1966 *Present :* **Sansoni, C.J., and Siva Supramaniam, J.**

CHARLOTTE JAYASEKERA, Appellant, *and*
SINNA KARUPPAN, Respondent

S.C. 529/1964—D.C. Galle, 3250

Cheque—Valuable consideration given by indorsee—Death of drawer before presentment—Liability of executor of drawer's estate—Bills of Exchange Ordinance (Cap. 82), s. 38—Alteration of a cheque by drawer with indorser's consent—Indorser's liability to indorsee—Notice of dishonour—Proof—Joinder of parties and causes of action—Indorser and executor of deceased drawer's estate—Liability to be sued by holder in the same action—Joint and several liability— Effect—Civil Procedure Code, ss. 15, 35 (2).

Where the holder of a cheque is an indorsee who has paid valuable consideration, his rights on the cheque cannot be extinguished by the subsequent death of the drawer before presentment. The liability of the drawer would pass to the executor or administrator of his estate.

Where a cheque, after it is indorsed, is materially altered by the drawer with the consent and acquiescence of the indorser, the indorser's liability to the indorsee remains unaffected by the alteration.

When a cheque is dishonoured on presentment by an indorsee, a promise made thereafter by the indorser to pay the amount of the cheque to the indorsee is evidence of an admission on his part that notice of dishonour was given to him by the indorsee.

Where the drawer of a cheque is dead, section 35 (2) of the Civil Procedure Code does not bar an indorsee from suing both the indorser and the executor of the deceased drawer's estate in the same action. And if the indorser happens to be the executor de son tort also of the drawer's estate, he may be sued both personally and as executor de son tort in the same action.

APPEAL from a judgment of the District Court, Galle.

E. R. S. R. Coomaraswamy, with *N. S. A. Goonetilleke* and *N. Wijeyanathan*, for the defendant-appellant.

C. Ranganathan, Q.C., with *J. Perisunderam*, for the plaintiff-respondent.

Cur. adv. vult.

September 29, 1966. SIVA SUPRAMANIAM, J.—

The plaintiff instituted this action claiming from the defendant a sum of Rs. 15,000/- both personally and as executrix de son tort of the estate of her deceased husband F. W. Jayasekera on a cheque dated 17.6.1963 drawn by Jayasekera on the Bank of Ceylon, Galle, directing the Bank to pay " Cash or Bearer Rs. 15,000/-" and endorsed by the defendant and delivered to the plaintiff. The learned trial Judge has found that the defendant received a sum of Rs. 15.000/- in cash from the plaintiff when she endorsed and delivered the cheque to the plaintiff. When the cheque was presented for payment to the Bank on 24th August 1963, it was dishonoured on the ground that the drawer was dead.

The cheque was drawn by Jayasekera and endorsed by the defendant and handed to the plaintiff on 19.12.1962. The amount due on the cheque remained unpaid on 17.6.1963 and by agreement between the parties, in lieu of issuing a fresh cheque, Jayasekera altered the date to 17.6.1963. The alteration was made and signed by Jayasekera in the presence of the defendant.

In the answer filed by the defendant she resisted the plaintiff's claim on the following grounds :—

(*a*) That she was not personally liable as she had endorsed the cheque at the request of the plaintiff and that no valuable consideration had passed.

(She stated, however, in paragraph 8 that " This sum has been admitted as a debt of F.W. Jayasekera in the Testamentary case to be filed and that the said sum is recoverable from the estate of the deceased ".)

(*b*) That she was not liable as executrix de son tort as she had not intermeddled with her husband's estate ; and

(*c*) That there was a misjoinder of parties and causes of action.

In the course of the trial two further matters were put in issue as defences :—

(*d*) That she was discharged from liability as she had no notice of dishonour ; and

(*e*) That in view of the material alteration of the date on the cheque she was discharged from personal liability.

After trial, the learned trial Judge entered judgment for plaintiff as prayed for. Owing to an error in the numbering of the issues he did not answer the issues relating to notice of dishonour but he held against the defendant on all the other issues.

In appeal, in addition to the defences raised in the lower Court, learned Counsel for the appellant submitted that the action on the cheque is not maintainable for the reason that the cheque became a nullity on the death of the drawer, in the absence of presentment before the death of the drawer. He argued that the only remedy available to the plaintiff is an action on the original transaction, independent of the instrument.

He based his argument on the following passage in the judgment of Lord Romilly M. R. in *Hewitt v. Kaye*[1]—

"But a cheque is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at a banker's or anywhere else. It is an order to deliver money and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing. "

This dictum was quoted with approval by Pollock M.R. in *Re Swinburne.*[2] In both cases the question at issue was whether a cheque which had been given by the drawer on his death-bed as a gift to the payee but which had not been honoured by the Bank before the death of the drawer was a valid *donatio mortis causa.* Under the English law a gift is invalid unless there is complete delivery and the decision in both those cases was that *as a gift* the cheque was worth nothing. Counsel interpreted these words as amounting to a general proposition that on the death of the drawer of a cheque which remained unrealised, the cheque became a nullity and no action could be founded thereon. There is nothing in the judgment of either Lord Romilly M.R. or Pollock M.R. to warrant that interpretation.

Chalmers [3] sets out the position of the donee of a cheque as follows :— "He cannot successfully sue the drawer's executors on the instrument because he is not a holder for value and the banker's authority to pay is revoked by notice of the drawer's death. " The position, however, would appear to be different if the cheque had been negotiated for value during the lifetime of the drawer. In the case of *Rolls v. Pearce* [4] it was

[1] *(1868) L. R. 6 Equity 198 at p. 200.*
[2] *(1926) 1 Ch. at p. 41.*
[3] *Chalmers ; Bills of Exchange, 11th Edition p. 249.*
[4] *(1877) 5 Ch. 730.*

held that a cheque drawn by a testator payable to his wife or her order, given to her shortly before his death, indorsed by her and paid into a foreign bank against the amount of which she drew, was a good *donatio mortis causa*, although the cheque was not presented for payment at the bank on which it was drawn till after the death of the testator. Malins V.C. quoted with approval the statement of Lord Loughborough in *Tate v. Hilbert* [1] as follows :—" If she had paid this away either for valuable consideration or in discharging a debt of her own, it would have been good " (as a *donatio mortis causa*). *A fortiori*, where the holder is an endorsee who has paid valuable consideration, his rights on the cheque cannot be extinguished by the subsequent death of the drawer before presentment.

Learned Counsel for the appellant also cited a passage from the judgment of Gratiaen J. in *Public Trustee v. Seneviratne* [2] which, he claimed, supported his contention. In that case a cheque for Rs. 5,000/- was given as a gift by the drawer to the payee but, before the cheque was realised, the drawer died. The payee filed an action against the Public Trustee who was the administrator of the drawer's estate on two alternative causes of action, one of which was based on the drawer's liability on the cheque itself. In approving of the dismissal by the District Judge of the action on that cause of action, Gratiaen J. said (at page 149) : " The learned District Judge rightly rejected the cause of action on the cheque, because admittedly the English law governs that aspect of the plaintiff's claim, and a promise to donate a sum of money to the payee does not constitute valuable consideration which is a condition precedent to liability. " The cause of action failed not because the cheque became a nullity on the drawer's death before presentment but because valuable consideration which was a condition precedent to liability on the cheque was absent. The passage in question, far from supporting Counsel's contention, would appear to support the view that if valuable consideration had been given, the action on the cheque was maintainable, despite the drawer's death before presentment. It should also be noted that there is no provision in the Bills of Exchange Ordinance (Cap. 82) which renders a cheque non-actionable on the death of the drawer in the absence of presentment before his death.

In the instant case, there is the finding of fact by the trial Judge, which has not been seriously challenged, that the plaintiff was a holder for value. In my opinion, the plaintiff's rights and powers as a holder under S. 38 of the Bills of Exchange Ordinance remained unaffected by the drawer's death. The liability of the drawer would pass to the executor or administrator of his estate.

The next point urged by Counsel for the appellant was that the defendant was discharged from personal liability as endorser (*a*) because of the material alteration of the date and (*b*) as she had no notice of

[1] *2 Vesey 111.* [2] *(1952) 54 N. L. R. 145.*

dishonour. In regard to (*a*) the evidence of the plaintiff that the alteration of the date was effected by the drawer in the presence of the defendant, the endorser, was not denied by the defendant. Having regard to all the circumstances, there can be no doubt that the alteration was effected with her consent and acquiescence and I see no reason to interfere with the trial Judge's finding that the defendant's personal liability remained unaffected by the alteration.

As regards the question of notice of dishonour, the plaintiff stated in the course of his evidence as follows :—

> " After the cheque was returned by the bank I went to meet the defendant. I spoke to her. I asked her for the money. She said she would pay . . . "

This evidence was not contradicted or denied by the defendant. In my opinion, it is implicit in the evidence given by the plaintiff that he informed the defendant of the return of the cheque by the Bank. In the circumstances, the defendant's admission of liability may be regarded as evidence of due notice having been received. In the case of *Bartholomew v. Hill*[1], which was an action on a dishonoured Bill of Exchange by the plaintiff as indorsee against the defendant the drawer and indorser, it was held (by a Bench consisting of Pollock C.B., Martin, Charnel and Wilde B.B.) that a promise to pay the amount made by the defendant to a person applying to him on behalf of the plaintiff amounted to and was evidence of an admission on the defendant's part of notice of dishonour. On the evidence in this case, the defendant's plea that she is discharged from liability by reason of non-receipt of notice of dishonour fails.

The next matter on which the trial judge's finding has been canvassed is the question of the defendant's liability as executrix de son tort of her husband's estate. The defendant admitted in the course of her evidence that she is residing in certain premises which forms part of the deceased's estate and is, in addition, in the enjoyment of the produce from the coconut trees standing on the said land. She stated that three days before his death, the deceased mortgaged all his properties to one Dharmawardene and that Dharmawardene is in possession of all the properties (apart from the land on which she resides) and collects the income therefrom. Under cross-examination, however, she admitted that Weihena estate which was owned by the deceased was about 150 acres in extent of which only about 100 acres had been mortgaged to Dharmawardene. She further admitted that Dharmawardene sends her accounts in regard to the income from the properties. On the evidence before him, the learned District Judge was justified in his conclusion that the defendant had sufficiently intermeddled in the estate of her deceased husband to constitute her an executrix de son tort of the estate.

[1] *(1862) 5 L. T. 756.*

The only other matter for consideration is the appellant's plea that the action is not maintainable by reason of misjoinder of parties and causes of action. It was submitted that the cause of action against the defendant personally as indorser was distinct and separate from her liability as executrix de son tort of the estate of her husband who was the drawer and that the claim made against the defendant both personally and as executrix de son tort was barred by S. 35 (2) of the Civil Procedure Code. S. 35 (2) of the C. P. C. (omitting the parts that are not relevant to this case) is as follows :—

> " No claim . . . against an executor . . . as such, shall in any action be joined with claims . . . against him personally unless the last mentioned claims . . . are such as he was . . . liable for jointly with the deceased person whom he represents. "

In regard to the holder, the drawer and indorsers of any instrument are jointly and severally liable for its due payment.[1] Had the drawer been alive, he as well as the defendant could have been sued together in the same action. (S. 15 of the Civil Procedure Code). Does S. 35 (2) bar the claim made against the defendant both personally and as executrix? If the liability of the defendant and the deceased was joint, S. 35 (2) permits the joinder of the claims. Does the fact that the liability is also several take away from the creditor the right to so join ? Lee and Honore state: " In the case of a joint liability, each joint debtor is liable only *pro rata parte* of the performance promised. . . . By law or by the terms of a contract a joint debtor may be bound both jointly and severally (correal or solidary obligation). The joint debtor . . . may then be sued either *pro rata parte* or for the whole performance promised. " [2]

Although certain differences exist in regard to the rights and liabilities of the co-debtors *inter se* in joint and solidary obligations, so far as the creditor is concerned, the liability of the co-debtors on a solidary obligation does not cease to be a joint liability. The plaintiff was therefore entitled under S. 35 (2) of the Civil Procedure Code to sue the defendant both personally and as executrix de son tort in the same action.

In the result, the appeal fails and is dismissed with costs.

SANSONI, C.J.—I agree.

Appeal dismissed.

[1] *Halsbury : Simonds Edition Vol. 3 p. 215.*
[2] *Lee and Honore : South African Law of Obligations p. 62.*