any time the said produce, without raising any question, to enable you to sell or at your discretion to ship the same for the purpose of realization under your directions.

Held, that the document C 3 was a bill of sale within the meaning of section 17 of the Registration of Documents Ordinance and that, in the absence of delivery of possession of the property, it was not valid or effectual so as to give the bank any lien, charge, claim, or priority over or in respect of such property, as it was not registered in terms of section 19 of the Ordinance.

PLAINTIFF in this action caused the Court to have sequestered before judgment, certain rubber, the property of the defendants, under the provisions of section 653 of the Civil Procedure Code.

The Eastern Bank, Limited, claimed the property sequestered as pledgee or owner thereof by virtue of a trust receipt (C 3) and delivery of possession to the bank.

The learned District Judge upheld the claim and this appeal is taken from his order.

H. V. Perera (with him *Nadarajah*), for appellant.—C 3 is not admissible in evidence as the bank has failed to prove that it had been signed by the defendants.

C 3 is not merely a record of a pledge. It is a document creating a charge. It is a bill of sale within the meaning of section 17 of Ordinance No. 23 of 1927 and must be registered (*Dublin City Distillery, Ltd. v. Doherty* [1]; *Ex parte Hubbard, In re Harwick* [2]).

[1] *(1914) A. C. 823.* [2] *(1886) L. R. 17 Q. B. D. 690.*

Hayley, K.C. (with him *Ferdinands*), for respondents.—Suduwella Stores are the stores of the bank. There is a notarial lease. The entry of the rubber into the stores was a delivery of possession to the bank. The rights of the bank as pledgees were complete on the deposit of the rubber in their stores. The memorandum C 3 need not be registered as the effect of the transaction was to transfer immediately possession to the grantee (*Ex parte North-Western Bank, In re Slee* [1]; *In re Hall, ex parte Close* [2]; *In re David Allester, Ltd.* [3]; *Wille, "Mortgage and Pledge in South Africa", pp. 95, 102, 114*).

In the alternative there is constructive delivery of possession of the rubber to the bank (*Young v. Lambeth* [4]).

H. V. Perera, in reply.—The bank is not in possession of the stores as they charge Tarrant & Co. Rs. 1,000 per month for the use of the stores. There is no pledge. The bank is merely a bailee and can have a lien on the rubber for storage charges and nothing else. The document C 3 is necessary to create a pledge and ought to have been registered.

If the bank had an intention of taking delivery of possession of the rubber, it should have complied with the provisions of the Rubber Thefts Ordinance, No. 21 of 1908.

Mere possession of the keys of the stores by the bank does not amount to constructive delivery.

August 24, 1931. LYALL GRANT J.—

The facts are fully set out in the judgment of my brother Maartensz and I need not recapitulate them.

The learned District Judge has held that apart from the document C 3, there is sufficient evidence to establish the fact that the claimant bank was pledgee of the goods.

I agree with my brother that this view cannot be sustained. The goods remained in the possession of Tarrant and Company, whose power of dealing with them was uncontrolled or at any rate only partially controlled by the bank. They were stored in godowns which had Tarrant and Company's name conspicuously displayed outside the premises. The bank took a lease from the owners of the godowns and affixed a rather inconspicuous board on the inside of each godown intimating that it was a godown of the Eastern Bank. This was the only hint or warning to the public of any transfer of possession of the rubber in the store from Tarrant and Company to the bank.

Otherwise everything went to show that Tarrant and Company were the owners. They were licensed rubber dealers (which the bank was not) and handled the rubber.

The keys were kept by a person who was paid partly by the bank and partly by the defendants, and this servant locked the sheds at night, but during the day the defendants had the unrestricted handling of the rubber. So far as I can find from the evidence, there was nothing to prevent them disposing of the rubber or part of it to other persons in breach of their agreement with the bank, and there is some evidence to indicate that some of the rubber in the store was in fact delivered to consignees other than the bank.

[1] *(1872) L. R. 15 Eq. 69.*
[2] *(1884) Q. B. D. 386.*
[3] *(1922) Ch. 211.*
[4] *(1870) L. R. 3 P. C. 142.*

There does not in fact seem to have been any effective delivery to the bank till the rubber was shipped and the bills of lading were handed over.

If the bank's claim is to be sustained, it must then rest on C 3. Counsel seemed uncertain whether this document was or was not a bill of sale. It was not registered, and if it was a bill of sale delivery of the goods pledged was necessary.

The case on which the learned District Judge relies, *In re David Allester* [1], is one where the debtor to a bank first transferred possession of the documents of title to specific goods and afterwards received back from the bank these documents for the express purpose of realizing the goods for the benefit of the bank.

In that case the document (a letter of trust) which the debtor gave to the bank was held not to be a bill of sale as it merely recorded the terms on which the company was previously authorized to realize the goods in the bank and did not create a charge at all. It was held that the bank's previous rights as pledgee remained unaffected by " this common and convenient mode of realization ".

In Allester's case, however, the letter of trust was a much more precise document than C 3. It acknowledged the receipt from the bank of certain specific documents of title, thus evidencing the prior existence of a pledge, and the signatories, the pledgors, undertook to hold these documents and the goods to which they referred in trust for the bank and to dispose of the latter as the bank's trustee.

They further undertook to keep the transaction separate from any other and to remit the proceeds to the Bank.

As the Judge in that case pointed out, the bank had its charge before the letters came into existence and their object was not to give the bank a charge but to enable it to realize in the usual way of business the goods over which it had a charge.

That case therefore does not help the respondent in this case if I am correct in holding that prior to, and apart from, the document C 3 the bank had no charge.

There is no evidence to show that C 3 is a document used in the ordinary course of business as proof of the possession or control of goods and authorizing or purporting to authorize either by endorsement or delivery the possessor of such document to transfer or receive, as thereby represented.

It can only have effect if it is a bill of sale completed by delivery as there has been no registration.

For the reason above set forth, I am of opinion that there was no delivery while the rubber remained in the warehouse. Delivery was effected in respect of each consignment by handing over the bills of sale after the rubber had left the warehouse.

Bills of sale are, I understand, unknown to the Roman-Dutch law, and also to the South African law.

They are, I believe, the peculiar creation of English law, but they have been introduced into the law of Ceylon.

The principle of the Roman law was that a pledge of a movable could only be effected by transfer of possession. English law allowed a

[1] *(1922) L. R. 2 Chancery 211.*

pledge by writing but, as this was found to lead to frauds, people getting credit on goods apparently theirs but really pledged, legislation was introduced in 1854 to compel registration of all bills of sale where actual delivery of the goods was not given.

The principal effect of this amendment of the law is that where, as here, the document has not been registered, the English law is assimilated to the Roman-Dutch law, at all events in a competition between creditors.

We have been referred to one or two South African cases. A general review of the South African law as set out in Wille's " *Mortgage and Pledge* " shows that the South African Courts have been strict in the matter of constructive possession. The guiding principle has been to guard against fraud in obtaining credit.

The fact that the bank took possession of the store two or three days before this action was instituted does not, I think, make any difference. The decisive date is that on which the plaintiff sent his rubber to the defendant's store and gave him credit for payment. At that date he had no notice of any arrangement between the defendant and the claimant bank.

I would therefore allow the appeal, setting aside the District Court judgment and continuing the mandate of sequestration over the goods or the proceeds realized therefrom.

I would give the appellant costs against the claimant in both Courts.

MAARTENSZ A.J.—

The appeal in this case arises from a claim made by the Eastern Bank, Limited (hereafter referred to as the bank), to certain rubber which the plaintiff in this action caused the Court before judgment to have sequestered as the property of the defendants under the provisions of section 653 of the Civil Procedure Code.

The bank claimed the property sequestered as pledgee or owner thereof by virtue of a document (C 3), called a trust receipt, and delivery of possession to the bank.

" C 3 " is in the following terms:

Trust Receipt I. F. No. 86.

(Advance in Account Current on Produce awaiting Shipment.)

19th Feby. 1929.

To The Eastern Bank, Limited,
Colombo.

H. G. Account.

In consideration of your allowing us to overdraw our current account from time to time, the total overdraft not at any time to exceed fifteen lacs of rupees, we hereby agree that all cheques drawn on our current account shall be applied by us solely in the purchase of produce, and in the event of an overdraft being created by reason of your honouring such cheques, then, until such overdraft has been repaid to you, either by proceeds of bills of exchange sold to you, or in cash, all such produce as shall be purchased by us by means of such cheques and overdraft shall be kept apart by us from all other goods and produce in our godowns and shall be held by us as agent and in trust for you, and kept fully insured by us against loss by fire, we holding such insurance and all moneys receivable therefrom in trust for you, and handing you forthwith all amounts received from the insurers.

The intention of this agreement is, that you are to be entitled to such produce as security for our overdraft for the time being, we holding such produce as agent and trustee for you, and in the event of our failing to repay to you the amount of our overdraft when called upon to do so we hereby undertake to deliver to you at any time the said produce, without raising any question, to enable you to sell or at your discretion to ship the same for the purpose of realization under your directions.

Also we further agree and undertake immediately upon shipment of the produce, or any part thereof, to hand to you the shipping documents for the same, or their equivalent in cash.

We will, whenever required, give you full particulars of the produce held by us on your behalf, and we hereby guarantee that its value shall at all times be equal to and shall be maintained at the amount of our overdraft.

It is understood that the keys of the godown remain in our possession, and we likewise further agree and undertake to have no advance from any other bank on the same or any other produce in our godowns in which produce under lien to you is stored so long as we are indebted to you.

And we further agree that the goods shall also be a security to you for the payment on demand of all other moneys which are now or shall at any time be due to you from us either alone or jointly with any other person or persons, either on account current or of any money advanced or paid or in respect of bills, drafts, or notes accepted, paid or discounted, interest, commission, or any other usual or lawful charges or on any other account whatsoever, together with all costs and expenses.

Yours faithfully,

Sgd.——

(50-cent stamp.)

Rubber lying in godown, &c., Suduwella Stores, Colombo.

When C 3 was executed, the defendants were the tenants of certain stores called the Suduwella Stores, and according to the evidence of the Manager of the bank, Mr. Manwaring, the produce purchased by the cheques drawn on the overdraft was placed in these stores, from which it was shipped from time to time to England consigned to H. G. Gardner & Co., the documents drawn on Gardner & Co. by the defendants were sent to the bank and forwarded by the bank to its London Office. The rubber was delivered to Gardner & Co. on payment of the draft.

On May 28, 1929, by indenture C 1 the Suduwella Stores were leased by the landlord to the bank at a rental of Rs. 1,000 a month. The defendants continued to use the stores and were debited with a sum of Rs. 1,000 monthly. On June 27, 1930, the bank locked up the stores with all the rubber in it. The balance due to the bank from the defendants on June 30, 1930, was Rs. 745,724.07, the value of the rubber in the stores at that date was only Rs. 150,000. Either the rubber purchased with the cheques drawn on the overdraft was sold elsewhere or the cheques were used for some other purpose than the purchase of rubber.

The bank was secured as regards Gardner & Co. by their letter of credit for £100,000 opened at or about the time C 1 was granted.

The name board of the defendants continued to remain on the outer wall of the Suduwella Stores, but to each godown was affixed a board with the name of the bank. One of the boards was produced, on it was stencilled—

" The Eastern Bank Limited
Godown "

Although according to C 3, the keys were to remain with the grantees, they were, according to Manwaring's evidence, kept by Silva, an employee of the bank. He opened the stores in the morning and locked them up at night but did not remain on the premises in the interval nor did he exercise any check on the rubber brought in and removed from the stores. He was paid an allowance of Rs. 65 for looking after these stores and another store, and part of this salary was paid by the defendants.

The learned District Judge upheld the claim and this appeal is taken from his order. He held that C 3 was admissible in evidence and that it did not require registration under section 17 of the Registration of Documents Ordinance as the bank was in ostensible and *bona-fide* possession of the goods as pledgee.

All the findings were challenged by the appellant's counsel, who contended that there was in law no delivery of possession of the goods to the bank, and that C 3 as a Bill of Sale was void as against the plaintiff as it had not been registered and was also inadmissible in evidence as the bank had failed to prove that it had been signed by the defendants.

On the other hand it was contended that the Suduwella Stores were the stores of the bank and that the entry of the rubber into them was a delivery of possession to the bank, that C 3 did not require registration as the property had been actually delivered over into the possession of the bank. In the alternative it was contended that there was constructive delivery to the bank.

The rubber, it was argued, either belonged to the bank or was in its possession as pledgee. I may say at once that I do not think it an arguable contention that the bank became the owners of the rubber from the time it entered the stores. There is no evidence, verbal or written, of any contract of sale.

C 3 cannot, in my opinion, be construed into a contract of sale.

In considering the question whether there was delivery of possession to the bank regard must be paid to the fact that document C 3 was executed and business done under it before the stores were leased to the bank.

There was, in my opinion, neither actual nor constructive delivery of possession to the bank of the rubber brought into the stores before the lease was executed. The position of the bank before the lease was executed cannot be distinguished from the position of the plaintiff Doherty in the case of *Dublin City Distillery (Great Brunswick street, Dublin), Ltd. v. Doherty* [1]. In that case " the plaintiff advanced moneys to a distillery company on the security of manufactured whiskey of the company stored in a warehouse provided by the company on the distillery premises in accordance with the Spirits Act, 1880. Neither the company nor the excise officer could obtain access to the warehouse without the assistance of the other and the whiskey could only be delivered out on presentation to the excise officer of a special form of warrant supplied by the Crown. On the occasion of each advance the company entered the name of the plaintiff in pencil in their stock book opposite the particulars of the whiskey intended to be pledged and delivered to the plaintiff (1) an

[1] *(1914) A. C. 823.*

ordinary trade invoice and (2) a document called a warrant which described the particulars of the whiskey and stated that it was deliverable to the plaintiff or his assigns and contained the words ' free storage '. The number of the warrant was entered in red ink against the cases of whiskey in the stock book. No intimation of the transaction was given to the excise officer ".

The warrants were not registered under section 14 of the Companies Act, 1900 (which corresponds to section 17 of our Ordinance No. 23 of 1927 for the Registration of Documents).

In an action by the plaintiff against the company in liquidation it was held reversing the decision of the Court of Appeal in Ireland, that the plaintiff was not entitled to a valid pledge on the whiskey comprised in the warrants; that assuming that a pledge was created it was, under section 14 of the Companies Act, 1900, a mortgage or charge granted or evidenced by an instrument in writing which, if executed by an individual, would require registration as a bill of sale, and was consequently void as against the liquidator for want of registration.

The only difference is that in this case an employee of the bank unlocked the stores in the morning and locked them up at night. But as he did not remain on the premises and exercise any control over the disposition of the property by day it cannot possibly be said that the possession of the keys by the bank amounted to constructive delivery as was held in the case of *Ward v. Turner* [1].

The position of the plaintiff in the case cited was stronger than the position of the bank in this case; for on the occasion of each advance made by Doherty the company purported to pledge to him a specific cask of whiskey and issued to him a delivery warrant and an invoice in the same form as if the whiskey had been sold to him and no whiskey was ever sold without the plaintiff's consent. In addition an entry was made in the company's stock book of the number of the warrant against the casks of whiskey mentioned in the warrant and particulars of the transaction were also entered in the company's register of mortgages. Evidence of this nature of a pledge is entirely absent in this case.

I have now to consider whether the position of the bank was altered by its taking a lease of the Suduwella Stores, the property sequestered having been brought into the stores after the execution of the lease.

I am of opinion that the lease did not have the effect of altering the position of the bank as the bank did not take possession of the stores. The defendants continued to occupy the stores and to deal with the rubber brought into them in exactly the same way as they had done prior to the execution of the lease. The only effect of the lease was to substitute the bank for Delmege, Forsyth & Co., the lessors under the indenture of lease, as the defendant's landlord and rent was paid to the bank accordingly.

Whatever expression may be used to describe the debit of Rs. 1,000 a month, it was nothing more or less than the payment of rent by the defendants to the bank. If the bank was in possession and the rubber was delivered to the bank and stored in the stores for the bank there was no reason why the defendants should have been debited with the amount of the rent.

[1] *(1751) 2 Vesey Senior 431*

I can conceive of a case of a pledgee taking produce on pledge and making it a part of the contract that the pledgor should pay the rent of the premises which the pledgee had to provide for storage. But in such a case to establish the delivery of possession there must be cogent evidence that the pledgor could not deal with the property pledged except through the pledgee. As for example, by the pledgee keeping the keys of the stores and keeping out the pledgor altogether, or if the pledgor was to deal with the property for certain purposes, by evidence that the pledgor could only take out the property on the orders of and subject to check by an employee of the pledgee in terms of a proper trust receipt.

The document C 3 is not a receipt at all and cannot be considered in the same way as a letter of trust of the nature referred to in *Grant on Banking on page 373.*

A point was made and it is one of considerable force that if it was the intention of the bank to take delivery of possession of the rubber it would have complied with the provisions of the Rubber Thefts Prevention Ordinance, No. 21 of 1908, as amended by Ordinance No. 39 of 1917.

Section 3 of the principal Ordinance makes it unlawful for any person to purchase rubber unless he has been licensed under the Ordinance to deal in rubber or has received from the Government Agent a permit authorizing him to do so. A breach of the section is made an offence.

By section 2 of the Ordinance the word " purchase " includes the taking of rubber in exchange for other goods or on account of any claim or indebtedness.

The bank has not been licensed nor has it complied with any of the other provisions of the Ordinance, and I am unable to hold that the bank by taking a lease of the Suduwella Stores took the rubber brought into it on account of a claim against the defendants.

All the cases on constructive possession were reviewed by Lord Atkinson in the case of *The Dublin City Distillery Co., Ltd. v. Doherty (supra.)*

I need only refer to the cases of (1) *Henry v. Mangles* [1], (2) *Whitehouse v. Frost* [2], and (3) *Castle v. Sworder* [3]. None of them are applicable to the present case. In the first case the vendor received rent from the vendee for storing the goods. In the second the vendor accepted a delivery order given by the vendee to a sub-vendee. In the third case the vendors entered in the rum book of their warehouse the purchases of rum in question as sold to defendants and proved that after this entry they themselves had no power to get the goods out of the warehouse.

In the present case the defendants paid the bank for the use of the premises; they were not warehousemen; there was no attornment to the vendee nor was anything done which put it out of the power of the defendants to dispose of the rubber.

I am accordingly of the opinion that the bank did not receive constructive delivery of the rubber in question.

The subsequent taking possession of the rubber about June 27 cannot be deemed a delivery of possession for the purpose of creating the contract of pledge.

[1] *(1808) 1 Camp. 452.* [2] *(1810) 12 East. 614.* [3] *(1861) 6 H. & N. 828.*

The learned District Judge in deciding that C 3 need not be registered as a bill of sale relied on the cases of *Ex parte Hubbard In re Harwick* [1] and *In re David Allester, Ltd.*[2]

I do not think either case applicable where, as in this case, there has been no delivery of possession actual or constructive.

In *Hubbard's case* the goods pledged were deposited with Hubbard as security for money borrowed and they remained in the actual possession of Hubbard until the bankruptcy. The terms on which the goods were deposited were at the time of the deposit embodied in an agreement signed by the pledgor.

It was held that the agreement was not a bill of sale as it did not constitute the title to the goods and was not intended to and did not come into operation until possession of the goods had actually been transferred.

In *Allester's case* it was held that the letter of trust did not fall within the statutory definition of a bill of sale because the rights of the bank as pledgee were complete on the deposit of the documents of title and the letters of trust were mere records of the terms on which the pledgor was authorized to realize the goods on behalf of the pledgees, and were not issued for the purpose of creating a security.

In applying these cases the trial Judge proceeded on the assumption that that there was delivery of possession but he has not discussed the evidence of possession nor has he given his reasons for that assumption.

In the case of *In re Hall ex parte Close* [3], to which we were referred by the defendant's counsel, Cave J. held that the Bills of Sale Act did not include a letter of hypothecation accompanying a deposit of goods or pawn tickets or, in fact, any case where the object and effect of the transaction are immediately to transfer the possession of the chattels from the grantor to the grantee.

Lord Bowen in *Ex parte Hubbard* observed that the law was correctly laid down by Cave J.

The *ratio decidendi* is the same in all three cases, namely, that a memorandum setting out the terms on which the goods are pledged is not a bill of sale within the meaning of the Act when the goods are deposited with the pledgee at the time the memorandum is made.

It is not applicable to this case as the goods were not deposited with the pledgee when C 3 was granted.

Ex parte North-Western Bank In re Slee [4] is more in favour of the respondent. In that case Bacon C.J. said that a letter of hypothecation created a good equitable charge and that it did not require registration under the Bills of Sale Act. Cave J. in *Ex parte Hubbard* at page 392 referred to this ruling as an *obiter dictum*.

Bacon C.J. appears to have come to the conclusion that it did not require registration for a variety of reasons arising from the facts in that case. The facts are in no way similar to the facts in this case.

Slee's case was referred to in *In re Hamilton Young & Co. ex parte Carter* [5] where the question arose whether a letter of hypothecation was void for want of registration as a bill of sale. The Court held that it was not

[1] *(1886) L. R. 17 Q. B. D. 691.*
[2] *(1922) L. R. 2 Chancery. 211.*
[3] *(1884-1885) 14 L. R. Q. B. 386.*
[4] *(1872) L. R. 15 Eq. 69.*
[5] *(1905) 2 K. B. 772.*

void as letters of lien were " documents used in the ordinary course of business as proof of the possession or control of the goods ". I venture to share the doubts expressed by Stirling L.J. whether letters of lien are either " transfers of goods in the ordinary course of business of a trade or calling " or " documents used in the ordinary course of business as proof of the possession and of control, within the meaning of section 4 of the Bills of Sale Act ".

C 3 cannot, in view of the definition in our Ordinance, fall within the former category. Section 17 of our Ordinance No. 23 of 1927 has substituted for " the transfer of goods in the ordinary course of business, &c. " the words " contracts for the sale of goods within the meaning of the Sale of Goods Ordinance, 1896, and made in the ordinary course of any business, trade, or calling ". The facts, however, in the case of *Ex parte Hamilton* were entirely different. There the letter of hypothecation referred to specific goods and there was evidence that they were used in the ordinary course of business as proof of the possession and control of the goods.

Collins M.R. restricted the letter of hypothecation to proof of possession of the goods.

There is no evidence in this case that documents like C 3 are used in the ordinary course of business as proof of the possession or control of the goods and the exception does not apply.

There is, in my opinion, no evidence of a pledge apart from C 3. In the case of the *Bublin Distillery Co., Ltd. v. Doherty* (*supra*) Lord Parker held that *Ex parte Close* and *In re Hubbard* did not apply in such a case. He disapproved of the proposition that a document which itself passed the possession to the pledgee and was not within the exception was not a bill of sale (page 855) and held that the warrants addressed to Doherty were bills of sale and void for want of registration.

C 3 appears to me to have been granted to the bank for the same purpose as the warrants were granted to Doherty and is a bill of sale within the meaning of section 17 of the Registration of Documents Ordinance, No. 23 of 1927, which, as the property was not delivered to the pledgee, had to be registered under the Ordinance.

I accordingly hold that C 3 is a bill of sale within the meaning of section 17 of the Registration of Documents Ordinance, No. 23 of 1927, and that it is not valid or effectual so as to give the bank any lien, charge, claim, right, or priority over, to, or in respect of such property as it was not registered as required by section 18 of the Ordinance.

The respondent's counsel cited in support of the claim of the bank two cases under the Roman-Dutch law referred to by Wille in his work on " *Mortgage and Pledge in South Africa* ".

In the first case, *Pietersz & Co. v. Landau Bros.* [1], " the debtor by deed pledged certain furniture in his hotel to a creditor. At the same time the former gave the latter a lease of the hotel and the furniture. The creditor sublet the hotel to a third person, who in turn assigned his sub-lease to a fourth person who was in possession of the furniture at the date of the debtor's insolvency. It was held that the fact that the movables

[1] *(1914) S. R. 30.*

had passed out of the physical possession of the pledgee did not destroy his pledge or preference as he still retained in law the effective control over the movables ".

This case does not help the respondent as by the lease the creditor took possession of the furniture and the sub-lessee was his agent in possession.

Neither does the second case, *Stratford's Trustees v. London & South African Bank* [1]. The facts were that Stratford, who was a dealer in wool and also a wool-washer, pledged to a bank certain wool belonging to himself, but which was at the time in the possession of a third person, this third person agreeing to hold the wool at the disposal of the bank. Thereafter the wool was placed in the possession of Stratford for the purpose of being washed in the ordinary course of business; it was held that this fact did not invalidate the pledge.

The *ratio decidendi* in that case and the *North-Western Bank, Ltd. v. John Poynter, Son & Macdonalds* [2] was that the pledge was valid because the pledged goods were not dealt with after the pledge in the same way as they had been dealt with before. The pledgor performed some work or did something in respect of them for the benefit of the pledgee and they were retained by him for that purpose.

They can be distinguished from the present case on another ground. In the South African case the goods were in the hands of a third person who attorned to the pledgee. In the English case the bill of lading was delivered in the first instance to the pledgee who returned it with a document similar to a letter of trust. In both cases, therefore, delivery of possession of the goods preceded the return of the goods to the pledgor.

I would allow the appeal with costs. As regards the costs in the District Court I would allow the appellant the amount the District Judge fixed as costs to which the respondent was entitled, namely, Rs. 105.

Appeal allowed.